Supporting Queensland Associations: a modern framework for civil society

Consultation on a new legislative framework for not-for-profit associations in Queensland

Toward Q Tomorrow's Queensland | Queensland Government

How can I have my say?

All Queensland associations and members of the community are invited to comment on the issues identified and the proposals presented in this Issues Paper. This feedback is very important, as it will reveal whether the proposed changes will work well in practice, and whether an alternative change would be more appropriate. The feedback will also ensure all the issues of concern have been identified and addressed.

The closing date for providing comments is **FRIDAY 25 MAY 2012** written submissions should be sent to:

Mail:
Associations Review
Office of Regulatory Policy
Department of Justice and Attorney-general
Locked Bag 180
City East QLD 4002

Facsimile:

07 3405 4059

Email: associationsreview@justice.qld.gov.au

Outside Government access to the submission

Submissions may be subject to laws providing for Freedom of Information. It should therefore be kept in mind when making submissions that they may be provided to persons making an application under such laws. Neither the Office of Fair Trading nor the Government will include the personal details of a member or an association in any report which may later be released in relation to this consultation.

Disclaimer

This is an Issues Paper only – it does not represent the policy of any State, Territory or the Australian Government. The Paper seeks public comment on the operation of the *Associations Incorporation Act 1981* and the *Associations Incorporation Regulation 1999*.

While every effort has been made to ensure the accuracy of the information contained in this Paper, no responsibility is taken for reliance on any aspect of it and it should not be used as a substitute for legal advice.

Message from the Minister

The mud army that assembled as a result of the 2011 Summer of Sorrow in Queensland undeniably demonstrated Queenslanders' commitment to volunteering. The tremendous efforts of our community and service organisations during this time reinforced their vital role in making Queensland a strong and inclusive society.

This is not a new phenomenon. Queensland has a long and proud history of volunteerism and community participation. In fact, the most recent Queensland Household Survey found that between November 2008 and November 2009, two thirds of the estimated 3 209 669 adults in Queensland volunteered for an organisation or provided unpaid help to someone who was not a relative.

The community and not-for-profit sector encompasses a broad range of community needs, and makes a valuable contribution to the economy and employment for Queenslanders. The value of volunteer time given each year in Australia is currently estimated to be $14.6 billion. Employment in the sector is growing, and represents about 8.5% of Australia's labour market – on par with the manufacturing sector.

The Queensland Government strongly values this contribution, and recognises that community engagement and participation are essential to the wellbeing of our communities and all Queenslanders. The resilience of a community is immeasurably enhanced by its community and not-for-profit groups.

Just as our community organisations help Queenslanders meet the challenges of changing times, the organisations themselves need our support. There are about 22 000 incorporated associations in Queensland, which range from sports clubs with multi-million dollar budgets to small sewing societies. As diversity in the sector continues to grow, our Government is committed to ensuring that our community groups and not-for-profits operate in the best environment possible. Queensland is committed to smarter regulation, and to reducing red tape for the sector. We were the first jurisdiction to adopt the Standard Chart of Accounts to provide greater consistency in financial reporting, and in turn reduce the cost of financial reporting for not-for-profits.

Recent initiatives by the Department of Communities under the Queensland Compact include:

- Streamlining human services quality standards, which can save large organisations up to $100 000 in staff time
- Simplifying criminal history screening and performance reporting
- Adopting a common service agreement
- Enacting uniform funding legislation

Queensland is also working towards uniform national laws for cooperatives, and recently passed an Act to make it easier to transfer from incorporation as an association to incorporation as a company limited by guarantee.

Consultations commenced late last year on further reforms to the *Associations Incorporation Act 1981* following earlier changes in 2005-2007. Valuable feedback was received from the consultation paper released by Government.

The Commonwealth Government has since announced its intention to fundamentally re-work the national framework for charity and not-for-profit regulation. The Queensland Government has decided to take advantage of this historic opportunity to ensure that Queensland regulation of not-for-profits is as effective, efficient and supportive as possible.

Modernising and updating the *Associations Incorporation Act* and *Regulation* is a key government priority. This paper invites further discussion on proposals to support associations, both incorporated and unincorporated, into the future.

Honourable Paul Lucas MP

Attorney-General,

Minister for Local Government

and Special Minister of State

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1.0 EXECUTIVE SUMMARY

Not-for-profit organisations make an invaluable contribution to the Queensland economy and community. They are the backbone of many important services and programs, including those delivered by government.

Many not-for-profit organisations in Queensland are incorporated as associations. The relevant legislation is over 30 years old, and is due for review. Accordingly, in 2010, the Queensland Government conducted consultation on improving the *Associations Incorporation Regulation 1999.*

However, since then, the Commonwealth Government has announced significant changes to the federal regulation of charities, including a national not-for-profit regulator, which will act as a 'one stop shop' for information and reporting, and a statutory definition of 'charity'. Sections One and Two explore these changes in more detail.

The Queensland Government believes these unprecedented national reforms provide an historic opportunity to reinvent the legal framework for not-for-profits, and ensure that red tape and outdated concepts do not hold Queensland associations back. Consequently, the Government has commissioned this Issues Paper to canvass community opinion on the possibility of wide-ranging changes to the *Associations Incorporation Act* and *Regulation.*

Section Three addresses the purpose of the Act noting that its framework has the ability to accommodate both small and large associations provided that proportionality is applied in its operation

Section Four looks at the structure of the Act, suggesting inclusion of an objects clause. Other issues include whether there needs to be clarification of the minimum numbers required to continue as an association and the scope of permitted trading.

Section Five is directed at associations' operational matters; specifically, vesting association property in trustees and abolition of common seals.

Section Six comprises an extensive discussion on corporate governance principles, and the extent to which these should be applicable to modern incorporated associations, given changing expectations for how not-for-profit companies and associations are accountable to government and the public. The disclosure of remuneration of committee members, senior management personnel and benefits to related parties is also considered in this section.

Section Seven continues the discussion on dispute resolution from the previous consultation, with a new Association Visitor option proposed.

Section Eight explores the issue of the appointment of a statutory manager in circumstances where an association has become dysfunctional due to high level internal conflict.

Section Nine considers voting methods and voting rights.

Section Ten addresses accountability measures – whether the current public register and tiered system of annual reporting are effective.

Section Eleven asks whether developing several types of Model Rules would be valuable, especially in helping associations have the rule structure required to gain tax concessions and exemptions from the Commonwealth Government.

The paper concludes in Section Twelve with a discussion of the role of the Office of Fair Trading in assisting associations to comply with their legal obligations.

The Queensland Government invites associations, their members and the broader community to comment on the issues raised in the Paper.

2.0 Introduction

2.1 Background to the Review[1]

Charitable and community associations, from social welfare organisations to sports clubs, have long provided valuable services to the people of Queensland. Associations promote social cohesion and resilience, create jobs, and build the knowledge and skills of the community.

There are approximately 22 000 associations incorporated in Queensland. Other legal structures for not-for-profits (NFPs) include co-operatives, companies limited by guarantee, charitable trusts, and organisations incorporated by Letters Patent under the *Religious Educational and Charitable Institutions Act 1861* (known as RECI Corporations – saved under section 144 of the *Associations incorporation Act 1981*), by Royal Charter or by dedicated Statute.

The vast majority of incorporated NFPs are either associations or companies limited by guarantee. However, most NFPs in Queensland and in Australia are unincorporated.

Over the last twenty years, not-for-profit associations have increasingly become part of government service delivery. In the four years to 2007-08, the amount invested in the NFP sector by the Queensland Government grew by 40%. NFPs are often more flexible than their commercial counterparts, and are committed to good processes as well as good final outcomes.

The original *Associations Incorporation Act 1981* was enacted with the intention of providing a simple and inexpensive means of incorporation for NFP associations whose activities benefited the community. Reform to the Act has been necessary before, and is now necessary again, to ensure associations are fulfilling the trust placed in them, and to support them in supporting others.

At the end of 2010, the Government issued a consultation paper on possible changes to the *Associations Incorporation Act* and *Regulation*.

Some key issues identified in that consultation paper included:

- Dispute resolution;
- Eligibility for election to the management committee;
- Appointment of voluntary administrators; and
- Remuneration and conflicts of interest for management committee members.

2.1.1 Productivity Commission Report

In February 2010, the Productivity Commission published a report on the not-for-profit sector which highlighted shortcomings of existing regulation across the States and Territories. The report focused on the contribution of the not-for-profit sector to Australia's society and economy, and impediments to the growth of the sector. Shortcomings and differences identified by the Commission include variations in jurisdictions' definitions of 'fundraising activities', reporting and registration requirements and exemptions.

[1] Adapted from Ch 3 of the Productivity Commission report, *Contribution of the Not-for-Profit Sector,* January 2010. The full report is available from http://www.pc.gov.au/__data/assets/pdf_file/0003/94548/not-for-profit-report.pdf.

The Commission recommended harmonisation of fundraising laws, including mutual recognition across Australia through model legislation.

In May 2011, the Commonwealth Government committed to undertake negotiations with the States and Territories on national regulation and a new regulator for the sector, with the aim of minimising reporting and other regulatory requirements. The Commonwealth Government also announced that it is establishing a new, independent statutory agency, the Australian Charities and Not-for-Profits Commission (ACNC), which will commence operations from 1 July 2012. The ACNC will be responsible for administering all federal tax concessions for charities, regardless of their legal structure, so this needs to be taken into consideration in formulating any Queensland reform.

Following recommendations by the Productivity Commission, the Commonwealth Government will also introduce a statutory definition of 'charity' from 1 July 2013, applicable across all Commonwealth agencies. Once the statutory definition of charity has been finalised, consideration will be given to whether it should also be applied to State laws.

Different requirements can impose extra compliance and administrative costs on associations, and there is considerable pressure on governments and departments at state and federal levels to reduce the regulatory burden and standardise reporting requirements. In any reform, government always seeks to strike a balance between association autonomy and the need to ensure associations are accountable not only to their members but to the community.

2.1.2 State Developments

On the 29th of November 2011, Parliament enacted amendments to the Act,[2] to allow for a seamless transition to a company structure for those incorporated associations wishing to become a national body.[3] It is anticipated that larger associations will take advantage of the new Part 11A to transfer to the *Corporations Act 2001* (Cth). The *Corporations Act* offers larger associations a tiered reporting structure which better suits their size and operations. In turn, this will assist Government by reducing the need to provide for an extremely diverse sector.

However, the Government upholds an association's autonomy in choosing its legal structure, and will not force larger associations to transfer.

2.2 A comprehensive review necessary

Matters raised in previous consultation where respondents believed no change was required will not be raised again. A list of the preferred options contained in the previous consultation paper can be found in Appendix 2 should associations wish to revisit these matters. Other matters are of such importance in modernising the Act that it is necessary to revisit them.

Given the national trend towards significant reform, it is an appropriate time to refresh the associations legislation for contemporary conditions. Concepts of corporate accountability and governance developed over the last 30 years increasingly apply to associations, and the sector has grown much more diverse in terms of association income, size and mission. For example, in the 2010-2011 financial year, the top ten clubs generated a combined revenue of $163 million from gaming machines. A balance

[2] *Civil Proceedings Act 2011* (Qld) ss 218-221.
[3] *Associations Incorporation Act 1981* (Qld) Part 11A.

needs to be struck between modern concepts of control, and unwieldy and unnecessary compliance costs.

Key issues for an overhaul of the legislation include dispute resolution and management responsibilities. Past consultations indicate an urgent need for simple, inexpensive dispute resolution mechanisms to be included in the Act and the Model Rules.

Enhanced governance provisions will provide better guidance on the functions and duties of the governing body. Management committees need greater certainty as to their duties and help in avoiding breaches of their legal obligations. Such provisions will reduce the need for Office of Fair Trading intervention, by empowering members to enforce association rules. A more active and informed membership fosters better governance and accountability, and stronger organisations.

The Government invites associations, members of associations, professionals involved advising associations and the broader community to submit feedback on the issues raised in this paper.

3.0 Purpose of the Legislation

3.1 Purpose of the Act when enacted

It is now over 30 years since the concept of association incorporation was introduced into Queensland. The *Associations Incorporation Act 1981* enabled small-scale organisations to avoid the problems inherent in lacking legal personality. Unincorporated associations face legal difficulties in relation to:

- Holding property;
- Being able to sign contracts;
- Committee members being liable for association debts and legal problems; and
- Rights of members to maintain legal actions against the association, fellow members and/or committee members.

Prior to the introduction of the *Associations Incorporation Act,* associations wishing to incorporate were forced to use the *Companies Act*. This was expensive, and imposed heavier duties and responsibilities than seemed required given the activities undertaken by most associations.

The purpose of the new incorporation system was to foster incorporation through providing a voluntary, simple inexpensive and expeditious means of incorporating.

In return for the benefits of legal certainty and legal protection, an incorporated association has to comply with the reporting and operational requirements set down by the Act. It was considered that offering the benefits of incorporation without obligations would produce an undesirable result.[4]

Broadly speaking, the Act sets down a framework for:

- Determining eligibility for incorporation and the process of incorporating;
- Establishing powers of incorporated associations and the rules by which they will operate (including a provision for Model Rules);
- Calling and running general meetings;
- Election and membership of the management committee;
- The role and meetings of the management committee;
- Keeping association records;
- Rights of members;
- Winding up an association; and
- Appeals or reviews of decisions made under the legislation.

A major review of the Act commenced in 2003, and culminated in the 2006-2007 reforms to auditing requirements and mandatory insurance.[5] The basis for these reforms was the recognition that 'one size does not fit all'.

It was flagged at the time that further work was being carried out on the issues of eligibility; types of associations; dispute resolution and conflicts of interest, as these were considered complex matters requiring further policy development.

Upon the introduction of the *Associations Incorporation Bill* into the Queensland Parliament, the then Attorney-General stated:

[4] Queensland Law Reform Commission Report 30, p 12.
[5] *Associations Incorporation and Other Legislation Amendment Act 2007* (Qld) ss 3-37, Schedule.

'The whole purpose of the Bill is to allow small associations that want to incorporate to do it as inexpensively as possible... to obtain the full benefit of incorporation.'[6]

At present, nearly 20% of incorporated associations in Queensland have assets over $100 000, and 48.5% have income less than $20 000. The majority are small with no employees. A 2002 survey found that 80% of associations had fewer than 100 members, and 11% had fewer than 10 members.

Queensland associations legislation does not restrict incorporated associations from trading outside Queensland or require interstate incorporated associations to register in Queensland. Incorporated associations wishing to operate across state borders can do so, provided they comply with the *Corporations Act 2001* and register under Division 1 of Part 5B.2 of that Act.

