

# **STRUCTURING AND RESTRUCTURING NONPROFIT ASSOCIATIONS**

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**A SOLICITOR WITH DUNHILL MADDEN BUTLER LAWYERS.**

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## 1.INTRODUCTION

In the mid seventies there was a spate of legal claims involving unincorporated not-for-profit associations. These claims highlighted the liability exposure of management committee members and prompted a dramatic increase in the number of associations seeking shelter behind the corporate veil. Corporate structure decisions during this period were primarily motivated by the incentive of limited liability.

Twenty years later, the not-for-profit sector is subject to new challenges. The Industry Commission Report into Charitable Organisations in Australia heralds an increasing intrusion of legislative responsibilities and reform in the sector. The traditional sources of funds for not-for-profit organisations are about to radically change with the advent of “competitive tendering” for government funding and the declining benevolence of society. The legal scuffle between Australian Rugby Football League Limited (the “ARL”) and News Limited has also exposed the vulnerability of not-for-profit groups and the many legal and commercial minefields in structural decision-making. The sector is beginning to respond to these pressures by rationalisation and restructure. Corporate structure decisions are now motivated by the need to promote efficiency and resilience. Survival of the fittest.

Restructuring is by no means a task for the faint-hearted. A delicate balance between legality and practicality needs to be maintained. The focus of this paper is on the restructuring choices for not-for-profit organisations and groups in Queensland. It answers “how-to” questions and identifies some important restructuring issues.

### 2. WHY CHANGE YOUR ORGANISATION’S STRUCTURE?

- To minimise the liability of management committee members.
- To isolate activities that are high risk or contrary to the organisation’s corporate or tax status.
- To share or combine resources, knowledge and members.
- To accommodate increasing size or geographical spread of members.
- To give independence to splinter groups.
- To comply with the law.
- To reinforce group relationships.

### 3. ALTERNATIVE ORGANISATIONAL STRUCTURES

It is important when making structural decisions to first assess the objects, operational requirements and desires of members and then determine which legal structure best facilitates those needs rather than selecting a structure and squeezing the organisation within its limitations. However, it is rare to find a perfect fit and some concessions and trade offs will inevitably have to be made.

So what are not-for-profit organisations? The Privy Council in *Wise -v- Perpetual Trustee Co Ltd* provided us with one of the most well known definitions:<sup>1</sup>

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<sup>1</sup> [1903] AC 139 @ 139

*“Clubs are associations of a peculiar nature. They are societies, the members of which are perpetually changing. They are not partnerships, they are not associations for gain; and the feature which distinguishes them from other societies is that no member becomes liable to pay to the funds of the society or to anyone else any money beyond the subscription required by the rules of the club to be paid so long as he remains a member. It is on this fundamental condition, not usually expressed but understood by everyone, that clubs are formed; and this distinguishing feature has been often judicially recognised.”*

The income and profit of not-for-profit organisations must be applied solely in furtherance of their objects and purposes and cannot be distributed to individual members. This is the key feature which distinguishes organisations in the not-for-profit sector from those in the private sector. Therefore structures such as partnerships and companies limited by shares, based on implicit profit-sharing motives, are inappropriate and costly vehicles for not-for-profit organisations. There are, however, a number of alternative organisational structures that are compatible with the “peculiar nature” of not-for-profit organisations.

- Charitable Trust
- Unincorporated Association
- Incorporated Association (*Associations Incorporation Act 1981 (Qld)*)
- Company Limited by Guarantee (*Corporations Law*)
- Cooperative Society (*Cooperative and Other Societies Act 1967 (Qld)*)
- Incorporation by Act of Parliament
- Aboriginal and Maori Association (*Aboriginal Councils and Associations Act 1976 (Cth)*)
- Friendly Society (*Friendly Societies Act 1991 (Qld)*)
- State or District Sports Association (*Sporting Body’s Property Holding Act 1975 (Qld)*)
- Body Associated with a Hospital (*Hospital Foundations Act 1982 (Qld)*)
- Industrial organisations (*Industrial Organisations Act 1996 (Qld)*).

