

INCORPORATED SOCIETIES BILL: PROPERTY COUNCIL NEW ZEALAND SUBMISSION

1. INTRODUCTION

1.1 Property Council welcomes reform and modernisation of the Incorporated Societies legislative regime, and is generally supportive of the Incorporated Societies Bill (Bill). However, Property Council has identified a number of issues with the Bill.

2. GENERAL SUBMISSION

2.1 While Property Council supports the Bill, we believe it has been modelled too closely on Companies Act 1993 (**Companies Act**) provisions. This creates a number of issues as to how the Bill applies to societies, particularly those societies with complex governance structures.

2.2 Firstly, the Companies Act is a statutory regime which governs the relationships between a company, its directors, and its shareholders. One of the principle objectives of the Companies Act is to protect the commercial interests of shareholders. However, incorporated societies do not operate within the same commercial context as companies and do not hold the same commercial objectives. This means that the members of a society, its committee, and its staff do not require the same degree of commercial protection.

2.3 There are a number of provisions within the Bill that impose requirements on societies which undermine the key function of a society; that being its membership. Property Council has identified a number of specific provisions within the Bill that will have a detrimental impact not only on Property Council itself, but will also impact a large number of societies.

3. COMMITTEE'S AND OFFICERS

3.1 Property Council supports imposing duties on persons who act as officers of an incorporated society. It is important that those who are responsible for the management and operational decisions of a society should be subject to certain duties. However, the scope of who are classified as officer's under the Bill causes concern.

Clause 36(1) - Meaning of Officer:

3.2 Under clause 36(1) of the Bill, an Officer is defined as a natural person who –
a) is a member of the committee (including the society's contact officer);
b) holds any other office provided for in the society's constitution.

3.3 Firstly, we recognise that committee members should necessarily be classified as officers of an incorporated society. This reflects the position that committee

members are the responsible for the management and operational decisions of a society. It is therefore reasonable that committee members classified as officers and so subject to officer's duties.

- 3.4 Clause 36(1)(b) extends the definition of officer to “a natural person who holds any other office provided for in the society’s constitution”. The use of the words ‘any other office’ are problematic. This effectively extends the definition of officer to all office holders within a society. For example, a person who holds the “office of communications manager” would, under this definition, be classified as an officer. This could make that office holder subject to officer’s duties, when it may be that they were not intended to be subject to officer’s duties.
- 3.5 Clause 36(1)(b) unnecessarily extends the definition of officer. The people that are responsible for the management and operational decisions of a society, and therefore should be subject to officer’s duties are:
- a) committee members; and
 - b) those who instruct committee members.¹
- 3.6 Clause 36(1)(a) sufficiently captures those persons within a society who should be classified as officers. Clause 36(1)(b) is therefore an unnecessary extension of the definition of officers. Clause 36(1)(b) should be removed from the Bill.

Clause 36(2) - ‘Shadow Officers’:

- 3.7 Under clause 36(2) of the Bill, an officer includes a person:
- a) in accordance with whose directions or instructions a person referred to in [subclause] (1) may be required or is accustomed to act; and
 - b) in accordance with whose directions or instructions the committee may be required or is accustomed to act; and
 - c) who exercises or who is entitled to exercise or who controls or who is entitled to control the exercise of powers that, apart from the constitution, would fall to be exercised by the committee; and
 - d) to whom a power or duty of the committee has been directly delegated by the committee with that person’s consent or acquiescence, or who exercises the power or duty with the consent or acquiescence of the committee.

Persons instructing officers:

- 3.8 Firstly, clauses 36(2)(a) and (b) extend the definition of officer to any person who directs or instructs an officer² or the committee. This provision captures any

¹ The inclusion of clause 36(2)(c) and (d) extends the definition of officer to persons acting under the authority or delegation of officers. We submit that this extends the definition of officer too far, as set out at page 2.

² As defined in clause 36(1). As already submitted, we propose the removal of clause 36(1)(b).

person with a degree of power or influence over a society and who exercises that power to instruct officers to act. For example, this could include the director of a commercial entity who holds significant influence over committee members or the committee as a whole. On that basis, it is reasonable that such persons should be treated as officers, and should be subject to officer's duties.

