
22 November 2022

CONSULTATION ON REGULATIONS for the INCORPORATED SOCIETIES ACT 2022

This submission is from the New Zealand Amateur Sport Association Inc., (2669211), (NZBN: 9429046103086), (the Association). It is approved by the Association's Board and has been reviewed by Succeed Legal Limited.

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1.0 Overview

- 1.1 The Association can understand a reasonable assumption by Officials and Government that currently incorporated community sport organisations (or “ICSOs”) are fully cognisant of (and compliant with) their obligations under the 1908 Act, as a foundational stepping-stone toward an ICSO’s understanding of its requirements under the 2022 Act, and in respect of the proposed regulations.
- 1.2 However, the Association suggests (based on its interaction with ICSOs nationally) that the gap between ICSOs’ actual and assumed understanding and compliance, is much wider than what has been assumed. The associated risk is that for many ICSOs, the gap between the 1908 Act and the 2022 Act becomes too daunting to bridge, with voluntary (or involuntary) dissolution a possible outcome, with the risk of “an extinction-event” for ICSOs unwilling (or unable) to comply.
- 1.3 The Association also notes that while the 2022 Act (and the proposed regulations) are based on rubrics contained in the Companies Act 1993, ICSOs (which are largely operated by volunteers on a not-for-profit basis for community benefit) do not operate like companies, with those responsible for their operations often lacking the requisite knowledge, competence, time and skill to fulfil the legislative obligations which would otherwise be required in a regulated corporate environment for good governance.
- 1.4 The Association would also like to highlight that (in considering the draft regulations), whereas remediation of involuntary ICSO non-compliance was simpler to resolve in respect of the 1908 Act, it is now more complex with adverse financial and social consequences. Officials should give careful consideration to the consequential risks associated with ICSOs that involuntarily do not re-register and continue to operate irrespective of the new legislation in an unincorporated manner.

2.0 Proposed Carve-Out Of Certain “Qualifying ICSOs” From Regulations

- 2.1 To ameliorate some of the more challenging legislative requirements of the 2022 Act, as discussed in our recent meeting with the responsible Minister, the Association suggests that the definition of “small society” in the 2022 Act is extended, so that if a “small society” is also an “amateur sport promoter” (as defined in CW46 of the Income Tax Act 2007), then certain provisions of the 2022 Act not apply (or specific regulations apply). Incorporated entities meeting these two criteria are referred to as a “qualifying ICSOs” in this submission.
- 2.2 In particular, the Association proposes that:
 - a. dispute-resolution management¹ and conflict-of-interest disclosure can be delegated/referred to a centralised service/resource provided by a national sport organisation (“NSO”), or if an ICSO is not affiliated to an NSO, then through a regional sport trust (“RST”) with which the ICSO is registered; and
 - b. that any incidences of non-compliance with the 2022 Act (if identified by the Registrar) are notified to an ICSO’s NSO, (or if the ICSO is not affiliated to an NSO, then through the RST in the ICSO’s region with which the ICSO is registered), to minimise the risk of infringement notices, fines, and possible dissolution; and
 - c. that ICSOs are not subject to s 47 (2) (b) and s 47 (3) of the 2022 Act, if they are “qualifying ICSO” and are affiliated to an NSO, (hereafter referred to as “qualifying, affiliated ICSOs”); and that in such instances, actions of committee members are not personally subject to liability clauses if the NSO also provides “combined association liability insurance” cover for the ICSO.

3.0 2022 National Sport Club Survey – Verbatim Comments

- 3.1 Included in this submission (where relevant), we have included verbatim comments from the 2022 National Sport Club Survey² (NSCS) which asked respondents for feedback in respect of the 2022 Act.

¹ We suggest that the Registrar may deal with this matter via s 254 (1) (c) of the 2022 Act

² Please contact the Association directly for more information concerning the National Sport Club Survey

A. Part 2 Of The Discussion Document: Section 254

1 Matter

- Prescribing information that must be included or provided

Question

- Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(a)?

