

# Associations and Clubs Law in Australia and New Zealand

## 1996-2008 Supplement<sup>1</sup>

This update notes some of the major decisions and legislative developments since the second edition was published at the beginning of 1996 (updated to January 2008). These comments are not, however, to be seen as a comprehensive updating service on every change to the law since that date. For further reference, see *Halsbury's Laws of Australia* title 435 – Voluntary Associations (by AS Sievers).

### GENERAL COMMENTS

All references to the Corporations Law now refer to the *Corporations Act 2001* (Cth) on 15 July 2001. The numbering of some sections of this legislation has been altered: see the Comparative Tables in the compilations of the legislation published by CCH and Butterworths.

While there have been a number of changes to individual State and Territory Associations Incorporation Acts since the publication of the second edition in 1996, with the exception of the extensive changes to the legislation in the Northern Territory, where a new *Associations Act* was passed in 2003, most of these changes are technical or consequential resulting from amendments to other statutes and there have been few changes to the substantive provisions. The provisions of the Queensland Act were renumbered in 1996 after publication of the second edition so it is necessary to consult the comparative table at the end of the Act.

### SPECIFIC COMMENTS AND NOTES

Paragraph      Update

- 1.1            The concept and nature of voluntary associations**  
In *Kibby v Registrar of Titles* [1999] 1 VR 861 at 872, Mandie J held that the essence of an association was ‘some form of combination of persons (with a common interest or purpose) with a degree of organisation and continuity at least sufficient to distinguish the combination from an amorphous or fluctuating group of individuals and with some clear criteria or method for the identification of its members’. Mandie J did not consider that a name, written rules, office bearers or some kind of contract between the members were essential characteristics of an association, but found that any one or more of these would help to establish that an association existed. In the case before him, the judge held that the group was nothing more than a fluctuating group of individuals and no association existed.

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### 2.3.2 Tort

In *Hrybnyuk v Mazur* [2004] Aust Torts Reports 81-774; NSWCA 374 the president of an unincorporated association had asked a member to help demolish a shed on the association's premises. The member fell through a gap in the roof and was seriously injured. The trial judge held that the president owed the member a duty of care but there was no evidence of a breach of this duty. An appeal to the Court of Appeal was dismissed. The Court of Appeal found that the relationship between members of an association does not, of itself, give rise to a duty of care to other members. It is necessary to establish that a duty of care exists according to the ordinary principles of negligence. In asking the member to help in the demolition, the president owed him a duty of care, but there was no evidence to show that this had been breached.

### 2.5.4 Judicial review of association decisions

In *Clarke v ALP (South Australian Branch)* (1999) 74 SASR 110, Mullighan J applied *Baldwin v Everingham* and distinguished *Cameron v Hogan*, holding that, although the rules of the ALP should not be treated as creating a legally enforceable relationship between the members, the fact that the party was registered under the *Commonwealth Electoral Act 1918* it was not in the same position as a voluntary association.

### 3.2.1 Registration as a company limited by guarantee

Registration as a company limited by guarantee remains a possible method of incorporation for non-profit associations. However, only those companies which comply with the requirements of s 150 of the *Corporations Act 2001* (Cth) (which replaced the former s 383 of the *Corporations Law* from 1 July 1998) may be registered without including 'Limited' or 'Ltd' in the company's name.

The company must have a constitution which:

- states that it is formed solely for charitable purposes and will apply its income in promoting those purposes;
- prohibits it making any distributions to its members or paying fees to its directors; and
- requires the directors to approve all other payments made to directors.

Existing licences to omit 'Limited' or 'Ltd' granted under the former s 383 are not affected: *Corporations Act* s 151.

The changes made to directors' duties by the *CLERP Act 1999* (Cth) must also be taken into account when considering registration as a company limited by guarantee.

### 3.2.2 Incorporation as a cooperative society, by charter or by special legislation

Co-operative societies – each State has agreed to introduce 'core-consistent' legislation for the registration and regulation of co-operative societies based on the model of the *Co-operatives Act 1996* (Vic). This legislation will make it possible for co-operatives to

operate in more than one State without becoming required to register under Part 5B.2 of the *Corporations Act*.

