NZEI TE RIU ROA
NEW ZEALAND EDUCATIONAL INSTITUTE

NZEI TE RIU ROA SUBMISSION

TO THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT

ON THE EXPOSURE DRAFT OF THE INCORPORATED SOCIETIES BILL

JUNE 2016

INTRODUCTION

1 NZEI Te Riu Roa ("NZEI") is the professional organisation and industrial union that represents the interests and issues of its 47,000 members. Our members are employed as teachers in the early childhood (ECE) and primary sectors (including Kura Kaupapa Māori and Wharekura), support staff in the primary, intermediate, and secondary sectors, school advisers employed by Universities and Colleges of Education, and Special Education staff employed by the Ministry of Education.

2 The main objective of NZEI is to advance the cause of quality public education generally while upholding and maintaining the just claims of its members individually and collectively.

3 NZEI is one of the largest unions and professional bodies in New Zealand and has a long history of playing a positive role in the education sector in particular, and on wider social issues that might affect our members and the children they serve.

EXECUTIVE SUMMARY

4 NZEI agrees that it is timely to modernise the legislation dealing with incorporated societies. NZEI is comfortable with much of the proposed Bill's content. This submission focuses on those areas of the Bill that cause us concern.

5 We believe that unions are amongst the largest and most complex incorporated societies in New Zealand, with sophisticated democratic underpinnings, and frequent involvement in sensitive industrial and political matters. We are concerned -

(1) that there is a lack of fit between some of the Bill's provisions and the nature, scale and complexity of modern unions; and

(2) that the Bill allows too much potential for inappropriate State interference in societies' governance.

6 We submit that the proposed Bill should be amended as follows:

(1) Amend cl 22(3) to explicitly exclude unions' activities (collective bargaining, enforcing compliance with employment agreements and legislation, and pursuing compensation for member grievances) from the definition of "financial gain";

(2) Further amend cl 22 to provide greater clarity, and to ensure that societies can continue the common practices of seconding in or employing members;

(3) Redraft cl 33 to explicitly provide that adoption of the standard provisions is voluntary;

(4) Redraft cl 13 Schedule 1 to explicitly identify which matters of non-compliance might trigger an intervention by the Registrar;

(5) Further amend cl 13 Schedule 1 to exclude the power to impose standard provisions; or (if such powers are to be provided), to explicitly provide that only standard provisions dealing with matters referred to in cl 24(1)(c)-(l) may be imposed;

(6) Delete cl 36(1)(b);

(7) Redraft cl 36(2) and (3) to provide greater clarity, and to make it explicit that "officer" does not include employees of societies;

(8) Amend cl 56(3)(b) so that it refers to the interests that are the same or substantially the same as *some* other members of the society;

(9) Delete cl 71, or (if such a provision is to be included), amend cl 71(4) to include language more apt to provide protection for unions' sensitive operational information;

(10) Amend cl 73 to require annual meetings to be held within 12 months of societies' balance dates;

(11) Redraft cl 75 to enable societies to structure annual meetings in ways that best meet their individual needs;

(12) Redraft Subpart 6 to provide greater clarity around the limited scope of the prohibitions around indemnities for members;

(13) Further redraft Subpart 6 to remove the outcome-based limitations on indemnifying officers and employees for costs;

(14) Amend cl 104 with the insertion of an exclusion recognising the exclusive jurisdiction of the Employment Relations Authority to determine disputes between unions and members.

6A We further submit that the interface between the new Act, the *Employment Relations Act 2000* and the *Trade Unions Act 1908* should be thoroughly scoped; that any conflicts should be identified; and that unions should be given an appropriate opportunity to have a say in how they should be resolved.

Clauses 21 and 22: Not Operating For Financial Gain Of Members

7 Clause 21 prohibits societies from being carried on for the "financial gain" of any members. Clause 22 expands on what is intended by that phrase, and provides for a series of permitted actions.

