



THE UNIVERSITY OF
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Submission
Review of the Associations Incorporations Act 1984 NSW

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1 Executive summary

This submission is made jointly by Ms Susan Woodward, Mrs Sally Sievers and Ms Shelley Marshall from the Centre for Corporate Law and Securities Regulation at The University of Melbourne. We have been conducting a major, three year research project on accountability and corporate governance in the not-for-profit context, and have based this submission on both the results of the large scale empirical data collected for the project, and our previous research experience (refer Appendix 1: Contact details and author information).

Our sole recommendation is for the establishment of a uniform regulatory regime for incorporated associations.

We have suggested three different mechanisms to achieve this result (refer heading 7). From these options, our preference is for introduction of a single, Commonwealth statutory regime for all corporate bodies (that is, ‘for-profit’ companies, not-for-profit companies and incorporated associations) by referrals of power from the States to the Commonwealth, along the lines of what has been achieved for company regulation.

This option would:

- ensure nationally consistent financial and other reporting obligations
- remove the considerable difficulties faced by the growing number of (often small) not-for-profit organisations that wish to operate on a multi-State or national basis (refer 4.1 and the data discussed under heading 5)
- enable national regulation by a specialist regulator - a specialist unit within the Australian Securities and Investments Commission or a new, independent commission such as that recommended by the Charity Definition Inquiry Report (refer heading 7.3)
- facilitate the introduction of a specialist form of corporate entity and an appropriate fee schedule for not-for-profit organisations generally
- prevent ‘forum shopping’ (refer heading 4.2)
- remove administrative duplication (refer heading 4.3)
- draw on the best features of the incorporated associations experience and ensure that the key aims behind *NSW Associations Incorporation Act 1984* would still be met.

In this submission we have outlined relevant data from our project to support our call for a uniform system (refer heading 5). Of particular note, is data on organisational size and the reasons why a company structure was chosen instead of an incorporated association. This data shows that it cannot be assumed that it is only the large not-for-profits that chose company registration. We explain why it is not just a simple matter of directing large associations to migrate to the Corporations Act regime as is mooted on pages 9-10 of the Consultation Paper (refer heading 5.2).

While the associations incorporations legislation has served the not-for-profit sector well, after almost a decade of experience the NSW review is timely. Accountability and good corporate governance are concerns that also touch the not-for-profit sector. In order to continue to provide an effective framework to support the economically and socially significant contribution not-for-profit organisations make to the community, it is essential that there is now a uniform legislative approach. We therefore urge the Office of Fair Trading to convene a meeting of State regulators to pursue this goal.

2 Basis for submission

The authors of this submission - Ms Susan Woodward, Mrs Sally Sievers and Ms Shelley Marshall - are making this submission in their capacity as members of the Centre for Corporate Law and Securities Regulation at The University of Melbourne. This submission is based on research conducted during a major, three year research project, titled "Accountability and Corporate Governance in Not-for-profit Companies", and previous research experience (refer Appendix 1: Contact details and author Information).

2.1 Accountability and corporate governance project

The not-for-profit (NFP) accountability and corporate governance project (the Project) is a collaborative research project funded by the Australian Research Council and conducted by the Centre for Corporate Law and Securities Regulation at The University of Melbourne, with 'in-kind' support from Philanthropy Australia Inc.¹ The principal aim of the Project is to examine the appropriateness of existing corporate legal frameworks as they apply to NFP companies. Whilst the project focuses on NFP organisations incorporated as companies limited by guarantee, its findings have implications for the regulation of NFP organisations generally, including incorporated associations.

We have conducted the first national, large scale survey of NFP companies. During 2002, a detailed survey was sent to the Chief Executive Officer of all registered companies limited by guarantee. Over 1,700 completed replies were received. Of relevance to this submission, questions were asked about:

- organisational size and profile - for example, is it only large NFP organisations that register under the *Corporations Act*;
- why a company limited by guarantee was chosen as the legal structure rather than an incorporated association;
- if the company structure had been successful;
- what type of information should be disclosed and to whom (in particular, what information should appear on a public register); and
- who the most appropriate regulator is for NFP organisations.

The Project is in its final stage. Analysis of data from the survey and a full report will be completed by the end of this year.

3 Background

3.1 Importance of the sector

As the Office of Fair Trading would be aware, the Australian NFP sector plays a vital role in our society. In economic terms alone:

- Australians give \$2.8 billion annually to NFP organisations
- NFP institutions contribute 4.7% of GDP and account for 6.8% of total employment; and
- NFP institutions add more to GDP than the mining industry.²

¹ Philanthropy Australia is the national membership organisation for grant-making trusts and foundations. Its mission is to promote and protect the interests of family, private, corporate and community giving in Australia. See <http://www.philanthropy.org.au/>

² See "Non-profit Institutions Satellite Account", ABS Cat No 5256.0 released 28 November 2002.

The NFP sector relies on several sources for funding. Accountability is vital for the sector so it can maintain the confidence of both government and non-government grant makers and the public. In 1995, the Industry Commission (in its major inquiry into charitable and related organisations) identified accountability as a key issue for the sector:

“[NFP] supporters and the general public expect and are entitled to information about the finances and operations of CSWOs [community social welfare organisations] in return for their donations, voluntary activities and taxation exemptions and concessions. Improved confidence that funds are being used appropriately by CSWOs can potentially increase the overall fundraising resources available to the sector.”³

Although much needed reforms for small business have been introduced over recent years, more needs to be done for NFP organisations especially given the importance of the sector. After more than a decade of a dual NFP regime - State and Territory based associations incorporations legislation and national regulation of companies - we believe that the NSW Office of Fair Trading Review is timely, and are pleased to contribute.

