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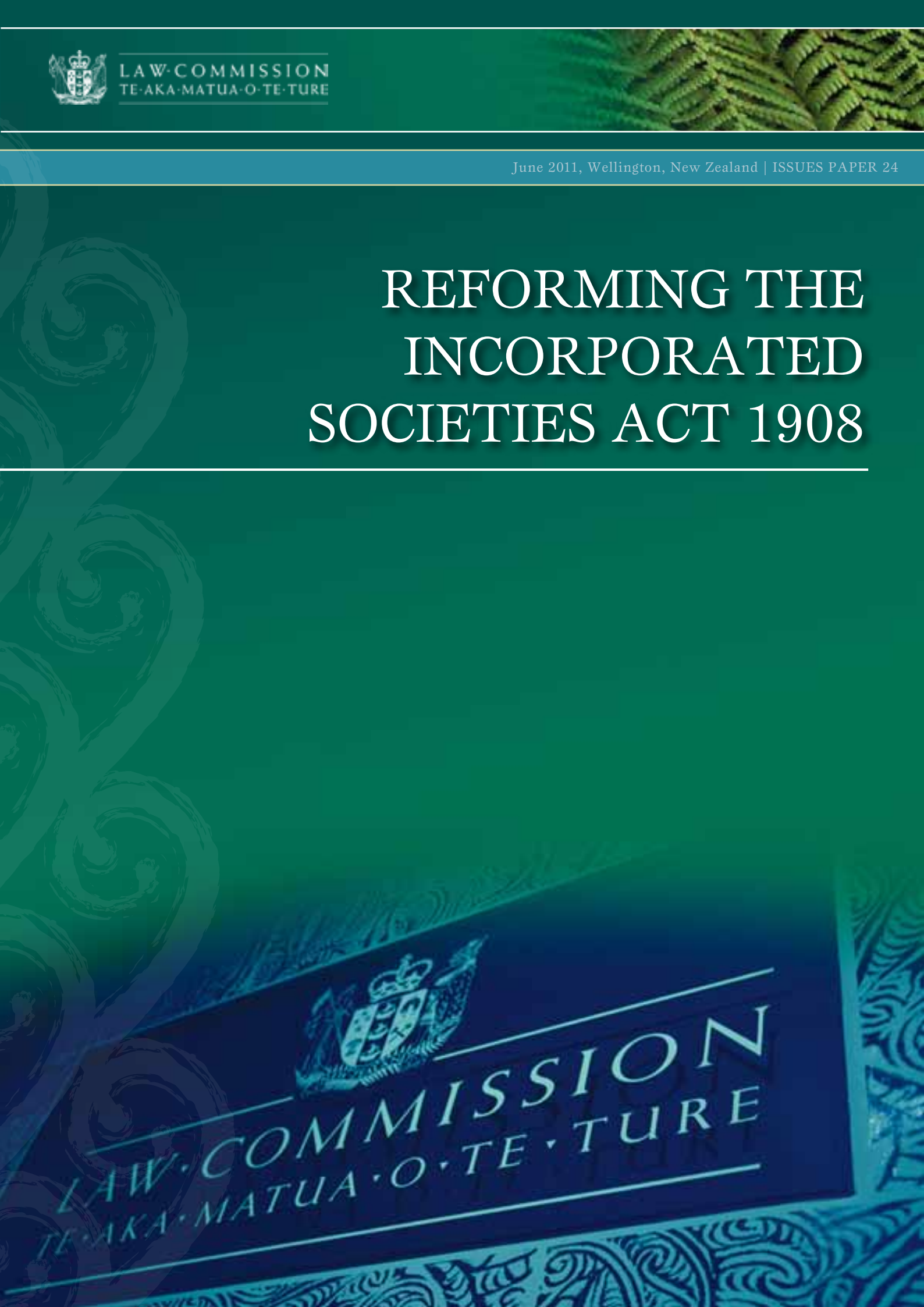
June 2011, Wellington, New Zealand | ISSUES PAPER 24

REFORMING THE INCORPORATED SOCIETIES ACT 1908



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REFORMING THE INCORPORATED SOCIETIES ACT 1908

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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National Library of New Zealand Cataloguing-in-Publication Data

Reforming the Incorporated Societies Act 1908 [electronic resource].

(Law Commission issues paper ; 24)

ISBN 978-1-877569-22-7

1. New Zealand. Incorporated Societies Act 1908.

2. Nonprofit organizations—Law and legislation—New Zealand.

I. New Zealand. Law Commission.

II. Series: Issues paper (New Zealand. Law Commission : Online) ; 24.

This paper maybe cited as NZLC IP24

This issues paper is available on the internet at the Law Commission's website: www.lawcom.govt.nz

FOREWORD

Community organisations play a very important role in New Zealand society. They range from small local sports associations to large beneficial societies. These bodies are often referred to as the "third sector", and exist alongside the private (for profit) sector and the public (or state) sector.

It is possible for such bodies to operate as unincorporated associations, or through a trust. But many prefer to become an incorporated body. The society as such then holds the relevant assets, and members have limited liability for the society's debts.

Historically societies have been able to incorporate under the Incorporated Societies Act 1908. But this statute is over 100 years old. Consequently it does not adequately address contemporary concerns faced by such bodies. In particular, it does not support modern governance structures, or provide for modern dispute resolution mechanisms.

The Law Commission is of the view that an updated and revised Act is appropriate to support this third, not-for-profit, sector in New Zealand. This Issues Paper sets out why it considers this to be an important objective, and raises a number of questions on which it seeks to consult, before making its final recommendations to Parliament.

Hon Sir Grant Hammond KNZM
President of the Law Commission

Call for submissions

Submissions or comments (formal or informal) on this Issues Paper should be sent to Geoff McLay, Commissioner, by **30 September 2011.**

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The Law Commission asks for any submissions or comments on this Issues Paper. The submission can be set out in any format but it is helpful to specify which of the numbered questions (listed in each chapter, and also at the end of the paper) you are discussing.

Submitters may like to make a comment that is not in response to a direct issue raised in the paper, and this is also welcomed.

Official Information Act 1982

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Law Commission will normally be made available on request, and the Commission may refer to submissions in its reports. Any requests for withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

Reforming the Incorporated Societies Act 1908

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Chapter 1
Introduction

SUMMARY

This chapter explains why the Incorporated Societies Act 1908 needs to be reformed. A new Act is needed to better support the third, not-for-profit sector. It suggests that any reform of the 1908 Act should also include the ability of charitable trusts to incorporate under the Charitable Trusts Act 1957.

WHY REVIEW THE 1908 ACT: AN ACT SHOWING ITS AGE

1.1 In his 1 July 2010 reference to the Law Commission, the Minister of Justice wrote of the proposed review of the Incorporated Societies Act 1908:

> The Incorporated Societies Act 1908 is uncomfortably old and has been little amended since its enactment. Yet the rich tapestry of community organisations that use this legal form is extensive in New Zealand. Practising lawyers are often called upon for advice concerning incorporated societies. They are asked for advice on whether to set one up, how to set one up, how to register it and what to include in the documents. Difficult questions frequently arise around the governance and administration of such organisations and the resolution of their internal disputes. Many of the reported cases revolve around such disputes. This review will take a first principles look at the Act.

1.2 New Zealanders who come together do not need to create a separate entity (or in legal terms, to incorporate), but can work together in what the law calls unincorporated associations or through trusts. However, there are a number of advantages to incorporation.

1.3 New Zealand has two specific regimes that enable non-profit organisations to incorporate: the Incorporated Societies Act 1908, which provided for the registration of societies; and the Charitable Trusts Act 1957, which enables the incorporation of charitable trust boards.

1.4 Parliament, when it passed the 1908 Act, and the Unclassified Societies Act 1895 that preceded it, recognised the valuable role that not-for-profit organisations play in our society, by allowing their incorporation as bodies corporate separate from their own members. While the idea of allowing community groups to incorporate has stood the test of time, the 1908 Act has fallen behind the statutes in jurisdictions that once copied it.

1.5 This issues paper starts from the premise that New Zealand ought to retain a separate statutory regime that enables community groups to incorporate. It seeks community views on possible reforms to the Act that go beyond simply redrafting in modern English. Central to our proposals is a new statute that would be more in line with a modern approach to corporate governance. In our view, providing model rules that they could adopt, and setting out better procedures to resolve disputes and to control societies that might be going off the rails, may be of help to both large and small incorporated societies. This would bring New Zealand into line with the recommendations of various law reform agencies and government reviews in both Australian and Canada.[1]

1.6 The paper seeks community views as to where the appropriate balance lies between modern notions of corporate accountability and governance on the one hand, and the flexibility and ease that many community groups have enjoyed under the 1908 Act on the other. There is a trade-off between seeking greater accountability and governance controls, and creating unnecessary compliance costs for community groups.

1.7 Getting basic governance structures right, understanding what is appropriate conduct for those who govern societies, and providing for suitable mechanisms for resolving disputes is critical for all organisations, especially those which seek government or other sponsorship. The 1908 Act, in our view, does not require societies to ask the appropriate questions when they are being set up. Nor does it provide incentives for already existing societies to improve.

1.8 As in other countries, including Australia, Canada and the United Kingdom, government and community groups themselves have been concerned about how to best support what is often called the "third sector". There have been a number of important reviews overseas.[2] In New Zealand, government efforts are coordinated by the Office for Community and Voluntary Sector, which is based within the Department of Internal Affairs.

1.9 While there are also wider issues that might be dealt with in a general review of the legal regime that surrounds non-profits and the regulation of the sector, our project is limited to reviewing issues relating to the incorporation and governance of societies. We believe that a new Incorporated Societies Act is an important step in strengthening part of the non-profit sector, even if such a review cannot address all the issues that confront the sector.

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1 See, for instance, Institute of Law Research and Reform *Proposals for a New Alberta Incorporated Associations Act* (Report 49, 1987); Law Reform Commission of British Columbia *Report on Conflicts of Interest: Directors and Societies* Volumes 1 and 2 (LRC 144, 1995); Ontario Law Reform Commission *Report on the Law of Charities* "The Non-profit Corporation : Current Law and Proposals for Reform" (OLRC, 1996) ch 15, 451–506; British Columbia Law Institute *Report on Proposals for a New Society Act: A Report prepared for the British Columbia Law Institute by the Members of the Society Act Reform Project Committee* (BCLI 51, 2008); State Service Authority (Victoria) *Review of Not-for-Profits: Final Report* (2007); Ontario Ministry of Government Policy and Consumer Protection Services Division *Modernization of the Legal Framework Governing Ontario Not-for-Profit Corporations* (Consultation Paper #3, 2008); Office of Fair Trading (NSW) *Review of the Association Incorporations Act 1984* (2003); Office of Fair Trading (Qld) *Review of the Associations Incorporation Act 1981: Consultation Paper* (2005); Commonwealth Attorney-General *Scoping Paper for National Not-for-profit Regulator* (2011).

2 See for instance National Audit Office (UK) *Building the Capacity of the Third Sector* (2009); *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector* [The Broadbent Commission] (Canada, 1999); *Australian Senate Inquiry into the Disclosure Regimes for Charities and Not-for-profit Organisations* (Canberra, 2009).

Q1 Do you agree that a review of the legal structure for incorporation of non-profits, and the requirements on those running such societies, would be a useful step in strengthening the non-profit sector?

GENERAL PRINCIPLES

1.10 The United Nations' International Classification of Non-profit Organisations has defined non-profits as sharing the following characteristics:[3]

- *Organised:* that is, they have some structure and regularity to their operations, whether or not they are formally constituted or legally registered. This definition embraces informal (ie, non-registered) groups as well as formally registered ones.
- *Private:* that is, they are not part of the apparatus of the state, even though they may receive substantial support from governmental sources.
- *Not profit-distributing:* that is, they are not primarily commercial in purpose and do not distribute profits to a set of directors, stockholders, or managers. Non-profit organisations can generate surpluses in the course of their operations, but any such surpluses must be reinvested in the objectives of the organisation. This criterion serves as a proxy for the "public purpose" criterion used in some definitions of non-profit, but it does so without having to specify in advance and for all countries what valid "public purposes" are.
- *Self-governing:* that is, they have their own mechanisms for internal governance, are able to cease operations on their own authority, and are fundamentally in control of their own affairs.
- *Non-compulsory:* that is, membership or participation in them is not legally required or otherwise a condition of citizenship.

1.11 Non-governmental and community based organisations are enormously important and government should be facilitating a context within which community-based initiatives can become more effective. A vibrant, established, and pluralistic civil society is an essential ingredient of democracy. This requires an enabling environment – that is, an economic, political, cultural and legal environment which enables citizens to achieve social development.

1.12 We have begun this project with the assumption the public itself must take responsibility for which non-profit organisations they support and how they do so. The legislation, on the other hand, should aim to create a climate of good governance, organisational credibility and informed choices with as little state interference as possible. Bodies that are incorporated under a new Incorporated Societies Act should, in our view, share the following characteristics, facilitated by the legislation:

- they should be established for a public purpose or for the (non-financial) benefit of their members;
- they should be private and independent;
- they should be self-governing; and

3 Lester M Salamon and Helmut K Anheier "The International Classification of Nonprofit Organizations: ICNPO-Revision 1, 1996" (Working Papers of the Johns Hopkins Comparative Non-profit Sector Project, no 19, The Johns Hopkins Institute for Policy Studies, Baltimore, 1996) applied in Jackie Sanders, Mike O'Brien, Margaret Tennant, S Wojciech Sokolowski and Lester M Salamon *The New Zealand Non-profit Sector in Comparative Perspective* (Office for the Community and Voluntary Sector, 2008).

