Withheld

From: Jim Newfield Withheld
Sent: Friday, 4 December 2015 1:28 p.m.
To: Societies
Subject: Submission - Exposure Draft: Incorporated Societies Bill - Jim Newfield

Good Afternoon,

This is my submission as an individual on the exposure draft of the Incorporated Societies Bill, responding to the Ministry of Business, Innovation and Employment's Request for Submissions November 2015.

I have many years of experience of being a member of various incorporated societies, including being an office-holder and being a committee member. I also have experience in interfacing, on behalf of an employer, with various incorporated societies.

I am currently the Secretary-Treasurer of an incorporated society and was a main participant in writing the constitution of the association and registering the association under the current Incorporated Societies Act.

In general, I find that the work of the Ministry in preparing the consultation documents has been very helpful, that the documents are very thorough in the presentation of the logic supporting the provisions of the exposure draft, and that the Ministry has been sensible in its reasoning. Thank you.

I have the following comments on two specific clauses of the exposure draft.

Clause 67 – Consent to become a member

Paragraph 90 of the Request for Submissions comments on the inclusion, in the exposure draft of the Bill, of Clause 67 – Consent to become a member. Clause 67, as it currently appears in the draft Bill, says that a person must consent to become a member of a society. Paragraph 90 of the Request for Submissions says that the draft provision codifies case law and that the purpose of including it is to increase public awareness.

In response to a query from me about the case law, about which no information was included in the Request for Submissions, Geoff Connor – Principal Advisor; Commerce, Consumers and Communications Branch of the ministry – provided this information:

> *Te Runanga o Muriwhenua Incorporated Society v Neho* HC Whangarei CP43/98, 2 December 1998 at 4 states that "it is fundamental to the structure of an incorporated society that by the voluntary act of joining such a society every members opts into a contract to be bound by the rules of the society."
>
> Mark von Dadelszen (*Law of Societies in New Zealand*, 2nd ed., Lexis Nexis, 2009) notes several cases which state that on becoming a member a contract arises between the member and the society. He adds that it is for this reason that membership must be a voluntary choice, rather than imposed upon a person. The cases are:
>
> *Henderson v Kane and Pioneer Club* [1924] NZLR 1073 at 1076
> *O'Neill v Pupuke Golf Club (Inc)* [1932] NZLR 1012
> *Temple v Hawke's Bay Football Association* [1970] NZLR 862 at 864
> *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (CA) at 177

Because of their vintage, none of the five decisions listed is easily accessible for the general public. However, two points are immediately clear in the information from Geoff Connor, even without being able to read the decisions. First, the main conclusion being enunciated in the five decisions is that a member of an incorporated

society is in a binding relationship with the incorporated society, and that relationship is defined by the rules of the incorporated society. The corollary enunciated is that membership therefore cannot be imposed on a person; the caveat "except by law" is not included, but it is surely to be understood. Second, the case law is not recent, and it certainly pre-dates, for example, the Retirement Villages Act 2003.

I also note, in relation to the first point, that the proposed Clause 67 attempts to codify the corollary, that a person must consent to become a member of a society, while ignoring the main point that the member is in a binding relationship with the society. In my view, and accepting that increased public awareness is the purpose of the provision, the public of the twenty-first century has small need of the message about consent being required and a much greater need to be made aware of the binding nature of society membership. I submit that the rationale for the proposal to include Clause 67 is questionable, even before a possible practical difficulty is considered.

The Retirement Villages Code of Practice 2008 is a disallowable instrument required by Section 89 of the Retirement Villages Act 2003. Clause 30 of the Retirement Villages Code of Practice provides for the residents of a retirement village to establish a residents committee and to set their own rules for running the committee.

Clearly, in establishing a residents committee and setting the rules, the residents of a retirement village must be acting collectively, as a community, as a society. Further, each resident has been made a member of that grouping by the Retirement Villages Code of Practice, which is an instrument made under a parliamentary enactment; it is the law in operation. No application or other expression of consent by the resident is required for the resident to be a member of the grouping. The person should be aware of that status before deciding to enter into the agreement to become a resident of the retirement village, because the Retirement Villages Act mandates that, prior to entering into that agreement, the prospective resident must given a copy of the Retirement Villages Code of Practice. Reviewing the Code of Practice should have made the resident aware, among many other things, of the provision for the residents collectively to form the residents committee and to set the rules. While consent to becoming a member of the grouping of residents can be inferred from the subsequent entering into the agreement to become resident, that is not a specific, separately documented consent.