Shadow officers:

- 3.9 Clauses 36(2)(c) and (d) extend the definition of officer to any person who exercises a power ordinarily reserved for an officer, or who acts under the delegated authority of an officer.³ This provision is modelled on similar Companies Act provisions.
- 3.10 It is submitted that clauses 36(2)(c) and (d) unnecessarily extend the scope of who may be classified as an officer. Similar Companies Act provisions are designed to constrain the exercise of powers which are ordinarily reserved for company directors. They are a protective measure, intended to apply duties to those who exercise directorial powers. For example, those in managerial positions within a company who enter into transactions or make executive decisions which may impact shareholders which may be subject to director's duties. The Companies Act provisions therefore act as punitive measures for those exercising directorial power and provide necessary commercial protection for company shareholders.
- 3.11 However, shadow director provisions do not have the same degree of applicability in a not-for-profit context. The practical operation of an incorporated society is such that officer's duties should only fall on those who actually manage or guide the operation of the society. Officers duties should not be extended to those who act under apparent or delegated authority. The effect would be such that employees of a society who are delegated the authority to represent a society and make decisions for the society may be subject to officer's duties.
- 3.12 We view this as an unjustified extension of the definition of officer, with unnecessary punitive consequences. In this regard, clause 36(2)(c) and (d) should be removed from the Bill. However, we accept the inclusion of a provision that provides a society with the discretion to include such a provision within their constitution.

³ Under clause 36(2)(c) of the Incorporated Societies Bill, officer means a natural person who exercises or is entitled to exercise or who controls or who is entitled to control the exercise of powers that, apart from the constitution, would fall to be exercised by the committee. Under clause 36(2)(d), officer means a natural person to whom a power or duty of the committee has been directly delegated by the committee with that person's consent or acquiescence, or who exercises the power or duty with consent or acquiescence of the committee.

Clause 43 - Contact Officer:

- 3.13 Firstly, it is accepted that a society should, at all times, have a contact officer.⁴ However, under clause 43(3) of the Bill, the contact officer must be a member of the society's committee. Given that the vast majority of Property Council's committee members have independent commercial interests and employment, it is overly burdensome for a committee member to also be the contact person for the society. Instead, this provision should allow the society to nominate an officer or senior employee of the society as its contact officer.

4. CONFLICTS OF INTEREST

- 4.1 There are significant concerns regarding conflict of interest provisions contained in the Bill. Under clause 57, an officer who is interested in a matter relating to the society must disclose details of the nature and extent of the interest to the committee and must disclose that interest in an interest's register, kept by the committee.⁵

Clause 56(1) - definition of Matter

- 4.2 Firstly, clause 56(1) of the Bill defines a matter as "a society's performance of its activities or exercise of its powers, or an arrangement, agreement or contract (a transaction) made or entered into, or proposed to be entered into, by the society."⁶

Clause 56(2) - definition of Interested

- 4.3 A person considered interested in a matter if he or she:⁷
- a) derives a financial benefit from a matter;
 - b) is a person who is related to a person who may derive such financial benefit;⁸
 - c) may have a financial interest in a person to whom the matter relates; or
 - d) is a partner, director, officer, board member, or trustee of a person who may have a financial interest in a person to whom the matter relates.

Clause 56(3) – exceptions to being 'interested':

- 4.4 Under the relevant provisions of clause 56(3), a person is not interested in a matter:
- a) if his or her interest is the same or substantially the same as the benefit or interest of all or most other members of the society due to their

⁴ Incorporated Societies Bill, cl 43(1). Every society must at all times have a contact officer.

⁵ Incorporated Societies Bill, cl 57(1).

⁶ Incorporated Societies Bill, cl 56(1).

⁷ Incorporated Societies Bill, cl 56(2).

⁸ Clause 56(2)(b) provides that a person is interested in a matter if he or she is the spouse, civil union partner, de facto partner, child, or parent of a person who may derive a financial benefit from the matter.

