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Associations Incorporation Act Review  
Fair Trading Policy  
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Dear Commissioner

## **Improving governance within incorporated associations: Discussion paper**

Governance Institute of Australia (formerly Chartered Secretaries Australia) is the only independent professional association with a sole focus on the practice of governance. We provide the best education and support for practising chartered secretaries, governance advisers and risk managers to drive responsible performance in their organisations.

Our Members are all involved in governance, corporate administration and compliance with the *Corporations Act 2001*. Many of our Members serve as officers of not-for-profit (NFP) organisations, or work for or are involved with NFP organisations, many of which are companies limited by guarantee and various of which are also incorporated associations. Governance Institute of Australia, itself is a company limited by guarantee, established to promote and advance the efficient governance, management and administration of commerce, industry and public affairs and the development of secretaryship of organisations through education and the dissemination of information.

Governance Institute of Australia welcomes, therefore, the opportunity to comment on the discussion paper, *Improving governance within incorporated associations* (the discussion paper) and draws upon the experience of our Members in providing our response.

### **General comments**

Incorporated associations deliver essential services and play a key role in providing community-based facilities, including, for example, sporting clubs, musical societies, arts, crafts and community groups. The importance of their role in society, however, also requires us to closely consider their governance frameworks and the regulatory structure within which they operate.

Governance Institute of Australia recognises that there is an intersection between the regulatory activities of Fair Trading (NSW) and the NSW Government Departments that provide funding to incorporated associations. Governance Institute of Australia is also supportive of the NSW Government's light-touch approach to regulation that balances the need for transparency and accountability with simplicity and efficiency.<sup>1</sup>

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<sup>1</sup> NSW Government submission to the House of Representatives Inquiry into the Australian Charities and Not-for-profits Commission Exposure Draft Bills, July 2012

However, Governance Institute of Australia is strongly of the view that the regulation of incorporated associations should be balanced with the broader not-for-profit (NFP) regulatory reform process which is currently underway. In keeping with a pre-election commitment, we note that the Federal Government has indicated that it will consult on the future of regulation for the NFP sector, including the role of the Australian Charities and Not-for-profits Commission (ACNC). As supporters of the role of an independent regulator for the sector, we believe that the reforms should be allowed to progress as originally intended. While the newly established ACNC has only been in operation for a year, and at this stage is responsible only for the registration and regulation of charities, we note that it was originally intended that regulation extend to the entire NFP sector in the longer-term, including incorporated associations currently subject to individual state legislation. We continue to support this objective.

To this end, we remain concerned by the ongoing duplication of compliance obligations for state-based charities that are incorporated associations, given the dual regulatory regime in Australia, with state and territory-based associations' legislation co-existing with the national regulation of charities by the ACNC. Any obligation to manage dual compliance obligations is, of course, at odds with the intent of the regulatory reform process to reduce red tape, which has been recommended in multiple inquiries into the regulation of the NFP sector over many years and actively welcomed by the sector itself.<sup>2</sup>

Our comments in this submission are all based on the strong view that NFP organisations should not continue to be subject to a dual regulatory regime.

### **Referral of powers in the long term**

We believe that for any regulatory reform of the NFP sector to succeed, it is essential that the sector is granted the same national context as the private sector. A fundamental aspect of the reform process should be for the states to agree to refer powers to the Commonwealth, as occurred with the Corporations Act, to provide for all incorporated associations to be regulated nationally.

Governance Institute of Australia does not believe that the states should retain any residual role in regulating incorporated associations in the long run and certainly not in regulating charities that are also incorporated associations in the short term. The states have not retained a role in regulating private companies since 2001 and national regulation of the private sector has been of immense economic benefit and value to Australia. Advances in technology have facilitated the establishment of a national regulator. Online interaction means that state-based offices are not required, as in the past, to facilitate registration of entities and lodgement of reports.

No private sector company in Australia, no matter how small or local in its activities is required to meet the compliance requirements of a state-based regulator as well as those imposed by the Australian Securities and Investments Commission (ASIC) — this has been the case since the commencement of the Corporations Act in 2001. For example, even a small milk bar servicing a local community incorporated as a proprietary limited company with a sole director is regulated by ASIC, and information about that company is held on the ASIC register of companies.

