

BUILDING SOCIETIES AMENDMENT BILL

EXPLANATORY NOTE

THIS Bill amends the Building Societies Act 1965. The principal features of the Bill are as follows:

- (a) It provides that, subject to any restrictions contained in the rules of a society, the function of a building society shall be to provide services of any kind for its members or other persons. The purpose for which a building society may be established under the principal Act is that of raising, by the subscriptions of members, a fund for making advances to members;
- (b) It repeals Parts III, IV and V of the principal Act, which impose restrictions on the power of building societies to make advances, to invest and bank surplus funds, and to borrow money;
- (c) It provides a mechanism for the conversion of a building society into a public company limited by shares under the Companies Act 1955;
- (d) It amends the principal Act so as to conform in certain areas the law relating to building societies with company law.

Clause 1 of the Bill relates to the Short Title.

Clause 2 repeals section 2 of the principal Act (relating to the interpretation of terms used in the principal Act), and substitutes a new section. New definitions are those of the terms "debt security", "instrument", "liabilities", "member", "participatory security", "property", "rights", "security", and "conversion date".

Clause 3 repeals section 9 of the principal Act, and substitutes 6 new sections.

The existing section 9 provides that the purpose for which a building society may be established under the principal Act is that of raising, by the subscriptions of members, a fund for making advances to members out of the funds of the society on security by way of mortgage of land, or on the security of the shares of members, or on other or no security, in accordance with the principal Act.

The new section 9A provides that, subject to any restrictions or prohibitions contained in the rules of a society, the function of a building society shall be to provide services of any kind for its members or other persons. The section expressly provides that the provision of services includes the provision of financial services, of which a non-exclusive list is referred to in subsection (2) of the new section.

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The *new section 9B* provides that, subject to any restrictions or prohibitions contained in the rules of a society, a society shall have all such powers, rights, and authorities as are conferred on it by the principal Act and all such other powers not inconsistent with the principal Act as may be reasonably necessary to enable it to carry on its function.

The *new section 9C* is based on section 18A of the Companies Act 1955, and modifies the *ultra vires* doctrine in its application to building societies. It provides that the acts of a building society shall not, except in certain specified cases, be invalid on the ground that they are *ultra vires*. The exceptions are in the case of proceedings—

- (a) Against a society by any member or debenture holder to prevent the society from entering into a transaction which is *ultra vires* the society or to obtain any other relief;
- (b) By a society or a member of a society against any officer of the society on the ground that the act of the society was *ultra vires*;
- (c) By the Registrar of Building Societies for the dissolution of a society.

It is also provided that relief may be granted, other than for loss of anticipated or future profits, by the Court to any party to a contract which a society is prevented from performing.

The *new section 9D* is based on section 18B of the Companies Act 1955. Section 18B relates to what is known in company law as the constructive notice doctrine under which persons dealing with a company are taken to have notice of the memorandum and articles of a company as well as other documents relating to the company on public record. That section abolishes the constructive notice doctrine except in relation to the registration of charges.

The *new section 9D* abolishes the constructive notice doctrine in so far as it applies to building societies.

The *new section 9E* is based on section 18C of the Companies Act 1955 which relates to what is referred to in company law as the “indoor management rule” and also the occasions on which the actions of a company’s officers are binding on the company. The effect of the “indoor management rule” is that a person dealing with a company is entitled to assume that the internal regulations of the company have been complied with unless that person has knowledge to the contrary or is put on inquiry. The *new section 9E* provides in similar terms to section 18C of the Companies Act 1955 that no building society and no guarantor of the obligations of a society may assert against a person dealing with the society or with any person who has acquired any property, rights, or interests from the society that the rules of the society have not been complied with unless that person has knowledge or by reason of that person’s position with or relationship to the society ought to have knowledge that the rules have not been complied with. The new section also specifies, in terms similar to section 18C of the Companies Act 1955, the circumstances in which a society is prevented from asserting that the actions of its officers or agents are not binding on the society in dealings with third parties or that a document has not been properly sealed.

