

Summary of legislation and policy requirements for exercise of discretions

(such as exemptions and approvals)

ASSOCIATIONS INCORPORATION ACT 1985



Government of South Australia

Office of Consumer and
Business Affairs

SUMMARY OF LEGISLATION AND POLICY REQUIREMENTS

FOR EXERCISE OF DISCRETIONS

ASSOCIATIONS INCORPORATION ACT 1985

23 May 2006

The Office of Consumer and Business Affairs (OCBA) undertakes the administration of the *Associations Incorporation Act 1985* (the Act). OCBA's functions in relation to associations include:

- incorporation and amalgamation;
- registration of rules;
- exemption from strict compliance with a provision of the Act;
- approval to do certain things under the Act;
- transfer of activities to another other body corporate; and deregistration.

This document contains a summary of the requirements of the legislation where OCBA has power to exercise discretion, and a summary of the policy that OCBA applies when considering the matter.

Where relevant, applications must be lodged with OCBA using an Approved Form, e.g. an application for incorporation or alteration of rules. The prescribed [fee](#) must accompany the [application](#). Where there is no Approved Form, generally in relation to seeking an exemption from strict compliance with a provision of the Act, an application to OCBA must:

- be made in writing accompanied by the prescribed fee; and
- fully address the legislation and policy requirements set out in this document, to the extent that it is applicable to the association.

Please note

The Office of Consumer and Business Affairs undertakes the administration of the Act on behalf of the Corporate Affairs Commission. OCBA's website address is www.ocba.sa.gov.au.

Fees

The fees payable under the Act to OCBA are set out in Schedule 2 to the Associations Incorporation Regulations, and are published on OCBA's website.

Disclaimer

OCBA is not providing legal advice and disclaims any liability arising from the use of this document. Where users of this information seek to apply it to particular facts or situations, they should consider seeking their own advice.

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S 18, 19, 20 Incorporation, and registration of rules, of a proposed association

LEGISLATION

Overview

An association may be incorporated under the Act, provided that trading is not its principal or subsidiary purpose and the resulting transactions are a means of providing funds directly for the association's objects, and where any profit making activities do not confer a direct monetary benefit on its members.

Application s 19(2)

An application for incorporation of an association (Forms 1 and 2) must include a statutory declaration made by the applicant and be accompanied by:

- a copy of the proposed rules of the association;
- the check-list of the proposed rules of the association;
- if referred to in the rules, or a rule depends on it, a copy of:
- any instrument creating a trust, and
- the settled draft of any instrument prepared to create a trust where the association will be the trustee; and
- the prescribed fee.

Incorporation s 20(1)

OCBA must incorporate an association if it is satisfied:

- the association is eligible to be incorporated under the act;
- the rules conform with the requirements of the act; and
- its proposed name:
 - is not misleading as to the true nature of the association;
 - is not likely to be confused with the name of a body corporate or registered business name;
 - is not undesirable as a name for an incorporated association; and
 - conforms with the ministerial directions.

Purpose of Association s 18(1)

An association formed for at least one of the following purposes may be considered for incorporation (hereinafter referred to as an "eligible purpose"):

- religious, educational, charitable or benevolent;
- promoting or encouraging literature, science or the arts;
- providing medical treatment or attention, or promoting the interests of persons who suffer from a particular physical, mental or intellectual disability;
- sport, recreation or amusement;
- establishing, carrying on, or improving a community centre, or promoting the interests of a local community or a particular section of a local community;
- conserving resources or preserving any part of the environmental, historical or cultural heritage of the state;
- promoting the interests of students or staff of an educational institution;
- political;
- administering any scheme or fund for the payment of superannuation or retiring benefits to the members of any organisation or the employees of any body corporate, firm or person; or
- promoting the common interests of persons who are engaged in, or interested in, a particular business, trade or industry.

In addition, an association may be formed for any purpose approved by the Minister.

Profits for members or engaging in trade or commerce s 18(5), (6)

An association is not eligible to be incorporated if it has a principal or subsidiary object to:

- secure a pecuniary profit for any of the members; or
- engage in trade or commerce.

This does not apply in any of the following circumstances:

- the association makes a pecuniary profit, unless any part of that profit is to be divided among or received by any of the members otherwise than in accordance with S 55 Prohibition against securing profits for members;
- the association buys or sells or deals in or provides goods or services where those transactions are ancillary to the principal objects and, in the case of transactions with non-members (other than spouses, children or parents of members), the transactions:
 - are not substantial in number or value in relation to the other activities of the association;
 - are intended to provide financial support to the association in a manner that is directly related to the objects; or

- consist in the charging of admission fees to functions organised for the promotion of the objects;
- the association is established for the protection of a trade, business, industry or calling in which the members are engaged or interested, if the association itself does not engage or take part in any such activity;
- the members of the association compete for trophies or prizes in contests directly related to the objects; or
- OCBA approves eligibility to be incorporated.

The provisions have the effect, in general, of distinguishing between an association formed for an eligible purpose, and one formed for a commercial purpose or which promotes commercial interests (hereinafter referred to as an “ineligible purpose”).

Rules to conform with the Act: s 23A

The rules must:

- state the name and objects; and
- not contain any provision that is contrary to or inconsistent with the Act.

They must contain provisions that, in the opinion of OCBA, deal sufficiently with the following matters having regard to the nature and objects of the association:

- membership in the case of an association that has members;
- the powers, duties and manner of appointment of the committee;
- the appointment of an auditor of a prescribed association;
- the calling of and procedure at general meetings;
- who has the management and control of the funds and other property;
- the powers and by whom and in what manner they may be exercised;
- the manner in which the rules may be altered; and
- any other matter prescribed by regulation.

Decline to incorporate: s 20(2)

OCBA may decline to incorporate an association if:

- it would be more appropriate for its activities to be carried on by a body corporate under other legislation; or
- with the consent of the Minister, it would not be in the public interest.

RELEVANT MATERIALS

The following are published on OCBA’s website, or are available from OCBA:

- Circular: How to incorporate;
- [Example rules of an incorporated association](#);
- [Forms 1 and 2: Application for Incorporation, and Statutory Declaration to Accompany the Application for Incorporation](#); and
- [Checklist for the proposed rules/alteration of rules of an association](#).

