TRANSITIONAL GUIDE

Information to assist Victorian incorporated associations transitioning from the *Associations Incorporation Act 1981* to the *Associations Incorporation Reform Act 2012*

HOW TO TRANSITION TO NEW LAWS FOR INCORPORATED ASSOCIATIONS

On 26 November 2012, the *Associations Incorporation Act 1981* was replaced by the *Associations Incorporation Reform Act 2012*. This Transition Guide explains how and when the new laws apply to your organisation. This Guide should be read before reading the Secretary's Satchel – A Guide for Secretaries (www.pilch.org.au/secsguide).

Key points

1. What laws are changing?

On 26 November 2012, the *Associations Incorporation Act 1981* (Vic) (**the old Act**) was replaced by the *Associations Incorporation Reform Act 2012* (Vic) (**the new Act**). The new Act contains new laws for incorporated associations, and Regulations under the new Act contain new model rules for incorporated associations.

2. What does your association need to do?

There are some laws that your organisation needs to comply with from 26 November 2012. There are also some things your organisation may need to do over the next 12 months, especially if your organisation uses the model rules. This section summarises these transitional issues.

3. Transitioning from "Public Officer" to "Secretary"

The "public officer" role has been replaced with "secretary". There are some particular issues that associations using the model rules need to consider.

4. Transitioning to the new reporting structure

A new reporting structure will apply to associations reporting on financial years ending 30 June 2013 and onwards. Associations reporting on financial years ending earlier than 30 June 2013 can choose to report under the old or new reporting structure.

5. Transitional issues for associations using their own rules

There are a number of new scheduled items that need to be addressed in all associations' rules. You can amend your association's rules to deal with the new scheduled items, or move to the new model rules. If you do nothing, where the new items are not addressed in your rules, the new model rule that deals with the new item will be read into your association's rules from 26 November 2012.

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6. Transitional issues for associations using the model rules

From 26 November 2012 to 25 November 2013 your association can continue to use the old model rules. During this period, your association, through a special resolution of members, can move to the new model rules under the new Act at any time or to adopt its own rules. If your organisation does nothing, from 26 November 2013, the new model rules will automatically apply.

7. What are the key differences between the old Act and the new Act?

This section outlines the key changes to the laws that apply to Victorian incorporated associations.

What laws are changing?

Incorporated associations in Victoria operate under a legislative framework that sets out laws, regulations and model rules. Until 26 November 2012, the *Associations Incorporation Act 1981* (Vic) (**old Act**) applied to incorporated associations, along with regulations under the old Act and model rules under the old Act (**old model rules**).

On 26 November 2012, the *Associations Incorporation Reform Act 2012* (Vic) (**new Act**) came into effect, implementing a new legislative framework for incorporated associations in Victoria. The new framework includes new regulations (**Regulations**) and new model rules (**new model rules**).

There are new requirements for associations' rules, which must now address 23 items listed in Schedule 1 to the new Act (**Scheduled Items**). Detailed guidance on the Scheduled Items is set out in PilchConnect's Rules Checklist.

This Transitional Guide discusses the transitional steps that associations will need to consider to make sure they are complying with the new laws, and provides a summary of the key changes to the law (at Part 7).

What does your association need to do? Key transitional issues

Several of the changes introduced by the new Act raise transitional issues for incorporated associations. All associations will need to consider the following transitions:

- transitioning from "public officer" to "secretary" (discussed in more detail at Part 3 of this Guide)
- transitioning from the reporting structure under the old Act to the reporting structure under the new Act (discussed in more detail at Part 4 of this Guide)

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- associations using their own rules need to either update their rules to reflect the changes in the law, or understand where new model rules will automatically apply to them (discussed in more detail at Part 5 of this Transition Guide), and
- associations using the old model rules must either transition to the new model rules, or draft and adopt their own rules that meet the requirements of the new Act (discussed in more detail at Part 6 of this Transition Guide).

Associations should also assess whether any insurance cover they have is properly worded and framed in light of the new laws, and consider whether any additional insurance is required to cover the new office holders' indemnity (discussed further at part 7 of this Transition Guide).

Associations may also need to consider putting in place new policies and procedures to address some of the key changes in the law outlined at Part 7 of this Transition Guide. In particular:

- to deal with requests by members to restrict access to their personal information on the members register, and
- to update disciplinary action and grievance procedures to reflect new legal requirements.