Historical avenues such as incorporation by letters patent under the Religious Educational and Charitable Institutions Act 1861 or by Royal Charter are no longer available.

In practice the most common forms of not-for-profit organisations are unincorporated associations, incorporated associations and companies limited by guarantee. This paper concentrates on these structures and their legislative frameworks. However other legislation referred to above, such as the Friendly Societies Act 1991 and the Co-operative and Other Societies Act 1967, also contain statutory restructuring, amalgamation and conversion procedures.

### 3.1 Unincorporated Associations

An unincorporated association is a group of people that associate together for a common purpose. This type of organisation has no separate legal identity apart from its members and cannot hold property or enter into contracts.

Unincorporated associations are not subject to the cost and expense of public accountability and disclosure requirements. They are only regulated by their rules and common law principles.

The members of an unincorporated association are bound together by a consensual relationship expressed in the association's rules. However, the courts are reluctant to treat this relationship as legally enforceable unless members' proprietary rights or livelihood are at stake.

In the absence of provision to the contrary or an indemnity in the rules, the committee members are personally liable for the outstanding debts of the association. The liability of individual members is limited to any unpaid membership fees or other payments required by the association's rules.

### 3.2 Incorporated Associations

The specialist legislation for not-for-profit organisations in Queensland is the Associations Incorporation Act 1981. It is a relatively simple and inexpensive regime designed for small not-for-profit clubs and associations. Since 1982, when the legislation commenced, over 16 000 not-for-profit associations have incorporated under the Act in Queensland.

The Associations Incorporation Act 1981 is available to associations formed for lawful excluding the purpose of providing financial gain to members. Association's incorporated under this Act are bodies corporate with all the advantages of separate legal existence.

The activities and administration of incorporated associations are subject to government supervision and paternalistic regulation resulting in inflexible administration practices. A set of basic "model rules" is available for adoption or as a foundation for the association's "own rules".

The liability of office holders and members is limited. However, management committee members are in an analogous position to directors of a company and case law suggests they are subject to similar fiduciary duties to act honestly and with due care and diligence<sup>2</sup>. In addition, management committee members and secretaries may be prosecuted under the Associations Incorporation Act 1981 for contravention of prescribed legislative provisions and individual penalties of up to \$750 per breach may be imposed.

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<sup>2</sup>

There is no system of uniform incorporated associations legislation in Australia so both the legislation and regulatory authorities differ in each State and Territory. An association incorporated under the Queensland Associations Incorporation Act 1981 (and bodies corporate incorporated other than under the Corporations Law) will be recognised in other jurisdictions but cannot carry on business in other States and Territories unless they are registered as a Registrable Australian Body under part 4.1 of the Corporations Law. Business carried on otherwise than for the profit of members is included within the Corporations Law definition of “business”<sup>3</sup>. If the association is subject to the Corporations Law as a Registrable Australian Body it may be more appropriate for the association to incorporate as a company limited by guarantee.

### **3.3 Company Limited By Guarantee**

An organisation formed for lawful purposes is eligible for registration as a company limited by guarantee under the Corporations Law. The Corporations Law is a national scheme of legislation regulated by the Australian Securities Commission (the “ASC”).

A company limited by guarantee is a public company subject to greater standards of accountability than those imposed under the Associations Incorporation Act 1981. This means compliance costs and lodging fees are correspondingly higher.

The objects and rules of a company limited by guarantee are contained in its memorandum and articles of association. There are no “model” rules (Table A articles are designed for companies limited by shares) and relatively few prescribed rules which gives the company greater flexibility in its internal operations and activities than it would have as an incorporated association.

A company limited by guarantee is required to have “Ltd” or “Limited” after its name. However, section 383 of the Corporations Law allows the ASC to grant a licence to omit this suffix from a company’s name if the company satisfies certain prerequisites and conditions. When the Corporations Law Simplification Bill (No. 2) becomes law the grant of this licence will be restricted to companies pursuing charitable purposes only.