3.2 NFP regulation

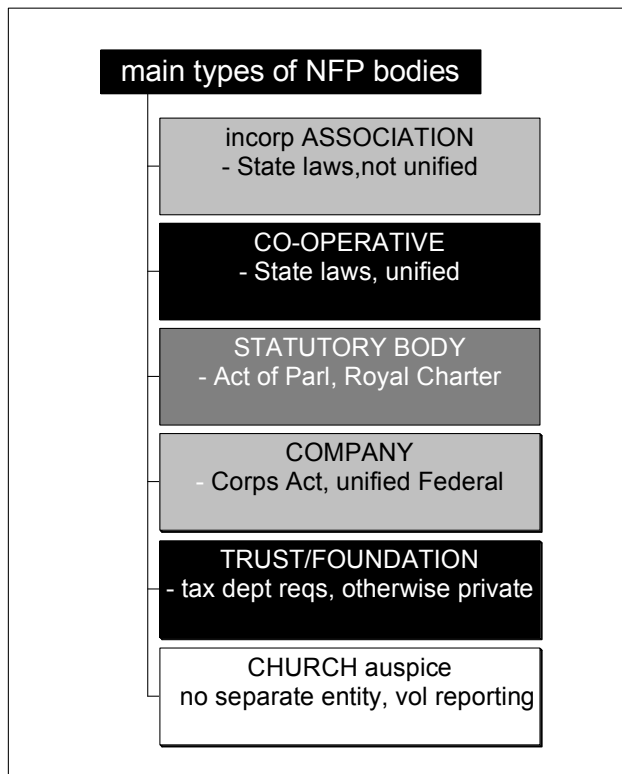
The associations incorporations legislation in each State and Territory has, for largely historical reasons, developed in a haphazard manner, reacting to local events and pressures. Appendix 1 to the Consultation Paper itself, and the more detailed comparative table that we have prepared for the Project (refer to the comparative table in Appendix 2 of this submission), highlight that key provisions of the legislation in each State and Territory can vary greatly (for example, audit requirements). Originally this focus on local and State issues caused relatively few problems because most incorporated associations only operated in a single State or Territory.⁴ But as is evident from the statistics mentioned under heading 3.1, there has been rapid growth in the NFP sector. There is also increasing commercialisation of many NFP organisations and greater outsourcing of service provision by all levels of government.

In addition to this lack of legislative consistency, the legal nature of NFP organisations in Australia is very varied, as illustrated in Figure 1. The range of possible legal structures (or indeed, the absence of a separate legal structure) is a significant point of difference between the NFP sector and the ‘for-profit’/business sector.

³ See Industry Commission, *Charitable Organisations in Australia*, Report No 45, 1995, AGPS, Chapter 8.

⁴ Sievers S, “*Incorporation of Non-Profit Associations: The Way Ahead?*” 18 C&SLJ 311 – 325 at p 316.

Figure 1: Myriad of legal structures in the NFP sector



In combination, these factors:

- the multiplicity of legal structures,
- a two tiered legislative system (with some organisations incorporated under a federal regime and some under a State/Territory regime), AND
- that the State/Territory regime for incorporated associations is not uniform,

have serious implications for accountability, governance and regulation of the NFP sector. Further, the importance of the regulatory framework is arguably greater in the context of NFP organisations because many of the other accountability mechanisms (for example, stock exchange regulation, dividends/returns to members and the influence of institutional investors) do not apply.

4 Problems arising from lack of uniformity

In terms of uniformity between the States and Territories, we are aware of current reviews of associations incorporations Acts being conducted in numerous States. However, despite the concurrent nature of these reviews, there would appear to be little coordination between these States.

As outlined under heading 3.2, such variations have implications for accountability, governance and regulation of the NFP sector. The following is more detail about the main problems that arise from this lack of uniformity.

4.1 Organisations operating on a multi-State or national basis

A NFP organisation that carries on, or hopes that in time it may carry on, operations in more than one jurisdiction faces a very difficult dilemma. If it wants to take advantage of the associations incorporations legislation, which is said to be specifically designed to meet the goals of simplicity and inexpensiveness, it will have to register a separate association in each

State and/or Territory that it wants to operate in. Obviously this will involve duplicating fees, on-going paper work and complexity because of a need to appreciate and keep abreast of the variations (even if only in minor detail) between legislation in the respective States and Territories. (The time and difficulty it took to prepare the comparative table in Appendix 2, even by an academic highly experienced in the area, has been practical testament to us of this fact.)

Aside from registration as a company under the *Corporations Act*, the only other option for such an organisation is to register as an association in one State and then, if it “carries on business” in another State or Territory, also register in that jurisdiction as a Registrable Australian Body under Part 5B.2 of the *Corporations Act*. However, again this involves extra time, expense and paper work. This course also involves many uncertainties, especially about the scope of the concept of “carrying on business” and how this concept applies to a NFP organisation.⁵ A breach for failing to register as such a body under the *Corporations Act* may occur quite inadvertently if, for example, a committee member moves to a different jurisdiction and takes part of the association’s administrative structure with them.⁶ Data from the Project (see headings 5.1 and 5.2) provides recent, large scale empirical evidence confirming that many small NFP organisations that incorporate as a company limited by guarantee chose to do so because they wish to operate on a multi-state or national basis.

4.2 Forum shopping

A lack of uniformity can potentially lead to forum shopping. By choosing the State or Territory of incorporation carefully, it would be possible for unscrupulous associations to avoid any requirement to maintain proper accounting records and comply with appropriate standards of financial reporting.⁷ Public disclosure obligations and financial recording keeping should be consistent across States and Territories. Lessons need to be learnt from the history of company law development in Australia. A nationally consistent approach based on a well thought out public policy decision about the most appropriate disclosure regime for NFP organisations is imperative in order to promote accountability and good corporate governance.

4.3 Duplication of administration

The need for separate Registrars in each State and Territory results in significant duplication of administrative effort and cost. Yet, as we understand it, there is no significant, net revenue gain for NSW (and presumably any of the other States and Territories). While we have not been able to ascertain an exact budgetary position, we note that, in view of the overall public benefit derived from the operation of NFP organisations (as noted in the Consultation Paper, page 7), it would be inappropriate for the incorporation of associations to be relied upon as a source of significant (net) revenue.

Further, the Department and the relevant government Minister whose portfolio covers incorporated associations varies between jurisdictions and, again adds to the complexity for an organisation that needs to operate in two or more jurisdictions.

5 Supporting data

5.1 Organisational size

It is generally assumed that the company limited by guarantee form is suitable for larger organisations, whereas smaller organisations choose to incorporate as associations. *However,*

⁵ Sievers S, “*Incorporation of Non-Profit Associations: The Way Ahead?*” 18 C&SLJ 311 – 325 at p 319.

⁶ Sievers S, “*Incorporation of Non-Profit Associations: The Way Ahead?*” 18 C&SLJ 311 – 325 at p 319.

⁷ Sievers S, “*Incorporation of Non-Profit Associations: The Way Ahead?*” 18 C&SLJ 311 – 325 at p 320.

