



IMPORTANT CHANGES TO LAWS REGULATING INCORPORATED ASSOCIATIONS

Simone Ball, a lawyer from PilchConnect, explains in detail some of the key changes to legislation for incorporated associations that were flagged in the last edition of EYE.

In April 2012, a new Act for incorporated associations was passed, changing the laws that apply to Victorian incorporated associations. These changes are due to come into effect in either November or December.

At the time of writing this article (4 October) we know that the new Act will commence on 26 November 2012, and the draft model rules have been released for consultation. We have assumed that at the time of reading this article, the new Act will have been introduced, or will be close to being introduced.

Some changes are significant, and if you are an incorporated association, now is the time to get to know the changes and the impact they will have on your organisation.

Do the changes apply to my organisation?

If your organisation is a Victorian incorporated association, the changes apply to you. The changes do not apply to you if your organisation is incorporated as another type of legal entity, such as a cooperative.

If you are unsure about your legal structure, you can check whether your organisation is registered as an incorporated association by contacting Consumer Affairs Victoria (CAV) or searching its database at www.consumer.vic.gov.au

What are the most significant changes?

The new Act:

- ▶ introduces new concepts of 'secretary' and 'office holder'
- ▶ makes changes to duties of committee members and office holders
- ▶ changes reporting requirements
- ▶ introduces an indemnity for office holders, and
- ▶ introduces new model rules.

'Public officer' replaced with 'secretary'

The new Act replaces all references to 'public officer' with 'secretary'.

The public officer will now be known as the 'secretary' and will automatically have all the responsibilities of the secretary under the new Act.

Unfortunately this may be confusing if your organisation already has a public officer and someone else with the title of secretary. If this is the case, we recommend you merge the roles of public officer and secretary so that the same person performs both roles, or change the name of your current secretary to something else – such as 'administrative officer' or 'assistant secretary'.

The new Act allows the secretary to live anywhere in Australia (not just Victoria).

For more information about the responsibilities of a secretary, see PilchConnect's guide for secretaries at www.pilch.org.au/incguide/

New concept: office holder

The new Act introduces a new concept – 'office holder'. The concept captures different people in your association and is wider than just the committee or board.

An 'office holder' can be:

- ▶ a member of the committee
- ▶ the (new) secretary, or
- ▶ a person, including an employee of the association, who is involved in key decisions that affect the operations of an association or who is influential in the affairs (financial or otherwise) of the association ▶▶



New duties for office holders and disclosing conflicts

The common law (judge-made law) already imposes legal duties on those governing an incorporated association. Common-law duties are commonsense obligations that are relatively easy to comply with.

Now the new Act clarifies these legal duties, including which ones apply to current and former office holders. Penalties may apply if duties are breached (and there are defences to the penalties).

The duties include the:

- duty to not make improper use of information or position
- duty to exercise powers and discharge duties with reasonable care and diligence
- duty to exercise powers and discharge duties in good faith and for a proper purpose
- duty to prevent the association from trading while it is insolvent (an association is 'insolvent' when it cannot pay its debts when they are due).

The new Act also introduces changes to the requirements for disclosing and managing conflicts of interest at committee level. Interests to disclose are wider and now include financial and non-financial interests.

For more information on legal duties see PilchConnect's guide to legal duties for not-for-profit committee or board members at: www.pilch.org.au/govguide/

Indemnity for office holders

A significant change, and good news for office holders, is that associations must indemnify (pay for or reimburse costs) office holders against any liability incurred in good faith in the course of performing their role in the organisation.

Your organisation may need to consider whether you need to increase your insurance to cover this new indemnity.

Use of technology at committee and general meetings

Changes allow for meetings to be convened using technology, such as Skype or phone conferencing, provided that the technology allows meeting participants to 'clearly and simultaneously communicate with each other'. This will make it easier for organisations that may struggle to get the required number of attendees at meetings, and for members who are often out of town.

If using technology, you should make sure that all participants can communicate with each other during the meeting (so if your Skype connection keeps dropping out – this will not meet the new Act's requirements!).



Changes to rules and model rules

Your organisation's rules (or constitution) will need to be reviewed whether you have your own drafted rules or use the model rules.

The new Act has a number of matters that must be included in an association's rules (these are all included in the model rules). If your rules are silent on a required matter, the relevant model rule will automatically apply.

You also need to be aware that if your rules are inconsistent with a requirement of the new Act, the new Act will override what your rules say.

What if we have our own rules?

You do not need to update your rules immediately, but to avoid confusion between what your rules say and what actually applies, we recommend your association review and update its rules, or adopt the new model rules, when it's next appropriate. PilchConnect has information on its website to assist organisations with this process.

What if we use the current model rules?

An association can continue to operate under the old model rules for up to 12 months after the new Act commences. Within the 12 months, an association can either:

- ▶ adopt the new model rules, or
- ▶ change its rules with approval from CAV.

If no action is taken, the new model rules will automatically replace the old model rules 12 months after the new Act started.

If you do decide to adopt the new model rules, it is important to make sure they are suitable for your organisation and contain any necessary clauses for taxation endorsement (if applicable to your organisation).

Other important changes:

- ▶ The new Act articulates what elements of natural justice must be followed when applying disciplinary or grievance procedures
- ▶ The new Act clarifies the rights of members of associations, including the circumstances in which members can inspect or get a copy of the rules, or request that their details not be publicly available.

PilchConnect provides free and low-cost legal assistance to not-for-profit community organisations and advocates on their behalf. The PilchConnect information webportal has a range of resources to assist Victorian Incorporated Associations. www.pilchconnect.org.au

