

*“
Review of the
Associations Incorporation
Act 1981
”*



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“ Preface ”

The Minister for Consumer Affairs, John Lenders MP, has asked me to review the operation of the Associations Incorporation Act 1981 to ensure that it remains effective and relevant to the 30,000 associations and clubs incorporated in Victoria under the Act.

The review will consider the objectives of the law for incorporated associations and examine the effectiveness and efficiency of the Act and its administration having regard to the varying size and diversity of associations registered under the Act.

The review panel, chaired by Dianne Hadden, has met with a cross section of associations over the past three months to help identify issues that need to be addressed in the review. The panel is interested in hearing from a wide range of incorporated associations and clubs so that it may be informed of and consider all relevant views.

This is an opportunity for associations and clubs to contribute to improving the legal framework under which they operate to ensure that their activities are conducted under the best possible framework.

The Government has a strong commitment to building and strengthening communities with the objective of increasing participation, reducing inequality and improving people’s quality of life. It is important both economically and socially to build the capacity and opportunity for people to be involved in Victorian communities. One of the ways to build and strengthen our communities is to encourage and

facilitate the operation of networks of mutual support and obligation through which members can access resources and enjoy social benefits.

This Discussion Paper seeks broad community input to ensure that the review of the Associations Incorporation Act 1981 results in a more efficient and effective operation of the law and its administration in relation to incorporated associations.



DIANNE HADDEN MP
Member for Ballarat Province

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“ Section 1 The Review ”

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In December 2003, the Minister for Consumer Affairs, John Lenders MP announced a review of the Associations Incorporation Act 1981. The review will be led by Dianne Hadden, MLC for Ballarat Province.

The **Terms of Reference** for the review are:

1. report on the objectives of the Associations Incorporation Act 1981 having regard to
 - (a) the varying nature and size of incorporated associations registered under the Act, and
 - (b) Commonwealth legislation permitting incorporation of community organisations;
2. examine the effectiveness and efficiency of the law and its administration in Victoria in relation to incorporated associations; and
3. identify whether the Act should be amended and assess any alternative means of achieving the objectives of the Act.

The review panel met with a cross-section of associations in December 2003 and January/February 2004 to help identify issues that need to be addressed in the review.

This discussion paper sets out the issues that were identified as a result of these preliminary consultations as well as identifying some other areas in which the current legislation may be improved.

The review panel invites submissions from incorporated associations and the communities they serve to help develop a system of regulation that meets broader community needs.

Incorporated associations and interested parties have until **31 May 2004** to make written submissions in response to the discussion paper.

A final report and recommendations will be submitted to the Minister for Consumer Affairs in August 2004.

Submissions should be forwarded to:

The Review Panel
Review of Associations Incorporation Act 1981
Consumer Affairs Victoria
PO Box 123A
MELBOURNE VIC 3001

or by email to: associations@justice.vic.gov.au

Closing Date for Submissions: 31 May 2004

“ Section 2 Executive Summary ”

2

This discussion paper outlines the history and objectives of the *Associations Incorporation Act 1981* and the current system of regulation for incorporated associations.

The paper identifies and discusses a number of issues which have been identified as a result of the Review Panel’s preliminary consultations with a cross-section of stakeholders and the experience of Consumer Affairs Victoria in administering the Act.

One of the issues raised for comment is the extent to which incorporation under the Act should be restricted on the basis of an association’s revenue, assets and scale of activities, bearing in mind that the Commonwealth operates an extensive system of regulation for non-profit entities that are incorporated as companies limited by guarantee under the *Corporations Act 2001*.

Another issue raised for consideration is whether the Act should maintain the current system which has two levels of financial reporting for large (prescribed) and small (non-prescribed) associations, as defined on the basis of annual revenue and assets. Given that many small incorporated associations appear to have difficulty in complying with the requirement to lodge annual financial statements with the Registrar, should this requirement be waived and, if so, at what level of income or assets should incorporated associations be expected to lodge annual statements.

Would there be any disadvantages to members of associations, their stakeholders and the community if the annual statements of incorporated associations were not accessible via a search of the register?

The section on winding up looks at two issues in particular – whether there should be a simple procedure to enable incorporated associations with limited assets to wind up without having to appoint a liquidator, and whether the Act should prohibit any distribution of assets to members on winding up.

Other issues raised include the role of the Public Officer, options for dispute resolution, corporate governance and availability of information.

“ Section 3 Background ”

3

3.1 Government Policy

One of the Government's central objectives is to build stronger communities. This may be achieved by increasing community involvement, building stronger partnerships with community organisations, and delivering government services in a way that supports and strengthens communities across Victoria.

The *Associations Incorporation Act 1981* enables non-profit community organisations and clubs to attain the benefits of corporate status and limited liability. The Government believes that the regulatory framework for incorporated associations should support their formation and operation in an effective manner, thereby providing direct benefits to the communities they serve and to Victoria generally.