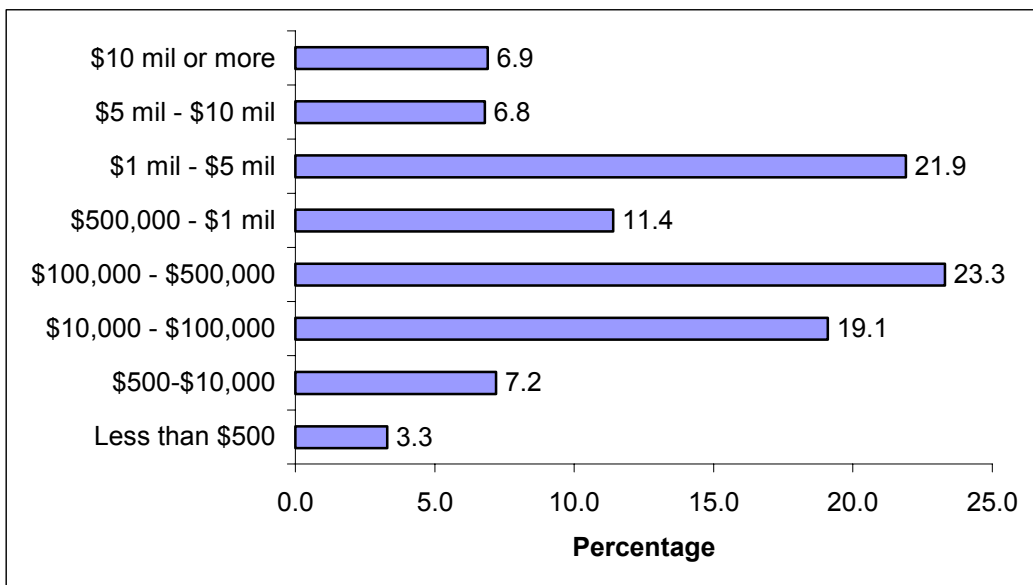
our data shows that a large proportion of NFP organisations incorporated as companies limited by guarantee are, in fact, small organisations.

From our survey⁸ (n=1688):

- 11% of respondent companies limited by guarantee had income of under \$10,000 in the last financial year;⁹
- nearly a third (30%) had income of under \$100,000;
- the majority (53%) had income under \$500,000 - that is, the majority of respondent companies were smaller than the those mentioned on p 10 of the Consultation Paper.

The graph below summarises the findings in relation to income.

Figure 2: size of companies limited by guarantee based on income



In order to obtain data on the size of the organisations that incorporate as companies limited by guarantee, we also asked questions about number of employees, number of volunteers, assets and liabilities. This data can be provided on request and it is also discussed in an article on the survey findings, see S. Woodward “Not-for-profit” motivation in a “for-profit” company law regime - national baseline data 21 Companies & Securities Law Journal 102-133, March 2003 (copy is enclosed with this submission and a PDF version is also available from the project web site <http://cclsr.law.unimelb.edu.au/activities/not-for-profit/>).

5.2 Analysis of data on size

In analysing all the survey data relating to organisational size, we also looked at how many of the respondent NFP companies could be said to fall within the *Corporations Act* definition of a

⁸ Question 3.1.1 of our survey read: “As at the end of the company’s last financial year, please indicate gross income from all sources (where relevant, please include fundraising, government funding, fees for service, subscriptions, commercial sales, interest income, bequests, philanthropic grants, corporate sponsorship and any other non-government grants).” A range of response options were offered: less than \$500; \$500-less than \$10,000; \$10,000-less than \$100,000; \$100,000-less than \$500,000; \$500,000-less than \$1mil; \$1mil-less than \$5mil; \$5mil-less than \$10mil; and \$10mil or more.

⁹ Our income scale did not have a separate category for under \$50,000 as referred to in the Consultation Paper, p 5.

“small” (proprietary limited) company under s 45A of the *Corporations Act*.¹⁰ When the s 45A test was applied to the survey data, it showed that 88% of NFP companies in the sample would, for their last financial year, have been classified as “small” (assuming of course, that they were a proprietary company limited by shares rather than a company limited by guarantee).

This result is important in the context of this submission because it shows that there is a mismatch between what is considered “small” in the NFP/associations context and what is considered “small” in the ‘for-profit’/company law context. As a rough illustration of this point, it is worth *comparing* the Consultation Paper which states “there are some larger associations with an annual turnover of \$250,000 or more” (p 5) and refers to associations “with turnover in excess of \$500,000” being required to incorporate as a company (p 10), *with* s 45A of the *Corporations Act* which defines a “small” proprietary company as one with consolidated gross operating revenue of less than \$10 million. We would argue that most people participating in the NFP sector would think that an NFP organisation with, say, 45 employees, assets of \$4 million and revenue of \$9 million would be a large (or at least not a “small”) organisation, especially if it had a large volunteer base. But under the *Corporations Act* definition, such an organisation would be regarded as “small”.

It is important to consider the implications of this definitional mismatch. If the Department’s Review results in associations that it regards as “large” being required to registered under the *Corporations Act* rather than under the *Associations Incorporations Act* (as mentioned in the Consultation Paper, pages 9-10), then it is worth noting that it will be possible for these organisations (those whose annual turnover is, say, in excess of \$500,000) to fall within the *Corporations Act* definition of “small” (which refers to revenue of \$10 million). In this event, certain company law disclosure and other requirements could be avoided. In particular, as “small” proprietary limited companies,¹¹ they would not be required by the *Corporations Act*¹² to have their accounts audited or to lodge them with the Australian Securities and Investments Commission (ASIC).

A national regulatory regime for all incorporated NFP organisations within the auspices of the *Corporations Act* would enable the issue of graded reporting obligations (dependent for example on size) to be addressed, and would eliminate the ability of an organisation to avoid reporting obligations merely on the basis of its legal structure and/or place of incorporation/registration. This point is discussed further under heading 7.3.

5.3 Why legal structure chosen

We asked respondents to our survey why they chose to incorporate as a company limited by guarantee rather than, for example, an incorporated association. The most significant findings concerning this question were as follows:

¹⁰ The *Corporations Act 2001* (Cth) s 45A(2) states: “A proprietary company is a small proprietary company for a financial year if it satisfies at least 2 of the following paragraphs: (a) the consolidated gross operating revenue for the financial year of the company and the entities it controls (if any) is less than \$10 million; (b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than \$5 million; (c) the company and the entities it controls (if any) have fewer than 50 employees at the end of the financial year.”