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<sup>2</sup> There have been at least 15 reviews of the regulation of the not-for-profit (NFP) sector in Australia over the last 17 years, which have concluded that the regulation of the NFP sector would be significantly improved by establishing a national regulator and harmonising regulatory arrangements and simplifying taxation arrangements. These reviews include: the 1995 Industry Commission inquiry report *Charitable organisations in Australia*; the 2001 Committee Report *of the Inquiry into the Definition of Charities and Related Organisations*; the 2008 Senate Economics Committee *Inquiry into the disclosure regimes for charities and not-for-profit organisations*; the 2010 Productivity Commission's inquiry report *Contribution of the not-for profit sector*; and the 2010 Senate Economics Committee's *Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010*

The current dual regulatory regime in Australia is inefficient, costly and does not meet the needs of either small or large NFPs. There is no public policy argument to support the imposition of dual regulation of charities, and eventually all NFPs, when our private sector companies have already been freed of such onerous obligations for more than a decade. Maintaining dual regulation would be regressive, and condemn NFP organisations to continue being subject to a greater compliance burden than the private sector, which currently has recourse to a 'one-stop-shop' national regulator.

A referral of powers to the Commonwealth, as occurred with the Corporations Act, to provide for all incorporated associations to be regulated nationally, will ensure that charities in the first instance (and the entire NFP sector in time) have to respond to only one set of compliance obligations that operate nationally. This will bring savings to the states and remove all uncertainty, confusion and duplication in any regulatory reform affecting the NFP sector.

### **Consistency in the short term**

We recognise that the process of implementing a referral of powers could take some time to effect. The process of national and state agreement on legislative reform can be slow.

We are therefore of the view that consideration should be given in the short term to harmonisation processes which can reduce the dual compliance burden currently imposed on incorporated associations that are also charities. We note that the South Australian Government has already committed to a harmonisation process and issued their proposals for public consultation, while the Australian Capital Territory Government has similarly announced their intention to amend their incorporated associations legislation to facilitate a harmonisation process.

We appreciate that the harmonisation of requirements is beyond the scope of this review and the power of Fair Trading (NSW). We note, however, that Fair Trading (NSW) does have the power to ensure that the legislative requirements for incorporated associations in NSW are consistent with the requirements for incorporated associations in other jurisdictions and with those imposed on charities under the ACNC legislation and governance standards. Such consistency will provide greater compliance certainty to those incorporated associations that are also charities, and reduce the compliance burden on them.

Incorporated associations currently face difficulties if they operate nationally and are required to comply with different requirements in different states. We commented previously (under our former name as Chartered Secretaries Australia) on the Regulatory Impact Statement on the *Victorian Associations Incorporation Regulations 2012*. In our submission, to Consumer Affairs Victoria, we noted the benefits that accrue for incorporated association from a properly regulated sector, including our preference for the longer term referral of powers to a national regulator. We also advocated for the imposition of regulations that do not impose a material burden over and above what the other states impose on incorporated associations. We believe that Fair Trading (NSW) should similarly consider the context of the proposals put forward in the discussion paper.

**Governance Institute of Australia recommends** that Fair Trading (NSW) give due consideration to ensuring that the requirements for incorporated associations in NSW are consistent with the requirements for incorporated associations in other jurisdictions and with those imposed on incorporated associations that are also charities.

### **Providing guidance, education and training for the associations sector**

One of the key ways to improve the governance of the incorporated associations sector is to ensure that associations are provided with access to guidance materials on their compliance

obligations, as well as education and training, to help them understand the legislative and governance framework in which they are required to operate.

Fair Trading NSW's website already contains a range of very good materials that explain many of the aspects of the regulatory operations of incorporated associations; however, Governance Institute of Australia also believes that the provision of guidance and advice on other aspects would also be beneficial.

There is no 'one-size-fits-all' governance framework for the public, private or not-for-profit sectors, and each situation must be assessed and an appropriate governance model and framework designed, maintained and periodically reviewed as and when circumstances change. For incorporated associations, Governance Institute of Australia believes that many of the instances of poor governance practice exist because of a misunderstanding of the role of members and those in the management committees of incorporated associations. We recognise that the associations sector may have little experience and/or training with operating within a governance framework. We recognise that some within the NFP sector will have the relevant experience, but there will be many who do not.