POLICY

Incorporation and registration of rules: s 20

Relevant considerations to be addressed include whether:

1. there is at least one identifiable “eligible purpose” (s 18(1));
2. the association is not formed for an “ineligible purpose” (s 18(5) and (6));
3. the rules conform with the requirements of s 23A;
4. the proposed name:
 - is not misleading, confusing or undesirable; and
 - conforms with ministerial directions (paragraph (1)(c)); and
5. a copy of any draft trust/trust instrument has been provided (s 19(2)(c), (ca)).

Trading and prima facie eligible

It is possible for an association to engage in trade or commerce providing such transactions:

- are to supplement an “eligible purpose”; and
- any transactions with non-members:
 - are not substantial compared to its other activities; or
 - provide funds directly to support an “eligible purpose”; or
 - are admission fees to functions for promoting an “eligible purpose”.

An association established for the protection of a trade, business, industry or calling may facilitate trading between its members, or act as an agent to buy on behalf of its members, providing it does not of itself engage in such trading or secure a financial benefit for any of its members.

Prima facie ineligible

An association would not be eligible to be incorporated where e.g.:

- the stated or implied purpose in the rules is not an “eligible purpose”;
- the primary or secondary purpose is to engage in trade or commerce;

- the association would be operating on a fee for service basis and such transactions are not supplementary to an “eligible purpose”.
- the primary or secondary purpose is to secure a financial benefit for any of the members;
- the principal common interest promoted by the association is the profitability of its members;
- any part of the profit of the association is to confer a financial benefit on any of the members otherwise than in accordance with s 55 (prohibition against securing profits for members);
- an implied purpose is to secure a financial benefit for members, or the more vague purposes would be understood primarily this way; or
- the association has been formed for an illegal purpose.

Purposes approved by the Minister: s 18(1(k))

In order for the Minister to consider any application for an approved purpose, the purpose of an association should be similar in kind or nature to an “eligible purpose”.

Relevant considerations to be addressed include:

1. the purpose of the association;
2. the manner in which the purpose is homogenous with an “eligible purpose”;
3. the manner and extent the association will conduct its activities;
4. the size, activities and structure of the association;
5. the availability of other means to incorporate; and
6. any exceptional circumstances that apply (applicants have a high standard of proof to overcome in showing the existence of exceptional circumstances).

Approval of eligibility in relation to securing pecuniary profits or engaging in trade or commerce: s 18(5):

An association is not eligible to be incorporated, unless OCBA otherwise approves, if a principal or subsidiary purpose is to secure a pecuniary profit for any of its members, or a principal or subsidiary purpose is to engage in trade or commerce.

Relevant considerations to be addressed include:

1. the purpose of the association;
2. the size, activities and structure of the association;
3. the manner and extent that the association would conduct its activities to:
 - 3.1. secure a pecuniary profit for any of its members; or
 - 3.2. engage in trade or commerce;

4. why incorporation is considered unsuitable under other bodies corporate legislation; and
5. the exceptional circumstances why it should be incorporated (applicants have a high standard of proof to overcome in showing the existence of exceptional circumstances).

OCBA may decline to incorporate: s 20(2):

An association may be declined incorporation if it would be more appropriate for its activities to be carried on by a body corporate under other legislation or it would not be in the public interest.

Relevant considerations to be addressed include:

1. the manner and extent that the association would:
 - 1.1. secure a pecuniary profit for any of the members; or
 - 1.2. engage in trade or commerce;
2. why approval of eligibility under s 18(5) is inappropriate;
3. the size, activities and structure of the association;
4. the availability to incorporate under other bodies corporate legislation;
5. whether the association is formed for an illegal purpose; and
6. any other public interest concerns.

The Act is usually legislation selected for a non-profit group of at least two persons where its members elect the committee of management and democratically control the association. Where a member could direct the management of an association, OCBA would consider whether it would be more appropriate for the association's activities to be carried out by e.g. a company limited by guarantee or some other body corporate.

S 24 Alteration of rules

LEGISLATION

An alteration to a rule, including a rescission¹ or replacement of a rule:

- may be made:
 - by special resolution of the members of the association; or
 - if other provision is made in the rules - by those means;
- must conform to the requirements of the Act;

¹ Type of cancellation

- comes into force at the time the alteration is passed, unless other provision is made in the rules or it is resolved to the contrary;
- must be registered with OCBA:
 - within one month after its making; and
 - be accompanied by a statutory declaration made by the public officer; and
- for the name of an association:
 - must conform with the Ministerial directions; and
 - does not come into force until it is registered.

RELEVANT MATERIALS

The following are published on OCBA's website, or are available from OCBA:

- [Forms 6 and 7](#): Application for registration of alteration of rules,
- [Checklist](#) for the proposed rules/alteration of rules of an association, and
- Example [rules](#) of an incorporated association.

POLICY

Relevant considerations to be addressed include whether:

1. the application is defective because:
 - 1.1. it is not accompanied by a statutory declaration made by the public officer as registered with OCBA: s 24(3)(b);
 - 1.2. there is no evidence that the statutory declaration was made before an authorised person, i.e. a Justice of the Peace or a Commissioner for Taking Affidavits: s 24(3)(b);
 - 1.3. the rules have not been marked as an annexure and endorsed by an authorised person (as above);
 - 1.4. the residential address of the registered public officer is not stated; or
 - 1.5. the public officer is not resident in South Australia;
2. the rules conform with the requirements s 23A; and
3. the name:
 - 3.1. is not misleading as to the true nature of the association;
 - 3.2. is not likely to be confused with the name of a body corporate or registered business name;
 - 3.3. is not undesirable as a name for an incorporated association; and
 - 3.4. conforms to the Ministerial directions.

S 30 Certain persons not to be members of the committee

LEGISLATION

Subsection (1) on grounds of insolvency

A person who is an insolvent under administration, which includes an undischarged bankrupt must not, without the consent of OCBA:

- be a member of the committee of an association; or
- be concerned in or take part in the management of an association, whether directly or indirectly.