Non-profit institutions are an important component of the Australian economy. Australian Bureau of Statistics' figures¹ indicate that non-profit institutions contributed \$21 billion or 3.3 percent to Australia's Gross Domestic Product in 1999-2000. When the free services provided to non-profit institutions by volunteers were valued and included, the contribution rose to \$30 billion or 4.7% of GDP.

Non-profit organisations often rely heavily on volunteer participation. A survey of volunteers in 2000 by the Australian Bureau of Statistics² indicates that nearly one third of Australians aged 18 years and over did voluntary

work in 2000, contributing 704.1 million hours of unpaid work. In Victoria, 28.9% of people provided volunteer services in metropolitan areas and 43.8% in rural areas, totalling nearly 200 million hours of volunteer labour annually. Following fundraising, participation on voluntary committees of management is the second highest volunteering activity. Over half a million people in Victoria participate in the governance and management of non profit organisations.

This data is included to illustrate generally the contribution of non-profit organisations and volunteers to the economy, community and in providing a form of social capital. While the above figures encompass various types of non-profit organisations and activity, there is no doubt that incorporated associations make a significant contribution to the Victorian community.

3.2 Sector Profile

At 31 December 2003, there were 29,863 incorporated associations registered in Victoria. Of these, 2061 (7%) were classified as 'prescribed associations'. Under the *Associations Incorporation Act 1981*, a 'prescribed association' means an incorporated association that has gross annual receipts in excess of \$200,000 or gross assets in excess of \$500,000.

¹ A.B.S, *Australian National Accounts, Non-Profit Institutions Satellite Account, 1999-2000* (cat. no. 5256.0)

² A.B.S, *Voluntary Work Australia 2000* (cat. no. 4441.0)

Prescribed associations are subject to additional mandatory financial reporting requirements which are discussed in section 4.3.1 (page 9) of this paper.

The incorporated associations on the Consumer Affairs Victoria Register represent diverse interests and groups in the community, including sporting, education, cultural or community service clubs. The size and scale of activities range from special interest clubs which have few members and whose income is derived solely from subscriptions to large non-profit organisations that operate businesses such as hospitals, nursing homes and employment services.

Forty-seven percent of all incorporated associations use the model rules, the remainder have adopted either their own form of rules or amended the model rules to suit their requirements.

3.3 History and Objective of the Act

The *Associations Incorporation Act* 1981 was passed to implement the recommendation of a sub-committee of the Chief Justice's Law Reform Committee that legislation be enacted to provide a simple and inexpensive means by which unincorporated non-profit associations may obtain corporate status.

The sub-committee was asked to consider what steps, if any, should be taken to enact legislation which would enable unincorporated associations to sue or be sued, receive gifts and bequests, enable members of unincorporated associations to enforce their rights as members and facilitate the equitable distribution of the assets of an unincorporated association upon dissolution. The terms of reference reflected some of the practical difficulties faced by unincorporated associations which are not entities recognised by the law.

Prior to the introduction of the *Associations Incorporation Act*, some non-profit associations sought incorporation under the *Companies Act* or the *Co-operation Act*, both of which were aimed primarily at profit making bodies.

However, many unincorporated associations were unwilling to seek incorporation under those Acts presumably because of the more stringent requirements for keeping, auditing and lodging financial accounts.

The *Associations Incorporation Act* provides a means of incorporation to any association, society, club, institution or body formed or carried on for any lawful purpose that has not less than five members. The introduction of the Act addressed many of the difficulties faced by unincorporated associations by providing a relatively simple mechanism of incorporation which conferred the benefits of limited liability of members, perpetual succession, ability to enter into contracts, and power to acquire, hold and dispose of property.

In addition to addressing the problems faced by unincorporated associations, parliamentary records show that the Act was also viewed by the Government of the day as a means of encouraging and promoting the formation and expansion of voluntary organisations in Victoria.

The Act has been amended several times but the most significant amendments were passed in 1997 and took effect from 1 July 1998. Financial reporting requirements were increased for large incorporated associations (defined as 'prescribed associations') and the Registrar was given greater powers to administer the Act including the power to reject applications for incorporation, direct the transfer of incorporated associations to another form of incorporation, and to direct the winding up of incorporated associations on specified grounds. A summary of the current legislative provisions is provided below.

3.4 Administration of the Act

The *Associations Incorporation Act* is administered by Consumer Affairs Victoria. The Director of Consumer Affairs, as Registrar of Incorporated Associations, is responsible for maintaining an accurate and current register of incorporated associations and ensuring that incorporated associations comply with the reporting requirements of the Act. Members of the public may search the register and obtain copies of lodged documents for a fee.

The Registrar's role includes assessing applications for incorporation, approving the rules of incorporated associations, monitoring the lodgement of annual statements to ensure that financial reporting requirements are met, and ensuring that any winding up and distribution of assets is in accordance with the law.