Further in recent times the introduction of a tiered reporting system has recognised that that one approach does not suit all associations. This has introduced the concept of proportionality to the regulation of incorporated associations in Queensland. There is no intention to force large incorporated associations to change their legal structure to a company limited by guarantee under the Commonwealth *Corporations Act 2001* as it is believed that the *Association Incorporation Act* can accommodate the entire range of associations. However the size of some associations in Queensland may require further consideration of accountability measures such as require additional criteria to assess whether an incorporated association is a Tier 1, Tier 2 or Tier 3 association. This additional criteria may include significant levels of staff, significant turnover, charitable status or owning property to be able to assess what is 'small' and 'large'.

Sections 6 and 10 of this consultation paper canvass a range of issues around governance and reporting and seek feedback from stakeholders on whether large incorporated associations should be required to comply with the higher standards required by the Corporations law to enhance transparency and accountability of large organisations.

[6] Minister for Justice and Attorney-General, Queensland Parliament, Hansard, 18 August, 1981 at p 1642.

4.0 Structure of the legislation

4.1 Objects Clause

4.1.1 Background

The Act does not specify its purpose or list any guiding principles for its operation. This is consistent with drafting practice at the time of its enactment. The title of the Act states that it is an Act to 'provide for the incorporation of certain associations, for the regulation of the affairs of incorporated associations and for connected purposes.' For guidance on the purpose of the Act, it is necessary to consult either the Queensland Law Reform Commission Report, or the Second Reading Speech in Hansard. The Law Reform Commission's Report on the draft *Associations Incorporations Act*[7] stated that 'one of the objects of the proposed legislation is to provide a system of registration and regulation which is less complex and onerous than the Companies Act.'[8] In providing a 'simple system of registration' the QLRC was mindful that the legislation was not attempting to reform the common law. These statements were reiterated by the then Minister for Justice and Attorney-General on the second reading of the Bill in May, 1981.[9] It was emphasized that the legislation was premised on providing an efficient mechanism triggered by the choice of an association to incorporate.

At present, only the NSW legislation, which has undergone the most recent, comprehensive reform contains an objects clause:

> *The objects of this Act are:*
>
> *(a) to establish a scheme for the registration of associations that are constituted for the purpose of engaging in small-scale, not-for-profit and non-commercial activities, including:*
> *(i) associations that are currently unincorporated (which become bodies corporate when they are registered), and*
> *(ii) associations that are currently incorporated under other legislation (which retain their corporate status following registration), and*
>
> *(b) to make provision with respect to the corporate governance and financial accountability of associations registered under that scheme.*

4.1.2 Issues

The Act should set out clearly its purpose and the characteristics to be facilitated by the Act. At present there is no summary of these characteristics from which the reader can gain an immediate understanding of what the Act is about. For discussion purposes, we propose that an objects clause should specify that:

[7] Queensland Law Reform Commission, *A Draft Associations Incorporation Act,* Report No 30, 1980.
[8] Ibid, p10.
[9] Minister for Justice and A-G, Queensland Parliament, Hansard, 7 May, 1981, pp 1030-1031.

- The Act is designed to provide a scheme to register associations established for a public purpose with no financial gain for members;
- Incorporated associations are private and independent;
- Incorporated associations are self-governing; and
- The Act makes provision for good governance and financial accountability proportionate to the size of and risks posed by associations.

Guiding principles could also be included in the Act to enhance understanding for both user and regulator. These guiding principles could include matters such as promoting public trust and confidence, reduction of red tape, encouraging innovation, and transparency.

The main options are outlined below.

- Option 1 – Maintain the status quo, by not providing an objects clause
- Option 2 – Introduce an objects clause that mirrors the NSW legislation
- Option 3 – Introduce an objects clause tailored to Queensland's legislation (broader in coverage than in NSW)
- Option 4 – Introduce an objects clause tailored to Queensland's legislation, as well as with general principles included to enhance the operation of the Act.

4.1.3 Preferred Option

The preferred option is Option 4. This option has the advantage of outlining the characteristics of the coverage of the Queensland Act, and at the same time, facilitating a framework of understanding of how the Act will be administered.

Option 1 is not preferred as it is difficult to determine what policies underscore the scheme established by the Act. Option 2 is not preferred as the object of the NSW Act is much narrower than the Queensland legislation – it restricts commercial trading and is expressly stated to be for small-scale NFPs.

1. Should the Act include an Objects Clause supported by guiding principles as proposed by Option 4?

2. If yes, what should those objects and guiding principles be?

4.2 Should the Act be amended to clarify the number of members required?

4.2.1 Background

In Queensland, the minimum number of members required before an association can incorporate is seven (see s 5(1) (a)).

4.2.2 Issues

While it is clear that seven members are required to incorporate, it is not immediately obvious from the Act whether an association must *always* have at least seven members. However, it may be that this is not an area of confusion for associations.

- Option 1 – Maintain the status quo, by not changing the Act to clarify how many members an association must have on an ongoing basis.
- Option 2 – Amend the Act and Model Rules to require a minimum of seven members for an association at all times.

3. Should the Act be amended to clarify that associations must always have at least seven members?

4. Are there any other issues that should be raised in relation to eligibility to remain incorporated?

4.3 Should non-ancillary trading be permitted?

4.3.1 Background

Associations law has long prohibited incorporated associations from distributing gains or benefits to members. Over time, legislatures around Australia have refined the basic concept to include and exclude many activities.

4.3.2 Issues

Currently, most jurisdictions, including Queensland, do not allow organisations which engage in purely commercial trading activities to either become or remain incorporated as an association. However, trading which is 'ancillary' to the core, charitable or community purposes of the association is permitted.[10]

This provision has become difficult to interpret and administer, with associations often confused about what does or does not constitute 'ancillary' trading.

In addition, contemporary developments in the NFP sector raise questions about the continued utility of restricting incorporated associations' ability to trade. Governments have for some time encouraged NFPs to achieve self-sufficiency. Associations often work closely with government in service provision, or aspire to do so. The current rules about trading in the legislation may create a barrier to the sector's future maturity and sustainability.

Victoria has recently responded to this dilemma by removing trading restrictions, but continuing to forbid distributing benefits to members. Conversely, NSW has moved to confirm that its Act is not designed for large trading associations, and that commercial trading is not permitted.

[10] Section 4 *Associations Incorporation Act 1981* (Qld)

The main options are outlined below.

- Option 1 – Maintain the status quo, with all trading needing to be ancillary to the primary purposes of the association.
- Option 2 – Amend the Act to remove any restriction on associations trading, but to prevent associations being used as shells for commercial trading, retain the existing prohibition on distributing benefits to members and requirement that associations operate for the benefit of members or the community.

4.3.3 Preferred option

The preferred Option is Option 2, as this removes the ambiguity about what is and what is not ancillary trading.

5. Do you agree that the restrictions on association trading should be removed from the Act?

6. If not, should the Act provide a clearer definition of activities an association can undertake in relation to 'trading'?

7. Are there other changes you would suggest?

5.0 Operations

5.1 Issues raised previously

Several operational reforms were proposed in the previous consultation, namely:

- Signatories for cheques
- Cheque/petty cash payment limits
- Keeping an account in Queensland
- Voluntary administration

Responses were fairly decisive and it is not proposed to canvass these issues in any detail again.

In summary, most favoured reducing restrictions on who could sign cheques, increasing petty cash limits, removing the requirement to keep an account in Queensland, and introducing voluntary administration.

If you wish to make comment on these issues or read a more expansive summary of views from the previous consultation, see Appendix 2.

5.2 Vesting property in trustees

5.2.1 Background

Associations are permitted to act as trustees for other people's property in some circumstances: for example, they may be trustees of land under the *Land Act 1994* (Qld). However, some associations seek to vest their own property in trustees, who then hold that property on trust for the association and its members.

5.2.2. Issues

It is not clear whether this arrangement of having association property held on trust is permitted by the Act. As the Act clearly provides for trusts established before incorporation to continue, it could be argued that an association which is already incorporated should be able to choose to deal with its property in this way. This argument is supported by section 25 of the Act, which gives associations all the power of an individual, including the powers to purchase, hold legal and equitable title to, and dispose of real and personal property.

The Act could be amended to make it clear that associations are permitted to vest their property in trustees. This would provide additional flexibility for associations, allowing them to manage their property as they see fit. However, section 60 of the Act requires the business and operations of an incorporated association to be controlled by a management committee. Allowing property to be held by a trustee removes potentially significant assets from the immediate control of the management committee and association creditors.

Another option is to disallow associations from vesting their property in trustees. This would ensure the management committee remains effectively in control of all assets. On

the other hand, this could present difficulties for those associations which receive property via bequests that are conditional on the asset being held in trust.

The main options are outlined below.

- Option 1 – Maintain the status quo, leaving it unclear whether associations can vest their property in trustees.
- Option 2 – Amend the Act to state that associations may vest their property in trustees, while stating that this should be the exception rather than the rule.
- Option 3 – Amend the Act to state that associations may not vest their property in trustees.

5.2.3 Preferred Option

The preferred option is Option 2, as it enables associations to have more flexibility in how they deal with property, especially property gifted to them on condition that it is held on trust.

8. Do you agree that associations should be allowed to vest their property in trustees?

9. If yes, do you agree that Option 2 is the preferred option?

10. If not, is there another way to achieve this?

5.3 Common Seal

5.3.1 Background

Only two jurisdictions stipulate that incorporated associations must keep a common seal: NSW and Queensland. Associations in the other States and Territories may choose to do so, but are no longer required to have a common seal unless provided for in their constitution.

There are relatively few mandatory rules for use of a common seal – most provisions are in the nature of conferring a power rather than a duty. Associations in Victoria, Queensland, SA, WA, Tasmania and the ACT can use their seal to make contracts requiring sealing. However, contracts may be executed without the seal in Victoria and the ACT, provided they are signed by the public officer (Victoria) or secretary (ACT). Similarly, in Queensland, documents only requiring authentication can be signed without the common seal.

If an association chooses to adopt the Queensland Model Rules as applied to seals, provisions are much more specific. Generally, the seal must be kept in the custody of the public officer, secretary, executive committee or other authorised person. In Queensland, it is the responsibility of the executive to ensure the association has a common seal.

5.3.2 Issues

It is now quite rare for contracts to require signature under seal. In updating the Act, should the requirement for a common seal be removed?

The main options are outlined below.

- Option 1 – Retain the status quo, as it confers a power not a duty
- Option 2 – Amend section 21 of the Act to remove reference to the association as a body having a common seal, and amend the Model Rules to remove the requirement for the management committee to keep a common seal. Instead, require associations to include their registration number on all contracts and any other documents they issue.

5.3.3 Preferred option

The preferred option is Option 2, as using a common seal is an outdated practice. A change will bring Queensland into line with all other jurisdictions with the exception of NSW.

11.	Do you agree that the requirement to keep a common seal should be removed from the Act?
12.	If yes, do you agree that Option 2 is the preferred option?
13.	Are there other ways to achieve this?

6.0 Corporate Governance

6.1 Issues raised previously

Several governance reforms have been proposed in previous consultation, namely:

- Impose minimum age for secretary;
- Change eligibility for management committee – persons convicted on indictment or given a custodial sentence made ineligible to be elected for five years from the date of conviction or the date of release, whichever is later; and
- Disclosure of management committee remuneration.

Responses were fairly decisive and it is not proposed to canvass these issues in any detail again.

In summary, most favoured requiring secretaries to be 18, changing eligibility for the management committee, and requiring disclosure of any remuneration paid to the management committee.

If you wish to make comment on these issues or read a more expansive summary of views from the previous consultation, see Appendix 2.

6.2 What is corporate governance?

'Corporate governance' refers to the processes by which organisations are directed, controlled and held to account. It encompasses authority, accountability, stewardship, leadership, direction and control exercised in the organization.[11]

Corporate governance principles do not only apply to for-profit corporations; they apply to all types of organisation where operations are conducted or property is managed for the profit or benefit of others, or for mutual benefit or profit.

6.2.1 Corporate governance in the legislation

In Queensland, the *Associations Incorporation Act* and *Regulation* provide little guidance on how the management committee should meet its governance obligations. The Act states in section 60 that 'the business and operations of an incorporated association shall be controlled by a management committee'. This is ambiguous – 'control' in management theory is a function of boards of directors, but it is likely that most people see section 60 as giving the management committee an operational role. The Act is therefore not clear about the allocation of operations and governance functions.

Under the common law, committee members have long been held to have similar fiduciary duties[12] to those of company directors, including the general duty to act in the interests of the association.[13]

[11] Standards Australia, *Corporate governance – Good governance principles*, Australian Standard 8000–2003.

[12] A fiduciary is a position which involves an undertaking to act in the interests of another, in circumstances where the other could be harmed if the 'fiduciary' does not act in that person's best interests. Some positions are assumed to entail fiduciary duties: e.g. company directors to their company; trustee to beneficiaries of the trust; solicitor to client; agent to principal.

In very small associations, practical separation of governance from operations is difficult (as it is in small private companies) but the conceptual separation is important for ensuring accountability and integrity of management, and should be made clearer in the legislation.

Model Rule 23(8) constitutes the only legislative guidance for management committees as to their governance duties. The Rule prohibits a management committee member from voting on a contract in which the member has an interest; if the member does vote, the vote does not count. Making the governance role and its associated obligations, responsibilities and duties clearer in the legislation would help strengthen governing bodies of incorporated associations. In turn, this would lead to improved legal compliance, better accountability to members, funders and stakeholders and would build resilience of organisations.

The need for Government agencies to exercise regulatory oversight would also be reduced: greater legislative guidance on the functions and duties of the governing body would give more certainty as to management committees' duties and reduce the likelihood of intentional or inadvertent breach of legal obligations. Members would also be more knowledgeable in what to expect of their management committee, and be more able to ensure self-enforcement. A more active and questioning membership fosters better governance and accountability, and stronger organisations.

The following should be considered for inclusion in the Act:

- Due care and diligence obligation;
- Good faith obligation;
- No profit from position (no use of position, opportunity or information acquired to gain an advantage or to cause detriment to the organisation, unless there is fully informed consent);
- No conflict of interest (duty to disclose material personal interest; restrictions on participating in discussion and voting on decisions involving material personal interest, unless there is fully informed consent);
- Delegation of powers in writing, and responsibility for the actions of delegates; and
- Duty to prevent insolvent trading.

6.3 Due care and diligence and good faith

6.3.1 Background

Directors of companies incorporated under the *Corporations Act* must exercise their powers with the care and diligence that a reasonable person in the director's position would exercise.[14] The business judgement rule assists directors in fulfilling this obligation: they are taken to have exercised the required degree of care and skill if:

- They make judgements in good faith and for a proper purpose; and
- Have no material personal interest in the subject matter; and
- Inform themselves about the subject matter to the extent they reasonably believe is appropriate; and
- Rationally believe their judgement is in the company's best interests.

