



22 July 2023

Corporate Governance and Intellectual Property Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

EMAILED

societies@mbie.govt.nz

Tēnā koutou,

RE: SUBMISSION TO MBIE CONSULTATION DRAFT INCORPORATED SOCIETIES REGULATIONS 2023

The New Zealand Institute of Architects (NZIA) Te Kāhui Whaihanga is a global professional membership body driving excellence in architecture. We serve our members and society in delivering quality buildings and places, stronger communities and a sustainable environment. Being inclusive, ethical, environmentally aware and collaborative underpins all that we do. We have over 4,600 members, 12 staff, assets of about \$5m and annual turnover of about \$5m.

The Institute welcomes the opportunity to respond to the Ministry of Business, Innovation and Employment (MBIE) call for submissions to the Consultation Draft Incorporated Societies Regulations. We confirm that we are happy for MBIE to publish this submission, in full and unedited, but with commentary if you wish.

NZIA happens to be structured as a single entity with unincorporated branches, but that could change. We are aware that other similar entities may have incorporated branches, with the central body having some separate functions but essentially being a society whose members are the branch societies.

We believe that the law in this area should be facilitative rather than restrictive, and some of our comments below are made with that in mind, even if they may not directly apply to our current structure. Plus, of course, the members we represent will also be members of societies of all kinds and sizes, and the points we make can be regarded in some sense as related to their wider interests.

The Institute has taken a keen interest in the review of the Incorporated Societies legislation and made a submission to the Select Committee on the Incorporated Societies Bill. It is pleasing to see that a good number of points made in our submission were accepted.

Definition of “officer”

However, in our opinion there remains a serious flaw that was not addressed adequately in the Departmental Report to the Select Committee relating to the definition of “officer” and we address that in some detail below.

In essence, the Act confuses governance and management, and adds the separate concept of “administration”. In our opinion, it wrongly assumes that employees vote, when that is not usually the case, and holds them liable for decisions they have advised on, rather than participated in. The Act also provides for loss of office (i.e. employment) in situations that cut across employment law rights and principles.

To take a simple example, an employee who is an officer is disqualified if they become bankrupt (sections 47(3)(b) and 50(1)(c)); but bankruptcy is not a legitimate ground for summary dismissal of an employee. It is not clear to us how far the defect can be rectified by regulation, but we urge that officials take this, final, opportunity to go as far as legally possible.

To the extent that it cannot be fixed, there is, at best, a partial solution to the employment aspect of problem through the discretions given to the Registrar in sections 48 and 49; but we suggest that the Registrar is not really the most appropriate person to decide employment issues.

NZIA urges that the problems caused by the expansive definition of “officer” be addressed at the earliest legislative opportunity. These issues were raised in the NZIA submission to the Select Committee.

Unfortunately, the Departmental Report to the committee did not address them, and even in its Supplementary Report merely stated that it was following the precedent of the Charities Act. That may be so, but it is an inappropriate precedent that should not have been extended. In our opinion, there are better precedents, for example the Crown Entities Act, which clearly separates the concepts of governance and administration.

In smaller societies, where an employee might also be an office holder or committee member, the disqualification and other rules should only apply only to the person’s role as an officeholder. It is for the society, not the Registrar to determine employment issues.

Detail around “Address” requirements

We also suggest that to encourage participation in the governance of societies generally, it should be made clear that where a person must give a “physical address used by that person”, that can be the address of the society or, if the society does not have a physical address (which we believe will be quite common) it can be the address of the contact person. For good reasons, many people are reluctant to have their residential addresses made public, or placed into official records where they might be disclosed.

Obviously, that applies to victims of domestic violence and other crime, but also many police, other enforcement and security officers, judges, doctors, and pharmacists are in that category. Identifying a physical address may well identify the address of whanau thought to be living with the person. We understand that frequently the partners of such persons do not lightly put their residential addresses into the public domain.

We understand the New Zealand Law Society (NZLS) has recently recommended that lawyers need not put a physical address of their practice on its register because so many work from home, and they or others at their address may not want to be traced easily, for good reason.

There has been concern expressed for many years about the Companies Register requiring directors to give physical addresses, and we understand that moves are under way to address that. Such people may often use the confidential sections of the Electoral Roll and Motor Vehicle Register and decline to have their phone number included in directories.

They ought not to be dissuaded from participation in the governance of societies by the risk of disclosure of their addresses. Many societies may not have a physical address and in those cases the address of the contact person should be able to be used.

Some small societies may meet in community facilities, irregularly, and not always at the same place; essentially, they are of no fixed abode, and a physical address may simply not exist. Even large societies may not have an appropriate address.