Transitioning from "Public Officer" to "Secretary"

The new Act has replaced all references to "public officer" with the term "secretary". It is best to think of the change as a name change, as the functions remain largely the same (although the new Act has made some changes, for example, the secretary must now receive members' requests to have access to their personal information restricted).

The name change came into effect on 26 November 2012, and from that date the "public officer" of an association automatically becomes the "secretary" of the association under the new Act.

For many associations, the name change means they now have 2 secretaries - a secretary under their rules (**Rules Secretary**), and the former public officer who is now known as secretary (**Act Secretary**)! If, prior to 26 November 2012, your organisation had a committee role called "secretary" in its rules that was separate to the role of "public officer" – this will be the case for you.

The transition from "public officer" to "secretary" can be complicated, because the new Act requires that associations' rules provide for the appointment and removal of the Act Secretary. Many associations' rules do not currently do this, and complicated transitional rules under the new Act apply.

If your association has its own rules, and these rules deal with the appointment or election of a Rules Secretary and also deal with the appointment or election of the public officer/Act Secretary, your association can continue to operate under those rules and will comply with the Act. However, to avoid

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confusion, your association should consider either merging the roles, or renaming the old secretary role so that there are not two secretaries.

If your association has rules that do not outline the process for electing or appointing the public officer/Act Secretary, some steps we recommend are outlined below. The steps are relevant for associations using the old model rules, and may also help associations with their own rules, where their own rules do not deal with the appointment or election of the Act Secretary.

Steps for associations merging the role of Rules Secretary and public officer/Act Secretary

If your association has a Rules Secretary and an Act Secretary, and your rules only deal with the election of appointment of the Rules Secretary, we recommend that you merge the two secretary roles.

To do this:

- the Act Secretary should resign (ie the person who has been public officer should resign from that role)
- the Rules Secretary should take on the responsibilities of the Act Secretary within 14 days of the Act Secretary resigning. The committee should approve the appointment of the Rules Secretary as the Act Secretary, and record this in committee meeting minutes
- the Rules Secretary must notify CAV within 14 days of taking up the role of Act Secretary that they have taken on that role
- at the AGM that follows the steps taken above, if your association is still operating under either the old model rules or own rules that have not been updated to specifically deal with the appointment or election of the Act Secretary, the members should be advised that the position of secretary that is being filled includes both the responsibilities of the Rules Secretary and the Act Secretary, and
- the person elected to be the merged Rules Secretary and Act Secretary role at the AGM must notify CAV within 14 days of their appointment.

Transitioning to the new financial reporting requirements

The new reporting system must be used if your association's financial year ends on 30 June 2013 or after. If the financial year your association needs to report on ends before 30 June 2013, your association can choose between reporting under the old and new systems. The new system includes a 'tiered' reporting requirements, and new financial reporting forms, described in more detail below.

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New reporting system

The new Act replaces the "prescribed"/"non-prescribed" distinction as the structure for reporting with a system of 'tiers' based on total revenue for the organisation's financial year. Different reporting requirements apply to the different tiers.

Tier	Eligibility	Reporting requirements
One	Up to $250,000 (or where declared Tier One by CAV)	Tier one associations can continue to report to CAV on the same annual basis as applied to 'non-prescribed' associations in the old Act – that is, no review or audit is required by the new Act. However, a tier one association must have accounts reviewed by an independent accountant if a majority of members vote to require it, or if CAV directs the association to do so.
Two	Between $250,000 and $1m (or where declared Tier 2 by CAV).	Tier two associations are required to have their accounts 'reviewed' by a recognised accountant or any other person approved by CAV. The reviewer must be independent, conduct the review in accordance with relevant industry standards, and provide a written report of the review to the association. A review differs to a formal audit. A tier two association may need to have its accounts audited if required by its rules, contracts or funding agreements.
Three	Over $1m, (or where declared Tier Three by CAV).	Tier three associations will continue to report to CAV on the same basis as applies to 'prescribed' associations in the old Act. They must have their accounts fully audited, and provide CAV a copy of the auditor's report (however the new Act adds the National Institute of Accountants to the existing list of approved accountants).

Generally, the new Act provides scope for an association to apply to CAV for an exemption from any or all of the reporting requirements for a particular year or longer.

