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MIGRATING A CHARITY OR A NFP FROM AN INCORPORATED ASSOCIATION TO A COMPANY LIMITED BY GUARANTEE

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1 CHANGING FROM AN “INC” TO A “LTD”

1.1 There can be compelling commercial and legal reasons for a charity to change its corporate structure. There is a pathway in most State and Territory legislation and in the Corporations Act 2001 (Cth) for an incorporated association to morph into a Company limited by guarantee. This presentation identifies the reasons for the change and discusses how to effect that change.

1.2 Generally a change in legal structure for Charities is actioned by:

- Forming a new entity (the desired new legal structure)
- Registering the new entity as a Charity – ABN, ACNC, ATO
- Transferring the assets and undertaking of the old entity to the new entity
- Assigning / Novating material contracts of the old entity to the new entity
- Obtaining transfer duty exemptions
- Winding-up the old entity

1.3 Migration is different – it is the same entity – one moment administered under State / Territory based regulation and the next administered under Federal regulation. As the “same entity” rights and obligations before the migration are the rights and obligations after the migration.

It is the same “legal person” in “new clothes” (with new powers and duties).

Analogy – Clark Kent → Superman.

1.4 Key legislative provision – section 601BM of the Corporations Act in Part 5B.1, subsection (1) of which provides as follows:

“Registration under this Part does not:

(a) Create a new legal entity; or

(b) Affect the body’s existing property, rights or obligations (except as against members of the body in their capacity as members); or

(c) Render defective any legal proceedings by or against the body or its members.”

(emphasis added)

1.5 For ease of reference, the table below sets out the governing bodies and applicable legislation in each State and Territory enabling the voluntary transfer of incorporation (“migration”) of incorporated associations to Companies limited by guarantee.

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- 1.6** South Australia is the only state with legislation that does not enable migration. **Instead, a new Company entity must first be formed.** With the necessary *authorisation*, the undertaking or operations of the incorporated association are then transferred to the new Company. This paper sets out the alternative transfer process for South Australia in more detail below.

Table: State and Territory governing bodies and legislation

Jurisdiction	Governing Body	Legislation	Migration Provisions
Queensland	Office of Fair Trading	<i>Associations Incorporation Act 1981</i>	Part 11A, Division 1
New South Wales	NSW Fair Trading	<i>Associations Incorporation Act 2009</i>	Part 7, Division 3
Australian Capital Territory	Office of Regulatory Services	<i>Associations Incorporation Act 1991</i>	Part 6
Victoria	Consumer Affairs Victoria	<i>Associations Incorporation Reform Act 2012</i>	Part 8
Tasmania	Consumer Affairs and Fair Trading	<i>Associations Incorporation Act 1964</i>	Sections 25C – 25F
South Australia	Consumer and Business Services	<i>Associations Incorporation Act 1985</i>	Not Applicable
Western Australia	Consumer Protection	<i>Associations Incorporation Act 1987</i>	Part IIIA
Northern Territory	Consumer Affairs	<i>Associations Act 2012</i>	Part 7

2 WHAT IS A “COMPANY LIMITED BY GUARANTEE”? – “XYZ LTD”

- 2.1** Registered under the Corporations Act 2001 (*Cth*).
- 2.2** Has “members” not Shareholders
- 2.3** “Members” have a limited liability, not limited to the fully paid face value of shares (as is the case for shareholders) but limited by the amount of the Member’s guarantee in the Constitution. This is usually a nominal amount - \$10 or \$50 per member.
- 2.4** It has directors (minimum 3)
- 2.5** It is a public Company – “Limited” (not a private Company “Pty Ltd”) – not because of its number of members or its listing on the stock exchange but because it exists for “purposes” not “persons”.

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3 WHY CHANGE TO A “COMPANY” STRUCTURE?