Subsection (2) on grounds of a conviction

A person who has been convicted within or outside South Australia of an indictable offence² must not, within a period of 5 years after their conviction, without the consent of OCBA:

- be a member of the committee of an association; or
- be concerned in or take part in the management of an association, whether directly or indirectly.

If such a convicted person was sentenced to imprisonment, the person is disallowed any such office for a period of 5 years after release from prison, without the consent of OCBA.

Who is concerned in management

Whether a person is concerned in or takes part in management should be interpreted widely. It may be construed to include any person who has something to do with management in a decision-making capacity. A person may also be taken to be indirectly concerned in management if the committee is (or other persons who take part in management are) accustomed to acting in accordance with directions or instructions given by the person. An association should consider seeking legal advice if it has any doubt as to whether a person is concerned in management for the purposes of the Act.

RELEVANT MATERIALS

The following are published on OCBA's website, or are available from OCBA:

- S 30 Application Insolvency; and
- S 30 Application Conviction.

² More serious criminal charges are called *indictable offences*. An indictable offence guarantees the defendant the right to trial by jury.

POLICY

Consent on grounds of insolvency

Relevant considerations to be addressed include:

1. the full details and circumstances of the insolvency;
2. whether the person has met their obligations under the *Bankruptcy Act 1966* (Cth);
3. the purposes, activities and structure of the association;
4. the number of members of the association, and of the committee;
5. the extent of the person's proposed involvement in the management of the affairs of the association;
6. the extent to which it is proposed that the person may incur debt on behalf of the association;
7. the reasons why the person believes that consent should be granted;
8. the desire of the committee of the association to involve the person in the management of the association; and
9. whether the applicant has agreed in writing that they are prepared for the consent, if granted, to be placed on the Register of Incorporated Associations, which is available for public inspection.

Consent on grounds of a conviction

Relevant considerations to be addressed include:

1. the full details and circumstances of the conviction;
2. the nature of the applicant's involvement in relation to the conviction;
3. the applicant's conduct since the time of the conviction;
4. the purposes, activities and structure of the association;
5. the number of members, of the association, and of the committee;
6. the extent of the person's proposed involvement in the management of the affairs of the association;
7. the reason why the person believes that consent should be granted;
8. the desire of the committee of the association to involve the person in the management of the association; and
9. whether the applicant has agreed in writing that they are prepared for the consent, if granted, to be placed on the Register of Incorporated Associations, which is available for public inspection.

S 35(2)(b) Approval of auditor of prescribed association

LEGISLATION

A prescribed association must, after the end of each financial year of the association, cause its accounts to be audited by either:

- a registered company auditor,
- a firm of registered company auditors,
- a member of the ASCPA or the ICA, or
- a person approved by OCBA.

A prescribed association is an association with gross receipts exceeding \$500,000 in a previous financial year: s 3.

Because an auditor must be in a position to perform their duties independently, these persons, in relation to a prescribed association, are precluded from being appointed as an auditor:

- an officer;
- a partner, employer or employee of an officer;
- an employee; or
- a partner or employee of an employee.

RELEVANT MATERIALS

The following is published on OCBA's website, or is available from OCBA:

- How to Apply for Approval of [Auditor of an Incorporated Association](#)

POLICY

Each application is considered on its merits having regard to, among other things, the qualifications and experience of the proposed auditor relevant to the complexity of the audit and the operations of the particular association. A person who is a professional member of the NIA with relevant public audit experience would normally be given favourable consideration.

Relevant considerations to be addressed include:

1. the qualifications and independence of the person;

2. the auditing experience of the person in relation to similar entities;
3. the size, activities and structure of the association;
4. the proposed audit practices and methodologies; and
5. any convictions or disqualifications.

S 38 Exemption in relation to accounts and audit requirements

LEGISLATION

Financial reporting by prescribed associations

Division 2 of Part 4 of the Act regulates the accounts and audit requirements of a prescribed association, i.e. an association with gross receipts exceeding \$500,000 in a previous financial year. Gross receipts means the total amount of receipts, including any government grants or subsidies paid to or on behalf of the association by a local, State or Commonwealth government or its agency, but excluding money received from:

- subscriptions, membership fees, levy or other fees paid by a member;
- a devise or bequest, i.e. by operation of a will; or
- the sale of assets not originally purchased for resale.

The accounts of a prescribed association that has members, together with the auditor's report on the accounts, the committee's statement, and the committee's report must be laid before members at the annual general meeting within 5 months after the end of the financial year: s 35(6).

The periodic return of a prescribed association must be lodged with the prescribed fee with OCBA within 6 months after the end of each financial year. A copy of the accounts, auditor's report, committee's statement, and committee's report must accompany it: s 36(1).

The accounts must be prepared as either cash accounts, or accrual accounts being an account of income and expenditure and a balance sheet. A combination of cash and accrual accounts is unacceptable.

The committee's statement must cover the 'fairness' of the presentation of the accounts for the financial year, the association's capacity to pay its debts as and when they fall due, and particulars of any subsidiaries of the association and of any trust of which the association is a trustee.

The committee's separate report must cover any benefits received directly or indirectly by an officer of the association. Where no benefits exist a report to that effect must still be prepared.

The auditor's report must state:

- whether or not the auditor is satisfied that the accounts present fairly the results of the association's activities and its financial position;
- the conclusions drawn from any examination of the audited accounts of a subsidiary of the association and of each trust of which the association is a trustee; and
- whether the auditor has obtained all of the information and explanations required from the association: s 37(3).

These requirements are more fully explained in a separate publication, [Accounts and Audit Requirements](#), which includes guidance on procedures to enable compliance.

Exemption

OCBA may exempt a prescribed association from the obligation to comply with one or more provisions of Division 2 of Part 4 of the Act. An exemption may include extending a limitation of time to carry out an obligation. An exemption may be conditional, and at any time, may be varied or revoked by OCBA.

Any application under the section must be made before the obligation has become due. Note that if an extension of time is sought in relation to a particular obligation and after that obligation has crystallised, the application should be made under S 49A General power of exemption of OCBA.

A consequence of incorporation under the Act includes the obligation of a prescribed association to account to members for all the money and property of the association. It would be inappropriate for OCBA to exempt an association from all of the requirements of Division 2 of Part 4.