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Part 8: Reporting to Consumer Affairs Victoria of The Secretary's Satchel - A Guide for Secretaries outlines the new reporting system and contains checklists and tools for secretaries to help fulfil their reporting responsibilities.

Transition for associations using their own rules

Associations using their own rules do not have to change their rules during or after the transition period. However, from 26 November 2012, it is likely that their rules will no longer meet the requirements of the new Act. Like the old Act, the new Act lists items (**Scheduled Items**) that must be included in an association's rules (these are listed in Schedule 1 of the new Act). The new Act contains several new items that must now be addressed in an association's rules. For more detailed guidance on the new Scheduled Items go to PilchConnect's Rules Checklist.

From 26 November 2012, there are two important consequences for the rules of associations that use their own rules:

- if any rule is inconsistent with the new Act, it will be invalid. This means that any rules inconsistent with the new Act should not be applied by an association. If invalid rules are followed (even inadvertently) by an association, this will a technical breach of the law, and
- if your rules do not cover a newly required Scheduled Item, the relevant new model rule that deals with the item will automatically apply to your organisation. This means that if you follow your own rules without considering whether they meet the requirements of the new Scheduled Items, your association may not be complying with the law.

The process of striking out rules and reading in model rules to associations' rules can make rules unworkable and confusing. Therefore, we recommend all incorporated associations using their own rules review and update their rules to ensure that all rules are valid, and that each of the 23 Scheduled Items is covered.

Remember!
PilchConnect's Rules Checklist can help you review your rules. To keep up-to-date on PilchConnect's new resources and training for 2013, sign up to PilchConnect's e-bulletin to www.pilch.org.au/subscribe.

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Transition for associations using the old model rules

There is a 12 month transition period for associations using the old model rules. During this period associations can:

- choose to adopt the new model rules (through special resolution at a general meeting, in accordance with your rules, and then notifying CAV)
- choose to draft and adopt their own rules that meet the requirements of the new Act (through special resolution at a general meeting, and then submitting the rules to CAV for approval), or
- do nothing. If you do nothing, the new model rules will automatically apply to your association at the end of the transition period on 26 November 2013.

The new model rules are quite different to the old model rules, so your organisation should carefully look at the new model rules, and consider whether or not you wish to adopt them. You can access a copy of the new model rules here.

For PilchConnect's summary of the differences between the old model rules and the new model rules, go to Model Rules Comparison Table.

It is important to understand that during the transition period, where the old model rules do not cover the new Scheduled Items (see discussion above), the relevant new model rule that covers the issue will be deemed to apply to your association. Most Scheduled Items are covered by the old model rules, however PilchConnect considers there are a few areas where there is some doubt that the old model rules do not adequately addresses the new Scheduled Items. These are:

- the rights and liabilities of members, and
- the appointment and removal of the secretary (formerly "public officer").

Therefore, it would be best practice to assume that the new model rules addressing rights and liabilities of members, and the appointment and removal of the secretary apply (discussed further in the Model Rules Comparison Table).

To avoid confusion, associations using the old model rules, may wish to adopt the new model rules or draft and adopt its own rules as soon as possible.

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What are the key differences between the old Act and the new Act?

Note:
The following is a summary of some of the more significant changes introduced by the new Act.

In summary, the main changes introduced by the new laws and regulations are:

- a new financial reporting structure, with different reporting requirements for different 'tiers' of associations
- the re-naming of the role of "Public Officer" as "Secretary"
- removal of the prohibition against trading for associations
- codification of the legal duties (and defences) that apply to committee members and office holders
- a new indemnity for committee members and office holders in associations
- new natural justice requirements for disciplinary and grievance procedures
- new procedures giving members rights to request that access to their personal information on the members register be restricted
- new matters that must be addressed in association's rules (and if they are not, the relevant new model rules will automatically apply to the association), and
- new model rules for associations.

Codification of duties for office holders and defences

The new Act spells out legal duties applying to office holders (including former office holders), in addition to clarifying their existing obligations. Under the new Act, an 'office holder' is defined as:

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

The practical effect of these changes is minimal, as the common law (judge-made law) already imposes duties on people governing an incorporated association. The Act now lists four key duties that apply to officer holders:

- the duty to not make improper use of information or position

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- the duty to exercise reasonable care and diligence, including the duty to prevent the association from trading while it is insolvent
- the duty to exercise powers and discharge duties in good faith and for a proper purpose, and
- the duty to manage conflicts of interest.

