



Review of Supported Decision-Making in South Australia

Fact Sheet 5 – Current Legal Structures: Corporations and Incorporated Associations

Why Incorporate?

Many individuals who presently provide support to persons with decision-making support needs use informal arrangements, say with family members, friends, and/or carers. Such arrangements are called 'circles of support'. These arrangements are valuable but may now be inadequate in some situations.

The option to formalise and incorporate such arrangements has emerged over recent years. Incorporating a supported decision-making structure, such as a 'microboard', gives it independent legal status, allowing it to enter into contracts and hold property.¹ This can be advantageous, as it allows people supporting those with decision-making support needs to enter into legal contracts on behalf of the person requiring support, while limiting their own personal liability.² Such a formal structure can assist with health, lifestyle or financial decisions in discussion with the person receiving the decision-making support. Incorporation also means members of the supported decision-making structure will have to comply with suitable safeguards,³ helping protect the person with decision-making support needs from potential financial abuse.

Corporations

The *Corporations Act 2001* (Cth) ('the **Corporations Act**') is the main statute regulating corporations in Australia. It is often amended and updated and is substantive and complex, spanning seven volumes.

It may be that registration under the *Corporations Act* is inappropriate for microboards, noting that the *Corporations Act* 'provides for relatively complex forms of incorporation with accordingly complex rules and procedures'.⁴ The considerable fees and ongoing costs associated with incorporation under the *Corporations Act* may make incorporation under this Act less suitable for microboards. Additionally, the strict regulatory burdens placed on company directors by this legislation may discourage individuals from agreeing to sit on a microboard, as they would then be subject to these regulatory burdens. Microboards are much smaller than the bodies generally contemplated by the *Corporations Act*, and federal incorporation would mean the microboard would need to be registered with the Australian Charities and Not-for-Profits Commission, leading to further, likely unaffordable, fees.⁵

The Australian Securities and Investments Commission ('ASIC'), which performs most of its functions through, and has general administrative oversight of, the *Corporations Act*⁶ is arguably not equipped to oversee microboards, or any other type of formal supported decision-making structure.

¹ Lukas Price et al, 'Better Together: Microboards and Supported Decision-Making in South Australia' (2022) 43(1) *Adelaide Law Review* 131, 157 citing *Associations Incorporation Act 1985* (SA) ss 20(3)(a), 25(a)–(b), (h).

² *Ibid* citing *Associations Incorporation Act 1985* (SA) ss 20(3).

³ *Ibid* citing *Associations Incorporation Act 1985* (SA) ss 31-32.

⁴ *Ibid* 151, citing *Sands v Commissioner for Corporate Affairs* [2021] SACAT 103 and Justice Geoffrey Nettle, 'The Changing Position and Duties of Company Directors' (2018) 41(3) *Melbourne University Law Review* 1402, 1404, 1412, 1417.

⁵ *Ibid* 154, citing *Sands v Commissioner for Corporate Affairs* [2021] SACAT 103 and 'Benefits of Registration', *Australian Charities and Not-for-Profits Commission* (Web Page) <<https://www.acnc.gov.au/for-charities/start-charity/you-start-charity/why-register>>.

⁶ *Corporations Act 2001* (Cth) s 5B.



However, there may be aspects of the *Corporations Act* that could be usefully adapted for microboards. SALRI would like to hear if there are aspects of the *Corporations Act* that could assist someone with decision-making support needs.

Incorporated Associations

The *Associations Incorporation Act 1985* (SA) ('the **AI Act**') provides for the incorporation of community associations and other not-for-profit organisations and has previously been used to incorporate a microboard in South Australia.⁷

The *AI Act* is typically used at present by community sports and social clubs.⁸ As the *AI Act* contemplates incorporation of smaller groups than the *Corporations Act*, it has been suggested that this could be a more appropriate means to incorporate a microboard, as the regulatory requirements of its members, including reporting requirements, are less onerous than those required under the *Corporations Act*, also making it a cheaper and more flexible option.

However, a body incorporated under the *AI Act* is overseen by the Corporate Affairs Commission (Consumer and Business Services), a body that may not be appropriate to oversee all aspects of this form of a supported decision-making structure. Whilst incorporation under the *AI Act* may be beneficial for the establishment and operation of microboards, there are concerns that it is not the best placed model for incorporation.

However, there may be aspects of the *AI Act* that could be usefully adapted for microboards. SALRI would like to hear if there are aspects of the *AI Act* that could assist someone with decision-making support needs.

Corporations (Aboriginal and Torres Strait Islander) Act

The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ('the **2006 Corporations Act**') was introduced to provide a special form of incorporation for Aboriginal and Torres Strait Islander corporations.⁹ Whilst there are some similarities with the *Corporations Act*, the *2006 Corporations Act* has different rules including for directors, membership and reporting requirements.¹⁰ The aim of this Act is to provide a fit for purpose framework specifically catering for Aboriginal and Torres Strait Islander corporations, rather than companies contemplated by the *Corporations Act*, which are likely to be purely commercial in nature.

The *2006 Corporations Act* is a possible template in contemplating appropriate laws for incorporation and regulation of formal decision-making structures. This Act can be considered and drawn upon in considering appropriate structures for the incorporation of formal supported decision-making bodies. There may be aspects of the *2006 Corporations Act* that could be usefully adapted for microboards.

A review of the *2006 Corporations Act* as it relates to Aboriginal and Torres Strait Islander communities and corporations is outside the scope of SALRI's reference.

Current Issues

As incorporation of formal supported decision-making bodies was not contemplated by any of the existing incorporation laws or frameworks, incorporation under these Acts may not be the most appropriate way to best provide legal personality to such bodies, especially noting that the current legal frameworks do not provide adequate oversight or safeguards for formal supported decision-making structures.

⁷ See *Sands v Commissioner for Corporate Affairs* [2021] SACAT 103.

⁸ This, for example, could be a football or Morris dancing club.

⁹ 'Review of the CATSI Act', *National Indigenous Australians Agency* (Web Page) <www.niaa.gov.au/indigenous-affairs/economic-development/review-catsi-act>.

¹⁰ Office of the Registrar of Indigenous Corporations and Australian Securities & Investments Commission, *The CATSI Act and the Corporations Act—some differences*, (Fact Sheet, January 2018).



Consultation Questions

1. How can current legal structures be adapted or enhanced to promote supported decision-making for an individual?
2. What aspects of the *Associations Incorporations Act 1985* (SA) could be used and/or implemented in supporting decision-making for people with supported decision-making needs? (I.e. incorporation procedures, committee and governance, financial management.)
3. What aspects of the *Corporations Act 2001* (Cth) could be used and/or implemented in supporting decision-making for people with supported decision-making needs? (I.e. incorporation procedures, corporate governance, directors' duties, financial reporting and disclosure.)
4. What aspects of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) could be used and/or implemented in supporting decision-making for people with supported decision-making needs?

SALRI's consultation process will open in July 2024 and close on 30 September 2024.

Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice, we encourage you to speak to a lawyer and/or contact a community legal service.