Governance Institute of Australia believes, therefore, that Fair Trading (NSW) could consider developing and issuing guidance, education and training in relation to the duties of those charged with governance responsibilities, and their obligations to members and the general public in terms of accountability mechanisms and transparency of decision making. Those engaging with the incorporated association will also wish to review financial information to ensure that the organisation is being managed prudently. It may also be useful to provide some information on the national regulatory reform process underway and its implications for incorporated associations.

## **Conclusion**

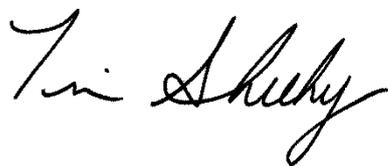
We support the intention of the review of the regulatory framework for incorporated associations in NSW to ensure that there is a consistent governance framework in place.

In reframing the governance framework for incorporated associations, we believe that Fair Trading (NSW) should look closely at the approaches and powers granted to regulators in other jurisdictions so as to ensure that any changes to the legislative and regulatory framework in NSW does not conflict with that occurring elsewhere in Australia. This will also ease any future process of harmonisation or referral of powers and is likely to relieve the compliance burden placed on incorporated associations. We also believe that Fair Trading (NSW) should further consider developing additional guidance and reference to education and training for the incorporated associations sector, as well as providing information on the national regulatory reform process currently underway.

In this light, we have provided in the following pages responses to the questions put forward in the discussion paper.

Governance Institute of Australia looks forward to seeing the recommendations and advice of the review in due course and would welcome the opportunity to discuss any of our views in greater detail.

Yours sincerely

A handwritten signature in black ink, reading "Tim Sheehy". The signature is written in a cursive, flowing style with a large initial 'T' and a long, sweeping underline.

Tim Sheehy  
Chief Executive

## **Feedback on issues raised in the Discussion Paper**

### **1. Should the Act provide for the appointment of an independent external person to act as returning officer in certain circumstances?**

Governance Institute of Australia understands that the appointment of an independent external person provides a method for incorporated associations to avoid disputes arising in relation to allegations that a returning officer is not truly independent or has acted in a partisan way.

While Governance Institute of Australia understands the rationale for the appointment of the independent external person, we are also cautious that such an approach may incur additional costs for small incorporated associations. For these organisations, the appointment of an independent person may not be financially feasible.

The proposed change provides that the amended legislation would only require the appointment of an independent returning officer where, for example,

- the association is a tier 1 association, that is, has annual gross receipts exceeding \$250,000 or current assets exceeding \$500,000, or
- the association received in excess of \$50,000 in government funding in the previous year.

Governance Institute of Australia believes that the thresholds provided for these requirements are too low and that many small incorporated associations without requisite financial resources are likely to be captured within these criteria. However, without any additional information available it is difficult for Governance Institute of Australia to otherwise comment on the appropriateness of the thresholds provided.

Instead, Governance Institute of Australia recommends that Fair Trading (NSW) provide some basis and background for its calculation of these figures. We also recommend that Fair Trading (NSW) provide guidance and education materials to explain some of the concepts used in describing the proposed obligation. We are concerned that some incorporated associations will not properly understand the terms 'annual gross receipts' and 'current assets' as these are predominantly accounting terms. Many of those serving in incorporated associations do so on a voluntary basis, and it cannot be assumed that they come from an accounting or financial background or have familiarity with such terms.

As highlighted above, we would also encourage Fair Trading (NSW) to assess whether the proposed measure is consistent with regulatory requirements in other jurisdictions across Australia.

### **2. Should the Commissioner for Fair Trading issue public warnings for incorporated associations?**

Governance Institute of Australia agrees in principle with the proposal. However, we are also of the view that any additional powers to be granted to Fair Trading (NSW) should be made consistent with the powers available for regulators in other jurisdictions across Australia.

### **3. Should mediation be mandatory before going to court?**

Governance Institute of Australia recognises that incorporated associations will need to access dispute resolution resources in order to resolve issues which arise within the association, between members and the association, or between third parties and the association. We appreciate that traditional dispute resolution methods, such as bringing an action in a court of law, can be expensive for both the association and the member or third party bringing the

action. In this light, it is preferable to have an independent method for the resolution of disputes for incorporated associations.

