Queensland Government

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9 DEC 2019

Ms Leanne Linard MP
Chair
Education, Employment and Small Business Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Ms Linard

Thank you for your letter dated 2 December 2019 regarding the Associations Incorporation and Other Legislation Amendment Bill 2019 (the Bill) which has been referred to the Education, Employment and Small Business Committee (the Committee).

The Department of Justice and Attorney-General is pleased to assist the Committee in its scrutiny of the Bill. As requested, I have enclosed an overview briefing outlining the policy drivers that have led to the Bill, and the proposals in the Bill, including their purpose and effect. I also refer the Committee to the explanatory notes for the Bill.

Should your officers wish to discuss the enclosed briefing further, they may contact Mr Martin Scott, Director, Office of Regulatory Policy, on (07) 3738 8343 or at: martin.scott@justice.qld.gov.au.

I trust this information is of assistance.

Yours sincerely

David Mackie
Director-General

Enc.

Briefing to the Education, Employment and Small Business Committee

Associations Incorporation and Other Legislation Amendment Bill 2019

1. Background

Queensland's not-for-profit (NFP) sector encompasses organisations that pursue a diverse range of charitable and not-for-profit purposes such as community development, disaster relief, education and employment training, and health and medical research. It includes organisations of all sizes from small local sporting and cultural volunteer groups to large providers of essential social and welfare services.

Associations Incorporation Act 1981

The *Associations Incorporation Act 1981* (AI Act) provides a means by which NFP associations can choose to incorporate in order to obtain certain legal advantages in exchange for certain legal responsibilities.

Incorporation establishes the association as a separate legal entity distinct from its members, and provides the association with the same rights and responsibilities as an individual. As a result, an incorporated associations can, in its own corporate name, do things such as hold property, enter into contracts, borrow money and appear in court.

Incorporation also provides the members and management committee of the association with protections from the debts and liabilities incurred by the association.

In exchange for these benefits, incorporated associations are required to meet certain obligations as required by the AI Act. Significantly, associations are required to conduct themselves in accordance with a set of rules. Rules may be developed by the association itself, but must meet the requirements of the AI Act and its subordinate legislation. Alternatively, the association may choose to adopt the model rules contained at schedule 4 of the Associations Incorporation Regulation 1999.

The AI Act explicitly provides (at section 71) that the rules of the incorporated association form a contract between the members of the association and the association itself. Appropriately, proposed changes to the rules of an association can only be progressed through a special resolution passed at a general meeting of the association by the votes of ¾ of the members present and entitled to vote. The other key obligation of incorporation is the requirement to submit annual financial reports to the state regulator, being the Office of Fair Trading (OFT). This requirement serves to instil a degree of accountability in incorporated associations. Additionally, the ability for members of the public to obtain a copy of the financial reports submitted by incorporated associations helps to ensure a degree of transparency in the financial management of associations.

As at 1 October 2019, there were 22,701 incorporated associations currently registered with the Office of Fair Trading.

Incorporation is voluntary and there are other corporate structures that associations may consider as a means of obtaining legal identity. For example, NFP organisations may operate as companies, cooperatives, indigenous corporations and trusts. They may also choose to remain unincorporated.

Collections Act 1966

Many NFP organisations rely on donations to achieve charitable and other goals. Fundraising is therefore of vital importance to many Queensland NFPs. In Queensland, charitable fundraising is regulated under the *Collections Act 1966*, and it is an offence to conduct an appeal for support for a charitable or community purpose except in the ways authorised under that Act.

The Collections Act allows an appeal for support to be conducted by charities who choose to register under the Act, associations with a community purpose objective that is sanctioned under the Act, and other entities or individuals who wish to fundraise for a sanctioned community purpose on a one-off basis.

The authorisation to fundraise is, like the benefits of incorporation, also accompanied by a requirement to submit annual financial reports to the OFT.

There is no requirement for an association to be incorporated in order to obtain an authorisation to fundraise. However, given that incorporation is a popular way for charities and community associations to obtain legal identity, it can be expected that a number of Collections Act entities are in fact also incorporated associations.

To help alleviate the regulatory burden associated with an incorporated association having to submit financial reports under both the AI Act and the Collections Act, the OFT accepts an audited financial statement submitted under the Collections Act as meeting the association's annual financial reporting obligations under the AI Act (as an audited financial statement is the highest level of assurance required under the AI Act).

As at 15 October 2019, 4,606 Collections Act entities were authorised to fundraise in Queensland.

