

THE PUBLIC SERVICE INVESTMENT SOCIETY LIMITED BILL

AS REPORTED FROM THE COMMERCE COMMITTEE

COMMENTARY

Recommendation

The Commerce Committee has examined The Public Service Investment Society Limited Bill and recommends that it be passed with the amendments shown in the bill.

The Public Service Investment Society Limited Bill is a private bill. The committee reports that the statements in the preamble have been proved to its satisfaction.

Conduct of the examination

The Public Service Investment Society Limited Bill was referred to the Commerce Committee on 2 June 1998. The closing date for submissions was Friday, 17 July 1998. The committee received and considered two submissions from the Public Service Investment Society Limited and the Inland Revenue Department. Both submissions were heard orally. One hour and twenty-five minutes were spent on the hearing of evidence and consideration.

Advice was received from the Ministry of Commerce and the Inland Revenue Department.

This commentary sets out the details of the committee's consideration of the bill and the major issues addressed by the committee.

Background

The bill aims to facilitate conversion of the Public Service Investment Society Limited (PSIS) from an industrial and provident society to a company registered under the Companies Act 1993. The PSIS is a financial services co-operative with approximately 130,000 members. It is currently incorporated under the Industrial and Provident Societies Act 1908. The PSIS said that the Act imposes various restrictions on its operations and believe that it is no longer a suitable vehicle for the PSIS as a financial services operation. Accordingly, it is considering registering under the Companies Act 1993.

Registration as a company

The PSIS canvassed its members at its annual meeting in August on this issue. We understand that there is considerable support for the conversion from a society to a company. A special meeting is scheduled for September. The business of this meeting is to confirm a Special Resolution for registration of the society as a co-operative company under the Co-operative Companies Act 1996 and the Companies Act 1993. This is required under section 14 of the Industrial and Provident Societies Act 1908.

The Industrial and Provident Societies Act 1908 (IPS) does provide for the conversion of societies to companies. However, the PSIS argued that the conversion provisions are not sufficient for the conversion of large concerns such as itself. In the absence of this bill, registration by the PSIS as a company would require the written consent of each of its 130,000 shareholders. The PSIS feels that this is impractical, if not impossible. The PSIS is concerned that the consequential provisions of the IPS Act do not adequately provide for legal continuity between the society and the company upon conversion. It also argues that the IPS Act does not clearly provide for continuity between the society and the company for taxation purposes.

The PSIS seeks the bill to allow it to apply to register as a company without the consent of each of its members, provided the application has been approved by a special resolution of members (a 75 percent majority), and to provide for continuity between the society and the company for taxation purposes.

If the bill is enacted the registration requirements of the Companies Act 1993 will have to be complied with except for section 12 (1) (d). This section requires a document signed by all prospective shareholders. Instead a document signed by two members of the board will be required. We consider that the mechanism that the bill provides for conversion adequately protects the rights of individual members of the PSIS.

We were advised by the Ministry of Commerce that it supports conversions from industrial and provident societies to companies and initiatives to facilitate such conversions, because the Companies Act provides more up to date and comprehensive corporate governance laws than the IPS Act does.

Taxes and duties

In its submission the Inland Revenue Department (the department) recommended omitting clause 13 of the bill relating to taxes and duties. The department does not favour specific tax provisions applying to single entities in legislation of this kind. Following discussions between the department and the PSIS, the department now considers that the most practicable solution is to retain a redrafted clause 13 in the bill. We agree.

Clause 13 (1) provides that the existing society and the company it is converted into are the same person for tax purposes. The PSIS considers that this clause is necessary because the bill does not make it clear that the existing society will continue as the company.

We agree that the society and the company should be the same person for tax purposes. A number of options are available to provide for this. First, whether the bill could be recast so that it was clear that the society continued as the company. A binding ruling could then be applied for and, if granted, clause 13 (1) would not be needed. The second option would be to review the legislation relating to industrial and provident societies. Both of these options would involve considerable further work and time.

A third option is that the clause be redrafted to make it clear that the society and the company are the same person for the purposes of the Inland Revenue Acts. We agree that this is the most practicable solution and recommend accordingly.

Continuity of ownership

Clause 13 (2) relates to continuity of ownership for tax purposes. Section 41 of the Companies Act 1993 provides that a company, after its registration, must forthwith issue shares. Upon registration as a company the society ceases to exist. The PSIS argues that because the cessation of membership in the society and the issue of shares do not happen at the same time, there is arguably a moment in time when the members are not members or shareholders. There may be a technical break in the continuity of ownership of the PSIS. For tax purposes this could mean the loss of tax losses and/or imputation credits. Normally, this would be better resolved in the wider context of industrial and provident societies and the conversion provisions of the IPS Act. However, because of practical difficulties outlined above, we agree that clause 13 (2) be redrafted so as to make it clear that the existing members of the society will also be the new shareholders.

Following discussions between the Inland Revenue Department and the PSIS, the PSIS agree that clause 13 (3) regarding exemption from gift duty is unnecessary, and should be omitted. We agree and recommend accordingly.