We are also cognisant that that Schedule 1 of the *Associations Incorporation Act 2009* (the Act) requires that every association's constitution include a dispute resolution clause. We note further that the *Associations Incorporation Regulations 2010* includes a model constitution which incorporated associations may adopt in whole or part, and that model includes a dispute resolution clause.

Governance Institute of Australia supports the proposed measure, provided that the terms of the amendment are not prescriptive in detailing how incorporated associations should resolve their disputes through mediation. We note further that incorporated associations should be given the opportunity to organise themselves in a way which is relevant to their operation and conducive to the needs of their members.

Governance Institute of Australia is also cognisant that many of the disputes that arise for incorporated associations arise out of a misunderstanding of the role of members and those charged with oversight of the association. We believe, therefore, that alongside providing access to dispute resolution measures for members, incorporated associations should also be provided with guidance and educational materials and referred to where they can obtain relevant training which highlights the role of the governing body within the organisation and the limits within which such a body may operate.

#### **4. Should the Commissioner for Fair Trading be permitted to issue mandatory practice directions?**

Governance Institute of Australia does not believe that the power to issue mandatory practice directions is consistent with a light-touch approach to regulation of incorporated associations. Although there can be issues involving governance and accountability in some associations, the ability to issue mandatory practice directions, particularly those which direct an incorporated association to operate in a certain way, is a heavy-handed undesirable way to enforce internal change, and a direct involvement in the operations of an incorporated association. Also we think that any attempt to become involved in operational actions may compromise the independence which Fair Trading (NSW) and other state departments may want when they have to exercise their powers. However it may be appropriate to advise an association that its actions are not in compliance with its constitution or the act.

Governance Institute of Australia understands the rationale for the proposed change and, in particular, recognises that in rare cases practice directions might be warranted. However, we also believe that a better approach is to focus on making available guidance and educational materials and referring incorporated associations to relevant training for those charged with responsibility for the day-to-day running of incorporated associations, as well as the responsibilities of the governing body. Governance Institute of Australia believes that incorporated associations would benefit from the provision of best practice guidance, and educational materials geared towards providing associations with advice about their governance framework.

As highlighted above, there is no 'one-size-fits-all' governance framework for incorporated associations, and while instances of poor governance must be addressed, we believe that incorporated associations would benefit more from guidance and education to address longer-term systemic issues which may exist than from the introduction of mandatory practice directions.

In line with our earlier comments, it may also be advisable to refer incorporated associations to the guidance and educational materials issued by the ACNC and easily accessible on its

website. A further advantage of this approach would be to ensure that there is consistency in practice among incorporated associations across jurisdictions, rather than a piecemeal approach which considers best practice methods in only one jurisdiction.

**5. Should the Commissioner for Fair Trading have the power to ban individuals from holding a position on a management committee?**

Governance Institute of Australia is cognisant that the power to ban individuals from holding a position in an incorporated association is one which is common to regulators across sectors and jurisdictions. It is also a substantial power to exercise.

In this instance, we would support Fair Trading being provided with this power provided that the limits and extent to which this power can be exercised is both made clear to the sector, and consistent with powers provided to regulators in other jurisdictions and sectors, including, for example, the powers provided to the ACNC. We note that the ACNC exercises this power as a 'last resort', having first provided access to guidance and educational materials in order to assist the charity and those responsible for governing it to understand their obligations.

In this regard, we also believe that Fair Trading (NSW) should clearly set out the terms and conditions of any proposed banning order, including issuing information about the classes of people who may be subject to a banning order. Providing educational materials and guidance to enable associations to properly manage any situations which might arise would also be of benefit. A clear statement of the conditions in which a banning order may apply will also act as a deterrent for those who might be in breach of the law.

**6. Should association members be able to enforce rules in the Local Court?**

As noted in our response to question three, we recognise that there is merit in ensuring that members are able to access dispute resolution measures in order to enforce their rights, including accessing the Local Court to enforce rules. While we support this option, we would highlight the importance of providing both members and incorporated associations with avenues for dispute resolution which avoid the use of the legal system in the first instance.

We reiterate that many disputes arise from members and associations being unclear about their roles and responsibilities within the organisation. We believe that this issue can be addressed through the provision of guidance and educational materials and provision of information on relevant training for incorporated associations.

