CHAPMAN TRIPP

TO:
MINISTRY FOR BUSINESS, INNOVATION AND EMPLOYMENT

ON THE INCORPORATED SOCIETIES BILL – EXPOSURE DRAFT

CHAPMAN TRIPP - JUNE 2016

INTRODUCTION

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.

The matters covered by the Incorporated Societies Bill Exposure Draft (*the Bill*) are of direct interest to us as legal practitioners and to our clients. We welcome the opportunity to comment on the Bill.

We have no objection to our submission being published on the Ministry's website.

We would be happy to discuss any of our comments with the Ministry.

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CONSTITUTION – PART 3, SUBPART 3

AREAS OF NOTE

Clause 12 – Registrar can refuse to register if constitution does not comply with Act

Clause 24(1)(a)-(m) specifies the matters that must be addressed in a constitution.

Clause 33 - Minister may issue regulations as to standard provisions

Schedule 1 - Transitional provisions:

- Existing society may amend its rules to ensure compliance with the requirements of the Act – clause 5(2);
- Rules of an existing society must be treated as being the constitution of the society when the Act comes into force (except to the extent that the rules contravene certain requirements) – clause 8(1) and (2); and
- For society not complying with the requirements of the Act, Registrar may declare that society must be treated as having adopted standard provisions – clause 13.

OUR SUBMISSION

Issue

One of the guiding principles that has driven the review of Incorporated Societies is that societies should be free from inappropriate government interference. Having a provision that specifies that the Registrar will be reviewing every constitution that comes in and will refuse to register one that is non-compliant is unwieldy and heavy handed. It is also inconsistent with the approach taken in limited partnership legislation.

Submission

We prefer the approach taken by the Limited Partnerships Act where there is a mandatory content list but the way it is monitored is that on registration the authorised person declares that those items are covered. Clause 12 should be deleted.

Issue

As a general observation we consider that the content of the mandatory list is confusing in that almost all of the items on the list are also covered in part in the Act. For example, clause 24(1)(l) specifies that the constitution must contain the method by which a constitution must be amended. Then clause 27 specifies some minimum requirements - every amendment must be in writing, approved at a general meeting by a majority vote and signed by three members and otherwise in accordance with the constitution. Our preference would be for the approach taken to follow that in the Limited Partnerships Act. In the context of limited partnerships, the Limited Partnerships Act takes the approach of prescribing certain compulsory content to be included in every limited partnership agreement.

Other than this limited core content, the partners are free to draft the limited partnership agreement as they choose (provided it is not inconsistent with the Limited Partnerships Act).

This approach is one which would be clear and easy for a society to follow.

Submission

Items should either be on the mandatory list or covered by legislation but not both, unless it is clear and straightforward for incorporated societies to understand what their rules need to say.

Issue

As a general observation we consider that the mandatory list is too prescriptive.

Submission

The mandatory list should be pared back, both in terms of the number of items listed and the detail at each limb. See detail below.

Issue

Clause 24(1)(c) is too prescriptive as to the requirement to include in the Rules that a person must consent to becoming a member. It is already covered by section 67(1).

Submission

That the words "including a requirement that a person must consent to be a member" should be deleted from clause 21(1)(c) of the Bill.

Issue

Clause 24(1)(e) should be deleted.

Submission

Updating the register should be covered in a new subsection 70(3) specifying that the register must be updated when members change.

Issue

Clause 24(1)(g) is too detailed and much of it is already contained in the legislation, see clauses 37 and 45.

Submission

Clause 24(1)(g) should only specify the composition and terms of appointment of the members of the committee.

Issue

Clause 24(1)(h) is not necessary.

Submission

Clause 38 already specifies that the operation and affairs of the society must be managed by the committee. This should be extended to include "finances". Then clause 24(1)(h) can be deleted.

Issue

Clause 24(1)(i) is not necessary.

Submission

Delete clause 24(1)(i) and extend clause 91(2) so that it says "in the presence of two committee members."

Issue

There are multiple places in the Act that deal with grievances. This will be immensely confusing. Procedures are required by the mandatory list (clause 24(1)(j)), but there are some requirements for those procedures in clause 31, some standard provisions and also a minimum of compliance with Schedule 2.

Submission

We submit that clause 24(1)(j) should be removed from the mandatory list on the basis that there are minimum default provisions in Schedule 2. Clause 31 will need corresponding amendments.

Issue

Clause 24(1)(k) is too prescriptive.

