

Associations Incorporation Amendment Bill 2008

Introduction Print

EXPLANATORY MEMORANDUM

Clause Notes

PART 1—PRELIMINARY

- Clause 1 sets out the purposes of the Bill.
- Clause 2 provides that the Bill (except Parts 3 and 4) will come into operation on the day after the day on which it receives the Royal Assent. Part 3 and Part 4 are each to commence operation on a day to be proclaimed or if no date has then been proclaimed, on 1 December 2011.

Part 3 changes references in the Act from public officer to secretary, and Part 4 specifies matters that the rules of an incorporated association must set out. A default date of 1 December 2011 has been specified in order to allow sufficient time for the Model Rules set out in the regulations to be revised to include the new matters and to recognise the change from "public officer" to "secretary". This will also enable incorporated associations sufficient lead-time to amend their own rules to comply with the new requirements.

- Clause 3 provides that the Act is referred to as the Principal Act.

PART 2—GENERAL AMENDMENTS

- Clause 4 amends section 3(1) of the Principal Act by—
- inserting a definition for *Council*. *Council* will have the same meaning as it has in section 3(1) of the **Local Government Act 1989**;

- substituting a new definition for the term **Registrar**. **Registrar** will mean the body corporate established under section 38 of the Act.

Clause 5 amends section 14 A of the Principal Act by—

- inserting a new heading in section 14A;
- inserting new section 14A(1A) which provides that, subject to the Act, an incorporated association must not—
 - exercise any power that it is prohibited by its rules from exercising; or
 - exercise any power contrary to a restriction on the exercise of that power contained in its rules; or
 - do any act that is outside the scope of the statement of purposes of the association;
- inserting new section 14A(1B) which provides that the public officer or a member of the committee of an incorporated association must not in any way be knowingly concerned in or be a party to a contravention by the association of proposed section 14A(1A);
- substituting the phrase "a member of the incorporated association or the Registrar" for "or a member of the incorporated association" in section 14A(2);
- inserting new section 14A(2)(ab) which provides that the Magistrate's Court, on an application by a member of an incorporated association or by the Registrar, may make an order restraining an association from doing an act that is outside the scope of its statement of purposes;
- inserting new section 14A(5) which provides that the Registrar may only make an application to the Magistrate's Court under section 14A(2) if the Registrar is satisfied that it is in the public interest to do so.

Clause 6 inserts new section 14C dealing with oppressive acts, which provides that—

- a member or former member may apply to the Magistrates' Court for an order that the incorporated association has engaged, or proposes to engage in oppressive conduct. An application may only be made by a former member within 6 months of ceasing to be a member, unless the Magistrates' Court grants leave to apply at a later date;
- the Magistrates' Court may only grant leave to a former member to make an application under subsection (1) if the Magistrates' Court is satisfied that there is sufficient public interest to do so;
- the Magistrates' Court may make one or more orders if satisfied that the incorporated association has engaged or proposes to engage in this conduct, including regulating the conduct of the incorporated association's affairs, restraining a person from doing a specified act or thing, an order altering the rules of the incorporated association, an order terminating or reinstating a person's membership of the incorporated association, an order under section 31D(2) appointing a statutory manager and (other than an order that the incorporated association be wound up) any other order necessary to remedy any default or resolve any dispute;
- the Magistrates' Court must transfer a proceeding to the Supreme Court if it has explored all possible avenues of achieving a negotiated settlement but this has not occurred, and it appears appropriate to make an order winding up the incorporated association;
- if a proceeding is transferred to the Supreme Court it may be continued and completed as if the matter had proceeded in the Supreme Court from the outset;
- the Supreme Court may make any order that the Magistrates' Court could have made under this section, or make an order that the incorporated association be wound up, but it must not make an order winding up the incorporated association if it is of the opinion that to do so would unfairly prejudice members affected by the conduct of the incorporated association;

- if the Magistrates' Court or the Supreme Court make an order altering the rules of the incorporated association, the alteration has effect as if it were made pursuant to a special resolution of the incorporated association, and the incorporated association does not have the power to make further alterations to the rules that would be inconsistent with the order without the permission of the Court that made the order;
- the person who applied to the Court for the order must lodge a copy of it with the Registrar within 14 days of it being made; and
- for the purposes of the section, the conduct of an incorporated association is oppressive if it is unfairly prejudicial to, or unfairly discriminatory against, a member of the incorporated association (including in the member's capacity as a member of the committee) or the conduct is contrary to the interests of the members of the incorporated association as a whole. A reference to engaging in oppressive conduct includes a reference to refusing or failing to take action.