3.1 Governance

- 3.1.1 This form of incorporation is a “better fit” for larger organisations.
- 3.1.2 The constitution of a Company can be far more flexible and can allow for the use of regulations/internal by-laws for aspects of the organisation’s life. These regulations / by-laws can be made and changed by the Board, and are not public documents.
- 3.1.3 Directors’ duties under the Corporations Act are perhaps more readily understood.
- 3.1.4 The Corporations Act is a far more sophisticated piece of legislation than most state pieces of legislation and while this does add to the compliance burden it does also usually mean better governance. (E.g. Under s249H (2) of the Corporations Act,¹ if all the members agree the period of time for a members meeting can be truncated. This allows members’ meetings to be called on short notice if required. This can become important as the asset base of a charity grows).
- 3.1.5 Practically in our experience, ASIC oversight is generally less intrusive than the state governing bodies (e.g. While your Constitution would need to comply with the Corporations Act, ASIC does not need to approve changes to your Constitution).
- 3.1.6 Generally for associations, you need to be a member in order to be on the management committee². For a Company (subject to the specific requirements of its constitution) Directors do not need to be members.
- 3.1.7 The Company can be structured so that Members control who the Members are.
- 3.1.8 A Company can hardwire in the Constitution a narrow membership with stringent controls on qualification for new and continued membership. We commonly use structures with a narrow membership for charitable bodies to protect from membership drives for take-over.
- 3.1.9 A Company can, as a matter of law, have a single member and the sole member can be a single organisation (s114). (While technically this could be a single individual, charitable tax endorsements require a minimum of three unrelated individuals, or a single charitable institution for the membership).³

¹ For convenience in this paper references to section numbers without further reference are references to sections in The Corporations Act.

² We are aware of an exception to this in Western Australia where management committee members do not need to be members of the Association.

³ We are aware that in South Australia it is possible for an association to have a sole members, but generally associations require a higher minimum number of members.

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3.2 Interstate operations

- 3.2.1 Migration to a Company limited by guarantee will enable an organisation to operate more easily across jurisdictions within Australia.
- 3.2.2 Should your organisation expand operations beyond the association's State of incorporation, there is some doubt as to whether an association's members continue to enjoy limited liability for activities outside its original registration State or Territory. By contrast, a Company limited by guarantee is an Australian public Company which can operate Australia wide.

3.3 Understood

- 3.3.1 Companies are generally more readily understood than Incorporated Associations by bankers and other contracting parties especially. (For example other contracting parties can rely on s127 in relation to the valid signing of a contract. There is no equivalent in the state legislation.)

3.4 Lenders

- 3.4.1 Lenders are generally more comfortable with lending to a Company limited by guarantee by applying the usual security instruments from the commercial lending arena.

3.5 Government grant conditions

- 3.5.1 In our experience, a Company limited by guarantee is seen as a preferred form of incorporation for some Federal Government funding and by the Federal Government in its consultation papers on the reform of the not for profit sector (as governance, and in particular the supervisory role of ASIC, is seen as more robust). It is better to choose your own timing for such a change rather than it being forced upon you, by a funding provider, at a time that may not be convenient.

3.6 No revenue consequences

- 3.6.1 Importantly, this process of migration does not create a new legal entity. It remains the same legal entity, with the same ABN, but with a different corporate structure, and a slightly different name – "Ltd" not "Inc". Registration of the Company under the Corporations Act based upon such a migration does not affect the entity's existing property, rights or obligations (s 601BM). Consequently, transfer duty and capital gains tax considerations are not relevant under this migration process because the assets of the association continue to be owned by the same body, despite the change of corporate status.
- 3.6.2 Although the process in South Australia requires the creation of a new legal entity, the SA Act specifies that the vesting of property in the new Company by virtue of the transfer (and any instrument evidencing or giving effect to that vesting) are exempt from stamp (transfer) duty.⁴

⁴ Per s 42(5) SA Act.
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- 3.6.3 Given that the Corporations Act specifically provides that the migrated entity is the same legal entity and where the Board and the members post migration remain the same (i.e. no change in control) it may be that deemed Assignment prohibitions (change of control) in material contracts would not be offended. However, all of these need to be checked.

4 PROCESS OF MIGRATION

4.1 Approval of funding bodies

- 4.1.1 Whilst this is not strictly necessary, we recommend that it is wise for an organisation to write to its funding bodies to confirm that they have no objection to the migration of the organisation to a Company limited by guarantee.

4.2 Reserve new Company name with ASIC

- 4.2.1 This is not essential but will provide certainty that the preferred name for a Company will be available upon incorporation. An ASIC Form 410 is required along with payment of a nominal fee. Reservation lasts for two months and can be extended for a short period on request (s 601DA).

4.3 Draft new Company Limited by Guarantee Constitution

- 4.3.1 Allow 1 month (for key stakeholders to have input). This is an opportunity to have the Constitution of an organisation thoroughly reviewed and, where appropriate, updated. Whilst there are templates available for the Constitution of Companies limited by guarantee, it is important to have this document prepared taking into consideration the unique objects and governance culture of the organisation.

4.4 Consents from key parties

- 4.4.1 These consents should be obtained from all the members, directors and secretary of the Company. Such consents should be in writing, signed and addressed to the organisation. Members' consents should set out the amount of the guarantee agreed to by the members.