- in general, their income and profits should not be channelled to members, trustees or anybody else except as reasonable compensation for services rendered.

1.13 Any reform must also take into account the diversity of New Zealand's not-for-profit organisations. Cultural, sporting and recreational organisations comprise 45 per cent of New Zealand non-profits. But there also significant numbers of organisations that cover the full range of community activities, including social service providers, religion, development and housing organisations, education, environmental interest groups, and business and professional associations. Although some are very large organisations, many are very small. As at 28 February 2011, there were 23,052 incorporated societies, and 20,106 charitable trust boards.

1.14 A compliance regime that might be appropriate for a large corporate may simply overwhelm a small community-based organisation. Similarly, a flexible approach to the regulation of small community groups may not appropriately deal with the issues of governance and control that might be relevant to the regulation of larger groups.

THE INCORPORATED SOCIETIES ACT 1908

1.15 The Incorporated Societies Act 1908 does not specify what the objects of a society may be, so long as the purpose is lawful and not for pecuniary gain.[4] There is a further prohibition on pecuniary gain that imposes a fine of $200 for the society, and $40 for members.[5] Members of a society can be liable for debts or obligations incurred in an activity intended to make a prohibited pecuniary gain.[6] Societies themselves can make pecuniary gain, but they cannot do so for the financial benefit of their members. Upon dissolution, the assets of an incorporated society are distributed according to the rules of a society, which may allow distribution to members.

4 Incorporated Societies Act 1908, s 5 provides:

Pecuniary gain

Persons shall not be deemed to be associated for pecuniary gain merely by reason of any of the following circumstances, namely:

(a) That the society itself makes a pecuniary gain, unless that gain or some part thereof is divided among or received by the members or some of them:

(b) That the members of the society are entitled to divide between them the property of the society on its dissolution:

(c) That the society is established for the protection or regulation of some trade, business, industry, or calling in which the members are engaged or interested, if the society itself does not engage or take part in any such trade, business, industry, or calling, or any part or branch thereof:

(d) That any member of the society derives pecuniary gain from the society by way of salary as the servant or officer of the society:

(e) That any member of the society derives from the society any pecuniary gain to which he would be equally entitled if he were not a member of the society:

(f) That the members of the society compete with each other for trophies or prizes other than money prizes.

5 Incorporated Societies Act, s 20. These penalties have not been updated since the coming into force of decimal currency.

6 Incorporated Societies Act 1908, s 20(3). "Pecuniary gain" is defined in section 5 of the Act.

1.16 The central purpose of the incorporation of societies is to create a body corporate distinct from its members. Registration under the 1908 Act creates a body corporate separate from its members,[7] that is, for instance, capable of holding property or incurring obligations in its own right.

1.17 The limitation of members' liability is contained in section 13:

> Except when otherwise expressly provided in this Act, membership of a society shall not of itself impose on the members any liability in respect of any contract, debt, or other obligation made or incurred by the society.

1.18 Incorporation requires the filing of rules with the Registrar of Incorporated Societies, that must cover various basic issues; and the filing of an annual account with the Registrar, that does not have to be audited. That, however, is where the requirements stop.

1.19 Any duties on those who run incorporated societies on behalf of their members come from either the society's rules, or from rather ill-defined judge-made obligations in common law or equity. For example, there is nothing in the Act to prevent committee members from acting in their own self-interest without first disclosing it to their fellow committee members. Nor is there a procedure in the Act to resolve disputes between societies and their members (nor any requirement that they have their own dispute resolution mechanism). Such procedures might enable disputes to be resolved without disrupting the work of the society, and prevent the need to resort to court.

Q2 Is the current limitation of liability sufficient?

OTHER FORMS OF INCORPORATION

The Charitable Trusts Act

1.20 Charities do not have to incorporate. They can remain as unincorporated associations, or they can be created as trusts. Incorporation is not required by the Charities Act 2005 to attract charitable tax status and the other benefits that go with registration as a charity. But the same benefits of incorporation apply as they do to non-charitable societies.

1.21 Charities that do wish to incorporate have the choice of registering under the Companies Act, the Incorporated Societies Act 1908 or the Charitable Trusts Act 1957. The 1957 Act enables trustees of the charitable trust to incorporate as a board to form a separate legal person, which then holds the property of the trust distinct from the trustees. The capacity of boards is described by the 1957 Act:[8]

> Every Board shall have perpetual succession and a common seal, and (subject to this Act and to the rules and other documents providing for the constitution of the Board) shall

7 Incorporated Societies Act, s 10 provides:
Upon the issue of the certificate of incorporation the subscribers to the rules of the society, together with all other persons who are then members of the society or who afterwards become members of the society in accordance with the rules thereof, shall, as from the date of incorporation mentioned in the certificate, be a body corporate by the name contained in the said rules, having perpetual succession and a common seal, and capable forthwith, subject to this Act and to the said rules, of exercising all the functions of a body corporate and of holding land.

8 Charitable Trusts Act 1957, s 13.

> be capable of holding real and personal property of whatsoever nature and whether situated in New Zealand or elsewhere, and of suing and being sued, and of doing and suffering all such acts and things as bodies corporate may lawfully do and suffer.

1.22 The Charitable Trusts Act 1957 also includes provisions that apply more generally to charitable trusts, regardless of whether they are incorporated. That part of the Act, Part Three, will be the subject of a separate Law Commission review as part of its wider review of the law of trusts.[9]

1.23 If the 1908 Act can be criticised for requiring only the bare bones of a corporate structure, the Charitable Trusts Act 1957 does not provide even those bones. The part of the 1957 Act that deals with incorporation of boards is the direct successor of the Religious Charitable and Educational Trust Act 1908, a consolidation of the Charitable Trusts Extension Act 1886, which enabled incorporation of boards of certain religious and educational trusts. That Act, in turn, was itself a successor to an 1856 statute. The 1957 Act does not require the setting out of even the basic rules of the Incorporated Societies Act 1908. It appears to leave all supervision of the body corporate to the trust deed or society's rules that established the trust in the first place, and through the general rules of common law or equity. Moreover, the 1957 Act is odd in providing for the incorporation of the board rather than the trust which it administers. Nor does registration under the Act granted the trust limited liability. Those who choose to be registered as charities under the Charities Act 2005 are, however, subject to the oversight of the Charities Commission.

1.24 Incorporation of a trust board or society depends on satisfying the Registrar of a broad principally charitable purpose including all educational and religious purposes.[10] That finding does not itself guarantee registration with the Charities Commission, which will independently assess an organisation's eligibility against a different legal test that is based not just on the organisation's purposes, but also the ways it carries them out.

The Companies Act

1.25 By far the most common of form of incorporation in New Zealand is under the Companies Act 1993, with 520,777 companies being registered. Often associations that are considering registration can choose to be registered under two or more of these statutes.

1.26 The Companies Act 1993 is designed as a general all-purpose statute, but contains provisions, requirements and oversights that are perhaps simply inappropriate for many incorporated societies, both because of the size of many, but also because of their non-profit motivation. Further, many non-profit organisations may welcome the public statement that the body is a non-profit one, which is implicit in registration under the 1908 Act.

9 Law Commission "Review of the Law of Trusts" http://www.lawcom.govt.nz/project/review-law-trusts (last accessed 23 May 2011).

10 Charitable Trusts Act 1957, s 2 "charitable purpose" includes every purpose that is religious or educational, whether or not it is charitable according to the law of New Zealand.

Other incorporation statutes

1.27 There are two special-purpose incorporation statutes that also date back to 1908: the Agricultural and Pastoral Societies Act 1908 and the Industrial and Provident Societies Act 1908. Societies incorporated under these statutes fall outside the governance regimes of the Companies Act in the same way as incorporated societies.

1.28 There are a number of regional Agricultural and Pastoral Associations that engage in various activities including the running of annual shows. The Agricultural and Pastoral Societies Act 1908 prescribes a model set of rules in section 12, that applies except where the bylaws of a particular association apply otherwise. There have been occasional issues in relation to property that have had to be resolved through special Acts of Parliament.[11]

1.29 The Industrial and Provident Societies Act 1908 enables incorporation of:

> A society for carrying on any industry, business, or trade, whether wholesale or retail, specified in or authorised by its rules, including dealings of any description with land, but excepting the business of banking.

1.30 The Industrial and Provident Societies Act, however, places a limitation on the degree to which members of a society may have claims on the assets of the society:[12]

> However, no member (other than a registered society) may have or claim any interest in the shares of the society exceeding $4,000 or such higher amount as may be specified, in respect of any particular society, by notice in the Gazette given by the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act.

Other jurisdictions

1.31 Almost all comparable jurisdictions, including the states of Australia,[13] many of the provinces of Canada,[14] federal Canada,[15] and many states of the United States,[16] have also chosen to recognise the special status of non-profits by allowing them to register under a special statute with a legal regime that is distinct from companies which may be conducted for profit. Some of those jurisdictions have only relatively recently switched to enable separate incorporation (such as New South Wales in 1984).[17] The major exception is the United Kingdom, which continues not to enable incorporation of non-profits in

11 See, for example, Canterbury Agricultural and Pastoral Association Empowering Act 1982, Clevedon Agricultural and Pastoral Association Empowering Act 1994, Auckland Agricultural Pastoral and Industrial Shows Board Act 1972.

12 Industrial and Provident Societies Act 1908, s 4(2).

13 Associations Incorporation Act 1985 (SA), Associations Incorporation Act 1981 (Vic) as amended in 2010, Associations Incorporation Act 1987 (WA) (note that there was a 2006 Bill that was not enacted), Associations Incorporation Act 1981 (Qld).

14 Non-profit Corporations Act SS 1995, c N-4.2; An Act respecting assistance for the development of cooperatives and non-profit legal persons RSQ c A-12.1; Society Act RSBC 1996, c 433.

15 Canada Not-for-profit Corporations Act, SC 2009, c 23.

16 See for instance the American Bar Association *Model Law on Non-profit Corporations* (3rd ed, 2008).

17 Associations Incorporation Act 1984 (NSW), following the recommendations of the New South Wales Law Reform Commission *Report on Incorporations of Associations* (LRC 30, 1982). The 1984 Act has been replaced by the Associations Incorporations Act 2009 (NSW).

general, although both England and Scotland are soon to enable the incorporation of charities once 2005 legislation comes into force.[18] No Commonwealth jurisdiction that has enabled separate incorporation of non-profits has subsequently removed that ability.

1.32 In both New South Wales and Victoria there are provisions that allow incorporated associations to switch incorporation to the Corporations Act.[19] The Victorian Associations Incorporation Act 1981 empowers the registrar to require that an incorporated association be registered under the Corporations Statute. There are no such provisions in the 1908 Act.

SHOULD THERE BE ONE STATUTE FOR THE INCORPORATION OF NOT-FOR-PROFITS IN NEW ZEALAND?

1.33 Rather than duplicating a similar set of rules, obligations and processes for incorporated societies, and then repeating the exercise for charitable trusts, it may make sense to deal with them in the same unified incorporation statute. Australian states do not have separate legislation that allows the incorporation of charitable boards.

1.34 People seeking to incorporate their non-profit organisation would have one set of rules to comply with. Under this approach, questions of whether a body was a "charity" would not be relevant at the incorporation stage, and the Companies Office would no longer be involved in deciding whether charitable trust boards were indeed "charitable" and thus could be registered. The Charities Commission would remain the regulator of those bodies that applied to be registered under it.

1.35 But even if there is one statute, there may need to be different rules in that statute to take account of different requirements of different kinds of organisations. Canadian provinces like Saskatchewan,[20] and Ontario,[21] as well as the federal Canadian government, have divided incorporations which are for members' benefit primarily on the one hand from those that are for public benefit or charitable purpose on the other. It may be appropriate to have different rules in some circumstances depending on the status of a society, as we later discuss in relation to distribution of assets on the dissolution of the society.

18 Charities Act 2006, sch 7.

19 In New South Wales the Office of Fair Trading has an internal guideline of total assets of $2 million that triggers consideration of whether transfer should be suggested.

20 The Non-profit Corporations Act SS 1995, c N-4.2, s 2 defines a charitable corporation as follows:

(9) A corporation other than a corporation mentioned in Division XV of Part II is deemed to be a charitable corporation where, after incorporation or continuance pursuant to this Act, the corporation:

(a) carries on activities that are not primarily for the benefit of its members;

(b) solicits or has solicited donations or gifts of money or property from the public;

(c) receives or has received any grant of money or property from a government or government agency in any fiscal year of the corporation that is in excess of 10%, or any greater amount that may be prescribed, of its total income for that fiscal year.

21 Not-for-profit Corporations Act SO 2010, s 1 [Not yet in force] defines a public benefit incorporation as:

(a) a charitable corporation, or

(b) a non-charitable corporation that receives more than $10,000 in a financial year,

(i) in the form of donations or gifts from persons who are not members, directors, officers or employees of the corporation, or

(ii) in the form of grants or similar financial assistance from the federal government or a provincial or municipal government or an agency of any such government.