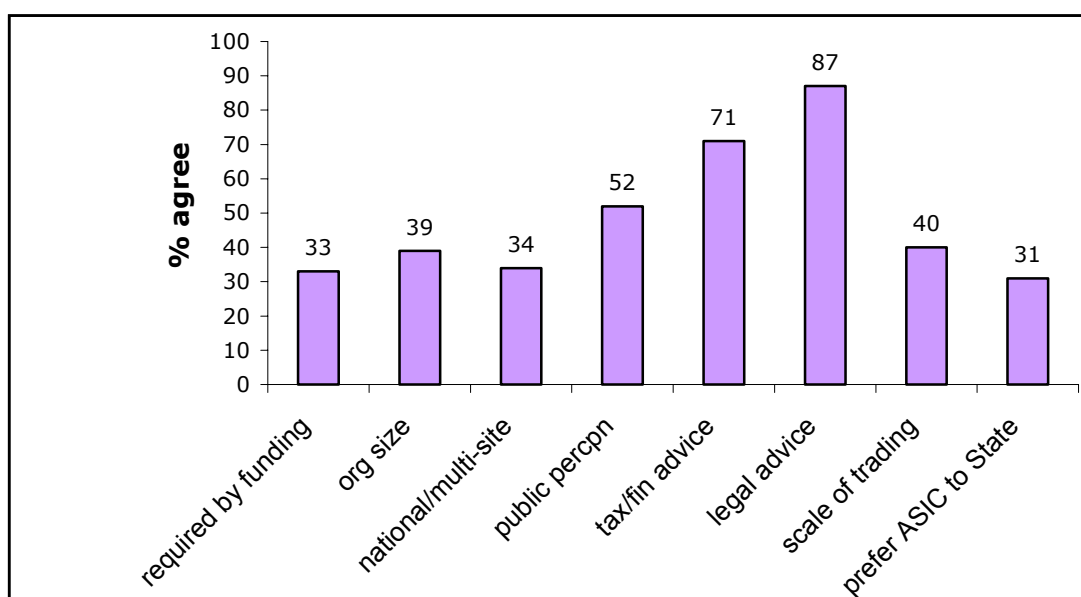
¹¹ There is no taxation or company law requirement that they register as a company limited by guarantee rather than a company limited by shares. In fact, we are aware of several NFP organisations that are registered as proprietary limited companies.

¹² They would not be required to lodge such accounts unless requested by ASIC (s 294) or by the requisite number of members (s 293) or if they are controlled by a foreign owned company (s 292(2)(b)).

- a) over a third (34%) indicated that being a “national or multi-state organisation” was an important factor in their choice of a company structure, and significantly more small¹³ organisations said this factor was an important in their choice compared with large organisations (36% of small organisations compared with only 22% of large organisations);
- b) 40% indicated that the “scale of trading activities” was an important factor;
- c) almost a third (31%) identified a preference for ASIC “rather than State regulator” as an important factor;
- d) “public perception and status” was important to the majority (52%) of respondents; and
- e) 39% indicated size as an important factor in choosing to incorporate as a company limited by guarantee.

Space was also given on the questionnaire for comments on why a company structure was chosen. It is worth noting that many of these respondents stated that a company structure was a legislative or government funding requirement (for example, under the *Registered Clubs Act 1976 NSW*) and some said that the company structure was more flexible. Interestingly, there were also comments that the choice was based on the need to have a structure that is understood globally. So, while they may in fact be a very small organisation, the Australian ‘arm’ of an overseas NFP organisation, needs a legal structure that has international compatibility.

Figure 3: Reason chose to incorporate as company limited by guarantee



Further data was obtained in May (2003) from participants at a conference of Chief Executive Officers of disability organisations who are members of the peak body ACROD (National Industry Association for Disability Services), at which Ms Woodward was invited to deliver a presentation on the Project. Participants were asked to complete a brief feedback form for ACROD. From the 125 responses (out of about 140 who attended the session), the majority (68) were incorporated associations and 46 were companies limited by guarantee. It is worth noting that:

- 84% indicated that they were in favour of a new specialist NFP legal structure;

¹³ To distinguish between small and large NFP respondents, we applied the s 45A *Corporations Act* definition.

- 95% were in favour of suitable accounting standards for NFP organisations being developed and implemented; and
- 95% were also in favour of government reporting requirements being streamlined and being made to one specialist government regulator.

5.4 Analysis of data on choice of legal structure

In relation to finding (a), this data confirms that the needs of small, but national or multi-state, NFP organisations are not being adequately met by the current incorporated associations’ regime. It is also a particular problem for a federated body. We are aware of several organisations that have a small national secretariat incorporated as a company limited by guarantee, but all their member State and Territory bodies are incorporated associations. As explained under heading 4.1, this model increases administrative costs for the organisation. It also makes it difficult to produce educational NFP management material that caters for both the State/Federal regimes and for the variations between the States/Territories in their associations’ legislation.¹⁴ With increased use of technology such as email and internet, many organisations have a greater ability to operate on a national basis and, therefore, this is an increasingly important issue for the States and Territories to consider.

In relation to finding (b), the data reflects that the scale of a NFP organisation’s trading activities is an area of debate and variation in the incorporated associations’ regime.¹⁵ There were several respondents who indicated in written comments that they would prefer to be an association but, because of the actual or likely scale of their trading activities, said they had decided, or had been directed by the relevant registrar, to incorporate as a company.

In relation to finding (c), the preference for ASIC rather than a State regulator as an important factor supports anecdotal evidence from informal interviews conducted prior to conducting the survey, that many of the State regulators are under-resourced and cannot cope easily with organisations that want to have variations to the prescribed model rules.

In relation to finding (d), public perception and status was (perhaps) surprisingly important to the majority of respondents (52%), but this data supported anecdotal evidence that “serious” or “more sophisticated” NFP organisations are companies rather than incorporated associations.

The ACROD feedback supports the Project survey data and is significant because it provides responses from *a group of incorporated associations* to show that they are even more strongly in favour of a new specialist NFP structure and regulator.

5.5 Has the choice of legal structure been successful?

Respondents were asked to respond to several statements about their experience of a company structure and the results are summarised in Figure 4 below.

Figure 4: Respondents’ view on success of company structure

Positive questions about company structure	Negative questions about company structure
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¹⁴ See this argument made by other academics: McGregor-Lowndes, M *Reforming Queensland’s Incorporated Associations Legislation*, 22 *The Queensland Lawyer*, 9-19 and Fletcher K, *Incorporated Associations: Cheap Incorporation – Limited Choices* 22 *The Queensland Lawyer*, 20-24.

¹⁵ See Sievers AS, *Associations and Clubs Law in Australia and New Zealand* (The Federation Press, 1996) para 4.1.4.