[13] *Haselhurst v Wright* (1991) 4 ACSR 527; *Lai v Tiao (No 2)* [2009] WASC 22 at [84]; *Taylor v National Union of Mineworkers (Derbyshire Area)* [1985] BCLC 237 at 241; *Porima v Te Kauhanganui o Waikato Inc* [2001] NZLR 472; *Stratford Racing Club Inc v Adlam* [2008] NZCA 92.
[14] *Corporations Act 2001* (Cth) s 180.

Company directors must also exercise their powers and discharge their duties in good faith in the company's best interests, and for a proper purpose. This is in line with the equitable obligation of a fiduciary to act in the interests of his or her principal.

These obligations are based on an ordinary person of reasonable prudence, and cannot be reduced only because a particular director is inexperienced (though the standard required *increases* if a director holds their position due their special skill or experience). Company directors are expected to have a reasonable person's standard of competence in reading and understanding financial material, and assessing risks when making decisions, taking into account the organisation's circumstances. This means that board members can be in breach of their due care and diligence obligation even if their organisation is not negatively affected.

The *Trusts Act 1973* (Qld) imposes the more onerous requirement that trustees exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of another person (even higher if the trustee is a person whose profession or business is acting as a trustee or managing investment).

6.3.2 Issues

There are no equivalent provisions in the *Associations Incorporation Act*. However, it is arguable that care and diligence are integral to management committee members' duty of care as office holders. In addition, good faith is arguably inherent in a fiduciary's obligation to act in the best interests of their principal.

The NT's *Associations Act* provides that an officer must not 'commit an act with intent to deceive or defraud the association, members or creditors of the association or creditors of another person or for any fraudulent purpose' in exercising their powers or discharging their duties.[15] The penalty for non-compliance is quite high, at 200 units or 12 months in prison.

Other states and territories do not appear to have equivalent provisions in their associations legislation.

The New Zealand Law Commission is considering whether a code of (governance) obligations should be part of any new Act to regulate incorporated societies.[16] Such a code could include a range of governance duties and responsibilities. If drafted clearly, it could provide an effective guide not only to management committee members but to all the association's members, as to the legal governance obligations of committee members.

The main options are outlined below.

- Option 1 – Maintain the status quo, by not changing the existing obligations for committee members under the common law
- Option 2 – Amend the Act to require committee members to exercise their powers with due care and diligence and good faith, in terms similar to those of the *Corporations Act* but tailored for the requirements of incorporated associations
- Option 3 – Amend the Model Rules to require committee members to exercise their powers with due care and diligence and good faith, but leave the Act as it currently stands

[15] *Associations Act* (NT) s 33(1).
[16] Law Commission, New Zealand, *Reforming the Incorporated Societies Act 1908*, Issues Paper 24, 2011, p 22.

- Option 4 – Introduce a code of governance obligations as a guide to the legal duties of committee members, rather than an amendment to the legislation.

6.3.3 Preferred option

The preferred option is Option 2.

Inserting duties of due care and diligence and good faith in the Act would provide clearer guidance to management committee members about the nature of their obligations. These duties are in some ways more important for NFPs than they are for for-profit entities, because the governing body is responsible for an association whose object is to achieve an altruistic purpose, not to achieve a profit for the benefit of self-interested shareholders.

14. Do you believe the existing common law duties of management committee members should be written into the Act?

15. If so, do you believe that Option 2 is the way to achieve this?

16. Are there other ways to introduce duties of due care and diligence and good faith into the incorporated associations legislation?

17. Given the range of associations, are the duties currently owed under the common law appropriate for all associations, or should they be different?

6.4 No profit from position

6.4.1 Background

The *Corporations Act* imposes both civil and criminal penalty provisions on company directors who use their position, or information gained from their position, to obtain an advantage (personally or for another) or cause detriment to the company.[17] Criminal penalties apply where this conduct is dishonest or reckless.

This is similar to directors' equitable fiduciary duty to not make use of knowledge or opportunity acquired by virtue of their position to gain a benefit, unless they have fully informed consent. This duty is a significant element of a fiduciary position, and breach will usually result in the fiduciary being stripped of any unauthorised gains, even if the conduct is not wilfully deceitful or the principal has not suffered a loss.

Several submissions to the 2011 consultation raised fraudulent behaviour as an issue.

NSW has provision for offences if an association committee member or former member makes dishonest use of information gained, or dishonest use of position on the management committee to gain an advantage for him or herself or another, or to cause

[17] *Corporations Act 2001* (Cth) ss 182-183.

detriment to the association.[18] The penalty is high – 240 penalty units or two years in prison.

Victoria and the NT have similar provisions, for knowingly or recklessly making improper use of information or position.[19] If a committee member is found 'guilty of an offence' under this provision, the court can order him or her to pay compensation to the association. Even if the association suffers no loss, this can still be a breach of the obligation not to profit from position.

6.4.2 Remuneration of committee members, senior management personnel and benefits to related parties

In addition, under the *Corporations Act*, directors of (listed) public companies must, in their directors' report, disclose the remuneration paid to 'key management personnel'. This includes directors and senior managers.

The requirements for companies limited by guarantee are outlined in section 285A of the *Corporations Act* and vary according to the size of the organisation. 'Small' companies limited by guarantee having annual revenue less than $250,000 (section 45B) may have no obligation to prepare a directors' report; but others will be required to prepare a directors' report, although less detailed than that of listed companies.

Consideration should be given to whether members of management committees should be required to disclose in their annual report any remuneration paid to them and to key management personnel. This could be disclosed in bands rather than requiring precise amounts.

Under the *Corporations Act*, the annual report must also include disclosure of certain benefits to related parties of the company – spouses, parents and children of directors and key managers. Consideration should be given to whether it is appropriate to require incorporated associations to make similar disclosures, i.e. whether benefits to spouses, parents and children of management committee members and key managers should be disclosed in their annual reports.

6.4.3 Issues

The main options are outlined below.

- Option 1 – Maintain the status quo, by not creating a statutory duty not to misuse a committee member position
- Option 2 – Amend the Act to prohibit committee members from misusing their position or information gained from their position to secure a benefit for themselves or someone else, in terms similar to those of the *Corporations Act*
- Option 3 – Amend the Act to prohibit committee members from misusing their position or information gained from their position to secure a benefit for themselves or someone else, in terms similar to those used in Victoria
- Option 4 – amend the Act to require disclosure of remuneration of management committee members, senior staff and any benefits to related parties e.g. spouse, parents or children of management committee members and/or senior key management personnel

[18] *Associations Incorporation Act 2009* (NSW) ss 32-33.
[19] *Associations Act* (NT) s 33; *Associations Incorporation Act 1981* (VIC) s 29A.

- Option 4 – Amend the Model Rules to prohibit committee members from misusing their position or information gained from their position to secure a benefit for themselves or someone else, but leave the Act as it currently stands
- Option 5 – Introduce a code of governance obligations as a guide to the legal duties of committee members, rather than an amendment to the legislation.

6.4.4 Preferred option

The preferred options are Option 3 and Option 4

Inserting provisions similar to those used in Victoria will require a person who breaches this rule to surrender any profits from the breach to the association, or make good any losses. Requiring disclosure of remuneration enhances transparency and accountability.

18. Do you believe that management committee members should be subject to a duty not to profit from their position?

19. If so, do you believe that Option 3 is the way to achieve this?

20. Are there other ways to introduce a duty not to profit from position into the regulation of incorporated associations?

21. Given the range of associations, is it appropriate to mandate a duty not to profit from position for all associations?

22. Should incorporated associations be required to disclose in their annual reports the remuneration paid to management committee members and key management personnel (by reporting remuneration in bands)?

6.5 No conflict of interest – disclosure of pecuniary interests

6.5.1 Background

The conflict of interest rule was included in the previous consultation process in the narrow context of the current provision in the Model Rules (rule 23(8)):

> A member of the management committee must not vote on a question about a contract or proposed contract with the association if the member has an interest in the contract or proposed contract and, if the member does vote, the member's vote must not be counted.

Model Rule 23(8) is very restrictive, in not permitting the management committee to determine whether a member with a conflict of interest should be permitted to vote. However, this only addresses one particular issue, and there is no other real guidance

on governance elsewhere in the Model Rules. Importantly, the Rules do not impose a positive obligation on the committee member to disclose an interest in the contract under consideration.

Avoiding conflict of interest rule is a major element of the equitable fiduciary duty. While management committee members are not company directors, on the basis of equitable principles, they arguably owe a fiduciary duty to the association.[20] Since the Act states that they are agents of the association, they can also be assumed to owe fiduciary duties on this basis.

Under the *Corporations Act,* company directors who have a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest, except in certain circumstances.[21] Furthermore, directors of a public company may not be present during deliberations or votes on the matter, unless the other directors pass a resolution allowing it. An offence of strict liability applies unless the interest is within one of the exceptions. The Act (s 192) allows directors to give a standing notice of an interest that may result in a conflict.

Almost all other states and territories prohibit voting in cases of conflicts of interest, and NSW and WA go further, prohibiting participation in deliberations as well.

6.5.2 The previous Consultation paper

In the previous consultation, the preferred option was to amend the Act to require management committee members to disclose such conflicts of interest, but leave it to the committee to decide whether the member could vote on the matter. The member would still be allowed to take part in deliberations. Of the respondents who commented on this issue, three quarters agreed with the preferred option. The remaining quarter preferred the more restrictive option of prohibiting voting altogether, but allowing participation in deliberation.

This is better than the current state of the Act, and is closer to the *Corporations Act.* However, it is open to abuse where a particularly vocal committee member can persuade the committee to allow him or her to vote or remain in the meeting room, especially if participating in deliberations. The *Corporations Act* requirement for public companies is arguably a better option in order to protect associations and give the committee a strong basis for excluding a member from debate where they have a conflict of interest.

In addition, there is an argument for disclosing the interest to the members in general meeting or at least having it recorded and available for inspection by members.

6.5.3 A new preferred option

Consideration should be given to a new preferred option, in line with the requirement for public companies under the *Corporations Act* or the NSW requirement, that is:

- a positive duty to disclose any material personal interest that appears to conflict directly or indirectly with a matter under consideration by the management committee; and

[20] See e.g. Finn J's guidelines in *Australian Securities Commission v AS Nominees* (1995) 62 FCR 504 at 521 – undertaking by the person to act in the interests of the other; vulnerability of the other to have their interests harmed; reasonable or legitimate expectation by the other that the person will act in the other's best interests.
[21] *Corporations Act 2001* (Cth) ss 191-95.

- recording any such interests and either (a) disclosing them in the next general meeting; or (b) making the record available to members; and
- prohibiting conflicted committee members from being present during deliberations and from voting, unless the committee determines otherwise; and
- prohibiting conflicted committee members from being present during deliberation or voting on this decision of whether to include or exclude them from the conflicted matter.

Consideration could also be given to whether management committee members could give standing notice of matters that may involve a conflict of interest; and whether failure to disclose such material personal interest should attract a penalty.

Therefore, the proposed options for this consultation are as follows:

- Option 1 – Maintain the status quo, by not changing the disclosure and voting provisions where committee members have a conflict of interest (the principles of fiduciary duty under the law of equity would continue to apply)
- Option 2 – Amend the Act to require management committee members to disclose such conflicts of interest, but leave it to the committee to decide whether the member could vote on the matter. The member would still be allowed to take part in deliberations (this is the previous preferred option)
- Option 3 – Amend the Act to:
    - require management committee members to disclose material personal interests which conflict with a matter under consideration by the committee; and
    - prohibit them from being present during deliberations and from voting unless the other members approve; and
    - prohibit the conflicted committee member's involvement in the decision whether to exclude them from deliberations and voting; and
    - require a written record to be kept of all conflicts of interests; and disclosure to the membership at the AGM
- Option 4 – Amend the Act to require disclosure, and prohibit conflicted members from voting altogether, leaving participation in deliberations to the discretion of the non-conflicted members.

6.5.4 Preferred option

For the reasons stated above, the new preferred option is Option 3.

23. Do you believe there should be legislative change to address the issue of management committee members having material personal interests that conflict with matters being considered by the committee?

24. If yes, is the new preferred option, Option 3, the way to achieve this?

25. Alternatively, do you think the previous recommended option (current Option 2) is the most appropriate way to achieve this?

26. If neither, what would you suggest instead?

27. Given the range of associations, is it appropriate to apply such provisions to all associations?

6.6 Powers and duties of committee members

6.6.1 Background

Section 60 of the Act provides that, subject to the Act, the business and operations of the association are to be controlled by a management committee. In addition, members of the management committee are deemed to be agents of the association for all purposes within its objects. This is reinforced in the Model Rules, where Rule 22(1) gives the management committee 'general control and management of the administration of the affairs, property and funds of the association', although this is stated to be subject to the Rules and any resolution of the general meeting.

The management committee of smaller associations is often responsible for these functions, as well as their governance role – there is no-one else to do the job. However, in most medium to large associations, management of the day to day operations is done by staff, whether they are paid or volunteers. In this situation, the lack of definition as to the management committee's role, powers and responsibilities can lead to confusion, conflict, and excessive intervention by the management committee.

6.6.2 Issues

The management committee is the primary decision-making body of an association. As the governing body, its responsibility is governance, rather than management. This could be made clearer in the Act by creating a list of powers and responsibilities. Currently, there is nothing in the Act or Regulation setting out the management committee's stewardship[22] or leadership roles, or its obligation to manage risk and ensure compliance with all legal requirements affecting the association.

[22] Stewardship sees the governing body less concentrated on oversight and control of managers and more on planning and strategy. It is a more facilitative role, guiding managers to achieve the

The range of specific duties allocated to the management committee and particular office holders is a matter for the association to decide. However, the Act and Regulation do place responsibility for certain matters in the hands of the management committee or office holders:

- To ensure the association complies with its rules about meetings (s 57)
- To have financial statements prepared (and, if necessary, audited) and presented to the AGM (ss 59, 59A, 59B); and then lodged with the Office of Fair Trading – breach of the latter means the president, treasurer and secretary have committed an offence;
- To notify OFT of the appointment or election of the secretary (s 68)
- To consider whether the association should have public liability insurance and report its decision to the members and applicants for membership (s 70)
- To ensure the association has current public liability insurance over any land which it owns, leases, or over which it is trustee (s 70A)
- To approve up to 3 non-committee members authorised to sign cheques (reg 11)
- To consider applications for membership (rule 9)
- To consider termination of membership (rule 10)
- To keep a register of members (rule 13)
- To appoint and remove the secretary (if the secretary is not elected) (rules 15 and 16)
- To approve or ratify all expenditure (rule 45(9))
- To ensure safe custody of books, documents, instruments of title etc (rule 47)
- Cheques of value greater than $100 must be signed by the president, treasurer or secretary plus one other authorised person (rule 45(5))
- The treasurer must ensure financial statements are prepared for each reportable financial year (rule 46)

A set of broad general governance responsibilities could be included in the Act, in terms similar to those duties of good faith, due care and diligence and so on which are in the *Corporations Act*. Alternatively, consideration could be given to incorporating a more specific set of duties as part of the Model Rules, or as a set of optional rules.