The new Act also introduces civil penalties (fines of up to $20,000) for office holders found to have fallen short of these duties, and where a defence is not available.

Detailed information on office holders' duties can be found in PilchConnect's Guide to Duties.

As well as codifying the duties of directors and office holders, the new Act sets out two defences to alleged breaches of duties (there largely reflect defences already available under the common law).

The 'business judgment' rule

A judgement made by a director or office holder will not amount to a breach of the duty to exercise care and diligence, even if it has detrimental outcomes for an association, if the decision-maker:

- made the decision in good faith for a proper purpose
- did not have a material interest in the subject matter
- appropriately informed themselves about the subject matter of the decision, and
- rationally believed the decision is in the best interests of the association (an objective test).

Reliance on information or advice

The new Act introduces a defence to claims that an office holder has breached a legislative duty where that office holder has reasonably relied on information or advice (for example from a specialist or from an employee).

The defence is available to directors and officer holders where they have relied on advice from the following types of people:

- employees of the association that the office holder reasonably believes are reliable and competent
- professional advisors where the subject matter falls within their scope of expertise
- another office holder when acting within their authority, or
- a sub-committee of the association, where the office holder is not a member of the sub-committee.

The reliance by a director or office holder must have been in good faith and with an independent assessment of the reliability of the advice.

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Updates to conflicts of interest provisions

The new Act introduces changes to the requirements for disclosing and managing conflicts of interest at committee level. The new requirements apply to all committee members of incorporated associations.

The old Act used the term 'pecuniary interest' to identify a conflict. The new Act uses the term 'material interest' which is broader and will encompass more types of conflicts, including non-financial interests.

Where a committee member has a material personal interest in a matter being considered at a committee meeting, the new Act requires that they must not be present while the matter is discussed and voted on. This differs to the position in the old Act, which allowed committee members with a pecuniary interest in a matter to be present during deliberations, despite not being able to vote on the matter.

Indemnity for office holders

The new Act creates an obligation requiring all incorporated associations to indemnify office holders against any liability incurred in good faith by that office holder on behalf of the incorporated association in the course of performing his or her duties.

Prior to 26 November 2012, many associations had a rule to ensure that committee members are indemnified for personal loss, however this amendment makes it a requirement for all associations to indemnify the broader category of 'office holders', even if there is a no indemnity in an associations' rules.

This new requirement has caused some confusion amongst organisations, and we have the following tips:

- **TIP!** The indemnity of office holders is not the same as indemnity insurance.
- **TIP!** The new Act does not introduce a legal requirement for organisations to take out insurance.
- **TIP!** While this new law does not require your organisation to take out insurance, it is certainly worth considering insurance to cover the potential costs of the indemnity, as a part of your overall risk management strategy.

New privacy requirements

The new Act introduces two new privacy measures. Firstly, it allows members to request, where they have "special circumstances", that access to their details on the members register is restricted to either just the secretary, or to the secretary and the committee.

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A request to restrict access must be made by a member to the secretary (formerly "public officer"). The secretary should consider whether or not there are special circumstances (for example, a member may have received death threats, and wish to have their address suppressed). If there are special circumstances, the secretary must remove the member's details from the register available for inspection. A member can request a review of a secretary's decision at VCAT.

If an association has members whose details on the register need to be restricted, it may need to keep two (or more) versions of the register. One complete version for use by the secretary, and one version available for inspection, that has the relevant records suppressed.

The new Act also includes a new offence that prohibits misuse of information on the members' register. A use of members' information will be a misuse of information if it is for purposes other than furthering the management and purposes of the organisation, or is prohibited by the association's rules. Misuse could include sending advertising to members or sending unwanted emails unrelated to the organisation.

"Public Officer" replaced by "Secretary"

The new Act replaces all references to 'public officer' with 'secretary'. This should be thought of as simply a change in name, however the name-change can become confusing for organisations who already have a committee member known as "secretary" – these organisations will now have two secretaries! See Part 3 of this Transition Guide for tips on transitioning to the new terminology.

Go to our Guide for Secretaries for a comprehensive overview of the secretary's role in an incorporated association.

