

## Memorandum of legal advice

**To:** Diane Costello, Chief Executive Officer, CAUL  
**From:** Martin Ross, Partner, Hall & Wilcox  
**Date:** 28 February 2017  
**Subject:** Possible incorporation of CAUL

### 1 Background

The Council of Australian University Librarians (**CAUL**) is, and has been for some time, operating as an unincorporated organisation.

CAUL is considering whether it should become an incorporated entity.

CAUL does not want to become a company limited by guarantee (or, we assume, a proprietary company), therefore the relevant structure for consideration is an incorporated association under the relevant State or Territory legislation.

### 2 Advice sought

You have requested we provide advice to CAUL on the following:

- (a) What are the relevant factors and considerations in determining whether CAUL should become an incorporated association?
- (b) If CAUL is to incorporate, should CAUL be incorporated in the ACT or NSW?

### 3 Advice

- (a) **What are the relevant factors and considerations in determining whether CAUL should incorporate as an association?**

Schedule 1 sets out a table summarising the key differences (including the associated advantages and disadvantages) between an unincorporated association and an association which is incorporated under the State or Territory law.

If CAUL wishes to proceed to become an incorporated association the process is fairly straightforward. We are available to assist CAUL with any incorporation.

**(b) If CAUL is to incorporate, should CAUL be incorporated in the ACT or NSW?**

The law relating to incorporated associations is state-based, and an incorporated association is incorporated and registered in a particular State or Territory.

There are two primary considerations regarding the place of incorporation of an association:

**(i) Registration as an Registered Australian Body**

An association incorporated in a certain State or Territory cannot substantially operate in other States or Territories without taking further legal steps.

However, there is a simple, common way to allow an incorporated association to operate outside the State or Territory in which it is incorporated. An incorporated association can register with the Australian Securities and Investments Commission (**ASIC**) as a 'registered Australian body'.<sup>1</sup> The effect of this registration is that the association is authorised to operate in any state or territory within Australia.

If CAUL was to become an incorporated association, it should also register as a registered Australian body, therefore for the purposes of its operations it will not matter if it is incorporated in the ACT or NSW.

**(ii) Residency requirements of a public officer of an incorporated association**

The public officer of an incorporated association is the official point of contact for the association. A public officer is also one of the authorised signatories of the association.

Under the relevant legislation in the ACT and NSW, a public officer must reside in the state or territory where the association is incorporated.<sup>2</sup>

This residency requirement is important: an association's incorporation may be cancelled if its public officer does not comply with this requirement.<sup>3</sup>

The category of person who can become a public officer is broad: the following categories of person are able to hold the position:

- (A) A committee member of the association;
- (B) An ordinary member of the association; or
- (C) Any person outside of the association.<sup>4</sup>

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<sup>1</sup> *Corporations Act 2001* (Cth), s 601CB.

<sup>2</sup> *Associations Incorporation Act 2009* (NSW), s 34(2); *Associations Incorporation Act 1991* (ACT), s 57(2).

<sup>3</sup> *Associations Incorporation Act 2009* (NSW), s 76(1)(e); *Associations Incorporation Act 1991* (ACT), s 93.

If CAUL wishes to become an incorporated association then, given the residency requirements above, the place of residence of the person who CAUL wishes to appoint as the public officer will necessarily inform whether CAUL chooses to incorporate in either the ACT or NSW.

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If you have any questions or comments in relation to the matters discussed above or the future steps associated with incorporated CAUL, please contact Martin Ross or Deborah Chew.



**Hall & Wilcox**

**28 February 2017**

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<sup>4</sup> *Associations Incorporation Act 2009 (NSW), s 34(3); Associations Incorporation Act 1991 (ACT), s 57(3).*