The Registrar has specific powers in relation to rejection of applications for incorporation, giving directions to transfer to another form of incorporation, and winding-up and cancelling incorporated associations.

Consumer Affairs provides information to incorporated associations about their responsibilities under the Act via a telephone enquiry service and by publishing information on its website and in printed form.

Consumer Affairs also investigates complaints about incorporated associations that involve breaches of the Act. Consumer Affairs aims to promote compliance with the Act by ensuring that incorporated associations are informed of their obligations and that any breaches of the Act are rectified.

In the financial year ended 30 June 2003, Consumer Affairs registered 1,568 new incorporated associations and cancelled 1,108 defunct incorporated associations.

During the past few years, the total number of incorporated associations has remained relatively steady at approximately 30,000.

3.5 Responsibilities of Incorporated Associations under the Act

An incorporated association must have at least 5 members, a statement of purposes and a set of rules that provide for the matters covered in the schedule to the Act. These matters pertain to the administration of an incorporated association and include membership qualifications; fees and subscriptions; constitution, powers and election of the committee; procedure, quorum, notice of general meetings; sources of funds; custody and inspection of documents; disposition of surplus assets on winding-up; and grievance and disciplinary procedures.

An incorporated association may adopt the model rules that are contained in the Associations Incorporation Regulations 1998 or adopt its own set of rules. If an association adopts its own rules, the rules must provide for all seventeen matters listed in the schedule to the Act. If one of these matters is not included, then the corresponding rule in the model rules is deemed to apply.

An incorporated association may amend its statement of purposes or its rules by special resolution. A special resolution is passed if not less than three-quarters of entitled members at a meeting vote, in person or by proxy, in favour of the resolution and any additional requirement of the rules relating to the passing of a special resolution has been met. The public officer must apply to the Registrar for approval of the alteration within 28 days after the alteration was passed. The Registrar must approve the alteration unless it is contrary to the Act or the regulations.

The rules of an incorporated association constitute the terms of a contract between the association and its members for the time being. The rules must set out a grievance procedure for dealing with any dispute under the rules between a member and the incorporated association or a member and another member. If the dispute cannot be resolved by mediation, an incorporated association or a member of an incorporated association may apply to the Magistrates' Court for an order to enforce the observance or performance of the rules or to declare and enforce the rights or obligations of the incorporated association and its members.

The Public Officer is the primary contact within the association and is responsible for lodging documents with the Registrar. The onus is on the public officer to notify Consumer Affairs of his or her appointment as public officer and the date of appointment.

All incorporated associations must hold an annual general meeting within five months after the end of the financial year of the association and submit to members at the annual general meeting a financial statement containing the particulars prescribed in Section 30(3) of the Act. The financial statements must give a true and fair view of the financial position of the association and if the association is a 'prescribed association' be accompanied by the audited accounts of the association. The public officer must lodge an annual statement with the Registrar within one month after the annual general meeting.

The Act sets out certain duties of committee members of incorporated associations. A committee member must not make improper use of his or her position in the association or information acquired by virtue of that position so as to gain any pecuniary benefit or material advantage or so as to cause a detriment to the association. A committee member must disclose any interest in a contract or proposed contract with the incorporated association and must not take part in any decision of the committee with respect to that contract.

An incorporated association may wind up voluntarily if members so resolve by special resolution. Certain provisions of the Corporations Act 2001 are applied to the voluntary winding up of an incorporated association.

Incorporated associations may also be wound up by the Supreme Court or on Certificate of the Registrar if the prescribed grounds exist.

The Act also provides for the cancellation of incorporated associations that are no longer operating. If the Registrar is of the opinion that an incorporated association has ceased to operate, he may give notice to the association requiring it to show cause why its incorporation should not be cancelled. If no response is received within 28 days after notice is given, the Registrar may cancel the incorporation. On cancellation any remaining assets of the association vest in the Registrar who may give directions for their distribution or disposal.

“ Section 4 Issues ”

4

4.1 Type and size of entity incorporated under the Act

The *Associations Incorporation Act 1981* was introduced to provide a simple and inexpensive means by which unincorporated non-profit associations could obtain corporate status. The 1981 Act contained minimal financial reporting requirements and made no provision for duties of the committee of management. Failure to comply with certain requirements of the Act constituted an offence, but penalties were relatively low. A simple regulatory scheme was deemed appropriate at the time since the aim of the Act was to facilitate incorporation of non-profit associations in the community and to ensure that volunteer committee members were able to obtain the benefits of limited liability.

Since 1981 the size of many incorporated associations, as measured in annual turnover and assets, has grown considerably. This is partly due to the growth in the scale of the operations of some incorporated associations and the introduction of gaming machines into many sporting and recreational clubs. Further, since 1981 many large non-profit organisations have chosen to become incorporated as associations under the *Associations Incorporation Act* rather than as a company limited by guarantee under the *Corporations Law*. In addition, many non-profit organisations that originally incorporated as companies

limited by guarantee prior to the introduction of the *Associations Incorporation Act* have since transferred to the Act.