The members agree to contribute an amount specified in the memorandum of association (the “guarantee”) during their membership and within twelve months after their membership concludes in the event that the company is wound up and is unable to satisfy its outstanding debts. The liability of each member is limited to the “guarantee” and any subscriptions or other fees charged under the articles of the Company.

The liability of company directors is limited but the Corporations Law imposes legislative duties on directors including the duty to prevent insolvent trading. Contravention of these duties may expose the directors to personal liability and substantial statutory penalties.

## **4. RESTRUCTURING**

A non-profit organisation may transform by participating in a group relationship, by merging with other organisations pursuing similar objects or by converting to a different organisational form.

The two most common “group” structures within the not-for-profit sector are branch/parent structures and federations. These are generic classifications and individual characteristics of group relationships

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<sup>3</sup>

may vary considerably depending on the degree of unity reflected in relevant constitutional and legislative provisions.

The other ways in which organisations can restructure is by amalgamation or merger with other organisations having similar objects or by converting from one structure to another. The restructuring process is dependent on the initial structure and governance of the organisations and the availability of legislative assistance.

#### 4.1 **Branches**

##### 4.1.1 **Characteristics**

A branch is a subset of members within a parent organisation. In its purest form the members of the branches are also members of the parent and the branches' rules reflect and are subordinate to the parent's rules. Any surplus income and property on the winding up of the branch will pass to the parent association (subject to enforceable rules to the contrary).<sup>4</sup>

In *Lewis -v- Heffer*<sup>5</sup>, Lord Denning M.R. described the nature of the branch/parent relationship in his analysis of the national British Labour Party and a local constituency party:

*“The legal bonds between these two associations are as tight as rules can make them. When a person joins a local constituency party, he becomes automatically a member of the national party. In the eyes of the law he enters into two contracts - one with the other members of the local constituency party - the other with the other members of the national party. He is taken to have agreed to both; and to be bound by the rules of both. So the two sets of rules ... must be read together. It then becomes apparent that the local constituency party is in no sense, an independent organisation.”*

##### 4.1.2 **Legislative formation of a branch/parent structure**

Part 9, division 1 of the Associations Incorporation Act 1981 provides a procedure for incorporation of a branch or group of branches of a “parent association”. This procedure was initially restricted to branches of associations incorporated in Queensland under the Associations Incorporation Act 1981 or entities incorporated under the Religious Educational and Charitable Institutions 1861. The definition of “parent association” was expanded considerably by amendments to the Queensland Associations Incorporation Act 1981 which became law on 20 November 1996.

“Parent association” is now defined in section 2 of the Associations Incorporation Act 1981 to mean “... the central entity of the branch if the entity is -

- formed or carried on for a purpose other than providing financial gain to its members; and
- is incorporated under -
  - (i) this or another Act;
  - (ii) a Commonwealth law or another State's law; or
  - (iii) royal charter.

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<sup>4</sup> Hall v Job (1952) 86 CLR 639

<sup>5</sup> [1978] 1. W.L.R. 1061 @ 1071

This amendment enables an association to incorporate under the Associations Incorporation Act 1981 as a branch of a company limited by guarantee or an association incorporated under another State or Territory's legislation. However, the definition is still not wide enough to facilitate the incorporation of a branch of an unincorporated parent body.

Queensland is the only State that provides for incorporation of branches. This lack of legislative uniformity means that associations established in other states and territories cannot similarly be incorporated as branches of their parent associations.

The effect of incorporation as a branch under the Associations Incorporation Act 1981 is that the branch obtains the benefits of separate incorporation but:

- it does not relieve the members of the incorporated branch of a liability or obligation the members had as members of the parent association<sup>6</sup>;
- the parent association's rules control the membership of the branch or group of branches; and
- a member of the branch or group of branches -
  - (i) is taken to be a member of the parent association; and
  - (ii) is under the same liabilities and obligations as members of the parent association.<sup>7</sup>

In Queensland, the members of the branch or group of branches must resolve by special resolution to incorporate as a branch under the Associations Incorporation Act 1981 and the application must be accompanied by the parent association's written consent.