28. Should the management committee's role, responsibilities and duties be set out in the legislation?

29. If yes, what should be included (e.g. stewardship, risk management, financial oversight, legal compliance, to keep informed of the association's operations and environment, appointment of senior managers, etc)?

30. What is the best way to achieve this (e.g. amendment to the Act, incorporation into the model rules, optional rules, a code of conduct)?

31. Given the range of association sizes and types, is it appropriate to legislate the management committee's role and functions for all organisations?

organisation's mission through active discussion and influencing the strategic direction of the organisation.

6.7 Power to appoint a secretary who is not a member

6.7.1 Background

All incorporated associations are required to have a secretary at all times. While most secretaries are elected by the membership, section 66(1) gives the management committee the power to appoint any person as secretary. In the event that the membership does not elect a secretary, subsections (b) and (c) are intended to prevent the committee from being forced to commit the offence of not ensuring that the association has a secretary.

6.7.2 Issues

This power to appoint a secretary includes the power to appoint a non-member as secretary (s 66(1)(c)). Given the level of responsibility that the secretary has in an incorporated association, should the management committee continue to be allowed to choose a non-member if appointment is necessary? Alternatively for large associations the preference may be to appoint a professional person from outside the organisation as the secretary of the association.

The main options are outlined below.

- Option 1: Maintain the status quo, by not amending the legislation to require any secretary appointed by the management committee to be an association member.
- Option 2: Amend the Act to require that any secretary appointed by the management committee to be an association member.
- Option 3: Amend the Model Rules to require that any secretary appointed by the management committee to be an association member.

6.7.3 Preferred option

The preferred option is Option 2. The role of secretary is pivotal to the proper functioning of an incorporated association, and should not be occupied by a person who is not invested in the future of the association.

32. Do you agree that the management committee should not be allowed to appoint a non-member as secretary of an association?

33. If yes, do you agree that Option 2 is the preferred option?

34. If not, is there another way to achieve this?

6.8 Delegation to management

6.8.1 Background

It can be necessary for the management committee to delegate management powers to operational staff, usually through a chief executive, centre director, manager or similar role. It may also be necessary at times for the whole committee's powers over particular matters to be delegated to a smaller committee or an individual committee member. Model Rule 27 enables the management committee to appoint a subcommittee to help conduct the association's operations, but it is not clear how the management committee is to go about this delegation.

Delegations need to be made clearly and formally, and recorded in order to ensure decisions made under delegation are within power and, if necessary, to protect the individuals and the organisation.

The *Corporations Act* allows directors to delegate their powers to a similar range of persons as committees under the *Associations Incorporation Act.* Delegations must be recorded in the minute book.[23] Furthermore, directors are responsible for the delegate's exercise of power unless the director believed on reasonable grounds, in good faith, and after making proper inquiry that the delegate was reliable and competent.[24] A trustee who delegates powers under the *Trusts Act 1973* (Qld) remains responsible for the actions of his or her delegate.

6.8.2 Issues

There is no provision in the *Associations Incorporation Act* itself for delegation of management powers – only the Model Rules. However, delegation is likely to be a widespread practice. Requiring written delegation would stimulate adoption of clear, formal practices to delineate what the management committee and others are each responsible for, especially in larger organisations.

This could be adopted as a model rule. It would be important to provide something like section 190 of the *Corporations Act,* to ensure that committee members exercised their delegation carefully, but gave them protection where they had done so.

The main options are outlined below.

- Option 1 – Maintain the status quo, by not amending the Act to clarify the ability of the management committee to delegate its powers.
- Option 2 – Amend the Act to specifically allow management committees to delegate powers, in writing, to subcommittees, one member or other persons approved by the committee, but with the committee retaining responsibility for the acts of the delegate. Include a provision protecting committees from unexpected acts by delegates, along the lines of s 190 of the *Corporations Act.*
- Option 3 – Amend the Model Rules to specifically allow management committees to delegate powers, in writing, to subcommittees, one member or other persons

[23] *Corporations Act 2001 (Cth)* s 198D.
[24] *Corporations Act 2001* (Cth) s 190.

approved by the committee, but with the committee retaining responsibility for the acts of the delegate. Include a provision protecting committees from unexpected acts by delegates, along the lines of s 190 of the *Corporations Act*.

6.8.3 Preferred option

The preferred option is Option 2.

Therefore consideration should be given to including a provision in the Act to allow delegation of management committee powers, with the delegator's responsibility for the action of the delegate maintained, subject to protections such as those in the *Corporations Act.*

6.9 Management committee members' duty to prevent insolvent trading

6.9.1 Background

Under s 588G of the *Corporations Act*, directors have a duty to prevent insolvent trading by the company. 'Insolvent trading' refers to incurring a debt while there are reasonable grounds to believe the company is insolvent, or will become insolvent if it incurs the debt, or debts that include that debt. If a person is aware of grounds for suspecting insolvency, or a reasonable person in their circumstances would have been aware, and they fail to prevent the company incurring the debt, they will be in breach of the Act. If the failure is dishonest, the contravention is an offence.

6.9.2 Issues

NSW has a similar provision in its *Associations Incorporation Act*: all committee members will be guilty of an offence if the association incurs a debt while insolvent or when there are reasonable grounds to believe it will become insolvent. The association and the committee members are jointly and severally liable for the debt (s 68).

In Queensland, all committee members have responsibility for the financial report presented to members at the AGM and therefore must take care to understand what is in the financial statements, at least to the extent expected of a reasonable committee member in similar circumstances. Model Rule 22 gives the management committee powers to manage the property and funds of the association, including power to invest, borrow and pay interest, mortgage, issue debentures and security over the association's property. These responsibilities and duties extend to monitoring the financial affairs of the association.

However, there is no clear equivalent to *Corporations Act* section 588G or NSW section 68 in the Queensland Act. Given the increasing sophistication of many associations, and the need to protect all associations from financial loss caused by negligence of the committee, such a provision may be appropriate.

If committee members were to have such a duty, the ability to start voluntary administration would be essential. Introducing voluntary administration was discussed in previous consultation and received overwhelming approval.[25]

The main options are outlined below.

- Option 1 – Maintain the status quo by not amending the Act to introduce a duty for committee members to avoid insolvent trading.
- Option 2 – Amend the Act to impose a duty on committee members to ensure their association does not incur a debt while insolvent or possibly insolvent. The amendments would include protections for committee members who acted reasonably and made efforts to keep themselves informed.
- Option 3 – Amend the Act to impose a duty on committee members to ensure their association does not incur a debt while insolvent or possibly insolvent. The amendments would include protections for committee members who acted reasonably and made efforts to keep themselves informed. In addition, amend the Act to make it an offence to dishonestly or recklessly fail in the duty.

6.9.3 Preferred option

The preferred option is Option 2. Management committee members are already responsible for the financial statements presented to the AGM. Their position requires that they take responsibility and use reasonable care to read, question and understand the financial information presented to them.

35. Should the Act be amended to impose an obligation on management committee members to prevent associations incurring debts while insolvent or while there are reasonable grounds to believe it could be, or could become insolvent by incurring the debt?

36. If so, do you agree that Option 2 is the best way to achieve this?

37. If not, is there another way to achieve this?

38. Given the range of association sizes and types, is it appropriate to legislate the management committee's role and functions for all incorporated associations?

[25] This proposal and a summary of consultation responses can be found in Appendix 2.

7.0 Dispute Resolution

7.1 Background – previous discussion paper

7.1.1 Background

Disputes within associations can become quite personal and acrimonious. Members are emotionally invested in their association, and if issues are not resolved in a reasonable time, conflicts can become much larger than the original point of disagreement. While the number of association disputes is unknown, over 130 complaints were referred OFT between January 2007 and August 2010.

The current legislation does not provide or require a simple dispute resolution process.

A majority of respondents to the 2007 review of the Act indicated that change was required. Consultation to date has indicated support for resolving disputes in a less formal way than going directly to the Supreme Court.

7.1.2 The previous Consultation paper

In the previous consultation, the preferred option was to amend the Regulation and Model Rules to provide a mediation process, and amend the Act to require associations to exhaust dispute resolution before going to the Supreme Court. Associations not adopting the Model Rules would have to include their own dispute resolution process in their rules.

This was preferred because it would institute a dispute resolution process for associations without the formality and expense of going to the Supreme Court, which is currently the only avenue for redress in the Act if associations are not operating according to their rules. Consideration was given to allowing associations to access the Queensland Civil and Administrative Tribunal instead of requiring them to go to the Supreme Court, but it was thought this would remove the incentive to resolve the dispute themselves.

The previous preferred option is better than the current state of the Act, but it does not give sufficient consideration to the realities of association disputes. Mediation relies on the cooperation of all parties in agreeing to, attending and abiding by the results of the mediation. It fails where cooperation is absent. Due to the often emotional nature of intra-association conflict, and personal investment in ‘sides’,failed mediation is a real possibility. This was a problem brought up by a number of submissions to the earlier consultation.

Restricting associations and members to a Supreme Court action where informal dispute resolution fails does not greatly improve on the current position.

7.1.3 Submissions to the consultation paper

Most respondents to previous consultation endorsed requiring mediation or another informal dispute resolution process before any recourse to external forums. Further clarification is needed as to whether the Supreme Court is the preferred external dispute resolution forum.

7.2 A new preferred option

Due to the ambiguity of previous submissions on this question, the preferred option has been split into two elements: internal and external resolution of disputes.

7.2.1 Internal resolution of disputes

A new preferred option is proposed: that of the Association Visitor[26] ('the Visitor'). A Visitor would have the authority to intervene in an association dispute at the earliest opportunity, to bring about resolution without the need for court action.

The role of Visitor was popularised in the 1500s to allow for an independent person to investigate and settle problems and disputes in religious and charitable corporations without involving the courts. There is a substantial body of common law developed around the conduct and appointment of Visitors. Visitors have been used in modern universities and still are in religious bodies.

The role of a modern Visitor is written into an entity's constitution or rules, including their powers and their function. Visitors are usually appointed to deal with all internal disputes, as they arise. Some groups may have a number of Visitors to deal with sub-issues, under the direction of a senior Visitor (for example, a multi-sport organisation having a Visitor for each sporting activity). A person appointed to be a Visitor usually has knowledge of the law, concerns and special issues affecting the entity as well as being independent of members and management, enabling them to make decisions which are right for the entity.

It is anticipated that Visitors will intervene in a dispute when the 'trigger' written into the constitution happens, and they may resolve the dispute as they see fit, as long as it is legal and within their role as set out in the constitution. Their determinations are proposed to be binding and not able to be appealed to a court. However, Visitors *would not be permitted to* resolve disputes involving parties outside the association, or matters of general law (e.g. an employment contract). The Court can also restrain Visitors who act outside their jurisdiction or are guilty of bias or fraud.

A person acting as a Visitor would need to be a person of good standing in the community, independent of the association, and trained in dispute resolution. There are a number of options for sourcing Visitors. It may be a role that Justices of the Peace could undertake, or it may form part of the current training program for community mediators run by the Department of Justice and Attorney-General. Lawyers are another option, though this would be higher in cost.

Whoever fulfils the role of Visitor, the cost of employing them is likely to be substantially less than court fees, and many associations would be able to find a willing and suitably qualified volunteer who is sympathetic to the association's aims.

It may also be desirable to grant the Attorney-General all the powers of an Association Visitor in order to intervene in an association dispute where it is in the public interest to do so. In this way disputes in associations that provide high level public services that

[26] The following is adapted from Myles McGregor-Lowndes' 1998 paper *The Visitor – Facilitation of Internal Dispute Resolution in Not-for-profit Organisations,* Working paper No. PONC82. For the full text of the paper, see http://eprints.qut.edu.au/12032/1/82_McGregor.pdf.

could potentially disrupt the provision of those services could be addressed at a high level and at an early stage.

Early intervention in disputes also reduces the emotion, complexity and potential negative publicity associated with long-running disagreements. As with other alternative dispute resolution methods, the role of a Visitor can be adapted to an association's needs, and deal with the emotional issues that often lie under the surface of a technical dispute.

7.2.2 External resolution of disputes

For issues where alternative dispute resolution is either inappropriate or has been exhausted, the current forum for resolving association disputes is the Supreme Court. However, lodging an application alone costs $1,050 for an association, and $520 for an individual member. Anecdotal evidence suggests that the process is expensive, highly technical and beyond the resources of many associations and members. Unsurprisingly, few association disputes ever reach the Supreme Court.

Earlier consultation canvassed the prospect of transferring jurisdiction from the Supreme Court to the Queensland Civil and Administrative Tribunal. QCAT is recognized as a simpler and cheaper process for dispute resolution. While there are still application fees (currently $53-$265), this is less expensive and more accessible than the current option.

7.2.3 Issues

Given developments interstate and the absence of a less formal method of dispute resolution in the Act or Regulation, it would be appropriate to consider a range of options to address the need for a less formal dispute resolution process.

The main options are outlined below.

Internal dispute resolution

- Option 1 - Maintain the status quo, by not providing an internal process to deal with disputes, and requiring disputes to be resolved in an external forum (see below for options as to which body this would be).
- Option 2 – Amend the Regulation and the Model Rules to provide a mediation process to deal with disputes, and require those associations which do not adopt the Model Rules to provide for a dispute resolution process in their rules. This would also require a complementary amendment to the Act, to require an association to exhaust this informal dispute resolution process before proceeding to an external forum.
- Option 3 – Amend the Model Rules to create Association Visitors. Visitors would have jurisdiction to conclusively settle internal disputes between members, or members and the association. Decisions of the Visitor would not be able to be appealed. Associations not adopting the Model Rules would be required to provide for a dispute resolution process in their rules. Associations would be required by an amendment to the Act to exhaust internal dispute resolution before proceeding to external review. Where it is in the public interest to intervene the Attorney-General be granted all the powers of an Association Visitor

External resolution of disputes

- Option 1 – Maintain the status quo, by leaving the Supreme Court as the forum for external resolution of association disputes.
- Option 2 – Amend the Act to substitute the Queensland Civil and Administrative Tribunal (QCAT) for the Supreme Court as the body to adjudicate disputes unable to be resolved internally. The jurisdiction of the Supreme Court would remain, but only for appeals on questions of law.