Prior to 1998 the Registrar had no power to reject applications providing that the purpose of the association was lawful and the correct procedures for incorporating were followed. From 1 July 1998, amendments to the Act enabled the Registrar to reject applications for incorporation on the grounds of the scale or nature of the activities of the association, or value or nature of the property of the association, or extent or nature of the dealings an association has with the public. The Registrar also has the power to direct incorporated associations to transfer to another form of incorporation if deemed appropriate on the basis of these same grounds.

There are currently around 680 incorporated associations which have gross annual revenue over \$1 million. Of these associations, 109 associations have gross annual revenue over \$5 million.

The financial reporting requirements for large associations were increased under the 1998 amendments to the Act. These amendments aimed to address concerns that associations with substantial income and assets were subject to insufficient financial reporting standards.

In addition, the 1998 amendments clarified the responsibilities of committee members of incorporated associations with the addition of some duties and obligations. Committee members were prohibited from

knowingly or recklessly making improper use of their position or information acquired by virtue of their position so as to gain any pecuniary benefit or to cause a detriment to the association. If a committee member is found guilty of an offence under these provisions, they may be fined up to \$6,000 and ordered by the Court to pay compensation to the association.

Committee members were also required to disclose any pecuniary interest in contracts with the association and to refrain from taking part in any decisions of the committee in relation to those contracts. A breach of these requirements may result in a fine of up to \$1,000.

The *Associations Incorporation Act 1981* remains less prescriptive and contains fewer enforcement options than the *Corporations Act 2001*. While common law duties are likely to apply to committee members of incorporated associations, the fact that the *Corporations Act* contains substantial civil and criminal penalties in respect of some directors' duties appears to be a factor in the decision by non-profit associations to become incorporated associations. Another factor in the decision may be the cost of complying with the financial reporting requirements of a public company under the *Corporations Act*. However, while there are some differences between the reporting obligations of a prescribed association and a company limited by guarantee, it is unlikely that the compliance costs of a company limited by guarantee would be prohibitive for incorporated associations meeting the criteria that define a prescribed association.

The difference between the two regulatory schemes in respect of application and lodgement fees is no longer significant. An application to become an incorporated association lodged manually costs \$50 if the association adopts the model rules and \$100 if the association adopts its own set of rules and the fee to lodge an annual statement is \$35. Following recent changes to the *Corporations Act Regulations*, an application to become a company limited by guarantee costs \$330 and the fee to lodge the annual review is \$40.

There appears to be two aspects to the argument for requiring large incorporated associations that conduct

significant business activities or have significant income or assets to incorporate under the *Corporations Act 2001*, notwithstanding that the revenue generated is applied towards a non-profit purpose:

- i. Organisations of similar scale and objects should be subject to similar regulation. In other words, it is arguable that incorporated associations which engage in substantial business activities should be subject to the same standards of financial reporting and their committees of management subject to the same accountability standards as like organisations that are regulated under the *Corporations Act 2001*.
- ii. There would appear to be little justification in having two regulatory systems at Commonwealth and State level aimed at the regulation of similar entities.

An opposing argument is that the transfer of such large incorporated associations to Corporations Law would increase the responsibilities and potential liabilities of committee members (as directors) and that this would act as a significant deterrent to members of the community volunteering their services to non-profit associations.

Issue Number 1

Should incorporated associations beyond a certain size as defined by income, assets or level of business activity, be required to become a company limited by guarantee under Corporations Law?

Issue Number 2

What levels of income or assets, types of activities or other criteria should be used as criteria by the Registrar for rejecting an application for incorporation or issuing a direction to transfer to another form of incorporation?

Issue Number 3

If large incorporated associations were required to transfer to the Corporations Act, what impact would such a change have on the associations and their volunteer committee members?

4.2 Nationally consistent legislation

During the review's preliminary consultations some associations mentioned the difficulties encountered by national organisations that have branches in more than one State and suggested that there should be more uniformity in State legislation for incorporated associations. The regulation of incorporated associations and related administrative requirements varies considerably from one State jurisdiction to another.

Some incorporated associations have a national executive and branches operating in several States. The branches are often incorporated separately under State association incorporation legislation and are subject to different requirements in respect of accounting and audit requirements, financial reporting to members, lodgement of annual statements and requirements in relation to the association's rules and amendments to the rules.

It is not known what percentage of associations incorporated in Victoria operate across State borders or are affiliates of national bodies. Comments made during the preliminary consultations suggest that some associations experience difficulties as a result of having to comply with different legislative regimes. This particularly seems to be the case where associations operate under national or international charter, bylaws or rules but have to take account of different legislation and implement varying procedural arrangements in each State. It has been suggested that there may be a need for nationally consistent or uniform legislation for incorporated associations.