- membership; or
- b) if the interest is so remote or insignificant that it cannot be reasonably regarded as likely to influence him or her in carrying out his or her responsibilities.
- 4.5 Firstly, Property Council notes that clause 56 refers to a person, whereas clause 57 refers to an officer. Property Council recommends that the reference in clause 56 to person is amended to officer.
- 4.6 Secondly, this conflict of interest provision appears to be based on section 140 of the Companies Act 1993, which requires ‘interested’ company directors to disclose their interests in company transactions. In the context of Companies, “shareholders should be protected against abuse by imposing duties [on] directors who have a conflict of interest.”⁹ However, the same commercial context does not apply to an incorporated society. Property Council therefore makes the following submissions in respect of the disclosure of interest provisions of the Bill.
- 4.7 **Matter:** In terms of satisfying the disclosure requirements, it is likely that Property Council operations and activity would constitute matters for the purposes of clause 56(1).
- 4.8 **Interested:** It is likely that Property Council Committee Members (as officers) are interested in the matters of Property Council, given their membership and interest in our general advocacy and policy representation. Firstly, those committee members would likely have a financial interest in Property Council advocacy. Further, a number of our committee members are directors and shareholders of companies of which Property Council advocacy directly or indirectly relates. On that basis, our committee members would likely be classified as interested in Property Council matters.
- 4.9 **Interest Exceptions:** In terms of the circumstances in which our members would not be classified as interested,¹⁰ Property Council committee members are made up of members of a wide variety of organisations. They therefore have a wide variety of interests in our advocacy and general representation. Our committee members include directors of property development companies, real estate agents, architecture firms, law firms and construction companies. This broad committee representation means that Property Council committee members often have different vastly interests in Property Council matters. Under the current Bill provisions, an interested committee member who has a unique or

⁹ Law Commission *Company Law Reform and Restatement* (NZLC R9, 1989) at [85].

¹⁰ For the purposes of clause 56(3).

different interest in a property council matter would be required to disclose the nature of that interest. This is because under clause 56(3), the person would not be classified as interested if their interest is the same or substantially the same as all or most of the other members of the society. However, if their interest is different to all or most of the society members then they would be required to disclose the nature of that interest.

As an example of the application of this provision is in the context of a committee meeting, attended by a committee member who is a partner of a law firm. If Property Council discussed an executive matter at the committee meeting and the lawyer's interest in that matter was counter to the interests of the wider membership, then the lawyer would be obliged to disclose the nature of their interest in that matter. Because their interest in the matter is different to the interests of the wider committee, the lawyer would be unable to refuse to disclose the nature of their interest. Further, the lawyer would either be precluded from voting on the matter.¹¹

4.10 Property Council believes this provision undermines the fundamental membership aspect of societies. It could have a significant impact on the ability of society's committee members to protect potentially sensitive commercial information. It is accepted that while conflicts of interest should be avoided where possible, it is also important that committee members are able to protect their unique and divergent interests in a society's matters.

4.11 This provision must include a prejudice exception, whereby a committee member could refuse to disclose their interest in a matter on grounds that the disclosure would be in some way prejudicial to either themselves or some other person. It is vital that a committee member is able to protect sensitive information. A prejudice provision would afford the committee member this protection.

5. INFORMATION REQUEST

5.1 The clauses which allow members of a society to request information are also of significant concern.

5.2 Clause 71 of the Bill provides that:

- (1) a member may at any time make a written request to a society for information held by the society.¹²

¹¹ Clause 58(1) sets out the consequences of being interested in a matter, and precludes the interested party from participating in further committee activity regarding that matter.

¹² Incorporated Societies Bill, cl 71(1).

- 5.3 The grounds on which a society may refuse to disclose that requested information include that:
- the disclosure would or would be likely breach an information privacy principle;
 - the disclosure would or would be likely to prejudice the commercial position of the society;
 - the disclosure would or would be likely to prejudice the commercial position of any other person; or
 - the request is frivolous or vexatious.
- 5.4 This clause enables any society member to request any information from the society at any time. Under this clause, the member would not need to be concerned with, or interested in the subject information. This provides a very broad right for a society member to request information from the society.