KEY TO SYMBOLS USED IN REPRINTED BILL
AS REPORTED FROM A SELECT COMMITTEE

Struck Out (Unanimous)

Subject to this Act,

Text struck out unanimously

New (Unanimous)

Subject to this Act,

Text inserted unanimously

(Subject to this Act,)

Words struck out unanimously

Subject to this Act,

Words inserted unanimously

Hon Richard Prebble

**THE PUBLIC SERVICE INVESTMENT SOCIETY
LIMITED**

[PRIVATE]

ANALYSIS

Title	9. References to society in existing instruments
Preamble	10. Continuation of legal and other proceedings
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2. Interpretation	12. Employees
3. Society may decide to be registered as company	13. Taxes and duties
4. Registration as company	14. Application of sections 14A and 14B of Industrial and Provident Societies Act 1908
5. Undertaking of society belongs to company	15. Private Act
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7. Status of contracts and other instruments	
8. Status of securities	

A BILL INTITULED

An Act to enable The Public Service Investment Society Limited to be registered as a company under the Companies Act 1993

5 WHEREAS:

- A. The Public Service Investment Society Limited is a society incorporated under the Industrial and Provident Societies Act 1908 with approximately 130,000 members:
- 10 B. The society wishes to be registered as a company under the Companies Act 1993 with the initial shares in the company held by the members of the society:
- C. Section 14A of the Industrial and Provident Societies Act 1908 enables industrial and provident societies to be registered as companies, but requires an application for registration as a company to be signed by all the initial
- 15 shareholders:
- D. It is impracticable for the society to obtain the signatures of all its members to an application for registration as a company:

- E. Registration of the society as a company in accordance with section 14A of the Industrial and Provident Societies Act 1908 may result in the company becoming liable for the payment of taxes and duties:
- F. It is not considered appropriate that liability for taxes and duties should be incurred as a result solely of a change in the legal status of the society: 5
- G. The society wishes that provision is made for other matters in connection with its registration as a company:
- H. Legislation is the only means by which the society can be registered as a company conveniently and without the risk of adverse tax and other consequences: 10
- I. The *(object)* objects of this Act can be attained only by legislation:
- BE IT THEREFORE ENACTED by the Parliament of New Zealand as follows: 15
- 1. Short Title**—This Act may be cited as The Public Service Investment Society Limited Act 1998.
- 2. Interpretation**—In this Act, unless the context otherwise requires,— 20
- “Board” means the board of the society:
- “Company” means the company that exists on the registration of the society as a company in accordance with this Act:
- “Instrument” includes— 25
- (a) An instrument that creates, evidences, modifies, or extinguishes rights, interests, or liabilities or would do so if it or a copy of it were lodged, filed, or registered under an Act; and
- (b) A judgment, order, or process of a court: 30
- “Liabilities” means liabilities, debts, charges, duties, and obligations (whether present or future, actual or contingent, or payable or to be observed or performed in New Zealand or elsewhere):
- “Property” means real or personal property; and includes— 35
- (a) Choses in action and money:
- (b) Goodwill:
- (c) Rights, interests, and claims in or to property, whether arising from, accruing under, created or evidenced by, or the subject of, an instrument and 40

whether liquidated or unliquidated, actual, contingent, or prospective:

“Rights” means rights, powers, privileges, and immunities, whether actual, contingent, or prospective:

5 “Security”—

(a) Means a mortgage, charge (whether legal or equitable), debenture, bill of exchange, promissory note, guarantee, indemnity, defeasance, hypothecation, instrument by way of security, lien, 10 pledge, or other security for the payment of money or for the discharge of an obligation or liability and whether on demand or not, present or future, actual or contingent; and

(b) Includes an agreement or undertaking to give or 15 execute whether on demand or not any of the things referred to in **paragraph (a)**:

“Society” means The Public Service Investment Society Limited, a society registered under the Industrial and Provident Societies Act 1908:

20 “Undertaking” means the property, rights, and liabilities of the society.

3. Society may decide to be registered as company—

(1) The society may, by special resolution, decide to apply to be registered as a company under the Companies Act 1993.

25 (2) The special resolution must be passed in the manner prescribed by section 14 of the Industrial and Provident Societies Act 1908.

4. Registration as company—(1) The board may, at any time, deliver to the Registrar of Companies a copy of the special resolution and an application for registration under section 12 of the Companies Act 1993.

30 (2) Section 12 (1) (d) of the Companies Act 1993 (which requires the initial shareholders to consent in writing to becoming shareholders) does not apply to the application. Instead, the application and any other documents required to accompany it may be signed by 2 members of the board.

(3) The Registrar of Companies must—

(a) Register the application; and

(b) Issue a certificate of incorporation.

40 (4) The registration of the society ceases on its registration as a company and must be cancelled by the Registrar of Industrial and Provident Societies.

5. Undertaking of society belongs to company—On the registration of the company, the undertaking of the society belongs to and vests in the company.

