

Incorporated Associations Victoria

On 26 November 2012, the old Act was replaced by the Associations Act. This change affects all associations that are incorporated in Victoria. The Associations Act includes a number of key changes including:

- allowing *incorporated associations* to trade, providing profits are used to further the purposes of the associations;
- revising annual reporting and audit requirements;
- replacing the term “public officer” with “secretary”; and
- clarifying the definition of office holders, their duties, and their *indemnity* against *liability*.

A summary of these changes can be found on the CAV website at www.consumer.vic.gov.au

CAV has issued a new set of Model Rules to include these changes. Existing incorporated associations may also need to review their rules to ensure compliance with the requirements with the Act.

Features of an incorporated association

Purpose and membership

An association, as defined by the Associations Act, includes any association, society, club, institution or body formed or carried on for a lawful purpose. The minimum membership of an association is five people.

Legal status

An incorporated association has a legal identity separate from that of its members. Normally, an individual can enter into formal agreements, *sue* (or be sued), buy property and so on, because a person has a legal identity. When a group of people incorporate, that body of people has a collective legal identity. If 10 people form the Buffalo Tom Appreciation Society (BTAS) and then incorporate BTAS, it may sue or be sued, purchase property, enter into agreements and so on, in its own name.

Liability of members

Flowing from the legal status of the incorporated association is an important feature: that the members’ *liability* is limited to the annual subscriptions of the members and any other money due under the Rules of Association.

Secretary

All *incorporated associations* must have a Secretary. This role was formerly called the Public Officer under the old Act. The Secretary is the conduit between the association and those people and organisations that the association deals with. The holding of the office of Secretary does not preclude the holding of another office in the association. The Secretary must be at least 18 years old and a resident of Australia. The Secretary has a number of obligations to the Registrar of Associations, generally having to keep the Registrar informed of certain events and to assist the Registrar in its functions. In particular, the Registrar must be:

- notified of the appointment of the Secretary (within 14 days);

- notified of any change to the Rules of Association (within 28 days), for the Registrar's approval;
- notified within one month of, and give approval for, any change in the name of the association;
- sent the Annual Statement and other required financial information within one month of the Annual General Meeting (AGM) of the association;
- assisted with the inspection of any books (which includes minutes of meetings, accounting records and similar documents) of the association;
- be informed of any motion to wind-up the association and dispose of its assets (within 28 days of the motion); and
- be informed of any change of address within 14 days.

Purposes of the association

The purposes of the association must be set out in the Rules of the association. This "charter" or "mission" sets out what the association is aiming to achieve, how it intends to do so and what will be the collective "beliefs" of the association. Most groups will simply need to commit to writing answers to the questions that they will have discussed when they decided to form an association including: why do we want to form an association, what do we want to achieve, and how are we going to do it?

The rules of association

The rules of an association govern the rights and responsibilities of the members as well as how the association will operate; they are a *contract* between the incorporated association and its members.

The rules must be divided into paragraphs that are set out in a logical sequence (e.g. in alphabetical order such as paragraph a, b, c, etc., or numerically as in 1, 2, 3, etc.).

An association has a choice to either:

1. completely adopt the Model Rules provided in the *Associations Incorporation Reform Regulations 2012* (Vic). A copy of these Rules can also be found on the CAV website at www.consumer.vic.gov.au; or
2. partially adopt the Model Rules. The Model Rules may not adequately provide for all of your association's needs. In this situation your association can legitimately amend the Model Rules to suit its purposes. When making amendments to the Model Rules, the most important matters to keep in mind are simplicity and clarity of language. What is intended to be achieved by the amendment or new clause? Express this aim in the simplest, most unambiguous language. This will assist in avoiding later disputes about what was intended by the Rules; or
3. draft its own rules which must contain the matters specified in schedule 1 of the Associations Act.