The *new section 9F* is similar to section 18D of the Companies Act 1955 and relates to the effect of fraud.

Clause 4 repeals section 12 of the principal Act (which relates to the powers of a society in relation to land), and substitutes a new section. The existing section 12 provides that societies may acquire land as business premises. The *new section 12* confers wide powers to acquire, improve, manage, develop, and dispose of property to the extent that the society may think it necessary or convenient for the purpose of the performance of the function of the society.

Clause 5 amends section 17 of the principal Act which relates to the contents of the rules of a society. It provides that the rules of a society shall specify whether there are any restrictions or prohibitions on the provision of any service that a society is authorised to provide by the principal Act, or on any powers, rights, or authorities that a society has under the principal Act, and whether there are any restrictions on the power of a society to borrow, lend, or invest money. It also repeals paragraph (c) of subsection (5B), which contains a prohibition on the issue of shares by a society on terms which give the society any right to make any deduction from any capital subscribed by a member.

Clause 6 repeals section 18 of the principal Act (which relates to the effect of rules), and substitutes a new section.

Subsection (1) of the new section re-enacts the existing section 18.

Subsection (2) of the new section provides that no lender or other person dealing with a society shall be concerned to see or enquire whether any restrictions on the power of a society to borrow money imposed by the rules of a society is observed.

Clause 7 amends section 19 of the principal Act (which relates to the alteration of rules). The existing section provides that where a society alters its rules by special resolution it shall send copies of the alteration or the resolution rescinding any rule signed by 3 members and the secretary to the Registrar together with a statutory declaration of an officer of the society that the resolution that alters the rules has been passed as a special resolution. The amended section provides that the alteration need be signed by only a director and the secretary, and dispenses with the requirement for a statutory declaration. This corresponds to the requirements for companies.

Clause 8 repeals section 21 (1A) of the principal Act (which prohibits any society from containing in its name the word “Bank”, “Bankers”, or “Banking”). The use of those words as part of the name of any person is now dealt with in Part VA of the Reserve Bank of New Zealand Act 1964 (as enacted by the Reserve Bank of New Zealand Amendment Act 1986).

Clause 9 repeals section 30 of the principal Act (which prohibits a society from commencing advertising except in accordance with the section).

Clause 10 repeals sections 32, 33, and 34 of the principal Act, and substitutes 4 new sections.

The *new section 32* re-enacts with amendments section 32 of the principal Act, which relates to unions of societies whereby 2 or more societies may unite and become one society. The new section provides that such societies may unite if the terms of the union are approved by a special resolution of each society. It removes the requirement contained in the existing section 32 (1) (b) that either the holders of not less than two-thirds of the whole number of shares in each society must consent in writing to such a transfer or the transfer must be confirmed under section 34 (3).

The *new section 33* re-enacts with amendments section 33 of the principal Act, relating to transfers of engagements from one society to another. The *new section 33* provides that a society may, by special resolution, transfer all or part of its engagements to another society and a society may, by resolution of a general meeting or of the board of directors, undertake to fulfil all or part of the engagements of another society. It removes the requirement contained in the existing section 33 (3) (a) that either the holders of not less than two-thirds of the whole number of shares in each society must consent in writing to such a

transfer or the transfer must be confirmed under section 34 (3) of the principal Act.

The *new section 34* re-enacts with amendments section 34 of the principal Act. The new section contains supplementary provisions relating to the union of societies and the transfer of engagements of societies under the *new sections 32 and 33*.

The *new section 34A* provides that a society may, with the approval of a resolution of a general meeting of the society or of the board of directors, sell or otherwise dispose of any part of the business undertaking of the society to such person or persons and upon such terms and conditions as the society in general meeting or the board of directors thinks fit.

Subsection (2) provides that nothing in *subsection (1)* authorises a society to sell or otherwise dispose of any part of the business undertaking of the society if that sale or disposition would result in the society uniting with any other society or transferring any of the society's engagements.