7.2.4 Preferred option

Firstly, stakeholders are asked to consider whether Option 3 should be the preferred option for internal resolution of disputes. Internal dispute resolution Option 3 is preferred because it recognizes the principle that the freedom inherent in voluntary association is best respected if disputes within associations are resolved by the parties themselves. It follows that a simple and inexpensive process to deal with internal disputes should be provided to facilitate a mediated dispute resolution process. An independent Visitor would provide a conclusive decision, avoiding the need to rely on cooperation from both parties as in mediation.

Internal Option 1 is not preferred because maintaining the status quo would not address the issue of associations currently experiencing difficulty in resolving disputes.

Internal Option 2 is not preferred because mediation relies on the cooperation of all parties in agreeing to, attending and abiding by the results of mediation. This was a problem brought up by a number of earlier submissions. Associations can still choose to provide for their own dispute resolution process in their rules, including the mediation option.

Secondly, stakeholders are asked to consider whether Option 2 should be the preferred option for external resolution of disputes. External dispute resolution Option 2 recognizes that not all disputes will be resolved internally, and that QCAT is a simpler, less expensive and more accessible forum for the adjudication of disputes. The role of the Supreme Court would then be confined to a Court of Appeal and a forum for resolution of questions of law referred to it from QCAT, including questions about whether a Visitor has jurisdiction to act in a particular case.

External Option 1 is not preferred because the disputes that cannot be resolved internally should be provided with a simpler solution than a Supreme Court action. A hearing before QCAT is likely to be a significantly more attractive proposition (because it would probably involve less delay and expense) than applying to the Supreme Court.

This should lead to earlier resolution of disputes and consequently better functioning associations. Extending the jurisdiction of QCAT to cover disputes arising from the Act is likely to be a more cost effective utilization of judicial resources with consequent savings for the Government and litigants. With internal dispute processes preceding court action, it may well be the case that the number of actions will be reduced.

In any case, it is the responsibility of the state to provide appropriate forums for dispute resolution where parties cannot agree. Resort to QCAT with an appeal to the Supreme Court seems more appropriate. This may require further resources being allocated to QCAT.

In particular, the combination of Internal Option 1 and External Option 2, allowing disputes to go straight to QCAT, is not preferred. This provides less incentive for

disputes to be settled internally. Further, the absence of any in-house dispute resolution process may deter persons from joining associations (and may particularly deter existing members from joining the management committee), due to the likelihood of being involved in a QCAT hearing.

39. Do you believe there is a need for a new dispute resolution process?

40. If yes, do you agree or disagree that a combination of Internal Option 3 and External Option 2 is the way to achieve this?

41. Are there any other ways this could be achieved?

42. Given the wide variance in the types and sizes of associations, is the preferred option appropriate for all associations?

43. Are there any other issues about dispute resolution or impacts which need to be considered?

8.0 Statutory Management

8.1 Background

Incorporated associations are self-governing bodies. This is reflected in the principle that courts will not interfere with the affairs of voluntary associations as expressed in the High Court decision of *Cameron v Hogan*[27] if the association has complied with its rules. The role and powers of the Chief Executive under the Act are designed to ensure compliance with the provisions of the Act in respect of financial and legal accountability but do not extend to intervention in internal matters or disputes.

If an association is no longer functioning or unable to pay its debts then the only course of action currently provided under the Act is for the association to be wound up either voluntarily or by an order of the Supreme Court.[28]

Previous reviews of the Act have proposed a mechanism for the appointment of a voluntary administrator in circumstances where an association is experiencing financial difficulty but may have capacity to overcome these difficulties. It is proposed that the Act be amended to allow for the appointment of a voluntary administrator. (see Appendix 2 paragraph 1.4)

8.2 Issues

There may be circumstances where an association has become dysfunctional for reasons other than financial difficulties which can only be remedied by another form of external intervention. The issue to be considered is whether consideration should be given to granting the Chief Executive the power to appoint a temporary statutory manager to resolve a deadlock or overcome dysfunction within an association. The Chief Executive may also require the power to alter the rules or constitution of the association to enable any proposed statutory manager to carry out their duties to restore function to the association.

Recent amendments to the Victorian *Associations Incorporation Act* 1981[29] have introduced this measure. Under the Victorian Act, the Registrar can investigate the affairs of an incorporated association, including its functioning and financial condition. After such an investigation if the Registrar considers it in the interests of the incorporated association's members, creditors or the public, the Registrar can apply to the Victorian Magistrates' Court for the appointment of a 'statutory manager' to conduct the affairs of an incorporated association. It is anticipated that this provision will be used in circumstances where there is evidence of a serious dysfunction in the operations of an association such as the association ceasing to function due to an internal dispute over election results. This was seen as a less severe alternative to seeking that the association be wound up.

Victoria introduced the added measure of its Registrar having to apply to the court for an order to appoint a statutory manger to ensure that the power was not used without external independent oversight.

In NSW the Director-General may appoint an administrator to manage the association's affairs if the association has either persistently failed to comply with the Act or if the Director-

[27] (1934) 51CLR 358 at 378
[28] Part 10 *Associations Incorporation Act 1981 (*Qld)
[29] PartVIIAB

General believes in the circumstances it is in the interests of the association's members or creditors.[30]

If provision were to be made to appoint a statutory manager should this power only be exercise upon an order of the Supreme Court or should the Chief Executive be able to exercise the power on their own initiative? Should provision also be made to give the statutory manager the power to alter the rules or constitution of the association in order to restore function to the association and if so should this only be upon the approval of the Chief Executive?

8.3 Options

Option 1 – Maintain the status quo and leave it to associations to resolve the situation through internal dispute resolution mechanism or by application to court.

Option 2 – Amend the Act to give the Chief Executive the power to apply to court for the appointment of a temporary statutory manager.

Option 3 – Amend the Act to give the Chief Executive the power to appoint a temporary statutory manager without the requirement for a court order to do so.

Option 4 – Amend the Act to allow the statutory manager to alter the rules or constitution of the association to overcome any dysfunction but only upon approval from the Chief Executive to do so.

8.4 Preferred option

The appointment of a statutory manager is a very serious matter as it disregards the autonomy of an association yet there can be circumstances where this would be an appropriate course of action to overcome a deadlock if there are competing committees after an election or an association is experiencing debilitating internal disputes. Therefore the preferred option is to amend the Act to make provision for the appointment of a statutory manager. However to ensure that there is transparency in this appointment and a right for members to be heard it is proposed that Option 2 be the preferred option.

Further as the circumstances which have brought about the need to seek the appointment of a statutory manager may involve the need to ensure rules or constitution of the association operate so as to permit the association to function properly it is proposed that Option 4 also be included as a preferred option.

44.	Do you consider there is a need to provide for the appointment of a temporary statutory manager in circumstances where an association becomes dysfunctional?
45.	If yes, do you agree with Preferred Option 2?
46.	Do you also agree that a statutory manager should be able to change the rules or constitution of an association with the approval of the Chief Executive?
47.	Are there any other issues that need to be considered about appointing a statutory manager?

[30] S55 *Associations Incorporation Act 2009* (NSW)

9.0 Meetings and voting

9.1 Holding an AGM and voting procedures

9.1.1 Background

Elections are a significant aspect of an association's AGM and voting on matters at an AGM or general meeting is an important right of a member. Matters to be decided by associations are put to a general meeting and decided by a majority of members present; or if a special resolution, by ¾ of the members who are present and entitled to vote. If a member is unable to attend a meeting to vote, there is provision in the Model Rules for the appointment, in writing, of a proxy. The Model Rules provide that a proxy does not have to be a member of the association. Postal ballots may also be used to pass general and special resolutions, subject to the association's constitution. NSW's Model Constitution also provides for postal ballots:

> *34. Postal ballots*
>
> *(1) The association may hold a postal ballot to determine any issue or proposal (other than an appeal under clause 12).*
>
> *(2) A postal ballot is to be conducted in accordance with schedule 3 to the Regulation.*

The Queensland Act was amended in 2007 to allow associations to include provisions in their rules to hold meetings using 'any technology that reasonably allows members to hear and take part in discussions as they happen' (s 56). The Act also provides that management committee meetings may now be conducted through this type of communication technology, without needing a specific rule (s 63A) and can be held in two places at once.

9.2 Proxy Votes

While the Model Rules provide for proxy votes, not all associations may want proxies or they may want to restrict the circumstances in which proxies are approved or the number of proxies an individual can hold. It is also recognised there may be instances where proxies can appear to decide issues against the votes of the majority of members present at the meeting. Some jurisdictions no longer permit proxy votes.

The practice of proxy voting, and how many proxies a member can hold should also be reviewed. Concern has been raised that elections and voting may be manipulated through the use of proxy voting.

It is also a matter of concern that proxies are not required to be association members under the legislation or Model Rules. Potentially, this means that people who are not informed about association business, or who are not motivated by the association's best interests, could influence key decisions.

The main options are outlined below.

9.2.1 Proxy voting: retain

- Option 1 – Maintain the status quo, by leaving it to individual associations to decide if they wish to amend their rules in relation to proxy voting.
- Option 2 – Amend the Model Rules to ban proxy voting.
- Option 3 – Amend the Act to ban proxy voting.

9.2.2 Proxy voting: numbers

- Option 1: Maintain the status quo, by leaving it to individual associations to decide if they wish to amend their rules in relation to proxy voting.
- Option 2: Amend the Model Rules to restrict the number of proxy votes any one member can hold, with an exception for the Chair of the meeting.

9.2.3 Proxy voting: members

- Option 1: Maintain the status quo, by leaving it individual associations to decide if they wish proxies to be members.
- Option 2: Amend the Act to require all proxies to be members.
- Option 3: Amend the Model Rules to require all proxies to be members.

9.3 Postal Voting

If participation in all meetings is paramount, then should the Model Rules allow for postal voting?

The main options are outlined below.

- Option 1 – Maintain the status quo, by leaving it to individual associations to decide if they wish to amend their rules in relation to postal voting.
- Option 2 – Amend the Model Rules to introduce postal voting as a means of voting for association meetings.

9.4 Communications technology

Given that an association has to make the deliberate choice of altering its rules to enable general meetings to be held using technology, should the Act allow the use of communication technology for management meetings without the need for a rule change?

The main options are outlined below.

- Option 1 – Maintain the status quo, by leaving it to individual associations to decide if they wish to amend their rules in relation to holding meetings using communication technology.
- Option 2 – Amend the Act to provide for the use of communications technology to conduct association meetings, as well as management meetings, without the need to include it in association rules.

- Option 3 – Amend the Act to remove the ability to use communications technology for management committee meetings, and move the provision to the Model Rules.

9.5 Preferred Options

Proxy voting: retain?

The preferred option for whether to retain proxy voting is Option 1. Proxies ensure that absent members have voting power, so it is the members who should decide whether such a restriction is appropriate. In practical terms, appointment of proxies should enable the broadest possible participation in decision making by the members of an association.

Proxy voting: numbers

The preferred option for numbers of proxies is Option 1, for similar reasons to retaining proxies generally.

Proxy voting: members

The preferred option for proxies being members is Option 2. It is not acceptable that a loophole in the law could permit a person who is not a member to make key decisions about an association's business.

Postal voting

The preferred option for postal voting is Option 1, for the reasons given for proxy voting.

Communications technology

The preferred option for communications technology is Option 2. All associations should be able to utilise technology to enhance a member's ability to participate directly, without the need to amend their rules.

48. Do you agree that there should be no changes to the Model Rules in respect of the existence of proxy voting, proxy members and postal voting?

49. If you do not agree, which changes would you like to see?

50. Do you agree that Option 2 is the preferred option for proxies being members?

51. If not, what changes would you suggest?

52. Do you agree that Option 2 is the preferred option for communications technology, in order to improve participation in meetings?

53. If you do not agree, which changes, if any, would be appropriate?

54. Are there any other changes you would like to see in relation to participation in meetings?

9.6 Voting rights of minors

9.6.1 Background

The Act states that management committee members must be adults. Minors can be members of an association, but it is not clear as to whether they may vote in association meetings.

9.6.2 Issues

Voting rights for minors may be warranted for some associations, particularly those set up to address the interests of young people. In some associations, minors play a significant role in fundraising and other activities of public benefit. However, the law relating to minors can be complex (for example, they will generally not have the legal capacity to sign contracts) and there may be implications for other management committee members if minors take on additional responsibilities.

The main options are outlined below.

- Option 1 – Maintain the status quo, leaving it unclear whether minors can vote or not.
- Option 2 – Amend the Act to clarify that minors may not vote in any association unless specifically provided for in the rules of the association.

9.6.3 Preferred option

The preferred option is Option 2, as this clarifies the issue and gives associations who may have minors as members the right to make a decision about whether or not minors may vote in their organisation, and in what circumstances. This would give flexibility to the association and allow minors to participate in decision making where, in the view of the association, it is appropriate.

55. Do you agree that there should be changes to the Act to clarify the lack of voting rights for minors?

56. If yes, do you agree that Option 2 is the way to achieve this?

57. If not, what changes would you suggest?

10.0 Reporting and Accountability

10.1 Public Register – does it fulfil its purpose?

10.1.1 Background

The Office of Fair Trading maintains a register of incorporated associations, both in hard copy and online. The register contains information about an association's name, contact address, date of registration and copies of any financial documents submitted to the regulator.

The register is intended to assist accountability of associations to the public. Anyone can inspect the register, either in person or online. Information can only be withheld if the chief executive believes supplying it to the public would risk harm to the association or an association member.

The rationale is that the public and the Government are entitled to effective and appropriate standards of accountability to ensure the integrity of the regulatory system. In a changing environment, where associations are holding gaming licences and or being contracted to undertake social services by government, increased scrutiny is necessary, to ensure public trust and confidence.

10.1.2 Issues

While access to the register is free, copies of anything on the register are not. Depending on the amount of information sought, it can be an expensive exercise. For example, a simple computer extract from the register (not full documents) currently costs $19.05. Uncertified copies of documents cost $2.80 per page.

Members of the public must also either have internet access or physically travel to Brisbane to view the register. In addition, to search the register, the searcher must know an association's number, name or postcode. Unlike some other Australian jurisdictions, a 'list' view is not available, though something similar can be obtained by searching for a single letter of the alphabet.

Both of these issues make it difficult for members of the public to obtain clear information about an association and its financial history. In addition, there is potentially capacity to add more detailed information about associations than is currently recorded.

The Federal Treasury's April 2011 *Scoping Study for a National Not-For-Profit Regulator* argued for an Australian NFP information portal, to increase accountability and legitimacy of the sector with the public, and improve efficiency for government and NFPs. In addition to matters already covered by the Queensland register, it recommended this include:

- Focus of organisations and areas in which they operate
- Constitution (rules)
- Information on governance obligations
- Information about the sector as a whole: statistics, funding information, governance and educational tools

Queensland could use such a register concept to streamline reporting for multiple purposes and organisations. For instance, fundraising and gaming licences could potentially be merged along 'report once, use often' lines.