- it is proposed that under s 9 (a), an applicant will need to "certify" a number of matters, for the satisfaction of the Registrar; what form will this certification be required to take to meet Companies Office requirements?
- in respect of the "certification" provided in respect of s 26, should it be required that "the applicants view" is substantiated by a third-party certificate from an endorsing or authorising entity or party?
- with reference to b. above, without such substantiation, how will the Registrar be sure that the requirements of s 26 have been met, (and what liability will the applicant have for any errors or omissions?)
- the preceding comments (a., b., and c.) also apply in respect of the proposed requirements for s 33 (2).
- in terms of s 79 (2) (d) it is likely that not all incorporated sport entities will have retained records relating to the "date" (how specific is this required to be?) that "members" first became registered; in the event that no such record is available, can the date of membership on the membership register default to the date that the constitution (if in the process of being renewed to become compliant with the 2022 Act), is filed?
- with reference to the point e. above, there is no regulatory guidance provided with reference to s 76 as to how a person "consents" to become a member, (can this be verbal, a handshake, or must it be in writing?); if not in writing, how can it be proven that a person on the register consented to become a member?
- one further point with reference to s 79 (2) (d) relates to the meaning of "last known"; does this mean "when last provided" to the society, or is there another statutory definition requiring the society to make reasonable enquiries as to the current address of the member?
- s 86 (1) (c) requires an officer of an incorporated society to (in accordance with s 63) to disclose details of the nature and extent of "interests", with these matters to be tabled at the Annual General Meeting; in the case of an ICSO, there are myriad interests which might involve an officer, (e.g., provision of catering, laundry, or transport services through a family business, player coaching services or building maintenance services); in many cases, these "services" (or "interests") will be provided at concessional (or non-commercial) rates, with the service provider not necessarily wishing for these to be disclosed to members, (please refer to Q8 for further elaboration on this point and for a suggested resolution).
- with reference to s 109 (2), (and previous comments), will certification be required in a certain format?; for example, on what basis would "the membership figure included in the annual return" be "certified"?
- with reference to the proposed regulatory requirements in respect of s 192 (c), in addition to clarity on the form that certification must take, is a "majority" intended to be a simple majority, or some other percentage of votes cast by members; where "members" must vote?
- is there a prescription as to "who" qualifies as a "member", given many ICSOs are unlikely to have kept detailed membership registers, (or necessarily required members to be financial).
- we note the following comments from the 2022 NSCS: "Seems like another bureaucratic nonsense." (Lawn Bowls club); "No formal constitution, any decisions re: club matters are made by all members at AGM or special meeting." (Indoor Bowls club); "Our local club was formed by the local iwi ... becoming a legal entity puts us in danger of being voted out by non-iwi members. A risk we are not prepared to take." (Hockey club).

2 Matter

- Prescribing the manner in which things must be done

Question

- Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(b)?

- in respect of all references to "the Internet site designated by the Registrar" in this section of the Consultation Document, guidelines should be provided by the Registrar for those who are unable to use the Registrar's internet system; (for example, will there be an 0800 number to call, or paper-based forms?); the Association notes that while New Zealand has generally good internet coverage, many ICSOs are rurally based, with the responsible Minister recently noting that only 86% of New Zealand has UFB coverage.
- with reference to s 48 and 52 (2), the Association proposes that certain ICSOs are exempt from s 47 (2) (b) and s 47 (3) of the Act, given the nature of the entity and the exemption criteria proposed, (per point 2.2 c. of page 1. of this submission).
- with reference to s 177 (2) (b) and s 186 (2), the Association proposes that where an ICSO is a "qualifying ICSO", that notices required under these sections be also provided to the relevant NSO (to which a qualifying ICSO is affiliated), or to the regional RST with which the ICSO is registered (if there is no NSO affiliation).
- per point c. above, the Association recommends in respect of s 65 and 66 of the 2022 Act that where an

