



Department of Consumer  
and Employment Protection  
Government of Western Australia  
Consumer Protection

# **Explanatory Memorandum**

## **Associations Incorporation Bill 2006** *A Green Bill for Public Comment*

*November 2006*



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# ***Associations Incorporation Bill 2006***

## ***A Green Bill for public comment***

### **Overview of Green Bill**

#### ***Background***

In 1996 the then Minister for Fair Trading, the Hon Cheryl Edwardes MLA, approved a review of the *Associations Incorporation Act 1987* (the Act). As a result, the then Ministry for Fair Trading (the Ministry) invited submissions from the public through print media advertising in relation to amending the Act.

Following receipt of 14 submissions and numerous other unsolicited requests to alter provisions of the Act, during 1998 the Ministry released a Consultation Paper outlining 17 proposals to amend the Act. Fifty-one submissions were received in response to the Consultation Paper. The review of the Act has now been completed. Account has been taken not only of the issues outlined in the Consultation Paper and all submissions received, but also of a number of further matters that have arisen during the lengthy review process.

In recognition of the substantial nature of the changes proposed as a result of the review it has been decided to draft for consultation a Green Bill that would repeal and replace the Act. It is thought that this will make it easier for interested persons to see the detail of the proposed operation and effect of the legislative changes. Public deliberation and comment on the draft legislation will refine the proposed amendments so that a new Act will aptly address contemporary issues for incorporated associations.

Some incorporated associations are dealing with more complex management issues as a consequence of the size and scale of their operations. In addition, community expectations of voluntary organisations and the people who run them appear to be changing.

Also, members of incorporated associations and funding bodies have an increased expectation that the Commissioner for Consumer Protection (“the Commissioner”) will monitor various aspects of the activities of incorporated associations. As well, there is an increasing demand for governance education for members of incorporated associations, and incorporated associations and funding bodies are increasingly looking to the Commissioner to help resolve significant management problems in incorporated associations.

The extended review and consultation process identified various deficiencies in the current Act. The Green Bill intends to clarify uncertainty, streamline regulation, and promote the efficiency and accountability of incorporated associations. Cost savings for new associations through the simplification of incorporation procedures are also anticipated.

The provisions of the Green Bill are designed to achieve a balance between the need for reasonable regulation and the desire for incorporated associations to be able to function autonomously and effectively.

The Green Bill contains changes covering the following broad areas: the incorporation process; the rules of incorporated associations; management and accountability of incorporated associations; the powers of the Commissioner; voluntary winding-up and cancellation of incorporation; and certain miscellaneous matters. A summary of the general effect of the key changes under these headings is set out below.

## ***Key Changes***

### ***The incorporation process***

The incorporation process will be improved by:

- removing the specific eligibility criteria in relation to the purpose or objects of an association so as to broaden the range of not-for-profit associations that may become incorporated;
- no longer requiring that all applications for incorporation be advertised; and
- requiring that an application for incorporation show that the association concerned has at least six members who have full and equal voting rights.

### ***Rules of Association***

The content and operation of incorporated associations' rules will be enhanced by:

- Prescribing in the regulations a set of model rules that will automatically apply to all newly incorporated associations – until amended by special resolution;
- making the rules a contract between members and enforceable as such;
- requiring that an internal dispute resolution process be included in the rules;
- allowing members to refer unresolved disputes to the State Administrative Tribunal for determination;
- prescribing a limitation on the number of members that, under the rules may, call a general meeting; and
- requiring that the rules provide for the distribution of surplus property on a winding up.

### ***Management and accountability***

The management and accountability of incorporated associations will be improved by:

- obliging an association to appoint a member of its management committee to be its public officer and as such to be responsible under the Act for providing information to the Commissioner and doing certain other things on behalf of the association;
- the inclusion of a clearer definition of “special resolution”;
- requiring associations to lodge an annual return with the Commissioner setting out their financial position;
- the inclusion of audit requirements that will differ depending on the extent of the financial activities and property of an association;
- permitting associations to require members seeking access to the register of members to demonstrate that such access is for association business only; and
- allowing associations to amalgamate, or with the approval of the Commissioner to apply for incorporation under some other more appropriate legislation.

### ***Powers of the Commissioner***

The powers of the Commissioner for Consumer Protection will be widened to include:

- the power to direct an association to call a general meeting of members where the members are in dispute;
- the power to change the name of an association if it is inappropriate;
- the appointment of a statutory manager to administer the affairs of an incorporated association in certain circumstances, so long as it is in the public interest to make such an appointment;
- the power to direct a large or complex association, or one that has ceased to be eligible for incorporation, to apply for incorporation under some other more appropriate legislation;
- the power in certain circumstances to direct an association to transfer its undertaking to some other appropriate body corporate;
- the power to appoint a qualified person to carry out a special audit of an association’s financial affairs; and
- the powers necessary for the carrying out of investigations, including the power to obtain a search warrant.



### ***Voluntary winding up and cancellation of incorporation***

New procedures and controls will be enacted to enable:

- an association to be wound up voluntarily if it has surplus property to be distributed; and
- the incorporation of an association to be cancelled at its request if it has no liabilities and there is no surplus property to be distributed.

### ***Miscellaneous changes***

These include:

- provision that the doctrine of constructive notice does not apply to the documents of associations that are lodged with the Commissioner;
- extension of the period within which proceedings for an alleged offence against the Act may be commenced from one year to three years;
- where the incorporation of an association is cancelled by the Commissioner, provision for the creation of an instrument showing the specific day on which the cancellation occurred; and
- the power to enforce obligations under the Act by the issue of infringement notices.

# ***Explanatory Notes***

## **Part 1 – Preliminary**

### ***Division 1 – Introductory***

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|----------|--|
| Clause 1 | Sets out the name of the Act.  |
| Clause 2 | The Act will commence on a day or days to be fixed by proclamation.  |
| Clause 3 | This clause defines certain terms used in the Act.   |
| Clause 4 | The Commissioner may require that information provided in an approved form be verified by a statutory declaration.   |
| Clause 5 | The use of the term 'Incorporated', or any abbreviation of the term, in a business name or title or in a contract except by a body incorporated under the Act or some other law is prohibited and a fine of up to \$10,000 may be imposed on conviction for a breach of the prohibition. |

## Part 2 – Exclusion from Corporations legislation

In 2001 the Commonwealth enacted the *Corporations Act 2001*. The *Corporations Act 2001* applies to companies and other bodies corporate.

The *Corporations Act 2001*, being Commonwealth law, prevails over State law to the extent of any inconsistency between the two. This would mean that incorporated associations, being bodies corporate, would be governed by the *Corporations Act 2001*. To avoid this, ...

Clause 6 declares an incorporated association and any act or omission of any person, body or other entity in relation to an incorporated association to be an excluded matter for the purposes of the *Corporations Act 2001*. This results in the *Corporations Act 2001* not applying to those matters.

However, it is appropriate for the provisions of the *Corporations Act 2001* to apply to or in relation to some of the actions of incorporated associations. So ...

Clause 7(1) sets out those matters in relation to which the *Corporations Act 2001* will apply. This list includes, for example, matters that regulations made under this Act say are not excluded matters and the transfer of an incorporated association to the *Corporations Act 2001*.

Clause 7(2) To ensure that the list of matters in clause 7(1) is not read as suggesting that all incorporated associations can engage in the actions referred to in the list, clause 7(2) says that the matters listed are only relevant to an association to the extent to which the association can already engage in those actions.

The combined effect of clauses 6 and 7 is that the formation and governance of incorporated associations, and related matters, will be dealt with by the new Associations Incorporation Act and not the *Corporations Act 2001*. However, the *Corporations Act 2001* will apply to other matters (for example, matters relating to the provision of financial services) in relation to incorporated associations in the same way as it applies to companies generally.

## **Part 3 – Application for incorporation**

### ***Division 1 – Eligibility***

Clause 8 An association is generally eligible to be incorporated under the Act if –

- its purposes are lawful;
- it has six or more voting members;
- it is not set up for the purpose of trading (see clause 9); and
- it is not a type of organisation that has been excluded by the regulations from incorporation under the Act (see clause 10).

Clause 9 Associations set up for the purpose of trading, or securing pecuniary (i.e. monetary) profits for their members are not eligible for incorporation.

The matters that are defined by section 4(4) of the existing Act as not amounting to trading appear in the Bill as “*Schedule 1 – Some circumstances that do not make an association ineligible for incorporation*”.

Clause 10 Regulations may be made to exclude certain associations or classes of association from eligibility for incorporation.

### ***Division 2 – Requirements for application***

Clause 11 This clause describes how an application for the incorporation of an association is to be made to the Commissioner by a person authorised by the association to do so and sets out the details that are to be included in the application.

The Commissioner may also seek further information from the applicant.

Clause 12 The objects or purposes of an association must be included in the application for incorporation and the objects or purposes must include a clause providing that any property or income of the association will only be used for association purposes and prohibiting the distribution of the property or income of the association to its members.

Clause 13 An application for incorporation must include the names and addresses of at least six members who have full voting rights and the signatures of those persons.