Q3 Do you agree that there should only be one statute for the incorporation of not-for-profits in New Zealand? If not, why not?

Q4 Do you think that for some purposes it might be advisable to divide societies between members' benefit and public benefit societies? If so, in what circumstances?

Q5 Should Agricultural and Pastoral Societies be incorporated under the new statute?

Q6 Can Industrial and Provident Societies that are conducted for business purposes be incorporated under the new statute?

WHAT ABOUT UNINCORPORATED ASSOCIATIONS?

1.36 The law that governs unincorporated associations is uncertain and unclear. A number of inventive legal theories have been developed by both academics and the courts to explain how an unincorporated association might have a personality distinct from its members, and might be able to own property, and to contract in its own right. None of these theories has ever been entirely convincing. For some purposes, however, the law will sometimes recognise an unincorporated society as a legal person.[22]

1.37 Unincorporated associations are incapable of holding property in their own right, or of concluding contracts. The members of unincorporated associations are liable for debts or other obligations.[23] Many of the same governance concerns that are dealt with in this paper apply to unincorporated associations.

1.38 The Scottish Law Commission has recently recommended that general legal personality be given to unincorporated societies that satisfy very basic requirements: two members, a constitutive document that specifies certain minimum provisions (provisions relatively similar to those currently expected by the 1908 New Zealand Act, including a clause as to what would happened to assets in the event of dissolution) and an objective that does not include making a profit for its members.[24] The Scottish Law Commission rejected imposing other minimum requirements on unincorporated societies.

1.39 However, care needs to be taken with effectively creating a lesser statutory regime for organisations that are not incorporated, either deliberately, or because of inadvertence. The 1908 Act's regime has relatively low entry costs. In contrast,

22 Interpretation Act 1999, s 29: "Person includes a corporation sole, a body corporate, and an unincorporated body".

23 See the analysis, for instance, in Scottish Law Commission *Report on Unincorporated Associations* (Scot Law Com R217, 2009) at [2.1–2.23].

24 Ibid at [3.9].

the Scottish Law Commission made its proposal in an environment where the only alternative for non-charities seeking legal personality was registration as a company.[25]

1.40 The New Zealand community has given incorporated societies the benefit of legal personality. In return it should be able to expect minimum standards, and for members of those associations to enjoy minimum legal protections of their status within the societies. One advantage of promoting a model code of rules for incorporated societies might be to convince unincorporated societies to effectively adopt those rules voluntarily.

1.41 We do not propose any further review of the law relating to unincorporated associations.

25 Charities could wait for possible incorporation as a Scottish Charitable Incorporated Organisations under ch 7 of the Charities and Trustee Investment (Scotland) Act 2005, which is yet to come into force.

Chapter 2

The constitution of societies

SUMMARY

The rules of a society tell members how it is to be run. This chapter proposes that the rules should be called a "constitution". It considers what should be in the rules, and suggests that there would be benefit in statutory model rules.

2.1 As we said in chapter 1, members of non-profit societies should be able to decide how they are to govern themselves. At the moment the Incorporated Societies Act 1908 enables societies to choose essentially all the rules by which they are governed. We believe that the new statute should have two roles. First, all societies should, as a condition of incorporation, be subject to certain minimum governance rules (we deal with these in the following chapter) that cannot be varied by the incorporation. Second, not all incorporated societies have the necessary skills or resources to create constitutions that will serve them well, and there may be benefit in a statutory model, that societies would be deemed to have adopted unless they have chosen other rules that cover the same ground.

WHAT MUST BE IN THE CONSTITUTION?

2.2 The 1908 Act requires that societies have a set of rules as a precondition of registration. Those rules govern certain very basic organisational matters:[26]

- the name of the society, with the addition of the word "Incorporated" as the last word in that name;
- the objects for which the society is established;
- the modes in which persons become members of the society;
- the modes in which persons cease to be members of the society;
- the mode in which the rules of the society may be altered, added to, or rescinded;
- the mode of summoning and holding general meetings of the society, and of voting at the meetings;
- the appointment of officers of the society;
- the control and use of the common seal of the society;

26 Incorporated Societies Act 1908, s 6. The age of the provision is perhaps indicated by the requirement that the rules be "printed or typewritten".

- the control and investment of the funds of the society;
- the powers (if any) of the society to borrow money;
- the disposition of the property of the society in the event of the society being put into liquidation.

2.3 The 1908 Act's mandatory rules provide all incorporated societies with a governance skeleton, but do very little to require those organisations to fill out that skeleton. Importantly, there is no requirement to consider dispute resolution mechanisms, or the devices that might be employed if, for whatever reason, the governance of the society is deadlocked. Nor is there a requirement that the society have rules about conflicts of interest.

2.4 This list can be contrasted with the more specific requirements that must be covered by the constitution of an incorporated association under the 2009 New South Wales Act:[27]

(1) **Membership qualifications**

The qualifications (if any) for membership of the association.

(2) **Register of members**

The register of the association's members.

(3) **Fees, subscriptions etc**

The entrance fees, subscriptions and other amounts (if any) to be paid by the association's members.

(4) **Members' liabilities**

The liability (if any) of the association's members to contribute towards the payment of the debts and liabilities of the association or the costs, charges and expenses of the winding up of the association.

(5) **Disciplining of members**

The procedure (if any) for the disciplining of the association's members and the mechanism (if any) for appeals by members in respect of disciplinary action taken against them.

(6) **Internal disputes**

The mechanism for the resolution of disputes between members (in their capacity as members) and between members and the association.

(7) **Committee**

The constitution and functions of the committee, including:

(a) the election or appointment of the committee members, and

(b) the terms of office of the committee members, and

(c) the grounds on which, or reasons for which, the office of a committee member is to become vacant, and

(d) the filling of casual vacancies occurring on the committee, and

(e) the quorum and procedure at meetings of the committee.

(8) **Calling of general meetings**

The intervals between general meetings of the association's members and the manner of calling general meetings.

27 Associations Incorporations Act 2009 (NSW), sch 1.

(9) **Notice of general meetings**

The time within which, and the manner in which, notices of general meetings and notices of motion are to be given, published or circulated.

(10) **Procedure at general meetings**

The quorum and procedure at general meetings of the association's members, and whether members are entitled to vote by proxy at general meetings.

(11) **Postal ballots**

The kinds of resolution that may be voted on by means of a postal ballot.

(12) **Sources of funds**

The sources from which the funds of the association are to be or may be derived.

(13) **Management of funds**

The manner in which the funds of the association are to be managed and, in particular, the mode of drawing and signing cheques on behalf of the association.

(14) **Custody of books etc**

The custody of books, documents and securities of the association.

(15) **Inspection of books etc**

The inspection by the association's members of books and documents of the association.

(16) **Financial year**

The association's financial year.

2.5 There is a question as to what additional rules the New Zealand Act ought to require. It seems to us that New South Wales' list is a good starting point. Suggestions are sought whether other rules might usefully be required, or at least considered by societies as they apply for registration.

> Q7 Do the New South Wales' requirements for matters that must be dealt with by a constitution offer a good starting point for New Zealand legislation? Have you any other suggestions about other types of rules that might be required?

2.6 It would be advisable to ensure that the requirements set in statute are able to accommodate possible future changes in technology. Provisions relating to voting by mail ought to be more widely phrased to include other forms of distance participation; likewise the keeping of "books" and "record" should explicitly contemplate keeping them electronically.[28]

PROVIDING FOR MODEL CONSTITUTIONS FOR SOCIETIES

2.7 Telling societies that they must have particular rules in their constitutions does not assist smaller or less well-resourced societies in the actual drafting of those rules. Some societies have adopted appropriately drafted rules which are likely to serve in all eventualities, while other societies may have only included registration requirements. In reality, societies need rules, particularly when matters become contentious.

28 Which may be the case in any event for certain requirements: see the Electronic Transactions Act 2002, s 21.

2.8 Apart from the statutory mimima, there is no requirement that rules be in any particular form, or cover any particular eventualities. The Registrar of Incorporated Societies has wisely suggested on the Registrar's website that those seeking to incorporate search the rules of relevant or similar societies to find a template for their own society's rules. The Registrar also provides a set of sample rules.[29] The Charities Commission includes examples of common clauses on its website.[30]

2.9 This contrasts with the position in Australian jurisdictions such as Victoria, Queensland and New South Wales, which provide for model rules that an incorporated association is deemed to have accepted unless it expressly decides to derogate from those rules by providing its own version of the particular rule.[31] This is the model adopted by the Companies Act 1993, which does not require companies to have a constitution, but deems provisions of the Act to bind the company unless the company derogates from them in its own constitution.[32]

2.10 Model codes overseas set out rules in quite some detail. The 2010 New South Wales model constitution, for instance, sets out express provisions relating to dispute resolution, as well as quite specific rules about the conduct of elections, the running of committees and general meetings.

2.11 In our view, New Zealand should have a generic code of rules that could act as a default mechanism for those organisations that choose not to have their own specific rules. These model rules could be reviewed periodically and new model rules could be issued. There is a concern that, given the sheer variety of societies in New Zealand, it would be difficult to draft a constitution that would suit all those societies. However, the aim would be to provide a basic code of rules that would operate only if the society did not adopt its own variants. It is possible that those differences might be dealt with by providing different codes depending on the type of organisation.

Q8 Australian jurisdictions provide for model rules that an incorporated association is deemed to have accepted unless it expressly decides to derogate from a rule by providing its own version. Do you agree that New Zealand should adopt this approach?

29 Ministry of Economic Development "Societies and Trusts Online" http://www.societies.govt.nz/cms/incorporated-societies/rules-of-incorporated-societies (last accessed 23 May 2011).

30 Charities Commission http://www.charities.govt.nz/Strengtheningyourcharity/GovernanceandPolicies/CharityRules/Clauses/tabid/174/Default.aspx (last accessed 23 May 2011).

31 See, for instance , Associations Incorporations Act 2009 (NSW), s 25:

Provisions of model constitution to apply if appropriate provision not otherwise made

(1) If an association's constitution fails to address a matter referred to in Schedule 1, the provisions of the model constitution with respect to the matter are taken to form part of the association's constitution.

(2) For avoidance of doubt, an association's constitution may address a matter referred to in Schedule 1:

(a) by adopting the provisions of the model constitution with respect to the matter, or

(b) by adopting a modified version of the provisions of the model constitution with respect to the matter.

(3) Subsection (2) does not limit the way in which an association's constitution may otherwise address a matter referred to in Schedule 1.

(4) A provision of an association's constitution is of no effect to the extent to which it is contrary to this or any other Act or law.

32 See Companies Act , ss 26–27, 30.

Q9 If there is to be a division between members' benefit and public benefit societies, should there be different generic codes of rules?

2.12 In Australia there has been some concern that, while the relevant statutes deem incorporated associations to have accepted the model rules that were in existence at the time of incorporation, there is no provision to automatically update societies' rules as new model rules are issued. There may be practical difficulties in actually ascertaining what might have been a model rule at the time of incorporation, and if a rule has been superseded by a new rule generally, it would be preferable for the society to be deemed to be governed by the new rule as opposed to the old one.[33] Such a proposal would allow an opt-out provision to all such updates, or deny such updates on a case-by-case basis.

Q10 If model rules are implemented, when a rule has been superseded by a new rule, should the society to be deemed to be governed by the new rule as opposed to the old one?

RULES FOR DISCIPLINING MEMBERS

2.13 By far the best way of avoiding disputes around disciplining members is to have clear rules that reflect basic notions of natural justice to guide the administration of disciplinary processes. The Victorian and New South Wales statutes present two different methods of doing this. As amended in 2010, the Victorian Act expressly provides the following:[34]

> **14AB Disciplinary action**
>
> …
>
> (1) In applying the disciplinary procedure, the incorporated association must ensure that—
>
> (a) the member who is the subject of the disciplinary procedure—
>
> (i) is informed of the grounds upon which the disciplinary action against the member is proposed to be taken; and
>
> (ii) has been given an opportunity to be heard in relation to the matter; and
>
> (b) the outcome of the disciplinary procedure is determined by an unbiased decision-maker; and
>
> (c) to the extent that doing so is compatible with paragraphs (a) and (b), the disciplinary procedure is completed as soon as is reasonably practicable.

2.14 In contrast, the New South Wales Act merely requires rules in a constitution that govern discipline, including the possibility of appeals. The model constitution in the 2010 regulations,[35] which would operate by default, provides such a structure but is perhaps curiously silent as to need for natural justice that might avoid court disputes.

33 See Myles McGregor-Lowndes "Reforming Queensland's Incorporated Associations" (2001) 22 QL 913–14.

34 Associations Incorporation Act 1981, s 14AB (Vic).

35 Associations Incorporation Regulation 2010 (NSW).

2.15 The new Victorian statute sets out basic standards of natural justice, which may be helpful. It seems undesirable to be too prescriptive as to how societies should fulfil natural justice norms, as different procedures would be appropriate for different kinds of societies. There may be some concerns from smaller societies that it would be difficult for them to deal with the problem of potential bias, because of their size. Such societies should be encouraged to consider how that problem might be dealt with before disputes arise. But similarly it does not seem to us sensible to simply require societies to "observe natural justice". In our view, the new statute should follow the Legislative Advisory Committee's guidelines, by setting out what minimum procedures are to be adopted rather than just stating that natural justice should be observed.[36]

2.16 Our preliminary suggestion is that New Zealand adopt the mandatory natural justice requirements of the Victorian statute. Societies should be able to set their own procedures to fulfil those obligations, but if they fail to prescribe appropriate rules, they should be deemed to have accepted the model rules. Suggestions are sought as to how to set out these standards.