The residents at the retirement village where I reside have gone one step further. To gain the legal identity that is useful for such things as activities under the liquor licencing laws, the residents' association has sought and obtained registration as an incorporated society. Accomplishing the transition to being registered was straightforward: the current Incorporated Societies Act has no requirement that is incompatible with needs of the society of the residents of a retirement village registered under the Retirement Villages Act. Without conflict with the requirements of either Act, the rules of the village residents' association provide that membership is automatic for each resident, on becoming a resident. No resident can be turned away. No level of participation in the communal activities of the residents is mandated, not even paying the subscription. However, the rules agreed by the residents do provide that voting on issues requiring a vote and election to the residents committee are restricted to financial members. Each new resident is given a copy of those rules.

I believe that this situation is reasonable and sensible and that it should continue, and therefore that any replacement Incorporated Societies Act should also not include any barrier to a society of retirement village residents being also an incorporated society. My fear is that the proposed Clause 67 would be such a barrier. The people drafting the Bill or who have read the Request for Submissions may know that the purpose of the provision is public education, but any future user of the ensuing Act would, I think, be more likely to think that public education is not the usual purpose of an Act of Parliament. Further, I think that that user is likely to conclude that both the intention and the result of the provision must be to require that the rules of a society must provide that a person cannot become a member of the society until that person makes to that society some specific statement of consent to being a member. This situation would block rules that are consistent with the needs under the Retirement Villages Act from also being rules that are consistent with the requirements enabling registration under the Incorporated Societies Act. That outcome is unnecessary and I think that it would be undesirable. A very likely result would be to provoke new case law, rather than to reduce the perceived problem with the dated case law.

I submit that Clause 67 must be deleted from the draft bill.

Clause 129 – Grounds for removal from register

Sub-clause 129(2)(a) provides that a request for removal from the register may be made on the grounds that the society has ceased to operate and has discharged in full its liabilities to all its known creditors, and has distributed its surplus assets in accordance with its constitution and the Act.

Some years ago, the business that was employing me at the time obtained some resource consents under the Resource Management Act to enable it to continue to operate. A community group that had registered as an incorporated society opposed the continued operation of the business and used the appeal provisions of the Resource Management Act to challenge the resource consents, in the name of the incorporated society. In due course, the courts upheld the consents and awarded costs against the community group. However, after receiving the decision that its appeals had not succeeded, and before the court could rule on the question of costs, and realising that the commentary in the main decision meant that the cost ruling would be unfavourable, the group had the society wound-up. The result, that was both sought and achieved, was that the cost-ruling could not be enforced because the society no longer existed.

The legal advice that I was given at the time, by a law firm of unassailable credibility, was: firstly, that the winding-up could not be challenged legally despite its moral objectionableness; secondly, that this was not the first time that an incorporated society had been wound-up to avoid imminent liability; and thirdly, that the situation could be considered a defect in the law regarding incorporated societies.

A convenient opportunity now arises to correct that defect.

My direct, non-legal approach is to add to the ground, in clause 129(2)(a), for being able to request removal from the register, the additional requirement that the society has no potential to have a liability arise from any judicial process that has been initiated and that has not been resolved, with all appeal rights either exercised or lapsed. I suspect that the addition could beneficially be worded more generally so that it covers, as well as court action, other potential liabilities than merely those to "known creditors", but I do not have the expertise to make a specific suggestion.

I suspect that the registrar should have discretion to waive both the existing requirement and these added requirements in cases where the registrar is satisfied that the risk of significant liability is slight or that suitable arrangements have been established to deal with the risks and that the arrangements were established in anticipation of the removal from the register and will survive that removal. However, the over-riding consideration needs to be to deny future opportunities for the protections available under the Incorporated Societies Act to be blatantly abused.

Jim Newfield
Withheld