4.5 Resolutions for migration

- 4.5.1 The authorisation of the members to migration is a general legal requirement of each of the state or territories for migration, and an organisation is required to demonstrate compliance with all migration legal requirements prior to migration (s 601BC(8)(e)).
- 4.5.2 If those requirements did not include consent to the migration, the Corporations Act nevertheless requires members' consent by way of a special resolution (75% of members entitled to vote), with members having been given at least 21 days notice of

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the meeting and the proposed special resolution (s 601BC(8)(f)). The proposed new Company Constitution must be provided with that notice of meeting.

- 4.5.3 The procedure for calling the special general meeting and proposing the special resolution to voting members of the incorporated association should be followed according to the applicable state or territory legislation and any applicable rules of the incorporated association.
- 4.5.4 In Queensland, the organisation will need to convene a special general meeting to determine the following by special resolution (75% majority):
- a To apply to become registered as a Company limited by guarantee under the Corporations Act;
 - b The name under which the association is to become registered as a Company;
 - c To adopt the Constitution of the Company;
 - d To authorise the President (or as otherwise named) and 2 other members of the management committee to apply to the Chief Executive of Fair Trading (Qld) for authorisation to migrate to a Company limited by guarantee.⁵
- 4.5.5 In New South Wales, the organisation simply needs to have authorised the application to migrate by a special resolution, which must be passed by at least 75% of the members entitled to vote:
- a at a meeting of the association where at least 21 days notice is given with a copy of the proposed special resolution;
 - b in a postal ballot conducted by the association; or
 - c in such other manner as directed by the Director-General.⁶
- 4.5.6 In the Australian Capital Territory, the organisation needs to have authorised the application to migrate by a special resolution, which must be passed:
- a at a general meeting of the association where at least 21 days notice is given with notice of intention to propose the resolution as a special resolution; and
 - b by at least three quarters of the members entitled to vote.⁷
- 4.5.7 In Victoria, the organisation needs to have approved the application to migrate by a special resolution, which must be passed:
- a at a general meeting of the association where at least 21 days notice is given to each voting member, including notice of the meeting, the full resolution and the intention to propose the resolution as a special resolution;

⁵ Per s 106B QLD Act.

⁶ Per s 78(2) and s 39 NSW Act.

⁷ Per s 82(2)(a) and s 70 ACT Act.

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- b by at least three quarters of the members entitled to vote; and
- c in accordance with any additional requirements of the association.⁸

4.5.8 In Tasmania, the organisation needs to have approved the proposal to migrate by a special resolution, which must be:

- a passed at a general meeting where notice specifying the intention to propose the resolution as a special resolution is given in accordance with the rules of the association;
- b passed by a majority of not less than three-quarters of members entitled to vote and present in person at that general meeting; and
- c lodged with and registered by the Commissioner within a period of one month after being passed.⁹

4.5.9 In South Australia, the organisation must receive notice from the Corporate Affairs Commission (see paragraph 4.7.7) before passing a special resolution to transfer the undertaking or operations of the association to a new Company. **This is not a migration.** The special resolution must be passed:

- a at a meeting of the members (or the members of the committee) of the association where at least 21 days written notice is given for that meeting specifying the intention to propose the resolution as a special resolution; and
- b by at least three quarters of such members (or members of the committee) entitled to vote.¹⁰

4.5.10 In Western Australia, the organisation must decide to apply for migration by special resolution, which must be passed:

- a at a general meeting of which notice specifying the intention to propose the resolution as a special resolution was given in accordance with the rules of the association; and
- b by at least three quarters of members entitled to vote.¹¹

4.5.11 In the Northern Territory, the organisation must by special resolution:

- a approve the application to become registered as a Company limited by guarantee under the Corporations Act;
- b determine the name under which the association is to become registered as a Company, which must not include the word “association” or any other word importing a similar meaning;

⁸ Per s 64 Vic Act.

⁹ Per s 25C and s 23 TAS Act.

¹⁰ Per s 3 SA Act.

¹¹ Per s 10B and s 24 WA Act.

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- c adopt the Constitution of the Company.¹²

The special resolution must be passed at a general meeting, where at least 21 days notice is given with notice of intention to propose it as a special resolution, and by at least three quarters of the voting members who vote at that meeting.

4.6 Courtesy advice to key contracting parties

4.6.1 It is best practice for an organisation to write to its key contracting parties (for example, a landlord or funding bodies) to explain that a special resolution has been passed and that the association will soon migrate to become a Company.

