NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

Submission of the New Zealand Council of Trade Unions Te Kauae Kaimahi

to the

The Ministry of Business, Innovation and Employment

on the

Incorporated Societies Bill exposure draft

P O Box 6645
Wellington
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1. Introduction

1.1. This submission is made on behalf of the 31 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 320,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. The CTU welcomes the opportunity to submit on the exposure draft of the Incorporated Societies Bill ('the Bill') in relation to the particular issues for unions.

1.4. Unions are unusual among incorporated societies and the current Incorporated Societies Act 1908 ('the Act') is not well designed for them. This is due in part to the unceremonious way that unions came to be covered by the Act. Before 1991, unions were registered under the Labour Relations Act 1987 and its predecessors along with the Trade Unions Act 1908.[1] This framework recognised unions' particular role and status as workers organisations.

1.5. The Employment Contracts Act 1991 changed this with the stroke of a pen. Section 185 of that Act stated:

[1] The Trade Unions Act 1908 was passed as a sister Act to the Incorporated Societies Act 1908.

185 Existing organisations

(1) Every union, employers organisation, or association that was registered or provisionally registered or deemed to be registered under the Labour Relations Act 1987 immediately before the commencement of this section shall, as from the commencement of this section, become an incorporated society incorporated under the Incorporated Societies Act 1908, with its current rules, and the Registrar of Incorporated Societies shall, on being given by the Secretary of Labour particulars of the registration under the Labour Relations Act 1987 of any such union, employers organisation, or association, issue a new certificate of incorporation attesting to the registration of that union, employers organisation, or association as a society incorporated under the Incorporated Societies Act 1908.

(2) Subject to this Act, the rights, assets, liabilities, and obligations of every such union, employers organisation, or association shall remain rights, assets, liabilities, and obligations of the society incorporated in its stead under this section.

1.6. This created an odd legal situation. Many unions had provisions in their constitutions that were permitted under the Labour Relations Act 1987 and the Trades Union Act 1908 but not under the Incorporated Societies Act 1908 except through the savings provision in the Employment Contracts Act 1991. The most common provisions related to mergers (standard clauses in most union constitutions). We welcome the clarity on the mergers issue contained within the Bill.

1.7. Incorporated societies vary widely and it is impossible to talk about a 'typical' incorporated society. However, unions are particularly unusual due to the overlapping statutes which regulate them, their advocacy on behalf of their members' collective interests, their strongly democratic processes and the highly politicised nature of employment relations. As our submissions on the Bill below indicate, each of these features causes particular challenges in a generalist piece of legislation.

1.8. We have worked closely with our affiliated union, the New Zealand Educational Institute (NZEI) in the preparation of our submission. We have read NZEI's submission (which comes to similar conclusions but goes into greater detail on some points) and support that submission.

2. Financial gain (cls 21-22)

2.1. Clauses 21 and 22 of the Bill set out restrictions on societies operating for the financial gain for their members along with a series of safe harbour provisions protecting certain kinds of activities (cl 22(3)).

2.2. These restriction and safe harbour sit uneasily with the statutory aims and activities of unions. Under s 14(1)(a) of the Employment Relations Act 2000 a union must have an object of "promoting its members' collective employment interests." Unions do this in a number of ways including activities which financially benefit its members.

2.3. The most obvious way in which unions do this is by negotiating collective agreements covering the terms and conditions of union members in the workplace. Negotiation regarding pay rates are an integral part of these negotiations and only unions are permitted to negotiate collectively on behalf of workers. In general, workers at workplaces with collective agreements command higher wages than their counterparts in un-unionised workplaces.

2.4. Other examples of indirect financial gain on behalf of members may include claims for damages, arrears, breach of contract by the employer and the use of strategic litigation to establish entitlements to these.[2]

2.5. It could be suggested that this sort of work is covered by the safe haven in cl 22(3)(d) of the Bill as "provid[ing] benefits to members of the public or of a class of the public and those persons include members of the society or their families." However we do not consider that this is specific enough: Unions negotiate directly on behalf of their members not their members as a class of the public. Any additional benefits to non-union members are ancillary to unions' work not integral.

2.6. We submit that the Bill should contain a new subclause 22(3) that specifically covers union activities in accordance with the Employment Relations Act 2000.

3. Effect of constitution (cl 26)

3.1. Clause 26 of the Bill holds that the constitution of a society has no effect to the extent that it convenes the provisions of the Bill. It is important to note that the governance of unions is affected by requirements under both the Employment Relations Act 2000 and the Trade Unions Act 1908.

