RESISTANCE AHEAD?

HENRY BRANDTS-GIESEN AND **NICK BERESFORD** WEIGH UP THE NEED FOR BENEFICIAL OWNERSHIP REGISTERS IN NEW ZEALAND

KEY POINTS

WHAT IS THE ISSUE?
The New Zealand government has released a discussion document containing proposals to introduce a beneficial ownership (BO) register of New Zealand-registered companies and limited partnerships.

WHAT DOES IT MEAN FOR ME?
A BO register would be a significant change to the traditionally light-touch approach to regulation in New Zealand. The government's preference is for the registers to be freely accessible by the public, which raises data protection and privacy concerns.

WHAT CAN I TAKE AWAY?
An overview of the discussion with specific reference to the key areas of trusts and privacy concerns.

On 19 June 2018, New Zealand's Ministry of Business, Innovation and Employment (MBIE) published a discussion document (the Document)[1] proposing the introduction of beneficial ownership (BO) registers for New Zealand companies and limited partnerships, termed corporate entities.

The proposals are driven by recent high-profile cases of alleged criminal wrongdoing involving the use of New Zealand-registered corporate entities (although whether the proposals would have stopped such wrongdoing is another matter). They also implement the Financial Action Task Force's (FATF's) Recommendation 24 into New Zealand law and are part of wider recent reforms to align the country's anti-money laundering (AML) framework with international standards.

THE BROAD PROPOSALS

The Document sets out three potential options for reform:

- **option 1:** a specific requirement for corporate entities to hold up-to-date BO information;
- **option 2:** a central BO register, accessible to law-enforcement agencies only; and
- **option 3:** as per option 2, but with the register being freely accessible by the public. The MBIE states in the Document that this is its preferred option.

It is proposed that the definition of 'beneficial owner' for the purposes of the register will align with the one used in New Zealand's AML legislation, which broadly follows the internationally accepted FATF definition. Under this definition, individuals will be a beneficial owner if they:

- own more than 25 per cent of the corporate entity;
- hold or control more than 25 per cent of the voting rights in a company;
- control the corporate entity through close family relationships, personal connections or contractual associations;
- hold a senior management position in the corporate entity and thereby exercise control over the daily or regular affairs of the corporate entity; or
- can appoint or remove the corporate entity's directors, general partners or senior managers.

Under all three options, the following information would need to be disclosed for each beneficial owner:

- full legal name;
- residential address;
- address for service;
- email address;
- date and place of birth; and
- the basis on which the individual is considered a beneficial owner.

WEIGHING UP THE OPTIONS

Options 1 and 2 would provide for real-time, or at least on-demand, access to BO information by law-enforcement agencies. It is arguable that the further step of option 3 in terms of fully public access is unnecessary, given that law-enforcement agencies are clearly best placed to identify and prevent money laundering. Option 3 would not provide law-enforcement agencies with any additional tools in the fight against money laundering, and so the inclusion of public access may be seen as a disproportionate step when weighed against the right to privacy.

The previous few years have seen an increase in the regulatory framework governing the use of corporate entities. This includes requirements for all companies to have at least one New Zealand-resident director; the introduction and subsequent expansion of New Zealand's AML/counter-financing of terrorism regime; and an increased focus by the Companies Office on verifying director information. Any introduction of a BO register should therefore be considered an additional tool in the armoury of law-enforcement agencies, rather than a silver bullet.

THE NEW ZEALAND CONTEXT

Family trusts are fairly ubiquitous in New Zealand and are often used by families with only modest wealth. It is also common for closely held corporate entities, e.g. a company that operates the family business, to be owned by the trustees of a discretionary family trust.

Successive governments have resisted calls for a register of trusts. However, under option 2 or 3, and depending on the finer details of the proposals,[2] a register of trusts would, in effect, be introduced for all trusts that hold an interest in a New Zealand corporate entity. This would increase compliance costs for many family trusts, which may prove politically contentious, given both the number of families utilising trusts and the moderate approach of recent governments to trust law reform generally.