8 NZEI understands the intent of these provisions, but we are concerned that as drafted, they fail to properly reflect the primary purpose of unions, and that

they fall short of the apparent intention to enable societies to engage members on a paid basis.

Drafting Does Not Accommodate Union Purposes

9 The key problem arises from the breadth of the prohibition on societies being carried on for members' "financial gain", the scope of which is unclear since it is only partially defined[1] in cl 22.

10 Section 14 *Employment Relations Act 2000* requires unions to promote members' collective employment interests. The most common way in which unions do this is through the negotiation of collective agreements, and in particular, improving pay rates, allowances and other financial benefits for members. Unions also pursue "financial gain" for members in other ways such as enforcing compliance with employment agreements and/or employment legislation, and by pursuing compensation for members who are aggrieved at their treatment by employers.

11 We understand that the underlying aim is to prevent societies' funds being distributed to members. We believe that the simplest solution is to amend cl 22(1) and (2) so that they are clearly an exclusive definition of "financial gain". Alternatively, we suggest that cl 22(3) be amended to specifically include within the protected actions, union activities on behalf of members.

12 For completeness we note that one of the acceptable activities is the provision of benefits to "the public" which may include members and/or their families. However this is not apt to protect union activities, which centre on the interests and rights of members as members rather than a sub-class of the general public.

Engaging Members

13 The second problem is that it is relatively common for a society to engage members to do work for it in various ways that involve financial reward for the member. We believe that societies should be able to continue to do so, accepting that this needs to dovetail properly with the general prohibition on being carried on for financial gain.

14 We note the efforts in cl 22(3) and (5) to enable such arrangements, provided that they are on "arms-length" terms. We are not confident that they fully achieve this aim.

15 In particular, societies do not only engage members as employees or contractors – they can also arrange for members to be "seconded"[2]. Such an

[1] Clause 22 makes it clear that certain activities will mean that a society *is* being carried on for members' financial gain, but this is not expressed as an exhaustive definition of that phrase.

[2] An arrangement under which an employee is "lent" by their employer to another organization and there is no direct employment or other contractual arrangement between the host organization and the person being "lent".

arrangement is technically a transaction between the society and the member's employer, but it is common for money to be paid by the host society, and for some of that to be received (directly or indirectly) by the secondee.

16 We further note that the aim seems rather undone by the closing words of cl 22(5)(b). Any payment to a member who is engaged to do work for the society will be a "reward in connection with the activities of the society", which would seem to mean that it would not be a transaction on "arm's length terms" and therefore not protected by cl 22(3).

Clause 26: Effect of Constitution

17 This apparently simple provision raises potentially complex questions about the interface between the new Act and the other two Acts that impact on the governance of unions – the *Employment Relations Act 2000* and the *Trade Unions Act 1908.*

18 We consider that it is important for that interface to be thoroughly scoped, for any conflicts to be identified, and for unions to be given an appropriate opportunity to have a say in how they should be resolved.

Clause 33: Ministerial Provision For Standard Provisions

19 We understand the origins of these provisions to be the Law Commission's recommendations around "model" constitutions. We would not be concerned if this clause transparently reflected those recommendations, which were intended to provide assistance to those societies who wished to avail themselves of help, without imposing any constraints on societies more able to draft their own unique constitutions.

20 However, our participation in the Ministry's recent consultative seminars and subsequent discussions with Ministry officials has left us with the clear impression that the intention is to provide for enforceable "standard provisions" that can be imposed on some or all societies by Ministerial fiat.

21 We would regard this as being fundamentally inappropriate. To quote the Law Commission: *Incorporated societies should be self-governing. A key aspect of this is freedom from inappropriate state interference, no matter how well-meaning.*[3]

22 We accept that it is appropriate for government to regulate what should be in societies' constitutions, through legislation which has been developed through the normal democratic law-making processes. We also accept that from time-

[3] Law Commission *A New Act For Incorporated Societies* (NZLC R129 2013) at 1.26.

to-time, such regulation may require refinement or evolution – but that should be done in the same open and transparent way, with a proper opportunity for all affected societies to have input.

