

Incorporated Societies Regulations 2023

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BACKGROUND

1. Franks Ogilvie is a public and commercial law firm based in Wellington.
2. Our lawyers have wide-ranging experience in establishing and providing guidance to societies, including on constitutional arrangements, dispute resolution, and compliance matters.

SUBMISSION

Introduction

3. We made detailed submissions in 2021 on the Incorporated Societies Bill, in particular on the unique features of New Zealand’s voluntary sector, and the risks of pushing too far in aligning the law for incorporated societies with company law.
4. We remain concerned about the negative impact of parts of the Act on the sector. However, within the necessary confines of subsidiary legislation, the present draft Regulations contain steps in the right direction. Our submissions highlight areas where we think they may be improved.

Acceptance of applications and notices

5. The Regulations set out mandatory procedures for notifications and applications which are mostly required to be made online using a designated website. However, all of these procedures also give the Registrar discretion to accept an application or a notice made in another manner if the Registrar “considers it would be unreasonable” to refuse the application.¹
6. The emphasis on online filing and communication is practical. However, those practical gains may be undermined if the only alternative is the exercise of the Registrar’s discretion, potentially resulting in uncertainties and delays.
7. New Zealand society encompasses individuals with varying levels of proficiency and physical capabilities. In awareness of this, the government recently announced additional funding for digital literacy training. Some individuals, such as the elderly or people with disabilities, may face challenges in navigating complex websites. Low-income individuals or people living in remote locations might not have access to computers or reliable internet connection. Most people will no doubt use the online form, and it is desirable that they do so from a cost and efficiency standpoint. However, for those persons for whom the online option presents significant difficulty, a well-defined offline alternative is required.
8. Discretion for the Registrar is not a sufficient recognition of the barriers people face in accessing digital services.

Recommendation

9. We recommend the Regulations provide that the Registrar must accept paper-based applications.

¹ See regs 6(2), 10(2), 12(2), 17(3), 19(3), 20(2), 21(2), 29(2), 34(2), 38(2), 43(2), 46(2), 50(2), and 52(2).

10. If the Minister considers a deterrent to paper-based processes is needed, a longer processing period could be specified for this type of application.

Providing officers residential addresses

11. Regulation 5(d) of the Regulations requires an application for incorporation to contain, for each person named as an officer, a physical address used by that person. The same requirement applies to re-registration applications under reg 45(e)(i). Similarly, reg 11 requires notification of changes in an officer's physical address.
12. There are obvious privacy implications to requiring notification of physical address, something acknowledged by the Minister in the paper proposing the draft Regulations to Cabinet. Individuals might be deterred from acting as officers through potentially well-justified fears of harassment, stalking, or identity theft.
13. We note that MBIE has provided reassurance that officers' physical addresses will not be made public on the register. This protection should be made certain in the Regulations, in order to give those considering participating in the voluntary sector a clear assurance that their privacy is not at risk.

Recommendation

14. Change regs 5(d), 11, and 45(e)(i) to provide a certain pathway for withholding address details by:
 - 14.1. requiring **either** a physical **or** an electronic address, and a telephone number (i.e. reflecting section 5(2) of the Act); or
 - 14.2. stating explicitly that where a physical address is provided, the Registrar must, if requested, ensure that address is not made public on the register.

Financial reporting and total current assets

15. The Act sets out different financial reporting standards for small societies than for other incorporated societies. Whether a society is a 'small society' in respect of a particular accounting period is defined by reference to the 'total current assets' of the society as at the balance date. Those assets must be valued at less than \$50,000 for the society to qualify as a small society in the relevant period.
16. Under reg 15, total current assets are defined as the total value of the society's assets that each individually satisfy any 1 or more of the following criteria:
 - (a) the asset is expected to be sold or otherwise disposed of within 12 months of the society's balance date;
 - (b) the asset is primarily held for the purpose of being traded;
 - (c) the asset is cash or a **cash equivalent** and is not restricted from being exchanged or used to settle a liability for at least 12 months after the society's balance date.

17. The definition of 'cash equivalent', which the Regulations describe as a "short-term highly liquid investment that is readily convertible to a known amount of cash and is subject to insignificant risk of changes in value" could be problematic. While this term has been borrowed from International Accounting Standards, it is insufficiently certain and accessible to be practically useful to the types of volunteers who operate societies where the distinction between small societies and others is likely to be relevant.
18. It is uncertain is whether term investments fall within the definition of 'cash equivalents'. This type of investment is likely to be common for incorporated societies. As of 21 July 2023, early withdrawal of a term deposit is at the discretion of the bank in the case of the five major New Zealand banks², and all bar Kiwibank require 31 days' notice to withdraw other than in cases of hardship. However, we understand that in practice, banks rarely (if ever) decline to allow early withdrawals. This inconsistency between law and practice raises uncertainty as to whether these investments are 'short-term' or 'highly liquid'.
19. This uncertainty is material to small societies. If their assets exceed the \$50,000 threshold at the balance date, their financial statements must be prepared in accordance with generally accepted accounting practice (or another similarly exacting standard). These standards are both costly and potentially beyond the practical capabilities of small incorporated societies, meaning it is crucial that societies know their obligations well in advance and with sufficient certainty.

Recommendation

20. We recommend that reg 15(2) be amended to specifically exclude term investments held with a deposit-taker (as defined in sch 2 cl 2 of the Deposit Takers Act 2023) from the definition of 'cash equivalent'.

² ANZ, ASB, BNZ, Kiwibank, and Westpac.