- Clause 14            An application must include the name, residential address and postal address of the person who is to be the public officer of the incorporated association.
- Evidence that the person is eligible to be a public officer and the person's consent in writing must also be included.
- Clause 15            The Commissioner may, in writing, require an applicant to give public notice of an application for incorporation.
- Clause 16            Where public notice of an application has been given, any person may ask the Commissioner not to incorporate the association and must specify the reasons for the request.
- If the Commissioner declines a person's request, the person may apply to the State Administrative Tribunal for a review of the decision within 28 days (or other period prescribed by the regulations) after the person receives notice of the decision.
- Clause 17            The public officer is responsible for advising the Commissioner of a change of address of an incorporated association and a fine of up to \$1,000 may be imposed on conviction for a breach of this duty.

## **Part 4 – Incorporation and transfer of incorporation**

### ***Division 1 – Incorporation***

- Clause 18            The Commissioner must incorporate an association if –
- it is eligible for incorporation;
  - the name of the association is appropriate; and
  - there is no reason why the application should be refused under clause 20 or 21.
- Clause 19            If public notice of the application has been given, the Commissioner must not incorporate the association until –
- the time allowed for making a request to decline to incorporate under clause 16 has expired;
  - any request so made has been refused; and
  - any application to the State Administrative Tribunal for a review of that refusal has been unsuccessful.
- Clause 20            The Commissioner must refuse to incorporate an association if he or she is of the opinion that it would be more appropriate for the association to be incorporated under some other law.
- The grounds on which such an opinion may be formed include (but are not limited to):
- the likely scale or nature of the activities of the association;
  - the likely value of the property of the association; or
  - the extent or nature of the dealings that the association is likely to have with the public.
- Clause 21            The regulations may provide for other grounds on which the Commissioner may refuse to incorporate an association.
- Clause 22            An applicant may apply to the State Administrative Tribunal for a review of a decision by the Commissioner to refuse to incorporate an association, but must do so within 28 days (or other period prescribed by the regulations) after the applicant receives notice of the Commissioner's decision.

- Clause 23            An association ceases to be incorporated under the Act:
- if it becomes a body corporate under some other law (Part 4 Division 4) or amalgamates with another incorporated association (Part 8);
  - if the Commissioner cancels the incorporation of an association following: the winding up of the association (Part 9 Division 2 or Division 4); a request by the association for cancellation of its incorporation (Part 9 Division 3); or a transfer of the association's undertaking to another body corporate (Part 10 Division 2); or
  - if the Commissioner cancels the incorporation of an association under Part 10 Division 1.
- Clause 24            The Commissioner may reinstate an association's incorporation where there has been an error or the cancellation has arisen from certain dishonest behaviour.

***Division 2 – Effect of incorporation and related matters***

- Clause 25            An incorporated association has a corporate legal identity that is separate from the legal identities of its members. The conferral of “perpetual succession” means that an incorporated association continues to exist until its incorporation is cancelled under the Act, regardless of any change in its membership.
- Under *Schedule 2*, on the incorporation of an association property, rights and liabilities pass from the association as it was before incorporation to itself as an incorporated body.
- Clause 26            An incorporated association may do all things necessary or convenient for carrying out its objects or purposes, and in particular may do the things specified in this clause, but subject always to compliance with its rules and the Act.
- Clause 27            An incorporated association may, subject to its rules, act as a trustee and accept and hold property on trust, but cannot as a trustee do anything that it does not have power to do in its own right.
- Clause 28            This clause provides for the formalities to be observed by an incorporated association when it makes contracts. The clause does this by reference to the requirements of contract law for contracts made between natural persons.

- Clause 29            The fact that an incorporated association does not have power to enter into a particular contract with a party does not invalidate the contract unless the other party has actual notice of the lack of power. Clause 203 is relevant here so far as it provides that lodgement of documents with the Commissioner does not have the effect of imputing knowledge of their contents to members of the public.
- Clause 30            A member of the management committee of an incorporated association or a trustee or member of an incorporated association is, as such, liable in respect of the liabilities of an incorporated association.
- Clause 31            The public officer of an association may verify a document or proceeding of the association as authentic and this need not be done under seal.

### ***Division 3 – The corporate name***

#### ***Subdivision 1 – Name restrictions***

- Clauses 32 and 33    The Commissioner has the function of deciding whether the name of an association submitted as its corporate name is appropriate having regard to the various matters set out in clause 32 or any prohibition that applies by way of a regulation made under clause 33.
- Clause 34            An applicant for incorporation may apply to the State Administrative Tribunal for a review of a decision of the Commissioner to refuse incorporation under a particular name, but any application must be made within 28 days (or other period prescribed by regulation) after the applicant receives notice of the decision.

#### ***Subdivision 2 – Conferral of name***

- Clause 35            The corporate name of an association is to be as stated in its certificate of incorporation and must always conclude with the word “Incorporated” or the abbreviation “Inc.”.
- Clause 36            All documents endorsed or issued by an incorporated association, including advertising materials, must contain the corporate name of the association which must conclude with the word “Incorporated” or the abbreviation “Inc.”, whether or not that word or abbreviation appears on the association’s certificate of incorporation.



### ***Subdivision 3 – Change of name by amendment of rules***

- Clause 37 If an incorporated association wishes to change its name the Commissioner’s approval must be obtained to amend the rules of the Association.
- Clause 38 The Commissioner may approve a change of name only if the new name is appropriate having regard to –
- the various matters set out in clause 32; and
  - any prohibition that applies by way of a regulation made under clause 33.
- Clause 39 The Commissioner must issue a new certificate of incorporation showing the new name of the incorporated association, but only when the existing certificate is returned or there is proof of its loss or destruction.
- Clause 40 An association may apply to the State Administrative Tribunal for a review of a decision of the Commissioner to refuse approval of a change of name, but any application must be made within 28 days (or other period prescribed by regulation) after the association receives notice of the decision.
- Clause 41 The Commissioner may require an association to give public notice, including by way of an advertisement, of an application for approval of a change of name.
- Clause 42 Where public notice is so given, any person may request the Commissioner not to approve the change of name, and if the Commissioner refuses the request the person may apply to the State Administrative Tribunal for a review of a decision, but any such application must be made within 28 days (or other period prescribed by regulation) after the person receives notice of the decision.

### ***Subdivision 4 – Change of name by order of Commissioner***

- Clause 43 The Commissioner may, by order, cancel the corporate name of an association and determine a different name for it, if the Commissioner becomes of the opinion that the existing corporate name is inappropriate having regard to –
- the various matters set out in clause 32; or
  - any prohibition that applies by way of a regulation made under clause 33.

Clause 44            The Commissioner must give the incorporated association at least 28 days' notice in writing of a proposed change to its name, and the notice must set out the grounds for the change and invite submissions from the association.

The Commissioner must consider any submission made by the association in response to the notice before a change in name can be made.

Clause 45            If an order is made under clause 43, the Commissioner must issue a new certificate of incorporation showing the new name of the incorporated association, but only when the existing certificate is returned or there is proof of its loss or destruction.

Clause 46            An association may apply to the State Administrative Tribunal for a review of the Commissioner's proposal to change its corporate name.

If such an application is made, the Commissioner cannot proceed with the proposal unless the State Administrative Tribunal confirms it or the application is dismissed or struck out.

#### ***Subdivision 5 – Savings and other provisions on change of name***

Clause 47            A change of the corporate name of an association, either by way of an approved rule amendment or an order made by the Commissioner does not affect –

- the corporate identity of the association;
- its rights or obligations; or
- any legal proceedings by or against it.

This clause also provides for the adjustment of documentary references to the old name and for legal proceedings to be continued or commenced in the new name.

#### ***Division 4 – Transfer of incorporation***

Clause 48            The effect of the definition of the term 'prescribed body corporate' is that, when the definition is read with the other relevant provisions of Division 4, an incorporated association –

- will be able to apply to become (see clause 49); or
- the Commissioner will be able to direct an incorporated association to apply to become (see clause 50),

a company under the *Corporations Act 2001* of the Commonwealth or a body corporate under some other law that is prescribed by the regulations.

- Clause 49 An incorporated association may, with the approval of the Commissioner, apply to become a company or a body corporate (as mentioned under clause 48 above) subject to the application being made in accordance with any terms and conditions imposed by the Commissioner.
- Clause 50 The Commissioner may direct an incorporated association to apply, in accordance with specified terms and conditions, to become a company or a body corporate (as mentioned under clause 48 above) if the Commissioner is satisfied that it is not appropriate or convenient for the association to continue as an incorporated association because it has ceased to be eligible or because of –
- the scale or nature of its activities;
  - the value or nature of the property it holds; or
  - the extent or nature of the dealings the association has with the public.
- Clause 51 The Commissioner must give at least 28 days' written notice of an intention to give a direction under clause 50 or to amend a direction that has been given and must invite submissions from the association.
- Before giving a direction the Commissioner must consider any submission received from the association.
- Clause 52 An incorporated association that is given a notice under clause 51 may apply to the State Administrative Tribunal for a review of the Commissioner's proposed direction or amendment and if an application is so made the Commissioner cannot give the direction or make the amendment unless it is confirmed by the State Administrative Tribunal or the application is dismissed or struck out.
- Clause 53 An incorporated association must comply with a direction given by the Commissioner under clause 50.
- Contracts to which an incorporated association is a party are not affected by a failure of the association to comply with a direction under clause 50.
- Clause 54 The incorporation of an association under the Act is automatically cancelled if the association becomes a company under the *Corporations Act 2001* of the Commonwealth or a body corporate under some other law that is prescribed by the regulations.
- The new body must notify the Commissioner in writing of the new incorporation within 14 days after it occurs; and a fine of up to \$5,000 may be imposed on conviction for a breach of this duty.

