

# Clubs, societies, and arbitration: the Incorporated Societies Act 2022

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**The Incorporated Societies Act 2022 came fully into force in October 2023. Dispute resolution procedures must be included in a society's constitution. This article looks at the background of this potentially significant change and briefly foreshadows its impact.**

## Setting the scene

A fair proportion of New Zealanders are affected in some way by the operation of a civil, sporting, or cultural club or society incorporated under the Incorporated Societies Act 1908 (the **1908 Act**).

Many people's interests are promoted by joining together and benefiting from the positive features of the skeletal 1908 Act which Sir John Salmond drafted around 115 years ago. As the Parliamentary Select Committee report back on the Incorporated Societies Bill 2021 noted, the bill retained the *underlying principles of the current law* but codified into statute various statutory minima *since some of it is not in the 1908 Act but has built up in case law over time*.

## Law reform



Alternative Dispute Resolution clause mandatory in Incorporated Society rules under new legislation



The Incorporated Societies Act 2022 fleshes out the duties, powers and obligations of members following the coming into effect and operation of the Charities Act 2005 and the Law Commission's/ Te Aka Matua Te Ture's (June 2013) Report: R129 *A New Act for Incorporated Societies* (the **2013 Report**).

One of the key changes to societies (which must re-register from the 1908 Act to the 2022 Act) is to require them to include dispute resolution clauses in their constitutions. The report back on the bill stated that the *bill would require a society to determine its own dispute resolution procedures and include these in its constitution*, (the requirement is set out in s 26(j) of the Act), either as model rules in Schedule 2 of the Act (see ss 40 and 41) or their own rules so long as they "satisfy the statutory minima" (a phrase noted repeatedly in chapter 8 of the 2013 Report).

The statutory minima are largely set out in section 39 (which requires procedures for resolving disputes to be consistent with natural justice) and each clause of the Model Rules in Schedule 2, which headings note:

- ...
- (2) How a complaint [defined at s 38] may be made
  - (3) Person who makes complaint has right to be heard
  - (4) Person who is subject of complaint has right to be heard

- (5) Investigating and determining dispute
- (6) Society may decide not to proceed further with complaint
- (7) Society may refer complaint
- (8) Decision makers

Should a society's constitution not contain dispute resolution procedures, by virtue of clause 6 of Schedule 1 the constitution will be treated as including the Model Rules set out in Schedule 2. Using the Model Rules will create a presumption under section 41 that the society's rules are consistent with natural justice.

The 2013 Report noted *Gibson v New Zealand Land Search and Rescue Dogs Inc*<sup>1</sup> as a case where there were problems regarding natural justice.<sup>2</sup>

This article moves on to focus on sections 42 and 43 of the Incorporated Societies Act 2022, after recording the sections' background arising in the 2013 Report.

### **Express reference to alternative dispute resolution**

The 2013 Report, *Chapter 8: Complaints and Grievances* notes variously:

- the courts have regularly held that members of societies can bring judicial review proceedings or claims in contract (they still can);
- this is expensive in *both time and money, and is highly likely to be*

*divisive and potentially destructive within a society;*

- the Act will specify minimum standards of natural justice for affected members that society processes must satisfy;
- the processes may be made bespoke to suit the culture and purposes of their society and members;
- two types of disputes are common: (1) misconduct or disciplinary disputes usually brought by the society against a member; and (2) grievances brought by a member against other members, officers or the society itself (such as for breach of the constitution);
- the statute should not require appeal rights but should permit societies to include them in their disputes procedures (this does not exclude the possibility of judicial review); and
- arbitration was considered as an option, noting that *[T]he courts are accustomed to arbitration as an alternative to court action, with appeals to court generally restricted, mainly to allegations of bias, other natural justice issues or major procedural deficiency.*<sup>3</sup>

Arbitration has the distinct advantages of flexibility, informality, familiarity with technical subjects, confidentiality, and speed.<sup>4</sup> The

1 *Gibson v New Zealand Land Search and Rescue Dogs Inc* [2012] NZHC 1320, [2012] 2 NZLR 181 (HC and CA).

2 2013 Report at 125 and 131.

3 2013 Report at 135.

4 See D Williams and A Kawharu *Williams & Kawharu on Arbitration* (LexisNexis Wellington, 2017) at 1.1.9 "Perceived advantages and increasing popularity of both domestic and international arbitration"; and "Real Alternatives to Court Process [2010] NZLJ 380.

2013 Report also mooted the visitor system used in universities, but this concept has not been expressly carried through into the new Act.