The main options are outlined below.

- Option 1 – Maintain the status quo, as this provides sufficient information to the general public.
- Option 2 – Update the OFT website to provide online information about an association, including its rules and latest annual report as well as whether it is registered to fundraise or holds a charitable and not-for-profit gaming licence.
- Option 3 – Co-operate with the Federal Government and co-ordinate efforts to reduce reporting for Queensland associations required to register with the ACNC.
- Option 4 – Educate and encourage associations who have websites to publish details of their annual report as well as copies of their rules online.

10.1.3 Preferred option

The preferred Option is Option 2. This will enable the public to easily access relevant information about an association, increasing transparency and accountability at no extra cost to associations.

58. In your view, would there be any unintended consequences of posting annual reports and other details of an association, such as its rules, and fundraising licences, online?

59. Are there other matters which need to be considered?

10.2 Tiers for financial reporting

10.2.1 Background

One of the major reforms to the Act in 2007 was the introduction of a tiered approach to financial reporting. The thresholds have remained the same since 2007, with Level 1 associations having current assets or total revenue above $100 000, Level 2 associations being anything other than Level 1 nor Level 3, and Level 3 associations having current assets and total revenue below $20 000.

10.2.2 Issues

10.2.2.1 Asset/revenue levels

At a national level, tiered annual reporting for companies limited by guarantee (CLG) has recently been introduced into the *Corporations Act*. 'Small' CLGs have revenue of less than $250 000 in a financial year. These CLGs do not have to prepare a financial report or directors' report, or notify members of annual reports, unless requested by ASIC or a

member. CLGs with annual revenue of less than $1 million also have reduced reporting requirements.

NSW and Victoria also have a tiered approach to association reporting. For larger associations in NSW, the highest level reporting requirements (Tier 1 associations) occur when annual gross revenue is over $250 000, or current assets are over $500 000.[31] In Victoria, the thresholds for highest level reporting (a 'prescribed association') are over $200 000 in annual gross revenue or over $500 000 in gross assets.[32]

The proposed Australian Not-for-Profit and Charities Commission (ACNC) plans to set its tiers at $250 000, $1 million and over $1 million.

All these thresholds are significantly higher than Queensland's. By 2012, Queensland thresholds will have remained the same for five years.

The main options are outlined below.

- Option 1 – Maintain the status quo, by not changing the current tiering thresholds.
- Option 2 – Increase tiering thresholds to take into account of inflationary impacts over the past five years.
- Option 3 – As for Option 2, but also tie future thresholds to the CPI index, to keep thresholds relevant without the need for review.
- Option 4 – Harmonise Queensland thresholds with those in other Australian jurisdictions – the new ACNC thresholds, for example.

10.2.2.2 Other measures of organisations' sophistication

In addition, a simplistic revenue/asset driven classification is an increasingly blunt instrument with which to judge the sophistication of an association. An association may not earn a great deal of income, but its income may be almost entirely earned from public fundraising. It may also own property, and have large numbers of staff.

Associations which receive large amounts of government funding, especially those which deliver services on the government's behalf, should also be subject to the higher level of accountability. These associations receive taxpayer funds for the purpose of providing public services – the public has a right to know how the money is being spent.

This would not include one-off, smaller grants – for example, a P & C association which receives a grant for school computers.

The main options are outlined below.

- Option 1 – Maintain the status quo, by keeping revenue and assets as the only criteria for which level of reporting an association must provide.
- Option 2 – Add property ownership, possession of fundraising licences and significant levels of staff to the criteria used to determine which tier an association belongs to.
- Option 3 – Add all the above to the criteria, and also whether an association receives large amounts of government funding, and/or provides services on behalf of the government.

[31] *Associations Incorporation Act 2009* (NSW) s 42; *Associations Incorporation Regulation 2010* (NSW) reg 7.
[32] *Associations Incorporation Act 1981* (VIC) ss 3, 30B.

- Option 4 – Only add whether an association receives large amounts of government funding, and/or provides services on behalf of the government, to the existing asset/revenue criteria for tiering.

10.2.3 Preferred Option

10.2.3.1 Asset/revenue levels

Stakeholders are asked to consider whether Option 2 should be the preferred option.

Option 4 is preferred because it will ensure the tiered approach to reporting maintains its 'one size does not fit all' rationale, and ease complexity for those associations which report to multiple government entities. Feedback is invited as to which thresholds Queensland association threshold should align with.

10.2.3.2 Other measures of organisations' sophistication

The preferred option is Option 3. This will produce a more accurate matrix of associations which can be considered 'large' or more sophisticated than smaller organisations.

60. Do you agree that the reporting thresholds should be increased from their present levels?

61. If yes, do you agree that Option 4 is the way to achieve this?

62. If not, what are some other ways to achieve this? What would be an appropriate level of increase?

63. Do you also agree that more criteria should be added for how tiering is determined?

64. If yes, do you agree that Option 4 is the way to achieve this?

65. If not, what changes do you propose?

66. Given the diversity of incorporated associations in Queensland, would this be suitable for all associations? Should the tiering rules be different for charitable and non-charitable organisations?

11.0 Model Rules

11.1 Adoption of amendments to the Model Rules

11.1.1 Background

Incorporated associations are required to have documented rules. When associations resolve to incorporate, they may decide to adopt the Model Rules or their own rules. It is estimated about 8 000 of the approximately 21 000 Queensland associations have their own rules.

Model Rules in the *Associations Incorporation Regulation* may be amended from time to time. Once associations become incorporated and adopt the Model Rules, neither the Act nor the Regulation make any provision as to what should happen if the Model Rules are amended. The amended Model Rules will be put on the Department's website as an example of best practice, but it is up to individual associations to inform themselves of changes and to decide whether to adopt the updates to the rules.

This issue was examined in the previous consultation, with two options discussed. Most respondents favoured retaining the status quo, on the basis of association freedom of choice.

11.1.2 Issues

This Paper is seeking feedback on this issue again in light of the substance and importance of the matters being considered in the process of modernising the Act. Of particular importance is the issue of including a dispute resolution process in the Model Rules.

The current Model Rules do not provide for a simple and inexpensive dispute resolution process. [See section 3 of this Paper for full examination and discussion of consultation questions.] Having a dispute resolution mechanism in the Model Rules is most desirable and would be beneficial to all. However, if the Model Rules are updated to include a dispute resolution process, how can widespread adoption of the new Rule be assured?

Many smaller associations struggle with administration issues arising from turnover of volunteers and staff and a lack of comprehensive handover procedures. Some submitters raised that they have problems knowing what the current version of their rules is.

In addition, associations may not realise when changes to the Model Rules are made, and mass mailouts by the Office of Fair Trading are not financially feasible.

The main options are outlined below.

- Option 1 – Maintain the status quo, by leaving it up to individual association whether to adopt any new rule included in the Model Rules – the 'opt in' approach.
- Option 2 – Amend the legislation to require associations to provide a current email address, so the regulator can ensure associations are aware of changes to the Model Rules. However, retain associations' freedom to choose whether to adopt a change.

- Option 3 – Automatic application of updated Model Rules. Associations would have to amend the current version of the Model Rules or the purposes of their own Rules to exclude any amendments – the 'opt out' approach.

11.1.3 Preferred Option

The preferred option is Option 2. Model Rules are an example of best practice, and if these rules change, it is also arguable associations should have to comply with the changed Model Rule unless they specifically decide a different rule is more appropriate for their particular circumstances.

Of particular importance is the issue surrounding the adoption of a dispute resolution mechanism to the Model Rules, which to date has received widespread support. It would be beneficial to the wellbeing of all associations to have recourse to a simple dispute resolution process. The optimum way in which this can be achieved would be through automatic updates to the Model Rules.

This option also helps alleviate confusion for both members and the public as to which rules are in operation – unless they make amendments, associations adopting the Model Rules will easily be able to find the 'current' version of their rules. A further advantage is that it alleviates the necessity for a general meeting to adopt the changes, and avoids the cost of lodging amendments to the association's rules.[33]

Option 1 is not preferred because adopting changes and seeking approval is time-consuming, laborious and costly. In previous consultations, a view was expressed that there could be a relaxation of fees for approval of changes to the Rules in the circumstances of the Model Rules being updated. However, while this would improve take-up of changes, it would not deal adequately with the problem.

67. In your view, should there be any changes to the way that Model Rules amendments are adopted by associations?

68. If yes, do you agree that Option 2 is the best option?

69. Are there any other ways to change Model Rules adoption for the better?

11.2 More than one set of Model Rules

11.2.1 Background

Creating custom rules is usually expensive and time consuming. Model Rules were introduced to alleviate the challenges that many smaller associations faced in drafting their own rules. Model Rules are also an example of best practice. It has previously

[33] Of course, if an association elected to 'opt out' of the changes, registration of this resolution would incur the normal registration fee.

been recognised that 'one size does not fit all' with the Act, and in particular, issues have arisen with respect to associations applying for tax concessions.

11.2.2 Issues

More and more incorporated associations are seeking Commonwealth tax concessions or Deductible Gift Recipient (DGR) status. This requires specific provisions in an association's constitution (rules) which do not appear in Queensland's Model Rules. Inevitably, this requires associations to adopt custom-made rules. It is reported that the difficulties presented by the Model Rules deficiency for tax concession purposes does not come to light until application is made to the ATO. This in turn requires special general meetings to be held to customise the rules. Similar issues can confront associations wishing to fundraise from the public, acquire gaming machine or liquor licences, or apply for some forms of government funding

The question has been raised whether it would be appropriate to introduce different sets of Model Rules for different purposes. Associations could choose to adopt a set of Model Rules appropriate to their future goals: tax concessions, fundraising, or various types of licences.

The main options are outlined below.

- Option 1 – Maintain the status quo, with only one set of Model Rules. Associations wishing to supplement the Model Rules need to adopt their own Rules or a modified form of the Model Rules.
- Option 2 – Amend the Model Rules provisions to have several sets of Model Rules, with eligibility requirements for fundraising, the main types of tax concessions and licences already written in.
- Option 3 – No amendments made to the legislation, but the regulator to publish clear practice directions as basic instructions for several types of common amendments.

11.2.3 Preferred option

For the purposes of consultation, stakeholders are asked to consider whether Option 2 should be the preferred option. The advantage of this option is that associations which are charitable in nature and would be likely to be undertaking fundraising activities or applying for tax concessions would still have a simple, inexpensive means to adopt a set of rules. This would alleviate the need to seek specialist legal advice while meeting the requirements set down by other legislation.

70. In your view, should there be more than one set of Model Rules to choose from, to alleviate the cost of customising Rules?

71. If yes, do you agree that Option 2 is the best way to achieve this?

72. Are there any other ways to achieve this?

73. Are there any disadvantages in having more than one set of Model Rules?

74. Are there any other matters you wish to raise about the Model Rules?

12.0 The Role of the Office of Fair Trading

12.1 Education, Information and the OFT

12.1.1 Background

The OFT website currently contains a range of information about incorporated associations. The Office has also developed a Good Business Guide on the operation of incorporated associations. Staff of the Office provide assistance wherever possible and the website provides guidance sheets. Forms can also be accessed on the website.

12.1.2 What you have told us

From previous consultation, issues have been raised in respect of the stress caused by constant changes to the Act. Practical and easy to understand self-help materials have been requested.

It has been suggested that another area in which the OFT could take a more proactive approach is by publishing statements which disclose its policy position and administrative guidelines. Although the OFT cannot provide legal advice to associations, internal policies for the administration of the Act and for the exercise of discretion could be made available and updated as necessary. Such rulings are prepared by the Australian Taxation Office and the English Charities Commission.

This would allow for formal comments on procedures adopted by the OFT rather than allowing news of policy positions to spread 'on the grapevine'. Information of this type may also be available in the form of 'statements of affairs' under freedom of information legislation and would complement existing fact sheets and other publications.

Basic governance and compliance training regarding the role and obligations under the Act for directors and office holders has also been put forward as a role the OFT should undertake.

75. Should the OFT produce and publish public statements setting out policy positions and administrative guidelines?

76. Should the OFT undertake an education role for associations?

77. If yes, should this be through educational material on the OFT website, through information sessions, or another method?

78. Are there any other improvements the OFT can make to assist the community in understanding how to run an association?

Appendices

APPENDIX 1: QUESTIONS FOR CONSULTATION

Structure of the legislation

1. Should the Act include an Objects Clause supported by guiding principles as proposed by Option 4?

2. If yes, what should those objects and guiding principles be?

3. Should the Act be amended to clarify that associations must always have at least seven members?

4. Are there any other issues that should be raised in relation to eligibility to remain incorporated?

5. Do you agree that the restrictions on association trading should be removed from the Act?

6. If not, should the Act provide a clearer definition of activities an association can undertake in relation to 'trading'?

7. Are there other changes you would suggest?

Operations

8. Do you agree that associations should be allowed to vest their property in trustees?

9. If yes, do you agree that Option 2 is the preferred option?

10. Are there other ways to achieve this?

11. Do you agree that the requirement to keep a common seal should be removed from the Act?
12. If yes, do you agree that Option 2 is the preferred option?

13. Are there other ways to achieve this?

Governance

14. Do you believe the existing common law duties of management committee members should be written into the Act?

15. If so, do you believe that Option 2 is the way to achieve this?

16. Are there other ways to introduce duties of due care and diligence and good faith into the incorporated associations legislation?

17. Given the range of associations, are the duties currently owed under the common law appropriate for all associations, or should they be different?

18. Do you believe that management committee members should be subject to a duty not to profit from their position?

19. If so, do you believe that Option 3 is the way to achieve this?

20. Are there other ways to introduce a duty not to profit from position into the regulation of incorporated associations?

21. Given the range of associations, is it appropriate to mandate a duty not to profit from position for all associations?

22. Should incorporated associations be required to disclose in their annual reports the remuneration paid to management committee members and key management personnel (by reporting remuneration in bands)?

23. Do you believe there should be legislative change to address the issue of management committee members having material personal interests that conflict with matters being considered by the committee?

24. If yes, is the new preferred option, Option 3, the way to achieve this?

25. Alternatively, do you think the previous recommended option (current Option 2) is the most appropriate way to achieve this?

26. If neither, what would you suggest instead?

27. Given the range of associations, is it appropriate to apply such provisions to all associations?

28. Should the management committee's role, responsibilities and duties be set out in the legislation?

29. If yes, what should be included (e.g. stewardship, risk management, financial oversight, legal compliance, to keep informed of the association's operations and environment, appointment of senior managers, etc)?

30. What is the best way to achieve this (e.g. amendment to the Act, incorporation into the model rules, optional rules, a code of conduct)?

31. Given the range of association sizes and types, is it appropriate to legislate the management committee's role and functions for all organisations?