Clause 7 amends section 17 of the Principal Act by—

- inserting a new heading;
- substituting section 17(1). New section 17(1) provides that no act of an incorporated association or conveyance or transfer of property to or by an incorporated association is invalid by reason only that the incorporated association lacked the capacity or power to so act or so convey or transfer, or because the act or dealing was prohibited under section 14A(1A);
- inserting new section 17(1A), which provides that no act of a person for or on behalf of an incorporated association is invalid by reason only that it was prohibited under section 14A(1B);
- inserts a reference to "prohibition" in section 17(2), a reference to the Registrar in section 17(2)(a) and a reference to an application by a member of the incorporated association or the Registrar to wind up the incorporated association as well as the appointment of a person as the statutory manager of the incorporated association in section 17(2)(c) and (d).

- Clause 8 inserts section 22(5) in the Principal Act, which enables the Registrar to approve some, but not necessarily all, alterations to rules, even though the alterations have been the subject of one special resolution.
- Clause 9 substitutes section 29(3) to provide that a resolution is not validly passed as a special resolution under section 29(2) unless 21 days notice is given specifying the intention to propose the resolution as a special resolution, and the notice sets out the proposed resolution in full.
- Clause 10 inserts section 29D, which provides that—
- within 28 days of a person ceasing to be a member or a holder of an office or of a role, in an incorporated association, that person or their estate must return any documents belonging to the incorporated association to its committee;
 - if they have not returned the documents within 28 days, the public officer or statutory manager of the incorporated association may make a written request for return of the documents; and
 - if they have not done so within 28 days after the request, the Magistrates' Court may make an order on the application of the incorporated association directing a person, or the executor of the estate of a person, to return the documents.
- Clause 11 inserts section 30C, which provides that an auditor of an incorporated association may only be removed from office by a resolution at a general meeting of the incorporated association following the procedures set out. The procedures require—
- notice to be given to every member of the incorporated association and the auditor, stating in full the proposed resolution; and
 - a copy of the notice to be lodged with the Registrar; and
 - the auditor to be allowed to make a written representations about the proposed resolution; and

- unless the Registrar on the application of the incorporated association otherwise orders, a copy of a written representation made by the auditor must be given to all the members of the incorporated association before the meeting at which the resolution is considered; and
- the auditor to be allowed to attend the meeting and address the meeting prior to the vote on the resolution.

Clause 12 inserts new Part VIIAB dealing with the administration of incorporated associations.

Division 1 deals with the appointment by the Magistrates' Court of a statutory manager to conduct the affairs of an incorporated association.

- Section 31D provides that the Registrar may apply to the Magistrates' Court for the appointment of a statutory manager, and the Magistrates' Court may appoint a person on such terms and conditions as it determines. The Magistrates' Court must not appoint a statutory manager unless the Registrar certifies that, following an investigation into the affairs of the incorporated association, it is in the interests of the incorporated association's members, its creditors or the public, that a statutory manager be appointed.
- Section 31E provides that on the appointment of a statutory manager—
 - the committee members cease to hold office;
 - the statutory manager has the functions of the incorporated association; and
 - a committee member can only be appointed or elected while the statutory manager is in office in accordance with Part VIIAB.
- Section 31F outlines the powers of the statutory manager. It provides that the statutory manager of an incorporated association—

- has control of, and may manage, the property and affairs of the incorporated association;
- may dispose of all or part of the property of the incorporated association;
- may engage or discharge employees on behalf of the incorporated association;
- may perform any function and exercise any power that could, were the incorporated association not under statutory management, be performed or exercised by the incorporated association, any officer of the incorporated association or the members of the incorporated association; and
- may perform any function and exercise any power the incorporated association has as trustee.
- Section 31G provides that—
 - the statutory manager holds office until their appointment is revoked by the Magistrates' Court, the incorporation of the incorporated association is cancelled under section 36EC or a liquidator is appointed by the Supreme Court;
 - immediately upon revocation, the statutory manager must prepare a report for the Registrar about the statutory management, and the statutory manager is thereafter released from any further duty to account on the statutory management, other than in the circumstances set out in section 31G(6);
 - the Registrar may provide a copy of the statutory managers' report to the incorporated association;
 - where the Magistrates' Court revokes the appointment of a statutory manager, it must either appoint another statutory manager, or ensure that there is a committee to take over the statutory management of the incorporated association. The committee may have been elected under the rules of the incorporated association at a meeting convened by the

statutory manager, or appointed by the Registrar, and holds office until the next annual general meeting of the incorporated association.

