

New Zealand Business Number Bill – Exposure Draft

**Submission by the Privacy Commissioner
to the Ministry of Business, Innovation and Employment**

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Privacy Commissioner
Te Mana Matapono Matatapu

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Introduction and summary

This submission focuses on the privacy implications of the exposure draft of the New Zealand Business Number Bill (the draft Bill). By expanding the application of the New Zealand Business Number (NZBN), the Bill aims to achieve significant efficiencies both for business and for government. I support this aim and my staff have been working with officials to ensure that efficiency can be achieved without unnecessary intrusion into privacy. I am pleased to see that in the evolution of policy development officials have been open and receptive to our input and willing to incorporate privacy values into the NZBN framework.

Experience shows that where systems are not designed with adequate sensitivity to users' needs uptake is slow. Changes to an inflexible system can be impracticable, and expensive. We understand one of the objectives of the policy is to ensure rapid uptake. Therefore getting the privacy settings right early on is in everyone's interests.

The Privacy Act regulates how agencies may collect and use personal information, and when they can disclose it to other agencies. However, it covers only information about identifiable individuals and does not apply to companies. My comments on the Bill therefore focus on the impacts on the privacy of individuals who are operating businesses as sole traders, and all other such unincorporated bodies. My aim is to help ensure the provisions fully reflect the purposes underlying the legislation and maximise the public good the law aims to facilitate.

The Ministry of Business, Innovation and Employment has identified privacy for sole traders as a particularly significant consideration in the extension of the NZBN. Protecting the privacy of individuals in business is now one of the three core purposes of the draft Bill, along with facilitating efficient and accurate business transactions and reducing the administrative burden associated with conducting business.

The Ministry has engaged constructively with my office as this draft Bill has been developed. The proposed legislation includes some valuable privacy protections, in particular, an explicit prohibition on agencies using the NZBN in relation to individuals in their private or personal capacity. Other tangible privacy safeguards that should be retained in the include controls to:

- prevent agencies who have not been approved as mandating agencies requiring businesses to use their NZBN to access services, and preventing those that have not been approved as authorised agencies from accessing primary business data that has not been made publicly available
- provide that I may require the Registrar to report on the operation of the NZBN register to assess the effects that the register has on the privacy of individuals, and
- require the Register to consult with me before recommending changes to prescribed primary business data; before recommending regulations to declare an agency to be an authorised agency or a mandating agency (or to revoke that authority); and before authorising the delegation of an authorised agency's powers and obligations.

However, a few fundamental components of a privacy protective NZBN register are still missing from the current formulation. The scheme would benefit from further statutory safeguards.

I therefore recommend that to strengthen the Bill and ensure the safeguards integral to the established mechanisms under the Privacy Act are not inadvertently undermined:

Recommendation 1:

Provision should be made for individuals to have separate NZBNs for different activities.

Recommendation 2:

Businesses should only have to publish limited, non-personal information on the register.

Recommendation 3:

Additional protections should be included to control the use of the NZBN in existing information matching or sharing agreements developed under the Privacy Act.

Recommendation 1:

The Bill should include scope for individuals in business to be allocated more than one NZBN if the Registrar considers their business activities are sufficiently distinct.

Clause 10 of the Bill, in conjunction with Part 2 of Schedule 2 (Entities eligible for allocation of an NZBN) effectively prevents individuals in business from having more than one NZBN.

I recommend that clause 13 (Applying for NZBN) be amended to provide that, despite the restrictions in clause 10(1)(a), the Registrar may assign an individual more than one NZBN if their different business activities separately meet the criteria under clause 10(2) to be classified as an undertaking.

Individuals in business choose to use different data in their transactions with different agencies. This is particularly important for sole traders, where there may be little or no distinction between what is business information, and what is personal information (for example, where a business is conducted largely from a residence). A sole trader may want to use their residential address for transactions with one agency (or be under a statutory obligation to do so), but wish to use a different postal address for transactions relating to completely separate business enterprises.

For sole traders, administrative efficiencies may be reduced, and business costs increased, if they must go to additional lengths to ensure the effective separation of business activities they do not wish to have arbitrarily linked. It would be more consistent with the principle of maintaining individual autonomy if the NZBN was allocated according to the business activity, not the individual.

Enabling sole traders to have different NZBNs for distinct business activities would be equitable. They would be afforded the efficiency gains available to other individuals who have multiple, but more formalised business interests that fall within the current parameters for a separate NZBN, while maintaining control over what information about them is accessible, and to whom.

The assignment of multiple NZBNs to different business activities would be broadly consistent with the existing practice of assigning separate GST numbers to separate branches or divisions of businesses that carry out different activities. I consider it should similarly be able to be accommodated by implementing agencies.

The Registrar's assessment of whether an individual's business qualifies for separate NZBNs could be based on the Accident Compensation Corporation's current assignment of the Business Identification Code. The oversight provided for by the Registrar under clause 15(2) should be sufficient to ensure against misuse of the NZBN for purposes of deception, for example, in detecting phoenix operations.

Recommendation 2:

No further data should be included in the list of publicly accessible primary business data in Part 1 of Schedule 3 of the Bill.

Best practice in terms of privacy protection would favour an opt-in approach to adoption of the NZBN for all sole traders. However, I acknowledge that an opt-in approach may limit voluntary participation, thereby reducing the efficiencies that would result from widespread uptake of the NZBN across the economy.