3.2. Any conflict between these statutes should be carefully worked through to determine the optimal outcome rather than simply declaring the primacy of the Bill's provisions and hoping for the best. In our submission we have identified a number of issues where the wording of the Bill appears to contradict other enactments. If our suggested fixes are adopted then there may be no conflict of laws. It is worth noting that the Employment Contracts Act 1991 expressly reserved powers that would otherwise have been contrary to the Incorporated Societies Act 1908 and there may be some residual constitutional issues arising from these powers.

[2] See for example the sleepover case and the pay equity case.

4. Grievance and complaint procedures, arbitration (cls 31-32, Sch 2)

4.1. In general, we think that the grievance and complaint procedures in schedule 2 are fair and reasonably drafted. However, we note also that unions are subject to additional obligations of good faith in relation to their members. See, for example of the operation of good faith, *McCartney v Atlas Concrete Ltd & First Union Inc* [2014] NZEmpC 85.

4.2. It would be helpful for the specific situation of unions to be recognised including their obligations to act in good faith towards their members (and vice versa).

4.3. Another challenge is that the Employment Relations Act 2000 holds that members of unions have a right of challenge through the employment institutions (including for breach of good faith). *Atlas Concrete* is an example of such a challenge. Section 238 prevents parties from contracting out of the Employment Relations Act 2000 and our view is that this section would also invalidate an arbitral provision in a union's constitution.

5. Amendment of a society's constitution and liquidation of societies (cls 33, 158 and cl 11-13 of schedule 1)

5.1. We are extremely concerned by the breadth of the powers granted to the Registrar of Incorporated Societies by the Bill. Our understanding is that:

5.1.1. Under cl 11 of schedule 1, the Registrar may give directions at any time before the second transition date if it appears that the constitution does not comply with the Bill, an officer is disqualified or it is otherwise necessary or desirable to facilitate the society's transition to compliance with the Bill;

5.1.2. Under cl 12 of schedule 1, the constitution of an existing society must comply with the Act by the second transition date ((according to MBIE no earlier than 2022).

5.1.3. If a society's constitution does not comply with the Act then the Registrar may either:

- In accordance with cl 13 of schedule 1, rewrite the society's constitution so long as the standard provisions are included (along with the society's purpose, rules and any additional provisions the Registrar sees fit); or

- In accordance with cl 158(1)(d) of the Bill, apply to the High Court to have the society put into liquidation (with the costs of the application borne by the society under cl 159(2)).

5.2. These are extremely wide-ranging powers and in the case of the powers to rewrite the constitution and apply to place a society into liquidation ongoing from the second transition date.[3] Given the possible abuse of these powers we think that additional safeguards must be built into the Bill.

5.3. Several sets of safeguards are needed. We comment on the process for creation of standard provisions, the imposition of standard provisions on a non-compliant society and timeframes for appealing the Registrar's decision.

Standard provisions

5.4. Under cl 34 of the Bill, the Registrar may recommend to the Minister responsible for administering the Act that the Minister should issue standard provisions for a constitution.

5.5. These provisions may be imposed upon societies that the Registrar deems non-compliant with the Bill and a huge range of societies may be affected by the standard provisions. Given this, the procedural protections against misuse (or simple misapplication) of these provisions are weak. There is no process for potentially affected parties to be consulted on draft standard provisions before they are issued (it is unclear whether administrative fairness would mandate this in any case).

5.6. It is also unclear whether the standard provisions may be differentially applied to different classes of societies (for example, such as only applying to unions).

5.7. MBIE has suggested that because standard provisions must be made in accordance with the usual standards of administrative law and may be subject to scrutiny though either Regulation Review Committee or judicial review, this is a sufficient safeguard. We do not agree.

5.8. <u>Consultation of potentially affected parties should be built into the standard provision-making power</u>.

[3] Given this, it is a mischaracterisation to treat cl 13 of Schedule 1 as a transitional provision given its ongoing effect.

Imposition of standard provisions

5.9. We are very concerned at the breadth of the Registrar's powers to impose what is essentially a new constitution on a society under cl 13 of schedule 1. As noted above, this is an ongoing power from the second transition date onwards with no fixed end date.

5.10. The Registrar may exercise this power by written notice to a society "if satisfied that the constitution of a society does not comply with the Act." Again, much is being left implied as to procedural fairness in the Registrar's process. This compares unfavourably with the requirement for the Registrar to give a society six months' notice that it has fallen below the 10 member requirement.