- Section 31H provides that—
 - the statutory manager may defray the expenses of and incidental to the statutory management from the funds of the incorporated association;
 - the Magistrates' Court oversees the remuneration of the statutory manager, which is one of the expenses of the statutory management; and
 - in relation to the expenses of and incidental to the statutory management of the incorporated association, the statutory manager has the same priority on the winding up of the incorporated association as the liquidator of the incorporated association.
- Section 31I provides that the statutory manager is liable for any loss incurred by the incorporated association in the circumstances set out in section 31H(1), and that the statutory manager is not liable for any other loss incurred by the incorporated association but must account for the loss in a report to the Registrar.
- Section 31J provides that if requested by the Registrar, the statutory manager must give the Registrar a report showing how the statutory management is being carried out. The Registrar may give a copy of this report to the incorporated association.
- Section 31K provides the Registrar with additional powers in relation to an incorporated association that is being administered under this Division.

Where the Registrar has appointed committee members under proposed section 31G(8), the Registrar may specify the terms and conditions on which the committee members hold office, the period for which the terms and conditions and rules apply and, with the consent of the Magistrates' Court, the rules that are to be the rules of the incorporated association.

The Registrar may remove and appoint committee members, change their terms and conditions and, with the consent of the Magistrates' Court, amend any or all of the rules during this period.

Where the Registrar has specified a rule, it can only be altered during this period by the Registrar, and to the extent that it is inconsistent with any other rule of the incorporated association, it prevails.

- Section 31L provides that if the Magistrates' Court has appointed a statutory manager, a person cannot continue or commence proceedings against the incorporated association during the term of the statutory management without the leave of the Magistrates' Court, and if leave is granted, except on the terms and conditions imposed by the Magistrates' Court. The Registrar must be given at least 10 days notice of the intention to apply for leave, and the Registrar may oppose the application.

Inserts new part VIIAC which provides for the voluntary administration of an incorporated association under Part 5.3A of the **Corporations Act**.

- Section 31M provides that the voluntary administration of an incorporated association is declared to be an applied Corporations legislation matter for the purposes of Part 3 of the **Corporations (Ancillary Provisions) Act 2001** in relation to Part 5.3A and Division 3 of Part 5.9 of the Corporations Act.
- Part 5.3A and Division 3 of Part 5.9 are applied as part of the Principal Act, subject to the modifications set out in section 31M(2), and any other modifications that may be prescribed.

Clause 13 repeals sections 32, 33A to 33E. These sections deal with the distribution of surplus assets. This matter is now covered by new Division 3A of Part VIII (see clause 15 below).

Clause 14 inserts a reference to the statutory manager of the incorporated association in section 34(2)(c) of the Principal Act, enabling the statutory manager to make an application to the Supreme Court for the winding up of the incorporated association.

Clause 15 inserts new Division 3A in Part VIII, which regulates the distribution of surplus assets on the winding up of an incorporated association.

- Section 36CA provides that—
 - surplus assets are those assets remaining after the satisfaction of debts and liabilities of the incorporated association, and the costs, charges and expenses of its winding up. Subsection 36CA(5) provides that on the winding up of an incorporated association, surplus assets are to be distributed in accordance with the rules of the incorporated association, or if there are no valid rules about this, then in accordance with a special resolution of the incorporated association.
- However—
 - the surplus assets of an incorporated association that is in the process of winding up may be distributed to a member or former member if—
 - the member or former member is a body corporate (whether incorporated or not) and the Registrar is satisfied that at the time of the distribution, the member or former member is prevented by its rules or otherwise from distributing the surplus assets to its members; or
 - the member or former member is a trustee who holds, or held, membership of the incorporated association on behalf of a trust and the Registrar is satisfied that at the time of the distribution, the trustee is prevented by the terms of the trust or otherwise from distributing the surplus assets to beneficiaries of the trust; and
 - the distribution is not contrary to this Act or regulations; and
 - any part of the surplus assets that is property (including the unexpended portion of a grant) supplied to the incorporated association by a government department, Council or public

authority must be returned to the government department, Council or public authority or a body it nominates.