- 3.3 An Overview of the Associations Incorporation Legislation**  
In the Northern Territory, the *Associations Act 2003* (NT), has modernised the statute and aligned many of its provisions more closely with the more recent legislation in the other States and the Australian Capital Territory. This statute also includes special provisions providing for the incorporation by registration of trading associations formed by the members of aboriginal communities (see note to 4.1.4).
- 4.1.1. The definition of an eligible association**  
Although the *Associations Act 2003* (NT) made major changes to the previous statute, it retained the ‘specific’ or ‘functional’ approach which defines an eligible association by reference to the purposes for which it was formed.
- 4.1.2. Minimum size for an incorporated association**  
In the Northern Territory a minimum of 5 members is now required (*Associations Act 2003* (NT) s 26).
- 4.1.4. The concepts of trading and pecuniary profit or gain**  
**(a) Aboriginal and Maori associations**  
In the Northern Territory, the *Associations Act 2003* (NT) ss 4, 8(3)(e) and 9(3)(b)(i) now allows trading associations to be incorporated by the members of prescribed ethnic communities (defined by the *Associations Regulations 2004* reg 5, Sch 2 as communities constituted by persons who are aboriginal natives of Australia and are domiciled in the Northern Territory).
- 4.2.1. Notice of intention to apply for incorporation**  
This requirement now only applies in Western Australia.
- 4.2.2. Application for incorporation**  
Footnote 30: In *Jobnet Employment Services Inc v Copeman* (1999) 32 ACSR 554, the issue was whether or not an incorporated association was a continuation of a former unincorporated association under s 8(1) of the NSW Act or was a new association incorporated under s 8(2). On the evidence in that case, Windeyer J held that the association was incorporated under s 8(1).
- 4.2.5. Migration to and from other legislative regimes**  
This is now allowed in the Northern Territory by *Associations Act 2003* (NT) ss 56-63.  
A recent case in Western Australia makes it clear that it is only possible for an incorporated association to migrate to another legislative regime if the power to do so is authorised by the law under which it is incorporated. In *ASIC v Medical Defence Association (WA) Inc* (2005) 143 FCR 125; 54 ACSR 787; [2005] FCAFC 173 the association was registered as an association under the Western Australian Act and applied to register as a company limited by guarantee

under Part 5B.1 of the *Corporations Act* 2001 (Cth). The primary judge allowed the application but this decision was reversed by the Full Federal Court. The Full Court held that under s 601BC(8)(d) of the *Corporations Act* 2001, a transfer of incorporation was only possible if it was positively authorised by the law under which the body was incorporated and there was no such provision in the Western Australian Act.

- 4.3.2 Constructive notice and the authority of agents**  
See also the more recent New Zealand case of *Barrett v Te Ruanga O Ngati Pu Inc* [2002] NZAR 296 applying the indoor management rule.
- 4.3.3 Property**  
The *Associations Act* 2003 (NT) s 12(2) requires a person holding property on behalf of an incorporated association to take whatever action is required to deliver or transfer the property to the association as soon as practicable after it is incorporated.
- Footnote 72: Several recent cases have made it clear that, if a dispute arises as to whether the property of a former unincorporated association has vested in the incorporated association, it will be necessary to prove that the latter is the successor in title to the unincorporated association according to the normal rules of evidence: see *Mune v Argentino of Victoria Inc* [1966] 2 VR 82; *Kibby v Registrar of Titles* [1999] VR 861; *Popovic v Tanasijevic (No 5)* (2000) 34 ACSR 1.
- 4.3.6 Compulsory insurance**  
Footnote 80: in Queensland the minimum amount of insurance cover is now \$1,100,000.
- 4.4 Constitution and Rules**  
The *Associations Act* 2003 (NT) differs from the other statutes in that it refers to the constitution of an incorporated association rather than the rules. Sections 8 (4) and 22-23 of this Act require a copy of the constitution to be lodged when an association applies for incorporation.
- 4.4.1 The objects and purposes of an incorporated association**  
The *Associations Act* 2003 (NT) no longer requires prior administrative approval of any proposed amendments to an association's objects and purposes.
- 4.4.2 Rules**  
The *Associations Act* 2003 (NT) s 21 lists the matters to be provided for by the rules of an incorporated association. Section 21(3) allows the constitution to be based on the customs and traditions of the ethnic community to which its members belong.

- 4.4.3 Model rules**  
The *Associations Act* 2003 (NT) s 8(4) provides for Model Rules which were promulgated in July 2004.
- 4.4.4 Amendment of rules**  
The *Associations Act* 2003 (NT) s 21(1) (g) provides that the method by which the association's rules are amended is to be set out in the constitution. The requirement to advertise any proposed changes no longer applies but any amendments will not take effect until approved by the Commissioner.
- 4.5.2 The committee or other governing body**  
The decision of Chesterman J in *Re Vassallo* [2001] 1 Qd R 91 confirms that an incorporated association in Queensland must conform to the statutory requirement that it be managed by a management committee.  
The *Associations Act* 2003 (NT) ss 30 and 40 follows the approach adopted in other States and includes provisions derived from the *Corporations Act* regulating the eligibility for election to the committee of an association and disqualification from office. The Act also
- requires committee members to disclose any pecuniary interest in contracts made by an association and prohibits them voting in respect of such contracts (ss 31-32);
  - makes it an offence to commit an act with an intent to deceive the association, its members or creditors or for any fraudulent purpose or to make improper use of his or her position or information (s 105); and
  - makes committee members liable for insolvent and fraudulent trading (ss 90-92).
- 4.5.3 General meetings**  
The *Associations Act* 2003 (NT) ss 35-38 now requires an incorporated association to hold regular annual general meeting.
- 4.5.4 Special resolutions**  
The *Associations Act* 2003 (NT) s 37 provides a similar definition of a special resolution.
- 4.7 The rights of members of an incorporated association**  
The decision of the High Court in *Cameron v Hogan* still causes difficulties for members seeking to obtain judicial review of decisions by both unincorporated (see note to 2.5.4 above) and incorporated associations. While it is clear that a court would not refuse to intervene in cases involving a person's livelihood, the position otherwise remains unclear.
- 4.7.3 Statutory protection of the rights of members**  
Section 14A of the Victorian Act was used successfully in *Andricciola v Italian Community of Keilor Association Inc* [1996] 1 VR 1 and *McKay v Australian Alpaca Association Inc* (1997) 69 SASR 218 (an association incorporated under the Victorian Act).