RELEVANT MATERIALS

The following is published on OCBA's website, or is available from OCBA:

- [Accounts](#) and Audit Requirements of an Incorporated Association

POLICY

Relevant considerations to be addressed include:

1. the extent of relief sought;
2. any unique reasons or special circumstances that apply;
3. whether and how full compliance with the act would place an unreasonable burden on the association; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable;
4. the extent of the impact on the interests of members and creditors of the association and how determined;
5. the size, activities and structure of the association;
6. the number and location of the association's members;
7. the extent of any public interest in the association;
8. what alternative financial reporting methods are proposed;
9. if relief is sought for particular activities, the nature and size of the activities and their relationship to the association as a whole, and the extent of any government grants utilised for those activities;
10. if relevant, the reasons why the association should be given a preference compared to other incorporated associations that have purposes that are similar to the association; and
11. if relevant, whether compliance would be inappropriate because an external administrator has taken over all, or a significant part of, the day-to-day operations of the association.

S 39 Annual general meeting

LEGISLATION

Exemption

OCBA may exempt a prescribed association that has member from the obligation to hold its AGM within 5 months after the end of its financial year (or, in the case of its first financial year, within 18 months after incorporation). An exemption may include extending the time to hold an AGM, and may be conditional, and at any time, varied or revoked by OCBA.

Any application under the section must be made before the obligation has become due. Note that if an extension of time is sought to hold an AGM after the obligation to hold the AGM has crystallised, the application should be made under S 49A General power of exemption of OCBA.

RELEVANT MATERIALS

The following is published on OCBA's website, or is available from OCBA:

- [Accounts](#) and Audit Requirements of an Incorporated Association

Policy

Extension of time to hold AGM

An application must be made within the prescribed period, i.e. within 5 months after the end of the financial year. An application made after the prescribed period has expired should be processed under s 49A(1)(a), which allows OCBA to grant an extension whether or not the prescribed period has expired.

Relevant considerations to be addressed include:

1. that the rules provide for membership of the association;
2. any unique reasons or special circumstances that apply;
3. whether and how full compliance with the act would place an unreasonable burden on the association; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable;
4. the extent of the impact on the interests of members of the association and how determined;
5. the size, activities and structure of the association;
6. the number and location of the association's members;
7. if relevant, what alternative financial reporting methods are proposed; and
8. the effect of the proposed extension on other regulatory requirements.

Exemption from holding AGM

Relevant considerations to be addressed include:

1. any unique reasons or special circumstances that apply;
2. whether and how full compliance with the act would place an unreasonable burden on the association; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable;
3. the extent of the impact on the interests of members of the association and how determined;
4. the size, activities and structure of the association;
5. the number and location of the association's members;
6. the reasons why the association should be given a preference in relation to other incorporated associations that include purposes that are similar to the association;

7. whether and why recurrent annual relief is sought;
8. what alternative financial reporting methods are proposed; and
9. if relevant, whether compliance would be inappropriate because an external administrator has taken over all, or a significant part of, the day-to-day operations of the association.

S 41(10) Approval of liquidator in relation to voluntary winding up

LEGISLATION

OCBA may, in relation to the voluntary winding up of an association, approve the appointment of a person who is not a registered company liquidator as the liquidator of the association.

RELEVANT MATERIALS

The following is published on OCBA's website, or is available from OCBA:

- Application for Approval as Liquidator of an Association

POLICY

Relevant considerations to be addressed include:

1. the qualifications, experience and independence of the person in relation to the task to be undertaken;
2. the person's experience in relation to similar entities;
3. the size, activities and structure of the association;
4. the adequacy of any professional indemnity insurance; and
5. any convictions or disqualifications.

S 42 Power of OCBA to require transfer of activities to a body corporate

LEGISLATION

Overview

On certain grounds, after giving notice to an association, and receiving a request from the association to transfer its undertaking to a specified body corporate, OCBA may order the transfer of undertaking to that body corporate. If OCBA makes the order, the association is dissolved, and all of its property and rights and liabilities are effectively vested in the transferee body.

If the association makes no request for transfer of its undertaking within 3-months of the notice, OCBA may consider winding up the association by certificate. Refer to s 41(1)(c) and 41(7)(d) for this winding up process.

Paragraph (1)(a) on grounds of ineligibility

The grounds to be satisfied are that the association has ceased to be an association eligible to be incorporated under the Act. Refer to s 18, 19 and 20 for eligibility to be incorporated.

If OCBA has evidence to form the opinion that the association has ceased to be eligible, it may issue the required notice of this opinion to the association.

The notice would set out that the association may request OCBA to transfer its undertaking to a specified body corporate, e.g. a company limited by guarantee or a co-operative, and that OCBA may consider winding up the association by certificate if no such request is received within 3-months of the notice: s 42(2).

Paragraph (1)(b) on other grounds

The grounds to be satisfied are that the undertaking or operations of the association:

- are being carried on by a body corporate incorporated under some other Act; or
- would more appropriately be carried on by a body corporate incorporated under some other Act.

If OCBA has evidence to form the opinion on these grounds, it may issue the required notice of this opinion to the association.

The notice would set out that the association may request OCBA to transfer its undertaking to a specified body corporate, and that OCBA may consider winding up the association by certificate if no such request is received within 3-months of the notice: s 42(2).

POLICY

Paragraph (1)(a) on grounds of ineligibility

Relevant considerations to be addressed include:

1. whether there is evidence that the association is conducting its activities so that it no longer meets the eligibility requirements of s 18 (eligibility for incorporation);

2. the circumstances, activities and events that have resulted in the ineligibility;
3. whether members of the proposed transferee body have been consulted about the proposal and, if so, what those views are and by what means they were obtained; and
4. if the transferee body were another incorporated association, how the proposed transfer of undertaking would affect the continuing eligibility under the Act of that association.

Paragraph (1)(b) on other grounds

Activities are carried on by another body

This covers the circumstances where another body corporate is already carrying on the essential purpose or purposes of the association.

Relevant considerations to be addressed include:

1. what the undertaking or operations of the association are, in relation to its principal or subsidiary objects; and
2. evidence that another body corporate is already carrying on the basic and fundamental purposes of the association.