While consideration of a nationally consistent legislation is beyond the scope of this review, the review panel is interested in hearing of any problems encountered by incorporated associations that result from differences between State regimes for incorporated associations.

Issue No 4

Has your association encountered any difficulties as a result of differences between State legislation for incorporated associations?

Issue No 5

Should States move towards a nationally consistent regulatory regime for incorporated associations?

4.3 Financial Reporting Requirements

4.3.1 Prescribed associations

The Act has a two-tier system of financial reporting for incorporated associations. Incorporated associations that have gross annual revenue over \$200,000 or gross assets over \$500,000 are classified as 'prescribed associations' and subject to a higher standard of financial reporting. This two-tier reporting system commenced on 1 July 1998 and currently 2,061 incorporated associations or 7% of the total number of associations on the register are classified as 'prescribed'.

The extra level of reporting was introduced in 1998 in response to concerns that incorporated associations with significant revenue and assets were not subject to an appropriate level of financial accountability, and that some organisations were opting to incorporate under the Act to avoid the more onerous responsibilities under other regulatory schemes.

Prescribed associations are required to prepare their accounts in accordance with prescribed Australian Accounting Standards and to have their accounts audited. The accounts must be audited by a registered company auditor, or a person who is a member of CPA Australia or the Institute of Chartered Accountants in Australia or any other person or class of persons approved by the Registrar. A prescribed association must keep all accounting records for a period of seven years after the completion of the transactions to which they relate.

While Consumer Affairs monitors the lodgement of annual statements from all incorporated associations, the annual statements and audit reports from prescribed associations are reviewed on lodgement to ensure that they comply with the reporting requirements of the Act and the accounting standards prescribed in the Associations Incorporation Regulations. If an auditor's report is qualified, further information may be sought from the auditor and/or the association.

The extra level of reporting for large associations does not appear to have caused any significant problems and may have resulted in an overall improvement in corporate governance within these associations.

The level of compliance among prescribed associations with financial reporting requirements is reasonably high. As at 30 June 2003, 86% of prescribed associations were up-to-date with the lodgement of their annual returns. The 14% that had overdue returns included a number of associations that had ceased operating or were in the process of winding-up.

Issue Number 6

Should the Act contain different levels of reporting to accommodate associations with different levels of income and assets?

Issue Number 7

At what level of assets and income should incorporated associations be

- (i) **required to comply with accounting standards, and**
- (ii) **have their accounts audited?**

Issue Number 8

Have incorporated associations or their accountants/auditors experienced any difficulties in complying with the current financial reporting requirements for prescribed associations?

4.3.2 Non-Prescribed associations

All incorporated associations are required to have an annual general meeting and submit to members a financial statement containing particulars of income and expenditure; assets and liabilities; mortgages, charges and securities affecting the property of the association; and details of any trusts. A copy of this statement has to be lodged with the Registrar within one month of the annual general meeting.

The level of compliance among small or non-prescribed associations with the requirement to lodge an annual statement with the Registrar has improved considerably in recent years but remains lower than for prescribed associations. Consumer Affairs sends an annual reminder to all incorporated associations just prior to the end of their financial year, as recorded on the register. An association has five months to hold an annual general meeting after the end of the financial year and one month to lodge the annual statement. If a statement has not been received within this period, Consumer Affairs sends a letter to the public officer of the association requesting lodgement of the overdue annual statement. Despite these two reminders, some non-prescribed associations fail to lodge their annual statements on time. As at 30 June 2003, 6,472 non-prescribed associations or 23% had one or more annual statements outstanding.

There have been various reasons advanced for this non-compliance including:

- lack of awareness by committee members and/or public officer of their obligations to lodge an annual statement;
- annual changes of committee members and public officers means that there is often a lack of continuity and information may not be passed on within the association;
- committee members and public officers of incorporated associations are usually volunteers who have little time or resources available to them.

It has been suggested that one option is to abolish the requirement to lodge an annual statement with the Registrar, particularly for incorporated associations with small amounts of income and assets. Instead they could be required to lodge a statement with the Registrar certifying that an annual general meeting has been held and a financial statement has been submitted to members.

This would lessen the workload for volunteer committee members and public officers to some degree and presumably reduce non-compliance with lodging requirements.

The disadvantage for members of incorporated associations and the community in general is that there may be a reduction in transparency and accountability as financial information about the association would no longer be available via a search of the register.

Issue Number 9

Should small incorporated associations with limited income and assets be exempt from the requirement to lodge annual statements?

Issue Number 10

At what level of assets and income should incorporated associations be required to lodge annual statements?

Issue Number 11

What impact, if any, would exempting small incorporated associations from lodging annual financial statements have on associations and/or the communities they serve?