Footnote 140

The *Associations Act* 2003 (NT) s 39 requires an incorporated association to observe the principles of natural justice when making decisions affecting the rights of its members.

The Northern Territory Act s 109 also provides a statutory remedy for oppression similar to that in s 61 in the South Australian statute. The latter provision was applied in *Pettit v South Australian Harness Racing Club Inc* (2006) 95 SASR 543; [2006] SASC 306. In this case, the club received a large number of applications for membership just before an election of committee members was to be held. The existing committee suspected that these applications were an attempt to influence the election and voted to reject all the applications without considering them individually on their merits. The Court held that this decision may have caused genuine applicants to be denied membership and held that it was unconstitutional and in breach of s 61 (4) (see also *Millar v Houghton Table Tennis and Sports Club Inc* (2003) 225 LSJS 241; [2003] SASC 1 dealing with similar facts in which the court ordered the committee to consider each application for membership individually).

**4.8.1 Initial and continuing disclosure requirements**

Since the *Associations Act* 2003 (NT) came into force in the Northern Territory, a copy of the association's rules or a statement that the model rules are to be adopted must be lodged with an application for incorporation (s 8) and an annual return must also be lodged providing general information about the association's operations (ss 43,45).

**4.8.2 Accounts, audit and financial returns**

In Victoria the position is now similar to South Australia and the accounts of an incorporated association which has gross annual receipts exceeding the prescribed amount or which otherwise comes within the definition of a prescribed association, must be audited and presented at the annual general meeting (s 30A).

In the Northern Territory, the *Associations Act* 2003 (NT) ss 42-43 provides that the committee must ensure an audited statement of accounts is prepared and presented to the annual general meeting. The audit requirements vary according to the size of the association and are similar to those applying in the Australian Capital Territory. The most stringent regime applies to the accounts of an incorporated trading association (ss 46-48).

**4.8.3 Powers of inspection and special investigation**

The *Associations Act* 2003 (NT) Pt 10 now gives the Commissioner broad powers to investigate the affairs of an association.

**4.8.4 Power to direct migration to another statutory regime**

Under the *Associations Act* 2003 (NT) s 63 the Commissioner has a similar power to direct that an incorporated association become registered under the *Corporations Act* 2001(Cth).

**4.9.1 Offences**

The provisions of the *Associations Act* 2003 (NT) dealing with offences are similar to those in the other jurisdictions and set out monetary penalties for breach of specific provisions together with general provisions imposing penalties for breaches of duty by committee members and officers, including heavy penalties for making false and misleading statements (s 42(2), see Footnote 169).

**4.11.1 Voluntary winding up by the members**

Footnote 192: following amendments to the legislation in Tasmania and the Northern Territory, of the Australian statutes include a statutory power allowing the members to resolve by special resolution to wind up an association voluntarily (Tas s 32; NT s 72).

**4.11.2 Winding up by the court**

The importance of ascertaining exactly which provisions are incorporated by reference into a particular Associations Act is illustrated by a recent New South Wales case. In *QBE Workers Compensation v Wandiyali Atsi Inc* (2004) 51 ACSR 330; 22 ACLC 1547; [2004] NSWSC 1022 the Registrar had made an order that the association be wound up under the presumption of insolvency in the 2001 (Cth). On appeal, the Court of Appeal held that these provisions did not apply because, as an incorporated association, it must be wound up under the provisions of the *Associations Incorporation Act* 1984 (NSW) not the *Corporations Act* and under that legislation, before a winding up order could be made, it must be shown that the association was unable to pay its debts and the order must be made by the Supreme Court of NSW, not by the registrar.

**4.11.4 Disposition of surplus assets**

Footnote 201: In Victoria, any disposition of surplus assets to members following the voluntary winding up of an association is now prohibited if, on the date of winding up or at any time within the previous five years, the association's rules prohibited any distribution of its assets to the members on a voluntary winding up: ss 33A-33B.

The position in the Northern Territory is now similar to that in South Australia and the Australian Capital Territory.