

SUBMISSION

By



to the

Ministry for Business, Innovation and Employment

on the

Incorporated Societies Bill – exposure draft

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**INCORPORATED SOCIETIES BILL – Exposure draft
SUBMISSION BY BUSINESSNZ¹**

Executive summary

While accepting that some changes to the existing legislation might be of benefit, BusinessNZ is concerned about the exposure draft bill's complexity.

Lacking evidence of any systemic failure in the way incorporated societies are run, it would be counterintuitive to introduce a bill considerably more prescriptive than the current Act.

Incorporated societies are chiefly responsible to their members and should therefore be largely self-governing; applicable legislation should be correspondingly light-handed. The bill's high maximum penalties are particularly concerning.

Before any draft legislation is introduced, it should first be carefully examined for unintended consequences. Good intentions are not enough.

1.0 Introduction

1.1 BusinessNZ welcomes the opportunity to comment on the *'Incorporated Societies Bill – exposure draft*.

1.2 In its response to the Royal Commission's *'Reforming the Incorporated Societies Act 1908'* report, BusinessNZ was opposed to replacing the existing statute on the grounds that it is still, in general, operating effectively.

1.3 It appears now, however, that replacement is something in the nature of a fait accompli, causing BusinessNZ to review its previous opposition. It now holds the view that some changes might be of benefit provided they are constructed with a careful eye to avoiding unintended consequences and unnecessary complexity.

¹ Appendix: Background information on BusinessNZ.

- 1.4 BusinessNZ, itself an incorporated society, emphasises that as organisations essentially accountable only to their members, incorporated societies, should be largely self-governing. To the extent, therefore, that the state chooses to interfere in the life of incorporated societies, it should do so with a light hand – as with the 1908 Act.
- 1.5 The fact, as the Regulatory Impact Statement notes, that there are few reported cases involving incorporated societies, is not an indication that such societies generally are poorly run or in need of further legislative direction. Nor are the 200 or so Law Commission submissions, to the effect that the current Act does not adequately support or promote good governance practice, necessarily an indication of inferior practice.
- 1.6 Given the paucity of evidence of systemic failure in the way incorporated societies are run, it seems counterintuitive that the exposure draft should be considerably more prescriptive than the current Act. Not only are administrative requirements detailed and provision made for a complaints process, possibly encouraging complaints where none existed before, but the high maximum penalties set could have quite severe consequences, particularly for smaller societies.
- 1.6 How this approach will work in practice cannot yet be known. But it would be unfortunate if the major effect were to provide more work for the legal profession rather than assist incorporated societies to function more effectively.
- 1.7 It is noted that the number of persons entitled to claim incorporation would, under the bill, reduce from 15 to ten. However, as indicated above and somewhat paradoxically, one likely effect of the bill is to make life significantly harder for smaller societies given the new statutory requirements to be imposed on them.
- 1.8 BusinessNZ therefore urges that, before the bill is introduced, it should not only be examined for unintended consequences but that consideration should

be given to its overall effect and whether what are obviously good intentions will produce a satisfactory outcome.

2. Specific comment

- 2.1 Compared with the current Act's 'Rules' requirements, what is required of a society's Constitution is rather more detailed than at present. This, of itself, could cause problems for smaller societies which would need from the outset to deal much more specifically with matters such as committee members' terms of office (query, does 'terms' refer to the terms on which the office is held or the length of time a committee member can continue in office?, presumably the latter), the appointment of a contact officer, whether or not someone has consented to be a member of the society (how many subscription paying society members currently have not consented to join?) grounds for removal from office and so on.
- 2.2 As with the current Act, a means of amending the Constitution (Rules) must be specified but the Constitution must also provide for a special general meeting if a conflict of interest prevents 50% or more of the committee members from voting on a proposed amendment, or on some other matter. It is this kind of detail (of which small societies might well be unaware) that is likely to make operating an incorporated society rather more complex than it is at present. And if potential members *are* aware, the effect of unnecessary prescription might be to discourage incorporation, with common interest groups choosing instead to operate outside the legal rules. Better to provide basic requirements (as at present) while giving guidance on matters that a constitution might optionally include.
- 2.3 Although the current Act permits its members to divide the society's property between them should the society be dissolved, under the bill, the constitution must specify a not-for-profit entity to which any surplus assets would be distributed on liquidation or on removal from the register. This could cause an immediate – or indeed subsequent - problem should agreement on the particular entity be hard to achieve. In some instances this could prove almost

farcical, for instance an incorporated society that is a yacht club with marina facilities would have considerable difficulty finding an entity on which to bestow its assets. Moreover, it is not unlikely that a suitable entity could predecease the society in question, or not exist at all, producing further complications.

