



cole corporate

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Associations Incorporation Consultation
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Re: Feedback on Bill and Draft Model Rules

I apologise for my lateness in responding but trust that the below comments may nevertheless be taken into consideration in your ongoing review and analysis.

I am actively involved in a number of Tier 1, Tier 2 and Tier 3 associations including holding the position of Chair. Through my consultancy company which trades as "cole corporate" I also advise on governance related issues relevant to incorporated associations as well as being a conference and seminar speaker on governance related issues including to not for profit community and charitable organisations.

Subject to the comments below, I commend the initiative to clarify many of the shortcomings currently evident in the 1987 legislation. My below comments have been sub-categorised between the Model Rules and the Bill itself.

1. Model Rules

(a) Rule 17.1

The 20% threshold could be a challenging number for many disgruntled members. Members need reasonable opportunity and rights to formally hold their committees accountable. I note a much lower threshold applies under the Corporations Act although appreciate that different considerations apply.

Recommendation: 10% is the appropriate threshold.

(b) Rule 11.5(b)

There is an unfortunate trend emerging internationally for board/committee appointments to be for annual periods only. This trend has been prompted by the constitutional/statutory inability in those offshore jurisdictions to remove a director/officer within the term of their appointment. This is not the case in Australia.

Annual appointments risk:

- (i) focus by associations on "short termism";
- (ii) the loss of corporate memory;
- (iii) increases in administrative costs and loss of efficiency as new members "get up to speed" with their understanding of the workings of the association.
- (iv) ineffective succession planning.

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Recommendation: At least 2 years (50% to retire annually), if not 3 years ($\frac{1}{3}$ to retire annually), be the standard.

(c) Indemnity for Office bearers

The Department's commentary mentions the removal of this provision due to the affordability of insurance. Indemnification and insurance are 2 separate issues.

Community leaders should be encouraged to take up positions of leadership on worthwhile community associations. The lack of indemnification for liabilities (including legal expenses in funding a spurious claim) incurred in properly acting in their office will be a deterrent to these people. It represents an unjustified risk transfer from the association to the individual officer.

Associations often seek D&O insurance cover for their officers to protect the association and the officer. Such insurance cover can be expensive (current reasonable cover for a small association is around \$800 p.a.). D&O insurance is not compulsory. It is a decision taken by the association. If there is no indemnity obligation by the association to the officer, then many existing D&O insurance policies effected by associations for their and their officers' benefit, might not even respond to a claim.

Recommendation: Re-introduce an indemnity provision.

2. Association Incorporation Bill 2014

(a) Part 4 Division 2 Ss.43 and 44

The term "material personal interest" does not appear to be defined.

Usually conflicts of interest arise in 2 circumstances:

- (i) duty to the association v's personal interest of the officer;
- (ii) duty to the association v's duty of the officer to another person/organisation eg. where the officer is an officer of 2 associations/organisations whose interests may compete

Although I am happy to leave open what is "material" (as this will vary depending on the circumstances of each case and it would be dangerous to seek to define it too closely), the same cannot be said of "personal interest". In fact merely by referring to "personal interest", can be misleading to a lay person who might not otherwise appreciate that a "duty v's duty" conflict can be as compromising in a fiduciary duty context.

Recommendation: Define "personal interest" to also include a "duty v's duty" fiduciary conflict.

(b) Section 41(3) – Handing over Documents

The provisions are unduly onerous in their practical effect and warrant material change, although their spirit is sound. They oblige a management committee member of his/her own volition "as soon as practicable" to deliver up all association documents and records (broadly defined), including a copy of any relevant document or record on his/her computer.

From my own personal experience, if a person has been on a management committee of an active association for some years, this could be very burdensome and expensive not only to the officer, but also to the association. I know I would hold gigabytes of data on my personal computer concerning one association I chair, all of which is also held on the computer records of the association and therefore copies of which will not be required by the association.

Further, if the officer has died, the obligation falls upon the personal representative, who may not even be aware that the deceased was an officer of the relevant association. A considerable penalty is then imposed of \$2,750 for failure to strictly comply.

Recommendation: Section 43(3) be amended so that the obligation only arises where the association has in fact requested in writing the delivery up of the relevant documents and records.


(c) Penalties generally

Quite significant penalties are prescribed throughout, sometimes for relatively minor administrative transgressions. I accept the desire to discourage breaches of the Act. However a penalty of \$'000s could be disconcerting to the ageing association secretary of a Tier 1 community bridge club.

Recommendation: Penalties be reviewed generally perhaps with differential penalties if the relevant association is a Tier 1, Tier 2 or Tier 3 entity. "Penalty units" may also be used to allow the amount of penalty to be addressed more easily in the future due to inflationary pressures.

I trust that the above comments and observations are of use. I would be happy to discuss them further in person should you so desire.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Steven Cole', with a stylized, cursive script.

Steven Cole

Encls.