Clause 17 and the related Schedule 2 of the Bill provide that the Registrar may automatically register some business entities without the need for the entity to apply for registration.

As an alternative to the opt-in approach, provision could be made for entities that have been allocated NZBNs to opt-off the register if they do not wish to use it to facilitate their business activities. I appreciate, however, that this may also not be practicable if provision is going to be made for agencies to be able to require businesses to use the NZBN for their transactions.

Nonetheless, if NZBNs are allocated to sole traders automatically, or agencies are mandated to require NZBNs be used in business transactions, privacy concerns will arise if individuals in business are required to publish personally identifying information. The efficiency gains from automatic allocation and compulsory use must be balanced by appropriate privacy protections.

To that end, only the minimum amount of information needed to achieve the register's aims should be public. This would ensure the register remains an index, rather than a database, thereby preserving some autonomy for sole traders as to what data is in the public domain.

In conjunction with Part 1 of Schedule 3, clause 23(2) of the draft Bill prescribes the information associated with the NZBN Register that must be publicly accessible (mandatory public data).

Currently Schedule 3 includes only a pair of non-identifying descriptors, namely the NZBN and a general location identifier. This combination of factors does not raise privacy concerns. It appropriately supports the effective operation of the register and gives sole traders control over how they interact with other businesses and the public. I see no business imperative that would necessitate expansion beyond this defined data set and recommend it should be kept as it is.

Recommendation 3:

The Bill should include additional protections to ensure NZBN is only used appropriately in existing information matching or sharing agreements.

Clause 32 of the draft Bill provides that the NZBN may be used in the information sharing agreements listed under Schedule 5 of the Bill. These include three distinct mechanisms provided for under the Privacy Act.

The third mechanism covered by clause 32 relates to law enforcement information by Justice Sector agencies, and places specific restrictions on the use of unique identifiers in that context. Enabling the NZBN to be accessed under this schedule is not problematic, provided that it complies with the terms of use prescribed under Schedule 5 of the Privacy Act.

The other two mechanisms captured by clause 32 are information matching programmes (as listed in Schedule 3 of the Privacy Act) and information sharing agreements (as listed under Schedule 2A of the Privacy Act). Here I do have cause for concern.

I appreciate clause 32 is intended to future-proof the NZBN framework against the need for multiple, resource intensive legislative amendments, should agency uptake of the NZBN into their business systems mean it is required for the effective operation of those agreements. However, the vast majority of the more than 50 currently active information matches deal only with personal information of individuals in their private capacity. Use of the NZBN would therefore, for the most part, be neither necessary, nor appropriate in these agreements.

If the NZBN could automatically be included in any data set exchanged between agencies, non-mandated recipient agencies could access NZBNs they do not need and would not otherwise be entitled to. This would effectively over-ride the privacy, adequacy and necessity safeguards inherent both in development of information matches and information sharing agreements under the Privacy Act, and in the new NZBN legislation itself.

Clause 32(3) of the draft Bill provides that the Minister must consult me before recommending new information sharing arrangements be added to the list in Schedule 5 of the Bill. This is appropriate but could go further in order to provide the public with greater confidence that the NZBN will not be used to undermine the existing statutory information matching scheme.

I recommend the following four specific restrictions should be included in clause 32 of the Bill to ensure the potential privacy implications are considered before the NZBN can be used in information matching programmes or approved information sharing agreements:

1. Agencies involved in an approved information sharing agreement (under Part 9A of the Privacy Act) must consult the Privacy Commissioner before including an NZBN in the information able to be shared between agencies under that agreement.
2. An agency who is party to an information sharing agreement must not collect or use the NZBN, or any non-public primary business data associated with the NZBN, unless the agency needs that information to perform its statutory function, and the disclosure, collection and use is necessary for the effective operation of the agreement.

3. Consistent with section 2 of Schedule 4 of the Privacy Act, agencies involved in an authorised information matching programme (under Part 10 of the Privacy Act) may only include an NZBN in the data transferred to a receiving agency if use of that unique identifier is essential to the success of the information matching programme.
4. Agencies involved in an authorised information matching programme who wish to include the NZBN in the data transferred must incorporate, into the technical standards agreement that governs that programme, any such modifications as the Commissioner considers may be necessary to address the privacy risks arising from the use of the NZBN in the match.

Conclusion

In my April 2014 submission on the public discussion paper that preceded this draft Bill, I noted that a number of details of the design of the NZBN, and how it would be implemented, were still to be determined.

My recommendations at that time were predicated on the NZBN being expressly authorised by legislation, and the premise that while there would be a publicly searchable NZBN register, the NZBN would result in no additional aggregation of information across departments, or collection beyond that provided by existing authorities. These assumptions appear to remain valid.

I remain confident that the NZBN and the framework developed to implement the register can contribute to business efficiency and productivity in New Zealand. However, to be most effective, it must meet the needs of the whole business community by ensuring all individuals can conduct business without concern for their personal privacy. The changes I have recommended will help achieve a positive-sum outcome; a “win-win” where the benefits of the NZBN that can be realised don’t come at the expense of privacy.

In closing, I would like to acknowledge the efforts the Ministry has taken to date to work collegially with my staff to ensure privacy is appropriately addressed in this draft Bill.

I am committed to an ongoing and positive engagement as this work continues and I will look forward to working further with the Ministry to ensure any changes made to reflect the outcomes of this public submission process are implemented in a way that best protects individual privacy.