	<p>ICSO is a “qualifying ICSO”, that the ICSO refers suspected (or actual) conflicts-of-interest to the relevant NSO (if affiliated) or the regional RST with which they are registered (if not affiliated), who then determines the materiality of such interests for disclosure to members of the ICSO, (if required).</p> <p>e. for the purposes of s 193 (c) and the reference to “an Internet site maintained by the society”, this definition should be extended to include any “an Internet site or any social media platform maintained by the society, which is ordinarily accessible to members of the public.”</p> <p>f. with reference to point e. above, the Association notes that while some ICSOs have free web-hosting arrangements, others do not; and it is not uncommon for web-hosting and domain-name fees to be among the first unpaid in the event that an ICSO faces financial challenges, (often leading to service suspension).</p>
3	<p>Matter</p> <ul style="list-style-type: none"> Authorising the Registrar to determine the manner in which things must be done <p>Question</p> <ul style="list-style-type: none"> Do you agree with MBIE’s proposal that no regulations should be made at this stage under section 254(1)(c)? <p>a. the Association suggests, (for the reasons outlined in the “overview” section of this submission response), the Registrar may be compelled to act should unintended consequences affect ICSOs once the 2022 Act is fully in-force; for example, should it be determined the processes envisaged through the “Internet service designated by the Registrar” fails, or proves to be ineffective.</p> <p>b. the Association also suggests that the Registrar may determine “by notice” that “qualifying ICSOs” may delegate their dispute resolution obligations to an ICSO’s NSO (if affiliated) or regional RST (if not affiliated), if an NSO or RST is in a position to provide that service to the ICSO.</p>
4	<p>Matter</p> <ul style="list-style-type: none"> Declaring persons to be, or not to be, officers <p>Question</p> <ul style="list-style-type: none"> Do you agree with MBIE’s proposal that no regulations should be made at this stage under section 254(1)(d)? <p>a. with reference to point 2.2 c. in the preamble to this submission response, the Association proposes that where an ICSO is a “qualifying ICSO”, that s 47 (2) (b) and s 47 (3) do not apply; this is based on evidence (refer to point b. below) that volunteers will find the matters required for compliance to be confronting and a deterrent to their ongoing participation on the committee of an ICSO as envisaged under the 2022 Act.</p> <p>b. with reference to point a. above, we note the following verbatim comments from the 2022 NSCS: “Struggling to keep up enthusiasm for the various tasks that require volunteer labour.” (Bowls club); “Should the new Incorporated Societies legislation make life more difficult for volunteers, the result will be less people willing to take on roles in committees/boards, and serious thought should be given if this is what they want to achieve.” (Tennis club); “The number of regulations seems to increase year on year, and while some of these are understandable, the people creating them seem to forget that the clubs are run largely by volunteers and the increased burden is a deterrent to getting more people involved in the running of the club.” (Football club); “Going to make it harder to attract members willing to take up their time to navigate through the changes and requirements.” (Athletics club); “The new Incorporated Societies legislation puts a lot of extra work on volunteers.” (Hockey club).</p>
5	<p>Matter</p> <ul style="list-style-type: none"> Prescribing circumstances related to independent committee members <p>Question</p> <ul style="list-style-type: none"> Do you have any comments on MBIE’s proposals regarding regulations under section 254(1)(e)? <p>a. provided that the recommendation proposed in the preceding point 4. a. is agreed, the Association has no comment to add in respect of this proposal; however, in the event that the recommendation is not agreed, the Association would propose that the suggested regulation be extended to all ICSOs as a means of limiting their liability for matters for which they do not have the requisite knowledge, competence or skills to manage.</p>
6	<p>Matter</p> <ul style="list-style-type: none"> Prescribing jurisdictions whose officer disqualifications we will recognise <p>Question</p> <ul style="list-style-type: none"> Do you have any comments on MBIE’s proposals regarding regulations under section 254(1)(f)? <p>a. the Association has no comment in respect of this question.</p>
7	<p>Matter</p> <ul style="list-style-type: none"> Prescribing the types of changes in officer information that must be notified <p>Question</p> <ul style="list-style-type: none"> Do you have any comments on MBIE’s proposals regarding regulations under section 254(1)(g)?