Removal of the prohibition on trading

The old Act no longer contains a prohibition on trading. Therefore, associations can now trade, or be involved in trading activities so long as they are consistent with their purposes. Each association should consider whether trading is consistent with their purposes. Most associations with broad purposes will now be able to trade, so long as all funds raised are directed back to furthering the association's mission.

The prohibition on securing profits for members remains in force.

Use of technology at committee and general meetings

The new Act specifically allows associations to hold committee meetings and general meetings via new technology (eg teleconference) provided that the technology allows meeting participants to 'clearly and

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simultaneously communicate with each other'. This amendment acknowledges the range of methods used to conduct meetings when participants are in different locations.

New Scheduled Items that must be provided for in an association's rules

Schedule 1 to the old Act stipulated 17 core items that must be addressed in the rules of an association. Schedule 1 to new Act now includes 23 items that must be addressed (**Scheduled Items**).

New Scheduled Items include requirements that rules of associations:

- set out that that accurate minutes of all general and committee meetings be prepared and kept
- provide members with access to the minutes of the general meetings of the incorporated association (including accounting records and financial statements)
- clarify whether or not members can have access to the minutes of meetings of the committee of management of the incorporated association (and, if so, the terms and conditions on which minutes will be made available)
- address the rights, obligations and liabilities of members
- outline procedures for the resignation of a member or cessation (ending) of membership
- outline procedures for the appointment and removal of the secretary (formerly "public officer"), and
- address what will happen to the assets of the association when the association comes to an end (remember that the way this provision is framed may affect your eligibility for tax concessions, so always seek legal advice if you wish to be eligible, or remain eligible for tax concessions).

For help on assessing whether rules meet the requirements of the new Schedules Items, go to PilchConnect's Rules Checklist.

Removal of members of the committee (and secretary)

The new Act introduces a number of triggering events that will mean a committee member no longer holds their office. The triggering events include when an office holder:

- resigns by written notice to the committee
- is removed by special resolution of members at a general meeting
- dies
- becomes bankrupt
- becomes a 'represented person' for the purposes of the Guardianship and Administration Act 1986, or

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- if secretary, ceases to reside in Australia.

A committee member will no longer hold their office if a statutory manager is appointed to conduct the affairs of the association (this is normally a result of action taken by CAV).

Rights of members

The new Act clarifies the rights of members of associations, including the circumstances in which members can inspect or get a copy of the association's rules.

The new Act also clarifies a member has rights to:

- be notified of the date, time and place of all general meetings of the incorporated association
- attend and vote at general meetings (if their membership allows for voting), and
- be sent a proxy form, where proxy voting is permitted.

Grievance procedures

The new Act sets out specific requirements for an association's grievance procedures, rather than the old Act which simply notes in Schedule 1 that an association's rules must set out a grievance procedure.

An association's grievance procedures now must:

- give each party to a dispute an opportunity to be heard, and
- be determined by an unbiased decision maker.

Disciplinary action against a member

The new Act also introduces requirements for associations' disciplinary procedures (but note it is not compulsory for an association to include disciplinary procedures in its rules).

If an association proposes to take disciplinary action against a member (and it can do so even if its rules do not set out a procedure), the association must comply with its own disciplinary procedures (if any) **and** must ensure that:

- the member who is the subject of the disciplinary procedure is informed of the grounds upon which the disciplinary action is proposed
- the member is given an opportunity to be heard
- any outcome arising from a disciplinary proceeding is determined by an unbiased decision maker, and

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- the disciplinary procedure is completed as soon as is reasonably possible.

The new model rules also allow a member who disagrees with the outcome of a disciplinary action to call a disciplinary appeal meeting of members who can vote on whether to approve the committee's disciplinary action against the member.

Further information

PilchConnect resources

The PilchConnect web portal contains a variety of resources and fact sheets for community organisations – go to www.pilch.org.au/legal_info/:

- See Secretary's Satchel – A Guide for Secretaries of Victorian Incorporated Associations
- See Rules Checklist
- See Model Rules Comparison Table

Legislation

The *Associations Incorporation Act Reform Act 2012* (Vic) is the legislation that regulates incorporated associations in Victoria.

The *Associations Incorporation Reform Regulations 2012* (Vic) contain additional requirements for incorporated associations in Victoria, including the model rules.

Government

Consumer Affairs Victoria website contains a variety of online resources, including online access for incorporated associations. See: www.consumer.vic.gov.au > Clubs and not-for-profits.

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