Clause 11 repeals Parts III, IV, and V of the principal Act, and substitutes a *new Part VA* containing *new sections 56A to 56F*.

Part III of the existing Act relates to advances. It provides, among other things, that every society must ensure that, of the total amount of advances made by it that are outstanding at a given time, at least 85 percent of those advances were, at the time each advance was authorised, intended to be used for residential purposes and is, or will be, secured by way of mortgage of land.

Part IV of the existing Act relates to the investment and banking of surplus funds. It provides that any funds of the society that are not immediately required for the purpose of making advances to its members may be invested only in such securities, deposits, or advances as are referred to in section 55 (1) or must be kept in cash or on current account with or otherwise on deposit with or loan to a bank (as that term is defined in section 54).

Part V of the existing Act relates to borrowing by societies. Among other things it—

(a) Provides that the total amount borrowed by a society and not repaid shall not at any time exceed two-thirds of the aggregate of the amounts referred to in section 56 (2); and

(b) Restricts the acceptance by societies of savings bank deposits.

The *new section 56A* provides that, subject to any restriction contained in the rules of the society, a society may invest any money belonging to it or acquired in the course of its business—

(a) For any purpose connected with the function of the society; or

(b) To the extent that any money is not immediately required for the performance of that function, in any other manner that the society thinks fit.

The *new section 56B* provides that, subject to any restriction contained in the rules of the society, a society may borrow money on such terms and conditions as it thinks fit.

The *new section 56C* provides that a society may secure the payment of money and the performance of any other obligations of the society in such manner as the society thinks fit.

The *new section 56D* re-enacts the existing section 57A relating to home ownership accounts and farm ownership accounts.

The *new section 56E* re-enacts the existing section 62 relating to depositors under the age of 20 years.

The *new section 56F* re-enacts section 63 of the principal Act relating to the designation of societies for investment by trustees. Subsection (2) is not, however, re-enacted.

Clause 12 of the Bill repeals Part VI of the existing Act (which relates to the powers of control of the Registrar of Building Societies). *Clause 27* of the Bill inserts a *new section 122A* conferring powers of inspection on the Registrar which are based on the powers of inspection of the Registrar of Companies under section 9A of the Companies Act 1955.

Clause 13 repeals section 75 of the principal Act (which relates to the power of members to inspect the register of a society), and substitutes a new section. The new section gives members wider powers to inspect the register based on the powers of inspection of members of companies under the Companies Act 1955.

Clause 14 amends section 78 of the principal Act (which relates to the persons who are entitled to notice of meetings of societies). The existing section 78 (2) provides that notice of meetings need not be sent to members of societies who did not, at the relevant time (as defined), hold shares in the society to a value of \$50 or more. This amendment raises that threshold to \$200.

Clause 15 amends section 81 of the principal Act (which relates to special resolutions). The existing section 81 (2) provides that, if the society's rules so provide, members who do not hold shares in the society to a value of \$50 or more shall not be qualified to vote on a special resolution. This amendment raises that threshold to \$200.

Clause 16 repeals section 84 of the principal Act (which requires officers of a society to give such security as the society considers sufficient for the faithful execution of that officer's duties).

Clause 17 repeals section 85 of the principal Act (which relates to the duty of officers of a society to account).

Clause 18 repeals section 87 of the principal Act (which relates to the acceptance of commissions by officers of a society), and substitutes a new section.

Clause 19 re-enacts subsections (1), (3), and (4) of section 96 of the principal Act relating to directors' reports.

Clause 20 substitutes a new subsection (4) in section 101 of the principal Act relating to the duties of auditors.

Clause 21 repeals subsection (2) of section 104 of the principal Act. That subsection requires the annual return of a society to disclose the amounts of advances made to employees under section 55 which is repealed.

Clause 22 repeals section 105 of the principal Act (which relates to additional annual returns of certain transactions).

Clause 23 amends section 109 of the principal Act relating to the determination of disputes by arbitration. It prohibits the appointment of the Registrar as an arbitrator or umpire.