	a. the Association refers to matter 4. above and the proposal contained therein; if the proposal was not agreed to by officials, then the Association would suggest that in the case of ICSOs, notification of changes be limited to both the “name of the officer” only, with notification of changes limited to “date of cessation of being an officer”, (irrespective of any reason for the cessation).
8	Matter
	a. Regulating constitutional provisions on conflicts of interest
	Question
	b. Do you agree with MBIE’s proposal that no regulations should be made at this stage under section 254(1)(h)?
	a. with reference to point 2.2 a. in the preamble to this submission response, the Association proposes that where an ICSO meets the criteria proposed in point 2.1, that the ICSO is obliged to make the notification envisaged by s 66 to the NSO or RST to which they are affiliated or registered (where that affiliation or registration has been notified to the Registrar), who may then determine and advise the materiality of the interest and the requirement (if any) for disclosure to the ICSO’s members.
9	Matter
	• Prescribing societies that can restrict general meeting attendance to delegates
	Question
	• Do you have any suggestions regarding regulations that should be made under section 254(1)(i)?
	a. the Association has no suggestions in respect of this question.
10	Matter
	c. Defining the term ‘total current assets’
	Question
	d. Do you have any comments on MBIE’s proposals regarding regulations under section 254(1)(j)?
	a. the Association recommends that sums that are received on behalf of an ICSO’s governing entity (and accordingly tagged for this purpose), (e.g., the ICSO’s NSO), if held temporarily, notwithstanding their “current” characteristics, are specifically excluded from the definition of “current assets”, given in many cases the ICSO simply acts as a clearinghouse for an NSO in respect of annual affiliation fees.
	b. the Association further suggests that that the definition of total current assets meaning “total assets excluding fixed assets, where fixed assets are those items of property, plant, and equipment which are not expected to be sold within 12 months after the society’s balance date” is expanded to state, “and any sums received by an ICSO which it is obliged to pass on to a governing body within 12 months of receipt.”
	c. the Association further submits that a “fixed asset” is any asset which at the time of preparation of financial statements was not minuted by the ICSO as an asset intended for sale in the subsequent 12 months.
11	Matter
	Prescribing additional requirements for the financial statements of small societies
	Question
	Do you agree with MBIE’s proposal that no regulations should be made at this stage under section 254(1)(k)?
	a. the Association recommends that the Registrar update its public domain financial reporting templates for small societies, together with guidance notes on minimum financial reporting requirements.
	b. we note the following comments from the 2022 NSCS: “The accounting requirements are adding more burden to over worked club administrators. Can’t get a treasurer as it is, will only get harder.” (Hockey club); “We have no idea how to do financial reports under the new legislation.” (Squash club).
12	Matter
	• Determining the class of society that must have its financial statements audited
	Question
	• Do you have any comments on MBIE’s proposals regarding regulations under section 254(1)(l)?
	• For example, do you agree that focusing on the proportion of societies that should be captured is appropriate?
	• the Association agrees with MBIE’s recommendation.
13	Matter
	• Setting infringement fees
	Question
	• Do you have any comments on MBIE’s proposals regarding regulations under section 254(1)(m)?
	a. as a general comment, volunteers involved in governing and administering ICSOs will find the prospect of unintentionally incurring (and potentially defending in court) infringement fees (being category one offences in New Zealand’s judicial system) as a consequence of their voluntary not-for-profit activity, to be