Activities should be carried on by another body

This covers the circumstances where it would be more appropriate for another body corporate (including one to be incorporated as the specified body corporate) to carry on the essential purpose or purposes of the association.

General considerations

The Act is usually legislation chosen for a non-profit group of at least two persons where the members elect the committee of management and control the association democratically. Where an association was effectively controlled by one person (or their associates, e.g. family members), OCBA would consider whether it would be more appropriate for the association's activities to be carried out by e.g. a company limited by guarantee.

There are no strict rules to apply for considerations under these provisions, as it will depend on the circumstances. Considerations may include:

1. why other bodies-corporate legislation is considered more appropriate;
2. whether it would be usual for a body with similar activities to be incorporated under other bodies-corporate legislation;
3. the purposes of the association;
4. the composition of the committee;
5. the extent of general membership;
6. the scale and nature of activities and of dealings with the public;
7. how the association is controlled directly or indirectly and by whom;
8. whether one person has de facto control of the association; and
9. whether there are any extenuating circumstances, e.g. it is Government policy that the association continues its incorporation.

Administrative convenience

There may be circumstances where an association conducts its activities in South Australia and interstate. For example, it may be a national body with membership comprised of representatives from affiliated state bodies, and may need to be registered as a "registrable Australian body" under the Corporations Act. This does not mean that the undertaking of the association should be transferred to some other body corporate. However, there may be circumstances where the association may wish to do so for administrative convenience; it may choose to request that OCBA act under the provisions to order a transfer of the association's undertaking to a specified body corporate. If so, the relevant considerations to be addressed by that association include:

1. why other bodies-corporate legislation is considered more appropriate;
2. whether it would be usual for a body with similar activities to be incorporated under other bodies-corporate legislation;
3. any unique reasons or special circumstances that apply;
4. the extent of any national operations including the extent of activities conducted in relation to South Australia and other jurisdictions;
5. the significance of trading operations (whilst not disqualifying for eligibility under the act);

6. potential future ineligibility under the act, because of, e.g. increasingly complex and multi-faceted operations;
7. whether the transferee body prohibits payments or dispositions of income or capital to its members or associates of members (except those of a similar nature as permitted under s 55(3) of the act);
8. whether the transferee body prohibits the distribution of surplus assets to the members or former members, or associates of such persons, on a winding up (except distributions of a similar nature as permitted under s 43(1a) of the act);
9. whether it is a requirement of another act that the activities be carried out by a different type of body; and
10. the extent of members' agreement to the proposal (generally 100% agreement is required where a proposed transfer is for administrative convenience).

S 43(1a) Distribution of assets on winding up

LEGISLATION

Surplus assets

The surplus assets of an incorporated association may, with the consent of OCBA, be distributed among the members of the association at the completion of the winding up, if each of the members of the association is also an incorporated association that has identical or similar aims and objects.

"Surplus assets" means those assets that remain after the liabilities of the association have been discharged and the costs and expenses of the winding up have been paid.

POLICY

Relevant considerations to be addressed include:

1. whether all the members of the association are incorporated associations;
2. the aims and objects of each of those incorporated member associations;
3. the aims and objects of the association; and
4. whether each of the incorporated member associations has aims and objects identical or similar to the aims and objects of the association.

S 43A Application for deregistration

LEGISLATION

Overview

This section enables an incorporated association with surplus assets of \$5000 or less to apply for deregistration. The association may distribute its surplus assets as an alternative process to dissolution by a members voluntary winding.

“Surplus assets” means those assets that remain after the liabilities of the association have been discharged and the costs and expenses of deregistration have been paid.

Who can apply

An application for deregistration may be made by:

- a person authorised by special resolution to make the application: s 43A(1); or
- at least two people where it is impracticable to authorise a person because the association no longer has an active membership: s 43A(2); in this case, the applicants must be an officer or member of the association, or a person who has a proper interest in the application. OCBA must be of the opinion that the person has a proper interest in the application: paragraph (2)(c).

Subsection (6) Approval to the manner or proposed manner of distribution

Where an application is made under subsection (2), and the rules are silent on the manner of distribution of surplus assets, then the two people making the application may seek the approval of OCBA to the manner or proposed manner of the distribution: s 43A(5). OCBA must, in approving such a manner of distribution, have regard to the objects of the association and any relevant provisions of the rules.

Public submissions

OCBA must invite public submissions in relation to an application for deregistration, within one month of the receipt of the application. Any submissions must be made within one month of OCBA’s notice of invitation, which is published in The Advertiser (or other newspaper circulating generally throughout SA): s 43A(7).

Subsection (8) Application where no distribution has occurred

After one month of the notice in The Advertiser, OCBA may approve the application for deregistration if satisfied that:

- the proposed manner of distribution of surplus assets is consistent with the requirements under s 43 for distribution of assets upon winding up; or
- OCBA has approved the proposed manner of distribution under s 43A(6); and
- no member of the public will suffer undue hardship as a result of deregistration.

Subsection (9) Application where distribution has occurred

After one month of the notice in The Advertiser, or after OCBA receives satisfactory evidence of the manner of distribution of surplus assets (whichever is the later), OCBA must approve the application for deregistration if satisfied that:

- the manner of distribution of surplus assets was consistent with the requirements under s 43 for distribution of assets upon winding up; or
- OCBA has approved the manner of distribution under s 43A(6); and
- no member of the public will suffer undue hardship as a result of deregistration.

Notice of deregistration

An association is dissolved on publication by OCBA of a notice in the *Gazette*. OCBA must publish the notice within one month of approving the application for deregistration: s 43A(10) & (11).

RELEVANT MATERIALS

The following is published on OCBA's website, or is available from OCBA:

- [Form 9C](#): Application for deregistration of incorporated association with surplus assets not exceeding \$5,000.

POLICY

Paragraph (2)(c) Whether the person has a proper interest in the application

Relevant considerations to be addressed include that the person can demonstrate they have had an ongoing relationship with and understanding of the association, e.g. in a professional capacity as a solicitor or auditor.