Clause 55

The fact that an association becomes a company or other body corporate under some other law does not affect –

- the legal identity of the association or any existing matter or circumstance that remains relevant to the association;
- the continuance or commencement of any legal proceedings by or against the association; or
- any existing liability under the Act or the investigation or enforcement of such a liability.

However, if an association has become a company under the *Corporations Act 2001* of the Commonwealth, then this clause applies only to matters not dealt with by that Act.

## **Part 5 – Rules of incorporated associations**

### ***Division 1 – Effect of Rules***

Clause 56            The rules of an incorporated association have effect as if they were a contract between the members of the association, but only so far as they are consistent with the Act.

This clause is new in this Bill. – an equivalent provision was not included in the 1987 Act.

### ***Division 2 – Content of Rules***

Clause 57            The rules of an incorporated association must –

- deal with each of the 18 topics set out in Schedule 3 Division 1 of this Bill;
- comply with the requirements of Schedule 3 Division 2 of this Bill; and
- be otherwise consistent with the Act.

Clause 58            If an incorporated association is wound up its surplus property, after all of its liabilities have been met, can only be distributed to the types of bodies specified in this clause (which includes a local government). These bodies can be described generally as bodies whose constitution or rules forbid the distribution of their assets to their members.

This clause overrides any inconsistent provision in the rules of an association.

### ***Division 3 – Model rules and rules of existing incorporated associations***

Clause 59            Regulations may be made specifying model rules that will deal with each of the topics in Schedule 3 and all other requirements of the Act.

Clause 60            The model rules will automatically apply to all associations that are incorporated after this Bill becomes law, except in the case of a new body that is an amalgamation of 2 or more bodies under Part 8 (which under that Part will have to have its own set of rules).

An incorporated association will be able to amend the model rules after the association is incorporated.

Amendments after incorporation will still need to be consistent with the Act.

- Clause 61 The rules of an incorporated association that is in existence when this Bill becomes law will continue in force. Schedule 6 Division 4 deals with obligation of existing incorporated associations to amend their rules to make them comply with clause 57.
- Clause 62 An incorporated association must keep a consolidated copy of its rules.

#### ***Division 4 – Amendment of the Rules***

- Clause 63 An incorporated association may only amend its rules by special resolution, and any amendment must be in accordance with the Act.
- Clause 64 The public officer of an incorporated association must, within 28 days after a rule amendment has been made by special resolution, lodge with the Commissioner –
- notice of the special resolution and particulars of the amendment;
  - a certificate signed by 2 members of the management committee that the special resolution was duly passed and that the amendment complies with the Act; and
  - a consolidated copy of the rules of the association.
- Clause 65 An amendment to the objects or purpose in the rules of an incorporated association requires the approval of the Commissioner.
- If the Commissioner refuses to approve the amendment, the association may apply to the State Administrative Tribunal for a review of a decision, but any such application must be made within 28 days (or other period prescribed by regulation) after the person receives notice of the decision.
- Clause 66 The Commissioner may direct an incorporated association to give public notice of an application for the Commissioner's approval of an amendment to its objects or purposes.
- Clause 67 Any person may request the Commissioner not to approve such an amendment, and if the Commissioner refuses the request the person may apply to the State Administrative Tribunal for a review of a decision, but any such application must be made within 28 days (or other period prescribed by regulation) after the person receives notice of the decision.

***Division 5 – Provision of rules to members***

Clause 68            A member of an incorporated association may inspect the consolidated copy of the rules of the association that are required to be kept under clause 62.

Clause 69            A member of an incorporated association has a right to obtain on request, in accordance with the regulations, a copy of the consolidated rules of the association (or any part of the rules), and a new member has a right to receive, in accordance with the regulations, a copy of those consolidated rules.

An association may not make any charge for carrying out its duties under this clause.

## **Part 6 – Management of Incorporated Associations**

### ***Division 1 – Management Committee***

Clause 70            The management committee is the governing body of an incorporated association.

Acts or omissions of a person acting as a member of a management committee or an alternate or deputy member, are not invalid because of any defect in the person's appointment or qualifications.

Clause 71            Where the Act imposes an obligation on an incorporated association, members of the management committee of the association must take all reasonable steps to ensure that the association meets the obligation.

A fine of up to \$5,000 may be imposed on a member of a management committee on conviction for a breach of this duty.

Clause 72            Where a person who is a member of the management committee of an incorporated association dies or ceases to be such a member, the person (or, if the person has died, his or her personal representative) must hand over all documents and records relating to the affairs of the association to a member of the management committee.

A fine of up to \$10,000 may be imposed on conviction for a breach of this duty.

### ***Division 2 – Pecuniary interest of committee member in contract***

Clause 73            In Division 2, a 'relevant interest' is a direct or indirect interest that is measurable in money, in a contract being considered by a management committee or a contract made by a management committee.

Clause 74            If a member of the management of an incorporated association becomes aware that the member has a relevant interest in a contract the member must disclose to the management committee the nature and extent of that interest, and fine of up to \$10,000 may be imposed on conviction for a breach of this duty.

The association must ensure that any disclosure is recorded in the minutes of the relevant meeting.



Clause 75           Where, in relation to a contract, there is a disclosure by a person under clause 74 or under that clause there does not need to be such a disclosure by a person –

- the person’s interest in the contract is not a ground for the association cancelling it; and
- the person does not have to disclose the extent of benefits derived from the contract.

Clause 76           A member of a management committee with a relevant interest in a contract or a proposed contract must not take part in any deliberations or decisions by the committee about that contract, and fine of up to \$10,000 may be imposed on conviction for a breach of this duty.

### ***Division 3 – Public officer***

Clause 77           Each incorporated association must have a public officer.

Various provisions of this Bill impose duties on the public officer of an incorporated association to provide information to the Commissioner in respect of the association and to do other things on its behalf.

Clause 78           The public officer of an incorporated association must –

- be at least 18 years of age;
- live in Western Australia; and
- be a member of the management committee of the association.

The public officer may also hold any other office of the incorporated association unless its rules provide otherwise.

Acts or omissions of a person acting as a public officer are not invalid because of any defect in the person’s appointment or qualifications.

Clause 79           This clause describes the circumstances in which the office of public officer becomes vacant and requires an incorporated association to appoint a new public officer within 28 days of the position becoming vacant.

An incorporated association may remove the public officer from that position in accordance with its rules.

Clause 80           A public officer must advise the Commissioner of the officer’s name, residential and postal address within 14 days of being appointed to the position and must also notify any change of address. A fine of up to \$1,000 may be imposed on conviction for a breach of this duty.

- Clause 81 A document may be served on an incorporated association by posting it to the public officer or leaving it at the public officer's residential address with a person apparently over 18 years of age.
- Clause 82 A public officer (or a former public officer if the person has held this position within the last 2 years) who receives a document pursuant to clause 81 must bring it to the attention of the management committee, and a fine of up to \$1,000 may be imposed on conviction for a breach of this duty.
- Clause 83 Where a person ceases to be the public officer of an incorporated association, all documents or records –
- held by the person (including a copy of any electronic records held); and
  - relevant to the management of the affairs of the association,
- must be handed over to the new public officer as soon as practicable.
- A fine of up to \$1,000 may be imposed on conviction for a breach of this duty.

#### ***Division 4 – Annual general meeting***

- Clause 84 An incorporated association must hold an annual general meeting of its members in each calendar year, but a newly incorporated association may hold its first annual general meeting within 18 months after incorporation.
- The annual general meeting must be held within 4 months of the end of the incorporated association's financial year unless the Commissioner grants an extension of that period.
- An application for such an extension must be made within 90 days after the end of the financial year.

#### ***Division 5 – Special resolution***

- Clause 85 For the purposes of the Act a special resolution is one that is:
- passed at a general meeting; and
  - supported by three fourths of the members of the association who have a right to vote on the resolution and cast a vote at the meeting either in person or (if allowed by the rules) by proxy or postal vote.

- Clause 86            Written notice of a proposed special resolution and the time and place of the general meeting must be given to each member of the association in accordance with the rules, and failure to give such notice will make the resolution invalid.
- Clause 87            The Commissioner may, on application by an incorporated association, determine other requirements for a special resolution if he or she is satisfied that any requirement in clause 85 or 86 cannot be met.
- Clause 88            A declaration by the person who presided at a meeting at which a special resolution is passed is evidence that the special resolution has been duly passed.

***Division 6 – Register of members***

- Clause 89            An incorporated association must maintain a register of its members in accordance with the requirements set out in the regulations and update the register within 28 days of any change of membership.
- Clause 90            An incorporated association must make its register of members available for inspection on request by a member, but the rules may require the member, by statutory declaration or otherwise, to satisfy the management committee or a senior executive of the association that information in the register will only be used for association purposes.
- A member may make a copy of the register, but is not permitted to remove it for that purpose.
- Clause 91            The Commissioner may request an incorporated association to provide him or her with a copy of the register of members and the association must do so within 14 days after the request is made.
- Clause 92            A member of an incorporated association may in writing request the association to provide the member with a copy of its register of members. The request must be accompanied by a statutory declaration setting out the purpose for which the application is made.
- The association must comply with the request in the manner provided for by the regulations if it is satisfied that the member's purpose is directly connected with the association's affairs, but may require the member to pay a reasonable charge for the work involved (subject to any maximum fixed by the regulations).