Q11 Whereas, in New South Wales, rules are merely required that govern discipline, the Victorian legislation explicitly sets out certain natural justice aspects (for example, the disciplinary procedure is handled by an unbiased decision maker). Do you agree that the Victorian approach is the preferable one for New Zealand? If not, why not?

Q12 How should the requirement be phrased?

NUMBER OF MEMBERS NEEDED TO INCORPORATE A SOCIETY

2.17 In order to be registered, and to remain registered under the Incorporated Societies Act, a society must have 15 members. The origins of this number are not clear, although as Douglas White has pointed out, there may be a connection with the number required for a rugby team.[37] Australasian statutes tend to require fewer members. Victoria and New South Wales, for instance, allowed the incorporation of associations of only five members.

2.18 It may be that ongoing number of members is less important for some non-profit organisations that their capacity to continue to continue to function for the purpose for which they were established, and this may especially be so for public benefit or charitable organisations.

Q13 Should a society require a minimum number of members, to be incorporated? If yes, what minimum number of members do you consider would be appropriate? The current number is 15. Australian statutes require five.

36 Legislative Advisory Committee *Guidelines on Process and Content of Legislation* at ch 13.

37 Douglas White "The Law Relating to Associations Registered under the Incorporated Societies Act" (LLM Thesis, Victoria University of Wellington, 1972) at [2.10].

REQUIREMENT FOR COMMITTEE, AND PARTICULAR OFFICERS

2.19 The 1908 Act differs from its Australian counterparts in not requiring that there be a committee that runs the society or that there be particular members. It is difficult to be prescriptive about how societies ought to govern themselves, but submissions are sought on whether it might be advantageous to require societies to form governance committees, and to at very least to have a particular officer, perhaps a secretary, to perform the requisite statutory functions.

Q14 Do you have views on whether it might be advantageous to require societies to form governance committees, or appoint any particular type of officer?

NAMES OF SOCIETIES

2.20 Currently, the Act provides that names cannot be identical to that of another society or "which so nearly resembles that name as to be calculated to deceive, except with the consent of the other society".

2.21 The Companies Act has a streamlined process that enables reservation of names, but only prevents the registration of names that are identical to those of names that are already reserved. By and large it leaves disputes between companies as to the use of those names to the intellectual property laws, and in particular the Fair Trading Act. There would be advantages to societies in changing the regime in the incorporated societies' statute to something that more resembled the Companies Act regime. It would give certainty to societies and avoid confusion as the level of protection given to approved names.

Q15 Is it appropriate to move towards a name regime similar to that in the Companies Act?

A NON-PROFIT ENFORCEMENT AGENCY OR REGULATOR

2.22 The current statute and much of this report assumes that it is the members of incorporated societies who are best placed to enforce the provision of a society's constitution and the duties placed by the Act upon committee members. In the current Act the Registrar has powers of inspection under section 34A, and the ability to apply to have a liquidator appointed under section 26. Incorporated societies that are also registered charities under the Charities Act fall under the jurisdiction of the Charities Commission.

2.23 The creation of a general non-profit regulator is one of the options currently being considered by an Australian review.[38] There is a legitimate question as to whether greater oversight of incorporated societies that are not registered charities is needed. Any proposal to increase either enforcement or regulation roles would involve consideration of funding. There could be some kind of additional levies on incorporated societies to fund such a role.

38 *Australian Treasury "Consultation Paper – Scoping Study for a National Not-For-Profit Regulator"* http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1934 (last accessed 23 May 2011). Funding has been provided in the most recent Australian Federal Budget to create a national charities and non-profit regulator, see Hon Bill Shorten MP, Assistant Treasurer "Making It Easier for Charities to Help Those Who Need It" http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/077.htm&pageID=003&min=brs&Year=&DocType=0 (last accessed 23 May 2011).

Q16 Does your experience suggest that there is a greater role for a regulator of this sector, beyond the role currently played by the Charities Commission, or the Registrar of Incorporated Societies? If so, what should that role be?

A GENERAL POWER TO FIX THE RULES?

2.24 Some societies may find themselves bound by rules that are inappropriate but which cannot, because of other rules, be easily changed. It may, therefore, be worth exploring whether there ought be the ability in certain circumstances to apply to court or to an official like the Registrar to change the rules, to allow the society to move forward. There are obviously difficulties with allowing such a power, including the grounds on which such an application can be made, and what safeguards ought to surround such a process, given that the change is otherwise contrary to the established rules of the society.

Q17 Is a general variation power justified? Who would appropriately exercise it and what safeguards ought to exist to prevent its misuse?

Chapter 3

Good governance

SUMMARY

The chapter discusses good governance, and how to achieve it – for example, rules to avoid or manage conflicts of interest, and enforcement tools to respond to breaches (such as providing for derivative actions by members, and criminal offences). Standards for financial reporting are also considered.

INTRODUCTION

3.1 Perhaps the most glaring omission in the 1908 Act is the lack of basic governance rules. There are no provisions in the statute about conflict of interest, obligations to act in the interests of the society, or prohibitions on using a committee position for personal advantage. Recent reforms in Australia have placed significant emphasis on setting out basic governance rules.

3.2 Failure to disclose a conflict of interest may amount to breach of fiduciary duty. In the leading case of *Kuys*,[39] the Privy Council agreed that, as a matter of principle, a committee member could not take advantage of business opportunities that arose from his involvement with a society without first disclosing what he was doing.

3.3 The trouble with relying on such court-generated rules is they are not clear from looking at the statute; nor is it necessarily clear from the case law how those obligations are to be discharged. Moreover they can, in some cases, be too strict. Equity, for instance, took the view that a company could avoid contracts on the basis of a conflict of interest, regardless of any disclosure that might have been made.[40]

3.4 A code should set out the obligations of committee members, and other decision makers, when they are involved in decisions in which they might have an interest, and the effect of following through on those obligations.

39 *New Zealand Netherlands Society "Oranje" Inc v Kuys and The Windmill Post Ltd* [1973] 2 NZLR 163 (PC), agreeing generally that the strict self-dealing duties might apply to dealings with incorporated societies.

40 Peter Watts *Directors' Powers and Duties* (LexisNexis, Wellington 2009) at [8.1–8.2].

A CODE OF COMMITTEE MEMBERS' DUTIES

3.5 The 1908 Act does not contain a general code of how Committee members ought to act. In contrast, sections 131 to 137 of the Companies Act set out a code of director's obligations. Directors:

- must act in good faith and in the best interests of the company use powers for a proper purpose (section 131);
- must not act, or agree to act, in contravention of the Companies Act or the company's constitution (section 134);
- must not agree to the business of the company being run recklessly or to create a substantial risk to creditors (section 135);
- must not agree to the company incurring obligations that the director does not reasonably believe will be fulfilled (section 136);
- must exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances, taking into account (without limitation) the nature of the company, the nature of the decision, and the position of the director and the nature of the responsibilities undertaken by him or her (section 137).

3.6 Providing a similar code of duties, in the new Act, would perform the useful function of telling committee members what was expected of them in relation to their official duties.

Q18 Do you agree that the new Act should provide a 'code' of duties that committee members must observe in their decisions?

Q19 If so, what duties ought to be included in the code?

Q20 In what respects might the Companies Act obligations need to be altered if included in a new Incorporated Societies Act?

CONFLICT OF INTEREST RULES

3.7 The Companies Act 1993 sets out rather complex provisions relating to the disclosure of conflict of interest in transactions. There are a number of other statutes that expressly require disclosure of conflicts of interest.[41] The Law Commission also emphasised the need to provide for conflict of interest rules in its *Waka Umanga* report, recommending a new corporate structure for Māori entities.[42] Importantly, the Companies Act and corporations statutes overseas have varied judge-made prohibitions that left such contracts voidable.[43]

3.8 One option is to have an express conflict of interest provision that would be contained directly in the statute, as the Companies Act 1993 and most comparable jurisdictions have done. Rules regulating conflict of interest are commonplace in corporations' statutes generally and in non-profit corporation law in both

41 See, for instance, Local Authority (Members Interests) Act 1968, ss 6, 7.

42 New Zealand Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, 2006) at 176–186.

43 *Aberdeen Railway Co v Blaikie* (1854) 1 Macq 461, see John Farrar *Corporate Governance: Theories, Principles and Practice* (3rd ed, OUP, Melbourne, 2008) at 118.

Australia and Canada. New South Wales, which previously did not have conflict of interest provisions, has recently enacted them, and Victoria, which previously had such protections, has recently extended them to non-financial interests. Under the New Zealand Companies Act, self-interested transactions can be avoided within three months of the shareholders being notified of them.[44] The other option is to require incorporated societies to provide for rules relating to conflict of interest and to expressly consider what will be tolerable for that particular incorporated society.

3.9 Our preliminary view is that some minimum standards of conflict of interest rules ought to be part of the new statutory regime, as they are in the Companies Act. The prohibition against acting in one's own interest without disclosure is fundamental. It ought to be included in the statute. Moreover, having mandatory provisions in the statute might hopefully prove educative.

Q21 Our preliminary view is that some minimum standards of conflict of interest rules ought to be part of the new statutory regime, as they are in the Companies Act. Do you agree?

The definition of interest

3.10 Traditionally concern about conflicts of interest has focused on financial conflicts. The Companies Act, for instance, sets out a rather complex definition of "interested". The focus is on monetary interests of either the director or a close relative.[45]

3.11 Arguably this restriction to "financial" interests is too narrow in community organisations where committee members' decision may have an effect on members beyond financial advantage. In *Waka Umanga*, we argued that non-financial interests of representatives involved with the governance of the *Waka Umanga* "may create as great a potential for conflict of interest as financial interest".[46] It seems to us that there should be a requirement either in the statute or in the rules of associations for disclosure of such interests, to avoid the need to resort to such doctrines or to courts to resolve perceived unfairness in decision-making.

3.12 Until 2009, Australian associations' incorporation statutes limited the disclosure of interest to financial interests. New South Wales' Act does not limit the term to "financial" interest, and apparently includes non-financial interest.[47] Similarly the Victorian Act, which regulated only financial interests, has been amended to require the disclosure of a "material personal interest".[48] In *Waka Umanga*, we recommended that representatives who were conflicted by material financial interest should neither vote nor participate in the decision.[49]

44 Companies Act 1993, s 139.

45 Companies Act 1993, s 139.

46 Above n 42 at [15.42].

47 See Associations Incorporation Act 2009 (NSW), s 31.

48 Associations Incorporation Act 1981 (Vic), s 29C(2).

49 Above n 42 at [15.11].

Q22 Do you agree that there should be a requirement for the disclosure of financial interests? Do you agree there should be a further requirement to disclose other material personal interest?

3.13 Even if non-financial interests were to be disclosed, different rules might apply after disclosure, or there might be different consequences for failing to disclose. In *Waka Umanga* we concluded that, while there ought to be default provisions setting out a procedure to deal with the disclosure of non-financial interests, it might still be possible to allow the representative to continue to contribute to the decision-making process.[50]

3.14 Non-financial interests are generally not seen as such a threat to integrity as financial interests. For this reason, and because these interests potentially arise in a very wide range of situations, we recommend that there be a provision for the representative to act despite the interest, so long as the runanganui passes a resolution to that effect.

Resolving conflict of interests — disclosure or recusal?

3.15 There are perhaps three ways in which conflict of interest issues can be dealt with.

Disclosure

3.16 The Companies Act only requires disclosure of interests. Once the interest is disclosed, the Companies Act 1993 allows interested directors to contribute to the meeting discussing the transaction and to vote. The Companies Act does allow the company to avoid the transaction within three months of it being reported to shareholders, provided it can be established that the transaction was not for "fair value". Professor Farrar, in his leading textbook on corporate governance, comments that as a result, New Zealand company law is "relatively lax on self-interested transaction".[51]

Disclosure and recusal from voting

3.17 Another option is to allow a committee member, once he or she has disclosed the interest, to participate in the meeting that considers the transaction, but not to be part of the actual decision, and not to vote. This is the regime that operates in Western Australia,[52] and South Australia.[53] The concern with this option is that the presence of the conflicted committee member may well influence the decisions taken by the non-conflicted members.

50 Above n 42 at [15.46].

51 John Farrar *Corporate Governance: Theories , Principles and Practice* (3rd ed, Oxford University Press, Melbourne, 2008) at 123.

52 Associations Incorporations Act 1987 (WA), s 22.

53 Associations Incorporations Act 1985 (SA), s 32.

Disclosure and recusal from meeting

3.18 The New South Wales Act,[54] and the Victorian Act, as amended in 2010,[55] have created an even stricter regime which requires conflicted members to be absent during consideration of the relevant contract. The Victorian Act acknowledges the difficulty that such a recusal might mean for the quorum of the committee, by enabling the committee to call a general meeting to vote on the contract.