The Australian Charities and Not-for-profits Commission

Charities have historically been regulated by states and territories. However, since 2012, the Commonwealth Government, through the Australian Charities and Not-for-profits Commission (ACNC), has been a partial regulator of the charitable sector.

The ACNC's regulatory coverage of the NFP sector extends only as far as registered charities that have voluntarily registered with the ACNC in order to claim Commonwealth tax concessions from the Australian Taxation Office. Importantly, ACNC registration does not provide organisations with legal identity, and does not authorise fundraising in any way. Organisations therefore register with the ACNC for entirely different reasons than they would register with a State Government for incorporation or fundraising approval.

In return for the taxation benefits that registration with the ACNC provides, registered charities are required to adhere to certain governance standards and submit annual financial information to the ACNC.

It is estimated that nearly 17% associations incorporated in Queensland and 70% of Collections Act entities are registered with the ACNC and therefore fall within the ambit of both the OFT and the ACNC for annual financial reporting purposes.

It should be noted that as some Collections Act entities will also be incorporated associations, there is some overlap in the estimated number of incorporated associations and the estimated number of Collections Act entities registered with the ACNC.

2. Purpose of the Bill

The Associations Incorporation and Other Legislation Amendment Bill 2019 (the Bill) arises from the Department of Justice and Attorney-General's (DJAG) review of the legislation governing Queensland's NFP sector.

The AI Act has not undergone substantial reform in a number of years. Between 2010 and 2016, DJAG sought to canvass community opinion on potential changes to the Act via the release of two public discussion papers and the establishment of a Not-for-profit Red Tape Review Reference Group (NFPRRG), with the aim of resolving a number of issues important to the NFP sector to improve its efficiency and effectiveness.

The Bill primarily seeks to progress amendments to the AI Act previously identified as being needed or beneficial to incorporated associations. The Bill also amends the Collections Act to the extent necessary to achieve consistency with the proposed amendments.

Collectively, the amendments broadly aim to reduce regulatory burden for incorporated associations and charitable entities. They also seek to improve the internal governance of incorporated associations, clarify existing legislative requirements, streamline government processes, and consolidate the investigation powers of OFT.

3. Key proposals

3.1 Reducing regulatory burden

3.1.1 Financial reporting

The most significant red tape reduction measure proposed by the Bill relates to the financial reporting obligations of certain incorporated associations and charitable entities.

As will be noted from the background section of this briefing, the emergence of the ACNC into the regulatory landscape in 2012 initially created a situation in which a number of incorporated associations and fundraising entities must submit annual financial statements to both a State regulator (as an obligation arising from incorporation and/or fundraising approval) and the ACNC (in exchange for eligibility for certain Commonwealth taxation benefits).

This duplicated reporting requirement has been of significant concern to the sector, which has advocated very strongly for States and Territories to recognise the ACNC reporting obligations of some NFPs. As a result, all other State and Territory jurisdictions have moved to at least partially address the situation, either by exempting ACNC-registered entities from the State-based reporting requirements, or by aligning those reporting requirements with those of the ACNC.[1]

Accordingly, the Bill proposes to provide a framework in which the duplicated reporting requirement can be addressed both for associations incorporated in Queensland and entities authorised to fundraise in Queensland (noting as above that the issue affects an estimated 16.5% of Queensland incorporated associations and 70% of Collections Act entities).

[1] While all other jurisdictions have by now moved to recognise ACNC-reporting requirements in their Associations Incorporations legislation, Victoria still requires financial reports under its fundraising legislation regardless of ACNC registration. Western Australia and New South also continue to require financial reports from ACNC-registered entities under fundraising legislation, but have indicated they are in the process of removing this requirement.

To do this, clauses 21 to 24 of the Bill changes the existing financial reporting requirements of the AI Act to provide that certain classes of association may be exempted from various requirements of the annual reporting cycle, including the requirement to prepare and submit annual financial reports to the OFT. Clause 32 of the Bill provides a similar amendment to the Collections Act.

In both cases, the Bill provides that a regulation may define the exempt classes by reference to a number of characteristics, including financial characteristics, registration under another Act, or the existence of another reporting requirement.

As will be noted from the Attorney-General's explanatory speech, the intention is that these provisions will be used to exempt ACNC-registered entities from their Queensland Government reporting obligations under both the AI and Collections Act.