In addition, New Zealand operates in a competitive environment when it comes to attracting international investment. The MBIE rightly points out that damage to the country's reputation, resulting from criminal activity conducted through New Zealand entities, could make it harder for New Zealand firms to do business overseas or reduce its influx of overseas investment. On the other hand, there are also concerns that the introduction of a publicly accessible BO register may have the effect of eroding confidentiality in legitimate commercial arrangements, something that would adversely affect New Zealand's growing venture capital and private equity sectors.

THE INTERNATIONAL CONTEXT

The Document cites the EU's Fourth Anti-Money Laundering Directive (4AMLD) as an international example of BO registration. In 2018, the EU introduced the Fifth Anti-Money Laundering Directive (5AMLD), which amends the BO provisions of 4AMLD, requiring the existing BO registers to be made freely available to the public. The provisions of 5AMLD requiring public access to the registers are required to be implemented into each EU Member State's local laws by the end of 2019. This has been met with significant opposition on the grounds that public access to what is, in many cases, private information infringes the basic right to privacy and data protection contained in the *European Convention on Human Rights* (ECHR). The EU's own data protection regulator issued an opinion on 2 February 2017 that was highly critical of these aspects of the amendments to 4AMLD.[3]

At the time of writing, a British law firm has commenced legal proceedings in London, claiming that the proposed UK publicly accessible registers breach both the fundamental right to privacy and data protection enshrined in the ECHR and the EU's recently enacted General Data Protection Regulation. Notably, France pre-empted 4AMLD by introducing a public register of trusts and trust-like entities in 2016, only for this to be struck down in its entirety on privacy grounds.[4]

Given the above developments, there is a real possibility that the elements within 5AMLD allowing public access to the BO registers in the EU will be abandoned before the commencement date.

CONCLUSION

There is no specific statutory right to privacy in New Zealand. However, the *Privacy Act 1993* and the *Privacy Bill* (which is currently before parliament) set out 12 Privacy Principles.[5] It is doubtful whether publicly accessible BO registers would be compliant with the Privacy Principles. In particular, it is arguable that public access to the registers is at odds with Principle 4 (which provides that personal information cannot be collected where it 'intrudes to an unreasonable extent on the personal affairs of the individual concerned') and Principle 5 (which provides that personal information must be stored securely and protected from misuse).

Arguments that public registers infringe rights to privacy and data protection are particularly persuasive in New Zealand, as a nation of small and often family-owned businesses. Over 97 per cent of businesses have fewer than 20 employees, and a sizeable majority are incorporated. Many of the driving factors for publicly accessible BO registers internationally (the vast amount of prime UK real estate owned by opaque corporate or trust structures being one example) are simply not present in New Zealand.

Given international developments, it seems inevitable that some form of requirement for New Zealand corporate entities to collect BO information will be introduced. However, the proposal by the MBIE to introduce BO registers that are freely accessible by the public is likely to meet with resistance if the reaction to 4AMLD in Europe is any guide.

1 Since the time of writing, this document has been removed from the MBIE website. **2** Draft legislation containing the finer details may have been published since the time of writing. **3** European Data Protection Supervisor Opinion 1/2017, www.edps.europa.eu/sites/edp/files/publication/17-02-02_opinion_aml_en.pdf **4** Conseil Constitutionnel, *Décision no.2016-591 QPC du 21 octobre 2016 3/3*, www.agefiactifs.com/sites/agefiactifs.com/files/fichiers/2016/10/conseil-constitutionnel-148055.pdf **5** www.privacy.org.nz/the-privacy-act-and-codes/privacy-principles

HENRY BRANDTS-GIESEN TEP IS A PARTNER, AND **NICK BERESFORD TEP** IS AN ASSOCIATE, AT KENSINGTON SWAN, AUCKLAND