> Q23 What should be the consequences of a disclosure of either financial or other material personal interest? The Companies Act requires disclosure only, but there are other options: recusal from voting, or recusal from the meeting. Which do you consider appropriate, and why? Should there be different types of consequences, depending on whether the matter disclosed is financial, or other material personal interest?

Mechanism for enforcement

Criminal sanctions?

3.19 The Companies Act 1993 and the 2009 New South Wales Act make the failure to declare a conflict of interest an offence punishable by a fine.

3.20 In contrast, in *Waka Umanga* we recommended that a failure to disclose should be a ground for removal from a governing body, rather than being an offence. The Commission also cited concern over the ineffectiveness of the criminal penalties in Auditor-General's Report into the Local Authorities (Members' Interests) Act 1968.[56]

3.21 There is a question whether the failure to disclose a conflict of interest ought to be a criminal offence punishable by a fine in the new Act. The Legislative Advisory Committee lists a number of questions to be considered before the creation of a criminal offence, including:[57]

- Will the conduct in question, if permitted or allowed to continue unchecked, cause substantial harm to individual or public interests?
- Would public opinion support the use of the criminal law, or is the conduct in question likely to be regarded as trivial by the general public?
- Is the conduct in question best regulated by the civil law because the appropriate remedies are those characteristic of the civil law (eg, compensation, restitution)?
- Is the use of the criminal law being considered solely or primarily for reasons of convenience rather than as a consequence of a decision that the conduct itself warrants criminal sanctions?
- If the conduct in question is made a criminal offence, how will enforcement be undertaken, who will be responsible for the investigation and prosecution of the offence, and what powers will be required for enforcement to be undertaken?

54 Associations Incorporation Act 2009 (NSW), s 31(5).

55 Associations Incorporation Act 1981 (Vic), s 29C(1).

56 Controller and Auditor-General *The Local Authorities (Members' Interests) Act 1968: Issues and Options for Reform* (Wellington, 2005) at 11.

57 Legislative Advisory Committee *Guidelines on Process and Content of Legislation* at [12.1.3].

- If the new offences in question are unlikely to be enforced, or enforced only rarely, the question of whether a criminal sanction is warranted should be examined carefully, because creating offences that are not going to be enforced brings the law into disrepute. If enforcement of the law is going to be left to the Police as part of their general duty to enforce the law, it may be useful to make prior enquiries of the Police as to the likely priority to be given to the new offence or offences being created.
- Would it be more economic or practicable to regulate the conduct in question through the use of existing or new civil law remedies?

3.22 Breaches could subject committee members only to possible civil suits. The difficulty with such an approach would be that, in the case of many societies, the value that might be recovered in a civil suit might be significantly below the cost of bringing the suit. Moreover, those who know and are concerned about a breach of the obligation may simply not be able to afford to enforce it.

3.23 The possibility of criminal prosecution might be off-putting to potential committee members who may be inhibited by unfounded fears of prosecution even though they might behave honestly.

3.24 While New South Wales simply provides for criminal sanctions, the Victorian statute imports the civil penalties provisions of the corporations statute to cover offences that fall short of dishonesty.[58] Civil penalties do not carry with them the stigma of criminal conviction. However, there is legitimate concern that such civil penalties expose people to what are effectively criminal punishments without the benefit of criminal procedural protections and that proof is on the civil standard rather than the criminal standard of "beyond reasonable doubt". Such provisions should be carefully drawn. Submissions are sought as to whether civil penalties are preferable for failures under the Act that do not amount to deliberate dishonesty.

Q24 What are your views on the criminalisation of failure to disclose a conflict of interest? Might civil penalties be preferable, for failures under the Act that do not amount to deliberate dishonesty?

A GENERAL OFFENCE FOR THE DISHONEST USE OF POSITION?

3.25 In addition to the particular offences, both New South Wales and Victoria prohibit the "dishonest use of position", which would include using a committee position to improperly gain an advantage for the committee member or another. Both Acts provide for a higher penalty than that for failing to disclose a conflict of interest.[59] Section 33 of the New South Wales Act, for instance, provides:

> A committee member of an association who uses his or her position as a committee member dishonestly with the intention of directly or indirectly:
>
> (a) gaining an advantage for himself or herself or for any other person, or
>
> (b) causing detriment to the association, is guilty of an offence.

58 Association Incorporation Act 1981 (Vic), s 37AB.

59 Association Incorporations Act 2009 (NSW); Association Incorporation Act 1981 (Vic).

3.26 There is no equivalent in the Companies Act. Views are sought as to the advisability of such a provision, either in addition to particularised offences or perhaps in substitution to particular offences of breach of conflict of interest provisions.

Q25 Does there need to be a general prohibition on the "dishonest use of position"?

BANNING ORDERS FOR PERSISTENT INFRINGEMENT

3.27 The Securities Act 1978 provides a mechanism whereby a court can disqualify someone from being a director. Another potential enforcement mechanism would be to allow members, the Registrar and others to apply to have someone who has persistently breached the director's obligation under the Securities Act 1978, Companies Act 1993, the Securities Markets Act 1988 and the Takeovers Act 1993. Banning orders might well be an appropriate remedy for persistent breaches of the governance standards of the new Act. This could be done either by including such a power within the new statute or expanding the banning power within the Securities Act. Another possibility is the warning notice process that is provided for under the Charities Act.[60]

Q26 Would it be useful to allow courts to consider banning individuals from being committee members of incorporated societies in the same way as individuals can be barred from being directors?

A ROLE FOR THE REGISTRAR IN SEEKING COMPENSATION AND OTHER SANCTIONS

3.28 An additional (or alternative) way of dealing with enforcement might be to allow the Registrar to take civil action on behalf of the society, to recover compensation or to seek an account of profits on behalf of the society.

Q27 Would enabling the Registrar to take actions on behalf of the society to recover compensation or seek an account of profits be appropriate?

FINANCIAL REPORTING

3.29 Under the Charities Act, incorporated societies and charitable trusts that are also registered charities must provide summary information in a prescribed form and file financial statements with the Charities Commission. However, there are no standards to govern recognition, measurement and disclosure, and no prescribed form in which the financial statements must be presented.

3.30 Under the Incorporated Societies Act, incorporated societies that are not registered charities must file annual financial statements with the Registrar, to maintain their registration. The Act contemplates a 10 cent fine for each officer per day,[61] and more importantly can lead to the dissolution of the society if the Registrar considers that the failure is evidence of the society having ceased to operate. As is the case with incorporated societies that are registered charities, the statements do not have to be audited and there are no standards to govern recognition, measurement and disclosure. In addition, there is no prescribed form in which the financial statements must be presented, other than a requirement to contain:

60 Charities Act 2005, ss 54, 55.

61 Incorporated Societies Act 1908, s 23.

- the income and expenditure of the society during the society's last financial year;
- the assets and liabilities of the society at the close of the said year;
- all mortgages, charges, and securities of any description affecting any of the property of the society at the close of the said year.

3.31 Incorporated charitable trusts that are not registered charities do not have any financial reporting requirements. Both incorporated societies and charitable trusts that are registered under the Charities Act must provide accounts to the Charities Commission, and the former are explicitly exempted from filing requirements under the Incorporated Societies Act.[62]

3.32 There is a strong argument that the preparation of financial statements should be subject to greater control, audit and application of appropriate accounting standards. The difficulty is that what might be appropriate for a large incorporated society is not necessarily appropriate for the very small. Moreover accounting standards developed for "for-profit" organisations are not necessarily appropriate for the non-profit sector. At present, accounting and auditing standards setting responsibilities are split between the New Zealand Institute of Chartered Accountants and the Accounting Standards Review Board, which is an independent Crown entity. All of those functions will be consolidated within the External Reporting Board, which will replace the Accounting Standards Review Board from 1 July 2012. Neither Board has the power to make standards for private not-for-profit entities at present. We understand that this issue will be considered by the government later this year.[63]

3.33 The Victorian and New South Wales statutes deal with this by differentiating between associations according to income, and imposing different audit requirements.

Q28 Does there need to be greater rigour than currently, around requirements for auditing and appropriate accounting standards? If not, why not? Do you agree that the new Act should provide for the imposition of audit and accounting standards by regulation that might be varied in accordance with the size on the society, and how ought that size be judged?

62 Incorporated Societies Act 1908, s 23(4).

63 See further the Financial Reporting Amendment Act 2011, establishing the External Reporting Board as a continuation of the Accounting Standards Review Board from 1 July 2011.

Chapter 4

The legal dealings of an incorporated society

SUMMARY

The Incorporated Societies Act 1908 differs from the Companies Act: it does not grant the incorporated society the powers of a natural person. This may create problems for persons dealing with the society, who may not be aware of restrictions on what it may do. Legal capacity of a natural person is recommended for incorporated societies. Limits on the ultra vires doctrine, to protect good faith dealers are also discussed.

CLARIFYING LEGAL PERSONALITY

4.1 The 1908 Act stops short of creating a body corporate with the powers of an ordinary person. This can be contrasted with the Companies Act 1993, which provides in section 16:

> (1) Subject to this Act, any other enactment, and the general law, a company has, both within and outside New Zealand,—
>
> (a) Full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction; and
>
> (b) For the purposes of paragraph (a) of this subsection, full rights, powers, and privileges.
>
> (2) The constitution of a company may contain a provision relating to the capacity, rights, powers, or privileges of the company only if the provision restricts the capacity of the company or those rights, powers, and privileges.

4.2 Other jurisdictions clearly grant the equivalent bodies the powers and privileges of a natural person. For example, the New South Wales Associations Incorporation Act 2009, modelled on the Australian Corporations Act, provides:

> **19 Legal capacity and powers**
>
> (1) An association has the legal capacity and powers of an individual both in and outside New South Wales.

(2) An association's legal capacity to do something is not affected by the fact that the association's interests are not, or would not be, served by doing it.

4.3 It is suggested that the new statute confer personality on incorporated societies in same way as is done in the Companies Act.

Q29 Should the new Act grant incorporated societies the powers and privileges of a natural person, in the same way as is done in the Companies Act?

LIMITING THE APPLICATION OF THE ULTRA VIRES DOCTRINE

4.4 The effect of not having the same provisions as the Companies Act is that it leaves those who deal with societies, as well as the societies themselves, with difficulties created by the ultra vires ("excess of powers") doctrine. This doctrine is a consequence of an older view of bodies corporate: that they could only enter into legal arrangements that were for the purpose of incorporation, or which were permitted by the rules of incorporation. At the root of the doctrine was the simple logic that if a body was incorporated for a particular purpose, it could not do something else, and it certainly could not do anything in breach of the rules that constituted it. This simple logic runs against the now-conventional wisdom that the ultra vires doctrine could result in injustice to those who had honestly dealt with a corporation, while being unaware of the restrictions imposed upon the corporation by either its purpose or its rules. It was also possible for those who dealt with the corporation to use the doctrine against the corporation itself. This could occur by refusing to comply with what would otherwise have been a contractual obligation owed to the corporation but which it turns out the corporation could not itself have entered into in terms of its rules.

4.5 To some degree, incorporated societies can limit the possible application of the doctrine by drafting rules and purposes broadly, just as companies used to do. Nevertheless, the difficulty that the ultra vires doctrine can create for incorporated societies is illustrated by the New Zealand Court of Appeal case *Cabaret Holdings Ltd v Meeanee Sports and Rodeo Club Inc*.[64] In that case the incorporated society was unable to recover the expenses that it had incurred under a contract with Cabaret Holdings, as the rodeo that had been the subject of that contract had taken place outside the Club's normal region, hence the contract was outside its objects. The Court of Appeal accepted that the ultra vires doctrine applied to incorporated societies in the same way that it did then to companies. The Court rejected the contention that the doctrine could not apply in circumstances where the incorporated society had fulfilled the obligations that it had incurred under the contract.

4.6 The Companies Act 1993 has essentially removed the effect that the ultra vires doctrine might have on company transactions. Section 17(1) provides:

> No act of a company and no transfer of property to or by a company is invalid merely because the company did not have the capacity, the right, or the power to do the act or to transfer or take a transfer of the property.

4.7 Fletcher, in his book *The Law Relating to Non-Profit Associations in Australia and New Zealand*, argues that the entire point of the Incorporated Societies Act, or its Australian equivalents, is not to create a person with full legal capacity,

64 *Cabaret Holdings Ltd v Meeanee Sports and Rodeo Club Inc* [1982] 1 NZLR 673 (CA).

but rather one with legal capacity to be exercised for a non-profit purpose. Moreover, the ultra vires doctrine gives members of societies the ability to question transactions that they themselves may have thought were not in pursuance of the objects of the societies, or not in their interests.[65]

4.8 Some of these arguments might seem logically compelling. However, overseas reviews of equivalents of the Incorporated Societies Act have modified the ultra vires rule. They have either abolished it or limited its application in cases where the third party was ignorant of the restriction created by either the Association's purpose or rules.[66] The better focus is to enhance the ability of members to prevent unauthorised transactions from being consummated in the first place, and to allow remedies against those who might have authorised transactions outside the purposes or the rules of the society.

4.9 We recommend that the new statute adopt provisions, similar to those in the Companies Act, that prevent the operation of the doctrine except insofar as allowing members to restrain the actions of the society before contracts are entered into. An alternative option is to adopt the New South Wales provision that allows third parties to assume that the association's constitution permits the transaction, unless the third party knows otherwise.