Coupled with information-sharing arrangements between the OFT and the ACNC, the provisions are intended to create a "report once" arrangement for affected associations and Collections Act entities. All ACNC-registered entities with an obligation to report under the AI or Collections Acts will benefit from the proposed change.

Further, with the obligation to report to the Queensland Government removed through the proposed exemption powers provided in the Bill, relevant ACNC-registered entities will need only prepare financial reports based on ACNC financial assurance requirements. As a result, exempt entities will only be required to have their financial statements externally reviewed when annual revenue exceeds $250,000, and audited when annual revenue exceeds $1M. A table comparing existing thresholds is provided below:

AI Act category	ACNC equivalent	Requirement	AI Act threshold (Revenue or assets)	ACNC threshold (Revenue)
Level 1 incorporated association[2]	Large charity	Audit	>$100,000	>$1M
Level 2 incorporated association	Medium charity	External review	$20,000 to $100,000	$250,000 to $1M
Level 3 incorporated association	Small charity	Internal review	<$20,000	<$250,000

The OFT expects to receive information directly from the ACNC in regard to entities that are exempt from Queensland Government reporting requirements (assisted by the information sharing provisions proposed in the Bill).

However, in recognition that the OFT remains the only regulator of matters pertaining to the internal governance of incorporated associations and the fundraising activities of Collections Act entities, the Bill provides the chief executive with the power to direct exempt entities (as well as non-exempt entities) to lodge financial information and to cause the financial information to be audited, verified or examined (as the case may be) by appropriately qualified persons.

Subject to passage of the Bill, it is intended that the regulations necessary to prescribe the relevant exemptions will be in place for the 2020/21 financial reporting deadlines for most incorporated associations and Collections Act entities. Taking into account the overlap between Collections Act entities and incorporated associations, it is estimated that approximately 5,000 NFPs will benefit from this change.

Another significant red tape reduction measure under the Bill is intended to benefit those incorporated associations that will not be exempt from the financial reporting requirements under the AI Act. The Bill proposes that in special and unusual circumstances, the chief

[2] And particular level 2 and 3 associations who have audit obligations under the Collections Act, the *Gaming Machine Act 1991*, or another Act.

executive may approve an incorporated association to report as a smaller association (in terms of its current revenue or assets). This will address a situation whereby a smaller association may incur the cost of having their financial statements reviewed or audited because a one-off grant or insurance payment has temporarily increased their annual revenue into a higher, more burdensome reporting tier.

3.1.2 Voluntary cancellation of incorporation

Currently, the AI Act provides for a number of ways an association may be wound up and its incorporation cancelled. An association can chose to voluntarily wind up by special resolution of its members, or it may be wound up by the Supreme Court under certain circumstances such as if the incorporated association is unable to pay its debts or its members have reduced in number to the point where there are not enough to constitute a quorum at a general meeting. In either case, the association's incorporation is cancelled following the winding up of the association.

However, circumstances may exist where an association may wish to cancel its incorporation without undergoing a formal winding up process. There are a few reasons why this may be the case. For instance, an association may feel that the costs and/or administrative burden associated with incorporation are not justified given the size of the association, the scale of its assets (if any), or the nature of the activities it undertakes. Alternatively, the association may no longer have any need for the benefits that incorporation provides, and may wish to continue as an unincorporated association.

Accordingly, the Bill contains amendments to enable an incorporated association or an administrator of an association to apply to the chief executive to cancel the association's incorporation. The amendments will help small associations avoid the complexity and unnecessary costs involved with formal winding up procedures which require the appointment of a liquidator.

As stated in the explanatory notes, voluntary cancellation will only be available to associations that have no outstanding debts or liabilities, have paid all fees and penalties that apply under the AI Act, and are not a party to legal proceedings. The application must also be accompanied by a copy of the special resolution passed by the association approving the making of the application and providing for the distribution of any surplus assets.

3.1.3 Streamlining internal processes of incorporated associations

The Bill contains two amendments to streamline the internal processes of incorporated associations.

3.1.3.1 Common seal

The AI Act currently requires an incorporated association to have a common seal. It provides for the use of the seal in relation to contracts entered into by an association and requires the rules of an association to provide for the form, custody and use of its common seal.

While historically common seals were the standard means by which a corporate entity would execute documents, it is now quite rare for contracts to require signature under seal. It is relevant to note that the requirement for companies to have a common seal was abolished by the Commonwealth Government in 1988 as part of the *Company Law Review Act 1988* (Cth).