- The Registrar, a liquidator, member or any person aggrieved by the operation of this Division may apply to the Supreme Court for an order relating to the distribution of surplus assets. In making an order, the Supreme Court must have regard to any relevant rules and purposes of the incorporated association.
- Section 36CA(8) prevents section 36CA from displacing any trust affecting all or any of the assets of the incorporated association.

Clause 16 inserts a heading for Subdivision 1 of Division 5 of Part VIII of the Principal Act.

Clause 17 substitutes section 36E(7) of the Principal Act. New section 36E(7) refers simply to any person who has a liability incurred by virtue of their role or membership in the incorporated association. The previous section referred to the public officer, any member of the committee or any member of the association. This change is made as part of the change from public officer to secretary.

Clause 18 inserts new Subdivision 2 in Division 5 of Part VIII of the Principal Act, which sets out a procedure for the voluntary cancellation of certain incorporated associations.

- Section 36EA(1) provides that an application may be made to the Registrar to cancel the incorporation of an incorporated association where that incorporated association—
 - has gross assets of less than \$10 000 or other prescribed amount;
 - has no outstanding debts or liabilities;
 - has paid all fees and penalties under the Principal Act; and
 - is not a party to any legal proceedings.

- Section 36EA(2) provides that the application may only be made—
 - by an incorporated association if the incorporated association has passed a special resolution agreeing to seek cancellation under this section;
 - by a statutory manager appointed under section 31D;
 - by an administrator of the incorporated association appointed under voluntary procedures under Part VIIAC; or
 - if the incorporated association is not in operation, by one of its members or former members.
- Section 36EA(3) provides that the Registrar must be satisfied that the incorporated association is not in operation before accepting an application from a member or former member.
- Section 36EA(5) provides that the application must include a declaration by the applicant setting out why the applicant has formed a view that the incorporation should be cancelled, that all of the matters in section 36EA(1) exist, that the applicant is qualified under section 36EA(2) to make the application, and, where the applicant is a member or former member, that the incorporated association is not in operation.
- Section 36EB provides that the Registrar may make further inquiries regarding the information provided in the declaration under section 36EA(5) required to establish the validity of that information.
- Section 36EC provides that the Registrar must publish a notice in the Government Gazette and a newspaper stating that the application has been received, and that unless a person makes an objection within 28 days of the publication, the incorporation will be cancelled. If an objection is received the Registrar must not cancel the incorporation unless after making further inquiries the Registrar is satisfied of the validity of the information provided under section 36EA.

Otherwise, if satisfied that the circumstances in section 36EA exist, the Registrar must cancel the incorporation of the incorporated association, and advise the applicant.

- Section 36EC(5) preserves the liabilities of persons incurred by virtue of their role in or membership of the incorporated association.

- Clause 19 inserts a heading for Subdivision 3 of Division 5 of Part VIII.
- Clause 20 substitutes "Subdivision 1" for "this Division" in section 36F, as Division 5 now has 3 subdivisions.
- Clause 21 substitutes section 37A of the Principal Act to add a definition of **Director** for the purposes of Part VIIIA.
- Clause 22 substitutes section 38 in the Principal Act to provide that the Registrar of Incorporated Associations is a body corporate with perpetual succession, an official seal and may sue and be sued. Previously the Registrar was an individual. This change facilitates the Registrar holding property vested under section 36F. The Registrar may also by instrument delegate any of the Registrar's powers and functions under this Act, other than the power of delegation, to any person employed under Part 3 of the **Public Administration Act 2004**.
- Clause 23 substitutes references to "statements" and "statement" for "returns" and "return" in sections 39(1A) and 39(1B) of the Principal Act, which are the expressions used elsewhere in the Principal Act.
- Clause 24 inserts subsection 42(2) in the Principal Act. Section 42(1) provides that an incorporated association or guarantor of an incorporated association may not assert against a person dealing with the incorporated association or with any person who has acquired rights from the incorporated association that the rules have not been complied with, or that the person last notified to the Registrar as the secretary or public officer of the incorporated association was not the secretary or public officer. Section 42(2) provides that the incorporated association or guarantor may make such an assertion where the person dealing with the incorporated association or who has acquired rights from the incorporated association has actual knowledge, or ought to have knowledge by reason of their connection or relationship with the incorporated association, of the matter asserted.