Subsection (6) Approval to manner or proposed manner of distribution

Relevant considerations to be addressed include:

1. the objects of the association and any other relevant provisions of the rules;
2. any unique reasons or special circumstances that apply where the manner of distribution would be inconsistent with the objects of the association;
3. whether the distribution is consistent with s 43(1), i.e. it is not lawful to distribute among members, former members, or associates of such persons; and
4. whether the distribution is consistent with s 43(1a), i.e. to members of the association if each of the members is also an incorporated association that has identical or similar aims and objects.

Subsection (8) Approval of application where no distribution has occurred

Relevant considerations to be addressed include:

1. whether OCBA has approved the proposed manner of distribution under s 43A(6);
2. the objects of the association and any other relevant provisions of the rules;
3. the size of the proposed distribution;
4. whether the proposed manner of distribution is consistent with s 43(1), i.e. it is not lawful to distribute among members, former members, or associates of such persons;

5. whether the proposed manner of distribution is consistent with s 43(1a), i.e. to members of the association if each of the members is also an incorporated association that has identical or similar aims and objects; and
6. whether any member of the public will suffer undue hardship because of the deregistration.

Subsection (9) Approval of application where distribution has occurred

Relevant considerations to be addressed include:

1. whether OCBA has approved the manner of distribution under s 43A(6);
2. the objects of the association and any other relevant provisions of the rules;
3. the size of the proposed distribution;
4. any satisfactory evidence received by OCBA of the manner of distribution of surplus assets;
5. whether the manner of distribution is consistent with s 43(1), i.e. it is not lawful to distribute among members, former members, or associates of such persons;
6. whether the manner of distribution is consistent with s 43(1a), i.e. to members of the association if each of the members is also an incorporated association that has identical or similar aims and objects; and
7. whether any member of the public will suffer undue hardship because of the deregistration.

S 44 Defunct associations

LEGISLATION

Subsections (1) and (2) cancellation of incorporation

OCBA may by notice require an association to show good cause why it should not be dissolved where OCBA thinks that the association is defunct.

After 1 month of the notice, if satisfied that the association should be dissolved, OCBA may by Gazettal notice cancel the incorporation of the association, whereupon the incorporated association is dissolved.

Subsection (3) reinstatement of incorporation

If OCBA is satisfied an association was dissolved under s 44(2) because of an error on OCBA's part, it may reinstate the association as an incorporated association.

The association is then taken to have continued in existence as if it had not been dissolved, and any property, which is still vested in OCBA under s 45, is revested in the association.

Note that where an association was deregistered following a winding up, the Corporations Act S 601AH(1) Reinstatement of registration^{5F} applies. In addition, when there has been no error by OCBA, and reinstatement of registration under s 601AH(1) is not applicable:

- an application for reinstatement may be made to the court under applied s 601AH(2) in circumstances where an association was deregistered following winding up; or
- a private application to the court for reinstatement may need to be considered.

POLICY

Cancellation of incorporation

Where an association is not being wound up

Relevant considerations to be addressed include:

1. whether the association is not carrying on any activities or is not in operation;
2. whether the association has ceased to have any purpose or function (this must carry sufficient conviction that the association is at an end and not merely dormant);
3. whether the association's periodic return is at least 30 months late;
4. whether the association has not lodged any other documents under the Act in the last 3 years;
5. the extent of the association's general membership, office bearers and committee membership;
6. the financial position of the association, if known;
7. the existence of any property that would vest in OCBA under s 45 if the association were dissolved; and
8. whether an application ought more properly proceed under S 43A Application for deregistration.

Where an association is being wound up³

Relevant considerations to be addressed where an association is being wound up, include:

1. whether OCBA has reason to believe that:
 - a. the liquidator is no longer acting and another liquidator may not be appointed; or
 - b. the association's affairs have been fully wound up and a return that the liquidator should have lodged is at least 12 months late; or
 - c. the association's affairs have been fully wound up in insolvency under s 41 and the association has no property or not enough property to cover the costs of obtaining a Court order for the association's deregistration;
2. the financial position of the association, if known; and
3. whether an application ought more properly proceed under S 43A Application for deregistration.

Reinstatement of incorporation

Relevant considerations to be addressed include:

1. evidence the association was dissolved as a defunct association under s 44(2);
2. what OCBA's error was that resulted in the association being dissolved; without limiting, this should include whether the error was because of a matter being overlooked and whether the error was in relation to the requirements of subsection (1) or (2);
3. evidence that the association is not defunct; without limiting, this should include:
 - a. evidence that the association's objects or purposes continue to be relevant to its members; and
 - b. the extent of the association's general, and committee, membership;
4. whether the association would be solvent if were to be reinstated;
5. whether the association has lodged any outstanding returns or documents under the Act with late fees; and
6. whether any property is still vested in OCBA under s 45;

³ Section 601AB(2) of the Corporations Act provides that ASIC may decide to deregister a company being wound up in certain circumstances. Note that this is not applied legislation for associations. It was determined that under similar circumstances, the matter may be dealt with administratively under s 44 for OCBA to form the opinion that an association is defunct

S 44A OCBA to act as representative of dissolved association

LEGISLATION

After an association has been dissolved, if OCBA is satisfied that:

- if the association still existed, it would be legally or equitably bound to carry out, complete or give effect to some dealing, transaction or matter; and in order to do so
- some purely administrative act should have been done by the association, or be done by it if it still existed;

OCBA may represent the association or its liquidator in order to do that act or to cause that act to be done.

Any act must be merely administrative, and not of a discretionary kind. It may include completion of a contract for sale of land or execution of a transfer document where no discretion or judgment by OCBA would be involved.

POLICY

Relevant considerations to be addressed include:

1. evidence that the association was dissolved;
2. what the dealing, transaction or matter was or is;
3. evidence that if the association existed, it would be legally or equitably bound to carry out the act; and
4. evidence that the act is purely administrative, not being of a discretionary kind.

S 46 Disposal of outstanding property of former association

LEGISLATION

Property vests in OCBA

Any estate or interest in outstanding property of an association that is dissolved under the Act vests in OCBA: s 45.

Property vested is subject to all charges, claims and liabilities imposed on or affecting that property, e.g. any rates or taxes to which the property would have been subject had the property continued in the possession, ownership or occupation of the association: s 47.