- 2.4 If it is accepted that the responsibility of incorporated societies is to their members, the kind of matters referred to above are clearly those societies should be entitled to determine for themselves. This, as under the current Act, should include the right, on dissolution, to distribute any surplus assets to their own members, particularly as those members will have contributed to building up the assets. Distribution to members of whatever assets might remain at the end of a society's life is scarcely the same thing as operating for financial gain, as the current Act recognises.
- 2.5 Two further features of the bill that are arguably unnecessary are the power to take derivative actions and the power bestowed on the court to intervene in a society's affairs. Derivative actions - as where the society does not intend to bring or continue a proceeding - would be contrary to the nature of an incorporated society; intervention - as where the constitution was considered not to comply with the statutory requirements - would sit more comfortably with the Registrar than with the court, at least in the first instance. Court action should be a last, not a first, resort.
- 2.6 The inclusion of a grievance procedure could prove a helpful step but allowing a society the option, for clause 24(1)(j) disputes, to proceed straight to arbitration under the Arbitration Act 1996 (clause 32(1)) appears contrary to the 'responsibility to members' aspect of incorporated societies. As with the bill's Schedule 2 complaints and grievance procedures and in the same way as employment disputes, it would be better to provide that parties in the first instance will endeavour to resolve their differences privately. Recourse to mediation should be the second step if private resolution proves unsuccessful. The matter should be referred to an arbitrator only if mediation fails to resolve

the matter. This is particularly so, as it seems likely incorporated society disputes will often involve a party or parties who are not legally represented.

- 2.7 The bill, unlike the Act, sets out the qualifications for officers (or rather, approaches the matter from the negative standpoint of who may not be an officer) but this should be a matter for societies themselves to decide. Further, it seems excessively punitive to bar from the officer role someone convicted of one or other of the offences specified if the sentence imposed has been served. That societies can waive a disqualifying factor simply adds a complication. How do they go about doing this? Will further prescription be sought?
- 2.8 Provision is made for dealing with conflicts of interest but given the bill also imposes on officers the duty to act in good faith this of itself should help to avoid such situations. And societies themselves are best able to determine how any conflict of interest that might arise is to be identified and managed. Whether a conflict of interests exists will more often than not be readily apparent. Detailed disclosure provisions are likely to confuse not enlighten.
- 2.9 But with the bill's more prescriptive approach to setting up and running an incorporated society it is its more punitive aspects that are probably of greatest concern. Members of legitimate incorporated societies do not, as a general rule, set out to defraud, deceive or otherwise damage their own interests. Evidence of such occurrences is rare. The bill, while recognising the self-governing nature of incorporated societies, nevertheless appears only too happy for the court to intervene in a society's affairs. And if it does so, the penalties available could be described as swingeing, although in many instances the offence committed will have been unintentional.
- 2.10 Ignorance of the law might be no excuse but unduly complex law can have the effect of setting up individuals to fail. For that reason alone, the imposition of criminal sanctions is a step too far, with the prospect of possible contravention likely to discourage good people from taking up official roles to the detriment of incorporated societies, not to their benefit.

2.11 Existing criminal law already imposes sanctions for fraud, dishonesty, theft, misappropriation and such like. The creation of new, specific offences will do nothing to ensure incorporated societies are better governed than they have been to date. The impulse to criminalise needs to be resisted; it doesn't help, it hinders.

Appendix

Background information on BusinessNZ

[BusinessNZ](#) is New Zealand's largest business advocacy body, representing:

- Regional business groups [EMA](#), [Business Central](#), [Canterbury Employers' Chamber of Commerce](#), and [Employers Otago Southland](#)
- [Major Companies Group](#) of New Zealand's largest businesses
- [Gold Group](#) of medium sized businesses
- [Affiliated Industries Group](#) of national industry associations
- [ExportNZ](#) representing New Zealand exporting enterprises
- [ManufacturingNZ](#) representing New Zealand manufacturing enterprises
- [Sustainable Business Council](#) of enterprises leading sustainable business practice
- [BusinessNZ Energy Council](#) of enterprises leading sustainable energy production and use
- [Buy NZ Made](#) representing producers, retailers and consumers of New Zealand-made goods

BusinessNZ is able to tap into 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.

In addition to advocacy and services for enterprise, BusinessNZ contributes to Government, tripartite working parties and international bodies including the International Labour Organisation ([ILO](#)), the International Organisation of Employers ([IOE](#)) and the Business and Industry Advisory Council ([BIAC](#)) to the Organisation for Economic Cooperation and Development ([OECD](#)).

BusinessNZ family



www.businessnz.org.nz