

CONSTITUTIONS

A Presentation to AG Excellence Alliance

March 2015



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THREE KINDS OF ORGANISATIONS:

1. Unincorporated Association
2. Limited Liability Company
3. Incorporated Association



Unincorporated Association

An organisation set up through an agreement between a group of people who come together for a reason other than to make a profit, eg a voluntary group or a sports club.

A collection of people acting together.



Unincorporated Association

ADVANTAGES

- No need to register
- No cost to set up
- No Government regulation (unless a charity)
- May or may not have a Constitution or Rules

Unincorporated Association

DISADVANTAGES

- No separate legal identity apart from the members
- Property must be owned by individuals on its behalf
- Cannot enter into formal contracts, such as leases – must be in the names of office bearers or trustees
- Legal problems when office bearers or trustees change
- Cannot bring legal proceedings (other than through individual members)
- Members can be personally liable for debts of the association

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Limited Liability Company

ADVANTAGES

- Separate legal identity
- Can undertake business for commercial profit to members
- Can own property and enter into formal contracts in its own name
- Changes of Directors do not require transfer of property
- Can bring legal proceedings in its own name
- Limited liability for members (shareholders)



Limited Liability Company

DISADVANTAGES

- Highly regulated – *Corporations Act 2001* (Cwth)
- Fees payable to establish and register company and for annual reviews
- Fees payable to register changes in Directors
- Must have a Constitution (but may be prescribed by the Act)
- Must have at least one Director and shareholder and a registered office address
- More suited to commercial enterprises than non-profit ones



Incorporated Association

ADVANTAGES

- Separate legal identity
- Can own property and enter into formal contracts in its own name
- Changes of Committee do not require transfers of property
- Can bring legal proceedings in its own name
- Usually no personal liability for members
- Relatively low cost to establish and maintain

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Incorporated Association

DISADVANTAGES

- Regulated by *Associations Incorporation Act 1985 (SA)*
- Fees payable on incorporation, but no annual fees if turnover under \$500,000 per year
- Must have a Constitution
- Must have a Public Officer
- Cannot be used for commercial enterprises profiting members



History of Incorporated Associations

- South Australian innovation – *Associations Incorporation Act 1858*

- Preamble to the Act explained its purpose:

“... great inconvenience has arisen in cases where property belonging to institutions established for the promotion of religion, education, and benevolent and useful objects, has become vested in trustees, by the refusal of such trustees to act, and by the necessity for the frequent change of trustees; and great expense is often incurred by reason of such change, and the appointment of other trustees, and the transfer of property to such other trustees.”

- Later adopted in other states of Australia

Associations Incorporation Act 1985

To become incorporated under the Act, an association must:

- be *eligible* for incorporation, e.g. religious, educational, benevolent, charitable, sporting, political, community or common interest purpose;
- apply for incorporation, with a chosen name;
- have a Constitution or Rules that are not inconsistent with the Act;
- have a common seal for executing formal documents;
- not make profits for its members; and
- appoint a ***Public Officer***.



Associations Incorporation Act 1985

An ***incorporated association*** can:

- continue to exist indefinitely, regardless of changes to its membership – *“perpetual succession”*;
- own property in its name;
- open and operate bank accounts and investments;
- borrow money and give security over its property;
- enter into Leases and Contracts; and
- sue and be sued in its own name.

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Associations Incorporation Act 1985

The **Constitution** or **Rules** of an *incorporated association* **must** set out:

- the **name** of the association (including “*Incorporated*”);
- the **objects** of the association;
- the **powers** of the association and who can exercise them;
- provisions relating to **membership** (if the association has members);
- the powers, duties and manner of appointment of the **committee**;
- who has the **management and control** of funds and property;
- the calling of and procedure at **general meetings**; and
- how the Constitution or Rules can be **changed**.

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Associations Incorporation Act 1985

The following ***cannot be committee members*** or directly or indirectly take part in the management of an incorporated association:

- a person who is bankrupt;
- a person convicted in the last five years or someone released from gaol within the last five years, for the following offences anywhere in Australia:
 - an offence connected with the promotion, formation or management of a body corporate;
 - a fraud or dishonesty offence carrying a maximum penalty of more than three months gaol;
 - an indictable offence (an offence that can be tried before a jury); or
 - an offence concerning the duties of officers of an association.

Maximum penalty \$5,000.



Associations Incorporation Act 1985

Duties of a committee member include:

- **disclosure of interests** – A committee member with a direct or indirect financial interest, no matter how small, in any contract or proposed contract with the association must disclose that interest to the committee as soon as possible, and to the next annual general meeting of the association.
- **not taking part in votes on contracts in which there is a financial interest** – A committee member who has a direct or indirect financial interest in any contract or proposed contract with the association can take part in discussion about the contract but **may not vote on the matter or take part in any decision about the contract.**

Penalties of up to \$5,000 for breach of these duties.