Submission

Many societies will have rules that adequately govern the procedure of meetings but will not satisfy clause 24(1)(k). In particular, it is overly prescriptive to require each society's rules to provide when minutes are required to be kept and the information that must be presented at general meetings. The information to be presented will often be inferred from the matters to be covered. Clause 24(1)(k) should be pared back to remove such specific requirements, and be along the lines of its equivalent in the Limited Partnerships Act – only dealing with when a meeting must be held and procedures for conducting meetings. We submit that a schedule of procedural rules for meetings (similar to that in the Companies Act) could be included in the legislation. The procedures set out in the schedule would apply unless societies specify otherwise in their rules.

Issue

The minimum requirements for amendment of a constitution are already covered in the legislation so do not also need to be in the mandatory list.

Submission

Clause 24(1)(l) should be deleted. Let the legislation (clause 27) stand as the minimum, with any further requirements able to be specified in the constitution.

OFFICERS – PART 3, SUBPART 4

AREAS OF NOTE

Clause 36(1) and (2) – definition of "officer"

Clause 43 – requirement for Contact Officer

Clauses 56 – 65 - Conflict of Interest disclosure rules

OUR SUBMISSION

Issue
The proposed definition of officer is too wide and captures a potentially large group of people.

Submission
The definition of "officer" should be aligned with that in the Charities Act, which has some influence from corporate law in that it includes a person occupying a position in the entity that allows the person to exercise significant control over management, e.g. a treasurer. It does not need to go as far as to cover subcommittees and staff.

Issue
The Bill does not provide sufficient detail about the role or obligations of a Contact Officer – clause 42 merely states that every society shall have a Contact Officer whom the Registrar can contact when needed.

It is not clear why the Contact Officer must be a member of the society's committee as it seems at best to be an administrative function.

It is unlikely that 20 working days will be enough time to replace the Contact officer if it is required to be an elected position.

Submission
We submit that:

- the scope of the Contact Officer role could be more clearly defined;
- it would be preferable if the Contact Officer role is not required to be a committee member (an elected position), but could be filled by a person who is available to correspond with the Registrar during business hours, for example, the CEO, CFO, secretary or an employee of a society;
- If the requirement for the Contact Officer to be a committee member remains, the timeframe to fill the vacancy provided for in clause 43(2) should be extended, or defined in relation to the meetings of a society.

Issue

Defining "interested" solely in relation to financial interest is too narrow and is not consistent with the approach under charities law and company law. There could be significant non-financial conflicts of interest that should be disclosed and be subject to restrictions. It is a matter of achieving the right balance - all interests should be disclosed with the committee being able to determine what happens depending on the nature of those interests.

The procedures in respect of the disclosure of conflicts of interest are strict, particularly the consequences of being interested in a matter.

Submission

The conflict of interest provisions should be consistent with the approach under other law and be able to be contracted out of.

It seems unnecessarily rigid to require that an officer who is interested in a matter must not sign any document relating to the entry into a transaction or the initiation of the matter (considering full disclosure of the conflict of interest, including entry in an interests register, would have already taken place, and the Bill imposes an express duty to act in good faith on the officers of the society).

It is necessary to draw a distinction between financial and non-financial interests. All conflicts of interest, whether financial or non-financial, should be disclosed. The restrictions should be greater on conflicts involving financial interests, so that officers cannot vote on a matter if they have a financial conflict of interest in that matter – but should still be able to sign documents and implement after the conflict has been disclosed and the officer in question has abstained from voting. We submit that officers should be able to vote if the conflict is non-financial, and to sign documents and implement in that case also.

MEMBERS – PART 3, SUBPART 5

AREAS OF NOTE

Clause 71 – access to information for members

OUR SUBMISSION

Issue

The potential scope of information is very broad and there are no defined limits or restrictions around the type or nature of information that may be requested.

The provisions as worded could give rise to some uncertainty about the timeframes in which a society is required to respond.

The grounds for refusing to provide information are insufficient to address a range of situations which may arise.

Submission

We have seen in the area of trust law that access to information is often a contentious matter, largely due to competing interests and concerns about confidentiality.

We submit that the broad scope of the proposed provisions could give rise to significant problems, and may produce undesirable consequences as societies endeavour to work around such provisions.