A second issue to consider is whether or not providing access to the Local Court is consistent with the approach in other jurisdictions. Again, we would emphasise that consistency with the other jurisdictions should be a primary concern for this review process.

**7. Should the legislation allow action to be taken in the Local Court for oppressive or unreasonable conduct?**

Governance Institute of Australia believes that this question is best answered by the legal profession following the resolution of question six.

We reiterate the importance of ensuring that, alongside providing appropriate guidance and educational materials and information on relevant training on the obligations of incorporated associations their members' legal rights, the proposal for such powers also be considered in light of the legislation applicable in other jurisdictions across Australia.

## 8. Should disclosure of interests be recorded in the minutes?

Governance Institute of Australia supports the principle that it is good governance practice for associations to have a way of managing the interests of those charged with oversight of the association which may conflict or be perceived to conflict with the interests of the association. The management committee of an incorporated association has a duty to act in the best interests of the organisation as a whole.

The declaration and recording of the interests of directors in the minutes of meetings forms one part of the process involved in managing potential conflicts of interests. Governance Institute of Australia notes that a more complete process might require an incorporated association to turn its attention to:

- requiring potential and new committee or board members of the association to declare their interests and any potential conflicts of interest on appointment, and subsequently at a board or committee meeting as and when they arise
- maintaining a register of interests, which would be updated with subsequent disclosures
- requiring the disclosure of interests at meetings to be recorded in the minutes, and/or
- providing all employees with a copy of any conflicts of interest policy, or informing public officers of the processes required when a conflict of interest is identified

Importantly, however, Governance Institute of Australia does not support the proposed requirement that disclosure be published to all members. This requirement is both burdensome and unnecessary. While incorporated associations should be encouraged to publish information on disclosures, we believe that incorporated associations should be free to organise their affairs to suit their needs. This proposed requirement goes beyond that imposed on companies and their directors under the *Corporations Act 2001* and will impose extra cost for associations.

Governance Institute of Australia strongly believes that this requirement is one which can be better addressed through appropriate guidance, education and training for incorporated associations on the processes which can be put in place to manage any potential or real conflicts of interests of their public officers. There are already several good resources available for NFPs which are relevant to incorporated associations and can provide meaningful information on how best to approach the issue of managing and disclosing interests, including Governance Institute of Australia's booklet entitled *Managing Conflicts of Interest in the Not-for-Profit Sector*.

## 9. Should the Commissioner for Fair Trading have the ability to cancel the registration of an incorporated association if it is considered in the public interest to do so?

Governance Institute of Australia supports granting Fair Trading (NSW) with the ability to cancel the registration of an incorporated association, as this power is consistent with practice in other jurisdictions and sectors, including for example the powers granted to ACNC.

Governance Institute of Australia, however, strongly believes that Fair Trading (NSW) should clearly articulate how 'public interest' is to be defined and publish clear guidance and education on how this power may be exercised.

## 10. Should the legislation prohibit an incorporated association from engaging in conduct that is misleading or deceptive, or would be likely to mislead or deceive?

Governance Institute of Australia recognises that there may be instances in which incorporated associations have been involved in misleading or deceptive conduct. We believe, however, that the applicability of a general 'misleading and deceptive' conduct clause for incorporated associations may not be appropriate in all circumstances.

Without further information provided on the type and nature of the offences which have occurred, it is difficult for Governance Institute of Australia to provide conclusive feedback on this issue. However, while we recognise that this proposal would align NSW with the provisions of Australian Consumer Law (ACL), such a measure might also consider whether:

- this proposal is consistent with the powers given to regulators in other sectors and jurisdictions
- the provisions of misleading or deceptive conduct appropriately apply to incorporated associations, which by their nature are excluded from the ACL owing to their classification as not engaging in 'trade and commerce', and
- the prevailing body of predominantly corporate law is adequately adapted to apply to incorporated associations.

Governance Institute of Australia believes that the terms of any legislative amendment must be clearly spelt out, and that appropriate guidance and educational materials and provision of information on relevant training must be offered should Fair Trading (NSW) decide to pursue this course of action.

As with all the measures put forward in the discussion paper, Governance Institute of Australia also believes that further information should be published which demonstrates that these measures form an appropriate response to issues which have arisen in the governance of incorporated associations.