## **4.2 Federations**

### **4.2.1 Characteristics**

A federation is a number of independent associations that agree to cooperate for common purposes. The arrangement may be purely functional or it may be coordinated by a separate central body or committee.

If a central committee or body presides over the federation, a set of rules governing the committee's conduct and powers must be drawn up by the federated bodies. These bodies should also make changes to their own constitutions to provide for appointment of delegates, conduct of meetings and the enforcement of central committee recommendations. Power-sharing and dispute resolution hurdles must also be overcome and entrenched in the respective rules and constitutions.

It is often the case that delegates of the federated bodies are members of the central committee. In these circumstances the federated bodies and their members only have limited standing to enforce the committee's rules. Alternatively the federated bodies themselves become members of the central committee and in that capacity are bound by and can enforce the terms of the committee's constitution (refer to item 5.1 below).

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<sup>6</sup> Associations Incorporation Act 1981 (Qld) s77(2)

<sup>7</sup> Associations Incorporation Act 1981 (Qld) s77(3)

#### 4.2.2 Formation of a federation

The Associations Incorporation Act 1981 appears to implicitly discourage federated structures.

Last year debate arose in Queensland as to whether the Office of Consumer Affairs was correct in refusing to incorporate associations under the Associations Incorporation Act 1981 if their constitutions contained clauses giving defacto control to a governing organisation. The clauses in question relinquished some of the associations' rights to another body including the right to veto amendments to the associations' constitutions, to appoint an administrator and to otherwise deal with the funds and assets of the associations.

The State Attorney General and Minister for Justice pronounced that associations independently incorporated under the Associations Incorporation Act 1981 should be autonomous and that such clauses were unenforceable and unacceptable. However, a governing organisation is free to negotiate contractual arrangements with incorporated associations (separate from their constitutions) so long as the arrangements do not require the associations to relinquish control of their property or management.

For example, the governing organisation may require notification of constitutional amendments by the association but cannot insist on the right to veto those changes.

Therefore, if a federation is comprised of incorporated associations the relationship between the bodies and the central committee is likely to be largely consensual.

#### 4.2.3 Regulating federations

The highly publicised battle between the ARL and News Limited revealed "control" dilemmas within federated structures. Federations also have to tread carefully if the central committee proposes to give funding assistance to the federated bodies.

##### (a) financial assistance

If the central committee is incorporated as a company limited by guarantee with a licence to exclude the word "Limited" or "Ltd" from its name it is subject to two legislative restrictions:

- Section 179(1) of the Corporations law makes any rule or resolution of a company limited by guarantee giving a person a right to participate in the divisible profits of the company "otherwise than as a member" void; and
- The company must apply its profits (if any) and other income in promoting its objects and cannot pay dividends to its members<sup>8</sup>. This prerequisite must be satisfied before a company will be granted a licence to omit "Limited" from the company's name and is also an Australian Taxation Office policy requirement for tax exemption purposes.

The impact of these restrictions can be illustrated by examining the structure of major sporting federations in Australia such as the Australian Football League (the "AFL"). Aussie rules clubs are independent clubs coordinated by the AFL. The Articles of the AFL and the individual clubs entitle

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<sup>8</sup> Corporations Law s383(1)(b) & (c)



each club to nominate representatives to be members of the AFL on an annual basis. The clubs themselves are not legal members. If the AFL makes any distribution of funds to the clubs those distributions are potentially void under the Corporations Law as being paid to the clubs “otherwise than as members”. Of course, the AFL could argue that these distributions are justifiable as a legitimate application of its profits in furtherance of its objects.

