

30 June 2016

By email: societies@mbie.govt.nz

Ministry of Business, Innovation and Employment
PO Box 1473
Wellington
New Zealand

Submission on the Incorporated Societies Bill exposure draft

1 Background

- 1.1 Kensington Swan is one of New Zealand's leading full-service commercial law firms with a legal team comprising over 100 lawyers acting on commercial and public law projects from our offices in Wellington and Auckland.
- 1.2 We have extensive experience in advising incorporated societies of varying degrees of size and complexity, and have analysed the proposed Incorporated Societies Bill ('**Bill**') with interest.

2 Summary

- 2.1 Kensington Swan welcomes the measures to modernise and simplify the incorporated societies regime. We support the objectives of the Bill in clarifying, without materially changing, the nature of the incorporated society structure.
- 2.2 In particular, Kensington Swan supports the way the Bill details the structure and powers of the incorporated society as an entity, in a manner that is more accessible and comprehensible to the general public than the Incorporated Societies Act 1908 ('**1908 Act**'). The use of the Companies Act 1993 framework means that the new procedures for incorporated societies come from already-familiar company law. This, we consider, will help incorporated societies to comply with the changes under the Bill without needing to incur undue costs in navigating novel and unfamiliar legislation. The new power to seamlessly amalgamate societies in a similar fashion to company amalgamations is particularly welcomed.
- 2.3 However, we wish to highlight two proposed changes which we consider warrant further discussion:
 - a the removal of the ability for an incorporated society to distribute its assets to members upon winding up, without breaching the 'not for pecuniary gain' rule; and
 - b the addition of prescribed officers' duties.

3 Distribution of assets

- 3.1 The proposed prohibition in the Bill on distributing a society's assets to its members upon a winding up could give rise to significant issues for some existing societies whose rules currently allow for such a practice ('**Affected Societies**').

- 3.2 The concerns are particularly acute for those Affected Societies that have had substantial contributions from their members over the years. It is unclear the extent to which such contributions were motivated by the prospect of those contributions coming back to members should the society be wound up. However, the prospect of members losing this expectant interest may prove highly disruptive for Affected Societies.
- 3.3 Under the 1908 Act, members of Affected Societies have a valid interest in receiving a portion of the Affected Society's assets upon winding up. The Bill is in effect removing a property right currently held by Affected Societies' members, without any compensation mechanism or ability to respond, short of the Affected Societies winding up ahead of the transition deadline.
- 3.4 We consider that a transitional provision should be included in the Bill to mitigate the adverse effects of this change. One option could be for members' interests in an Affected Society to be converted into debt on the transition date. If those members were still members on the date that the Affected Society is wound up, the members' debt would be repaid by the Affected Society, though with lower priority to other creditors of the Affected Society and with no prospect of interest or early repayment in the meantime. The remaining assets would then be distributed to the Affected Society's elected charity, as proposed. This would allow a less disruptive transition to the new regime, without prejudicing the current property rights of the Affected Societies' members.
- 3.5 We suggest that further discussion with incorporated societies may be required to understand how widespread this issue is, and further consideration of ways that any adverse effects may be addressed (including our suggestion above). We feel that this is one area where the discussion in the Law Commission's Report no. 129 'A New Act for Incorporated Societies' is a little superficial, and does not appear to have considered the full ramifications of the proposed change.

4 Officers' duties

- 4.1 The introduction of officers' duties that parallel directors' duties under the Companies Act 1993 is likely to be confronting for a number of society officers – particularly volunteers.
- 4.2 We recognise that officers do owe duties to societies at common law, and it is useful for such duties to be explicitly stated so that officers know exactly what is expected of them. However, there is a question as to whether the high standard expected of directors of commercial enterprises should apply to unpaid volunteers on a parallel basis.
- 4.3 Not-for-profit societies have a different role in the community than for-profit companies. There is an argument that the 'risk' for society officers should reflect the 'reward' – i.e. a paid officer should take on greater risk in terms of potential liability if officers' duties are breached than the paid officer's unpaid volunteer counterpart.
- 4.4 Society officers are often volunteers, and may not necessarily be well versed in business. Unduly onerous officer duties could deter society members from participating as officers. There is a high possibility that for many, the now explicit risks of volunteering for the community through an officer role in an incorporated society will be considered too great, depleting the pool of talent available. Those with the requisite business skills may not be able

to invest enough time in the society to justify the risk, and those without the requisite business skills may not be confident to volunteer. This would be an unfortunate consequence.

- 4.5 Further, officers' duties may prompt officers to demand that societies provide indemnity insurance, which adds another cost for community organisations, many of which have limited resources.
- 4.6 In our view, these effects must be balanced in order to ensure that the right people are still willing to serve as incorporated society officers. Providing an express, no fault defence for officers, in particular officers who are volunteers, may go some way to creating the appropriate balance.
- 4.7 In addition, we recommend clarifying that officers who are serving in a voluntary capacity will not be liable for acts or omissions of other officers, or for acts or omissions of delegates, employees or agents, where the officer has acted in good faith. It would be useful to include an express carve out to ensure that officers are not exposed in this way, to ensure that volunteers have no cause for concern in this regard.

5 Conclusion

- 5.1 Subject to the above, Kensington Swan supports the progression of the Bill as drafted. It will provide much needed clarity and modernisation in the incorporated societies area.
- 5.2 Thank you for considering our submission. Should you have any questions in respect of our submission, please feel free to contact either David Ireland or Henry Brandts-Giesen, using the contact details set out below.
- 5.3 We look forward to continuing to participate in this important piece of law reform.

Yours faithfully
Kensington Swan
Withheld

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