6. Relationship with depositors—(1) On and from the registration of the company, the relationship between the society and a depositor or an investor becomes the same relationship between the company and the depositor or investor. 5

(2) The same rights and liabilities, including rights of set-off, continue to exist as between the company and the depositor or investor as existed between the society and the depositor or investor immediately before registration. 10

7. Status of contracts and other instruments—Contracts, agreements, guarantees, conveyances, deeds, leases, licences, and other instruments, undertakings, and notices (whether in writing or not), entered into by, made with, given to or by, or addressed to the society (whether alone or with another person) before the registration of the company and subsisting immediately before registration are binding on, enforceable by, against, or in favour of the company, as if the company and not the society had been the person by whom they were entered into, with whom they were made, or to or by whom they were given or addressed. 15
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8. Status of securities—(1) A security held by the society for a debt or other liability to the society incurred before registration of the company is available to the company as security for the discharge of that debt or liability and, if it extends to future or prospective debts or liabilities, is available as security for the discharge of debts or liabilities to the company incurred on or after registration. 25
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(2) The company is entitled to the same rights and priorities and is subject to the same liabilities in relation to the security as the society.

9. References to society in existing instruments—A reference (express or implied) to the society in an instrument made, given, passed, or executed before the registration of the company is a reference to the company. 35

10. Continuation of legal and other proceedings—

5 (1) An action, arbitration, proceeding, or a cause of action that was pending or that existed by, against, or in favour of the society or to which the society was a party before the registration of the company may be continued and enforced by, against, or in favour of the company.

(2) It is not necessary to amend an application, notice, or other document to do so.

10 **11. Effect of this Act and things done under it—**Nothing in this Act and nothing done under this Act—

(a) Places the society, the company, or any other person in breach of contract or confidence or makes any of them liable for a civil wrong; or

15 (b) Entitles a person to terminate or cancel a contract or arrangement or to accelerate the performance of an obligation; or

20 (c) Places the society, the company, or any other person in breach of an enactment, a rule of law, or a provision of a contract that prohibits, restricts, or regulates the assignment or transfer of property or the disclosure of information; or

(d) Releases a surety from an obligation; or

(e) Invalidates or discharges a contract or security.

25 **12. Employees—**(1) On the registration of the company, each employee of the society becomes an employee of the company.

30 (2) For the purposes of an enactment, rule of law, contract, or agreement relating to the employee, the contract of employment of the employee must be treated as unbroken and a period of service with the society must be treated as a period of service with the company.

35 (3) The terms and conditions of employment of the employee must remain the same as the terms and conditions of his or her employment with the society immediately before the registration of the company, but they may be varied in the same manner.

(4) An employee is not entitled to receive a payment or benefit because he or she has, as a result solely of this Act, ceased to be an employee of the society.

40 (5) This section applies despite anything else in this Act.

Struck Out (Unanimous)

13. Taxes and duties—(1) For the purposes of the Acts of Parliament specified in the Schedule of the Tax Administration Act 1994 and any other enactment that imposes or provides for the collection of a tax, duty, levy, rate, or other charge,—

(a) The society and the company are the same person; and 5

(b) A transaction entered into by, and an act of, the society must be treated—

(i) As having been entered into by, or as an act of, the company; and

(ii) As having been entered into, or performed by, the company at the time it was entered into, or performed by, the society. 10

(2) For the purposes of the Income Tax Act 1994, the person or persons on whom voting interests or, if a market value circumstance exists, on whom market value interests in the company are conferred by reason of the issue to that person or those persons of shares in the company on the registration of the company must be treated as the same persons as those persons who, immediately before the registration of the company, were deemed by that Act to hold such interests in the society. 15

(3) The issue of shares in the company on its registration is not a gift for the purposes of the Estate and Gift Duties Act 1968. 20

(4) The terms “voting interest”, “market value circumstance”, and “market value interest” have the same meanings as they have in the Income Tax Act 1994. 25

New (Unanimous)

13. Taxes and duties—(1) For the purposes of the Inland Revenue Acts (as that term is defined in section 3 of the Tax Administration Act 1994)— 30

(a) The society and the company are the same person; and

(b) A transaction entered into by, and an act of, the society must be treated—

(i) As having been entered into by, or as an act of, the company; and 35

New (Unanimous)

(ii) As having been entered into, or performed by, the company at the time it was entered into, or performed by, the society.

5 (2) A person must be treated as having held a voting interest or a market value interest in the company at all times from the time the person became a member of the society if—

10 (a) The person acquired the voting interest or the market value interest in the company after its registration; and

(b) Immediately prior to the cancellation of the registration of the society the person was a member of the society and the interest in the company was acquired solely by virtue of that membership.

15 (3) The terms “voting interest” and “market value interest” have the same meanings as they have in the Income Tax Act 1994.

20 **14. Application of sections 14A and 14B of Industrial and Provident Societies Act 1908**—Sections 14A and 14B of the Industrial and Provident Societies Act 1908 do not apply to the society or the company.

15. Private Act—This Act is a private Act.