Q30 Do you agree that the new statute should limit the ultra vires doctrine, and if so, how? Which model is preferred, the Companies Act one, or the New South Wales' one?

65 Keith Fletcher *The Law Relating to Non-profit Associations in Australia and New Zealand* (Law Book Company, North Ryde (NSW) at 275–280.

66 Associations Incorporation Act 1985 (SA), s 27; Associations Incorporations Act 2009 (NSW), s 24.

Chapter 5

Resolving disputes between members and their societies

SUMMARY

This chapter reviews how disputes are currently governed, and overseas models for resolving member grievances.

INTRODUCTION

5.1 As noted in our terms of reference for this project, disputes inevitably arise between members of incorporated societies. There can be disputes over disciplinary processes, the use of the society's resources, differences about the objects of the society, and more serious disputes over the conduct of the society. The guiding principle of current New Zealand case law is that incorporated societies should, by and large, govern their own affairs, and that judicial interference should be an exception. Reference is often made (albeit rather imprecisely) to the company law case of *Foss v Harbottle*, which leaves the internal management of the company to the company.[67] It is only when there is a significant problem in terms of procedure that courts have tended to intervene.

5.2 As we previously discussed in *Waka Umanga*, our report relating to the governance of Māori entities, it is far better for all societies to be able to resolve disputes without having to invoke the courts.[68] The statute and/or model constitution should have clear standards as to what procedures are to be followed in disciplinary decision-making. Also important is the requirement that societies have some kind of dispute resolution mechanism. It is important that any new statutory regime either helps societies to better resolve those disputes, or preferably prevents them in the first place.

67 *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189.

68 New Zealand Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, 2006) at 176–186.

CURRENT MECHANISMS FOR DEALING WITH COMPLAINTS AND DISPUTES

5.3 New Zealand has at least three different routes by which disaffected members, or former members, can seek to resolve what they see as their differences with an incorporated society. Disaffected members may seek judicial review of an incorporated society under the Judicature Amendment Act 1972, seek to enforce the rules of a society as if they were a contract between members of the society, or seek a declaratory judgment under the Declaratory Judgments Act 1908.

5.4 None of these three routes is satisfactory, either conceptually or practically. It is suggested that, rather than relying on these legal avenues, a new statute should set out expressly the way in which members can seek to enforce the rules of a society, and their right to be treated fairly under those rules. By contrast, the Companies Act 1993 explicitly gives courts the power to make orders restraining a company from acting in a way that would contravene the constitution.[69] Consideration should also be given to a general oppression remedy, where the rules have been used in an unfair way.

5.5 Perhaps the most famous example of the New Zealand courts accepting jurisdiction to allow the review of the decision of an incorporated society is the 1984 decision in *Finnigan v New Zealand Rugby Football Union*.[70] In that case, the Court of Appeal accepted that the case could be brought to consider whether the decision to tour South Africa was for the best interests of rugby in New Zealand, as the rules of the NZRFU provided that the Union's actions ought to be. That decision was further complicated by the structure of the NZRFU, which had as its members not only individuals, but also its affiliated unions. Nevertheless, the Court of Appeal accepted that members of a club which was affiliated to the Auckland Rugby Union, which in turn was affiliated to the NZRFU, had sufficient standing to launch a claim based on contract. *Finnigan* was brought as a contractual challenge. The commentary on that case illustrates, however, that there may be procedural or tactical advantages in seeking one form of review over another.

5.6 It is suggested that silence about dispute resolution mechanisms is not desirable. Incorporated societies, in setting their rules, ought to be required to consider what first-instance dispute resolution mechanism will be appropriate when disputes arise between members and the society. It is further suggested that if model codes of rules are to be promulgated, those model rules contain an elementary dispute resolution mechanism. It is unlikely that such a dispute resolution mechanism could, or should, completely remove the prospect of remedy in more formal legal fora. Rather, it is hoped that it might prevent some of the more minor disputes that have reached the superior courts, and indeed the law reports.

69 Companies Act 1993, s 164.

70 *Finnigan v New Zealand Rugby Football Union (No 3)* [1985] 2 NZLR 181 (HC and CA), discussed at length in Michael Taggart "Rugby, the Anti-apartheid Movement, and Administrative Law" in Rick Bigwood *Public Interest Litigation* (LexisNexis NZ, Wellington 2006) at 69–100.

The contract theory

5.7 Since the leading 1924 decision of Salmond J in *Henderson v Kane and the Pioneer Club*,[71] it has been accepted that the rules of an incorporated society can be enforced as a contract between the members of the society. A decision to wrongfully exclude a club member from the club's facilities was a breach of contract between the club and the member who could claim damages against the club. The claim could not be enforced against the members that had taken the actual decision, as that would violate the association's separate legal personality.

5.8 The contract theory has the attraction of being a private law solution in a private law situation. But it seems to us a fiction, and it has never been clear whether much is meant by the fiction other than rules are enforceable by the members themselves. It seems better to simply say in the new statute, that members can enforce the rules of the society.

5.9 In the absence of rules that expressly set up what the procedures of clubs are and how they might be breached, the theory invites parties to ask judges to recognise obligations that resemble those of natural justice that are drawn from other areas. The better course would be to encourage clubs, through model rules, to have appropriate procedures in place and expressly enable, through statute, the enforcement of those proceedings.

Judicial review

5.10 New Zealand courts have accepted that the Judicature Amendment Act 1972 allows incorporated societies and their decisions to be judicially reviewed, on the basis that such decisions are made under a statutory power.[72]

5.11 There have been persistent arguments that this statute, although intended to be purely procedural, enables more extensive judicial review of incorporated societies than would be possible in either Australia or in the United Kingdom in relation to similar bodies.[73] But the broad jurisdiction that has arguably been given by the Judicature Amendment Act often confronts a deep judicial reluctance to become involved in the internal management of a society. Some academic commentators have suggested that the courts may have taken an overly broad approach to the applicability of judicial review under this section. On this view, internal management decisions are essentially private matters between private parties, which would normally not be considered through the public law

71 *Henderson v Kane and the Pioneer Club* [1924] NZLR 1073 (SC).

72 Judicature Amendment Act 1972, s 3 defines a statutory power of decision in the following terms:

Statutory power of decision means a power or right conferred by or under any Act, or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate, to make a decision deciding or prescribing or affecting—

(a) The rights, powers, privileges, immunities, duties, or liabilities of any person; or

(b) The eligibility of any person to receive, or to continue to receive, a benefit or licence, whether he is legally entitled to it or not.

73 See for instance Rowan Armstrong "The Whistle has blown…game over…or is it really? Challenging the decisions of Sports Governing Bodies in New Zealand" (2008) 14 Canta LR 65.

rubric of judicial review.[74] Further, it is not clear that the full range of judicial review procedures intended for the control of the exercise of public power is appropriate for the resolution of what are essentially private disputes. On the other hand, there is an acceptance that some disputes, most notably those involving membership and discipline, ought to be resolved in accordance with natural justice concerns, akin to those developed in the public context, and in the way that employment disputes must be.

5.12 An example of judicial reluctance is in *Hopper v North Shore Aero Club Inc*.[75] There, the Court of Appeal dismissed an attempt to judicially review an aero club's decision not to allow an experimental aircraft, owned by one of its members, to land. In *Hopper* the Court of Appeal emphasised the preference of the courts to leave such decisions to the society rather than to impose a judicial decision:[76]

> Mr Hopper's claim was essentially that the committee's decision in his case was not in accordance with the Club's rules. Whether that qualifies it for review under the Act is, in our view, doubtful…This Court has indicated that a power of a private entity will not normally be amenable to judicial review under the 1972 Act unless it has a "public" aspect: *College of Surgeons v Phipp* [1999] 3 NZLR 1 at 11–12 (CA). … Where the activities of a private entity are private in nature, the Courts have demonstrated a reticence to interfere with matters of internal management or regulation (see the rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189, and see also *Porima v Te Kauhanganhui o Waikato Inc* [2001] 1 NZLR 472 at [82] (HC)). Two cases are illustrative. In *Chrippes v Society for the Prevention of Cruelty to Animals* (1983) 4 NZAR 202 (HC) Hillyer J declined to review the respondent society's process for electing a new vice-president at its annual general meeting. And in *M v Board of Trustees of Palmerston North Boys' High School* [1997] 2 NZLR 60 (HC) Goddard J thought the decision of a board of trustees to expel a schoolboy from a boarding house was not a "statutory power of decision", even though the board was constituted under the Education Act 1989. The Judge characterised the board's relationship with the boy's parents as being a "purely private contractual arrangement".

5.13 While expressing a preference for the contractual or private law route to resolve members' disputes with societies, there may be occasions on which courts are still prepared to exercise judicial review. Williams J, for instance, wrote in the High Court in the *Hopper* case:[77]

> Beyond ensuring compliance with the rules and requiring society and committee decisions to be arrived at honestly and bona fide in accordance with the rules, the courts have interfered in the running of incorporated societies only in a relatively restricted variety of cases. Membership issues have attracted the court's intervention. Disciplinary proceedings or the like in a society's constitution have attracted the court's intervention. So, too, the courts have been prepared to involve themselves where what is in issue is a licence or a right to make a livelihood with or in association with an incorporated society.

74 Dean Knight and Jenny Cassie "The Scope of Judicial Review: Who and What May be Reviewed" in Administrative Law Intensive (NZLS, Wellington, 2008) 63–96 adopting Taggart's procedural as opposed to substantive interpretation; see further Michael Taggart "State-Owned Enterprises and Social Responsibility: A Contradiction in Terms?" [1993] NZ Recent Law Review 356.

75 *Hopper v North Shore Aero Club* [2007] NZAR 354 (CA).

76 *Hopper v North Shore Aero Club* [2007] NZAR 354 (CA) at [9–10].

77 *Hopper v North Shore Aero Club* HC Auckland CIV 2005 404–2817, 6 December 2006 at [31].

5.14 Indeed, the High Court has recently exercised jurisdiction to protect what it has seen as natural justice violations in the operations of incorporated societies.[78] Perhaps more remarkably, the Court of Appeal has accepted, in the subsequent case of *Adlam*,[79] that while the normal preference is for members to seek action under a contract, judicial review can be sought by those who might be excluded from the society. The Court of Appeal accepted that it had jurisdiction as a matter of contract law.

5.15 Where the dispute concerns the failure to allow someone to become a member, there cannot be a contract claim. Chambers J wrote of the distinction between *Hopper*, where the contractual route was available, and *Adlam*, where it was not available for those refused membership:[80]

> Part of the reason for the courts' traditional reluctance to intervene in the running of clubs by way of judicial review is that members who consider their club or society is breaching the rules have a remedy under the law of contract: *Hopper* at [11], citing *Peters v Collinge* [1993] 2 NZLR 554 at 566. We agree that the contract route is probably preferable, where available, although the outcomes (in contract and judicial review proceedings) are usually likely to be the same. Disappointed applicants, however, are not able to bring a claim in contract, because the club has refused to make a contract of membership with them. Their only recourse is judicial review. It is arguable perhaps that Mr Adlam could have brought this claim in contract, relying presumably on implied terms as to how the power under r 7 should be exercised. But he was not bound to follow that route. And his essential complaint against the committee, namely that they were acting unfairly and for an improper purpose, is quintessentially the stuff of judicial review.

5.16 That decision has been trenchantly critiqued by Professor Watts, who has argued that there should be no general jurisdiction to compel private associations to do business with outsiders. Professor Watts would have preferred that the *Adlam* case be dealt with as a contract case. He discussed an earlier Court of Appeal case, *Stininato*,[81] in which the Boxing Association had been held to violate the plaintiff's rights in failing to grant a boxing licence to compete in New Zealand. He considered that the case could be better understood not as a private association restricting its membership, but as a body exercising a statutory authority, as the Boxing Association had at that time.[82]

5.17 On the whole private parties should be allowed to decide with whom they wish to associate, subject, of course, to Human Rights Act concerns (and even then the Human Rights Act provides an exception for private clubs in section 44). However, it may be that access to a particular association is necessary to be able to conduct business, as in *Stininato*, it being necessary to be a member to be able to box. In such cases there might be merit in enabling non-members to ask that the membership procedures be enforced, as opposed to asking a court to require that

78 See Knight and Cassie, above n 74, namely *Surfing Taranaki Inc v Surfing New Zealand Inc* (27 May 2008) HC Dunedin, CIV-2007-412-1063), *Phillips v Wairarapa Kennel Association Inc* [2005] NZAR 460 and *Church v Commerce Club* [2006] NZAR 494.

79 *Stratford Racing Club Inc v Adlam* [2008] NZCA 92, [2008] NZAR 329.

80 *Stratford Racing Club Inc v Adlam* [2008] NZCA 92, [2008] NZAR 329 (CA) at [55].

81 *Stininato v Auckland Boxing Association (Inc)* [1978] 1 NZLR 1 (CA).

82 Peter Watts "The Tort of Refusing to Contract" (2008) 14 NZBLQ 69.

membership be given to those who have been excluded. On the other hand, the ability to exclude in such circumstances might be more properly regulated by the Commerce Act, which contains a general prohibition against the misuse of "substantial market power".

Declaratory Judgments Act

5.18 The Declaratory Judgments Act 1908 enables the High Court to give declarations even though there has been no pecuniary or other relief. Section 3 provides:

> No action or proceeding in the [High Court] shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the said Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.