Clause 24 inserts into the principal Act a *new Part VIIA* containing *new sections 113A to 113Q* relating to conversion to company status.

The *new section 113A* relates to the approval of a scheme for conversion of a society to a company.

Subsection (1) provides that a society may, by special resolution, approve a scheme for conversion of the society to a public company limited by shares under the Companies Act 1955.

Subsection (2) specifies the matters to be contained in any scheme for conversion.

Subsection (3) requires a copy of every special resolution approving a scheme for conversion to be registered with the Registrar of Building Societies.

Subsections (4) and (5) require a notice summarising the scheme for conversion and referring to the additional matters specified in *subsection (5)* to be sent to every member entitled to vote on the special resolution together with the notice of meeting.

Subsection (6) restricts the distribution of any scheme for conversion or other document for the purposes of the section if it contains any statement purporting to be made by an expert unless the requirements set out in that subsection are complied with.

The new section 113B relates to the incorporation of a society as a company under the Companies Act 1955.

Subsection (1) specifies the documents and fee to be delivered to the Registrar of Companies.

Subsection (2) provides that the Registrar of Companies, on being satisfied that the documents delivered under *subsection (1)* are in accordance with that subsection, shall register them and issue a certificate of incorporation for the company.

Subsection (3) provides that the certificate of incorporation is conclusive evidence that the society was on the date shown on the certificate registered as a company.

Subsection (4) provides that from the commencement of the date shown in the certificate of incorporation the society shall cease to be incorporated under the principal Act and shall be a company incorporated under Part II of the Companies Act 1955 and that that Act (except section 117, which restricts the commencement of business by companies) shall apply to it accordingly.

Subsection (5) requires the Registrar to publish notice of registration in the Gazette.

Subsection (6) provides that upon registration of the society as a company—

(a) The persons who are to be members of the company in accordance with the scheme shall be members of the company; and

(b) The shares in the capital of the company to which such persons are entitled in accordance with the scheme shall be deemed to be allotted to those persons; and

(c) An entry is to be made in the register of members of the company showing in respect of each person—

(i) That person's name;

(ii) The address of that person to which notices and other documents may be sent;

(iii) The class of share and the number and nominal amount of shares to be held by that member in accordance with the scheme.

Subsection (7) specifies additional information required to be supplied to the Registrar of Companies as soon as practicable after conversion.

Subsection (8) provides that section 60 of the Companies Act 1955 will not apply to an allotment deemed to have been made pursuant to *subsection (6)* of this section.

Subsection (9) provides that a company is not required to show on any list required under *subsection (7) (a)* or in the register of its members referred to in section 118 of the Companies Act 1955 the description of any person who before the conversion of the society into a company was a member of the society if the register of members of the society did not contain a description of that person.

The *new section 113C* contains provisions consequential upon a society becoming converted into a company pursuant to the *new Part VIIA*.

The *new section 113D* relates to the enforceability of rights and liabilities altered by or arising under the scheme for conversion.

The *new section 113E* provides that members of a society who become members of a company by virtue of their shares in the society shall not be liable to contribute any amount to the assets of the company in the event of it being wound up that exceeds the amount that that member was liable to contribute to the assets of the society in the event of it being dissolved.

The *new section 113F* prohibits the issue of terminating or bonus balloting shares in the capital of a company into which a society becomes converted.

The *new section 113G* provides that each terminating shareholder of any society that becomes converted into a company shall be issued with debt or participatory securities of the company corresponding in value to, and carrying the same rights and liabilities as, the terminating shares held by that shareholder. The section also provides a procedure whereby a terminating shareholder may consent to the conversion of his or her terminating shares into an alternative interest proposed by the company.

The *new section 113H* states that where a scheme for conversion provides for the conversion of bonus balloting shares into debt or participatory securities of the company into which the society becomes converted, those securities shall be held on substantially the same terms and conditions as those on which the bonus balloting shares were held.