23 We suggest that cl 33 be amended to explicitly provide that societies cannot be compelled to adopt any standard provisions, nor can they be treated as having adopted them.

Schedule 1

24 We note that cl 13 of Schedule 1 empowers the Registrar to declare that a society must be treated as having adopted (all) the standard provisions, where by the "second transition date" its constitution still fails to meet the "requirements of the Act". We note the other transitional provisions empowering the Registrar to take such steps as issuing "directions" about non-compliant constitutions.

25 We accept that there is a need to have some mechanism to deal with societies who fail to comply with the new requirements for constitutions.

26 However we consider that cl 13 of the Schedule is too broadly and vaguely drafted, particularly in view of the scope of the Minister's power to promulgate standard provisions that deal with matters beyond those referred to in cl 24(1)(c) to (l).

27 We believe that cl 13 should be more explicitly drafted. It should exhaustively identify those matters of non-compliance that might trigger an intervention by the Registrar.

28 We believe that *any* powers to impose standard provisions are inappropriate and out of step with the fundamental principle referred to in para 21, regardless of how "well-meaning" it might be. We consider that in the context of the carefully staged transition period being proposed, the proposed powers to advise, to warn, and to issue directions, should be sufficient. If any further power is considered necessary, we suggest that (with appropriate procedural safeguards), the Registrar should be empowered to remove societies with non-compliant constitutions from the register.

29 If there is to be any power to impose standard conditions, cl 13 should be explicit that the only standard provisions that can be imposed in this way are those dealing with the matters referred to in cl 24(1)(c) to (l).

Clause 36: Officers

Definition Of "Officer" Too Wide

30 NZEI acknowledges the desirability of greater clarity about the duties and obligations of those who effectively govern societies. We have no objection to the requirement for societies to have a "committee", and we have no significant issue with the duties proposed for "officers", other than some union-specific concerns about the present width of the proposed conflict of interest provisions, which we comment on below.

31 However we believe that the present definition of "officer" in cl 36 is too widely drafted, imposing onerous and unnecessary obligations on a far wider pool of individuals than is required or desirable.

32 NZEI's rules provide for

- a national executive (14 elected members);
- a complementary body called Te Reo Areare, (17 elected members);
- branches (we currently have 115), each of which must have at least five elected officers (ie at least 575 members);
- area councils (we currently have 16), each of which must have at least eight and often 12 or more elected officers (ie at least 128 members);
- worksite representatives (other unions call them "delegates") – we have members in approximately 4066 workplaces, each of which has one or more elected representatives (ie at least 4066 members);
- a Member Assist team, comprising members appointed by our national executive to provide personal and collegial support to other members (at present, comprising 93 members).

33 NZEI's rules also provide for branch and area council representatives to our Annual General Meeting, with branch representation being proportionate to size (there were approximately 350 officially designated representatives at our 2015 Annual Meeting).

35 While all of these elements are important to NZEI's functioning, operational governance is provided by our national executive, which would amount to our "committee" for the purposes of the Bill. It directs policy in between Annual Meetings, controls our finances, and it is responsible for all significant operational decisions. In corporate terms, it is effectively our "board of directors".

36 We believe that many other unions will have similarly complex constitutions, while also having operational governance centred on an elected national executive.

37 The key problem is cl 36(1)(b), which includes in the definition, anyone who "holds any other office provided for in the constitution". In NZEI's case, that would effectively involve thousands of members, despite the fact that most of

them would not be in any position to *"exercise significant influence over the governance of the society"*[4]

38 We understand that the diversity of current governance arrangements across incorporated societies presents some challenges when trying to identify who to impose duties on. However, the Bill's proposal to require all societies to at least have a "committee" (which we support) significantly simplifies the task. We believe that cl 36(1)(a) is all that is necessary, and that cl 36(1)(b) should be deleted.