- Clause 25 inserts sections 46(2) to (6) in the Principal Act dealing with the lodgement with the Registrar of incorrect documents.
- Section 46(2) provides that the Registrar may refuse to register or receive a document if the Registrar is of the opinion that the document is not a valid document of the incorporated association.
 - Section 46(3) provides that if the Registrar refuses under (2) to register or receive a document, the incorporated association may request that the Registrar reconsider the refusal and may provide to the Registrar any documents in support of the request.
 - Section 46(4) provides that the Registrar must refer the question of whether or not the document is valid to the Magistrates' Court if—
 - the incorporated association has requested under (3) that the Registrar reconsider a refusal to register or receive the document;
 - the Registrar remains of the opinion that the document is not a valid document; and
 - the incorporated association requests that the Registrar refer the question of whether or not the document is valid to the Magistrates' Court.
 - Sections 46(5) and (6) provide that the Magistrates' Court may make an order about the validity of the document and, if the order is that the document is valid, the Registrar must register the document.
- Clause 26 substitutes section 49A of the Principal Act to remove references to "public officer" as part of the change in the Act from "public officer" to "secretary".
- Clause 27 inserts new sections 53B and 53C after section 53A of the Principal Act.
- Proposed section 53B provides that in any proceedings under this Act, the Magistrates' Court may, on its own initiative or on application by a party to the proceeding, transfer the proceeding to the Supreme Court on the ground that the proceeding raises a complex question or matter of general importance or reserve a question of law for determination by the Supreme Court. If a

proceeding has been transferred to the Supreme Court under (1)(a), it may be continued and completed if steps taken in the proceeding prior to the transfer had been taken in the Supreme Court.

- Proposed section 53C provides that a person who is or has been the auditor, statutory manager or administrator of an incorporated association has qualified privilege in respect of a statement made by the person, whether orally or in writing, in the course of performing any functions or exercising any powers as the auditor, statutory manager or administrator, as the case may be, of the incorporated association.

- Clause 28 amends sections of the Principal Act to substitute gender specific references with gender-neutral references.
- Clause 29 repeals section 55(1) of the Principal Act, which is a spent transitional provision.
- Clause 30 inserts section 56 in the Principal Act, which is a transitional provision which recognises the Registrar under section 38 as substituted by clause 22; and which provides that section 36CA does not apply to an incorporated association that immediately before the commencement of clauses 13 and 15 of this Act had a rule that permitted the distribution of surplus assets to its members on a voluntary winding up.

PART 3—PUBLIC OFFICER

- Clause 31 amends section 3(1) of the Principal Act to substitute a new definition for *public officer*, the new definition referring to the public officer before the commencement of this Part, and inserts a definition of *secretary*.
- Clause 32 amends sections of the Principal Act to substitute references to "secretary" for "public officer", add references to "secretary" or delete references to "public officer" as appropriate.
- Clause 33 inserts a heading in section 42 of the Principal Act, and substitutes new sections 42(1)(b) and (c) for current section 42(1)(b) to recognise the change from "public officer" to "secretary" in the Principal Act.

Clause 34 inserts sections 56(6) and 56(7) in the Principal Act to—

- deem the public officer at the commencement of this Part to be the secretary of the incorporated association until a secretary is appointed at the next annual general meeting of the incorporated association;
- provide that section 17(2)(b) of the Principal Act only applies to a secretary (other than the deemed secretary above) appointed after the commencement of this Part. This ensures that a person acting as a secretary in an incorporated association who is not the public officer is not affected by section 17(2)(b) after its amendment by this Part, and preserves the intended operation of section 17(2)(b);
- preserves the authenticity of a document authenticated by a public officer under section 19(6) before the commencement of this Part; and
- provides that the secretary may continue and complete any continuing act or thing commenced by or the public officer or against the public officer before the commencement of this Part.

PART 4—RULES OF AN INCORPORATED ASSOCIATION

Clause 35 sets out additional matters to be provided for in the rules of incorporated associations.

PART 5—REPEAL OF AMENDING ACT

Clause 36 provides for the automatic repeal of this amending Act on 1 December 2012. The repeal of this Act does not affect in any way the operation of the amendments made by this Act (see section 15(1) of the **Interpretation of Legislation Act 1984**).