4.4 Winding up Incorporated Associations

There are several ways in which an incorporated association may be wound up:

- i. members may pass a special resolution to wind up voluntarily;
- ii. an incorporated association, members or creditors, or the Registrar may apply to the Supreme Court to have the association wound up;
- iii. the Registrar may issue a certificate to wind up the association on specified grounds.

If an incorporated association wishes to wind up voluntarily, members must pass a special resolution to authorise the winding up. Members may also pass a special resolution in relation to the distribution of any assets of the association. If no special resolution is passed, the assets must be distributed in accordance with the rules of the association or if the rules do not otherwise provide, be divided amongst the members of the association in equal shares. If, on the winding up date or any time in the previous five years, the rules prohibited the distribution of assets to any of the members, a special resolution that provides for the distribution of assets to members is of no effect.

Certain provisions of the *Corporations Act 2001* are applied to the voluntary winding of an incorporated association. This means that an incorporated association must appoint a registered liquidator unless it has gross assets of \$10,000 or less, when it may appoint a member of CPA Australia, or the Institute of Chartered Accountants in Australia, or a person approved by the Registrar to wind up its affairs.

Incorporated associations may also be wound by the Supreme Court or on Certificate of the Register if the prescribed grounds exist. The grounds for a winding up by the Supreme Court include insolvency, trading or securing pecuniary profit for members and engaging in activities outside the scope of the association's statement of purpose. The grounds for winding up on certificate of the Registrar include trading or securing pecuniary profit for members, failure to lodge annual statements for two consecutive years, failure to remedy a breach of the Act, and failure to comply with a direction to transfer.

The Act also provides for the cancellation of incorporated associations that are no longer operating. If the Registrar is of the opinion that an incorporated association has ceased to operate, he may give notice to the association requiring it to show cause why its incorporation should not be cancelled. If no response is received within 28 days after notice is given, the Registrar may cancel the incorporation. On cancellation any remaining assets of the association vest in the Registrar who may give directions for their distribution or disposal. The criterion used by the Registrar for deeming an association as no longer operating is failure to lodge an annual statement for three consecutive years.

There are two particular issues that have been raised in relation to the current winding up provisions of the Act:

Should the Act provide a simplified procedure to dissolve incorporated associations with few or no assets?

Should the Act prohibit the distribution of assets to members?

4.4.1 Simplified Procedure to Wind-up

While the Act makes provision for the voluntary winding up of incorporated associations, in practice many incorporated associations do not formally wind up but instead simply cease to continue their operations. This may be the result of a decision by members to dissolve operations but often it is simply because membership has declined below the minimum number of five or because there are insufficient members to form a committee of management. In many instances, the association has few or no assets remaining and insufficient funds to cover the costs of appointing a liquidator. These associations tend to remain listed on the register for a number of years until they are finally identified by Consumer Affairs as no longer operating and cancelled.

It is proposed that the Act be amended to include a simple procedure that would enable incorporated associations to request voluntary cancellation if the association has ceased or intends to cease operating and has assets below a defined level. The *Corporations Act 2001* permits a simple voluntary deregistration procedure which allows companies that have ceased

operations and have assets worth under \$1000 to apply for deregistration. A similar procedure is proposed which would enable incorporated associations with assets below a defined level to request voluntary cancellation instead of having to appoint a liquidator.

Incorporated associations that have assets above the defined level will continue to be required to wind-up in accordance with the procedure in the *Corporations Act 2001* and to appoint a liquidator to oversee the distribution of assets.

It is proposed that associations with assets below a prescribed amount that wish to request cancellation would be required to make an application to the Registrar certifying that the association has ceased, or intends to immediately cease operations; the members agree to cancellation; the association has no outstanding liabilities and is not a party to any legal proceedings; and the association has lodged all documents and paid all fees under the Act.

Issue Number 12

Should the Act provide a mechanism by which incorporated associations may request cancellation if they have ceased or intend to cease operations and have few or no assets to distribute?

Issue Number 13

At what level of assets should associations be required to appoint a liquidator to wind up their affairs?

4.4.2 Distribution of Assets to Members

There appears to be an anomaly in the Act concerning the ability of members to profit from the assets of the association. While the Act expressly prohibits an incorporated association from securing pecuniary profit for its members, the Act in some circumstances permits the distribution of assets to members on the voluntary winding up of an incorporated association.

In a voluntary winding up, an incorporated association may pass a special resolution in relation to the distribution of assets, including a distribution to members. If an association does not pass a special resolution to distribute the assets in a voluntary winding up, the Act provides that the assets must be distributed according to the rules or be divided amongst the members in equal shares.

In both situations, the Act prevents a distribution of assets to members if, at any time in the preceding five years, the rules of the association prohibited the distribution of assets to members. This restriction on the distribution of assets to members was introduced in 2000 to address situations where incorporated associations have changed their rules just prior to winding up to enable members to profit from the sale of the association's property.

The question raised for consideration is should members of incorporated associations be allowed to profit from the distribution of assets on winding up.