On the other hand, if the AFL federation had adopted a structure whereby the clubs themselves were members of the AFL, financial distributions to the clubs would compromise the AFL’s licence to omit “Limited” and its “non-profit” and tax exempt status.<sup>9</sup>

(b) **control**

Please refer to item 5.1 below.

### 4.3 Amalgamation

#### 4.3.1 **Characteristics**

Amalgamation occurs when two or more associations combine members and resources and adopt a single name and constitution. There are two common ways of amalgamating.

1. Existing organisations dissolve and form a new association. The new association’s constitution contains transitional rules for the transfer of membership rights, the transfer of assets and liabilities and the appointment of an interim management committee. Valuable goodwill may be sacrificed in this merger process but it has the advantage of avoiding “takeover” implications.
2. One organisation is the continuing entity and the other organisations dissolve. Similar transitional rules will be required as referred to above. This method is likely to be the most efficient and cost effective.

The fundamental nature of the change would require the prior approval of a substantial majority of members within each organisation (subject to their respective rules). Arrangements should also be made with creditors to either discharge or release outstanding debts or to negotiate a novation of contract in favour of the new or continuing association.

#### 4.3.2 **Legislative amalgamation procedure**

The Associations Incorporation Act 1981 provides a statutory amalgamation procedure which enables incorporated associations to amalgamate without the intermediate winding up step. The amalgamation provisions of the Associations Incorporation Act 1981 only apply to associations incorporated under the Associations Incorporation Act 1981 and would not, for example, assist an amalgamation between an incorporated association in Queensland and an incorporated association in Victoria or an incorporated association in Queensland and a company limited by guarantee.

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<sup>9</sup> Levy, K.J., “The Australian Football League: Is it time for the Siren to Blow?” Legal Issues for Non-profit organisations LBC Information Services 1996

Part 9, division 2 of the Associations Incorporation Act 1981 provides that an incorporated association may by special resolution:-

- (a) decide to amalgamate with one or more other incorporated associations to form a single new incorporated association;<sup>10</sup>
- (b) adopt a single set of proposed rules for the new association; and
- (c) elect interim officers for the new association.<sup>11</sup>

The Chief Executive of the Office of Consumer Affairs may require the secretary to give the association's creditors written notice of the application to amalgamate and advising them of their right to object by notice in writing to the Chief Executive.<sup>12</sup> If a creditor's objection is received within 21 days after the notice the Chief Executive is unable to grant the application to amalgamate without sanction from the Supreme Court.<sup>13</sup>

Registration of the new association vests ownership of the old associations' assets and liabilities in the new association and cancels the old associations' incorporation.<sup>14</sup> This obviates the need to formally wind-up the old associations.

Amalgamation doesn't affect a right or obligation that the old or new association would have had but for the amalgamation and if a legal proceeding might have been continued or started by or against an old association it may be continued or started by or against the new association.<sup>15</sup>

There is also special legislative relief from stamp duty payable on the transfer of real property to the new association.<sup>16</sup>

#### **4.4 Converting Organisational Status**

Conversion is changing an organisation's status by migration from one legal regime to another.

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<sup>10</sup> Associations Incorporation Act 1981 (Qld) s80

<sup>11</sup> Associations Incorporation Act 1981 (Qld) s81(1)(a) and (b)

<sup>12</sup> Associations Incorporation Act 1981 (Qld) s83(1) and (2)

<sup>13</sup> Associations Incorporation Act 1981 (Qld) s83(3)

<sup>14</sup> Associations Incorporation Act 1981 (Qld) s86

<sup>15</sup> Associations Incorporation Act 1981 (Qld) s88

<sup>16</sup> Associations Incorporation Act 1981 (Qld) s87(5)

The importance of complying with constitutional requirements and obtaining members' approval for conversion is illustrated by the 1980 decision of *Rendell-Short -v- Grier*<sup>17</sup>. The management committee and members of an unincorporated association; the Autistic Children's Association of Queensland resolved to convert the association into a company limited by guarantee. To effect the conversion, the management committee registered a company limited by guarantee; the "Autistic Therapy Society of Queensland Ltd" and proceeded to transfer the association's real estate and bank accounts to the new company. They also advised various government instrumentalities that the company was the association's successor for the purposes of subsidies, concessional registration fees, stamp duty and taxation exemptions.