<ul style="list-style-type: none"> is readily understood by the company's directors <p>majority (76%) agreed</p>	<ul style="list-style-type: none"> has caused difficulties <p>majority (76%) disagreed</p>
<ul style="list-style-type: none"> is readily understood by the company's members <p>majority (56%) agreed</p>	<ul style="list-style-type: none"> has added significant expense <p>majority (59%) disagreed</p>
<ul style="list-style-type: none"> is readily understood by those dealing with the company (such as funding bodies) <p>majority (73%) agreed</p>	<ul style="list-style-type: none"> has added a lot of paperwork <p>majority (51%) agreed</p>
<ul style="list-style-type: none"> involves manageable reporting obligations to members and ASIC <p>majority (76%) agreed</p>	
<ul style="list-style-type: none"> has been sufficiently flexible to meet the organisation's needs over time (eg, if a merger has been necessary) <p>majority (72%) agreed</p>	

As can be seen from Figure 4, there was no clear evidence of any overall dissatisfaction with the structure. The dissatisfaction that was expressed was about the expense and the paperwork. There was no control group of 'for-profit' companies and it is possible that similar dissatisfaction about fees and paperwork would be expressed by such a group. About three-quarters of the respondents believe that the company structure is well understood by directors and those dealing with the company, and that it has been a flexible structure with manageable reporting obligations.

5.6 Analysis of data on success of legal structure

The following observations can be made on this data:

- the company structure itself is readily understood, perhaps particularly so in more recent years with the introduction of single director/shareholder companies;
- consideration needs to be given to the fees payable where the company is a NFP organisation.

6 Public disclosure considerations

Almost all respondents (91%) said that their income was exempt from income tax. Almost half (48%) also enjoy gift deductible status. We submit that with this concessional taxation treatment should come a corresponding public disclosure obligation, *even if* the organisation is primarily member serving (as 56% of respondents said they were). However, we also submit that the public disclosure obligation should be consistent across States and Territories. It should not depend on which type of legal structure is adopted (a company or an association), or the States/Territory in which the organisation is incorporated. A nationally consistent approach based on a well thought out public policy decision about the most appropriate disclosure regime for NFP organisations that, for example, makes distinctions based on size and/or taxation status, is long over due.

7 Possible reform options for unified regulation of NFP organisations

We submit that uniform regulation of incorporated associations is now essential. An overall strategy is required rather than individual States and Territories tinkering with their own Acts. In

relation to how to achieve such uniform regulation, it is suggested that there are three main options that warrant consideration and debate:

- a) retention of the existing dual regime but with uniform State and Territory based associations incorporations legislation (along the lines of what has been achieved for cooperatives);
- b) retention of the existing dual regime but with uniform State and Territory associations incorporations legislation *and* legislative amendments enabling ASIC to assume jurisdiction over incorporated associations; or
- c) introduction of a single, Commonwealth statutory regime for all corporate bodies (that is, ‘for-profit’ companies, NFP companies and incorporated associations) by referrals of power from the States to the Commonwealth (along the lines of what has been achieved for company regulation) that would also enable national regulation by ASIC *and* the development of a specialist form of corporate entity for NFP organisations generally.

7.1 Uniform associations incorporations legislation

Others have already made the call for uniform legislation for incorporated associations.¹⁶ The logic of this proposition is inescapable. In addition, our survey data provides evidence of problems with an incorporated association as the legal structure for some NFP organisations, even small ones to which the legislation has been primarily directed.

It is worth recalling that the Industry Commission in its final report considered uniform State associations’ legislation as one option to improve accountability. However, the Commission concluded that it was “not the best way to ensure public accountability for CSWOs [community social welfare organisations]”. The Commission reached this conclusion for two reasons: (a) because of the difficulties of achieving and maintaining uniformity between States; and (b) because not all CSWOs are incorporated associations and therefore making the legislation uniform “would not encompass all CSWOs and hence would not provide a consistent set of reports for all CSWOs. Nor would it lead to a comprehensive database”. This report was published in June 1995 so it is possible to surmise that if the Commission had had the benefit of recent experience with the referrals of power for the *Corporations Act*, it would have felt that reason (a) (above) could be overcome, but presumably its conclusion would not have been altered because reason (b) (above) would still apply.

7.2 Uniform associations incorporations legislation administered by ASIC

The second option outlined under heading 7 (retention of the existing dual regime but with both uniform State associations’ legislation *and* power over incorporated associations being conferred on ASIC), is the intermediate of the three options, quite like what existed for companies under the *Corporations Law* scheme (that is, prior to the recent referrals of power). It would require each of the States to confer regulatory power on ASIC under their associations incorporations legislation and for the Commonwealth to amend the *ASIC Act*.

It has the advantage of allowing an existing, experienced regulator to take responsibility for the regulation of all bodies corporate (that is, ‘for-profit’ companies, NFP companies and incorporated associations), while retaining a specialist form of incorporation familiar to the majority of NFP organisations (see also the discussion of ASIC’s role under heading 7.3). The survey data shows that almost a third (31%) of respondents identified a preference for ASIC “rather than State regulator” as an important factor in their choice of incorporated legal form.

¹⁶ For example, McGregor-Lowndes M and Fletcher K (see note 14) and Sievers S, “Incorporation and Regulation of Non-Profit Associations in Australia and other Commonwealth Law Jurisdictions” (2001) 13 AJCL 124 at 142

If this option also facilitated the creation of a specialist unit within ASIC to deal with NFP companies and associations, then NFP expertise could be developed. However, this option would presumably raise the same constitutional issues as the *Corporations Law* scheme faced - Federal courts could not exercise enforcement powers under the respective State Acts and breaches could not (at least with total certainty) be prosecuted by the Commonwealth Director of Public Prosecutions.

7.3 Commonwealth legislation administered by ASIC

The third option of the introduction of a single, Commonwealth statutory regime for all corporate bodies by referrals of power from the States to the Commonwealth (along the lines of what has been achieved for company regulation) and national regulation by ASIC, would be the most drastic but, we suggest, the most satisfactory of the three options mooted. Because it is the most drastic, it may also be said to be unrealistic. However, unlike business name registrations, regulation of incorporated associations is not (as we understand it) a revenue earner for the States (refer heading 4.3). Indeed it may even be regarded as an administrative burden. Therefore, we would urge NSW to consult with other States and Territories with a view to a referral of powers, using the *Corporations Act* model.

There are several advantages to this third option:

First, a single regulatory body such as ASIC would enable the creation of a specialist unit to meet the particular needs of NFP bodies. While this advantage also exists for the second option (ASIC enforcement of State associations incorporations legislation), the third option would allow for cross-vesting and the same enforcement regime as provided for under the *Corporations Act*, without fear of constitutional challenge. Given that ASIC already deal with the registration and on-going compliance by over 10,000 NFP companies, this expanded role would not involve ASIC (that is, the Commonwealth) in either a completely new regulatory role or service delivery system. ASIC's established on-line lodgement and searching facilities could be used to streamline the paperwork for, and to enhance disclosure by, incorporated associations.