	<p>confronting and a deterrent to ongoing participation.</p> <p>b. moreover, as infringement fees are intended to be punitive, the ignominy for a volunteer worker to be considered liable (on behalf of an ICSO) is unlikely to foster positive interaction with ICSO colleagues.</p> <p>c. the Association suggests that where an ICSO is a “qualifying ICSO”, that the proposed infringement fees be reduced by 50%, reflecting the status and nature of the offence in the context of a qualifying ICSO’s scope of community operation.</p>
14	<p>Matter</p> <ul style="list-style-type: none"> Prescribing the information to be included in infringement and reminder notices <p>Question</p> <ul style="list-style-type: none"> Do you have any comments on MBIE’s proposals regarding regulations under section 254(1)(n)? For example, do you agree with the proposed forms set out in Annexes 1 and 2? <p>a. while the proposed format of notices is consistent with those applied for other category 1 offences in New Zealand, the Association suggests that where an offender is a “qualifying ICSO” and has formally confirmed its affiliation with an NSO with the Registrar, that notices are also sent to the NSO, (or if not affiliated to the regional RST with which the ICSO is registered).</p> <p>b. the Association notes the process by which infringement notices can ordinarily be defended through the District Court and notes that the Registrar should provide ICSOs with guidance as to the process for defending an infringement notice through the judicial system.</p> <p>c. as the quantum of unpaid infringement fees has the potential to be high among ICSOs, notice should be provided to the Ministry of Justice of the potential for an increased caseload of defended (or formal proof) hearings appearing before judicial Justices of the Peace throughout New Zealand.</p>
15	<p>Matter</p> <ul style="list-style-type: none"> Removal and restoration of societies from the register <p>Question</p> <ul style="list-style-type: none"> Do you have any comments on MBIE’s proposals regarding regulations under section 254(1)(o)? <p>a. in respect of s 177 (1) (a), notice should also be given to the NSO or RST to which an ICSO is related.</p>
16	<p>Matter</p> <ul style="list-style-type: none"> Prescribing certain matters relating to surplus assets <p>Question</p> <ul style="list-style-type: none"> Do you have any comments on MBIE’s proposals regarding regulations under section 254(1)(p)? <p>a. the Association has no comment on MBIE’s proposals.</p>
17	<p>Matter</p> <p>Prescribing procedural requirements for surplus asset ‘resolutions’</p> <p>Question</p> <p>Do you agree with MBIE’s proposal that no regulations should be made at this stage under section 254(1)(q)?</p> <p>a. the Association agrees with MBIE’s proposal.</p>
18	<p>Matter</p> <ul style="list-style-type: none"> Prescribing how documents must be served on a society <p>Question</p> <ul style="list-style-type: none"> Do you have any comments on MBIE’s proposals regarding regulations under section 254(1)(r)? <p>a. please refer to the comments made in response to Matter 19 below, which also apply in principle here.</p> <p>b. recently, the Association contacted a dissolved regional sport organisation who noted, “we weren’t aware of this [the dissolution] prior [to the dissolution being gazetted], and no notice was received from the Registrar around this.” “There is almost nothing in the [1908] Act about what steps the Registrar needs to take to be satisfied that operations have ceased, as it seems they didn’t even get confirmation from the IRD if we were filing returns, which we were, or a check of our website for events, or our social media.”</p> <p>c. while the Association agrees with cl. 146 of the Consultation Document, the standard of proof (for example will the person be required to provide a legal affidavit to the Registrar?) and the process by which proof is accepted (or not accepted) by the Registrar, will need to be carefully considered, to ensure it is not cost-prohibitive, nor overly complex for a person to undertake.</p>
19	<p>Matter</p> <ul style="list-style-type: none"> Prescribing how documents must be served on a person <p>Question</p> <ul style="list-style-type: none"> Do you have any comments on MBIE’s proposals regarding regulations under section 254(1)(s)? <p>a. with reference to the Association’s earlier comments (and per the Association’s discussion with the Minister),</p>

	<p>in terms of s 254 (1) (r) we suggest that where a “qualifying ICSO” is affiliated with an NSO (or in the absence of affiliation, registered with a RST), any official documents are delivered to the relevant NSO or RST to avoid any unintended consequences of a document not being delivered or received personally as anticipated under the 2022 Act.</p> <p>b. the Association notes that when considering delivery of official communications by email, many ICSOs do not actively monitor emails “out-of-season”, (and in some cases, not at all).</p> <p>c. moreover, the Association can certify that between 15% and 20% of emails to non-corporate email addresses (e.g., common domain email addresses used by ICSOs such as “gmail.com”) are not delivered owing to a combination of: public domain spam filters; unattended mailboxes; and full mailboxes.</p> <p>d. while “companies” will not typically experience this problem, volunteer organisations (such as ICSOs) will.</p> <p>e. it is easy to see how the issues relating to point b. above can compound easily where there are infringements or other legal consequences arising from inaction arising from non-receipt of an official communication, which is likely to be a further deterrent to a volunteer wish to assist a sport clubs in an official capacity.</p>
20	<p>Matter</p> <ul style="list-style-type: none"> Prescribing matters relating to the incorporated societies register <p>Question</p> <ul style="list-style-type: none"> Do you have any comments on MBIE’s proposals regarding regulations under section 254(1)(t)? <p>a. the Association has no comment on MBIE’s proposals.</p>
21	<p>Matter</p> <ul style="list-style-type: none"> Specifying matters concerning conversion into an incorporated society <p>Question</p> <ul style="list-style-type: none"> Do you have any comments on MBIE’s proposals regarding section 254(1)(u), (v) or (w)? <p>a. the Association has no comment on MBIE’s proposals.</p>