32. Do you agree that the management committee should not be allowed to appoint a non-member as secretary of an association?

33. If yes, do you agree that Option 2 is the preferred option?

34. If not, is there another way to achieve this?

35. Should the Act be amended to impose an obligation on management committee members to prevent associations incurring debts while insolvent or while there are reasonable grounds to believe it could be, or could become insolvent by incurring the debt?

36. If so, do you agree that Option 2 is the best way to achieve this?

37. If not, is there another way to achieve this?

38. Given the range of association sizes and types, is it appropriate to legislate the management committee's role and functions for all incorporated associations?

Dispute resolution

39. Do you believe there is a need for a new dispute resolution process?

40. If yes, do you agree or disagree that a combination of internal Option 3 and external Option 2 is the way to achieve this?

41. Are there any other ways this could be achieved?

42. Given the wide variation in types and sizes of associations, is the preferred option appropriate for all associations?

43. Are there any other issues about dispute resolution or impacts which need to be considered?

Statutory Management

44. Do you consider there is a need to provide for the appointment of a temporary statutory manager in circumstances where an association becomes dysfunctional?

45. If yes, do you agree with Preferred Option 2?

46. Do you also agree that a statutory manager should be able to change the rules or constitution of an association with the approval of the Chief Executive?

47. Are there any other issues that need to be considered about appointing a statutory manager?

Meetings and voting

48. Do you agree that there should be no changes to the Model Rules in respect of the existence of proxy voting, proxy members and postal voting?

49. If you do not agree, which changes would you like to see?

50. Do you agree that Option 2 is the preferred option for proxies being members?

51. If not, what changes would you suggest?

52. Do you agree that Option 2 is the preferred option for communications technology, in order to improve participation in meetings?

53. If you do not agree, which changes, if any, would be appropriate?

54. Are there any other changes you would like to see in relation to participation in meetings?

55. . Do you agree that there should be changes to the Act to clarify the lack of voting rights for minors?

56. If yes, do you agree that Option 2 is the way to achieve this?

57. If not, what changes would you suggest?

Reporting and accountability

58. In your view, would there be any unintended consequences of posting annual reports and other details of an association, such as its rules, and fundraising licences, online?

59. Are there other matters which need to be considered?

60. Do you agree that the reporting thresholds should be increased from their present levels?

61. If yes, do you agree that Option 4 is the way to achieve this?

62. If not, what are some other ways to achieve this? What would be an appropriate level of increase?

63. Do you also agree that more criteria should be added for how tiering is determined?

64. If yes, do you agree that Option 4 is the way to achieve this?

65. If not, what changes do you propose?

66. Given the diversity of incorporated associations in Queensland, would this be suitable for all associations? Should the tiering rules be different for charitable and non-charitable organisations?

Model Rules

67. In your view, should there be any changes to the way that Model Rules amendments are adopted by associations?

68. If yes, do you agree that Option 2 is the best option?

69. Are there any other ways to change Model Rules adoption for the better?

70. In your view, should there be more than one set of Model Rules to choose from, to alleviate the cost of customising Rules?

71. If yes, do you agree that Option 2 is the best way to achieve this?

72. Are there any other ways to achieve this?

73. Are there any disadvantages in having more than one set of Model Rules?

74. Are there any other matters you wish to raise about the Model Rules?

Role of the Office of Fair Trading

75. Should OFT produce and publish public statements setting out policy positions and administrative guidelines?

76. Should OFT undertake an education role for associations?

77. If yes, should this be through educational material on the OFT website, through information sessions, or another method?

78. Are there any other improvements OFT can make to assist the community in understanding how to run an association?

APPENDIX 2: Questions addressed in previous consultation

OPERATIONS

Funds Management - Signatories for cheques (proposed amendments to the Regulation)

Background

The management committee has the general control and management of the administration of the affairs, property and funds of the association, including all expenditure which must be approved or ratified at a management committee meeting.

It is important there are transparent and accountable processes for funds and account management.

Under the Model Rules (and the Regulation itself), cheques must be signed by two persons, one of whom must be the president, secretary or treasurer, and one of three other members with authority from the management committee to sign cheques.

Issues

The issue is, where an association makes a payment by cheque, who should be required to sign the cheque? It may be argued that associations, through their management committee, should be able to decide who signs cheques on behalf of the association.

One problem identified by stakeholders was the practice of one management committee member signing a number of blank cheques at once, and then the requisite second signatory adding their signature and the amount either when they become available to do so or when the need to issue the cheque arises. In terms of funds management and control, this is a particularly poor practice for any organisation; however, it does highlight the difficulties faced by some associations in complying with the present requirements. This is because not all of the necessary signatories may be available at the same time - particularly busy management committee signatories.

The main options are outlined below.

- Option 1 – Maintain the status quo, by not changing the Model Rules (and the Regulation). As such, associations which adopt the Model Rules must ensure cheques are signed by the president, secretary or treasurer and one of three other members of the association as authorised by the management committee.

- Option 2 – Amend the Model Rules (and the Regulation) to enable cheques to also be signed by two of the three members nominated by the management committee.

- Option 3 – Amend the Model Rules (and the Regulation) to no longer prescribe the persons required to sign a cheque.

1.1.1 Summary of views from consultation

Those who addressed this issue in their submission tended to have strong opinions about what should be done. Five submissions pointed to the fact that modern associations often delegate operational functions like payments to employees who are neither members nor part of the management committee, and that powers of associations needed to reflect this. Most felt that the current arrangements were too restrictive given the diversity of associations. Those who favoured the status quo did so out of fraud concerns.

Another suggestion raised in submissions was that any new provisions be technology neutral to avoid the need for frequent amendments, addressing payments in general rather than specifying a payment format.

Preferred option

For the purposes of consultation, stakeholders are asked to consider whether Option 2 should be the preferred option.

Option 2 is preferred because enabling cheques to also be signed by any two members as nominated by the management committee is likely to improve business efficiency for associations. Under the proposed change, the two signatories to a cheque must be either (a) two members of the management committee, or (b) one member of the management committee and one of the three members authorised by the management committee to sign cheques, or (c) two of the three members authorised by the management committee to sign cheques. Requiring cheques to be signed by two members of the association (one of which must be the president, the secretary or the treasurer) and one of three other authorised members with authority from the management committee to sign cheques is not always practical.

Option 1 is not preferred because, as discussed above, it may not always be practical or efficient to comply with the current requirement. In particular, the incidence of practices such as one signatory signing a blank cheque highlights the need to build greater efficiencies into the Model Rules.

Option 3 is not preferred because the question of who is authorised to sign cheques is sufficiently important for it to be specifically provided for in the Model Rules, as it is goes to the heart of good governance and accountable funds management.

Impacts of preferred option

Incorporated associations and members

The present signatory requirements assist in controlling financial outgoings, and the preferred option is in keeping with this principle by requiring the management committee to identify those additional members who may also sign cheques. Further, any association concerned about the proposed, arguably less stringent requirement may continue to limit the persons who may be signatories to cheques (and may, in fact, still implement additional controls). As such, the likely impact of this amendment will be to provide greater flexibility to associations, without exposing the association to any meaningful risk of funds misuse.

Community

No negative impacts are expected from this proposal, as the proposal (being of a minor administrative matter) would be unlikely to affect community confidence in the integrity and good management of associations.

Government

No negative impacts for government have been identified.

1. Do you believe changes are needed about who may sign cheques?
2. If yes, do you agree or disagree Option 2 is the way to achieve this?
3. Are there any other ways this could be achieved? (For example, by extending the signatories to include employees of an association, or allowing the management committee to nominate more than three members to be signatories).
4. Given the wide variance in the types and sizes of associations, is the preferred option appropriate for all associations?
5. Are there any other issues about who may sign cheques which need to be addressed?

Funds management - Cheques, electronic funds transfer and petty cash accounts (proposed amendment to the Regulation)

Background

Currently, payments by associations of $100 or more must be made by cheque or electronic funds transfer. This is a requirement of the Model Rules and additional accounting requirements in Schedule 5 of the Regulation. Only payments less than $100 may be made out of the petty cash account.

Issues

The issue is whether the amount of payments required to be made by cheque or electronic funds transfer should be increased (thereby also increasing payments which may be made from the petty cash account). Having regard to the impact of inflation, the existing limit of $100 is arguably now too low, and needs to be increased to reduce the administrative burden on associations. Payments by cheque allow outgoings of funds to be more easily traced than payments by cash, and this in part explained the low limit for amounts which must be paid by cheque. However, today it is common for associations to make payments electronically, which also enables outgoings to be traced and therefore reduces the need for cheques.

The main options are outlined below.

- Option 1 – Maintain the status quo, and continue to require payments of $100 or more to be made by cheque or electronic funds transfer and continue to restrict payments which may be made from petty cash accounts to $100 or less.

- Option 2 – Amend the Regulation to increase payments which must be made by cheque or electronic funds transfer from $100 to $500, and thereby also increase the amount of payments which may be made from the petty cash account to $500 or less.

- Option 3 – Amend the Regulation to require associations to decide the amount which must be paid by cheque or electronic funds transfer, and to then include this decision in their rules.

Summary of views from consultation

There was little agreement with retaining the current limit. Several submissions raised the need for associations to choose to reduce a mandated upper limit if it was too high for their circumstances.

1.1.2 Preferred option

For the purposes of consultation, stakeholders were asked to consider whether Option 2 should be the preferred option.

Option 2 is preferred because the current amount of $100 is too low and needs to be raised to account for inflation. The proposed new threshold amount of $500, although considerably higher than the present amount, is a realistic point between funds required to meet day-to-day/recurrent outgoings and one-off/significant expenditure. This option, directly aimed at reducing red tape requirements, will increase operational efficiencies for associations, whilst maintaining a reasonable degree of control of funds outgoings.

Option 1 is not preferred because given the relative modern-day value of $100, it is inefficient to expect associations to deal with such amounts by way of cheque or electronic funds transfer.

Option 3 is not preferred because the purpose of reforming the threshold of monies which must be paid by cheque is to facilitate business efficiency and recognise the effect of inflation, while recognising adequate funds control may be achieved by making other rules. That is, few associations may feel it necessary to require amounts of less than $500 to be paid by cheque, so providing additional discretion in this regard may be of little benefit. In any event, an association seeking stricter controls on outgoings may still implement their own rules about payments by cheque.

Impacts of preferred option

Incorporated associations and members

As the proposed new $500 threshold is still a relatively small amount, this change should have no negative impacts for associations in terms of managing financial outgoings. There remains a possible risk any financial mismanagement would have an increased impact, however, if the funds

are transferred electronically, such outgoings are easily able to be tracked, and any association concerned about the level of the new threshold may still implement other monetary controls.

Community

No negative impacts are expected from this proposal, as the proposal (being of a minor administrative matter) would be unlikely to affect community confidence in the integrity and good management of associations.

Government

No negative impacts on government are expected from this proposal.

6. Do you believe changes are needed about payments by cheque?
7. If yes, do you agree or disagree Option 2 is the way to achieve this?
8. Are there any other ways this could be achieved?
9. Given the wide variance in the types and sizes of associations, is the preferred option appropriate for all associations?
10. Are there any other issues about payments by cheque which need to be addressed?

Funds management - Keeping an account with a financial institution in Queensland (proposed amendment to the Regulation)

Background

The Regulation requires associations to keep an account with a financial institution in Queensland. This does not reflect modern electronic banking and communication practices, and there is no equivalent restriction in the other States and Territories.

Issue

The issue is whether the current requirement for associations to keep an account in Queensland with a financial institution should be removed. When the requirement was first included, banking usually occurred at the branch of a financial institution, whereas today banking is mostly conducted electronically. As such, not all financial institutions maintain physical branches in every jurisdiction, and therefore the requirement to keep an account actually within Queensland limits an association's choice of financial institutions. Given the diversity in size and type of associations, this freedom of choice is important to ensure an association has a financial institution which best suits its needs.

The main options are outlined below.

- Option 1 – Maintain the status quo, and not change the present banking arrangements.

- Option 2 – Amend the Regulation to remove the restriction that incorporated associations must keep an account in Queensland with a financial institution.

1.1.3 Summary of views from consultation

A clear majority favoured removing the restriction for greater flexibility in association administration. Those who did not want the account requirements changed were concerned about ease of access to evidence in fraud cases.

Preferred option

Stakeholders were asked to consider whether option 2 should be the preferred option.

Option 2 is preferred because removing the current restriction will give associations greater flexibility and enable them to choose banking arrangements which best suit their needs. It will also bring Queensland in line with other jurisdictions. Such an amendment offers improved choice for associations in their banking arrangements.

Option 1 is not preferred because maintaining the status quo will continue to restrict associations in their choice of banking arrangements with little corresponding benefit.

Impacts of preferred option

Incorporated associations and members

As this amendment does not require any change to an associations present banking arrangements, but merely offers improved choice, the impact is expected to be minimal.

Community

No negative impacts for the community have been identified.

Government

The present requirement for an account to be held in Queensland is primarily to assist the Office of Fair Trading investigate serious complaints of financial mismanagement within associations, and to determine if an association is still operating. Under this proposal, if an association held its accounts interstate, the government would incur the cost of serving documents interstate in order to access those accounts, as the powers of Fair Trading inspectors do not extend beyond Queensland borders. Although this is a potential negative impact for government, the likelihood of this scenario is remote, and would only happen where the association management refuses to provide access to their accounts in the course of an investigation.

11. Do you believe changes are needed about account keeping requirements?

12. If yes, do you agree or disagree Option 2 is the way to achieve this?

13. Are there any other ways this could be achieved?

14. Given the wide variance in the types and sizes of associations, is the preferred option appropriate for all associations?

15. Are there any other issues about account keeping requirements which need to be addressed?

Appointment of administrators (proposed amendment to the Act)

Background

The Act does not provide voluntary administration procedures. These procedures are therefore not available if associations experience financial difficulties, despite their potential usefulness and capacity to resolve issues in a way which suits all parties. In some instances, administrators are appointed by banks holding security over the association's mortgage, but the bank's interests differ from those of the association and will not necessarily give priority to the needs of the association, its members or other creditors.

If Part 5.3A of the *Corporations Act 2001* (Cth) were available to associations, this would allow associations to appoint a voluntary administrator. Under the present law, an association in financial difficulty would need to apply to the Supreme Court for appointment of a provisional liquidator, which is a time-consuming and expensive process. The delay in securing this appointment may jeopardise confidence in the association, and there have been incidents of this causing governments to withdraw their funding and creditors refusing to continue dealing with the association. Further, the cost of applying to the Supreme Court may only worsen the association's financial problems.