Secondly, because the Federal Government has not adopted the Charity Definition Inquiry's recommendation for an independent administrative body,¹⁷ State referrals of power may be the most realistic and revenue neutral option. Indeed, some of the submissions by NFP organisations to both the Industry Commission and the more recent Charity Definition Inquiry have suggested reforms along this line.

Thirdly, and perhaps even more importantly, this option would facilitate the introduction of a specialist form of corporate structure available only to NFP organisations. While there are many overarching provisions in the *Corporations Act* that should apply to all companies (particularly, directors' duties), the unique issues faced by NFP companies could be addressed in specialist provisions. A plain language guide for NFP's along the lines of the Small Business Guide could make an enormous difference. At the time that the associations incorporations legislation was introduced, the simplification of requirements and filings for small business had not been introduced into the corporations' regime. The concept of replaceable rules under the *Corporations Act* is not dissimilar to that of model rules under the various State and Territory associations incorporations Acts. In the way that some replaceable rules apply only to public companies, there could be some designed specifically for NFP bodies - picking up the best of the incorporated associations model rules framework.

¹⁷ See Peter Costello, The Treasurer, Commonwealth of Australia, *Government Response to Charities Definition Inquiry*, Press Release, No 049 (29 August 2002) available at <http://www.treasurer.gov.au/tsr/content/pressreleases/2002/049.asp>

As a general comment, the regime of “small” and “large” proprietary companies was introduced primarily as a result of pressure from the business community to reduce and streamline the regulatory burden on small business. Consideration needs to be given to the position of small NFP organisations. The public policy argument for requiring disclosure from small NFPs is arguably greater than for small ‘for-profit’ companies because the majority of them enjoy (as a minimum) income tax exemption. However, there is a strong argument for tailoring the nature of what is disclosed and the fees payable to meet their different needs. It is not so much the extent of the disclosure, as its relevance and accessibility to the different stakeholders that NFP organisations serve, for example, the donating public, members and clients rather than shareholders. But to be effective as a mechanism for good corporate governance, disclosure needs to depend on considerations such as size, purpose and taxation status, NOT on jurisdiction and choice of legal structure.

8 Conclusion

Since its inception, the associations incorporations legislation has served the NFP sector well but, after almost a decade of experience, the NSW review is timely. In order to continue to provide an effective framework to support the important contribution NFP organisations make to the community, it is essential that there is now a uniform approach. As the corporations’ law experience has shown, a nationally consistent approach is best achieved by a referral of powers and an independent, specialist, national regulator. On the basis of the large scale empirical evidence we have obtained from the Project and our prior academic experience, we urge the Office of Fair Trading to convene a meeting of State regulators to pursue this goal.

Appendix 1 - Contact details and author information

Contact details

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Appendix 1 - author information

Ms Susan Woodward

Ms Susan Woodward is a lecturer in the Faculty of Law, and a member of the Centre for Corporate Law and Securities Regulation. Ms Woodward is the other co-chief investigator on the Project. She has published substantial articles in refereed journals on the topics of directors' duties and the implications of recent company law reforms on non-profit companies (see, for example, "*Not-for-Profit Companies - Some Implications of Recent Corporate Law Reform*" (1999) 7 *Company & Securities Law Journal*). She is also a co-author (with Mrs Sievers and Ms Helen Bird) of *Corporations Law - in principle* (6th ed, LawBook Co May 2003) and accompanying *Teachers' Resources* which is used widely by law and non-law students throughout Australian tertiary institutions. Previously, in private practice, she acted for several NFP organisations. She has been on several boards of management of community organisations and is currently an (honorary) director of a NFP company limited by guarantee.

In relation to the Project, Ms Woodward has published a comprehensive article "*Not-for-profit motivation in a for-profit company law regime- baseline data*" (2003) 21 *Companies & Securities Law Journal* 102-133, an article "*Not-for-profit organisations: do they fit the company mould?*" *Keeping Good Companies*, June 2003 p 278-283 (*Journal for the Institute of Chartered Secretaries*) and, together with Ms Marshall, "*The more the merrier? Stakeholders in not-for-profit companies*" (currently with referees).

Mrs Sally Sievers

Mrs Sievers is an Associate Investigator on the Project. Until 1999 she was a Senior Lecturer in the Faculty of Law, Monash University and had worked at the Faculty for more than twenty years. She is now a member of the Centre for Corporate Law and Securities Regulation. Mrs Sievers, has for many years, been one of the few Australian legal academics researching and writing on matters relevant to the NFP sector. She was part of the research team whose report led directly to the introduction of the *Associations Incorporation Act 1981* (Vic) and is the author of one of the two Australian texts on non-profit associations (*Associations and Clubs Law in Australia and New Zealand* (1996) 2nd ed. 1989 1st ed). Her recent publications include '*Incorporation of Non-Profit Associations: The Way Ahead?*' (2000) 18 *Company & Securities Law Journal* 311-325 and "*Incorporation and Regulation of Non-Profit Associations in Australia and other Commonwealth Law Jurisdictions*" (2001) 13 *AJCL* 124 at 142. Mrs Sievers is also the author of Title 435 'Voluntary Non-Profit Associations' in *Halsbury's Laws of Australia* (loose leaf) and the current author of Chapter 9.1 'Incorporation of Community Groups' in the *Lawyers Practice Manual Victoria*. In 1993 and 1995 she was awarded ARC Small Grants to fund research projects into NFP associations. She has been a board member of, and honorary legal adviser to, several NFP organisations. As already mentioned, she is also a co-author (with Ms Woodward and Ms Helen Bird) of *Corporations Law - in principle* (6th ed LawBook Co May 2003) and accompanying *Teachers' Resources*.

Ms Shelley Marshall

Ms Shelley Marshall is a researcher in the Centre for Corporate Law and Securities Regulation, and an Associate of the Centre for Employment and Labour Relations Law, The University of Melbourne. Ms Marshall has been working as a researcher on the Project since January 2003 and has co-authored (with Ms Woodward) the article "*The more the merrier? Stakeholders in not-for-profit companies*" (currently with referees). She also published an article *The Stakeholding Theory of Corporate Governance: Can it deliver upon its promises?*, Working Paper No. 17, Centre for Employment and Labour Relations Law, Faculty of Law, University of Melbourne, 2000. Prior to her work as a research assistant on this and other projects in the Law Faculty, she practiced as a solicitor with a Victorian plaintiff law firm and worked in the area of legal compliance with an Australian industry group. She has been a board member of, and honorary legal adviser to, several NFP organisations, and has provided legal advice to not several NFP organisations concerning incorporation within Australia and internationally.