To take Wellington examples, there may well be many swimming and water polo clubs using the Kilbirnie Aquatic Centre, and numerous athletics clubs using Newtown Park. They may well have some storage facilities, but those do not seem to be appropriate addresses for service of formal documents.

We believe that the regulations should make more use of the term “contact details” which is defined as a physical or electronic address, rather than the term “physical address” only.

NZIA does have physical office premises, so this is not a direct concern for us in some situations; but could affect our officers, and if any of our branches were to incorporate, it is highly likely that most would not have physical premises.

Part 2 Incorporation of Societies

1. Here, in regulation 5, or more generally in Part 1, it should be provided that the officer may use the physical address of the contact person of the society, or the address of the society, if they wish. As noted above, the reason for this can be summarised as personal safety of officers and whanau.
2. It is also to be noted that officers who are employees should not have to give physical addresses other than that of the society; but below we argue that employees should not be officers anyway. It may well be that societies do not maintain up-to-date records of the physical addresses of their employees (which need not be their residential addresses).

Part 3 Administration of Societies

1. Ideally, section 254(1)(d) would be used to provide in or after regulation 8 that persons who are employees and do not hold any other role with the society are not officers. It may be thought that such a provision is an unusual or unintended use of the regulation making power because it negates paragraph (a)(ii) of the definition of “officer”, but arguably that is not the case. That part of the definition would still apply to a Patron or Immediate Past President, for example, who may exercise significant influence.

We believe that the regulation making power should be used to the fullest possible extent to reduce the inappropriate conflation of governance, management, and administration.

Members of the committee, in that capacity, are similar to directors, and the extension of the definition should be confined (by regulation, since that is the only remaining mechanism) to those who would be in the category of “deemed directors” if the society were a company; see section 126 Companies Act 1993.

2. If that change is not implemented to the fullest possible extent then, as noted above in our general comments, there is the potential for a direct clash with long established employment law principles.

3. If the definition of “officer” extends to Chief Executives (CEs) and other senior employees, and even less senior ones who have significant influence over administration though not management, then we believe the following provisions will be problematic;

3.1 The section 47 disqualification grounds are not automatic grounds for dismissal from employment, and we have seen nothing to suggest that the Registrar has to have experience in employment law matters sufficient to enable them to exercise the section 50 discretion.

3.2 The duties of officers in sections 54 to 57 are probably innocuous, but sections 58 and 59 are in our opinion clearly not appropriate. If the committee makes a decision that might cause a risk of loss to creditors, then employees who did not make the decision should not be liable for it, and should not be entitled by those sections not to carry it out.

Employees, particularly those below CE/CFO level may well not have enough information to assess that risk or to know whether the society will be able to perform an obligation when required to do so.

3.3 The conflict of interest provisions are borrowed from corporate law, and are only appropriate at the director/committee governance level. It is for the committee or CE to decide the conflicts regime for employees. Section 64 illustrates the problem, by prohibiting voting, when employees do not vote.

The society should not be able to avoid a transaction because an employee was interested; that is an internal problem for the society; but sections 68 to 71 allow this.

There is the prospect of a solution through section 67 which allows a constitution to modify the conflicts provisions if conditions prescribed by regulation (if any) are satisfied. To provide clarity around this power, the regulations could and should provide that constitutions may negate all the provisions of the sections referred to in section 67 in respect of any person acting in their capacity as an employee.

3.4 It is good to see that no regulations are proposed for section 62(2)(d) which allows constitutions to negate the conflicts of interest provisions. Those provisions are written as if they only apply to committee members, and we expect most constitutions will negate them for employees and provide internal employment law-based provisions for them.

3.5 Section 97 regarding insurances for officers, assumes in subsection (2) that officers can vote, but typically employees cannot vote on such resolutions. Yet, personal liability can follow. Some employees who are deemed to be officers may be totally unaware of any aspect of the insurance.

4. In or after regulation 8 there could and should also be clarification around addresses for various purposes. Section 254(1)(a),(b), (r), (s) and (x) appear to provide authority for this.

5. The discussion document proposes that the address of an officer need not be a residential address. However, the draft regulations, at reg 5(d) requires a physical address. For many people, their only physical address may be their residential address. That will be even more likely, and inappropriate, if, employees at various levels are treated as officers.

In our opinion, we believe officers should have the options of giving their address as C/O the registered office, or the address of the contact person for the society. The contact person should have to give a physical address, but that is not the case.

The same would apply in section 109 regarding the annual return. Not even the Companies Act requires physical addresses of directors to be in the annual report; see section 211. It is even more inappropriate to require that for employees, if they are to remain categorised as officers.