In particular, we submit that:

- there should be some restrictions as to the information that may be requested or the purposes for which information may be required (the latter being in the Limited Partnerships Act)

In respect of the grounds of refusal, we submit that:

- the reference to information privacy principles under the Privacy Act 1993 does not fit particularly well with the context of clause 71 as a whole, as the information privacy principles relate largely to the collection, source and storage of personal information from or about an individual. If reference to the Privacy Act is to be included in clause 71, we submit that it should be a reference to Part 4 of that Act, *Good reasons for refusing access to personal information.*

- Reference to the Official Information Act could also be included in respect of the grounds of refusal;

- the wording at clause 71(4), "Without limiting the reasons for which a society may refuse to provide the information", could be interpreted to suggest that a society may refuse to provide information for any reason. Is this the intended outcome?

- the grounds for refusal under clause 71(4) should include refusing to disclose information if the committee determines that this is in the best interests of the society; and to protect the privacy of natural persons.

Issue

Members have the ability to contest that a suggested charge for providing information is unreasonable and the court can make an order in that regard.

Submission

That it be left that the charge must be reasonable as under section 71(3)(c). When setting the charge the officers are bound to act in the best interests of the society. We don't see any need to take that any further.

ANNUAL RETURNS – PART 3, SUBPART 7

AREAS OF NOTE

Clause 85(2) provides that the annual return of a society (that is not a registered charity) must contain "the prescribed information".

OUR SUBMISSION

Issue

The prescribed information to be included in an annual return has not yet been defined, although MBIE has given a suggested list.

Submission

We submit that either:

(a) The information to be included in an annual return is defined in the next iteration of the Bill; or

(b) The relevant clause specifies that the Registrar will prescribe the information to be contained in an annual return from time to time.

COMPLAINTS AND GRIEVANCES

AREAS OF NOTE

Part 3, Subpart 3 - clauses 31 and 32; Schedule 2

OUR SUBMISSION

As a general principle, the inclusion of a procedure in the legislation to address complaints and grievances, and to resolve disputes between members, is helpful in terms of the operation of societies.

Issue

The Bill specifies that the requirements at Schedule 2 are the minimum requirements that must be included in a society's constitution in respect of complaints and grievances.

Submission

We submit that:

- this procedure is too extensive for smaller societies;
- extensive procedures with their corresponding cost have the potential to make societies vulnerable to vexatious members;
- many societies are run by volunteers, and are therefore unlikely to be adequately resourced to properly carry out these procedures;
- the formal and comprehensive nature of the proposed procedures is unlikely to suit all types of societies, and does not take into account the use of, for example, dispute resolution based in tikanga Māori principles

Issue

Clause 32(1) provides that a society's constitution may provide for complaints or grievances to be submitted to arbitration.

Submission

We submit that it would be preferable for a constitution to provide that:

- in the first instance, the parties to a dispute will endeavour to resolve their differences privately;
- if private resolution is not successful, the matter may be referred to mediation; and
- if mediation fails to resolve the matter, it should be referred to arbitration.

If the intention is not to provide a mechanism whereby societies can go straight to arbitration, we submit this should be clarified in the wording of clause 32.

ENFORCEMENT – PART 4, SUBPART 6

AREAS OF NOTE

Clauses 113-119

OUR SUBMISSION

We note the inclusion of criminal penalties in the proposed incorporated societies legislation. These unduly punitive provisions are of some concern, as criminal law already imposes penalties for matter such as fraud, theft, destruction of property, and falsification of documents.

We submit that the creation of new, specific offences in the context of societies law is unlikely to ensure better governance or management of societies, and may even discourage suitable people from taking up officer roles, which could have a potentially detrimental effect on societies given that the majority of officers will be volunteers.

AMALGAMATION – PART 5, SUBPART 2

AREAS OF NOTE

Clauses 143-154

OUR SUBMISSION

We support provisions which enable societies to amalgamate, and assume that corresponding tax provisions will be enacted in this regard.

SCHEDULE 1

ABOUT CHAPMAN TRIPP

Chapman Tripp is New Zealand's leading full service law firm with over 135 years of success.

With 51 partners and over 200 legal staff across three offices in Auckland, Wellington and Christchurch, we have the resources and experience to advise on all areas of New Zealand law.

We help clients achieve a competitive edge in today's market with clear, commercially focused advice across all of their legal requirements, including commercial, corporate, property, construction, finance, tax, dispute resolution, environmental and government relations issues.

We play key roles in mergers and acquisitions, disposals, takeovers, financing, insolvency, restructuring, banking, procurement processes, large scale infrastructure projects and dispute resolution proceedings.

Our lawyers have worked in Australia, the US, Asia, Africa, the UK and Europe and are well placed to advise on inbound and outbound trade and investment matters.

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