If an association decides to change the Model Rules to suit its needs then the following information must be included in detail:

- the name and purposes of the association

Membership

- qualifications for membership;
- fees and subscriptions payable by members;
- rights, obligations and liabilities of members;
- the procedure for disciplining members;
- grievance procedures for settling disputes under the rules

Management and recordkeeping

- the name, membership and powers of the committee or other body having the management of the association. This includes the election or appointment, terms of office, vacation of office and filling of casual vacancies of committee members and the *quorum* and meeting procedure of the committee;
- procedures for the appointment and removal of the Secretary;
- the *custody* of records of the association;
- the custody and use of the common seal of the association;
- provision for members to have access to and obtain copies of the records and other documents of the association;
- the preparation and retention of accurate minutes of general meetings and committee meetings

Meetings

- the intervals between General Meetings, the *quorum* and procedure at General Meetings and the rules regarding *proxy* votes;
- the time and manner in which notices of meetings may be given

Funds

- the sources of the association's funding and the management of that funding (in particular, cheque handling)

Alteration of rules

- the procedure for amending or rescinding the rules of the association and of making additional rules

Winding-up or dissolution

- the disposition of any surplus assets upon winding-up.

Activities

An incorporated association cannot be formed with a view to making a profit for its members. In this way it is different from business organisations such as partnerships. The Associations Act prohibits an association from trading or making *pecuniary* profit for its members (with exemptions for charitable organisations in some circumstances). Generally, only non-commercial non-trading organisations will be suited (or would wish) to use the incorporated association structure.

Community organisations can, with certain limitations, participate in a number of activities typically associated with businesses. An association can carry out the following activities, *deemed* by the Associations Act not to be activities with a view to a profit (see the explanation of non-profit above):

- make a profit itself, so long as that profit is not divided among the members;

- buy and sell goods and services, where doing so is ancillary to the principal purpose of the association, provided that the transactions are with members of the public. The transactions must not be substantial in value, unless they are for admission fees, fees to displays, exhibitions, contests, sporting fixtures or other occasions which are organised for the promotion of the purposes of the association;
- protect or regulate a trade, business, industry or calling so long as the association does not engage or take part in that trade, business, industry or calling;
- divide the assets among the members on dissolution of the association;
- pay its members a salary;
- provide members with a monetary benefit if they would be entitled to it notwithstanding their membership of the association; and
- compete for trophies or prizes in contests related to the purposes of the association.

The common seal

In Victoria it is not legally necessary for incorporated association to have a Common Seal. A Common Seal is simply a stamp showing the association's name and incorporated number, which is used on legal documents. Its purpose is to indicate to people dealing with the association that those documents that feature the Common Seal have been approved by the association.

Where an association chooses to have a Common Seal the Rules of the association must specify the rules regarding its *custody* and use.

Where a document requires authentication by an incorporated association it may be authenticated by the signature of the Secretary and does not need to be authenticated by the use of the Common Seal.

Identifying the association

All *incorporated associations* must have a registered address. An association must display its name and incorporation number on all its notices, business documents and official publications, including its letterhead.

Meetings

All *incorporated associations* must hold an AGM. An association's first AGM may be held within 18 months of incorporation. Subsequent AGMs must be held within five months *after* the end of the association's financial year. An association may apply to the Registrar for an extension of time for holding an AGM.

Regardless of the formality or content of the meeting, the following information must be submitted to the members:

- the income and expenditure of the association during the previous financial year;
- the assets and liabilities of the association at the end of the previous financial year;
- whether there are any *mortgages*, charges or securities affecting property owned by the association at the end of the previous financial year; and
- details of the above information concerning any *trusts* of which the association was the trustee during the previous financial year.

Details of the AGM must be lodged by the Secretary with the Registrar within one month of the date of the AGM. The Secretary must lodge a Statement with the Registrar that sets out when the AGM was held, details of the compulsory financial information set out above, certification that they were presented to the AGM, the resolutions relating to the financial statements and the lodgment fee.

Annual General Meeting

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Minutes of meetings

Incorporated associations must prepare and keep accurate minutes of all meetings (including general and committee meetings). The minutes should be confirmed by members in attendance as an accurate record of the meeting.

Financial reporting

New financial reporting requirements for associations were introduced by the Associations Act.

The committee must ensure that financial statements are prepared at the end of the association's financial year. The association's financial statements must include the following:

- the income and expenditure of the association;
- the balance sheet (assets and liabilities) of the association;
- any *mortgages*, charges and securities affecting any property of the association;
- the income and expenditure, assets and liabilities and any mortgages, charges and securities of any *trust* for which the association was a trustee; and

- details of any trust holding association funds or assets, held on its behalf by another person or body.