Disposal of outstanding property

If OCBA is provided with satisfactory proof that there is outstanding property of a beneficial nature (and not merely held in trust) vested in it under s 45, OCBA may get in, sell or otherwise dispose of or deal with the property as it sees fit.

Outstanding property may include real property, or an undischarged mortgage of which the association was mortgagee. Dealing with the property may include the transfer of real property, or the discharge of a mortgage.

The power to deal with the property may be exercised either solely or together with any other person, by public auction, public tender or private contract and in such manner, for such consideration and upon such terms and conditions as OCBA thinks fit. The power includes the power to rescind a contract, to resell or otherwise dispose of, or deal with, the property and the power to make, execute, sign and give such contracts, instruments and documents as OCBA thinks necessary.

A 5% commission is payable to OCBA (reg 11) for the exercise of the powers, from any income derived from the proceeds of sale or other disposition of the estate or interest concerned. OCBA may apply the moneys received in the exercise of any power in defraying the costs and expenses of and incidental to the exercise of that power. The remainder of the moneys are to be paid to the Treasurer.

POLICY

Disposal of outstanding property

Relevant considerations to be addressed include:

1. evidence that the association was dissolved;
2. evidence of the existence of the property, its value and its beneficial ownership by the former association;
3. any charges, claims or liabilities on the property;
4. what the dealing in the property is that OCBA should carry out and how it should be exercised;
5. satisfactory evidence to support the proposed dealing;
6. if relevant, proof that a mortgage has been repaid;
7. if relevant, proof that another person is entitled to the property; and
8. whether the dealing should be exercised solely by OCBA or together with any other person.

S 49A General power of exemption of OCBA

LEGISLATION

Extension or Exemption

OCBA may, on the application of an association, or a person authorised by an association to make an application:

- extend any limitation of time prescribed by or under the Act whether or not the prescribed period has expired; or
- exempt the association or any officer from the obligation to comply with any provision of the Act.

An extension or exemption may be conditional, and at any time varied or revoked by OCBA.

Note that if an extension of time is sought to hold the AGM of a prescribed association before the obligation to hold the AGM has crystallised (within 5 months after the end of the financial year, or in the case of the first AGM - within 18 months after incorporation), the application should be made under S 39 Annual general meeting.

In addition, if an exemption is sought in relation to a provision of the Act for which there is a specific exemption power, the application should be made under that section, e.g. see S 38 Exemption in relation to accounts and audit requirements of a prescribed association.

POLICY

Relevant considerations to be addressed include:

For an extension of time

1. the relevant provision of the Act;
2. the extension of time sought;
3. any unique reasons or special circumstances that apply;
4. whether and how full compliance with the act would place an unreasonable burden on the association; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable, e.g. because of unforeseen changes in crucial personnel or unexpected significant events.
5. the extent of the impact on the interests of members and creditors of the association and how determined;
6. the size, activities and structure of the association;
7. the number and location of the association's members;
8. if relevant, what alternative financial reporting methods are proposed; and
9. any effect of the proposed extension in relation to other requirements of the Act.

For an exemption

1. the relevant provision of the Act;
2. the extent of relief sought;
3. what alternative obligations are proposed;
4. any unique reasons or special circumstances that apply;
5. whether and how full compliance with the act would place an unreasonable burden on the association; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable;
6. the size, activities and structure of the association;
7. the extent of the impact on the interests of members and creditors of the association and how determined;
8. the number and location of the association's members; and
9. how and to what extent any public interest may be affected.

For an exemption for the public officer not to be resident in SA (other than temporarily): s 56(2) and (3)

1. the extent of relief sought;
2. any unique reasons or special circumstances that apply;
3. whether and how full compliance with the act would place an unreasonable burden on the association; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable;

4. how the duties imposed on the public officer under the Act and rules of the association would be affected by the person's residence interstate;
5. the size, activities and structure of the association; and
6. the number and location of the association's members.

S 53 Approval of invitation to invest or deposit money with association

LEGISLATION

Investing or depositing

Persons who are not members of an association do not have access to the same information as members of the association. Where an association seeks to raise money from non-members, in circumstances where there is an invitation, they must be provided with sufficient information, including the financial position of the association in order to make an informed decision before investing in or depositing with the association. This does not apply where money is provided as a gift to the association.

Before an association makes an invitation to a non-member to invest in or deposit money with the association, the association must issue to the person a disclosure statement that has been approved by OCBA. Otherwise, the transaction is void.

A deposit with an association may be similar to one made with a bank, building society or credit union. However, as an association is not any of these, the term "deposit" should be interpreted widely including putting or leaving money with an association or money lent to an association. An investment may include where the funds provided would produce some profitable return, especially of interest or income.

Disclosure

A disclosure statement must set out:

- the name and principal objects of the association from the rules of the association;
- the names, addresses and occupations of the committee members;
- the total amount of deposits sought;
- the purposes for which the deposits (if obtained) will be applied;
- particulars of any security to be given for the deposits;

- any rate of interest payable on the deposits;
- the terms of repayment of the deposits;
- details, as at the last balance date, of the association's:
 - current assets and liabilities;
 - other assets and liabilities; and
 - net tangible assets; and
- any operating profit and extraordinary items after income tax for the association's last financial year.

A disclosure statement must not contain any statement that is false, or misleading in its context, or omit anything that is required to be included. OCBA may give its approval to an invitation on conditions, and the approval may be varied or revoked.

POLICY

Relevant considerations to be addressed include whether:

1. any disclosure document is required in relation to the invitation under the *Corporations Act*, and if so a copy should be provided;
2. the association is required by the Act or its rules to have accounts prepared and audited, and if so a copy of the last set of accounts and any auditor's report should be provided;
3. the financial position, as required by paragraph (2)(h), is consistent with the accounts provided;
4. details of any interest payable, as required by paragraph (2)(f), clearly set out the manner of calculation;
5. the disclosure statement sufficiently addresses the other requirements of subsection (2); and
6. if the invitation relates to an investment with the association, the disclosure statement sufficiently sets out:
 - a. the total amount of investment sought;
 - b. the purposes for which the investment (if obtained) will be applied;
 - c. particulars of any security to be given for the investment;
 - d. any rate of interest payable on the investment; and
 - e. the terms of repayment of the investment.

