

# Supplementary Submission to Economic Development, Science and Innovation Committee

Incorporated Societies Bill

## About Chapman Tripp

- 1 Chapman Tripp is a leading law firm with offices in Christchurch, Wellington and Auckland. We act for incorporated societies on all aspects of their operation and activities, including registration, governing documents, regulation and compliance, asset and merger transactions, and financial reporting.
- 2 We have a broad understanding of the spectrum of options available. We have submitted on the limited partnership framework and the Trusts Act, and we advise regularly on the laws governing companies, charitable trusts and registered charities.
- 3 The matters covered by the Incorporated Societies Bill (*the Bill*) are of direct interest to us as legal practitioners and to our clients. We welcome the opportunity to comment on the Bill.
- 4 We have no objection to our submission being published on the New Zealand Parliament website.
- 5 We would be happy to discuss any of our comments with the Ministry, in particular our view that the purposes of the society have elevated importance in the legislation and form a clear part of the interpretation of officers' fiduciary duties (see discussion on clause 49).
- 6 Our key contacts on this Supplementary Submission are:

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## Supplementary submission on the Incorporated Societies Bill

- 1 This submission supplements Chapman Tripp's earlier submission on the [Incorporated Societies Bill](#) (*Bill*) dated 28 May 2021.

### **Officer's Duties: clauses 53 - 54**

- 2 We submit that the Bill's one-size-fits-all approach, in particular the inclusion of clauses 53 and 54, is inappropriate and should not be included in the new Incorporated Societies Act at this time.
- 3 Clauses 53 and 54 are close equivalents of sections 135 and 136 of the Companies Act 1993 (*Act*) which, in summary, require directors not to trade in a manner likely to create a substantial risk of serious loss to creditors and not to agree to incur obligations if they do not have reasonable grounds to believe that the company will be able to perform such obligations when required to do so.
- 4 We consider the current formulation of sections 135 and 136 of the Act are inherently flawed. The sections have attracted strident criticism from academia and the Courts. For example, in *Yan v Mainzeal Property and Construction Limited (in Liquidation)* [2021] NZCA 99, Goddard J was blunt in saying that sections 135 and 136 of the Act are not fit for purpose:

“[12] The legislation governing insolvent trading in New Zealand is unsatisfactory in a number of respects. The Act should be reviewed to ensure that it provides a coherent and practically workable regime for the protection of creditors where directors decide to keep trading in circumstances where a company is insolvent or near-insolvent.”

- 5 The duties under sections 135 and 136 of the Act place a substantial burden on directors with serious, and in some cases ruinous, consequences for breach following recent decisions in the Supreme Court (*Debut Homes Ltd (in liquidation) v Cooper* [2020] NZSC 100) and Court of Appeal in (*Mainzeal*, above) that directors can be liable for **all** debts incurred by the company in trading after a specific point.
- 6 These duties under sections 135 and 136 are devised for the context that companies are usually for-profit corporate structures, attracting limited liability status, and thus requiring the protection of customers and shareholders.
- 7 Incorporated Societies, by contrast, are usually not-for-profit, are akin to charities, and ought not to attract an overly onerous standard of duties. Their officers should be governed according to the society's constitution, which will inevitably refer to the need for officers to act in good faith in all of their dealings. This position better reflects the common law.
- 8 We consider adopting clauses 53 and 54 would have a disproportionately burdensome effect and may deter future officers from undertaking managerial or administrative functions in incorporated societies. We consider this is particularly important, given the Registrar's proposed power of striking societies off the register if officers materially fail to comply with their duties.

- 9 In our experience, incorporated societies are not overflowing with legal and commercial experts and are often scant in resources and skills. Therefore, to place such onerous duties on ordinary members of the public, with potentially ruinous consequences to follow, can be perceived as egregious and unreasonable.

### **Conclusion**

- 10 Clauses 53 and 54 should be omitted from the Bill.



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