The Bill amends the AI Act to make optional the requirement for incorporated associations to have a common seal. It also provides for the execution of documents with or without a common

seal. Existing incorporated associations that wish to no longer use their seal will need to submit an application to change their rules to remove the relevant rule provisions providing for the form, custody, and use of the seal.

3.1.3.2 Communications technology

Currently, the AI Act provides that the rules of an incorporated association may permit the association to hold general meetings, or permit members to take part in general meetings, by using any technology that reasonably allows members to hear and take part in discussions as they happen. The use of communications technology is therefore not permitted unless the rules specifically provide for this. In contrast, the AI Act allows the use of communications technology for the conduct of management committee meetings without the need for the rules to specify that this can occur.

The Bill addresses this disparity by removing the requirement for the rules to specify the use of communications technology in the conduct of general meetings of the association. The amendment will allow, but not compel, associations to use communications technology for the conduct of general meetings without submitting an amendment to their rules.

3.1.4 Management committee eligibility

Presently under the AI Act, a person is not eligible to be elected to a management committee of an incorporated association if the person has been convicted either on indictment, or summarily and sentenced to imprisonment (other than in default of payment of a fine). The person remains ineligible for election until the rehabilitation period relating to the conviction has expired.

The AI Act defines 'rehabilitation period' by reference to the *Criminal Law (Rehabilitation of Offenders) Act 1986* (CLROA). Under the CLROA, the rehabilitation period expires 10 years from the date of the conviction, or the date on which an order of the court relating to the conviction is satisfied. Accordingly, persons with relevant convictions are ineligible to serve on a management committee for a period of 10 years.

However, there is a complication in that the CLROA also states that there is no rehabilitation period for convictions resulting in sentences of more than 30 months (i.e. 2.5 years) imprisonment, regardless of whether the offender actually serves any time. This may mean that a person who has been sentenced to serve more than 30 months in prison will never be eligible for election to a management committee. Alternately, it might be interpreted to mean that persons with more significant convictions are not prevented for any period of time from serving on the management committee of an incorporated association.

These caveats on eligibility for election to a management committee were originally introduced to ensure the necessary probity expected of management committee members. Given incorporation provides management committee members a protection from liability for the association's debts, and given that many associations deal with substantial funds and rely on monetary support from the government and the community, the probity of management committee members is of critical concern.

However, the probity objective needs to be balanced against concerns that such a long period of ineligibility for election to a management committee may be a barrier to a former offender's reintegration into the community. Further, election restrictions should be consistent with those applicable to like organisations and in other jurisdictions. In this regard, it is noted that most other jurisdictions apply a five year disqualification period for like convictions, including the Commonwealth under Corporations Law. The Bill therefore proposes to amend the AI Act to reduce the period of ineligibility from 10 years to 5 years for persons with relevant convictions.

The Bill will also remove the link between the AI Act and the CLROA to overcome the interpretational difficulty that arises from reliance of the CLROA definition of "rehabilitation period."

The amendment is intended to give associations greater freedom regarding who they may elect to their committees, and will also allow associations to benefit from the potentially valuable input of persons who would otherwise be ineligible for election. It is anticipated that vital associations in some remote areas, and associations advocating for prison inmates and ex-inmates will be the primary beneficiaries of the change.

3.1.5 Applied Corporations Law

The *Corporations (Ancillary Provisions) Act 2001* (Qld) provides that a law of the State may declare a matter to be an applied Corporations legislation matter. Where a provision makes such a declaration, the Corporations legislation specified in the declaratory provision applies in relation to the matter as if the relevant Corporations legislation was a law of the State.

Currently, the AI Act applies parts 5.5 and 5.6 of the *Corporations Act 2001* (Cth) to the voluntary winding up of an incorporated association. The AI Act also applies part 5.7 of the Corporations Act to the winding up of an incorporated association by the Supreme Court. The application of these parts is subject to the changes referred to in subsection 91(3) of the AI Act and any other changes prescribed by regulation (of which there are none).

The Bill proposes to also apply the following as applied Corporations legislation matters under the AI Act:

- Corporations Act, part 5.3A to allow incorporated associations access to a legislative framework providing for voluntary administration. Currently, Queensland incorporated associations are unable to place themselves into voluntary administration and the ability to do this may assist them in overcoming period of financial difficulty as an alternative to liquidation.
- Corporations Act, part 5.7B, divisions 1 and 2 to allow a liquidator to recover payments by an association that are deemed unfair or unreasonable or were paid while the association was insolvent;
- Corporations Act, part 5.9, division 3 to apply miscellaneous provisions relating to external administration for consistency with the approach of some other jurisdictions in regard to the application of corporations law to incorporated associations;
- Corporations Act, part 5.9, division 4 to apply the Insolvency Practice Schedule. This amendment responds to recent structural changes to the Corporations Act and clarifies the role of liquidators and the rights of creditors in relation to the administration of an incorporated association.