B. Part 3 Of The Discussion Document: Section 255

22	<p>Matter</p> <ul style="list-style-type: none"> Setting fees for the performance of functions or the exercise of powers <p>Question</p> <ul style="list-style-type: none"> Do you have any suggestions on regulations that should be made under section 255(1)(a)? <p>a. with reference to s 255 (1) (a), where an ICSO has been granted not-for-profit status (or qualifies as an amateur-sport-promoter) for income tax purposes, services provided to it by the Companies Office should acknowledge the Objects of the entity, meaning that fees which might otherwise be imposed for a “with-profit” incorporated entity should be waived in accordance with not-for-profit principles.</p> <p>b. it would be beneficial for the Registrar to operate a free-of-charge help-desk (or concierge) service to assist incorporated entities meet their legislative and regulatory obligations, for the benefit of the community.</p>
23	<p>Matter</p> <ul style="list-style-type: none"> Setting late fees <p>Question</p> <ul style="list-style-type: none"> Do you have any comments on MBIE’s proposals regarding regulations under section 255(1)(b)? <p>a. the basic question which is unanswered in this section is whether the proposed late fee is intended to be “punitive” (equivalent to an infringement fee described elsewhere in the legislation), or for “cost-recovery” (as a result of unbudgeted costs that the Registrar will incur as a consequence of the filing not being made on time); the use of the word “penalty” indicates that the fee is intended to be punitive, although para. 183 suggests that late fees are intended to “recoup the Registrar’s [unspecified] costs”.</p> <p>b. the best approach would be to waive “late fees” where the proximate cause is intended to be covered by “infringement fees”; i.e., there is no point in “fee double-dipping” for the same offence/infracton, (particularly where the Registrar’s costs cannot be readily identified, as is the case here).</p>
24	<p>Matter</p> <ul style="list-style-type: none"> Setting other fees <p>Question</p> <ul style="list-style-type: none"> Do you agree with MBIE’s proposal that no regulations should be made at this stage under section 255(1)(c)? <p>a. the Association agrees with MBIE’s proposal.</p>

C. Part 4 Of The Discussion Document: Section 256

25	Matter
	<ul style="list-style-type: none"> • Providing that certain rules apply
	Question
	<ul style="list-style-type: none"> • Do you agree with MBIE's proposal that no regulations should be made at this stage under section 256(1)(a)?
	a. the Association agrees with MBIE's proposal.
26	Matter
	<ul style="list-style-type: none"> • Providing that certain legislative rules do not apply
	Question
	<ul style="list-style-type: none"> • Do you agree with MBIE's proposal that no regulations should be made at this stage under section 256(1)(b)?
	a. the Association agrees with MBIE's proposal.
27	Matter
	<ul style="list-style-type: none"> • Prescribing matters for the purposes of Part 1 of Schedule 1
	Question
	<ul style="list-style-type: none"> • Do you have any comments on MBIE's proposals regarding regulations under section 256(1)(c)?
	a. with reference to s 5 (3) (e), the cost of re-registration should be met by central Government in recognition of the role played by ICSOs in delivering invaluable social benefits to communities throughout the country; in the case of ICSOs (for example) the estimated fee recovery by the proposed re-registration fee of \$50 across an est. 7,500 clubs (or \$375,000) equates to only 0.23% of Sport New Zealand's 2022/23 budget; there is no benefit in placing this financial burden in the midst of a cost-of-living crisis on volunteer not-for-profit organisations which are being forced to act by legislative change, (and who may – in many cases – be required to pay professional advisory fees to ensure they become fully compliant under the 2022 Act).
	b. with respect to s 9 (3) (b) (ii), the legislation is silent on whether "a majority" is "a simple majority", or (as in the case of company constitutions involving a restructuring, a "75% majority of shareholders who are entitled to vote"; or, is the "majority" simply intended to be defined by the incorporated entity's existing Constitution?
	c. in terms of s 5 (3) (f), guidelines should be provided for re-registrants who (for whatever reason) are unable to use the Registrar's internet system; for example, will there be an 0800 number to call, or a paper-based form to enable re-registration to occur – (please refer to earlier comments on this point).

The Association welcomes any discussion on the above points at the convenience of Officials.

ENDS