KPMG, Chartered Accountants of Cairns, support the import of Part 5.3A, and provided examples of the difference voluntary administration provisions can make to associations facing financial difficulty. Public consultation conducted in February 2005 revealed overwhelming support (76% of respondents were in favour) for amendments to the Act to enable appointment of a voluntary administrator. Other States (including NSW, Victoria, SA and Tasmania) have all incorporated Part 5.3A into their association's legislation.

Issues

The issue is whether the voluntary administration provisions of the *Corporations Act 2001* (Cth) should be available to associations. Arguably, being able to appoint a voluntary administrator would greatly assist associations overcome periods of serious financial difficulty. Conversely, it may discourage some associations from trying to resolve the financial problem themselves by, for

example, restructuring their operations or electing a new management committee.

The main options are outlined below.

- Option 1 – Maintain the status quo, in which case associations experiencing financial difficulties will not have the benefit of appointing a voluntary administrator.

- Option 2 – Amend the Act to import Part 5.3A of the *Corporations Act 2001* (Cth).

1.1.4 Summary of views from consultations

Submissions on this issue were unanimous in supporting the introduction of voluntary administration as an option for struggling associations.

Preferred option

For the purposes of consultation, stakeholders are asked to consider whether Option 2 should be the preferred option.

Option 2 is preferred because allowing associations to appoint a voluntary administrator, pursuant to Part 5.3A of the *Corporations Act 2001* (Cth), will greatly assist associations overcome periods of serious financial difficulty. Even if the administrator is unable to navigate the association out of such difficulty, and it is wound up, the actions and guidance of the administrator should optimise the outcome for the association's creditors and members.

Option 1 is not preferred because it is important to provide associations with a cost-effective way of accessing the assistance that administrators could provide to assist the association overcome a period of financial difficulty.

Impacts of preferred option

Incorporated associations and members

As the amendment would only affect associations already in financial difficulty, and any decision by the administrator to wind up the association would only be made where this accords with the best financial course, any negative impact is expected to be minimal. There will be a strong positive impact on associations due to the expertise administrators can bring to help an association through a period of financial difficulty.

Community

No negative impacts are expected from this proposal, as the proposal would be unlikely to affect community confidence in the integrity and good management of associations. Members of the community dealing with associations would benefit from the expertise administrators can bring to help an association with which they may have contractual or other financial relationships through a period of financial difficulty.

Government

No negative impacts on government are expected from this proposal.

16. Do you believe changes are needed about appointment of voluntary administrators?

17. If yes, do you agree or disagree Option 2 is the way to achieve this?

18. Are there any other ways this could be achieved?

19. Given the wide variance in the types and sizes of associations, is the preferred option appropriate for all associations?

20. Are there any other issues about appointment of voluntary administrators which need to be addressed?

1. GOVERNANCE

2.1 Age of the secretary of an association (proposed amendment to the Act)

2.1.1 Issues

Neither the Act nor the Regulation specifies a minimum age for the secretary. If the secretary is a member of the management committee he or she must be at least 18. However, under the legislation, the secretary does not have to be a member of the management committee, and anecdotal evidence is that minors are sometimes appointed to the position. In large organisations, the secretary may be a paid position.

The secretary plays a vital role in managing the association, even if not a member of the management committee. Under the Act and Regulation, important functions and responsibilities are placed in the hands of the secretary, and penalties may be imposed for breaches of certain provisions about secretaries' duties. In addition, having a secretary under 18 may affect the person's capacity to perform all functions of the office.

Under the Act the duties and functions include:

- to notify Registrar of Titles regarding title to land (s 24);
- to sign documents requiring authentication for entering contracts on behalf of the association (s 28);
- to sign statutory declaration accompanying notification of amendments to rules to OFT (s 48);
- to comply with OFT's request for a copy of the rules, including signing a statutory declaration (s 52);
- to notifying changes to office holders' details (s 68);
- to call meetings, keep minutes, maintain register of members (s 69A); and
- to send notices to creditors when amalgamation occurring (s 83).

Under the Regulation and Model Rules further duties and functions include:

- capacity to sign cheques (1 of 2 signatories) (reg s 11);
- to call general meetings (rule 35);
- to get in proxies (rule 40);
- to keep minutes (rule 41);
- capacity to countersign sealed documents (rule 44); and

- capacity to sign cheques (1 of 2 signatories) (rule 45).

In addition, the secretary is one of the office holders considered to have committed an offence under the Act if the management committee breaches requirements to lodge financial statements with the OFT (ss 59, 59A, 59B).

General duties of the position may also include the following:

- calling meetings, and ensuring members are provided with an agenda, notice of issues being voted on, and copies of minutes;
- taking minutes of meetings, including recording attendance, voting outcomes, and general business discussed;
- completing actions arising from meetings;
- maintaining a register of members, and managing applications for new memberships; and
- attending to both day-to-day and urgent correspondence.

2.1.2 Summary of views from consultation

In the previous consultation, the preferred option was to amend the Act, Regulation and Model Rules to require the office of secretary to be held by someone who is at least 18 years old. All submissions on this issue agreed with imposing a minimum age requirement of 18 years on the position. One submission proposed that youth services organisations should be allowed to appoint someone under 18 to non-executive positions on the management committee, subject to capability and possibly with mentoring.

2.1.3 Preferred option

There appears to be no controversy in imposing a minimum age of 18. On the other hand, allowing under 18s to be office holders would encourage participation and contribution by more young people. OFT could approve appointment of secretaries under 18 in certain circumstances, e.g. with appropriate mentoring.

21. Do you believe the secretary should be at least 18 years of age?

22. If 'yes' do you agree or disagree the Act should be amended to require the secretary to be at least 18 years of age?

23. If not by amending the Act, what is the best way to achieve the purpose of requiring the secretary to be an adult?

24. Given the wide variance in the types and sizes of associations, is it appropriate in all associations to require that the secretary be at least 18?

2.2 Eligibility for election to the management committee

2.2.1 Issues

Currently, a member is not eligible for election to the management committee (s 61A) if he or she:

- has been convicted on indictment or convicted summarily and sentenced to prison (unless imprisonment is just in default of payment of a fine), and the rehabilitation period has not expired (the rehabilitation period does not apply (effectively it never expires) if someone is imprisoned more than 30 months); or
- is an undischarged bankrupt; is under a deed of arrangement and has not complied with the deed; or is yet to pay the final instalment under a composition with creditors; or
- is under 18 years of age.

Issues surrounding the eligibility provisions obviously include confidence of the public, funders (including government) and other stakeholders in the probity of management committee members. However, some other jurisdictions are less restrictive and allow someone with a criminal history to be elected to the committee.

Queensland (s 61A), SA (s 30), the ACT (s 63) and NT (s 30) are the only state and territory jurisdictions where criminal history is a stated bar to election. A review of the Queensland Act in 2007 revealed that 53% of stakeholders were in favour of amending the eligibility criteria for persons with a criminal history.

The Corporations Act restricts eligibility by age (at least 18) and disqualification under Part 2D.6 of the Act. In that Part, s 206B imposes automatic disqualification for: conviction on indictment for offences involving decisions in running a business or affecting the financial standing of a business; or conviction for breach of the Act resulting in 12 months imprisonment, or a dishonesty offence resulting in 3 months imprisonment; being an undischarged bankrupt or not complying with a personal insolvency agreement; or being subject to a disqualification order in a foreign jurisdiction.

In NSW, there is restriction on election in that committee members must be 18 years old, but under the Model Constitution, a casual vacancy occurs in an office on the committee if an office holder becomes insolvent under administration within the meaning of the Corporations Act, or mentally incapacitated, or is convicted of an offence involving fraud or dishonesty for which the maximum penalty on conviction is imprisonment for not less than 3 months (Model Constitution s 18).

In Victoria, under the Model Rules, an office on the committee becomes vacant if the person holding the office becomes an insolvent under administration within the meaning of the Corporations Act (Model Rule 24).

In the ACT, the Act (s 63A) allows the registrar-general to disqualify from office any person who has previously been a public officer or a committee member when the person or the association failed to comply with the Act. There does not have to be conviction for an offence – disqualification is based on the registrar-general being satisfied as to the non-compliance. The Act also provides disqualification for 5 years after conviction or imprisonment for an indictable offence against the Act or a dishonesty offence punishable by 3 months prison; or for bankruptcy (s 63). In addition, an office becomes vacant if, among other things, the office-holder becomes physically or mentally incapacitated (s 64).

WA has no specific provision, but qualifications for election to the committee is one of the matters to be provided for in an association's rules (as listed in Schedule 1). There are no model rules in WA.

The prior Consultation paper did not canvas any changes to the age or bankruptcy restrictions.

In regard to ineligibility based on conviction, the preferred option was:

- to place no restriction on those who have been convicted summarily and not sentenced to prison;
- for those who have been convicted on indictment or summarily, and sentenced to prison, to prevent election for five years from the end of the period of custody;
- for those convicted on indictment and not sentenced to prison, to prevent election for five years from the date of conviction.

This option was preferred because 'removing the present restriction on the eligibility of persons with certain criminal convictions being elected to the management committee will not only benefit such persons, but also give associations greater freedom as to who they may elect to this committee'. It was also considered important to bring Queensland into closer alignment with other state jurisdictions, the Corporations Act and the Corporations (Aboriginal and Torres Strait Islander) Act 2006.

2.2.2 Submissions to previous consultation

Half (11 of 21) of the submissions on this issue were in favour of the preferred option. Four submissions favoured no change. InCorrections supporters (6 submissions) favoured abolishing all restrictions, but in default of that, would accept the preferred option. An added comment was that the restrictions benefited no-one, and instead, checks should be made for criminal record and personal relationships. Another comment was that the restrictions on bankrupts should be maintained.

The issues of criminal history and bankruptcy could be handled with full disclosure by nominees for election. This would ensure that all members are aware of the circumstances and implications and can make their own election.

Alternatively, provision could be included in the Model Rules, or Associations could include provisions in their rules, such as that in NSW and Victoria, to provide that, if an office holder becomes bankrupt or is found to have a conviction that was not disclosed or is subsequently convicted of an offence, the office holder loses his or her office.

Leaving it as a matter for each association to include in its rules would allow for flexibility depending on the organisation. As stated in the previous consultation paper 'Although the present restrictions do not prevent any person from becoming a member of an association, they would stop many highly valued members from taking a more active role in the association through serving on the management committee'.

The consultation paper referred to the need to maintain the community's perception of an association's probity and accountability. However, this is something that members would take into account when deciding whether to include it in their rules and in deciding whether to elect someone with such a history to their management committee. The consequences of those decisions are something that could be left to the association's members.

There is a possibility that someone would not disclose such a record, but associations can run checks on ASIC records, criminal history, and bankruptcy.

2.2.3 Preferred Option

25. Do you believe changes are needed about eligibility for election to the management committee?

26. If yes, do you agree or disagree Option 2 is the way to achieve this?

27. Are there any other ways this could be achieved?

28. Given the wide variance in the types and sizes of associations, is the preferred option appropriate for all associations?

29. Are there any other issues about eligibility for election to the management committee which need to be addressed?

2.3 Disclosure of remuneration of management committee members

2.3.1 Issues

Currently there is nothing to prevent associations from paying remuneration to their management committee members. Across the sector, most do not pay remuneration although many reimburse out of pocket expenses and some may pay an honorarium e.g. to the treasurer. Some larger organisations do pay remuneration to management committee members for their work. Under the Corporations Act, publicly listed companies must disclose board member remuneration, but companies limited by guarantee do not have to. Other state and territory jurisdictions do not require it directly, although in NSW, the fundraising legislation requires disclosure in applications for fundraising licences.

As the previous consultation paper pointed out, depending on the size and activities of an association, the duties of the committee may be extensive, encompassing high-level accounting, contractual and staffing issues. In the case of very large associations, such as those with multi-million dollar assets and/or turnover, the skills, experience, workload and probity demanded of the management committee is extremely high, and equivalent to what is expected from directors of a company.

As such, it is not unreasonable to expect some associations to offer remuneration to their management committee members. Doing so recognises the commitment and skills of these persons, and also assists in attracting persons of higher calibre to take on these roles.

One significant issue confronting associations is the difficulty getting people to stand for election to management committees. This is at least partly due to the size of the commitment in time and effort. It is possible that remuneration would increase the pool of people willing to take on the task, although most associations could not afford it. There is also a perception by some people that committee members of voluntary associations should not be paid, but there is no reason why they should not be rewarded for their considerable work. The most important issue is transparency and accountability to members about payment of management committee members.

Members of an association have a right to be informed about how the funds are used. Therefore all such payments should be disclosed in the financial statements.

Associations could decide, further, to require a special resolution of the general meeting to pay remuneration to committee members.

While there is nothing preventing remuneration of management committee members, most organisations are confused about it and anecdotal evidence suggests some think remuneration is not permitted. Therefore it would be beneficial to have it in the Act.

2.3.2 Submissions to previous consultation

The Consultation paper set the preferred option to require associations to disclose remuneration of committee members however it is paid. This was preferred because it would 'increase transparency and accountability' particularly in large organisations 'where members of the management committee may receive significant remuneration'. It was also considered that the measure would 'benefit members of all sizes of associations, as they will be better informed about whether their management committee members are being remunerated, and will therefore be in an informed position to determine if this is an appropriate use of the association's funds'. Imposing a binding legal requirement was also expected to 'provide clarity and uniformity in relation to how the disclosure is to be made'.

Unfortunately the paper did not say how that disclosure should be done. It is not clear whether this is intended to include out of pocket expenses or just remuneration in the form of a salary or benefits such as a car. The consultation paper points out that some associations already disclose such remuneration in their accounts; the impact of such a requirement on the sector is expected to be low, while it will benefit all associations by mandating increased transparency.

Submissions to the consultation paper were generally in favour of the preferred option (15 of 17 submissions that commented on this issue) – only two submissions were in favour of maintaining the status quo, i.e. not requiring any disclosure. Caxton Legal Centre pointed out the lack of guidance in the legislation on this issue and requested that the government legislate more detail about what remuneration is permitted and how it is permitted to be paid, including definitions of remuneration, honorarium, and reimbursement for expenses.

Those who were only cautiously in favour, or not in favour at all, tended to be concerned about the possible administrative difficulties it might pose, or that it would make it more difficult to recruit committee members. Two submissions specifically queried whether disclosure would include reimbursement for expenses, judging this a step too far.

2.3.3 Preferred option

The previous consultation's preferred option would encourage accountability and transparency of associations to their members. It could be improved with more detail about the nature and extent of 'remuneration' and clear guidance as to how the disclosure should be achieved.

30. Do you believe there should be disclosure of remuneration of committee members?

31. If yes, do you agree or disagree that remuneration should be disclosed in the financial statements presented to the AGM?

32. If disclosure is not in the financial statements, are there any other ways this could be achieved?

33. Given the wide variance in the types and sizes of associations, is mandatory disclosure appropriate for all associations?