The *new section 113I* provides that employees of a society that becomes converted into a company pursuant to the *new Part VIIA* shall become employees of the company on the same terms and conditions that applied immediately before the conversion date.

The *new section 113J* provides an exemption from the Gaming and Lotteries Act 1977 for ballots conducted by a company into which a society becomes converted. In the case of bonus ballots the exemption expires after 5 years from the conversion date.

The *new section 113K* restricts the conduct of bonus ballots by a company into which a society becomes converted. It provides that—

- (a) No new balloting accounts can be opened after conversion;
- (b) No money can be received to the credit of existing balloting accounts.

The *new section 113L* confers trustee investment status on any company into which a society becomes converted if the society was before the conversion date a society designated as one with which trustees may invest trust funds by way of deposit. Such a company may retain trustee investment status for a maximum of 5 years from the conversion date by virtue of the new section.

The *new section 113M* confers on a company into which a society becomes converted the right to accept deposits from members in home ownership or farm ownership accounts if the society was authorised to accept such deposits before its conversion into a company.

The *new section 113N* prohibits a company into which a society has become converted from conducting bonus ballots after the expiry of 5 years from the conversion date. It also requires a company which is under a liability to any

person to hold ballots for the purpose of ascertaining the entitlement of that person to receive prizes to discharge that liability within 5 years of the conversion date in accordance with regulations made under the Act.

The new section 113O confers power to make regulations.

The new section 113P is a technical provision relating to taxes and duties.

The new section 113Q is a procedural provision relating to registers.

Clause 25 repeals section 117 of the principal Act (which enables a society to be dissolved on the award of the Registrar).

Clause 26 repeals section 122 of the principal Act (which enables the Governor-General, by Order in Council, to make regulations controlling advertisements by societies).

Clause 27 inserts *new sections 122A to 122D* into the principal Act.

The new section 122A confers powers of inspection on the Registrar of Building Societies corresponding to those of the Registrar of Companies contained in section 9A of the Companies Act 1955 (as amended by section 25 (1) of the Official Information Amendment Act 1987).

The new section 122B is similar to section 9AA of the Companies Act 1955 (as inserted by section 25 (1) of the Official Information Amendment Act 1987), and provides that the Registrar may refuse to disclose information relating to an inspection in certain circumstances.

The new section 122C is similar to section 9BA of the Companies Act 1955 (as inserted by section 25 (1) of the Official Information Amendment Act 1987), and provides a right of appeal from any refusal to disclose any information under the *new section 122B*.

The new section 122D re-enacts section 52 of the principal Act (repealed by clause 11 of the Bill), which relates to the power of the Registrar of Building Societies to require an actuary's certificate as to appropriations by ballot. The section is extended to apply to any company into which a society has become converted under the *new Part VIIA* of the Act as well as to societies registered under the principal Act.

Clause 28 repeals section 127 of the principal Act (which relates to joint holdings of shares), and substitutes a new section. The existing section provides, in subsection (4), that for the purpose of determining who is qualified to vote on a resolution and of determining the number of votes any person may have, the shares shall be treated as being held by the senior joint holder alone, and that a person other than the senior joint holder shall not be qualified to vote. The *new section 127* provides that the vote of the senior who tenders a vote at a meeting shall be accepted to the exclusion of the votes of the other joint holders. The new section is also different from the existing section in other minor respects.

Clause 29 repeals section 128 of the principal Act (which provides that where a society becomes the owner of any land in the exercise of its powers as mortgagee the land shall be sold as soon as reasonably practicable).

Clause 30 repeals the First Schedule to the principal Act (which sets out standard rules for meetings of a society). The Schedule had ceased to have effect as a result of the earlier repeal of section 17 (7) of the principal Act.

Clause 31 repeals the Third Schedule to the principal Act (which sets out requirements relating to advertising).

Clause 32 repeals the Fourth Schedule to the principal Act (which lists the societies authorised to accept savings bank deposits).

Clauses 33 to 37 contain various other consequential provisions, amendments, and repeals.