3.2 Improving internal governance of incorporated associations

3.2.1 Governance obligations

Management committees and officers play an important role in deciding the activities, direction and future development of incorporated associations. Regardless of whether an association is a small bird-watching club or a large football club with a multi-million dollar budget, committee members and officers should be acting in the best interests of the association when making these decisions. However, the AI Act currently provides little guidance on how those who hold influential positions within associations should behave.

Committee members and officers are generally considered to have similar fiduciary duties to those of company directors. The Bill seeks to codify these duties to give more certainty to management committee members and officers as to their duties and reduce the likelihood of any intentional or inadvertent breaches of their obligations.

The proposed duties and obligations discussed below are similar to those contained in the Commonwealth Corporations Act and are reflective of the good governance principles established under the common law. It is considered reasonable to expect adherence to these principles by management committee members and office holders and it is expected that many associations already promote these governance obligations as examples of best practice. The provisions are therefore considered to formalise and codify what might be considered existing expectations.

It should also be noted that most other jurisdictions apply similar governance requirements to incorporated associations, though the exact nature of the requirement may vary from State to State. However, the maximum penalty proposed for failure to observe the obligations (60 penalty units; currently $8,007) is significantly lower than some of the penalties that apply in some other jurisdictions for comparable offences.

It should also be noted that no other jurisdiction (including the Commonwealth via the ACNC) requires the disclosure of remuneration to committee members (see 3.2.1.5). This was however a popular reform in consultation undertaken with NFP stakeholders.

It is expected that the governance obligations as outlined below will commence in conjunction with the exemption from reporting requirements as above, following extensive communication with the sector to ensure associations and their management committees are aware of the changes.

3.2.1.1 Duty of care and diligence and good faith

Care and diligence are integral to management committee members' implied duty of care as office holders and good faith is inherent in their obligation to act in the best interests of the association. However, there is currently no provision in the AI Act that requires officers of an incorporated association to exercise their powers and discharge their duties in this manner.

The Bill amends the AI Act to provide that an officer of an incorporated association must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if that person were an officer of the association in the association's circumstances and occupied the office held by, and had the same responsibilities within the association as, the officer. The Bill proposes a maximum penalty of 60 penalty units for a breach of this duty.

An officer who makes a business judgement will, under the Bill, be taken to meet the requirement to act with care and diligence, and the officer's equivalent duties at common law and in equity in circumstances where the officer:

- makes the judgement in good faith for a proper purpose; and
- does not have a material personal interest in the subject matter of the judgement; and
- is informed about the subject matter of the judgement to the extent the officer reasonably believes to be appropriate; and
- reasonably believes the judgement is in the best interests of the association.

Additional amendments made to the AI Act by the Bill provide that an officer of an incorporated association must exercise their powers and discharge their duties in good faith in the best interests of the association and for a proper purpose. A maximum penalty of 60 penalty units will apply to a breach of this provision.

3.2.1.2 Improper use of position or information

In order to help mitigate the risk of fraudulent behaviour, the Bill makes clear that an officer of an incorporated association cannot use their position or information gained from their position for personal gain or to benefit another person. A breach of either obligation will attract a maximum penalty of 60 penalty units.

3.2.1.3 Duty to prevent insolvent trading

It is considered that all management committee members should take responsibility for the financial report presented to members of an incorporated association at the annual general meeting. It is therefore, reasonable to expect that the management committee must take care to understand what is in the financial statements to the extent that can be reasonably expected of them in the circumstances. This extends to knowledge of the financial standing of the association and the ability of the association to pay its debts as and when they become due.

The AI Act, however, does not currently impose a duty on the management committee in relation to insolvent trading. Imposing a duty on committee members to prevent insolvent trading will help ensure the association does not incur financial loss caused by negligence of the committee.

The Bill provides that a person who was a management committee member of an incorporated association or took part in the management of an incorporated association at the time the association incurred a debt commits an offence if:

- the association was insolvent at the time the debt was incurred or becomes insolvent by incurring that debt or by incurring at that time debts including that debt; and
- immediately before the debt was incurred, there were reasonable grounds to expect that the association was insolvent; or there were reasonable grounds to expect that, if the association incurred the debt, the association would become insolvent.

