

Incorporating an Australian association under State or Territory legislation or as a company limited by guarantee

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Associations in Australia have expressed interest in an opinion on the advantages and disadvantages of incorporating an association as either an:

- > Incorporated association under State or Territory associations incorporation legislation; or as a
- > Company limited by guarantee under the Commonwealth *Corporations Act 2001*.

The ideas expressed in this article are not a definitive piece of advice however we trust that they will be valuable to initiate discussion by the management and Board Directors/Councillors of associations.

Scope of activities

The context and scope of the activities of an association are a very relevant factor in which method of incorporation is preferable.

If an association currently operates with a relatively small turnover and within one State or Territory only, incorporating under association incorporation legislation of that State seems appropriate.

If an association seeks to become a significant national industry association, this positioning leans towards being incorporated under the Commonwealth *Corporations Act*.

In recent times, some State and Territory regulatory authorities have encouraged associations to seek registration under the Commonwealth legislation as the greater resources of the Commonwealth regulator, the Australian Securities and Investments Commission (ASIC) means they are better able to monitor the operations associations with larger turnover.

Technical issues

For organisations that are registered as an incorporated association and which operate beyond the border of the State or Territory in which they are incorporated, there are requirements to also register with ASIC and seek an Australian Registered Body Number (ARBN). Whilst gaining an ARBN is a straightforward matter, it is a form of dual registration that is a slight complication.

Being incorporated under a State or Territory law usually means that the association's Public Officer needs to reside in a same State or Territory in which the association is incorporated. This is often inconvenient because an appropriate person in that geographical location is not always immediately identifiable.

Understanding the relevant law

Whilst the Commonwealth *Corporations Act 2001* is a more complex Act than any of the State or Territory association incorporation laws, the principles that apply to an association are straightforward and are widely understood by lawyers from all parts of Australia because directors' duties are the same as for privately held companies.

It is unlikely a committee member or lawyer will know what the provisions of a State or Territory association incorporation legislation will be.

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Role of Company Secretary

In our opinion, the role of the Company Secretary of a company limited by guarantee is better defined in practice and in law than that of a Public Officer of an incorporated association.

The role of Company Secretary is one that should be undertaken by paid staff when the resources of an association allow this to happen. Whilst a volunteer can be Company Secretary, an association should move towards training an appropriate member of the management team to undertake this role. Until an association has the financial resources to pay for a dedicated Company Secretary, this role is often undertaken by the Chief Executive.

Compliance and cost

This article has not investigated the costs of registration under ASIC but these are readily found on the internet, www.asic.gov.au. In the overall costs of running an association, we believe the costs are similar..

Vigilance of the regulator

ASIC has a reputation for being a more vigilant regulator, with fines issued when compliance is not carried out in a timely manner.

Associations Forum supports these higher and yet reasonable standards. A well-run association should be pleased to be in a quality regulatory framework and be easily able to comply.

Conversion process

Some of the State and Territory association incorporations laws allow for transfer, sometimes called conversion, from that piece of legislation to the Commonwealth legislation.

A future version of this document will note the situation in each State or Territory.

Cost and conversion process

The main cost involved with transferring or converting from an incorporated association to being a company limited by guarantee related to writing a revised constitution to suit the Commonwealth legislation. This is likely to be in the vicinity of \$5,000 to \$10,000.

Regarding this expenditure, we note that constitutions are vital to the structure and success of associations and should be regularly revised and updated every few years. Therefore, such expenditure is not necessarily expenditure that would not be made regardless of transfer.

On one technical note, we add that the legal entity itself will often remain the same legal entity even though the legislation under which it is incorporated changes. In those few States or Territories that do not allow transfer, unfortunately an association may need to be wound up and a new legal entity started.

Culture

Anecdotal evidence leads to a suggestion that directors of a company limited by guarantee take their responsibilities more seriously than when these same directors were committee members of an association.

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Commentary from associations that have transferred legislation

A future version of this article will seek input from the following associations who have transferred from the state or territory legislation to the common legislation. The associations that will be asked to make commentary include:

- > Australian Sonographers Association
- > Australian Society for HIV Medicine
- > Australasian Sleep Association

Disclaimer

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