4.6.2 This advice may be given after the migration has been completed if there are only a few contracting parties (with minor rather than major contracts).

4.7 Pre-application to the relevant State / Territory body

4.7.1 This is necessary as the Corporations Act requires evidence that the migration is authorised by the applicable law in the place where the organisation was incorporated (s 601BC(8)).

4.7.2 In Queensland

- a The application must be made to the Office of Fair Trading.¹³
- b The application must be in the approved form, signed by the President and 2 authorised members of the management committee and accompanied by required documents.
- c The required documents include the association's certificate of incorporation, a copy of the association's special resolution and a statutory declaration of the association's President (or as otherwise named).

4.7.3 In New South Wales

- a The application must be made to the NSW Fair Trading.¹⁴
- b The application must be in the approved form, identify the Corporations Act as the proposed law for the transfer of registration and be accompanied by required documents and the prescribed fee.
- c The required documents include a copy of the association's special resolution.

4.7.4 In the Australian Capital Territory

- a The application must be made to the Office of Regulatory Services.¹⁵

¹² Per s 57(1) NT Act.

¹³ This application is made using a Form 28, pursuant to s 106A of the QLD Act, in accordance with s 106B QLD Act.

¹⁴ This is a Form A10, per s 78(1) NSW Act in accordance with s 78(3) NSW Act.

¹⁵ This is a Form A11, per s 82(1) ACT Act, in accordance with s 82(2) ACT Act.

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- b The application must be in the approved form, signed by the Public Officer and 2 authorised members of the management committee and accompanied by required documents and prescribed fee.
- c The required documents include a statement that the association's special resolution to migrate has been duly passed.

4.7.5 In Victoria

- a An application to Consumer Affairs Victoria is not required under the VIC Act.
- b The VIC Act authorises an incorporated association to make a migration application to ASIC if the special resolution approving the application is passed by the association.¹⁶
- c There are additional documents required by Consumer Affairs Victoria after migration, to be provided along with notice of migration (see below).

4.7.6 In Tasmania

- a The application must be made to the Commissioner of Consumer Affairs and Fair Trading.¹⁷
- b Prior to making the application, notice of the association's special resolution must be signed by the Public Officer and lodged with a copy of the special resolution to the Commissioner, within one month of being passed, for registration.
- c The application must then be made in the approved form, which is effectively a cover sheet to a copy of the association's registered special resolution. These documents must be lodged with a statement signed by all the association's committee members stating that in their opinion the association's creditors are not likely to be materially prejudiced by the change and setting out their reasons for that opinion.

4.7.7 In South Australia

- a The *Associations Incorporation Act 1985* (SA) does not enable the migration of an association to a Company. However, the Corporate Affairs Commission may give notice that the undertaking or operations of an association would more appropriately be carried on by a Company.¹⁸
- b In practice, the Commission will issue this notice upon being satisfied with the reasons given in writing by an association seeking to transfer its undertaking or operations as to why it would be better served by being a Company. This notice does not satisfy the requirement under the Corporations Act for state authorisation to migrate.

¹⁶ Per s 110(1) VIC Act.

¹⁷ Per s 25C(1) Tas Act, in accordance with ss 25C(2) and 23 Tas Act.

¹⁸ Per s 42 SA Act.

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- c Instead, within three months of the date of the notice from the Commission, the association will need do the following:
 - i commence a new Company using an ASIC Form 201;
 - ii pass a special resolution to transfer the undertaking or operations of the association to that new Company; and
 - iii write to the Commission to request that such transfer take place.¹⁹

The Commission will then order that the transfer take place, by way of a notice published in the Gazette.

- d Although this is not technically a migration and there is no application to ASIC for migration, the SA Act expressly provides that the vesting of property in the new Company by this process does not incur stamp (transfer) duty.²⁰
- e The SA Act expressly provides that the rights and liabilities of the old incorporated association (whether certain or contingent) become rights and liabilities of the new Company.²¹
- f With due care and process, a Company is also able to retain the same ABN as the old association and new applications do not need to be made for tax exemptions or endorsements.

4.7.8 In Western Australia

- a The application must be made to the Commissioner of Consumer Protection.²²
- b The application must be in the approved form, specify the period within which the migration application is expected to be made²³ and be accompanied by required documents and prescribed fee.
- c The required documents include a copy of the association's special resolution.
- d The WA Act presents a potential additional hurdle as it is drafted in a way that implies the Commissioner's approval is conditional upon the Commissioner first being satisfied that it would be inappropriate for the organisation to continue to be incorporated under the WA Act.²⁴ This is something to keep in mind when making an application to the Commissioner and it may warrant including tailored submissions in support of the application.²⁵

¹⁹ Per s 42(2) SA Act.