6. Societies should not be able to “hide”; but having to have a physical address for the registered office and the contact person should be sufficient. There needs to be a balance between contactability and privacy and security (plus not unnecessarily discouraging participation in governance). We believe our suggestion offers the right balance.
7. It follows that NZIA does not support draft reg 11 so far as it relates to physical addresses. Further, where employees are deemed to be officers, the society’s committee may not know where the employees live, let alone whether they have moved, or whether they have a non-residential physical address.
8. The same should apply for addresses for service. For the kinds of small societies described above that might use shared community facilities as registered offices, it may be necessary to require that the address for service is the physical address of the contact person. Section 254(1)(b) might be used to give the Registrar a discretion here; though it may not help if the society just gives the street address of the local community hall or swimming pool?
9. We have noted the definition of “contact details” in section 5(2) of the Act which allows a physical OR electronic address, but the draft regs seem to cut across that by requiring just a physical address in several cases. MBIE might consider whether that is an unintended or unusual exercise of the power that may attract the attention of the Regulations Review Committee?
10. There are references to a majority of votes of those voting. That should always allow for some other higher requirement, such as 75% (or special resolution) if the society’s constitution requires that. Also, officials need to bear in mind that not all societies have the “one vote per member” principle. Local Government New Zealand (LGNZ), for example, allocates more votes to Wellington and Christchurch Cities than to Gore or South Waikato District Councils. Such organisations might well also require important decisions to be supported by both a majority of votes and a majority of members; and that should be permitted.
11. As noted in our submission, NZIA believes societies should be able to have independent members on their committees if they wish, and regulations should not curtail this, so long as members are the majority.
12. Concerning service of documents and draft regulations 22 to 25, for reasons described above leaving a document at a registered office may be ineffective, and that may be fairly obvious to the person leaving it at a deserted community hall, sports facility, or wherever.

We suggest replacing it with a reference to the “contact person”, as defined. The discussion document, at para 140, proposed this, but it has not been carried forward to the regulations.

Incidentally, it is odd that the contact person does not have to have a physical address; electronic and telephone number are enough. We think that while many people should not have to give physical address, the contact person should have to do so.

The contact person need not be a committee member or employee, and to avoid constantly having to give notice of changes, it may be that those societies who have advisers will give the name of their accountant.

13. Draft regulations 26, as to receipt of documents, is complex, but fairly standard. There may be benefit in linking it to, or reconciling it with, Part 4 of the Contract and Commercial Law Act 2017?

Part 4 Amalgamations

1. Please note that the proposed regulation 39(e) is probably impractical, because the officers of the proposed amalgamated society may well not be known until it has its first meeting, and elects them.
2. Also, **if** employees are to be officers, the employment of them is a matter to be resolved by the amalgamating societies and/or the new society, and could be very sensitive. Two, CEs CFOs, or whoever, could be competing for the same position. Giving notice of a likely appointment before it is made is highly likely to signal pre-determination and cut across employment law principles.
3. Possibly the reference could be to proposed members of the committee, but even that is fraught because they may well not be known at the proposal stage. We suggest that, if anything, the requirement should be to name the members of the committees of each society proposed to be amalgamated.

Part 6 Fees

1. We note that generally, MBIE is reviewing fees elsewhere. In doing so, we urge that MBIE consider the persuasive guidance on the subject, including the Regulations Review Committee Digest, the Reports referred to there, and the Guidelines provided separately by the Treasury and the Office of the Auditor General.
2. Unsurprisingly, the general rule is that where users pay, they should get a benefit; and they should not pay for more. Elements of public good, encouragement of compliance, deterrence, and efficiency can all be relevant.
3. In that context we do wonder whether the proposed fees (called penalties) of \$25 and \$100 are appropriate for late filings?

A \$25 fee may be an incentive to comply, but with societies often having volunteers as officers, non-compliance may often be inadvertent.

There may be an element of public good in encouraging compliance by not imposing penalties?

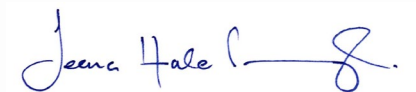
How much does it cost to administer the imposition and processing of a \$25 or even \$100 fee? Are they actually a cost to taxpayers?

In our opinion, we believe that MBIE should consider making regulations under section 255(3) relating to the waiver of fees by the Registrar in appropriate circumstances.

We acknowledge that there are opportunities to enhance and strengthen the Incorporated Societies Regulations and we'd welcome the opportunity to support the Institute's engagement with MBIE on these matters.

If you need any further information on the Institute submission, please feel free to contact Chief Executive, Teena Hale Pennington on thalepennington@nzia.co.nz

Ngā mihi,

A handwritten signature in blue ink, appearing to read 'Teena Hale Pennington', with a stylized flourish at the end.

Chief Executive

Cc. New Zealand Institute of Architects, General Counsel