Clause 93            Improper use of information in the register of members will be an offence and a fine of up to \$10,000 may be imposed on conviction for the offence.

***Division 7 – Record of office holders***

Clause 94            An incorporated association must keep a record of the names and addresses (as defined in the clause) of the persons who are:

- members of its management committee or hold other offices of the association provided for by its rules;
- authorised to use the common seal of the association; or
- appointed to act as a trustee on behalf of the association.

Clause 95            The record referred to in clause 94 (“the record of office holders”) must be made available for inspection at the request of a member, who may make a copy of the record, but is not permitted to remove it for that purpose.

Clause 96            An incorporated association must, on request by a member, provide the member with a copy of its record of office holders, but the rules may require the member, by statutory declaration or otherwise, to satisfy the management committee or a senior executive of the association that the purpose for which the record is to be provided is directly connected with the affairs of the association.

No charge is to be made to the member for the work involve in providing the record.

The regulations may make provision for the manner in which the record may be or must be provided.

Clause 97            Improper use of information in the record of office holders will be an offence and a fine of up to \$10,000 may be imposed on conviction for the offence.

Clause 98

The Commissioner may, by notice, require a person who appears to be a member of the management committee of an incorporated association or its public officer to advise the Commissioner –

- of the person's present address; and
- whether or not the person holds or has held a specified office and, if applicable, when the person ceased to hold the office.

Failure to comply with a notice will be an offence and a fine of up to \$10,000 may be imposed on conviction for the offence.

## **Part 7 – Accounts and audit**

### ***Division 1 – Preliminary***

Clause 99 This clause defines some terms used in Part 7, including the terms “tier 1 incorporated association”, “tier 2 incorporated association” and “tier 3 incorporated association”.

Those terms are defined because the Bill contains different audit requirements for incorporated associations depending on which of those categories they belong to (see Part 7 Division 3).

Which category an association falls into for a financial year depends on its turnover during the year and the gross value of its property at the end of the year.

An incorporated association is a “tier 3 incorporated association” if –

- its turnover exceeds an amount fixed by regulations made under clause 110; or
- the gross value of its property exceeds an amount so fixed.

An incorporated association is a “tier 2 incorporated association” if –

- its turnover exceeds an amount fixed by regulations made under clause 109, but is less than the amount fixed for a “tier 3 incorporated association”; or
- the gross value of its property exceeds an amount fixed by regulations made under clause 109, but is less than the amount fixed for a “tier 3 incorporated association”; or
- the regulations provide that it is a tier 2 incorporated association.

A “tier 1 incorporated association” is one that does not come within the definition of either a “tier 2 incorporated association” or a “tier 3 incorporated association”.

### ***Division 2 – Accounts***

Clauses 100 & 101 An incorporated association must –

- keep proper accounting records that are sufficient for the preparation of true and fair financial statements and the audit of those statements; and
- retain the records for 7 years.

- Clause 102 The annual financial statements of an incorporated association must be prepared before the end of the period allowed for the holding of its annual general meeting under clause 84.
- Clause 103 The annual financial statements of an incorporated association are to relate to its last financial year.
- They must not be misleading, and must, for the association itself and any trust it administers, give a true and fair account of –
- its financial transactions during the year, and
  - its property and liabilities, and any mortgage or charge that is in force, at the end of the year; and
  - any matter specified in the regulations.
- Clause 104 There must be presented at each annual general meeting –
- the audited financial statements; and
  - a copy of the auditor’s report on the statements; and
  - a resolution of the management committee, passed not earlier than 30 days beforehand, that in its opinion the association is solvent.
- Clause 105 An annual return must be prepared for each financial year of an incorporated association showing –
- its turnover during that year;
  - the gross value of its property, and its liabilities, at the end of the year; and
  - any matter specified in the regulations.
- An annual return must have attached a copy of the management committee’s resolution relating to the solvency of the association.
- The annual return of a tier 3 incorporated association must also have attached a copy of its audited financial statements, and a copy of the auditor’s report on the statements.
- Clause 106 The public officer must lodge the annual return and its attachments with the Commissioner within 28 days after the annual general meeting or within a longer period allowed by the Commissioner, and a fine of up to \$1,000 may be imposed on conviction for a breach of this duty.

### **Division 3 – Audit**

#### **Subdivision 1 – Auditors, qualifications and eligibility for appointment**

- Clause 107      The financial statements of a tier 1 incorporated association must be audited by a person who is not one of the following or the spouse or de facto partner of one of the following –
- a member of the management committee;
  - an employee of the association; and
  - a person who was involved in the preparation of the financial statements.
- Clause 108      The auditor of a tier 1 incorporated association must report to the incorporated association on whether the financial statements are properly drawn up.
- Clause 109      The financial statements of a tier 2 incorporated association must be audited by a person who is –
- a member of CPA Australia or of the Institute of Chartered Accountants in Australia; or
  - a member of the National Institute of Accountants, other than an associate, who has satisfactorily completed the course of study mentioned in clause 109; or
  - a person approved by the Commissioner.
- Clause 110      The financial statements of a tier 3 incorporated association must be audited by a person who is –
- a registered company auditor; or
  - a person approved by the Commissioner.
- Clause 111      This clause lists certain persons connected with an incorporated association or the preparation of its financial statements who are prohibited from acting as auditors of a tier 2 or a tier 3 incorporated association.

#### **Subdivision 2 – Provisions relating to auditors of all incorporated associations**

- Clause 112 & 113      The auditor of an incorporated association has –
- a right of access to the records of the association; and
- the right to require a member of the management committee to provide him or her with specified information.
- Clause 114      The auditor of an incorporated association must note in the auditor's report any breach of the Act or the rules of the association, and a fine of up to \$10,000 may be imposed on conviction for a breach of this duty.



- Clause 115 It is an offence for a member of the management committee of an incorporated association to –
- deny an auditor access to the records of the association; or
  - fail to give information requested by an auditor; or
  - obstruct an auditor in some other way.

A fine of up to \$5,000 may be imposed on conviction for this offence.

- Clause 116 Unless there is malice on an auditor's part, he or she cannot be sued for defamation in respect of statements made in the capacity of auditor.

***Subdivision 3 – Powers and duties of auditors of tier 2 and tier 3 incorporated associations***

- Clause 117 The effect of the definition of “auditor” in this clause is to make the rights and duties set out in Subdivision 3 applicable only to the auditor of tier 2 or a tier 3 incorporated association.

- Clause 118 The auditor must report on the incorporated association's financial statements and the records relating to them.

The auditor's report must be –

- included with the financial statements; and
- read out at the annual general meeting if a member so requires; and
- available for inspection by members.

- Clause 119 The auditor's report must state whether the financial statements are properly drawn up in terms of the Act and the Australian Accounting Standards, and give reasons for any finding that they are deficient in any respect.

- Clause 120 If the auditor considers that the financial statements have not been drawn up in accordance with the Australian Accounting Standards, the report must –

- give the auditor's opinion whether or not the statements are otherwise properly drawn up; and
- include the auditor's opinion as to the financial effect on the statements of the failure to comply with those Standards.

- Clause 121 & Clause 122 The auditor must also report on –
- any relevant defect, irregularity or omission that is not mentioned in Subdivision 3; and
  - whether or not he or she has obtained all required information; and
- whether the incorporated association concerned has kept proper records.

- Clause 123      The auditor of an incorporated association, or his nominated agent, is entitled –
- to receive all notices relating to, and to attend, general meetings of the association; and
  - to speak at meetings on relevant matters.
- Clause 124      The auditor of an incorporated association must –
- notify the Commissioner of any failure by the association to present to its annual general meeting the documents mentioned in clause 104, and include with the notice a copy of the audited financial statements if they are available and the auditor’s report on them; and
  - report to the Commissioner in writing any other breach of the Act or of its rules by an incorporated association if the matter has not been or will not be otherwise reported on by the auditor.
- Clause 125      The auditor must notify the Commissioner if he or she is removed or dismissed.
- Clause 126      An incorporated association must pay the reasonable fees and expenses of its auditor.

***Subdivision 4 – Special audits of financial affairs of incorporated associations***

- Clause 127      The Commissioner may, on the grounds of financial mismanagement, appoint a qualified person to carry out a special audit of the financial affairs of an incorporated association and make a report to the Commissioner.

## **Part 8 – Amalgamation of incorporated associations**

Clause 128

Clause 129 and  
130

A person acting for 2 or more existing incorporated associations may, pursuant to special resolutions passed by each association, apply to the Commissioner in accordance with clause 130 for the incorporation of a new body that is an amalgamation of the associations.

The proposed amalgamation must be not inconsistent with the rules of an association concerned.

Clause 131

If the Commissioner is satisfied that all of the requirements set out in clause 131 have been met, the Commissioner must incorporate the new body by the issue of a certificate of incorporation, but only when each existing certificate is returned or there is proof of its loss or destruction.