Some members successfully sought an injunction in the Supreme Court to prevent the management committee from transferring the association's remaining assets and funds to the company. They alleged that the transfers amounted to dissolution of the association and that the specific provisions of the association's constitution relating to dissolution had not been observed.

The court concluded that the transfer was unlawful on two grounds. The first ground was based on the requirement to apply the income and property of the association in accordance with its objects and powers:

*"It is true that the two bodies have the same fundamental object; assistance to autistic children; but the differences in the constitutions of the two bodies are such that in my opinion the transfer of the assets to the Therapy Society was not an application of the income or property of the association in promotion of its objects."*<sup>18</sup>

Therefore the court held that the transfer was beyond the powers of the Management Committee and was not authorised by the resolution to incorporate.

The failure to comply with specific provisions in the association's constitution regarding dissolution was the second ground relied on in the judgement. The court held that if the transfers did have the effect of dissolving the association, the voting provisions for dissolution in the constitution had not been observed.

For associations with body corporate status, the conversion process is complicated by cumbersome legislative winding up procedures. However, if an organisation's objects and powers contemplate a transfer of assets to another organisation with similar objects it may be possible to by-pass these lengthy and expensive winding-up procedures. While it remains a going concern, an organisation can transfer its income, property and members (subject to its rules and the consent of its members and creditors) to a more appropriate corporate vehicle. Once the transfer is complete, an empty corporate shell remains and application can be made for its cancellation (rather than winding up) under the relevant legislation.<sup>19</sup> This procedure is subject to a large number of variables and will not be suitable for all organisations.

#### 4.4.1 Legislative conversion

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<sup>17</sup> [1980] Qd. R. 100

<sup>18</sup> *Id.*, @ 112

<sup>19</sup> Corporations Law s573

Although the Associations Incorporation Act 1981 was designed to provide a more appropriate legal structure for not-for-profit organisations it made minimal allowance for transfer by bodies corporate to the Associations Incorporation Act 1981. The only true transfer mechanism under the Associations Incorporation Act 1981 is for certain friendly societies wanting to become incorporated associations<sup>20</sup>. The Minister also has power under section 131 to recall and cancel letters patent and require transfer to the Associations Incorporation Act 1981.

However, the greatest demand for conversion is by not-for-profit organisations wishing to migrate to and from companies limited by guarantee. In some states, the incorporated association's legislation permits transfer of registration to the Corporations Law. This is designed to avoid the cost of formally winding up the association and the potentially severe stamp duty implications of transferring the organisation's assets to a new body corporate.

In Queensland, the Associations Incorporation Act 1981 prohibits various bodies corporate from becoming incorporated under the Associations Incorporation Act 1981 including a company limited by guarantee, a partnership, an industrial organisation, a parents and citizens association under the Education (General Provisions) Act 1989 and organisations incorporated by a special Act of Parliament.

As a consequence expensive winding-up procedures must be carried out before these bodies corporate can transfer to the Associations Incorporation Act 1981.

(a) **Religious Educational and Charitable Institutions Act 1861**

Section 131 of the Associations Incorporation Act 1981 provides that the Minister for Justice may at the Minister's discretion recall and cancel any letters patent issued under the repealed Religious, Educational and Charitable Institutions Act 1861 and require the association to apply for incorporation under the Associations Incorporation Act 1981.

The Scout Association of Australia Queensland Branch incorporated by letters patent in 1974 was recently converted to an incorporated association by way of amendments to the Scout Association of Australia Queensland Branch Act 1975. The amendments vested the assets, rights and liabilities of the former corporation in the new incorporated association.