Appendix 2: Comparative table - key provisions of State and Territory associations incorporations legislation

	ACT Assoc	NT Assoc	NSW Assoc	Qld Assoc	SA Assoc	Tas Assoc	Vic Assoc	WA Assoc
Eligibility								
Specific definition		4(1) admin power to certify others)			18(1)	2(1)(a), (b) admin power to declare others to be eligible		4(1) admin power to approve others)
Non-specific	14(1)		7(1)	2, 5(1)			3(1)	
Definition of gain	5		4	4(1)	18(6)		3(2)	4(4)
Prohibition on trading	14(2), 109 (penalty)	4(1)	7(2)(a), 66 (penalty)	5 (prohib financial gain)	18(5)	2(1), 21(2)	10(4A), 51(1)	4(2)
Exemptions	15	4(1) (trading assoc)	4(h) Reg 10 (charities)	5			51(4)-(6)	
Prior notice/advertise intention to apply		5-6, 25A-25B (trading assoc)		10-11 (may be required in specific cases)				6-7
Reservation of name	37		13		53A			
To include denoter of NFP status in name	36	9(2), 9A, 25L, trading assoc)	12(3)	29-33 (unless exempt)	20(3)(a)(ii)	9(3)-(4)	12, 12A	10(b)
Procedure	18	7, 25C (trading assoc)	8-9	6-9	19	7-8	4-5, reg 5A	5-7
As of right	19		10(1)	12 (power to grant OR refuse)	20		7(1)	9(1)

	ACT Assoc	NT Assoc	NSW Assoc	Qld Assoc	SA Assoc	Tas Assoc	Vic Assoc	WA Assoc
Some exceptions			10(2) (scale or nature of activities etc)	10-13	20(2)		7(2)	9(2)
Discretionary		8, 25D (trading assoc)				8(1)		
Effect of incorporation	22	9(1), 25J (trading assoc)	15	21, 25	25	11-12, 21	14, 16	10, 13
Limited liability, etc	51	21	16	27	21(2)	27	15	12
Ultra vires	24		17-18,	26	27-28		17	15
Agency & other issues	47		31-36 (pre-reg contracts 60-61 (agents, constructive notice)	28	26	20	19, 20 (pre-reg contracts, 41-42 (constructive notice)	14
Transfer of Incorpor etc				Part 11				
Directed / voluntary from AI Act to Corps Act or Co-op	82 (voluntary), 83 (directed)	25AR (trading assocs only)	10(2), 56-58, regs 17-18 direct/ vol Corps/ co-op	105K-105N (to co-op)	42		31AA (vol), 31AB (directed)- 31A (incl co-op)	34 (to some other Act)
Voluntary to AI Act			48-49	105A-105J (co-op to AIA)		25A-25B	10-11, reg 5C	
Amalgamation	26-28		46	79-88 74-78	22	25	31, regs 5G-5H	
Branches								
Statement of objects/purpose	29		8-9, 19				5(1), 21(1)	

	ACT Assoc	NT Assoc	NSW Assoc	Qld Assoc	SA Assoc	Tas Assoc	Vic Assoc	WA Assoc
S								
Objects clauses	29		9(1)(b), 19(1)	46(2)(b), regs sch 3	23A(1)(a)			
Rules	31-32	15, 25U (trading assoc)	11	46	23		6, 21(2)	16-18
Minimum content	32, sch	25T (trading assoc)	11(1), Sch 1	Reg 7, regs sch 3	23A(1)(c)		6(a), sch	16, sch 1
Model/replaceable rules	regs		Reg 9, regs sch 1	Reg 8, regs sch 4	67(2)(a) (none prescribed)	16, regs	21(2)(b), reg 29, sch 5	
As default rules	31(2)		19(2), (3)	47(1), 51		16(3)	21(3)	
Alteration of rules	33	16, 25V (trading assoc)	20	48, regs sch 3 cll 8-9	23A(1)(c) (to be included in rules), 24, 24A (by court order)	18	22	17, 19 (objects)
By special resolution	33(1)		20(1)	48(1)	24(1) subj to rules	18(1)	22(1)	17(1)
Proportion of membership required for special reso	¾ (70)		¾ (5)	¾ (2)	¾ (3)	¾ (23)	¾ (29)	¾ (24)
Administrative approval		16(3)		48(5)-(8)	24(5) (name only)	10(2) (name), 18(4) (objects)	44(2)-(4)	18 (name), 19 (objects)
No effect until lodged	33(5)	25V(4)(5)-25Y (trading assoc)	20(3)	48(8), 49 (no effect unless approved)	24(7) (name only)	18(4)	22(2) (lodged for approval and approved)	17(2)
Rules take effect as contract	48		11(2)	71(1)	23(1)		14A(1)	
Committee/board	60			60-61, 61A				

	ACT Assoc	NT Assoc	NSW Assoc	Qld Assoc	SA Assoc	Tas Assoc	Vic Assoc	WA Assoc
d structure is mandatory				(eligibility)				
Public officer	57-58	12-14, 25R-25S (trading assoc)	22	65-67 (secretary)	56	14-15	24-28, reg 5E	
Registered office	121(1)(optional)			17			13A (registered address)	40 (lodging address for service opt)
AGM required	69		26	55-57	39 prescrib assoc only		30	23
Special resolution	70		5	2, 3	3	23	29	24
Removal of directors/commit tee members	63			64(1) (rules), 64(2)(automatic on death, BR, conviction etc), regs sch 3 (to be included in rules)	30 (automatic on death, BR, conviction etc)			
Meetings			See sch 1 (to be included in rules)	See regs sch 3 (to be included in rules) and s 133 (irregs)	23A(1)(c) (to be included in rules)	22A (10% of members may call a meeting)		
Technology permitted				63(2) (management c'ttee)				
Proxies permitted	In rules, Sch 1		In rules, Sch 1				In rules, Sch	
Voting procedure	In rules Sch 1		In rules, Sch 1				In rules, Sch	
Insurance			42-45,reg 14	70				

