

Upcoming reforms to the *Associations Incorporation Act 1981 (Vic)*

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Background and timing

In 2009 and 2010, the Victorian Government introduced amendments to the laws which regulate all incorporated associations in Victoria, the *Associations Incorporation Act 1981 (the Act)*. The reforms were introduced following a review of not-for-profit regulation conducted by the State Services Authority.¹

The reforms are divided into two separate amending Acts,² each introducing a number of changes to the way in which incorporated associations must manage their affairs. Importantly, while some of the reforms came into effect immediately, the majority were deferred and will not be effective until a later date. While the original date for implementation was to be 1 December 2011, the Victorian Government recently passed the *Consumer Acts Amendment Act 2011 (Vic)* which changed the default commencement date for these reforms to **1 July 2012**. The revised timeframe will allow the Government to undertake a number of projects related to the changes.

One of these projects is the development of new Model Rules for Victorian incorporated associations which will reflect the changes introduced by these reforms.

Note: The following is a summary of some of the more significant changes that are yet to come into force. It is not an exhaustive list of all the changes. If you would like to know about all of the changes, there is a link to the amending legislation and explanatory memorandums at the end of this document. Or **contact PilchConnect on (03) 8636 4444**.

Concerns / criticism

While the reforms introduce some progressive and welcome changes to the Victorian incorporated association regime, PilchConnect has significant concern with the complexity of the drafting. In particular, PilchConnect has expressed concern over the heavy reliance on the applied civil penalty provisions of the *Corporations Act 2001 (Cth)* and the deeming provisions that apply lengthy sections of Corporations Law.

An earlier PilchConnect submission to the reforms suggest that the current complicated and legalistic approach is not in line with the original (and ongoing) intention that the Act be a simple and inexpensive means by which unincorporated non-profit associations may obtain corporate status.

There is a link to the PilchConnect submission at the end of this document which elaborates on these points of concern further.

¹ [http://www.ssa.vic.gov.au/CA2571410025903D/WebObj/NFP_FinalRpt/\\$File/NFP_FinalRpt.pdf](http://www.ssa.vic.gov.au/CA2571410025903D/WebObj/NFP_FinalRpt/$File/NFP_FinalRpt.pdf)

² *Associations Incorporation Amendment Act 2009* and *Associations Incorporation Amendment Act 2010*, both available at www.legislation.vic.gov.au

Codification of duties for office holders

The reforms will codify legal duties applying to office holders (including former office holders), in addition to clarifying their current obligations. To avoid uncertainty about who the duties apply to, the reforms will insert a definition of 'office holder' into the Act which includes:

- ▶ a member of the committee;
- ▶ the secretary; or
- ▶ an employee of the association who makes or participates in making decisions that affect the whole, or a substantial part, of the operations of the association.

The practical effect of these changes will be minimal, given the common law already applies the duties to incorporated associations. However the changes will clarify the exact nature of the duty as it applies to incorporated associations, as well as the penalties. The amendments will include:

- ▶ Clarification of the existing duty to not make improper use of information or position.
- ▶ Introduction of a legislative duty to exercise powers and discharge duties with reasonable care and diligence. Note: business judgment defence listed below.
- ▶ Introduction of a legislative the duty to exercise powers and discharge duties in good faith and for a proper purpose.
- ▶ Introduction of a legislative duty to prevent the organisation from trading while it is insolvent. Note: this duty is a result of the application of Part 5.7B of the *Corporations Act 2001* (Cth) to insolvent associations.

The reforms introduce civil penalties (fines of up to \$20,000) for office holders found to have fallen who fall short of these duties, however a number of defences will also be included in the reforms (see below).

Legislative defences and indemnities for office holders

The business judgment rule

The reforms will be introducing a 'business judgment' defence to claims that an office holder has failed to meet the required standard of care and diligence. Reliance on this defence will be available where an office holder:

- ▶ makes the judgment in good faith for a proper purpose;
- ▶ does not have a material interest in the subject matter of the judgment;
- ▶ appropriately informed themselves about the subject matter of the judgment; and
- ▶ believes the judgment to be in the best interests of the association (objective test).