The committee must be satisfied that the financial statements give a 'true and fair' view of the association's financial position and performance.

Depending on the total revenue of the association (from all its activities during the last financial year) additional financial reporting requirements may also apply. The Associations Act establishes a three-tiered reporting framework:

- **Tier one:** less than \$250,000;
- **Tier two:** \$250,000–\$1,000,000;
- **Tier three:** more than \$1,000,000.

Tier one associations do not have any additional reporting requirements. They do not need to have their financial statements externally reviewed or audited unless:

- required by the rules of the association;
- a majority of members vote to do so at a general meeting; or
- directed to do so by Consumer Affairs Victoria.

Tier two associations must have their accounts reviewed by an independent accountant. The accountant's report must be presented to members at the AGM. Tier two associations do not have to audit their accounts unless required by the Rules of the association.

Tier three associations must have their accounts audited by an independent auditor. The audit report must be presented to members at the AGM. The auditor must be appropriately qualified and must be:

- a registered company auditor or firm;
- a member (holding a Public Practice Certificate) of CPA Australia or the Institute of Chartered Accountants in Australia, or
- someone approved by the Registrar.

The auditor must also be independent, so the auditor must NOT be:

- a member of the committee of the association;
- an employer or an employee of a member of the committee;
- a member of the same partnership as a member of the committee; or
- an employee of the association.

An incorporated association may only remove its auditor from office by resolution passed at a general meeting of the association. Two months advance notice of the proposed resolution must be provided to all members, the auditor and the Registrar.

How to incorporate

Who has authority to apply?

Any person who is 18 or over, lives in Australia and has been authorised by a majority of the group's members can apply for incorporation.

Holding a meeting

A meeting of the members (a minimum of five) should be held to appoint a Secretary who is authorised to make the application for incorporation and approve the Rules of Association. Members should be given 21 days notice of the meeting and all resolutions must be passed by at least a simple majority (that is, one more than half the people present either in person or by proxy). Minutes of the meeting (that is, a written record of the meeting) should be kept. The minutes should reflect the resolutions passed by the meeting. The resolutions should be along the lines shown below.

Most associations benefit from developing a structure and accordingly will often appoint a Chairperson/President, Treasurer and so on to be responsible for the different functions of the Committee. The Committee of Management (or the Board, whatever it may be called) should appoint officers at its first meeting.

Being a committee member is an important and responsible role. Members should always act honestly, exercising reasonable care and avoiding conflicts of interest. The Associations Act has codified the duties of office holders. An office holder includes committee members, staff and volunteers who make decisions that affect all or a substantial part of the business of the organisation or can significantly affect the financial *standing* of the organisation. Office holders have the following legal duties:

- not to make improper use of information acquired by virtue of holding their office (that is to secure personal advantage, the advantage of others or to the detriment of the association);
- to *discharge* their duties with care and diligence; and
- to exercise their powers in good faith in the best interest of the association, and for a proper purpose.

A committee member must disclose any “material personal interest” (something that can have a significant impact on a matter the association is discussing) to the committee as soon as they become aware of it and the nature and extent of the interest must be recorded in the minutes of the meeting. The nature and extent of the interest must also be disclosed at the next general meeting of the association. A committee member with a *material* personal interest in a matter must not be present while the matter is discussed at the committee meeting, or vote on the matter. (See also “Penalties”, below.)

The Committee will also need to consider whether insurance should be taken out to protect the interests of the association. The Associations Act now requires that associations indemnify each of their office holders against any *liability* that they occur in good faith in the performance of their duties. While the Associations Act does not *require* your association to take out insurance, it is useful to consider whether insurance may be useful to manage this, and other, risks.

Making the application

The application for incorporation is made to the Registrar on an *Application for Association Incorporation* form (IA form 1), which is available from the Consumer Affairs Victoria website at www.consumer.vic.gov.au. The form

must be accompanied by a declaration that the applicant is authorised to make the application, the rules of association and any *trust deed* relating to the association.