Clause 132

A person who has made an application under clause 129 may apply to the State Administrative Tribunal for a review of a decision of the Commissioner to refuse the application, but any application for review must be made within 28 days (or other period fixed by regulation) after the person receives notice of the decision.

Clause 133

Under Schedule 2, on the incorporation of the new body, property, rights and liabilities pass to the new body from the associations that are parties to the amalgamation.

## Part 9 – Winding up and cancellation of incorporation

### Division 1 – Preliminary

Clause 134 This clause defines two terms that are used in Part 9.

Clause 135 The object of Division 2 is to provide for –

- the voluntary winding up of an incorporated association that has surplus property to be distributed; and
- the cancellation of its incorporation.

The object of Division 3 is to provide for the cancellation of the incorporation of an association that has no debts and no surplus property to be distributed.

The object of Division 4 is to provide for –

- the winding up of an incorporated association by the Supreme Court; and
- the cancellation of its incorporation.

Clause 136 Applies Parts 5.4 to 5.8 of the *Corporations Act 2001* to:

- Division 2 - the voluntary winding of incorporated associations that have property to be distributed; and
- Division 4 - a court winding up.

Chapter 5 of the Corporations Act relates to external administration. Parts 5.4 to 5.8 relate specifically to:

- winding up in insolvency;
- being wound up by the Supreme Court;
- voluntary winding up;
- winding up generally;
- winding up bodies other than companies;
- recovering property or compensation for the benefit of creditors of an insolvent company; and
- offences.

Schedule 4 provides a definition of terms used in this Act with the equivalent terms in the *Corporations Act 2001*.

*Note: Clauses 140 and 165 relate respectively to the application of specified Parts of the Corporations Act 2001 of the Commonwealth to –*

- a voluntary winding up under Division 2; and
- a Supreme Court winding up under Division 4.

*Schedule 4 referred to in clause 136 provides for necessary modifications to the Parts of the Corporations Act 2001 that are applied by clauses 140 and 165.*

***Division 2 – Voluntary winding up of incorporated association that has property to be distributed***

***Subdivision 1 – Requirements for voluntary winding up***

Clause 137 An incorporated association may be wound up voluntarily only if –

- it has surplus property to be distributed;
- the management committee has by resolution declared that the association is solvent;
- the association has passed a special resolution that it be wound up voluntarily and a special resolution approving a distribution plan; and
- a distribution plan has been approved or determined by the Commissioner under Subdivision 2.

Clause 138 The public officer of an incorporated association must notify the Commissioner, in accordance with clause 138, of the passing of special resolutions by the association for its voluntary winding up and the approval of a distribution plan, and a fine of up to \$1,000 may be imposed on conviction for a breach of this duty.

Clause 139 The Commissioner must cancel the incorporation of an association if –

- he or she is satisfied that Subdivision 1 has been complied with; and
- a certificate under clause 149 has been lodged with the Commissioner showing that the surplus property of the association has been distributed in accordance with the relevant distribution plan,

and the Commissioner may give notification of the cancellation in the *Gazette*.

Clause 140 Provides that regulations may be made to apply the one or more of Parts 5.4 to 5.8 of the *Corporations Act 2001* and any modification that the regulations may care to make.

See clause 6 and 7 for more information about excluded matters of the *Corporations Act 2001*.

Once the regulations are made, this clause will have the effect of requiring someone (or a group of people) to act in the role of a liquidator for the incorporated association to assist in paying it debts, distributing surplus property, reporting to the Commissioner and to members and the other duties required to end the life of the association gracefully and legally.

*Note: Regulations may be made having the effect of applying one or more of Parts 5.4 to 5.8 of the Corporations Act 2001 of the Commonwealth to a winding up under Division 2 with any modification specified in the regulations.*

## ***Subdivision 2 – Distribution of surplus property on voluntary winding up***

- Clause 141 Subdivision 2 applies to an incorporated association that has passed a special resolution that it be wound up voluntarily and a special resolution approving a distribution plan.
- Clause 142 The incorporated association must ensure that its surplus property is distributed in accordance with an approved distribution plan within a period fixed by the Commissioner.
- Clause 143 A distribution plan must provide for the distribution of surplus property in accordance with the rules of the incorporated association concerned.
- Property so distributed is subject to any existing trust.
- Clause 144 Where a body has provided property to an incorporated association, a distribution plan must give effect to any contract made with the body as to the manner in which the property is to be dealt with if the association is wound up, unless the body agrees otherwise.
- Clause 145 & 146 A distribution plan requires the approval of the Commissioner.
- The Commissioner may, before approving a plan –
- make minor amendments to it; or
  - specify any other amendment that is to be made, require that the amendment be approved by or on behalf of the incorporated association concerned in a particular manner and determine the contents of the distribution plan if that requirement is not met.
- Clause 147 The Commissioner is to fix a period within which the distribution plan is to be carried out.
- Clause 148 A person who is dissatisfied with a decision of the Commissioner under clause 145 or 146 may apply to the State Administrative Tribunal for a review of the decision, but any application for review must be made within 28 days (or other period fixed by regulation) after the person receives notice of the decision.
- Clause 149 An incorporated association must –
- prepare and lodge with the Commissioner such reports as he or she requires on the carrying out of a distribution plan; and
  - when the surplus property of the association has been distributed, prepare and lodge with the Commissioner a certificate to that effect.

### **Subdivision 3 – Powers of Commissioner on default under Subdivision 2**

- Clause 150, 151 & 152      If the Commissioner considers that an incorporated association has failed –
- to properly carry out a distribution plan; or
  - to lodge a report or certificate under clause 149,
- he or she may give notice to the association that a declaration will be made under clause 154 if it does not show cause within a stated period, that is, if it does not show that there has been no such failure or there is any other reason why the declaration should not be made.
- Clause 153      An incorporated association may, within the stated period, apply to the State Administrative Tribunal for a review of the Commissioner’s proposal to make a declaration under clause 154, and if such an application is made, the Commissioner cannot carry out the proposal, unless the State Administrative Tribunal confirms it or the application is dismissed or struck out.
- Clause 154      The Commissioner may make a declaration that clause 155 applies to the incorporated association if it does not show cause within the stated period.
- Clause 155 & 156      The effect of the making of a declaration is that –
- the association’s property vests in the Commissioner; and
  - the Commissioner may realise the property, pay the debts of the association, distribute its surplus property in accordance with a distribution plan determined by him or her, and wind up the affairs of the association; and
  - the Commissioner has certain other incidental powers for those purposes.
- A person who is dissatisfied with the determination of a distribution plan by the Commissioner under clause 156 may apply to the State Administrative Tribunal for a review of the determination, but any such application must be made within 28 days (or other period fixed by regulation) after the person receives notice of the determination.
- Clause 157      When the affairs of an incorporated association have been wound up under Subdivision 3, the Commissioner must cancel the incorporation of the association and the Commissioner may give notification of the cancellation in the *Gazette*.

### ***Division 3 – Cancellation of incorporation on application by association that has no debts or surplus property***

- Clause 158 & 159      An incorporated association may apply to the Commissioner to have its incorporation cancelled if –
- its management committee has by resolution declared that the association's liabilities have been satisfied and that it has no surplus property to be distributed; and
  - the association has by special resolution approved the making of the application.

Copies of the resolutions must be included with the application and it must contain a statement that the special resolution was duly passed.

- Clause 160      The Commissioner may cancel the incorporation of the association if he or she is satisfied that –
- the special resolution was duly passed; and
  - the association's liabilities have been satisfied and it has no surplus property to be distributed; and
  - all of the requirements of the Act in respect of the association have been met.

- Clause 161      The incorporated association may apply to the State Administrative Tribunal for a review of a decision of the Commissioner to refuse the application, but any application for review must be made within 28 days (or other period fixed by regulation) after the association receives notice of the decision.

- Clause 162      Any liability of a member of the incorporated association or of a member of its management committee is not affected by the cancellation of the association's incorporation under clause 160.

### ***Division 4 – Winding up by the Supreme Court***

- Clause 163 & 164      Schedule 5 sets out the grounds on which an incorporated association may be wound up by the Supreme Court on application by –
- the association itself; or
  - a member of the association; or
  - the Commissioner; or
  - the Minister; or
  - a creditor (but only on the ground that the association is unable to pay its debts).



- Clause 165 Part 5.7 of the *Corporations Act 2001* of the Commonwealth applies to the winding up of an incorporated association under Division 4, subject to the changes of wording mentioned in clause 165.
- Clause 166 When the winding up of an incorporated association by the Supreme Court has been completed, the Commissioner must cancel the incorporation of the association and the Commissioner may give notification of the cancellation in the *Gazette*.

