

Submission

by



to the

Ministry of Economic Development

on

**Section 92A Review Policy Proposal
Document for Consultation**

7 August 2009

PO Box 1925
Wellington
Ph: 04 496 6555
Fax: 04 496 6550

**SECTION 92A CONSULTATION DOCUMENT
SUBMISSION BY BUSINESS NEW ZEALAND¹
7 AUGUST 2009**

1. INTRODUCTION

- 1.1 Business New Zealand welcomes the opportunity to comment on the Ministry of Economic Development's (MED) *Section 92A Review Policy Proposal Document for Consultation* (referred to as the 'Document').
- 1.2 While we appreciate the additional work that has gone into this issue via the establishment of a Working Group, we believe there are some fundamental flaws in policy development that means that consideration of key areas affecting business and further improvements are required.

2. SUMMARY OF RECOMMENDATIONS

- 2.1 Business New Zealand makes the following **recommendations** with regard to the Document, namely that:
- (a) ***Points raised in the submission by Employers & Manufacturers Association (Northern) are taken as having the full support of Business New Zealand. (p.2);***
- (b) ***MED looks at ways in which the costs arising from the administrative tasks performed by ISPs for phases 1 and 2 can be properly recovered (p.3); and***
- (c) ***MED places greater weighting on the unintended consequences on the business community for the possibility of ISPs being ordered to terminate a subscriber's internet account (p.4).***

3. BACKGROUND

- 3.1 Business New Zealand has some fundamental concerns with section 92A. Our issue is not with trying to address instances of repeat copyright infringement. Indeed, we believe that such infringement, no matter what the format, has the ability to have a crippling effect on those regarded as 'Right Holders' in the Document. Instead, our concerns are with some of the mechanisms for trying to stop such practices taking place, as well as with related consequences for the business community.
- 3.2 One of Business New Zealand's regional associations – Employers and Manufacturers Association Northern (EMAN) – has provided a detailed submission on the various aspects of possible harm to businesses, including:
- Employees use of Internet
 - Contractors use of Internet
 - Guest or other use of internet access
 - Perverse outcomes of enforcement of termination on business

¹ Background information on Business New Zealand is attached in the appendix.

- Enforceability of law
- Contract law implications
- Enforcement on business
- Cost of compliance to business

Business New Zealand fully endorses and supports the matters raised in EMAN's submission, as these succinctly highlight the many issues the Government still needs to work through to ensure what is proposed will at most have a negligible adverse impact on the business community.

Recommendation: That points raised in the submission by Employers & Manufacturers Association (Northern) are taken as having the full support of Business New Zealand.

- 3.3 Rather than replicate the valid concerns EMAN have raised, Business New Zealand wishes to quickly touch upon two primary issues. First, the issue of using ISPs as essentially middle-men for the investigative process, and second the associated effects on the business community should a tribunal choose to terminate a subscriber's accounts.

4. THE ROLE OF INTERNET SERVICE PROVIDERS

- 4.1 The Document outlines a considerable role for Internet Service Providers (ISPs) throughout the three phases discussed. For a particular case, it can include some or all of the following:

Phase 1

- ISP receives first infringement notice from Rights Holder.
- ISP forwards first infringement notice to subscriber.
- ISP receives response notice from subscriber to forward on to Rights Holder.
- ISP required to maintain records of subscriber's alleged infringements for up to nine months.
- Further infringement means ISP receives a cease & desist order to forward on to subscriber.

Phase 2

- Copyright tribunal sends ISP an order to provide name, contact details and other relevant information about the subscriber.
- ISP must inform the subscriber that it has been served a Copyright Tribunal order.

Phase 3

- ISP is ordered to terminate the subscriber's internet account.

- 4.2 The number of actions an ISP must undertake as part of the complaints process is obviously weighted more towards phase 1, since the gradual stepped process sees continued ongoing infringement leading to harsher proceedings.