39 While it does not seem to directly impact on NZEI, we would observe that cl 36(2) is difficult to understand. It appears to refer to someone who exercises *de facto* control over other "officers" (including the committee) while being simultaneously subordinate to the committee[5], which seems inherently contradictory. We note but do not understand the exclusion set out in cl 36(3)[6].

40 We suggest that the rest of cl 36 be redrafted to provide greater clarity.

"Officer" Should Not Include Employees

41 We are concerned that cl 36(2)(d) signals an intention to include at least some paid staff within the definition of "officer", and we note that cl 48(3) seems to reinforce that impression.

42 We do not support the notion of including employees within the definition of "officer". We believe that it confuses governance with management, and that it is out of step with best practice. While it is appropriate for legislation to impose core duties on those acting in a governance capacity, the duties of employees to their employer should be a matter for the parties to set between them.

Clause 56-65: Conflicts of Interest

43 While we understand the policy intention of ensuring that officers' conflicts of interest are properly managed, we do not think the present provisions sufficiently recognise the unique nature of unions, nor do they sufficiently accommodate the realities of members' involvement in unions' collective activities.

---

[4] Above, n 3 at 6.2.

[5] We note that the descriptors in cl 36(2)(a)-(d) are set out as cumulative.

[6] We take the reference to someone "acting in a professional capacity" to refer to someone either employed or engaged to serve the society, and when read with the rest of cl 36, it seems to contemplate an arrangement in which such a person would have the power to effectively control those on the society's committee – we cannot envisage any concrete example of such an arrangement.

44 It would be administratively impossible to enforce and record the disclosure of the "interests" of the thousands of members who play some official[7] part in NZEI's operations. Requiring NZEI to prevent any of those members from participating in internal affairs on the basis of such "interests" would seriously disrupt our organisational and democratic processes.

45 Narrowing the definition of "officer" as we have suggested above[8] would assist, but without further amendment these conflict of interest provisions would still cause serious problems.

46 Our rules provide that our national executive is to comprise fourteen elected members, four elected from specified sectors and eight more elected from the general membership. Almost all of our members are covered by national collective agreements, and at any one time, a number of our national executive members will be covered by the same collective agreement. Our rules require that national executive approves settlements of our national collective agreements before they are put to the members for ratification[9]. We believe this to be a common arrangement amongst unions that engage in large-scale collective bargaining.

47 The present provisions would prohibit any executive members covered by the collective agreement in question from participating in that vote. They would each be "interested" in the settlement of that collective agreement (they would derive a financial benefit from it in the event that it was approved and subsequently ratified).

48 They would not be rescued by cl 56(3) as presently drafted because their interest would not be *"the same or substantially the same as the benefit or interest of all or most other members of the society"*. Generally speaking, collective agreement settlements can (and usually do) have a diverse financial impact, depending on individual members' circumstances. In any event, even the primary teachers' collective agreement (the largest in the country), only covers some 27,000 of NZEI's 47,000 members.

49 As they stand, the Bills' provisions will undermine our democratic governance (and could render our national executive inquorate), when dealing with one or more of the most critical pieces of work our organisation does on behalf of its members.

50 Calling a special general meeting[10] would not be an adequate or appropriate solution. The logistical complexities of calling a special general meeting for 47,000 members makes it an unrealistic substitute for the nimble decision-making possible by our national executive.

51 Importantly, it could render our settlement approval processes fundamentally undemocratic. It would involve members with no legitimate interest in the

---

[7] Ie holds an office provided for in our constitution
[8] Above, paras 30-38
[9] See s 51 *Employment Relations Act 2000*
[10] The solution proposed in cl 58(3) for inquorate situations.

collective agreement in question determining whether or not the members actually affected by the settlement even get the chance to ratify it. Under our current rules, national executive members[11] are elected with a "whole of union" perspective to all of their decision-making, and they are democratically accountable on that basis. A special general meeting would be under no such constraints.

52 We think these problems can be avoided with a relatively simple amendment to cl 56(3)(b) so that it refers to interests that are the same or substantially the same as *some* other members of the society.