This defence was arguably always available to committee members of incorporated association, however the reforms will confirm this through legislative amendment.

Reliance on information or advice

The reforms will introduce a defence to claims that an office holder has breached a legislative duty where that office holder has reasonably acted on reliance on information or advice.

When determining what will be 'reasonable', the Act will create a presumption that the following sources of information or advice can be reasonably relied upon when that reliance is made in good faith and where an independent assessment of the advice has occurred:

- ▶ employees of the association that are believed by the office holder to be reliable and competent;
- ▶ professional advisors where the subject matter falls within the scope of expertise;
- ▶ another office holder when acting within their authority; or
- ▶ another committee of the association of which the office holder was not a member.

Requirement to indemnify committee members

The amended Act will create an obligation on all incorporated associations to indemnify (pay for or reimburse) committee members (including the secretary) against any liability incurred in good faith by that member on behalf of the incorporated association in the course of performing his or her duties.

Currently, many organisations have a rule to ensure that committee members are indemnified for personal loss, however this amendment will make it a requirement for all associations to indemnify.

An indemnity is different from 'professional indemnity insurance' which protects against financial loss arising from negligent or misleading and deceptive professional services, for example if you are giving health or legal services. For more information about types of insurance, please see our [Guide: Insurance and risk management for Victorian community organizations](#).

Reporting procedures

The amendments will be removing the prescribed/non-prescribed distinction which currently sets disclosure and reporting obligations, and introduces of a three-tiered approach to reporting based on total revenue. In summary, these tiers will be:

Tier One

Includes associations with a total revenue of less than \$250,000 (unless other amount prescribed), or that has been otherwise declared by the Registrar.³

Under the reforms, Tier One association will continue to report to CAV on the same annual basis as currently applies for 'non-prescribed' associations. However, a Tier One association must have accounts audited by an independent accountant if, at a general meeting, a majority of members present at the meeting vote to do so, or if the Registrar directs the association to do so.

Tier Two

Includes associations with total revenue between \$250,000 and \$1 million (unless other amount prescribed), or that has been otherwise declared by the Registrar.⁴

Under the reforms, Tier Two associations will be required to undergo a review of its accounts by a member of CPA Australia, the ICAA, the NIA or any other person approved by the Registrar. The reviewer must provide a written report of the review to the association and must be independent.

³ Registrar may only declare an organisation to be within a different tier where there are 'unusual and non-recurring circumstances' (s.30AB(6))

⁴ As above

This review differs to a formal audit however, under the reforms, an association must have accounts audited by an independent accountant if at a general meeting, a majority of members present at the meeting vote to do so, or if the Registrar directs the association to do so.

The upcoming reforms provide scope for an association to apply to the Registrar for an exemption from this review requirement where the Registrar 'thinks fit'.

Tier Three

Includes associations with total revenue exceeding \$1million (unless other amount prescribed).

Under the reforms, Tier Three associations would be expected to continue to report to the Registrar on the same basis as currently applies to 'prescribed' associations (however the reforms add the National Institute of Accountants to the current list of approved accountants).

Merger of the Public Officer / Secretary role

The reforms will replace all references to 'Public Officer' in the Act with 'Secretary'. In most cases, the Secretary will assume the responsibilities of the Public Officer.

Transitional provisions in the reforms make it clear that the Public Officer prior to the reforms coming into force will be deemed to be the Secretary until the following AGM for the purposes of the Act.

Removal of the prohibition on trading

Currently, the Act stipulates that an association is not to trade, either in its own right, or as a trustee - however there are many exceptions to this rule, which are often not very well understood.

The upcoming reforms will abolish the current prohibition on trading, allowing associations to engage in trade or trading activities in pursuance of, and in support of, its purposes. The prohibition on associations securing pecuniary profits for its members will remain in force.

Use of technology at committee and general meetings

The reforms will insert a new section that allows associations to hold both committee meetings and general meetings via new technology on the condition that technology allows meeting participants to 'clearly and simultaneously communicate with each other'.