- 4.3 However, the phase 1 actions still represent a potentially heavy compliance regime that ISP businesses will have to go through if the proposals are to work. Essentially, ISPs are the middle-man for phases 1 and 2, while being the hatchet man for phase 3.
- 4.4 Business New Zealand would expect the costs associated with duties undertaken by the ISP to be recovered. Exactly who would cover those costs will have to be worked through carefully. Paragraph Phase 3(5) indicates that the Rights Holder is to supply a prescribed filing fee (set at a cost-recovery basis). While this is one way in which the costs associated with phase 3 can be recovered for the Copyright Tribunal, there is nothing regarding the costs incurred in phases 1 and 2 where the ISP performs a variety of administrative tasks. Therefore, Business New Zealand believes that MED needs to investigate ways in which costs arriving from the administrative tasks performed by ISPs for phases 1 and 2 can be properly recovered.

Recommendation: That MED investigates ways in which the costs arising from the administrative tasks performed by ISPs for phases 1 and 2 can be properly recovered.

- 4.5 The ability for an ISP to terminate a subscriber's account is the other point Business New Zealand wishes to raise, particularly because of the consequent effects on the business community.

5. TERMINATION OF ACCOUNTS & THE EFFECTS ON BUSINESSES

- 5.1 Although we expect more details regarding the termination proposal after initial feedback has been received and discussed, at this stage there has been little in the way of initial discussions regarding various flow-on effects on the business community.
- 5.2 Paragraph Phase 3(9) of the Document shows some recognition of the problem where in regard to mediation, there is mention of the subscriber being a small business, *'The subscriber (account holder) may be a small business or a domestic household who has multiple subscribers on one IP address which would make identification of the actual infringer difficult and termination perhaps unreasonable. RH may suggest updating software to monitor subscribers (in the case of a small business)'*.
- 5.3 While at one level it is good to see that MED have noted the issue of multiple subscribers on one IP address as an issue that may have a negative effect on a particular business. This matter still requires considerably more attention before legislation is drafted. As noted above, EMAN's submission covers the issue well in regards to the possible effects on the business community.
- 5.4 In addition, paragraph Phase 3(11) of the Document outlines the actions the Tribunal can take if a subscriber is found guilty of repeated copyright infringement. The options include *available relief by way of damages, injunctions, account of profits or otherwise, ordering a subscriber to pay a fine or an ISP to terminate the subscriber's internet account*. We generally support the options of reparation of damages and fines given the relatively smaller

chance of unintended consequences. However, we hold deep concerns regarding the option of an ISP terminating a subscriber's internet account, not only from the flow-on effects to the day-to-day operations of a business, but also because at a theoretical level, this option tends to run counter to actually matching the punishment imposed to the specific offence. It seems peculiar that the process by which the offence is carried out should be made part of, if not all, of the offender's punishment.

- 5.5 For instance, stealing a car does not mean losing the right to own one. Instead, the specific punishment is typically prison, community work and/or a fine. Even if the use of a car is banned for whatever reason, there are still often provisions which allow the guilty party to use a car for other necessary purposes, particularly as part of business/job activities (usually called a limited licence).
- 5.6 Also, if we were to look at other types of offences carried out via the internet, state action against deplorable acts such as the viewing and trading of child pornography images over the internet does not actually include the termination of an account. Instead, it involves criminal punishment and/or damages claims.
- 5.7 One could also argue that the internet has now become a required day-to-day tool in society that provides a range of operations and benefits, much like a car or even electricity. The simple banning of it causes problems for the guilty party beyond anything for which he or she is actually being punished. Therefore, as is the case with the use of cars, some form of heavily restricted use on the internet would be the preferred option, over a complete ban.
- 5.8 Overall, we believe the Government has to be very conscious of the flow-on costs associated with the option of banning an internet account. Therefore, we believe MED needs to place greater weighting on the unintended consequences on the business community if ISPs can be ordered to terminate a subscriber's internet account.

Recommendation: That MED places greater weighting on the unintended consequences on the business community from the possibility of ISPs being ordered to terminate a subscriber's internet account.

APPENDIX

6. Background Information on Business New Zealand

- 6.1 Business New Zealand is New Zealand's largest business advocacy organisation.
- 6.2 Through its four founding member organisations – EMA Northern, EMA Central, Canterbury Employers' Chamber of Commerce and the Otago-Southland Employers' Association – and 70 affiliated trade and industry associations, Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.
- 6.3 In addition to advocacy on behalf of enterprise, Business NZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation, the International Organisation of Employers and the Business and Industry Advisory Council to the Organisation for Economic Cooperation and Development.