²⁰ Per s 42(5) SA Act.

²¹ Per s 42(3)(c) SA Act.

²² Per s 106A WA Act, in accordance with s 106B WA Act.

²³ Commissioner approval is generally given on the condition that migration be completed by this specified period.

²⁴ Section 10B(4) WA Act.

²⁵ Section 10C of the WA Act provides refused applicants with an avenue for appeal to the State Administrative Tribunal within 28 days of notice of the refusal.

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4.7.9 In the Northern Territory

- a In the Northern Territory, an incorporated association that holds prescribed property must first obtain the written consent of the Commissioner of Consumer Affairs before making a migration application to ASIC.²⁶ This is because any prescribed property owned by the incorporated association will not automatically be taken to be owned by the Company upon migration.
- b To be prudent, it is recommended that an incorporated association seek the Commissioner's consent even if they do not hold any prescribed property.
- c "Prescribed property" is defined in s 4 of the NT Act, and includes any real property obtained using funds obtained under a grant from the Territory or the Commonwealth.
- d The process for obtaining consent involves making a written request to Consumer Affairs. Along with this request, the organisation must:
 - i disclose any prescribed property being held by the organisation; and
 - ii ensure that all financial and other reporting for the organisation is up to date.
- e The NT Act refers to the "transfer" of an incorporated association "to a new body". Despite this, and the specific requirements in relation to prescribed property, the NT Act provides that the incorporated association and new Company **must be considered to be the same entity** and that any document or instrument executed or registered for or with respect to a transfer of any property to give effect to the migration is **exempt from stamp (transfer) duty**.²⁷

4.8 Application for registration as a Company

- 4.8.1 The next step in the process is to apply to ASIC for approval to migrate and be registered as a Company limited by guarantee.
- 4.8.2 Under s 601BC(7), an organisation cannot apply if it is an externally-administered body corporate, if a current application to wind it up has been made or if a current application to approve a compromise or arrangement between it and another person has been made.
- 4.8.3 An ASIC Form 202 is required, along with the prescribed lodgement fee and the additional required documents (s 601BC).
- 4.8.4 The additional required documents include:
 - a Certified copy of the association's certificate of incorporation;
 - b Certified copy of the existing association's rules;

²⁶ Per s 56(1) NT Act.

²⁷ Per s 62(1) and (4) NT Act.
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- c Certified copy of the new Company constitution;
- d Statutory declaration by an authorised person attesting to relevant matters, including:
 - i compliance by the organisation with applicable State/Territory and Commonwealth legal requirements, including obtaining the members' consent to migration by special resolution;
 - ii confirmation that it is not an externally-administered body corporate and no application has been made to wind up the organisation or to approve it entering into a compromise or arrangements with another person; and
- e Evidence of authorisation from the relevant state or territory body (a copy of which may be annexed to the Statutory Declaration).

4.9 Registration

- 4.9.1 ASIC may now register the organisation as a Company limited by guarantee under the Corporations Act (s 601BD).
- 4.9.2 Upon registration, ASIC will issue the Company with an ACN and certificate of registration.
- 4.9.3 It is at this point that the migration of the organisation is complete. Prior to this point, the organisation remains as an incorporated association.

4.10 Post-migration steps

- 4.10.1 Advise the regulator of the registration of the organisation as a Company limited by guarantee, within the time frame specified by such body (see below). This is done by providing a copy of the ASIC certificate of incorporation as a Company. The old governing body will then remove the association from the state register.
 - a In QLD, notice must be given to the Chief Executive of the Office of Fair Trading within 28 days of registration (s 106G QLD Act).
 - b In NSW, there is currently no time frame for giving notice. However, notice must be accompanied by the original certification of incorporation as an incorporated association, as well as the copy of the ASIC certificate of registration.
 - c In the ACT, there is currently no time frame for giving notice.
 - d In VIC, notice must be given to the Registrar of Consumer Affairs Victoria within 14 days of registration (s 112 VIC Act). The notice must be accompanied by the association's special resolution and any outstanding annual statements, along with the copy of the ASIC certificate of registration.
 - e In TAS, notice must be given to the Commissioner of Consumer Affairs and Fair Trading within 14 days of registration (s 25D TAS Act).