Grounds for refusing request

- 5.5 The grounds on which a society may refuse to provide the information requested by a member are limited to a breach of a privacy principle, that disclosure would cause commercial prejudice to the society or to any other person, or that the request is frivolous.
- 5.6 Firstly, Property Council has a large number of members with a variety of commercial interests. Property Council frequently advocated for commercial property interests to central and local government. Property Council holds a large amount of important and highly sensitive political and commercial information. Under this provision, any one of Property Council's members could request that Property Council disclose that information. This could cause significant damage to the policy decisions of central or local government, particularly in the context of current housing and development issues. This could have significant flow on effect to our commercial members, and their operations. Property Council therefore see this disclosure requirement as far too wide.
- 5.7 Secondly, the grounds on which Property Council could refuse to disclose that information are too restrictive. We are a not-for-profit organisation. We advocate for the public policy interests of the commercial property sector. It is therefore likely that any prejudice suffered by Property Council or any other person would be political, or non-financial. On that basis, Property Council would be unable to refuse to disclose that information to a requesting member.

By way of example, Auckland Council is currently a member of Property Council. The Council frequently relies on us to provide them

with wide ranging policy views from the commercial and residential property industries. Property Council is also in regular communication with central government about a variety of issues, some of which effect Auckland. As a result, Property Council frequently holds sensitive political information. As a result, we have built a relationship of trust and confidence with both Central Government and Auckland Council. However, under these provisions, Auckland Council could request any information we might hold from Central Government. Given that disclosure would not be a breach of a privacy principle, it would not cause commercial prejudice, and would not be a frivolous request, we would be obliged to disclose the information. This is potentially damaging for all parties concerned.

- 5.8 Property Council views both the definition of ‘information’ as too wide and the grounds on which a society may refuse to disclose information as too narrow.
- 5.9 This provision should be amended so as to confine the definition of what type of information may be requested. We submit that the definition of information should extend only to general financial and accounting information. This ensure that members could not request the disclosure of highly sensitive political or commercial information. In its current state, the provision allows a member to request and gain access to a wide variety of potentially damaging information.
- 5.10 Further, we submit that the grounds on which a society may refuse to grant the request should be widened. This clause should be amended to allow a society to refuse to disclose the information requested on grounds of general prejudice, public privacy or confidentiality. It is fundamental that a society be able to protect confidential and sensitive information. The grounds on which societies are able to do so are inadequate under this clause. The refusal grounds must therefore be extended to include a refusal on grounds of general prejudice either to the society, the information giver, or to some other person.
- 5.11 Further, we also submit that this provision will necessarily have to incorporate a subjective assessment as to the prejudice claim. Because a society would be seeking to protect confidential information, then the society is the only entity who may make the determination of whether prejudice will arise. An objective assessment would necessitate disclosure of the subject information, or an assessment of the circumstance surrounding the information. This would undermine the operation of any prejudice provision.

6. AMALGAMATION PROPOSALS

- 6.1 Property Council also has concerns regarding the amalgamation clauses under

the Bill. In particular, clause 144 provides that an amalgamation proposal must set out the terms of the amalgamation and all other prescribed information (if any).¹³

6.2 It is unclear as what ‘other prescribed information’ means. It is submitted that the term ‘other prescribed information’ should be clarified to include guidance as to what information must be set out in an amalgamation proposal. It is submitted that this clause should be simplified in a way such as that set out in section 83(5) of the Friendly Societies and Credit Unions Act 1982. Under this section of the Friendly Societies and Credit Unions Act 1982, a friendly society must provide information relating to the terms of the amalgamation to its members. The effect of this section is that it confines the nature of the information to be provided to the amalgamation. It is therefore submitted that clause 144 of the Bill should be refined so that any information a society is required to provide relates specifically to an amalgamation.

6.3 Further, the Bill’s amalgamation provisions currently allow for the amalgamation of 2 societies by a simple majority of votes.¹⁴ We support an amalgamation provision that requires amalgamation by special resolution of each society, as similarly drafted under section 83(1) of the Friendly Societies and Credit Unions Act 1982. This would ensure that the amalgamation is widely supported by the members of both amalgamating societies.

7. CONCLUSION

7.1 Property Council accepts and welcomes reform to the Incorporated Societies legislative regime. This Bill is a long overdue reform of the law as it relates to societies. However, as outlined above, we have strong concerns about a number of provisions. Changes to the current draft are necessary to prevent significant impacts and legal outcomes for societies.

7.2 *To add contact information.*

¹³ Incorporated Societies Bill, cl 144.

¹⁴ Incorporated Societies Bill, cl 146(3)(a).