5.19 A declaration is expressly a discretionary remedy, and can be a useful weapon to get the High Court to review the actions of societies against their stated objects.

5.20 The Act has been used in a number of contexts during disputes involving incorporated societies. In *Adlam* the Court of Appeal was prepared to allow a declaration that the transfer of society property had been in breach of the society's objects, even though the transfer, itself, had been completed and could not be undone by the courts:[83]

> We do not accept that submission. The declaration fulfils a real purpose. It tells the club's committee and members that the act of transferring the race-course to the trust was unlawful, being outside the objects of the club. We can understand why the club's committee has taken no steps to rectify the situation following Miller J's judgment; after all, they disagree with it and have exercised their right to appeal. But once the courts have finally spoken (whether that be this court or the Supreme Court on appeal from us), we would expect the club and the trust, which both remain under the control of the Blue faction, to do everything necessary to remedy the unlawfulness. There should be no need for Mr Adlam or his group to bring any further proceedings. There will be no difficulty from the Attorney-General once he is made aware of the fact that the land should never have been transferred to the trust.

5.21 Even given the essential flexibility of the Declaratory Judgments Act, there is merit in a specific enforcement provision in a new statute, to make it clear that members can seek remedies, rather than merely a statement that things have gone wrong. Moreover, declaratory judgments can only be sought in the High Court.

PROVIDING A WAY FOR MEMBERS TO RESOLVE DISPUTES WITH SOCIETIES

5.22 The lack of a remedies mechanism in the 1908 Act contrasts with the Companies Act, which contains a code of remedies for disaffected shareholders, often giving courts considerable flexibility. For example, section 174 of the Companies Act gives shareholders the ability to seek a remedy for conduct that is "oppressive, unfairly discriminatory or unfairly prejudicial".

5.23 The new statute should make the mechanism for enforcing a society's rules explicit. Such a provision would reinforce the necessity of following the rules.

83 *Stratford Racing Club Inc v Adlam* [2008] NZCA 92, [2008] NZAR 329 (CA) at [22].

Overseas models for resolving member grievances

5.24 In New South Wales, the Act does not have an enforcement clause as such, but merely recognizes that an incorporated association's constitution binds the association and its members to the same extent as if it were a contract between them under which they each agree to observe its provisions.[84] This is an improvement on the 1908 New Zealand Act, which is silent on this matter, leaving it to judicial interpretation. It seems preferable to us to make the enforcement regime explicit in the statute.

5.25 That is what the Victorian Act does in section 14A, which gives wide powers to the Magistrates' Court to make appropriate orders.[85] There is a similar provision in the 2010 Ontario Act.[86] The Victorian section gives the Magistrates' Court the ability to decline to make an order on the grounds that the application was trivial, or the matter could have been more reasonably resolved in other ways.[87]

5.26 The South Australian Act 1985 contains a provision that enables members or former members to seek remedies against "oppressive or unreasonable conduct".[88] The Victorian statute was amended in 2009 to include a remedy for oppressive conduct defined in the following way in section 14C:

> (a) oppressive conduct, in relation to an incorporated association, includes conduct that is—

84 Incorporated Societies Act 1908, s 26.

85 Associations Incorporations Act 1981 (Vic), s 14A:

> (2) The Magistrates' Court may, on the application of an incorporated association, a member of anincorporated association or the Registrar, make an order—
>
> (a) giving directions for the performance and observance of the rules of the incorporated association by any person who is under an obligation to perform or observe those rules; or (ab) restraining an incorporated association from doing an act that is outside the scope of its statement of purposes; or
>
> (b) declaring and enforcing the rights or obligations of members of the incorporated association between themselves or the rights or obligations of the incorporated association and any member between themselves.
>
> (3) An order may be made under this section whether or not a right of a proprietary nature is involved and whether or not the applicant has an interest in the property of the incorporated association.

86 Not-for-Profit Corporations Act 2010 (Ont):

> 191. On the application of a complainant or a creditor of a corporation, the court may make an order directing the corporation or any director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of the corporation to comply with this Act, the regulations or the articles or by-laws of the corporation or restraining any such person from acting in breach of them and may make any further order that it thinks fit.

87 Associations Incorporations Act 1981 (Vic), s 14A:

> (4) The Magistrates' Court may refuse to make an order on the application or may make an order for costs against a party, whether successful or not, if it is of opinion that—
>
> (a) the issue raised in the application is trivial;
>
> (b) having regard to the importance of the issue, the nature of the incorporated association, any other available method of resolving the issue, the costs involved, lapse of time, acquiescence or any other relevant circumstance, it was unreasonable to make the application; or
>
> (c) the unreasonable or improper conduct of a party has been responsible for the making of the application, or has added to the cost of the proceedings.
>
> (5) The Registrar may make an application to the Magistrates' Court under subsection (2) only if the Registrar is satisfied that it is in the public interest to do so.

88 Associations Incorporation Act 1985 (SA), s 61.

(i) unfairly prejudicial to, or unfairly discriminatory against, a member of the incorporated association (including in the member's capacity as a member of the committee); or

(ii) contrary to the interests of the members of the incorporated association as a whole; and

(b) a reference to engaging in conduct includes a reference to refusing or failing to take action.

5.27 Section 14C gives Magistrates' Courts wide remedial power, but does not give that court the power to wind up an association, leaving that to the Supreme Court, to which cases may be transferred. In contrast, the 2009 New South Wales Act does not contain an oppression provision.

5.28 In Canada, non-profit corporation statutes contain a similar oppression provision, focusing on conduct that "is oppressive or unfairly prejudicial to any member, security holder, creditor, director or officer or, where the corporation is a charitable corporation, the public generally".[89] There are a wide range of potential remedies including not only corrective orders but also the ability to amend articles or bylaws. Our preliminary suggestion is that New Zealand adopt provisions similar to those in Victoria.

Q31 Do you agree that the Victorian model should be adopted, which gives wide powers to the court to make orders, plus the ability to decline to make an order on the grounds that the application was trivial, or the matter could have been more reasonably resolved in other ways?

Relationship between grievances between members and disciplinary procedures

5.29 The Victorian Act 1981, as recently amended, draws a useful distinction between procedures that are designed to resolve disputes between members and those that are designed to deal with disciplining of members:[90]

> In practice, there has been some overlap between the two processes. For example, a member who has been disciplined by the committee but disagrees with the disciplinary decision has the right to appeal the decision under the disciplinary provisions. When the appeal fails some association members have sought to use the grievance procedure. This makes for a tortuous process. The two procedures should be kept separate.

5.30 As a result, the Victorian Act contains an express provision that gives primacy to the disciplinary procedures and prevents members from taking a grievance procedure until the disciplinary procedure has been concluded.

Q32 Do you agree that the Act should provide for disciplinary procedures to be kept separate from those designed to resolve disputes between members, with members being prevented from taking a grievance procedure until any disciplinary procedures have been concluded?

89 Non-Profit Corporations Act SS 1995 c N-4.2, s 198; The Non-Profit Corporations Act 2009 (Canada), s 253.

90 Consumer Affairs Victoria *Review of Associations Incorporations Act 1981: Interim Report* (Melbourne, 2005).

Should some decisions be outside the court's purview?

5.31 If a new statute were to expressly provide a remedy for members against decisions of societies made in contravention of their rules, there is a question whether any particular rules or decisions, or types of organisation, ought to be excluded.

5.32 In an interesting proviso, the Canadian federal statute prevents courts from interfering with decisions against a religious organisation, when a decision might have been the result of a tenet of faith held by members of religious organisations. Neither "religious organisation" or "tenet of faith" is defined, but the contrast is between decisions which clearly the Canadian legislators thought might be inappropriate for Courts to review, and commercial decisions that might be reviewed regardless of the organisation. The Ontario statute prevents derivative actions being brought in relation to religious organisations,[91] but it does not make any distinction between religious organisations and others kinds of organisations to enforce the organisation's rules.

5.33 There may well be other groups that believe particular cultural or faith questions ought to be dealt with in their own communities as opposed to a judge. In *Waka Umanga* we recommended that disputes should initially be dealt with by a robust internal dispute resolution mechanism. If they could not be resolved in that way, disputes could go by consent, in the first instance, to the Māori Land Court, essentially as a court with more experience of the Māori world.[92] It may be that some provision might be made for societies representing Māori interests to designate that they would prefer certain issues, when in dispute, to be dealt with by that court rather than the District Court.

5.34 On the other hand, it is difficult to argue with the proposition that religious organisations ought not to be subject to the constraint that they follow their own procedures. The ability to go to court to resolve a dispute ought to be seen as a last resort.

Q33 Should there be any limits on the types of cases with which a court can deal? If so, what types, and why?

DERIVATIVE ACTIONS

5.35 Section 165 of the Companies Act enables shareholders to apply to the Court to be allowed to bring a "derivative action" on behalf of the company. The section (and its overseas equivalent) is designed to circumvent common law that shareholders lacked standing to bring actions for wrongs committed against the company by directors. Since it was the company, as opposed to the individual members, that had properly suffered loss, the courts have held that the company was the proper plaintiff. However, it might be the very directors against whom misconduct is alleged who would then decide if an action might be brought against them. Derivative actions would cover allegations of directors' negligence, or breach of care. If the court allows the suits in its discretion, the costs are borne by the company rather the individual.

91 Not-for-Profit Corporations Act SO 2010, s 181(3) [Not yet in force].

92 Above n 68.

5.36 Currently there is no similar provision in the 1908 Act. It is possible, rather, for members, or the Registrar, to apply for the society to be wound up on "just and equitable" grounds if the society is being mismanaged.[93] There is a legitimate question as to the desirability of introducing the ability to commence a derivative action or whether such a provision might be viewed as an overly-complicated addition to the statutory scheme. The principal advantage would be that it would give members, and perhaps other interested parties, the ability to apply to courts to remedy what they see as misconduct, and that that action would be financed from the societies' funds as opposed to the members' own resources. Typically Australian statutes, even the recent New South Wales Act and the Victorian amendments, do not enable derivative actions, but Canadian statutes do.[94]

Q34 Should the new legislation include provision for derivative actions by society members, similar to section 165 of the Companies Act?

General judicial/administrative discretion?

5.37 A general remedial power should be given to the courts to do what is "just and equitable" on both an interim and final basis. Hammond J has held such a jurisdiction exists under section 8 of the Judicature Amendment Act, which allows preservation orders in judicial review proceedings, and also under the inherent jurisdiction given to the High Court under section 16 of the Judicature Act 1908.[95] While such a remedy would be broadly phrased, this would not be a general invitation to go to court to win a dispute that has otherwise been lost. Hammond J wrote in *Porima* of the Judicature Act 1908 jurisdiction:[96]

> There is room for argument as to the precise extent of that jurisdiction. It certainly does not mean that this Court can act in an untrammelled way. The jurisdiction must be exercised in a judicial way, and on proper juristic principles. In this case, the plaintiffs are in a trustee-like position. Certainly, they would be in a fiduciary position vis-à-vis the society. Courts of Chancery have long had the inherent power to appoint trustees in appropriate cases, and that power still exists today, quite independently of the provisions of the Trustee Act 1956. In the quaint language of a past age, "equity abhors a vacuum". Equity Courts will step in to see that paralysis has not overtaken a trusteeship, and it is but a short step from that to the case before me.

Q35 Do you agree that a general remedial power should be given to the court to do what is "just and equitable"?

BRANCH SOCIETIES

5.38 As a result of the Incorporated Societies Amendment Act 1920, branch societies can be formed by parent societies to create somewhat uneasy hybrids, which are both independent incorporations in and of their own right, but which are also

93 See for instance *Registrar of Incorporated Societies v the Hearing Association* HC Whangarei CIV 2007–488–406 at [25–26].

94 See for instance Not-for-Profit Corporations Act SO 2010, c 15 [Not yet in force], s 183.

95 *Porima v Te Kauhanganui o Waikato Inc* [2001] 1 NZLR 472 (HC).

96 *Porima*, ibid at [111–112].

linked by membership and some degree identity with the parent associations.[97] Commentators such as White and van Dadelszen have emphasised the top-down nature of the relationship, but the Court of Appeal in 2005 held that the branches were in effect independent stand-alone organisations. The bite, however, comes in sections 6 and 7 of the Amendment Act, which essentially require members of branches to continue their obligations of membership and to pay the fees for the principal association.

5.39 It is unclear what becomes of branch associations when a parent is dissolved. In his book von Dadelszen makes this point well, suggesting that other more federal structures might avoid some of the problems implicit in the current regime, which raises the question whether the branch societies regime should be continued.[98]

5.40 Submissions are sought as to whether the current provisions about branches have created problems, beyond those disputes that have been resolved in court, and how those provisions might be altered to avoid those problems.

Q36 Have the current provisions about branches created any problems, and how might the provisions be altered to avoid those problems?

Q37 Is there still a need for branch societies?

97 See the discussion in *Federated Farmers of NZE Inc v Federated Famers (Northland Province)* CA144/04, 15 June 2006.

98 Mark von Dadelszen *Law of Societies in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at [4.7.1].

Chapter 6

The liquidation and dissolution of societies

SUMMARY

It is suggested that incorporated societies should be established for either public benefit, or members benefit. This would in turn affect their ability to distribute assets on dissolution. The status of societies during dissolution is also discussed.