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- f In SA, this step does not apply, as the transfer of undertaking or operations takes place as set out in paragraph 4.7.7 above.
 - g In WA, notice must be given to the Commissioner of Consumer Protection within 14 days of registration (s 10H(2) WA Act).
 - h In the NT, there is currently no time frame for giving notice.
- 4.10.2 On notice, the State/Territory Regulator removes the Incorporated Association from its register.
- 4.10.3 Assemble and keep a secretarial folder for the Company, including all consents and authorisations (s 601BK).
- 4.10.4 Records of ownership / interests in property (including title to real property and motor vehicles) will need to be updated. Where there are mortgages and/or security interests involved, the financier may charge fees for the change of name on the security. (Note: the requests are equivalent to a change of name – General Request not a Transfer)
- 4.10.5 Notification to the ATO (ABR) of the change of entity name and type, including providing copies of the Company Constitution and the Certificate of Incorporation.
NOTE: THE ABN DOES NOT CHANGE. NO NEW ABN APPLICATION IS REQUIRED.
- 4.10.6 If the organisation is a registered charity with the ACNC, notification of the ACNC will be required for change of name, change of governing document and change of responsible persons (if applicable).
- 4.10.7 Update letterheads with the new Company name.
- 4.10.8 Hold the first Annual General Meeting. The Company must hold its first AGM after registration in the calendar year of its registration (s 601BR).
- 4.10.9 Note – A Company limited by guarantee that is a registered charity with the ACNC is not required to pay ASIC annual review fees. This may change if the ACNC is abolished. The charity would then be well served to consider applying to ASIC to be recorded as a Special Purpose Company which historically reduced ASIC annual fee down from \$1,000.00 to \$40.

5 EFFECT OF THE MIGRATION

5.1 Change of entity or the same but differently regulated

- 5.1.1 What will stay the same
 - a The Company is considered the same legal entity as it was prior to migration (s 601BM).

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- b The organisation's property, rights and obligations do not change, except as against the members of the organisation in their capacity as members.
- c Any legal proceedings by or against the organisation or its members remain in effect.
- d Any Income Tax Exemptions, Deductible Gift Recipient status and Public Benevolent Institution endorsement (if applicable) will be retained by the Company.
- e There will be no change in ABN. Any attempt by the ATO to require a new ABN should be strongly resisted as a new ABN would require new tax endorsement applications.
- f Because the ABN and ACN are not numerically related, it will be necessary for the Company to set out both its ACN and ABN on all public documents and negotiable instruments.
- g The Company may potentially choose to replace the existing ABN with an ABN that embeds its ACN, however great care would be required in making this request of the ABR to ensure there was no loss of tax endorsements. There would also be additional administrative consequences flowing from the issuing of a replacement ABN.

5.1.2 As discussed, transfer duty and capital gains tax are not relevant because the assets of the association continue to be owned by the same entity, despite the change of corporate status.

5.2 Position of employees – is there a transmission of business?

- 5.2.1 Because migration to a Company limited by guarantee does not affect the identity of the organisation, there is no material effect on the position of the organisation's employees.
- 5.2.2 All employment contracts continue to carry on and are enforceable after migration.
- 5.2.3 There is no transmission of business because, upon the transfer of its incorporation (migration), an organisation ceases to be an incorporated association and commences operation as a Company limited by guarantee.
- 5.2.4 As a matter of prudence, the organisation should notify the employees of the change in the entity's name, but be clear that there has been no change in entity or employment conditions.

5.3 What about litigation which the entity is involved?

- 5.3.1 There is no need for "substitution" of applicant or respondent as the "entity" has not changed.
- 5.3.2 All that has changed is the name of the entity and so the record will need to be updated with that change of name.

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MIGRATING A CHARITY OR A NFP FROM AN INCORPORATED ASSOCIATION TO A COMPANY LIMITED BY GUARANTEE



Strategic Responsive Solutions

5.4 Why not transfer assets to a new Company and wind up the association?

- 5.4.1 While an organisation could transfer all the assets and undertaking of the association to a new Company Limited by guarantee, (and then wind-up the old Incorporated Association) outside of enabling provisions of the AI Act, the costs and risks associated with doing so make such an option unpalatable. Those costs and risks include:
- a The need to re-apply for your tax exemptions and any DGR or PBI endorsements; and
 - b Potential transfer (stamp) duty on some asset transfers (if not exempt for some reason).
- 5.4.2 This process however, may see some “tie off” of unknown liabilities (being buried with the old entity).

Questions?