It is proposed that the offence will have a maximum penalty of 60 penalty units. A defence is available if the committee member is able to prove that the debt was incurred without their express or implied authority or consent; or at the time the debt was incurred, the committee member did not take part in the management of the incorporated association; or had reasonable grounds to expect that the incorporated association was solvent and would remain solvent even if it incurred the debt and any other debts that it incurred at that time.

3.2.1.4 Disclosure of material personal interests

Presently, the AI Act does not require management committee members to disclose a conflict of interest and does not prohibit committee members from voting when such an interest exists although some provision is made for this in the model rules.

Specifically, the model rules provide that a member of the management committee must not vote on a question about a contract or proposed contract with the association if the member has an interest in the contract or proposed contract and, if the member does vote, the member's vote must not be counted. It is important to note, however, that as not all associations adopt the model rules, this obligation is not uniform.

Requiring management committee members of all incorporated associations to disclose potential conflicts of interest would ensure greater probity and accountability, and ensure decisions of management committees are made in the best interests of associations and their members. However, it is recognised that there are some circumstances where it may be beneficial for a committee member with a relevant pecuniary interest to still take part in deliberations, for example, if they have specialist skills and knowledge. In addition, the management committee may resolve that the potential conflict of interest is slight or immaterial.

The Bill provides that a member of the management committee of an incorporated association who has a material personal interest in a matter being considered at a management committee meeting must, as soon as the member becomes aware of the interest, disclose the nature and extent of the interest to the management committee. A failure to disclose will attract a maximum penalty of 60 penalty units. The member must also disclose the nature and extent of the material personal interest at the next general meeting of the association or face a maximum penalty of 60 penalty units.

Under the Bill, management committee members have an obligation to ensure that relevant details of a material personal interest are recorded in the minutes of the meeting at which they were disclosed and are provided to a member of the association on request. A failure to do so will attract a maximum penalty of 4 penalty units for each member of the management committee. The Bill also prescribes this as a penalty infringement notice (PIN) offence of 1 penalty unit (through amendment to the *State Penalties Enforcement Regulation 2014*).

The Bill also provides that a member of the management committee of an incorporated association who has a material personal interest in a matter being considered at a management committee meeting must not be present while the matter is being considered or vote on the matter, unless the management committee determines otherwise. A breach of this restriction will attract a maximum penalty of 60 penalty units.

If the management committee decides that a member of the committee who has a material personal interest in a matter may be present at a meeting while the matter is being considered or may vote on the matter, the management committee must ensure its decision is recorded in the minutes of the meeting and disclosed at the next general meeting of the association. The management committee must also provide the details of committee's decision to a member of the association if requested by the member. A failure to adhere to these obligations will attract a maximum penalty of 4 penalty units for each management committee member. The Bill also prescribes this as a PIN offence of 1 penalty unit.

3.2.1.5 Disclosure of remuneration and benefits

It is not unreasonable to expect some incorporated associations to offer remuneration to their management committee members, particularly very large associations where the skills, experience, workload, and probity demanded of the member is extremely high and equivalent

to what is expected from directors of a company. Remuneration may take the form of a salary, or other reward or incentive such as provision of a vehicle for both work and private use.

While there is currently no requirement under the AI Act to do so, requiring associations to disclose remuneration paid and benefits given to office holders or other persons to their membership would ensure greater transparency and accountability within associations, and will also give those not on the management committee the information necessary to determine whether the remuneration is an appropriate use of the association's funds.

The Bill therefore amends the AI Act to require members of the management committee to ensure the prescribed details of the remuneration or other benefits provided to certain persons is presented to the association's annual general meeting, in a way to be prescribed by regulation.

The relevant disclosure must provide the prescribed details relating to remuneration and benefits paid to each member of the management committee, each senior staff member of the association, and each relative of committee members or senior staff members. A breach of this obligation will attract a maximum penalty of 10 penalty units for each member of the management committee. The Bill also prescribes a failure to disclose as a PIN offence of 1 penalty unit.

The provisions will commence by proclamation to allow the necessary details to be first prescribed in a regulation.

3.2.2 Dispute resolution

Another measure aimed at improving internal governance within incorporated associations relates to ensuring that all incorporated associations have a grievance procedure in their rules.