## **Part 10 – Certain remedial measures available to the Commissioner**

### ***Division 1 – Cancellation of incorporation by the Commissioner on certain grounds***

- Clause 167, 168 & 169      If the Commissioner considers that –
- any of the 7 grounds set out in clause 167(1) applies to an incorporated association; or
  - the ground in clause 167(2) applies to the public officer of an incorporated association,
- he or she may give notice to the association that its incorporation will be cancelled if it does not show cause, that is, if it does not satisfy the Commissioner within a stated period that the ground or grounds for cancellation mentioned in the notice does or do not apply.
- Clause 170      The Commissioner may cancel the incorporation of the association if it does not show cause within the stated period.
- The instrument of cancellation must be served on the association concerned and published in the *Gazette* and comes into force on publication or on another day stated in the instrument.
- Clause 171      On the cancellation of the incorporation of an association under clause 170 –
- its property passes to the Commissioner; and
  - clauses 155 and 156 apply so that –
    - the Commissioner may realise the property, pay the debts of the association, distribute its surplus property in accordance with a distribution plan determined by him or her, and wind up the affairs of the association; and
    - the Commissioner has certain other incidental powers for those purposes.
- Clause 172      An incorporated association to which notice is given under clause 168 may, within the period stated by the Commissioner in the notice, apply to the State Administrative Tribunal for a review of the Commissioner's proposal to cancel the association's incorporation; and if such an application is made the Commissioner cannot carry out the proposal unless it is confirmed by the State Administrative Tribunal or the application is dismissed or struck out.

## ***Division 2 – Direction by Commissioner to transfer undertaking***

Clause 173            The Commissioner may direct an incorporated association to transfer its undertaking to a specified body corporate if he or she considers its continued incorporation under the Act to be inappropriate because –

- it is no longer eligible for incorporation; or
- its undertaking or operations are being carried on by another body corporate; or
- it is more appropriate for its undertaking or operations to be carried on by another body corporate.

Clause 174            The Commissioner must give at least 28 days' written notice of an intention to give a direction under clause 173 or to amend a direction that has been given and must invite submissions from the incorporated association.

Before giving a direction the Commissioner must consider any submission received from the association.

Clause 175            An incorporated association that is given a notice under clause 174 may apply to the State Administrative Tribunal for a review of the Commissioner's proposed direction or amendment and if an application is so made the Commissioner cannot give the direction or make the amendment unless it is confirmed by the State Administrative Tribunal or the application is dismissed or struck out.

Clause 176            An incorporated association must comply with a direction given by the Commissioner under clause 173.

Contracts to which an incorporated association is a party are not affected by a failure of the association to comply with a direction under clause 173.

Clause 177            If an incorporated association does not comply with a direction under clause 173 the Commissioner may, after giving 28 days' notice of his or her intention to do so, make an order –

- transferring the undertaking to the other body corporate; and
- making other incidental or transitional provisions.

An incorporated association to which notice of the Commissioner's intention is given may, within the 28 day period, apply to the State Administrative Tribunal for a review of the Commissioner's proposal to make an order; and if such an application is made the Commissioner cannot carry out the proposal unless it is confirmed by the State Administrative Tribunal or the application is dismissed or struck out.

- Clause 178 On the gazettal of the order, the property, rights and liabilities of the incorporated association pass to the other body corporate. This clause also provides for –
- legal proceedings to be continued or commenced against the other body corporate;
  - the continued effect of any existing matter or circumstance that remains relevant to the other body corporate;
  - the adjustment of documentary references to the incorporated association concerned; and
  - the amendment of land registration records.
- Clause 179 An incorporated association to which a direction is given under clause 173 must notify the Commissioner in writing of a transfer of its undertaking within 14 days after the transfer is made and a fine of up to \$5,000 may be imposed on conviction for a breach of this duty.
- The Commissioner must cancel the incorporation of an association whose undertaking has been transferred under Division 2.

### ***Division 3 – Direction by Commissioner to convene general meeting***

- Clause 180 The Commissioner may direct a person who has power to convene a general meeting of an incorporated association –
- to convene a general meeting of the association; and
  - to arrange for a specified matter to be dealt with at the meeting,
- if the Commissioner thinks that the giving of the direction may assist in or towards the resolution of a dispute that is affecting the conduct of the association's affairs.
- The person must comply with such a direction unless there is reasonable excuse for not doing so; and a fine of up to \$5,000 may be imposed on conviction for a breach of this duty.
- Clause 181 The person may apply to the State Administrative Tribunal for a review of a direction under clause 180 or of an amendment to it, but the application must be made within 28 days (or other period fixed by regulation) after the person receives the direction or notice of the amendment.
- Clause 182 The Commissioner or an officer authorised by the Commissioner may attend the meeting and take part in the consideration and discussion of the matter and of any incidental matter.

#### **Division 4 – Appointment of Statutory Manager**

- Clause 183            The Commissioner may appoint a statutory manager to administer the affairs of an incorporated association, if there are grounds for doing so, and –
- the association is solvent; and
  - the appointment is in the public interest; and
  - there is no other suitable power under the Act for dealing with the issues that have arisen.
- The grounds for making an appointment are –
- that the incorporated association concerned has failed to remedy a breach of the Act of which notice has been given to it; or
  - the financial or administrative position of the association makes an appointment necessary; or
  - the association has by special resolution requested that an appointment be made.
- Clause 184            A statutory manager of an incorporated association takes the place of the association’s management committee and has the functions of that committee.
- Clause 185 & 186        An appointment continues in force until it is revoked or a liquidator is appointed to wind up the association.
- Before revoking the appointment of a person as statutory manager of an incorporated association, the Commissioner must –
- appoint a successor to the person; or
  - ensure that a management committee is in place, either by way of elections under the association’s rules or appointments made by the Commissioner.
- Clause 187            A statutory manager of an incorporated association has power to make any report to the Commissioner that he or she or he wishes on the affairs of the association, but must –
- make any report required by the Commissioner; and
  - make a final report to the Commissioner when the manager leaves office.
- A fine of up to \$10,000 may be imposed on conviction for a breach of any of these duties.
- Clause 188            The Commissioner has powers –
- to provide funds to meet the remuneration and expenses of a statutory manager (and may obtain an advance from the Treasurer for that purpose); and
  - to recover moneys so provided from the incorporated association concerned.

The incorporated association may apply to the State Administrative Tribunal for a review of a decisions made by the Commissioner under clause 188, but any application for review must be made within 28 days (or other period fixed by regulation) after the association receives notice of the decision.

- Clause 189 A statutory manager is not liable for any loss incurred by an incorporated association during his or her term of office unless it results from dishonesty, negligence or a breach of the Act or the rules of the association on the manager's part.
- Clause 190 Clause 190 confers powers that are supplementary to the power of a statutory manager to appoint members of the management committee of an incorporated association under clause 186(1)(c). The supplementary powers enable the Commissioner during a period fixed by him or her –
- to determine the conditions of appointment of, and remove, appointees; and
  - to make and amend rules of the association.
- Clause 191 While a statutory manager of an incorporated association is in office, court proceedings may only be brought or continued against the association with the leave of the Supreme Court, and the Commissioner must be given notice of any application for such leave.

## **Part 11 – Administration**

### ***Division 1 – General***

- Clause 192 The Commissioner is to be a designated executive officer of the administering Department. The designation is to be made by the Minister.
- Clause 193 The Commissioner may in writing delegate to an officer of the administering Department any of the Commissioner's powers or duties under the Act, other than the power conferred by clause 193, but an officer cannot further delegate a delegated power or duty.
- Clause 194 Regulations may be made authorising the Commissioner to obtain specified information from an incorporated association relating to the operation of the Act, including information by way of periodical returns.
- Clause 195 It is an offence for a person to record, use or disclose information about the affairs of a person obtained officially under the Act, or an Act that preceded it, except as allowed by clause 195(2), and fine of up to \$20,000 may be imposed on conviction for such an offence.
- Clause 196 Persons acting officially and in good faith for the purposes of the Act, or an Act that preceded it, are protected from liability arising from their acts and omissions, and the State is also protected from liability.
- Clause 197 In judicial proceedings evidence is not required to establish –
- that a person is or was the Commissioner; or
  - the authenticity of the Commissioner's signature.
- Clause 198 Evidence of the facts described in this clause may be given in proceedings by way of a certificate of the Commissioner setting out the facts.

A certificate of incorporation of an association is conclusive evidence of the contents of the certificate.

### ***Division 2 – Lodgement of documents with Commissioner***

- Clause 199 The Commissioner is to keep the documents that are required to be lodged with the Commissioner, including rules and rule amendments, in such manner as the Commissioner thinks suitable.

An incorporated association must, if so required, produce a copy of its rules to the Commissioner.

- Clause 200 Documents lodged with the Commissioner and copies may be disposed of once 15 years have passed since the association ceased to be incorporated, unless the Commissioner considers retention to be necessary or desirable.
- Clause 201 On payment of a fee fixed by the regulations, documents held by the Commissioner for the purposes of the Act may be inspected or a copy or extract certified by the Commissioner may be obtained.
- Clause 202 A certified copy or extract is evidence of equal validity with the original document.
- Clause 203 The lodgement of a document with the Commissioner under the Act does not have the effect of imputing knowledge of its contents to members of the public.

### ***Division 3 – Powers of investigation***

- Clause 204 This clause provides for the definition of some terms for the purposes of Division 3. In particular, the definition of “incorporated association” is extended to include an association that is being wound up and one that has ceased to be incorporated under the Act.
- Clause 205 Where in Division 3 the term “authorised officer” appears it means an officer of the administering Department designated as an authorised officer by the chief executive officer of the Department.
- An authorised officer is to be issued with a certificate of his or her authorisation. The certificate is evidence of the officer’s designation and must be produced on demand when he or she is carrying out official duties.
- Clause 206 The Commissioner may do any of the following –
- require that a specified record be produced to an authorised officer by the incorporated association concerned or by a relevant person (as defined in clause 206(1));
  - require that a relevant person attend before an authorised officer and answer questions;
  - require that a relevant person give written answers to specified questions and send them to the Commissioner.