## Schedule 1 - Issues associated with incorporation as an association

Issue	Incorporated association	Unincorporated association
<b>Separate legal entity</b>	<p><b>Advantage</b> - Once an association chooses to become incorporated it becomes a separate legal entity and can operate in its own name. It has the ability to:</p> <ul style="list-style-type: none"> <li>• sign documents and enter into contracts (leases or deeds of agreement);</li> <li>• buy, sell, own, lease and rent property and other assets;</li> <li>• borrow money; and</li> <li>• sue and be sued.</li> </ul>	<p>This can lead to difficulties with opening bank accounts, problems with insurance, and confusions about who owns what property. If an individual stops being a member of the unincorporated association but their name is still on the contracts there may be difficulties transferring their responsibilities to the new members.</p>
<b>Limited liability</b>		<p>This simplifies and clarifies the management and ownership of the money and other assets of the body. It also allows for bank accounts to be held in the name of the association.</p> <p><b>Advantage</b> - One of the main benefits of incorporating an association is that the association then has limited liability. Limited liability means that in most cases, the responsibility for debts of the association or any legal costs the association may be ordered to pay, is limited to the amount of money and assets held by the association. This helps protect the people involved in the association from being personally liable for debts, damages and contractual obligations arising from the activities of the association.</p> <p><b>Disadvantage</b> - An unincorporated association is not a separate legal entity and as a result the people involved in the association will not have the protection of limited liability. Instead these individuals would be personally liable if anything went wrong with the association. Depending on the severity of the debts/costs incurred by the association, this could expose individuals to significant adverse consequences.</p>

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However, limited liability will not apply in situations where a director or officer of an incorporated association breaches any of their directors' duties (such as the responsibility to act honestly and prudently).		
Perpetual succession	<b>Advantage</b> - Another benefit of incorporation is that an incorporated association will continue to exist until it is either it is de-registered or 'wound up'. This occurs because an incorporated association has a legal identity separate to that of the people involved in the association, so an incorporated association continues even when membership of the association changes.	<b>Disadvantage</b> - An unincorporated association is not a separate legal entity and hence it does not have the advantage of perpetual succession.
Fundraising and tax	<b>Advantage</b> - Incorporation allows organisations to apply for a much wider range of public and private funding. Many government and philanthropic organisations make it a basic requirement that applicants for funding are incorporated.	<b>Disadvantage</b> - An unincorporated association has less opportunity to fundraise and take advantage of any taxation benefits that may otherwise be afforded to it as an incorporated association.
Insurance	Incorporation also allows some incorporated bodies to enjoy tax advantages (e.g. not for profits).	<b>Advantage</b> - Insurance is much easier to obtain for an incorporated association.
Operations across multiple states/territories	<b>Disadvantage</b> - As the law relating to incorporated associations is state-based, and each state and territory in Australia has its own laws, an association incorporated in a certain state cannot	<b>Disadvantage</b> - While unincorporated associations can sometimes take out insurance to protect their members from possible liability, such insurance is often more difficult and more expensive to obtain. Further, while members could rely on the professional indemnity coverage from their home institution, there is no certainty that an institution's legal underwriters would cover the member in relation to CAUL's activities.
		<b>Advantage</b> - An unincorporated association can operate across multiple states and territories without restriction.

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	<p>substantially operate in other states without taking further legal steps.</p> <p>However, there is a simple workaround. An incorporated association can register with ASIC as a 'Registered Australian Body' and it will be authorised to operate in any State or Territory in Australia.</p>	<p><b>Disadvantage</b> - There are a number of costs and ongoing obligations <b>Advantage</b> - An unincorporated association does not have to comply of being an incorporated association. Although the legislation differs with many of the legal or financial requirements that incorporated from state to state, generally it requires incorporated associations to: associations have to comply with (such as those set out in the list on the left).</p> <ul style="list-style-type: none"><li>• have a 'constitution' or a set of written rules with purposes that the association agrees to operate in accordance with;</li><li>• pay an initial registration fee to the relevant state, territory or federal government;</li><li>• have a certain number of members and people who are willing to hold certain positions in the association;</li><li>• record the names of members in positions and provide them to the government;</li><li>• hold certain meetings and keep certain records;</li><li>• provide the government with financial information about the organisation; and</li><li>• pay an annual fee to government.</li></ul>
<b>Increased regulatory obligations</b>		<p>An unincorporated association does not have to pay the costs associated with incorporation. The saving on time and money that would otherwise be spent on compliance is the principal advantage associated with being an unincorporated association.</p>

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Privacy	<p><b>Disadvantage</b> - Incorporated associations are required to record the names of members in certain positions and disclose some or the association's financial matters. Incorporated associations must be prepared to forgo total privacy and accept that there will be public scrutiny of their activities.</p>	<p><b>Advantage</b> - An unincorporated association doesn't have to register with the government or its regulators and it does not have to disclose to the public who its members are or its financial situation.</p>