(b) **Friendly Societies Act 1991**

An "eligible" friendly society that has complied with pre-conditions in Part 11 of the Associations Incorporation Act 1981 and Part 12A of the Friendly Societies Act 1991 is eligible to transfer to the Associations Incorporation Act 1981. In particular, transfer is subject to amendment of the former society's rules to ensure compliance with the Associations Incorporation Act 1981<sup>21, 22</sup>.

On the transfer day:

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<sup>20</sup> Associations Incorporation Act 1981 (Qld) s98(1)

<sup>21</sup> Friendly Societies Act 1991 (Qld) s12A.2(2)(b)

<sup>22</sup> Associations Incorporation Act 1981 (Qld) s105

- the property of the former friendly society vests in the incorporated association without any conveyance, transfer or assignment but subject to any debt, liability or obligation affecting the property (transfer of real property is exempt from stamp duty);
- the debts and liabilities of the former society become debts and liabilities of the incorporated association; and<sup>23</sup>
- the directors of the former friendly society become management committee members and the president, treasurer and secretary of the former society continue to hold their offices in the incorporated association<sup>24</sup>.

The transfer does not dissolve the former friendly society<sup>25</sup>. However, the Registrar will cancel the former society's registration under the Friendly Societies Act 1991 on receipt of a copy of the new certificate of incorporation.

## 5. ISSUES

Once a restructuring course has been set, getting from A to B is by no means a simple process. There are a number of issues intrinsic to all structuring or restructuring projects which require careful assessment during the planning stage.

### 5.1 The Constitution or Memorandum and Articles of Association as a statutory contract.

Section 180(1) of the Corporations Law provides that the memorandum and articles of a company have the effect of a contract between the company and each member, the company and each officer and a member and each other member. The rules of an incorporated association are also deemed to constitute the terms of a contract between the members and the association.<sup>26</sup>

There are two reservations in relation to this contract.

- it is only enforceable by and against members so long as the member's membership continues.
- recent case law indicates that the statutory contract contemplated is limited to those rules that go to the heart of the relationship between members and the entity or between members with respect to the entity.<sup>27</sup>

It is therefore evident that the Memorandum and Articles or constitution should not be relied on exclusively to bind organisations and members. If necessary the governing organisation and each

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<sup>23</sup> Associations Incorporation Act 1981 (Qld) s101(1)

<sup>24</sup> Associations Incorporation Act 1981 (Qld) ss103 & 104

<sup>25</sup> Associations Incorporation Act 1981 (Qld) s101(2)(c)

<sup>26</sup> Associations Incorporation Act 1981 (Qld) s71(1)

<sup>27</sup> *Andy Kala Pty Ltd -v- E.J. Doherty (Northcote) Pty Ltd* (1995) 13 ACLC 1630 & *Norths Ltd -v- McCaughan Dyson Capel Cure Ltd* (1988) 6 ACLC 320

individual member (whether membership is comprised of individual persons or independent associations) should enter into a uniform and binding agreement apart from their respective constitutions to regulate inter-relationships and operations.

It is interesting to note that the constitution of an unincorporated association is usually regarded as directive only. However, courts have been prepared to enforce rules so far as they relate to proprietary interests of members or where it is clear that the rules were intended to form a legally binding contract.

## **5.2 Trades Practices Act**

Organisations that adopt a “group” structure must ensure that they do not engage in conduct that is potentially “exclusionary” or “anti-competitive” for the purposes of the Trade Practices Act 1974.

The Full Federal Court in the “Superleague case”<sup>28</sup> found the Loyalty and Commitment Agreements entered into by the ARL and the rebel clubs to be in breach of the exclusionary provisions of the Trade Practices Act 1974. An exclusionary provision is a provision in a contract, arrangement or understanding between persons, any two or more of whom are competitive with one another, and the provision has the purpose of preventing, restricting or limiting the supply of goods or services in particular circumstances. To be competitive the persons must be on the same level in the market.

The clubs were found to be competing for spectators, sponsors and television rights and a place in the national competition (given the ARL’s ability to exclude clubs from the competition). The Court also found that the agreements prevented participation by clubs in rugby league competitions organised by another competition organiser or acquisition of the services of another competition organiser other than one approved by the ARL.