A person does not incur any liability by reason of complying with a requirement so made.

The Commissioner's powers under this clause may only be exercised in order to find out –

- if there has been a breach of the Act; or
- if an offence has been committed in relation to an incorporated association that involves dishonesty or the mismanagement of its affairs.

Clause 207

An authorised officer does not have power of entry to premises except –

- with the consent of an occupier; or
- under a search warrant.

Where an authorised officer has power to enter a place he or she may also search the place for, and seize, any record or thing connected with a breach of the Act or certain other offences, but subject to the terms of any search warrant and clause 209(5), and in doing so may require any person to answer questions, produce any record or give assistance to the officer.

Clause 208

A justice may, on application by an authorised officer, issue a warrant to search a place if satisfied that there are grounds for suspecting that there is anything at the place (which thing must be specified in the warrant) relevant to –

- a breach of the Act; or
- an offence in relation to an incorporated association that involves dishonesty or the mismanagement of its affairs.

Clause 209

Any authorised officer may execute a search warrant within 28 days of its issue, using forcible entry if necessary, and the officer may at the place concerned exercise the powers conferred by clause 207.

The warrant must be produced on request.

Despite clause 208(4), the authorised officer may seize a record or thing found at the place in order to prevent its concealment, loss or destruction if the officer believes that the record or thing is relevant to –

- a breach of the Act; or
- an offence in relation to an incorporated association that involves dishonesty or the mismanagement of its affairs.

- Clause 210           Records seized or produced under powers in this Division may be copied and extracts of them may be taken, and they may be retained for reasonable periods.
- An authorised officer may require that a record kept in an unintelligible format be produced in a legible form.
- Clause 211 & 212       It is an offence –
- to disobey a requirement made under Division 3 unless legal professional privilege or some other lawful excuse applies; or
  - to knowingly or recklessly give false or misleading information to, or obstruct, anyone performing a function under Division 3,
- and fine of up to \$10,000 may be imposed on conviction for such an offence.
- Clause 213           A person cannot claim the privilege against self-incrimination when required to answer a question or produce a record under Division 3, but –
- the answer; or
  - the record or the fact of its production,
- is not admissible evidence against the person in criminal proceedings except proceedings for an offence against clause 211(2).
- Clause 214           Other persons may assist an authorised officer acting under Division 3.

#### ***Division 4 – Infringement notices***

- Clause 215 to 225       These clauses contain provisions in standard form to support the enforcement of the Act by the issue of infringement notices, including provision –
- for the making of regulations specifying –
    - offences for which an infringement notice may be issued (clause 216);
    - the modified penalty that is to apply where an infringement notice is issued for an offence (clause 217); and
    - the form of an infringement notice (clause 219(1));
  - authorising the issue of infringement notices by an authorised officer (clause 218);

- covering –
  - the wording of infringement notices (clause 219(2));
  - the extension of the time allowed for payment of a modified penalty (clause 220);
  - the withdrawal of a notice that has been issued (clause 221); and
  - the effect of the modified penalty being paid within the allowed time (clauses 222 and 223);
- providing that money paid as a modified penalty is to be dealt with in the same way as a court-imposed penalty (clause 224);
- for the chief executive officer of the administering Department to designate officers as authorised officers for the purposes of Division 4 (clause 225(2) and (3)); and
- requiring that an authorised officer be issued with a certificate of the officer's authority to act, which is to be produced on demand and is to be evidence that the officer has been designated as an authorised officer (clause 225(4), (5) and (6)).

## Part 12 – Miscellaneous changes

- Clause 226 A dispute that cannot be resolved under an incorporated association's internal disputes procedure may be referred to the State Administrative Tribunal for determination and the giving of appropriate relief.
- Clause 227 It is an offence –
- to make or authorise the making of a false or misleading statement in a document; or
  - to make or authorise the making of an omission from a document that makes it misleading,
- and fine of up to \$10,000 may be imposed on conviction for such an offence.
- This provision covers –
- documents for the purposes of the Act; and
  - those submitted to the Commissioner; and
  - those submitted to a meeting of an association or its management committee.
- Clause 228 A prosecution for an offence against the Act cannot be commenced later than 3 years after the offence was committed.
- Clause 229 A document is not taken to be duly lodged with the Commissioner if any relevant fee has not been paid.
- Clause 230 The Governor, as the regulation-making authority for the Act, may make regulations that are contemplated by the Act or are necessary or convenient for giving effect to it.
- Clause 231 The existing Act, the *Associations Incorporation Act 1987*, is repealed and provision is made in Schedule 6 for matters relating to the transition from the repealed Act to the new Act.
- Clause 232 Certain Acts are amended by Schedule 7 to reflect the repeal of the existing Act and its replacement by the new Act; and also to correct some references to the *Associations Incorporation Act 1895*.

## **Schedule 1 – Some circumstances that do not make an association ineligible for incorporation**

This schedule gives effect to section 9 of the Act.

Under clause 9, an association is not eligible to be incorporated under the Act if it is formed or carried on for the purpose of trading or securing pecuniary profit for its members from its transactions.

Schedule 1 sets out particular contingencies and circumstances that might arise in the affairs of an association and states that they are not to make an association ineligible for incorporation. In the absence of such an express statement it might be thought that they would affect an association's eligibility.

## **Schedule 2 – Vesting of property and liabilities on incorporation**

This Schedule is referred to in clauses 25(2) and 133.

- Clause 1            The definitions in this clause reflect the fact that the provisions of Schedule 2 relate to both –
- a newly incorporated association taking the place of an unincorporated association (a “former association”); and
  - a newly incorporated association taking the place of a one or more existing incorporated associations (also “former associations”) that are amalgamating.

- Clause 2            On an unincorporated association becoming incorporated or an amalgamation of existing associations to form an incorporated association –
- property, rights and liabilities pass to the newly incorporated association, but without releasing a person from any liability incurred by or on behalf of an unincorporated association before its incorporation;
  - legal proceedings may be continued or commenced against the newly incorporated association;
  - any existing matter or circumstance that is relevant to the newly incorporated association continues to have effect; and
  - documentary references to a former association are adjusted.

When a newly incorporated association takes the place of an unincorporated association any property held by a person on behalf of the unincorporated association passes to the newly incorporated association.

- Clause 3            Property that passes under Schedule 2 is subject to any existing trust, restriction or obligation.

- Clause 4            Land registration records are to be amended on application by an incorporated association to which any estate or interest in land passes.

## **Schedule 3 – Content of rules of an incorporated association**

### ***Division 1 – Matters to be provided for in rules***

This schedule contains 18 items showing for the purposes of clause 57(1)(a) the matters that are to be dealt with in the rules of an incorporated association. A brief description of each item is as follows –

- |           |   |
|-----------|---|
| Clause 1  | Any qualifications for membership.  |
| Clause 2  | The register of members (subject to regulations under clause 89).   |
| Clause 3  | Voting rights.  |
| Clause 4  | Membership fees etc.  |
| Clause 5  | The constitution and operation of the management committee.   |
| Clause 6  | The quorum and procedure at general meetings.   |
| Clause 7  | The requirements for notices of general meetings and notices of motion.   |
| Clause 8  | The percentage of members who may requisition a general meeting (subject to Division 2 clause 1).               |
| Clause 9  | The control of funds.   |
| Clause 10 | The fixing of the financial year (subject to Division 2 clauses 2 and 3).                                       |
| Clause 11 | The calling and timing of general meetings.   |
| Clause 12 | The amendment and revocation of rules (subject to Part 5 Division 4 and Schedule 6 clause 14).                  |
| Clause 13 | The custody and use of the common seal.   |
| Clause 14 | The custody of records, books, documents and securities.  |
| Clause 15 | The inspection of records and documents by members (subject to Part 5 Division 5 and Part 6 Divisions 6 and 7). |
| Clause 16 | A dispute resolution procedure.   |
| Clause 17 | The disposal of surplus property on a winding up or cancellation of incorporation.                              |
| Clause 18 | The requirements for the removal of the public officer from office.   |

## ***Division 2 – Particular requirements for certain rules***

Clause 1 Rules providing for the percentage of members who may requisition a general meeting cannot specify greater than the percentage fixed by the regulations.

Clause 2 For an association incorporated after the commencement of the Act (other than an association to which Schedule 6 clause 4(3) applies) –

- its first financial year is to be a period fixed by its rules, but not exceeding 15 months commencing on the day of incorporation; and
- subject to any rule amendment, subsequent financial years are to be successive periods of 12 months.

If an association incorporated after the commencement of the Act changes its financial year an initial period of more or less than 12 months may be determined as the financial year so far as is necessary for the transition from one period to another.

Clause 3 For an incorporated association in existence at the commencement of the Act or an association to which Schedule 6 clause 4(3) applies –

- subject to Schedule 6 clause 12(2), its financial year is to be a period of 12 months fixed by its rules; but
- the financial year as determined under the existing Act continues to apply until it amends its rules to fix its financial year.

If an existing incorporated association changes its financial year an initial period of more or less than 12 months may be determined as the financial year so far as is necessary for the transition from one period to another.



## **Schedule 4 – Modifications to text of Parts 5.4 to 5.8 of the Corporations Act**

This Schedule applies section 136 of the Act.