	ACT Assoc	NT Assoc	NSW Assoc	Qld Assoc	SA Assoc	Tas Assoc	Vic Assoc	WA Assoc
Mandatory								
Duties of Committee / Board				63 (regular meetings)				
Fiduciary duties					39A		29A	
Duty to disclose interests	65				31-32		29B-29C	21-22
Insolvent trading			37-38		49AD			
Membership rights			To be in Rules, Sch 1			22A (10% of members may call a meeting)		
Judicial review	49-53			71-73			14A92)-(4)	
Natural justice	50			71(3)	40		14B(3) (grievance procedure)	
Registered office	121(2)-(3) (if it has a regd office)			17			13A (reg address)	40 (lodging address for service opt)
Change in Officers	59 (public officer) 62 (committee)	14 (public officer) 25S (trading assoc)	25 (public officer) 21A (public officer keep reg of c'ttee membs.)	68 (sec, pres, treasurer)	56(5) (public officer)	15 (public officer)	28 (public officer)	
Change in constitutions/rules	33	16, 25V (trading assoc)	20(2)	48	24(2)	18(2)-(6)	22	17 (rules), 19 (objects)
Notify any other changes	38 (name), 26-27 (amalgamation)	17 (name), 25Z (name of trading assoc)	14 (name)	35-38 (name)		10(2) (name)	13, reg 6 (name)	18 (name)

	ACT Assoc	NT Assoc	NSW Assoc	Qld Assoc	SA Assoc	Tas Assoc	Vic Assoc	WA Assoc
Financial records kept	71	25AG(1) (trading assoc)	28(1)(a)	Regs 9-10, regs schs 3 & 5	39C(all assoc), 35(1), reg 8 (prescribed assoc)	23A	30A	25
Annual report/return lodged	79	25(3) (bal sheet), 25A(4) (bal sheet trading assoc)	27	59(4) (unless exempted: 59(5)), reg 11	36, reg 9 (periodic return for prescribed assoc)	24B (unless exempt)	30(4), reg 5F, 30(4)(aa) (prescribed assoc)	
Financial report to members	73	25A(3) (trading assoc)	26(6), 27(1)(b)	59(1)(c), regs sch 3 Pt 2	35(6) (prescribed assoc)		30(3)	26 (annual accounts)
Only concise/summary financial report lodged	79 (annual return)	25(3) (bal sheet), 25A(4) (bal sheet trading assoc)	27(1)	59(4), regs 11-12 (public may inspect: 59(6))			30(4) (prescribed assoc must lodge audited acc)	
Financial reports to comply with Accounting Std	76(3) (prescribed associations)				No, but see standards req by s 37		Reg 7, sch (prescribed assoc)	
Financial reports audited	76 (prescribed assocs)	25A(2) (trading assoc)		59(1)(b) (must be indep but need not be reg auditor), regs sch 3 Pt 2	35(2) (prescribed assoc), 23A(1)(c) (to be incl in rules of prescribed assoc)	24 (auditor or approved person, unless exempt)	30B (prescribed assoc, auditor or approved person)	
Minutes books			28(2)	Regs sch 3, cl 6-7	51			
Sliding scale	74, regs 12-13						3, reg 7	
Register of	67 (members)	25AF (trading)		18, reg 16			Sch (to be in	27 (members)

	ACT Assoc	NT Assoc	NSW Assoc	Qld Assoc	SA Assoc	Tas Assoc	Vic Assoc	WA Assoc
members –who has access?		assoc) open to public		(public access)			rules)	Assoc 28 (rules) & 29 (record of office-holders – members can inspect
Sources of funding (Fundraising Appeals Acts)	Sch 1 (to be included in rules)		Sch 1 (to be included in rules)				Sch 1 (to be included in rules)	
Investigation, etc	99-105	25AT-25AZD	67 (records)	119-120	10, 11, 62	24A	37C-37Q	39(3)-(7) (limited power)
Direction to migrate	83	25AR (trading assoc)	10(2), 56-58, regs 17-18	42			31AB	34
Cancellation of incorporation	93	23A-23G (dissolution by Registrar)	54-55, 55A-55b (Vol)	93-94D, reg 14	44-49	34-36	36E-37	35
Compromise with creditors					40A			
Voluntary administration					40B			
Voluntary winding up	88		50	89	41(1)(b) (decl of solvency required: 41C)	32 (incorporates CA by reference)	33	30
Compulsory winding up	89-90	20, 25AP-25AQ (trading assoc)	51	90-91	41(1)(a), (3) (by the court), 41(1)(c), (7)-(8) (on certificate of registrar)	32 (incorporates CA by reference)	34 (by the court), 35-36B (on certificate of registrar)	31
According to the rules or a special resolution		25T (trading assoc: to be in rules)	53(2), 55B(1) (vol cancellation)	92, regs sch 3 cl 14	43(2)	33(1)	33A-33B (vol only)	33 (distribution plan)

	ACT Assoc	NT Assoc	NSW Assoc	Qld Assoc	SA Assoc	Tas Assoc	Vic Assoc	WA Assoc
Subject to external approval	92, 94-98	2, 25AP (trading assoc)	53(2A)(a), 55B(1)(a) (vol cancellation)		43(3)-(4)	33(1)-(2)		33(6)-(12), 36
No distribution to members	92 (by implication)		53(2A)b, 55B(1)(b) (vol cancellation)		43(1)			33(2)
Name & OAN /ARB/ABN	9-11	Reg 7	59	16, 18, 40, reg 16	6	29	39-40	37
Registered office	121 (optional)			17, 18 reg 16				40 (address for service – if lodged)
Office holders	62	Public officer 12-14, 25R-25S (trading assoc)	21A(6) (kept by public officer, public can inspect)	68	56 (public officer)	24B(1A) (lodge details of committee if exempted from annual return)	28 (public officer)	
Details of shareholders / members	67 (members only)	25AF (trading assoc)						
Copy of rules / constitution	18,30,33	15-17, 25T-25V trading assoc)	20, 59	53(1) must allow membs to inspect)			5, 22	37(1)
Basic details of any changes registered	59,33,62	14, 16-17, 25R-25V (trad assoc)	20, 22,25, 59	16,17,18, 40, 68, regs 16-17	19, 24	7(2)(b), 15, 18	22, 28	37(1)
Penalties	108 (general provision)	S 27A (general provision) 25, 25A1 (public officer failure to lodge bal sheet) & other penalties for	66, 68,-71 (officers deemed liable for offences by assoc)	Manag'mnt committee membs liable for penalties re breaches, eg 57, false/misleading	14 (general provision), 57 (penalty for officers for non-compliance with Act)	18 (public office liable failure to lodge change of address, 21 (assoc liable raises public funds) 24	49 (false & misleading statements), 50-50A (general penalty provisions), 50B (penalty	42 (c'ttee members liable if assoc breaches Act) 43 (false & misleading statements)

	ACT Assoc	NT Assoc	NSW Assoc	Qld Assoc	SA Assoc	Tas Assoc	Vic Assoc	WA Assoc
		breaches		information: 19- 20		(penalty for failure to lodge accs	notices), 51 (trading)	