Clause 71: Information For Members

53 We note that cl 71 parallels s 178 *Companies Act 1993*, which empowers shareholders to require information from companies, backed by the scope to obtain court orders for disclosure where the court agrees that the company does not have sufficient reason to refuse.

54 However we do not believe that it is appropriate to simply copy corporate legislation, when this entire exercise is premised on the understanding that societies are not simply some sort of inferior company, but a unique and richly diverse sector in their own right.

55 We can see no good reason to impose such a requirement on societies, particularly in view of the increased rigour that the new legislation will bring to their governance, and the mandatory provisions that societies will need to have to address members' grievances.

56 We are concerned that these obligations could impose burdensome requirements, especially on larger societies. Incorporated societies are (effectively by definition) "not-for-profit" and so have limited scope to absorb increased operational costs.

57 If Parliament does proceed with some version of this clause, we are also concerned that the scope to decline to provide requested information takes insufficient account of the nature of union activities and the often combative environment in which they operate, and that our operational needs will not be sufficiently protected.

58 Unions deserve protection for sensitive operational information, just as companies deserve protection for sensitive financial information. While cl 71(4)(b) refers to prejudice to the "commercial position" of the society, this is not fully apt to reflect the nature of modern unions' business, nor the information that unions need to keep confidential. As examples, it would not protect strategic advice from senior management to the national executive about potential industrial action, or proposals about the legal pursuit of health

[11] At least those elected from the general membership.

and safety issues. Nor would it protect information about plans to pursue our wider professional, social and political goals.

59 We realise that cl 71(4) is not an exclusive list of reasons justifying the withholding of information, and that the ultimately the test is whether a court would be satisfied that it should make an order to supply the information under cl 72. However cl 71(4) would be an important touchstone, and would be influential in the exercise of the Court's power. It is therefore important that cl 71(4) is broadened to include language more apt to describe the sorts of sensitive information that unions should be able to withhold.

Clause 73 - 75: Annual General Meetings

60 We accept that it is appropriate to require all societies to hold an annual meeting, and we accept the desirability of imposing more rigorous financial reporting requirements on societies.

Timing of Annual Meeting

61 However, we have significant difficulty with cl 73(1) which requires the annual meeting to be held within six months of the society's balance date, given that a key element of the annual meeting is the presentation of the annual financial statements. We note that this replicates the requirements in s 120 *Companies Act 1993*, but we do not believe it is appropriate or realistic to be imposing the same tight deadlines on societies.

62 We note the Law Commission's observation that many societies struggle to comply with the simple reporting requirements under the existing legislation[12]. It is likely that many more societies will struggle to comply with the more onerous need to provide "financial statements"[13], and simultaneously halving the reporting timeframe will not assist.

63 NZEI is one of the largest and most complex incorporated societies in New Zealand. Having given careful consideration, and taken external advice, we are concerned that we would struggle to meet the six-month deadline.

64 Our internal structure comprises not only the usual sort of financial systems expected of a large, nationally distributed organisation, but as earlier described[14], we also have a large number of subordinate groups of members operating within our overall umbrella. We have 16 area councils and 115 branches, all nationally funded, but each with their own separate bank accounts and a relatively high degree of autonomy over their own finances.

---

[12] Above n 3, at 6.147

[13] As defined in the *Financial Statements Act 2013.*

[14] Above at paras 32-33.

65 Securing complete financial returns from all of these part-time volunteer officers within our current 12 month cycle is already a time-consuming and onerous task. We consider it unlikely that we could secure this information twice as fast.

66 Furthermore, we are advised that it would be all but impossible to have our accounts audited within the timeframes that a six month reporting cycle would impose.

Structure of Annual Meeting

67 While sympathetic to the need for an appropriate accountability mechanism, cl 75 as presently drafted would cause fundamental problems for unions.