As at 1 July 2013, the cost of applying for incorporation is between \$32.10 and \$186.20 – the cost depends on whether the Model Rules are adopted and whether the entity is a company, co-operative or society. The Registrar may refuse to incorporate an association when the type of group appears not to be appropriate as an association.

Naming your association

An association must not have, in the opinion of the Registrar, an undesirable name. While “undesirable” is not further defined, common sense would dictate against obviously offensive names.

The name and the registered number of the association must appear on all business documents including letterheads, notices, advertisements and publications. Once an association is incorporated, it must add the word “Incorporated” or “Inc.” to the end of its name.

An association can change its name by special resolution and by also seeking the approval of the Registrar. The change of name does not change the legal identity of the association, nor does it alter its rights or obligations in law.

Upon incorporation

The Registrar must send a *Certificate of Incorporation* that sets out the name of the association and the date of incorporation. Currently this takes approximately two to three weeks. An association must have a registered address, which can be the address of the Secretary.

Penalties

Committee members, especially the Secretary, should be aware that the Associations Act prescribes various penalties for non-performance of the Act’s requirements. Officers should make themselves aware of their responsibilities and ensure that they are carried out; this satisfies the officers’ duties to the association and the legislative regime.

Ending an association

Amalgamate an incorporated association

Two or more associations may amalgamate to form one association. To do this each of the associations wishing to amalgamate must pass a special resolution approving the terms of the amalgamation and the statement of purposes and rules of the proposed amalgamated association. In addition, the associations must each lodge with the Registrar a *Notice of Special Resolution Approving Amalgamation of Incorporated Associations*.

The application for amalgamation of the associations is made to the Registrar on an Application for Amalgamation of Incorporated Associations, which must be lodged by the Secretaries of the associations collectively. The application must include a copy of the statement of purposes and the rules of the proposed amalgamated association. As at 1 July 2013, the cost of

application for amalgamation is \$102.70 or \$186.20 depending on whether the Model Rules are used.

If the Registrar accepts the application for amalgamation a certificate of incorporation for the amalgamated association will be issued and the incorporation of the individual associations will be cancelled.

Upon amalgamation any property or *debts* of the individual associations becomes the property or debts of the amalgamated association.

Cancel or wind-up an incorporated association

Voluntary cancellation

An association can apply to the Registrar for *voluntary* cancellation if it has assets under \$10,000. The association can apply for voluntary cancellation if it has ceased to operate, has no outstanding *debts* or liabilities and there are no current or proposed legal proceedings against it.

Voluntary wind-up

An association may voluntarily wind-up by special resolution. The association must pass a special resolution to wind-up and confirm the distribution of surplus assets (the amounts left after paying all *debts* and liabilities and the cost of winding-up).

Associations are generally prevented from distributing surplus assets to members or former members on winding-up. Existing associations with Rules approved before 8 April 2009 that provide for the distribution of surplus assets to members will not be subjected to this change.

If the association's assets are \$10,000 or less, it must lodge with the Registrar an Application for Cancellation of Incorporation together with minutes of the meeting passing the special resolution and proof of distribution of assets.

If the association has more than \$10,000 in assets it must appoint a registered liquidator. The association must also lodge with the Registrar the following forms: Notice of resolution (form 205), Notice of appointment or cessation of an external administrator (form 505), Declaration of solvency (form 520), Notification of final meeting convened by liquidator (form 523) and Presentation of Accounts (form 524). These forms are available from the ASIC website at www.asic.gov.au.

Court wind-up of an association

Associations may be compulsorily ended by order of the Supreme Court where:

- the association has, by special resolution, resolved that it be wound up by the court;
- the association suspends its operations for a year;
- the association is unable to pay its debts;
- the association (or the association as trustee) has traded or divided profits among its members (subject to exceptions contained in the Associations Act);
- the association has acted outside its Statement of Purposes; or
- the court believes it is just or equitable to do so.

An application for winding-up can be made by the association, the Registrar or a member or *creditor* of the association. The general provisions, so far as they are relevant, relating to corporations that wind-up voluntarily or involuntarily also apply to associations.

Alternatively, a small association that has less than \$10,000 in assets, no outstanding *debts* or liabilities, lodged all annual statements and paid all required fees and is not a party to any legal proceedings can apply to the Registrar for *voluntary* cancellation of its incorporation.