5.11. Specification of minimum decision-making timeframes and the right to be heard should be explicitly included in cl 13 of schedule 1. We suggest that six months' notice is a fair timeframe.

Timeframes for appeal

5.12. Under cl 187 of the Bill, aggrieved persons have only 15 days to file an appeal in the High Court against a decision of the Registrar. This is a very short timeframe to file a notice of appeal in what may be an extremely complex legal issue to the point that it appears to act as a barrier to access to justice (notwithstanding the Court's discretion to allow further time). A more commonly accepted timeframe for appeal is 28 days.

5.13. We recommend that the timeframe for appeal be extended to 28 days.

6. Officers (cl 36)

6.1. The breadth of the definition of officer in cl 36(1) will create significant difficulties for many unions. In particular, the inclusion of 'a natural person who holds any other office provided for in the society's constitution' will capture a huge range of people under many unions' constitutions.

6.2. Nearly every union has a networks of workplace delegates elected by their colleagues as the face of the union within any given workplace. For larger unions, the total number of workplace delegates will easily be several hundred.

6.3. Delegates may well be caught within the expansive definition of officers depending on how the constitution is framed. It is impracticable and unworkable for delegates to

have the various officers' duties under the Bill. This may lead unions to an unpalatable choice between democracy and liability.

6.4. The definition of officer should include a specific opt out for workplace union delegates operating solely in that capacity or be limited more specifically to persons acting in a similar capacity to company directors.

7. Reckless trading (cl 52)

7.1. We are concerned that the adoption of the Companies Act 1993 definition of reckless trading is not a good fit for the activities of many incorporated societies. While we have some sympathy for the intended point, the question of activities of a society being carried on in a manner likely to create a substantial risk of serious loss to the society's creditors is oddly framed and inappropriate.

7.2. To give an example, one of the most important tools available to a union engaged in collective bargaining on behalf of its members is the right to ballot for and engage in strike action. However, the consequences of failing to follow the correct process for strike action are grave and may include actions in tort against the union sufficient to create a substantial risk of serious loss to the union's creditors.

7.3. There may be an argument that unions should not take strike action because of the inherent risk of litigation and the consequences. This would be an absurd outcome.

7.4. We think that the concept that MBIE hopes to encapsulate is already captured within the duty of officers to act in good faith and in the best interests of the society without the clumsy importation of a concept of 'reckless trading." A society's creditors have a range of options available to them under the Bill such as applying to the Court to liquidate the societies' assets and it will certainly be in the best interests of the society to avoid this happening.

7.5. Clause 52 is unnecessary and should not be enacted.

8. Conflicts of interest and interest registers (cls 56-65)

8.1. These provisions provide an illustration of the points raised above regarding the definition of financial gain and the breadth of the definition of officer. Unless the points raised above are addressed then the conflicts register may have to cover hundreds of people in some case and they will be unable to take part in decisions regarding such important issues as collective bargaining in their workplaces.

8.2. The issues relating to the breadth of the definition of officer and financial gain above must be resolved.

8.3. There is also a problem with conflict provisions that are only dis-applied when the member has the same interest as all or most other members. Ratification processes for collective agreements may often involve consideration by the executive. However, the provisions of a collective agreement will apply differentially to different members and may not apply to most members. "All or most" is an arbitrary threshold for decision-making.

8.4. We propose a specific exemption be created from being interested in a matter under s 56(3) for "the activities of unions in advocating for the collective interests of their members (including collective bargaining, dispute resolution and legal action)."

9. Information for member (cl 71)

9.1. We agree with the submissions of the NZEI on this point and refer you to their submission

10. Annual general meetings (cl 73)

10.1. While sympathetic to the reasons for setting annual general meetings not later than 6 months after the balance date, we are concerned that this underestimates the complexity of finalising some union accounts (particularly where the unions have branch structure that need to report in). Union annual general meetings (usually called conferences) are often massive organisational undertakings with hundreds of attendees.

10.2. For these reasons, some union conferences take place more than six months after the end of their financial years. Additional financial reporting requirements will put greater strain on the system.

10.3. The timeframe for holding AGMs should be extended to twelve months after balance date.

11. Prejudiced members (cl 104)

11.1. We agree with the submissions of the NZEI on this point and refer you to their submission.

12. Further discussion requested

12.1. We have meet with MBIE earlier on these issues and found the discussion very helpful in our understanding of the Bill and MBIE's understanding of the issues facing trade unions. We would like to ask for a further meeting to discuss these issues.