The rights of an incorporated association's members, as conferred upon them by the association's rules, may be of vital importance to the member. For example, licensing schemes provided for in other legislation may require the licensee to retain membership of a specified trade association (e.g. security firm licensees under the *Security Providers Act 1993*). Improper execution of the rules can therefore have significant consequences for members of certain associations.

Currently, the only recourse available under the AI Act to resolve a dispute under the rules of an incorporated association is to seek external adjudication by the Supreme Court. However, costs associated with filing a court application can be prohibitive for some associations and their members. While some associations may already attempt to resolve their disputes informally, there is no requirement in the AI Act for parties to attempt to resolve a dispute prior to filing an application with the Supreme Court.

As associations and their members would benefit from a formalised mandatory dispute resolution process, the Bill introduces a requirement for incorporated associations to undertake a grievance procedure for dealing with any dispute under the rules prior to seeking external adjudication.

In order to ensure the grievance procedure is fair, the Bill provides certain fundamental principles with which the grievance procedure must comply, including the need to ensure the procedure includes mediation; the mediator is unbiased; each party to the dispute is given an opportunity to be heard; and the complainant member is protected from disciplinary action while the dispute resolution process is ongoing.

If the rules of an incorporated association do not set out a grievance procedure that is consistent with these principles, the rules of the association will be taken to include the provisions of the model rules providing for the grievance procedure. This approach to implementation has been proposed both to ensure that all incorporated associations have a compliant grievance procedure, and to ease the implementation burden (as those associations that wish to simply rely on the model rule grievance procedure will not need to amend their rules).

To ensure that members and associations have an opportunity to resolve their disputes internally, the Bill requires the parties to a dispute to make reasonable attempts to resolve the dispute under the grievance procedure prior to seeking external redress.

It is intended that the provisions in the Bill relating to grievance procedures will commence two years from assent to provide incorporated associations with sufficient time to develop their own grievance procedure. The model rules will be amended prior to this date to provide associations with a model grievance procedure that is compliant with the prescribed principles under the Bill. Those associations that wish to rely on the model rule grievance procedure will not need to amend their rules.

3.3 Clarifying the operation of the AI Act

3.3.1 Objects clause

The AI Act does not currently specify its purpose. In line with modern drafting standards, the Bill amends the AI Act to insert an objects clause to facilitate greater understanding of what the Act is about which is to provide for a scheme for the incorporation of associations; and matters including the corporate governance, financial accountability, and rules and membership of incorporated associations. As the proposed amendment is a clarifying amendment, it will not impose any burden on incorporated associations.

3.3.2 Rules

At the time of incorporation, an association must specify whether its proposed rules are the model rules at Schedule 4 of the Associations Incorporation Regulation 1999 (AI Regulation) or its own rules. The Bill clarifies that an association may adopt the current version of the model rules at any time after its incorporation.

3.4 Streamlining government processes

The Bill makes two key amendments to streamline existing government processes.

3.4.1 Vesting powers

Currently, the AI Act provides that the surplus assets of an incorporated association upon its winding up are disposed of in accordance with a special resolution made by the association's members. If no such special resolution is made, the Governor in Council may vest all or any of the surplus assets in the public trustee. In contrast, the AI Act provides that the surplus assets of an association whose incorporation is cancelled by the chief executive are vested in the public trustee by the chief executive.

The Collections Act similarly provides for the vesting of property by the Governor in Council. Specifically, the Collections Act currently provides that where the Governor in Council is satisfied (under a range of prescribed circumstances) that property obtained under the Act is

unlikely to reach the intended beneficiary, the Governor in Council may vest that property in the public trustee by regulation.

In order to clarify and simplify the vesting powers under both the AI Act and the Collections Act, the Bill makes amendments to the legislation to transfer the power to vest surplus property from the Governor in Council by regulation to the chief executive by gazette notice.

3.4.2 Appointment of the Disaster Appeals Trust Fund Committee

The Collections Act requires the public trustee to establish and keep an account titled the disaster appeals trust fund (DATF). It also provides for the establishment of a disaster appeals trust fund committee (DATF committee), which consists of the public trustee, ex officio, and four other members appointed by the Governor in Council for a three-year term. Under the provisions, the Governor in Council is empowered to appoint a committee member to be chairperson of the committee and to authorise the payment of fees and allowances (if any) to committee members.