Under the current Act, unless your rules allow for this to occur, valid meetings must be held face-to-face. These reforms will amend this position to reflect the diverse range of methods available to conduct meetings in more than one place.

Recording of minutes and member's access

The rules of an incorporated association will now be required to cover a number of new matters in relation to the keeping of, and access to, minutes of meetings. All incorporated associations will need to have rules which:

- ▶ require that accurate minutes of all general and committee meetings must be prepared and kept;
- ▶ provide members with access to the minutes of the general meetings of the incorporated association (including accounting records and financial statements); and
- ▶ clarify whether or not members can have access to the minutes of meetings of the committee of management of the incorporated association (and, if so, the terms and conditions on which such minutes are to be made available).

New matters that must be provided for in an association's rules

Currently, the Schedule to the Act stipulates 17 core matters that must be provided for in the rules of an association. The reforms will restructure these items and inserts several new matters. The most significant of the new insertions include the requirement that associations provide for the:

- ▶ rights, obligations and liabilities of members;
- ▶ resignation of a member or cessation of membership;
- ▶ preparation and retention of minutes of general and committee meetings, as well as access to those minutes by members;
- ▶ procedures for the appointment and removal of the secretary; and
- ▶ disposition of any surplus assets on the winding up or dissolution of the association.

Removal of office holders

The reforms will be introducing a number of additional triggering events where a committee member (including the secretary) will be taken to have vacated their office. These events include where the committee member:

- ▶ resigns by written notice to the committee;
- ▶ is removed by special general meeting;
- ▶ passes away;
- ▶ becomes bankrupt;
- ▶ becomes a 'represented person' for the purposes of the *Guardianship and Administration Act 1986*;
- ▶ ceases to reside in Australia (this applies to Secretaries only); or
- ▶ is on the committee of an association that has a statutory manager appointed to conduct the affairs of the association.

Conflicts of interest by committee members

The reforms will be introducing minor changes to disclosure and voting for conflicts of interest at committee level. The current term 'pecuniary interest' is to be replaced by 'material personal interest'.

Under the forthcoming changes to the Act, committee members with material personal interest in a matter must not be present while the matter is being considered and voted on. This differs to the current position where the Act allows committee members with an interest in a matter to be present during deliberations, however is still unable to vote.

Clarification of the rights of members

The reforms introduce a number of amendments designed to clarify the rights of members of associations, including provisions that relate to the circumstances in which members can inspect or get a copy of the rules.

The reforms also aim to clarify member rights to:

- ▶ be notified of the date, time and place of all general meetings of the incorporated association;
- ▶ attend and vote at general meetings (if their membership allows for voting); and
- ▶ be sent a proxy form, where proxies are permitted.

Disciplinary action and grievance procedures

The amendments clarify the existing dispute settlement provisions in the existing Act by setting out procedures for how this is to take place.

The changes aim to clarify the rights and obligations of an association when addressing disputes amongst members, stating that an incorporated association must ensure that each party to a dispute has an opportunity to be heard before a decision is made, and that the dispute must be resolved by an unbiased decision maker.

Under the reforms, when applying a disciplinary procedure, an incorporated association will be required to ensure that the member subject to the procedure:

- ▶ is informed of the grounds on which the disciplinary action is proposed to be taken; and
- ▶ has been given an opportunity to be heard.

The amendments will require that any outcome arising from a disciplinary proceeding must be determined by an unbiased decision maker, and must be completed as soon as is reasonably practicable (ensuring that this takes into account the giving of notice and the opportunity to be heard).

Further information and resources

- ▶ For the full text of the amending Acts, see www.legislation.vic.gov.au
- ▶ PilchConnect has a webpage that is tracking these reforms at www.pilch.org.au/legalupdates
- ▶ PilchConnect's earlier submission to the reforms is available at www.pilch.org.au/submissions
- ▶ PilchConnect's e-bulletin will keep subscribers updated on any developments. Subscribe at www.pilch.org.au/subscribe