HOW INCORPORATED SOCIETIES ARE LIQUIDATED OR DISSOLVED

6.1 The 1908 Act provides that members in a general meeting can vote to liquidate a society, so long as that vote is confirmed by a subsequent vote at general meeting called for that particular purpose not less than 30 days later.

6.2 The 1908 Act provides that the High Court can liquidate a society if:[99]

- the society suspends its operations for the space of a year; or
- the members of the society are reduced in number to less than 15; or
- the society is unable to pay its debts; or
- the society carries on any operation whereby any member makes any pecuniary gain contrary to the provisions of this Act; or
- the High Court or a Judge thereof is of the opinion that it is just and equitable that the society should be put into liquidation.

6.3 An application for liquidation can be made by members, the Registrar, or creditors.[100] The 1908 Act deems that the liquidation provisions of the Companies Act apply to incorporated societies. However, the 2006 insolvency reforms do not apply to incorporated societies.

99 Incorporated Societies Act 1908, s 25.

100 Incorporated Societies Act 1908, s 26.

6.4 The Registrar can dissolve a society that he or she believes is no longer active, which might be evidenced by the failure to supply annual accounts.[101] The 1908 Act allows the Registrar to revoke the dissolution and to essentially restore the society to its previous existence.[102]

Q38 Have you experienced problems with the liquidation or dissolution provisions?

Q39 In what ways can the procedure for liquidation and dissolution be improved?

Q40 In particular, should the double meeting requirement for members' liquidation be altered?

THE DISTRIBUTION OF ASSETS TO MEMBERS ON LIQUIDATION

6.5 No incorporated society can be run for pecuniary gain. This does not prevent societies raising money to support their activities, but they cannot raise money for the benefit of their members. But if an incorporated society is liquidated, its assets are distributed according to its rules, which can include distribution of assets of existing members. There is a tension between allowing such a distribution and the non-profit nature of the society. This flexibility on liquidation is shared with the legislation in many Australian states, but New South Wales prevents distribution on dissolution.[103] The New South Wales Law Commission wrote of the need for such a prohibition, when it recommended the adoption of the predecessor to the 2009 Act:[104]

> Even in the case of an association established for the enjoyment and recreation of its members it is our view that members should not be allowed, without restraint, to treat the surplus assets of the association as their own. Those who form, say, golf or recreational clubs, do not ordinarily do so on joint stock basis. They may take debentures, but they do not ordinarily contemplate having a proprietary interest in the club's assets that is saleable when they resign. New members may pay a joining fee, but they do not purchase any share in club assets. Members, even foundation ones, or new ones, would probably be surprised to learn that if their golf course or clubhouse were compulsorily acquired in the next generation and the club dissolved, those who then happened to be members would be entitled to divide up the proceeds. It would be more reasonable to expect that the proceeds would be applied to the good of the game or to some other non-profit purpose.

6.6 Incorporated societies that wish to be charities under the Charities Act must include a rule that assets will be distributed on dissolution to another charitable purpose,[105] but there is no provision that prevents such a society from choosing

101 Incorporated Societies Act 1908, s 28.

102 Incorporated Societies Act 1908, s 28(6).

103 Associations Incorporation Act 2009 (NSW), s 65.

104 New South Wales Law Reform Commission Report on Incorporation of Associations (LRC 30, 1982) at [4.9].

105 Charities Commission http://www.charities.govt.nz/Settingupacharity/Charitablepurpose/tabid/158/Default.aspx (last accessed 23 May 2010).

to leave the Charities Act regime and changing its rules to allow distribution to members. This is problematic as assets accumulated as a charity, through for example the tax benefits, should not be liable to such distribution.

6.7 It is perhaps too radical a change to suggest that all incorporated societies be prevented from distributing assets on dissolution. Existing incorporated societies have been conducted on assumption that such distribution will occur on dissolution. Despite the firm views of the New South Wales Law Reform Commission, it is, in fact, not clear that those who form a ski club, for instance, and contribute to enable it to purchase a lodge, would not expect to get their contribution back if their ski club was liquidated for whatever reason. Rather it might be better to provide that incorporated societies could be registered as either "members' benefit" societies, where rules permitting distribution back to members are allowed, or alternatively, "public benefit" ones. Members' benefit societies should be able to convert to public benefit status, if they, for instance, wish to convert to a charity; but transfers back to being a members' benefit society should only be allowed with the permission of the Registrar, who ought to be satisfied that money received for public benefit has been appropriately applied in the public benefit.

Q41 What are your views on the division of incorporated societies into two types, requiring them to register for either members' benefit or public benefit? If this is not supported, how should the distribution of assets on dissolution be dealt with? Should it never be permitted?

STATUS OF SOCIETIES DURING DISSOLUTION BY REGISTRAR

6.8 Mark von Dadelszen has pointed out that the assets of a dissolved society must be dealt with in accordance with the society's rules, rather than being at the disposal of the unincorporated society that might survive the ending of its incorporation.[106] Moreover, while another provision restores the society to its status from the time of the revocation, it is silent as to what might happen to any obligations incurred in the time between the dissolution and its revocation. The first problem can be partially solved by a model rule as to what would happen on the registrar's dissolution. The second issue is harder, and perhaps might be solved by the addition of a provision allowing the society to adopt decisions and obligations made during the dissolution period.

DISTRIBUTION OF UNCLAIMED ASSETS

6.9 The Registrar currently determines what might happen to assets which cannot be distributed according to the rule of a dissolved society. The Registrar has advised that this power is used around three to five times a year, and an attempt is made to give the assets to a similar organisation. In contrast the Companies Act provides that undistributed property vests in the Crown with the removal of the company from the register.[107]

MERGER OF SOCIETIES

6.10 The 1908 Act lacks a provision to enable the merger of societies. Submissions are sought as to whether such a provision is desirable and what form it ought to take.

Q42 Should there be a provision for mergers of societies?

106 Mark von Dadelszen *Law of Societies in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at [12.2.4].

107 Companies Act 1993, s 324(1).

Chapter 7
Transitional issues

SUMMARY

This chapter deals with transitional arrangements from the current statute to the new one that we are proposing.

7.1 Any statutory reform will have to consider how the statute will apply to societies that already exist. It is suggested that some reforms, such as those relating to corporate governance, ought to apply to all societies from commencement, having given societies sufficient time to educate themselves. However, the legal personality changes and new requirements about rules, if introduced, might require some different commencement provisions. The Companies Act enabled re-registration of existing companies; and provided that those did not register would be deemed to have done so. If the new Act does not have a similar provision, the risk is that those societies who do not register would not get the benefit of the reform. If the number and type of mandatory rules are to be changed, consideration ought to be given to have a phase-in period, during which all societies can either choose to adopt new rules of their own, or be deemed to have adopted the new model rules. The requirement for rules on dispute resolution is an important part of the review. It would be inappropriate for societies to continue indefinitely to lack rules that cover the natural justice issues that we consider should be addressed.

Q43 What are your views on workable transitional arrangements? Do you support the Companies Act approach, which enabled re-registration of existing companies, and provided that those that did not would be deemed to have done so? Should there be a longer transitional period relation to the adoption of model rules?

Q44 How can we minimise the costs for societies in the transitional period?

Appendix

Appendix

Questions

CHAPTER 1 — INTRODUCTION

Q1 Do you agree that a review of the legal structure for incorporation of non-profits, and the requirements on those running such societies, would be a useful step in strengthening the non-profit sector?

Q2 Is the current limitation of liability sufficient?

Q3 Do you agree that there should only be one statute for the incorporation of not-for-profits in New Zealand? If not, why not?

Q4 Do you think that for some purposes it might be advisable to divide societies between members' benefit and public benefit societies? If so, in what circumstances?

Q5 Should Agricultural and Pastoral Societies be incorporated under the new statute?

Q6 Can Industrial and Provident Societies that are conducted for business purposes be incorporated under the new statute?

CHAPTER 2 — THE CONSTITUTION OF SOCIETIES

Q7 Do the New South Wales' requirements for matters that must be dealt with by a constitution offer a good starting point for New Zealand legislation? Have you any other suggestions about other types of rules that might be required?

Q8 Australian jurisdictions provide for model rules that an incorporated association is deemed to have accepted unless it expressly decides to derogate from a rule by providing its own version. Do you agree that New Zealand should adopt this approach?

Q9 If there is to be a division between members' benefit and public benefit societies, should there be different generic codes of rules?

Q10 If model rules are implemented, when a rule has been superseded by a new rule, should the society to be deemed to be governed by the new rule as opposed to the old one?

Q11 Whereas, in New South Wales, rules are merely required that govern discipline, the Victorian legislation explicitly sets out certain natural justice aspects (for example, the disciplinary procedure is handled by an unbiased decision maker). Do you agree that the Victorian approach is the preferable one for New Zealand? If not, why not?

Q12 How should the requirement be phrased?

Q13 Should a society require a minimum number of members, to be incorporated? If yes, what minimum number of members do you consider would be appropriate? The current number is 15. Australian statutes require five.

Q14 Do you have views on whether it might be advantageous to require societies to form governance committees, or appoint any particular type of officer?

Q15 Is it appropriate to move towards a name regime similar to that in the Companies Act?

Q16 Does your experience suggest that there is a greater role for a regulator of this sector, beyond the role currently played by the Charities Commission, or the Registrar of Incorporated Societies? If so, what should that role be?

Q17 Is a general variation power justified? Who would appropriately exercise it and what safeguards ought to exist to prevent its misuse?

CHAPTER 3 — GOOD GOVERNANCE

Q18 Do you agree that the new Act should provide a 'code' of duties that committee members must observe in their decisions?

Q19 If so, what duties ought to be included in the code?

Q20 In what respects might the Companies Act obligations need to be altered if included in a new Incorporated Societies Act?

Q21 Our preliminary view is that some minimum standards of conflict of interest rules ought to be part of the new statutory regime, as they are in the Companies Act. Do you agree?

Q22 Do you agree that there should be a requirement for the disclosure of financial interests? Do you agree there should be a further requirement to disclose other material personal interest?

Q23 What should be the consequences of a disclosure of either financial or other material personal interest? The Companies Act requires disclosure only, but there are other options: recusal from voting, or recusal from the meeting. Which do you consider appropriate, and why? Should there be different types of consequences, depending on whether the matter disclosed is financial, or other material personal interest?

Q24 What are your views on the criminalisation of failure to disclose a conflict of interest? Might civil penalties be preferable, for failures under the Act that do not amount to deliberate dishonesty?

Q25 Does there need to be a general prohibition on the "dishonest use of position"?

Q26 Would it be useful to allow courts to consider banning individuals from being committee members of incorporated societies in the same way as individuals can be barred from being directors?

Q27 Would enabling the Registrar to take actions on behalf of the society to recover compensation or seek an account of profits be appropriate?

Q28 Does there need to be greater rigour than currently, around requirements for auditing and appropriate accounting standards? If not, why not? Do you agree that the new Act should provide for the imposition of audit and accounting standards by regulation that might be varied in accordance with the size on the society, and how ought that size be judged?

CHAPTER 4 — THE LEGAL DEALINGS OF AN INCORPORATED SOCIETY

Q29 Should the new Act grant incorporated societies the powers and privileges of a natural person, in the same way as is done in the Companies Act?

Q30 Do you agree that the new statute should limit the ultra vires doctrine, and if so, how? Which model is preferred, the Companies Act one, or the New South Wales' one?

CHAPTER 5 — RESOLVING DISPUTES BETWEEN MEMBERS AND THEIR SOCIETIES

Q31 Do you agree that the Victorian model should be adopted, which gives wide powers to the court to make orders, plus the ability to decline to make an order on the grounds that the application was trivial, or the matter could have been more reasonably resolved in other ways?

Q32 Do you agree that the Act should provide for disciplinary procedures to be kept separate from those designed to resolve disputes between members, with members being prevented from taking a grievance procedure until any disciplinary procedures have been concluded?

Q33 Should there be any limits on the types of cases with which a court can deal? If so, what types, and why?

Q34 Should the new legislation include provision for derivative actions by society members, similar to section 165 of the Companies Act?

Q35 Do you agree that a general remedial power should be given to the court to do what is "just and equitable"?

Q36 Have the current provisions about branches created any problems, and how might the provisions be altered to avoid those problems?

Q37 Is there still a need for branch societies?

CHAPTER 6 — THE LIQUIDATION AND DISSOLUTION OF SOCIETIES

Q38 Have you experienced problems with the liquidation or dissolution provisions?

Q39 In what ways can the procedure for liquidation and dissolution be improved?

Q40 In particular, should the double meeting requirement for members' liquidation be altered?

Q41 What are your views on the division of incorporated societies into two types, requiring them to register for either members' benefit or public benefit? If this is not supported, how should the distribution of assets on dissolution be dealt with? Should it never be permitted?

Q42 Should there be a provision for mergers of societies?

CHAPTER 7 — TRANSITIONAL ISSUES

Q43 What are your views on workable transitional arrangements? Do you support the Companies Act approach, which enabled re-registration of existing companies, and provided that those that did not would be deemed to have done so? Should there be a longer transitional period relation to the adoption of model rules?

Q44 How can we minimise the costs for societies in the transitional period?