As the select committee report on the bill noted:

Dispute resolution can take many forms, such as mediation or arbitration, or approaches based on tikanga or other cultural practices. The bill does not specify which type of dispute resolution a society must use. Societies may decide which type of dispute resolution best suits their membership.

### Sections 42 and 43 of the new Act

An arbitration clause is not inserted by operation of law, but arbitration might be the procedure used by a society in its rules or under the Model Rules in Schedule 2. In terms of this article, the most relevant sections of the Incorporated Societies Act 2022 are set out for convenience:

#### 42 Constitution may provide for types of dispute resolution

- (1) A society's constitution may provide that all or certain kinds of disputes must or may be submitted to any type of dispute resolution, including—
  - (a) consensual dispute resolution (for example, mediation, facilitation, or a tikanga-based practice); and
  - (b) **determinative dispute resolution (for example, arbitration**

#### under the Arbitration 1996 or adjudication).

- (2) This section and section 43 do not apply to the extent that other legislation requires a dispute to be dealt with in a different way (and the provisions of a constitution that relate to disputes have no effect to the extent that those provisions contravene, or are inconsistent with, that legislation).

...

[emphasis added]

#### 43 Provisions relating to arbitration

- (1) If a society's constitution provides that a dispute must or may be submitted to arbitration under the Arbitration Act 1996, the relevant provisions of the constitution must be treated as an arbitration agreement that is binding on the society and the affected member or officer.
- (2) A society's constitution may prescribe procedural matters (not inconsistent with the Arbitration Act 1996) that govern an arbitration under this section.

One of the statutory purposes most relevant to this article is found at section 3(d)(iii):

societies are private bodies that should be self-governing in accordance with their constitutions, any bylaws, and their own tikanga, kawa, culture,

and practice, and should be free from inappropriate Government interference; ...

In keeping with this discouragement of resorting to the courts section 9 of the Arbitration Act 1996 provides for that Act to be subject to the Incorporated Societies Act 2022. The society's rules may provide for their own procedures in an arbitration context or adopt other rules, such as the NZDRC arbitration rules. While the 2013 Report notes that Schedule 1 of the Arbitration Act 1996 is more likely to be adopted than Schedule 2 if the Arbitration Act 1996 system is adopted,<sup>5</sup> that overlooks the fact that Schedule 2 applies to every domestic arbitration unless the parties expressly agree otherwise.

### Continuing judicial intervention and supervision

Regulations have been drafted, to support the new Act, they came into force on 5 October 2023. Approximately 24,000 societies incorporated under the 1908 Act are due to re-register under the Incorporated Societies Act 2022 from October 2023. The regulations set out what penalties will be imposed if the society's obligations are breached,<sup>6</sup> but one of the most relevant outcomes will be judicial intervention and continuing supervision. Notably, the High Court may place a society into liquidation under section 210(d) if the society's constitution does not comply with the Incorporated Societies Act 2022.

The new provisions promote internal dispute resolution to avoid *expensive and disruptive court*

<sup>5</sup> 2013 Report at 137 [8.54].

<sup>6</sup> Such as a failure to register amendments to the constitution or changes in officers.

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action as found in *Gibson*, for example. The contract methodology applicable to societies enables the members to develop their own rules, including arbitration clauses and, importantly, to enforce their rules contractually.<sup>7</sup> Courts might still intervene, but *societies must have procedures to deal with conflicts without – or at worst, before – going to court.*<sup>8</sup>

Arbitration as a form of alternative dispute resolution is mainstream and increasingly expressly provided for in New Zealand legislation, such as the alternative dispute resolution procedures in the Trusts Act 2019.<sup>9</sup>

The Incorporated Societies Act 2022 is another example. The New Zealand Dispute Resolution Centre (**NZDRC**), with experienced panellists available to act as arbitrators might assist societies of all sizes who

select arbitration or adjudication (in whichever level of complexity, tailored to the society), or mediation as the society's internal, alternative dispute resolution method.

## About the author

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7 As noted in *Finnigan v New Zealand Rugby Football Union (no 3)* [1985] 2 NZLR 181 (HC and CA); *Stratford Racing Club Inc v Adlam* [2008] NZCA 92, [2008] NZAR 329; *Strand v Bays Music Centre Inc* [2013] NZHC 1870, [2013] NZAR 1068; and *Attorney and General v Institution of Professional Engineers New Zealand Incorporated* [2018] NZHC 3211, [2019] 2 NZLR 731.

8 2013 Report at 125 [8.2].

9 See A Butler, "Arbitration of trust disputes under the Trusts Act 2019" [2021] NZLJ 106.