Most incorporated associations are genuinely non-profit and contain clauses in their rules to prevent the distribution of assets to members on winding up. Tax laws also require such clauses if the association wishes to claim tax exemptions.

Nevertheless there are some associations that have no provisions in their rules to prevent distribution of property to members on winding up and comments are sought on whether this remains appropriate. Other jurisdictions, for example, New South Wales and South Australia, have prohibited incorporated associations from distributing surplus property on winding up to any members or former members.

Issue Number 14

Should incorporated associations be prohibited from distributing any assets to members or former members on winding up?

Issue Number 15

Are there any other aspects of the winding up provisions that should be changed?

4.5 Role of Public Officer

The public officer of an incorporated association is the first point of contact in the association. Any notices from Consumer Affairs to the association are sent to the public officer at the registered address of the association. It is therefore important that these details are kept current. The name of the public officer is recorded in the register along with the registered address and is available to anyone who conducts a search of the register.

A public officer must be at least 18 years of age and a resident in Victoria. The first public officer may be the person who made the application for incorporation or another person if the application so provides. If the position of public officer becomes vacant, the committee shall appoint a person to fill the vacancy within fourteen days. The public officer does not have to be, but usually is, a member of the association. The role of public officer is not an elected position, but committee members may take on the role in addition to their own role, eg. Secretary/Public Officer.

A public officer is responsible for notifying Consumer Affairs of his or her appointment within fourteen days. This is done by completing a Change of Details form which enables the public officer to notify Consumer Affairs of any changes to the public officer or registered address of the association. The registered address may be the address of the public officer or another address.

In practice, many public officers fail to notify Consumer Affairs of their appointment or any changes to the registered address of the association. This has a detrimental effect on the currency of the register and may lead to the cancellation of the association's incorporation if the association cannot be contacted by Consumer Affairs giving notice to the registered address.

The requirement that public officers themselves notify Consumer Affairs of their appointment has also led to situations where more than one person has lodged documents claiming to be the public officer of an association.

It appears desirable to change the procedure by which Consumer Affairs is notified of a change of public officer. One option is to make it a responsibility of the committee of management to lodge the notification of the change of public officer within fourteen days of the appointment. The notice of appointment could be signed by two committee members, thus increasing the likelihood that the notification of appointment is authentic. This should address the current problems of disputes over public officer appointments and the failure by incoming public officers to notify Consumer Affairs of their appointment.

Another problem that sometimes arises is when a public officer leaves that position but fails to return documents, books or records of the association in a timely manner. This may make it difficult for an association to comply with requirements to lodge annual statements and may lead to loss of continuity in an association's operations, particularly with regard to knowledge of and compliance with statutory obligations.

During the review panel's preliminary consultations it was suggested that there may be some confusion about the title and role of public officers. There are similarities between the duties of a public officer and the duties usually undertaken by the Secretary of an association and it was suggested that role could be performed by the Secretary or another executive committee member and perhaps renamed.

Issue Number 16

Should the committee of management be responsible for notifying the Registrar of a change of public officer?

Issue Number 17

Should the notification of a new public officer be certified by two committee members?

Issue Number 18

Should there be a requirement that an outgoing public officer must return all documents relating to the association to the committee of management or the new public officer within a prescribed period?

Issue Number 19

Should the role of public officer be performed by the Secretary or another executive committee member of an incorporated association and renamed?

Comments are invited about the effectiveness of current dispute resolution options for incorporated associations and their members. Are there other mechanisms which would provide more user-friendly and cost effective options?

Issue Number 20

Are the current dispute resolution options sufficient and effective?

Issue Number 21

What alternatives options should be considered?

4.6 Dispute Resolution

The Act provides that incorporated associations must provide a grievance mechanism in their rules to address disputes under the rules between the association and members and members between themselves.

If a dispute cannot be resolved by mediation, an incorporated association or a member of an incorporated association may apply to the Magistrates' Court for an order to enforce the observance or performance of the rules or to declare and enforce the rights or obligations of the incorporated association and its members.

In practice, not many members or committees of incorporated associations are prepared to apply to the Magistrates' Court for a determination of their disputes, usually because of the application and any legal fees that may be involved and the uncertainty about the outcome and costs.

Some associations that have protracted disputes within their committees and membership seek assistance from Consumer Affairs or other government agencies, including the departments that provide funding to their association. Since these government agencies have no authority to enforce the rules of an incorporated association, the attempts by members to obtain assistance are frustrated and they may resort to seeking intervention by the Ombudsman, Ministers and Members of Parliament.

4.7 Corporate Governance

One issue that was consistently raised by stakeholders during preliminary discussions was the need to improve standards of corporate governance in incorporated associations. Committee members are often unaware of their obligations under the Act and, in particular, the need to follow the procedures in the association's rules or constitution. In part this may be due to the frequent turnover of committee members and the time constraints experienced by volunteer committee members. Some associations suggested that a code of good governance practice be developed and be included either in the Act or in the Schedule and model rules. Other issues were raised in relation to the model rules, uncertainty about the rights of members to access registers and documents of the association and information requirements of incorporated associations. Some of these issues are discussed below.