The Court concluded that the arrangements made between the ARL and the clubs attempted to exclude a competitor and were therefore void and unenforceable.

## **5.3 Intellectual Property Rights**

Appropriate registration and licensing should be undertaken to protect the organisation’s name, logos and trademarks. This is particularly important if the organisation is proposing to enter a federation relationship.

## **5.4 Accounting**

### **5.4.1 Inconsistent reporting**

The accounting standards and practices of not-for-profit organisations vary depending on their organisation form. This lack of standardisation may create difficulties for “group” structures. For example, a popular structure for federations is a central company limited by guarantee presiding over a number of independent incorporated associations. Companies limited by guarantee must produce financial statements that comply with Australian Accounting Standards. The accounting requirements for incorporated associations are usually far less onerous. Consequential inconsistencies may hinder comparability and comprehensive financial disclosure.

### **5.4.2 Consolidated accounts**

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<sup>28</sup> News Limited & Ors v Australian Rugby Football League Limited & Ors No 3 [1996] ATPR 41,811

The concept of control of entities under the Corporations Law is wide enough to include control over other bodies corporate, unincorporated associations and trusts. “Control” is defined in the Australian Accounting Standards<sup>29</sup> to mean “the capacity of any entity to dominate decision-making, directly or indirectly, in relation to the financial and operating policies of another entity so as to enable that other entity to operate with it in pursuing the objectives of the controlling entity.”

If this control element can be established, Division 4A of Part 3.6 of the Corporations Law requires the preparation of consolidated financial statements. Consolidation is potentially expensive and complicated especially if inconsistent reporting methods are applied within a group (as discussed above).

### **5.5 Stamp Duty and Tax Implications**

Stamp duty and tax implications should be carefully considered before embarking on any restructuring projects. This includes the impact of the restructure on the organisation’s current tax exempt status and the potential stamp duty or tax consequences arising out of the restructuring transactions.

### **5.6 Transfer of Rights and Obligations**

Restructuring often requires a transfer of rights and obligations from one organisation to another. These include the following:

- member’s membership rights and subscriptions
- rights and securities of creditors
- insurance policies including Workers Compensation Insurance
- employee entitlements/superannuation
- compulsory records (some statutes require organisations to store specified records for a minimum period before destruction)
- contracts, hire/purchase agreements, funding agreements and lease and tenancy agreements
- real property interests (some statutes require organisations to register a change of ownership of land within a specified period after the change has been effected)
- motor vehicle registration

### **5.7 Collections Act 1966 and Other Legislation**

If the organisation is sanctioned or registered under the Collections Act 1966 or holds a licence under the Liquor Act 1992, Gaming Machine Act 1991 or the Art Unions and Public Amusements Act 1992 it should notify the relevant authorities of the organisation’s change of status in accordance with prescribed legislative procedures.

### **5.8 Trusts**

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<sup>29</sup> AASB 1024

If the organisation has received any bequests or has been charged with the responsibility of administering any trusts it should ensure that the restructure does not compromise its right to participate in the funds or to apply the funds for the specified purposes.

## 6. CONCLUSION

The not-for-profit sector is currently comprised of a patchwork of organisational structures based on borrowed constitutions and notions of limited liability. However, emerging economic pressures will force the sector to review these structures and “rationalise” and reshape over the next few years. This paper summarises some of the multitude of options and issues that form part of the restructuring jigsaw puzzle. Organisations should not rush headlong into structural reform but should instead undertake reviews, develop strategies and seek professional advice to ensure the best and most effective organisational structure or system is built.



## Emma Fitzgerald

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This paper contains a summary of certain current issues relevant to legal structures and restructuring for not-for-profit organisations. It is not intended to and does not cover all aspects of the law on the relevant subject matter. Further professional advice should be sought before any action is taken based upon the matters described and discussed in this paper.

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