Clause 1-8            This Schedule provides for modifications to the Parts of the *Corporations Act 2001* that are applied by clauses 140 and 165. The modifications are necessary because the terminology in those Parts is relevant to companies under a regime administered by the Australian Securities and Investment Commission, and for the purposes of the Act the Parts need to refer to incorporated associations and to the Commissioner as the administering authority.

## **Schedule 5 – Grounds on which an incorporated association may be wound up by the Supreme Court**

Clauses 1-12        This Schedule sets out 12 grounds on which an incorporated association may be wound up by the Supreme Court under Part 9 Division 4. The grounds fall under the following general headings –

- incorporation was wrongly or wrongfully obtained;
- insufficient membership;
- inactivity;
- insolvency;
- carrying on unauthorised activities, including trading;
- oppressive behaviour by the management committee;
- breaches of the Act;
- failure to comply with directions of the Commissioner under the Act
- a resolution of the association for winding up by the Supreme Court; and
- a decision of the Supreme Court that winding up would be just and equitable.

## **Schedule 6 – Transitional provisions**

### ***Division 1 – Preliminary***

Clause 1            The term “existing incorporated association” is defined to cover all incorporated associations in existence when the new Act commences.

The provisions of Schedule 6 do not affect the operation of the Interpretation Act 1984 unless the contrary is indicated.

### ***Division 2 – Existing incorporated associations***

Clause 2 & 3        The incorporation of all existing incorporated associations is transferred to the new Act and their committees become management committees under clause 70.

### ***Division 3 – Continuation of certain matters in progress***

Clause 4            Any application for incorporation in progress under the existing Act when the new Act commences is to be completed under the existing Act, and this includes the right to apply for a review by the State Administrative Tribunal if an application is refused.

However, if the application is granted the association is taken to be an association incorporated under the new Act.

Clause 5            An alteration to the rules of an incorporated association for which a special resolution has been passed before the commencement of the new Act may be lodged with the Commissioner after that commencement in accordance with section 17 of the existing Act and takes effect as if that section was still in force.

Clause 6            An application for approval of a change of name or of a rule alteration that is in progress under section 18 or 19 of the existing Act when the new Act commences is to be completed under that section as if it was still in force, and this includes the right to apply for a review by the State Administrative Tribunal if approval is refused.

Clause 7            An application for an extension of time that is in progress under section 23(1) of the existing Act when the new Act commences is to be completed under that subsection as if it was still in force.

- Clause 8 An application to the State Administrative Tribunal for a review of a decision of the Commissioner that is in progress under section 4(6), 7(2), 8(2), 9(3), 18(4) or 19(3) of the existing Act when the new Act commences may be heard and determined as if that subsection had not been repealed.
- Clause 9 If before the new Act commences –
- an incorporated association had resolved under section 30(1) of the existing Act that it be wound up voluntarily; but
  - the association had not been dissolved,
- the existing Act applies, as if it had not been repealed, to the winding up and dissolution of the incorporated association and on its dissolution the Commissioner must cancel its incorporation.
- Clause 10 If –
- before the new Act commences a notice relating to the transfer of its undertaking has been given to an incorporated association under section 34(1) of the existing Act; and
  - when the new Act commences less than 3 months has expired since the notice was given,
- section 34(2), (3) and (4) of the existing Act apply as if they had not been repealed.
- Clause 11 If before the new Act commences –
- the Commissioner has given a notice of a proposed cancellation of incorporation to an incorporated association under section 35(1) of the existing Act;
  - but the notice has not been acted on,
- the Commissioner may after the new Act commences exercise the power of cancellation and other powers in section 35, and section 36 applies, as if those sections had not been repealed.

***Division 4 – Amendment of rules by existing incorporated associations and associations to which clause 4(3) applies***

- Clause 12 An existing incorporated association is allowed 18 months after the new Act commences within which to amend its rules to make them comply with Schedule 3 items 3, 8, 10, 16, 17 and 18.
- An incorporated association to which clause 4(3) of Schedule 6 applies is allowed 18 months after it is incorporated within which to amend its rules for that purpose.

In either case, the Commissioner may extend the period so allowed.

Clause 13 Under Schedule 2 clause 4 of the existing Act an association that was incorporated under the *Associations Incorporation Act 1895* is exempt from section 16 of the existing Act (which specifies matters to be provided for in the rules of an incorporated association).

An incorporated association that has that exemption is allowed 18 months after the new Act commences within which to amend its rules to make them comply with clause 57 of the new Act; but the Commissioner may extend the period so allowed.

Clause 14 During the 18 months period after the commencement of the new Act, a rule amendment that is required to ensure that the rules comply with the new Act may be made by the management committee of an incorporated association instead of by special resolution of the association, but the Commissioner must approve any such amendment.

The incorporated association must give notice of the amendment to its members with notice of its next annual general meeting.

The incorporated association may apply to the State Administrative Tribunal for a review of a decision of the Commissioner to refuse approval of a rule amendment made by its management committee, but any application for review must be made within 28 days (or other period fixed by regulation) after the association receives notice of the decision.

Clause 15 It is an offence on the part of an incorporated association if, at the expiry of the 18 months period allowed by clause 12 or 13, its rules do not comply with the new Act; and a fine of up to \$5,000 may be imposed on conviction for such an offence.

A member of the management committee of the association may also be in breach of a member's duty to take all reasonable steps to ensure that the association meets its obligations under clause 57(2).

Clause 16 Clauses 79(3) and 143(1) are temporarily modified to fit with the fact that an existing incorporated association is allowed 18 months after the new Act commences within which to amend its rules to make them comply with Schedule 3 items 17 and 18.

***Division 5 – Other things to be done by existing incorporated association and association to which clause 4(3) applies***

Clause 17            An existing incorporated association must notify the Commissioner of its address within 90 days after the commencement of the new Act.

An association to which clause 4(3) of Schedule 6 applies must notify the Commissioner of its address within 90 days after the association is incorporated.

Clause 18            An existing incorporated association is allowed 90 days after the new Act commences within which to appoint a public officer.

An incorporated association to which clause 4(3) of Schedule 6 applies is allowed 90 days after it is incorporated within which to make such an appointment.

In either case, the Commissioner may extend the period so allowed.

The person appointed must give notice of the appointment to the Commissioner, and a fine of up to \$1,000 may be imposed on conviction for a breach of this duty.

Pending the appointment of a public officer by an existing incorporated association the person who is normally entitled to preside at meetings of its management committee is to fill the role.

Clause 19            The obligation of an existing incorporated association to maintain a register of its members in accordance with the regulations does not arise until 18 months after the time when the Act and the relevant regulations have commenced, and the Commissioner may extend the period so allowed.

Until the end of the allowed period it is sufficient if section 27 of the existing Act is complied with.

***Division 6 – Other provisions***

Clause 20            Part 7 Divisions 1 and 2 (except section 101) and Division 3 Subdivisions 1 and 3 (which impose financial accounting and audit requirements) do not start to apply to an existing incorporated association until its next financial year after the new Act commences, and in the meantime sections 25 and 26 of the existing Act apply.

- Clause 21            The operation of section 36 of the existing Act is preserved in respect of property vested in the Commissioner under that section at the commencement of the new Act.
- Clause 22            Clause 203 only creates rights and liabilities in respect of things that occur after the new Act commences.
- Clause 23            Clause 228 only applies to offences committed against the new Act.
- Clause 24            References in written laws to an association incorporated under the new Act includes existing incorporated associations that are transferred to the new Act by Schedule 6 clause 2.
- Clause 25            Further transitional provisions may be made by regulation during the first 12 months of the operation of the new Act, including a provision modifying or misapplying a particular provision.
- Such a regulation may relate back to a time before it was gazetted (and after the new Act commenced) but not so as to affect any existing right or impose liability for any act or omission that occurred before the gazettal.

## Schedule 7 – Consequential Amendments

The clauses in Schedule 7 make necessary consequential amendments to various Acts mainly by replacing in those Acts references to the existing Act or to the *Associations Incorporation Act 1895* with appropriate references to the new Act or a relevant provision of, or term used in, the new Act.

- Clause 1 to 9      These clauses amend the –
- *Children and Community Services Act 2004*;
  - *Criminal Procedure Act 2004*;
  - *Education Service Providers (Full Fee Overseas Students) Registration Act 1991*;
  - *Hale School Act 1876*;
  - *Law Society Public Purposes Trust Act 1985*;
  - *Liquor Licensing Act 1988*;
  - *School Education Act 1999*;
  - *Taxation Administration Act 2003*; and
  - *Volunteers (Protection from Liability) Act 2002*.
- Clause 10      This clause amends the –
- *Companies (Co-operative) Act 1943*;
  - *Cremation Act 1929*;
  - *Legal Aid Commission Act 1976*; and
  - *Legal Contribution Trust Act 1967*.
- Clause 11      This clause amends the –
- *Companies (Co-operative) Act 1943*;
  - *Equal Opportunity Act 1984*;
  - *Gaming and Wagering Commission Act 1987*;
  - *Insurance Commission of Western Australia Act 1986*;
  - *Local Government Act 1995*;
  - *Members of Parliament (Financial Interests) Act 1992*;
  - *Planning and Development Act 2005*; and
  - *Western Australian Treasury Corporation Act 1986*.