68 NZEI's rules already provide for an annual general meeting[15].

69 However, with 47,000 members, a general meeting open to every member would be simply impracticable. Instead, NZEI's rules make detailed provision for delegated democratic representation. We understand many other unions conduct similar annual meetings. Each union has its own approach to the selection of delegates, reflecting their own structures and organisational divisions. The common denominator is that annual meetings are intended to enhance and promote the democratic workings within each union.

70 Rather than imposing a simplistic singular model of "democracy", cl 75 should be redrafted to enable societies to structure their annual meetings in ways that best meet their individual needs.

Clauses 77-80: Indemnities and Insurance

Protections For Members

71 NZEI is concerned at the potential impact of these provisions on unions' representation or legal support for members.

72 Like many other unions, NZEI will in appropriate cases, undertake litigation (in members' names) against current or former employers, on the understanding that NZEI will meet any costs orders made against the member(s) concerned. We provide representation (at our cost) for members who face proceedings before their professional bodies. We currently also provide some assistance with legal costs where members face allegations of criminal offending said to have occurred in the course of their work.

73 NZEI considers these supports to be ordinary incidents of union membership and we would not welcome statutory interference in these arrangements, nor

[15] Above at para 33.

would we welcome restrictions that would create future difficulties for us in providing such support in alternative ways, such as through insurance.

74 Officials have, in discussion with us, advised that the restrictions on providing indemnities etc to members are only intended to apply to members' actions or omissions in terms of the society's affairs. We note that cl 77 does refer to liability for actions or omissions in the member's "capacity as a ... member".

75 However we remain anxious that as presently drafted, Subpart 6 of the Bill could impinge on arrangements we wish to see left unaffected, and we suggest that it should be redrafted to express its limited intent more clearly.

Protections For Officers And Employees

76 We accept that it would be inappropriate for societies to indemnify officers or employees against criminal liability, and liability for failures to act in good faith and in the best interests of the society.

77 We are however concerned that these provisions would unduly restrict societies' ability to indemnify officers and employees for the costs of proceedings. Litigation ultimately creates "black-and-white" results around liability issues, but this is often an artificial certainty. In many cases the reality is more ambiguous, and even where officers or employees are held liable, they will frequently have had legitimate cause to have defended the proceedings.

78 We therefore do not believe that societies' ability to meet costs for officers or employees should be dependent on ultimate outcomes, particularly as clss79-80 would allow them to insure for such costs regardless of outcome.

Clause 104: Prejudiced Members

79 We are concerned that the width of this clause fails to appreciate the multiple avenues through which union members can already pursue concerns about their union's activities. Unions are of course subject to judicial review. Unions, their officers and employees can be sued in negligence. Investigations by the Privacy Commissioner or the Human Rights Commission can result in proceedings before the Human Rights Review Tribunal.

80 Importantly, unions owe duties of "good faith" to members under the *Employment Relations Act 2000*[16], which requires them to be *"active and constructive in establishing and maintaining [the] relationship in which [they] are, among other things, responsive and communicative."*. Section 161 *Employment Relations Act 2000* provides that the Employment Relations

[16] See s4.

Authority has "exclusive jurisdiction" to determine asserted rule breaches, or "any other matter" arising from a member's union membership.

81 Unions are constantly engaged in activities which have differential outcomes for members. Different employers will be more or less amenable to the claims being put forward on members' behalf. A single employer may be more amenable to meeting claims being put forward by one group of members within its operation and less amenable to identical claims from another group.

82 In collective bargaining, all unions seek to achieve the greatest good for the greatest number. This inevitably involves less emphasis on "niche" interests. Ultimately, the members collectively determine when sufficient progress has been made for an agreement to be reached. Compromise across and within the group is inevitable.

83 It would be problematic for unions to be exposed to yet another avenue of challenge to their activities. The Authority has a close understanding of the nature and dynamics of unions' internal workings, and the interface between those workings and union's day-to-day business; and we consider it is more appropriate to leave undisturbed its exclusive jurisdiction over such matters. We submit that an appropriate exception should be inserted into cl 104.

Yours sincerely

David Martin
Director, Legal & Compliance