The Bill amends the Collections Act to streamline the appointment process of the DATF committee to allow them to be appointed by the chief executive. The Bill also provides for the chief executive to be an ex officio member of the committee (along with the public trustee) and chairperson of the committee as it would be inappropriate for the chief executive to appoint him or herself to the committee and as chairperson. Additionally, the Bill provides that a DATF committee member appointed by the chief executive is to be paid the remuneration and other allowances decided by the chief executive.

These amendments give effect to a recommendation of the 2009 Webbe-Weller report into Queensland Government boards, committees and statutory authorities that recognised the appointment of the DATF committee by Governor in Council was administratively onerous and recommended the Collections Act be amended to provide for the appointment of committee members by the chief executive.

3.5 Consolidating investigation powers

The AI Act currently applies Part 10 of the *Financial Institutions Code 1992* (the Code) to an investigation of an incorporated association. The AI Act also provides that the Code continues to apply despite its repeal in 1999. Due to the age of the Code and the significant length of time since its repeal, the Code cannot be considered reflective of regulatory best practice for the conduct of a compliance investigation. It is considered unreasonable that a modern regulator should rely on a Code that was repealed two decades ago as the repository of its investigative powers with regard to incorporated associations, especially when it is considered that the Code was developed to regulate certain financial institutions rather than NFPs.

Fortunately, the Fair Trading portfolio already contains a modern repository of relevant powers. The *Fair Trading Inspectors Act 2014* (FTIA) is a contemporary piece of legislation that consolidates inspectorate functions and powers across a number of Acts within the Fair Trading portfolio.

The application of the FTIA to investigations conducted under the AI Act would provide inspectors with the necessary powers to investigate incorporated associations, while also providing the established checks and balances to those powers. It would also provide efficiencies and consistency for OFT inspectors in the course of their work.

The Bill therefore contains the amendments necessary to apply the FTIA to the AI Act. The Bill does however modify the FTIA in its application to the AI Act, by removing powers deemed

unnecessary to the investigation of incorporated associations. These include the power to stop or move vehicles, and the power to obtain criminal histories.

It should be noted, however, that the application of the FTIA will result in inspectors having entry and seizure powers that they do not currently under the repealed Code. Specifically, an inspector will only be able to enter a place in circumstances where:

- consent is given and the occupier is provided with relevant information relating to the entry; or
- it is a public place and the entry is made when it is open to the public; or
- the entry is authorised under a warrant; or
- it is a place of business regulated under a primary fair trading Act that is open for carrying on business, or is otherwise open for entry, or is required to be open for inspection under the primary fair trading Act.

The FTIA balances these powers with, for example, procedures that inspectors must follow when entering a place. Additionally, the entry powers will not apply to a place where a person resides.

Modernising (and making adequate) the powers of investigation available to OFT in regard to incorporated associations is considered appropriate given the legal identity and protections from liability that the AI Act affords to associations and their management committees, particularly in the context of the change to financial reporting requirements proposed by this Bill (discussed at 3.1.1).

4. Consultation

As noted above, community consultation on the majority of the proposals contained in the Bill were undertaken through the two public discussion papers. The first discussion paper, titled '*Possible changes to the Associations Incorporation Act 1981 and the Associations Incorporation Regulation 1999*' was released in 2010. The paper, which received 42 submissions, sought feedback on proposals intended to assist associations in their day-to-day operations including proposals relating to dispute resolution, eligibility for election to the management committee, the appointment of a voluntary administrator, and disclosure of remuneration and pecuniary interests.

Following developments at the national level, including the establishment of the ACNC, the Government released a second discussion paper in 2012 titled '*Supporting Queensland Associations: a modern framework for civil society*' to canvass public opinion on potentially wider-ranging changes to the AI Act and AI Regulation. The paper received only four submissions in response. Key issues canvassed as part of this consultation included dispute resolution and management committee responsibilities.

Despite these consultation activities, the 2010 and 2012 reviews did not result in legislative amendment. There were a number of reasons for this, including the timing of the 2012 and 2015 elections and, more significantly, uncertainty regarding the role and continuation of the ACNC, as well as other developments at the national level such as ongoing calls for fundraising to be regulated solely under the Australian Consumer Law.

While the refreshed consultation undertaken with the NFPRRG during 2014 to 2016 did not result in a consensus view or any formal recommendations, it supported the continued relevance of the proposed amendments and the views of stakeholders informed subsequent policy development.

5. Fundamental legislative principles

The Committee is referred to pages 6 to 12 of the Explanatory Notes to the Bill where potential breaches of fundamental legal principles are identified and justified.

[End]