4.7.1 Register of members, minutes of meetings, and access to documents

One aspect of good administration and corporate governance within an incorporated association is the maintenance of an accurate register of members and the keeping of accurate minutes of meetings. A related issue is the rights and conditions of access that members have to those registers, minutes and other relevant documents of the association and concerns about privacy. Disputes often arise when members feel entitled to access certain information that the committee has chosen to withhold.

Under the *Associations Incorporation Act*, the maintenance of a register of members is among the list of matters which an incorporated association must provide for in its rules. These matters are set out in the schedule to the Act. There is currently no reference in either the Act or the schedule to the recording and keeping of minutes of committee and general meetings

of the association, nor are minutes of meetings mentioned in the definition of 'relevant documents' of an incorporated association.

Other jurisdictions such as New South Wales, South Australia and Queensland have to varying degrees made provision in their legislation for the keeping of minutes of committee meetings and general meetings.

It has been the experience of Consumer Affairs that many incorporated associations do not keep proper minutes of meetings and that this hinders both the good administration of an association and the resolution of any disputes about proceedings.

This omission could be rectified by the insertion of a provision in the Act requiring an incorporated association to record and keep the minutes of committee and general meetings. The rules of an incorporated association should set out the rights of members to access minutes of meetings and any conditions of access.

Issue Number 22

Should it be mandatory for incorporated associations to record and maintain minutes of committee and general meetings?

Issue Number 23

Should an incorporated association be required to set out in its rules the rights of members to access minutes of meetings and any conditions of access?

Issue Number 24

Should an incorporated association be bound by a Code of Practice or good governance principles set out in the Act or Schedule?

4.7.2 Model Rules

In general, the preliminary consultations suggested that the model rules worked reasonably well for those associations that adopted them. Forty-seven percent of all incorporated associations use the model rules, the remainder have either adopted their own form of rules or amended the model rules to suit their requirements. A number of peak bodies indicated that they had developed rules for use by their affiliates.

There appears to be some uncertainty about the interpretation of some of the model rules and the circumstances under which a model rule could be deemed to be incorporated into an association's own rules. The Review is therefore seeking feedback on the model rules and any aspects which could be improved.

Issue Number 25

Are there any deficiencies in the model rules or rules that need to be updated?

4.7.3 Information Requirements

Consumer Affairs staff often provide information and advice to incorporated associations concerning their responsibilities under the Act, non-compliance and remediation of breaches of the Act, dispute resolution options available to members, and the process and fees for lodging documents and conducting searches of the register. Consumer Affairs does not give advice in relation to the management or procedures of an incorporated association nor does it generally intervene in or attempt to resolve disputes.

A telephone enquiry line provides recorded information for incorporated associations and contains a link to enquiries staff for those requiring additional assistance. Enquiries can also be lodged via the web-site. Associations may also lodge documents and make enquiries at the public counter which is open between the hours of 8.30 am and 4.30 pm.

Consumer Affairs has prepared an information pack for incorporated associations which it makes available free of charge on request. New public officers are sent a copy when they notify Consumer Affairs of their appointment and the information sheets may be downloaded from the Consumer Affairs Victoria website consumer.vic.gov.au. The information sheets provide basic explanations of the obligations of incorporated associations under the Act and have generally been well received.

During preliminary consultations some stakeholders expressed a view that there should be a code of practice or guide to good governance which could be used by associations as a model to encourage best practice. The focus of such a code of practice or guide would be the internal management procedures of the association as well as its statutory obligations.

The Review is interested in receiving feedback from associations concerning the current availability of information to assist committee members of incorporated associations and whether this should be provided by Consumer Affairs or alternative sources.

Issue Number 26

Is the information currently provided by Consumer Affairs adequate? What other types of information (if any) should be provided?

4.8 Other Issues

While a number of issues have been identified in this paper as areas in which improvements could be made, there may be other matters which concern incorporated associations and the communities they serve. Comments are invited on any other areas of the legislation that you believe are not working effectively.

Issue Number 27

Are there any aspects of the legislation for incorporated associations that should be changed?

4.9 Preliminary Consultations

Representatives from the following stakeholder groups participated in a round of preliminary consultations.

Our Community

Kiwanis in Australia

RSL clubs

Kindergarten Parents Victoria

Fundraising Institute – Victoria

Field and Game Association

Basketball Victoria

Victorian Multicultural Commission

Municipal Association of Victoria

Clubs Victoria

Australian Hotels Association

Law Institute Victoria

Notes

Notes

Consumer Affairs Victoria

Consumer Helpline

1300 55 81 81 (local call charge)

Website www.consumer.vic.gov.au