

Submission to Economic Development, Science and Innovation Committee

Incorporated Societies Bill

28/05/2021

About Chapman Tripp

- 1 Chapman Tripp is a leading law firm with offices in Christchurch, Wellington and Auckland. We act for incorporated societies on all aspects of their operation and activities, including registration, governing documents, regulation and compliance, asset and merger transactions, and financial reporting, and find this to be an area of increasing activity. We have previously fed into consultation on limited partnership legislation and the Trusts Act, and are familiar with legislation governing companies, charitable trusts and registered charities, which gives us a broad perspective and understanding of the spectrum of options.
- 2 The matters covered by the Incorporated Societies Bill (*the Bill*) are of direct interest to us as legal practitioners and to our clients. We welcome the opportunity to comment on the Bill.
- 3 We have no objection to our submission being published on the New Zealand Parliament's website.
- 4 We would be happy to discuss any of our comments with the Ministry, in particular our comments on the need for the purposes of the society to have elevated importance in the legislation and form a clear part of the interpretation of officers' fiduciary duties (see discussion on section 49).
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PART 1: Preliminary Provisions

Section 5: Interpretation

We acknowledge and support the new definition of “officer” and appreciate that it is consistent with the definition of “officer” in the Charities Act 2005. It is far more straightforward than the definition in the previous draft of the Bill and of course should dovetail with the Charities Act. We consider that it is appropriate that the “contact person”, which would ordinarily be an administrative role, is no longer required to be a committee member and is therefore not necessarily an “officer”.

PART 3: Administration of Societies

Section 26: Contents of constitution

In 2016 we submitted that the mandatory list outlining what a constitution of an incorporated society must contain was too prescriptive and onerous. We acknowledge that that submission was not accepted but are encouraged by the 'build your own' model constitution tool available for incorporated societies through the Companies Office. We anticipate that that tool will be updated to coincide with the passing of the Bill or at least the date of enactment to give existing societies the opportunity to get their constitutions in order.

We support the addition in section 26 of requiring the appointment of a chair, if any, and whether or not that individual has a casting vote.

We imagine that the deletion of use of a common seal reflects that new societies are unlikely to adopt them and the deletion of providing access to the register for members was for privacy reasons.

Section 30: Society may amend constitution

We support the changes made to section 30 (formerly 27), in particular insertion of section 30(3) which reflects the possibility that incorporated societies may insert their own threshold for approval of constitutional variations and reducing the number of members that need to sign an amendment to 2 from 3.

We note that a lawyer is no longer able to certify that an amendment has been properly made and consistent with the Act. In our experience as lawyers, enabling lawyers or authorised persons (which would include a lawyer for the incorporated society) to sign these more administrative tasks assists with efficiency for the organisation. We would ask that you reconsider this deletion.

Section 38, 39 and Schedule 2: Disputes between members and between members and society

We acknowledge that these sections are facilitative and do not require a society to resolve a dispute through arbitration. However, we recommend that it is clear on the face of the sections that societies may choose to resolve disputes through negotiation, mediation or arbitration, with the first two options being less formal and potentially cheaper. Similar terms and concepts could be used as have recently been applied in the Trusts Act 2019. For example, section 39 could be extended so that it reads – Constitution may provide for alternative dispute resolution. The Trusts Act applies definitions of "ADR process", "ADR settlement", "arbitral award" and "arbitral agreement" and distinguishes between "internal matters" and "external matters" – these could be usefully applied in the Bill.

Sections 49 -54: Officers' duties

This is the submission that we are most passionate about.

We understand and agree with the rationale for requiring a 'step up' in terms of governance, operation and professionalism for incorporated societies. However, incorporated societies and the people involved in them have very different drivers from those involved in a for-profit company. Incorporated societies are non-profit entities comprising volunteers (usually) that collaborate in furtherance of particular non-profit, community-related purposes. Incorporated societies, unlike companies, always exist for a set of purposes – they are the *raison d'être* of a society and the reason why members join that society. In our view, incorporated societies are more aligned, from a 'purpose' perspective, with charities than with companies. We consider that acknowledgement of this is missing in the legislation and it is a substantial omission. We are aware of debates

in other jurisdictions about the extent to which 'purpose' should form part of standard corporations law and fiduciary responsibilities. We consider that the fact that it should play a prominent role in non-profit body legislation is beyond doubt.

The first duty of officers in section 49 is to act in the best interests of the society (and in good faith). We consider that there is an opportunity to elevate the purposes of the society in this part of the legislation. This could be achieved in a number of different ways, for example:

- An approach similar to the Trusts Act could be adopted, where a 'Guiding Principle' was inserted to colour trustees' duties and ensure that they have regard to the context and objectives of the Trust when carrying out their duties. Officers of incorporated societies could be required to have regard to the purposes of the society when carrying out their duties; or
- An alternative might be to say that the best interests of the society equates to the best interests of the purposes of the society, being the reason why it was established; or
- To extend the duty in section 49 to be to act in good faith, in the best interests of the society and to further the purposes of the society; or
- To say that in determining what is in the best interests of the society officers must have regard to the purposes/context/objectives of the society; and/or
- To refer to the purposes of the society as the first consideration in the exercise of the officer's duty of care.

Sections 83-86: Resolutions in lieu of meetings

Regarding new sections 83-86, we endorse providing the ability for societies to decide in their constitutions that a resolution in lieu of a meeting is acceptable.

Section 95: Annual financial statements

Regarding section 95, we appreciate the lower financial reporting obligations on societies classified as "small".

We support the change that the contact person no longer needs to be a committee member.

Section 114: Use of Society name

We acknowledge the new sections 114 and 115 requiring every society to ensure that its name is on all written communications and documents. This aligns with section 25 of the Companies Act 1993 and was proposed (although did not eventuate) for trusts with corporate trustees when that area of law was under review several years ago. This is consistent with incorporated societies needing to operate on a more corporate and professional level.



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