S 55 Prohibition against securing profits for members

LEGISLATION

Overview

A distinguishing feature of associations legislation is that a member must not make a financial gain from the association. This prohibition extends to any associates of the member. An associate of another person is defined in s 3(6). See also Profits for members or engaging in trade or commerce s 18(5), (6).

Subsection (1) No profit for members

Unless OCBA approves, an association must not conduct its affairs in a manner calculated to secure a pecuniary⁴ profit for its members as a whole, or for any of its members, or for associates of the members or any of them.

Subsection (2) No payments to members

Unless OCBA approves, an association must not make a payment from its income or capital, or dispose of any of its assets in specie⁵, to its members or to associates of the members.

Subsection (3) Exceptions to payments

The following exceptions apply to the prohibition on payments to members:

1. the reasonable remuneration of a member of the association for work done by the member for or on behalf of the association; or
2. any payments or dispositions that are incidental to activities carried on by the association in accordance or consistently with its objects.

Approvals

An approval may be conditional, and at any time revoked or varied by OCBA.

POLICY

⁴ "Pecuniary" Relating to or involving money

⁵ "In specie" In the same or like form or kind

Subsection (1) Approval to secure pecuniary profit for members

Relevant considerations include:

1. the size, activities and structure of the association;
2. how the association intends conducting its affairs in a manner determined to secure a pecuniary profit for members or their associates;
3. the extent of the pecuniary profit, and the number of members or their associates affected by the intended conduct, in relation to the operations, and membership, of the association;
4. any unique or special reasons that may apply to the intended conduct; and
5. whether and how full compliance with the act would place an unreasonable burden on the association; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable.

Note that applicants have a high standard of proof to overcome in respect of points 5.

Subsection (2) Approval to make payments to members

Relevant considerations to be addressed in any application include:

1. the size, activities and structure of the association;
2. the nature and extent of the intended payments or dispositions, and the number of members or their associates affected, in relation to the operations, and membership, of the association;
3. the extent of any incidental pecuniary profit to be made by members or associates of members;
4. any unique or special reasons for the intended payment or disposition of assets;
5. whether and how full compliance with the act would place an unreasonable burden on the association; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable.

Note that applicants have a high standard of proof to overcome in respect of points 5.

OCBA has given an approval in circumstances including where payments to members constituted repayments of amounts subscribed by those members for a special project of the association that did not eventuate, and the amounts subscribed were additional to subscriptions payable at regular intervals by those members.

S 66 Waiver or reduction of fees in respect of lodging documents

LEGISLATION

The fees payable under the Act to OCBA are set out in Schedule 2 to the Associations Incorporation Regulations: reg 7, and are published on OCBA's website www.ocba.sa.gov.au.

OCBA may:

- waive or reduce, in a particular case or classes of cases, fees that would otherwise be payable; and
- refund, in whole or in part, any fee paid.

POLICY

Relevant considerations to be addressed include:

1. the relevant provision of the Act and the fee payable;
2. the functions to be performed by OCBA under the provision;
3. the extent of fee relief or refund sought;
4. if applicable, the class of association for which the relief or refund is sought;
5. the size, activities and structure of the association or associations;
6. any unique reasons or special circumstances that justify payment being waived, reduced or refunded; and
7. whether and how full compliance with the requirements would place an unreasonable burden on the association; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable.

Applicants have a high standard of proof to overcome in respect of points 6 and 7.

Corporations Act Applied Provisions S 601AH(1) Reinstatement of registration⁶

LEGISLATION

⁶ Part 5A.1 (and Part 5.5) applied by s 41(2) of the Act. See reg 10 for modifications

Deregistration – following winding up

OCBA must deregister an association if:

- 3 months have passed since the association's liquidator lodged a return under s 509⁷; and
- no order under subsection 509(6)⁸ has been made during that period.

An association is dissolved on deregistration under this section: s 601AC.

⁷ Voluntary winding up - Final meeting and deregistration

⁸ Voluntary winding up - OCBA must deregister on a day specified by the Court

Subsection (1) Reinstatement of registration

OCBA may reinstate the registration of an association, if OCBA is satisfied that the association should not have been deregistered under the applied s 601AC.

OCBA must give notice of a reinstatement in the *Gazette*. If OCBA exercises its power in response to an application by a person, OCBA must also give notice of the reinstatement to the applicant.

The association is then taken to have continued in existence as if it had not been deregistered, and any property that is still vested in OCBA under s 45 of the Act, is revested in the association. A person who was a committee member of the association immediately before deregistration becomes a committee member again from the time when OCBA reinstates the association.

In addition, an association must be reinstated upon order of the court under applied s 601AH(2), in circumstances where an association was deregistered following winding up.

Note that S 44 Defunct associations applies where there has been an error on OCBA's part in dissolving a defunct association under s 44(2).

POLICY

Reinstatement of registration

OCBA cannot reinstate registration just because it may be considered convenient; OCBA must be satisfied the association should not have been struck off.

In addition, where there have been dealings with the property of a deregistered association, which give rise to third party rights, reinstatement will generally need to proceed through a court.

Relevant considerations to be addressed include:

1. evidence that the association was deregistered under the applied s 601AC;
2. whether it was an error that resulted in the association being deregistered and by whom; without limiting, this should include, whether the error was because of a matter being overlooked, and whether the error was in relation to the requirements of the applied s 601AC;
3. other reason/s why the association should not have been deregistered under the applied s 601AC; and
4. whether the association would be solvent if were to be reinstated;

5. whether the association has lodged any outstanding returns or documents under the Act with attendant late fees; and
 6. whether any property is still vested in OCBA under s 45 of the Act.
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The Associations Incorporation Act 1985 is available for purchase from:

Service SA Government Legislation+ Outlet
Lands Titles Office
101 Grenfell St, Adelaide SA 5000
Mon - Fri 9:00 am - 5:00 pm
Telephone: 13 23 24
Facsimile: 8204 1909
<http://www.shop.service.sa.gov.au>