Associations Incorporation Act 1985

Officers of an *incorporated association* include:

- members (and acting members) of the *committee*;
- secretary, treasurer and public officer;
- anyone who “*is concerned, or takes part, in the management of the affairs of the association*”;
- the holder of any office under the Rules of the association (other than a patron) “*by whatever name called and whether or not validly appointed*”;
and
- “*any person in accordance with whose directions or instructions the committee of the association is accustomed to act*”.

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Associations Incorporation Act 1985

An **Officer** of an *incorporated association* **must not**:

- make ***improper use of information*** acquired by virtue of his or her position in the association, so as to gain an advantage or to cause detriment to the association; or
- make ***improper use of his or her position*** in the association so as to gain an *advantage* or to cause *detriment* to the association (the *advantage* includes any sort of advantage either for that person or anyone else); or
- exercise his or her powers or duties to commit an act with ***intent to deceive or defraud*** the association, its members, employees, creditors of any other person or for any fraudulent purpose.

Penalties of up to \$20,000 or four years gaol.

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Associations Incorporation Act 1985

INDEMNITY OF OFFICERS

The **bad** news:

Section 39B (1):

*Any provision, whether contained in the rules of an incorporated association or in a contract with the association or otherwise, exempting any officer or auditor of the association from, or indemnifying him or her against, any liability to the association that would otherwise attach to him or her in respect of any negligence, default, breach of duty or breach of trust of which he or she may be guilty in relation to the association, is **void**.*

Associations Incorporation Act 1985

INDEMNITY OF OFFICERS

The **good** news:

Section 39B (2):

Notwithstanding anything in this section, an incorporated association may, pursuant to its rules or otherwise, indemnify an officer or auditor against any liability incurred by him or her in defending any proceedings, whether civil or criminal, in which judgment is given in his or her favour or in which he or she is acquitted.

Section 39B (3):

Subsection (1) does not apply in respect of a contract of insurance.

Associations Incorporation Act 1985

DISPUTES

The Act requires the committee of an incorporated association, when determining a dispute between members, or between itself and members, to observe the ***rules of natural justice***.

This includes the right to:

- know about any accusation and any evidence in support of it;
- adequate notice of when any decision is to be made;
- an opportunity to present a case before a decision is made;
- a fair and unbiased hearing; and
- appeal the decision.



Associations Incorporation Act 1985

“PRESCRIBED ASSOCIATION”

- gross receipts (other than subscriptions, gifts under a Will or proceeds of sale of property not originally bought for resale) **greater than \$500,000** per year;
- must keep proper financial records in a form that can be conveniently audited;
- must have its financial statements audited annually by a registered company auditor; and
- must lodge a return with the Corporate Affairs Commission each year;
- greater obligations and responsibilities for Officers; and
- strict requirements and heavy penalties for non-compliance.

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Associations Incorporation Act 1985

ALTERATION OF RULES

Alterations must be made by ***special resolution***, unless the Rules otherwise provide.

A ***special resolution*** means:

- at least ***21 days written notice*** of the meeting and proposed resolution; and
- passed by ***majority of not less than three quarters*** of members who vote in person or by proxy at the meeting.

Changes to the Rules must be registered with the Corporate Affairs Commission within one month.

Maximum penalty \$1,250

Associations Incorporation Act 1985

WINDING UP AN INCORPORATED ASSOCIATION

An incorporated association can be wound up:

- by the Supreme Court – on application to the Court; or
- voluntarily – by ***special resolution*** of the association (if solvent); or
- by the Corporate Affairs Commission with the consent of the Attorney-General – usually for breach of the Act.

A liquidator will be appointed by either the Court or the Commission.



Associations Incorporation Act 1985

APPLICATION FOR DEREGISTRATION

A person authorised by **special resolution** of an incorporated association that has **surplus assets** not exceeding \$5,000 can apply for deregistration of the association.

The application must include:

- a declaration that the association has no liabilities and is not a party to any legal proceedings; and
- a statement of how the surplus assets have been, or will be, distributed.

The Commission must publish notice of the application and, if approved, publish notice of deregistration.

Associations Incorporation Act 1985

DISTRIBUTION OF SURPLUS ASSETS

- Surplus assets must ***not*** be distributed to members, former members or their associates.

- If the association is wound up by the Court, surplus assets are to be distributed in accordance with:
 - the Rules of the association, or

 - a special resolution of the association (if there are no valid Rules); or

 - the decision of the Court, having regard to the objects of the association and any relevant Rules.

Associations Incorporation Act 1985

DISTRIBUTION OF SURPLUS ASSETS (Cont.)

- If the association is deregistered, the Commission must be satisfied that:
 - the proposed manner of distribution of surplus assets is consistent with the Rules or objects of the association; and
 - no member of the public will suffer undue hardship as a result of deregistration of the association.

- In order to avoid uncertainty and inappropriate results, the Rules of an incorporated association **should** include provisions about how surplus assets are to be distributed if the association ceases to exist.

Any questions?



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Thank You

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