## **Annual General Meeting of ACT Rescue & Foster (ARF) on 23 November 2020 ­**

## **– explanation of proposed changes to the ARF Rules, and other significant statutory changes**

This document provides brief explanations of the changes to the ARF Rules provided for consideration by ARF members. In addition to explanations of Rule changes, there is additional information on some other significant recent changes to the ACT *Associations Incorporation Act 1991* (the Act).

In the copies of the ARF Rules sent out to members with the notice for this meeting, the proposed changes shown in red are as they would appear in the Rules after being passed. For convenience in reading, deletions are not shown: if members want to know what the Rules look like now, an electronic copy will be available on the website and copies will be available at the Annual General Meeting.

It is suggested that the groups of changes set out below be discussed individually on an informal basis and any changes to them agreed upon at that point by the mover and seconder of the overall motion to amend the Rules (see next sentence), or determined by a simple majority vote. Following that process, the motion to accept the Rules as proposed and amended should be debated and voted on – to be successful, the motion will need to be passed as a special resolution requiring a majority of 75% of eligible members voting in person or by proxy in accordance with section 70 of the Act (and see rule 33(1) for the required notice).

***Background***

In the *Red Tape Reduction Legislation Amendment Act 2018* (the RTR Act),the ACT Legislative Assembly made a number of reforms to the Act. The RTR Act was passed in October 2018, and the provisions relevant to incorporated associations came into force on 1 July 2019. There was supposed to be time for associations to make relevant changes to their Rules before the amendments came into effect, but as far as we can tell, associations weren’t directly informed by Access Canberra until a circular letter from the Registrar–General dated 29 July 2019. No changes have been made by government to the Model Rules, or other detailed guidance provided to help implement the significant new provisions. **Note: Access Canberra has seen a copy of the Rules as proposed to be amended and has raised no objections. We thank them for that assistance.**

Some of those reforms called for, or are suitable to be reflected in, amendments to the Rules of associations, and some don’t necessitate any changes to the Rules. Some changes confer new rights on Members.

In addition to changes to the Rules resulting from the RTR Act, the Committee has suggested a number of changes to the Rules proposing a reduction in the categories of membership and consequential amendments, and a number of other minor amendments. Also, new permanent Rules are proposed to provide for ‘remote’ meetings of the Committee and the association (new rules 26A and 34A).

Some minor typographical errors in the existing Rules have been amended – they are shown in red, but are not discussed here. Silent renumbering of existing misnumbered rules from 41, ‘Alteration of objects and rules’ to 46, ‘Surplus property’, has occurred.

***Reasons for proposed changes to ARF Rules and information on other major changes***

The following points explain the main proposed changes to the ARF Rules together with information about some other significant changes to the Act.

1. **ARF Rule changes**
2. **Changes proposed by the Committee to categories of membership and other minor amendments**

The Committee proposes to delete the following categories of membership as no longer required: associate members and honorary members. This has resulted in the deletion of two dot points in rule 2, and of rules 5,6 and 9 of the existing Rules (shown as deleted). There are minor consequential changes to later provisions eg in rule 19 on election of committee members.

Some minor amendments are proposed to the provisions concerning applications for membership (rule 7), including making a replacement provision for payment of a membership fee as determined from time to time by the Committee, which is now dealt with in rule 13 providing that the Committee may set the annual membership fee, if any, by resolution. The Committee would have power to set the fee at zero. Provision for an entrance fee has been deleted.

In rule 11 on cessation of membership, reference to corporate members has been removed, and a reference to failing to renew membership of ARF has been replaced by the words ‘fails to pay any required membership fee’. Where a member resigns (subrule 12(3), the Committee must ensure that ‘an appropriate record is maintained’, rather than the previous provision that an entry be made in the register of members. The provision concerning the date for payment of membership fees has been simplified to read ‘is payable as determined by the Committee’ (new subrule 13(2)).

An amendment is proposed to para (d) of subrule 31(2) by addition of the words ‘or any other applicable legislative provisions’. This is to allow for the fact that as a registered charity with the ACNC (Australian Charities and Not-for-profits Commission), ARF is not subject to section 73 of the Act mentioned in the subrule, but is subject to ACNC legislation and guidelines on similar matters.

A contradiction between existing subrule 26(9) and 28(3) on what should be done in the case of an equality of votes in a Subcommittee meeting has been resolved in favour of the person presiding having a casting vote, rather than the matter being referred to the Committee; the matter of equality of votes is now dealt with entirely in renumbered subrule 28(3)).

Provision is now made in renumbered rule 48 for service of notice by email (which makes the provision consistent rule 33(1)).

In relation to the election of Committee members, subrule 19 (2)(b) has been amended to change the time frame for receipt by the Secretary of nominations for Committee members from four weeks before the AGM to the more usual and manageable 1 week before the meeting.

1. **Changes to rules 15, ‘Disciplining of Member’ and 16, ‘Right of appeal of disciplined Member’**

Specific principles to be included in any **disciplinary procedure** are set out in new section 65C of the Act, providing for natural justice/procedural fairness (information about grounds for disciplinary action, opportunity to be heard, an unbiased decision-maker), as well as notification in writing of the decision and the reasons for it, and an appeal process. There has been no change by government to the Model Rules which already included a disciplinary procedure, and ARF’s existing Rules contain that procedure. There may be some question whether those Model Rules now meet all the recently-enacted requirements.

*Changes to ARF Rules:* After taking into account the changes to their Rules made by some other associations, the ARF Committee considered it would be appropriate to adopt new rules on disciplinary action and appeals against such action by incorporating the principles contained in section 65C of the Act into a revised specific procedure (see proposed new rules 15 and 16).

The process has been simplified and made fairer by removing the requirement for the committee to reach a provisional decision on a complaint before seeking the Member’s response to the complaint. Instead, where a complaint is made by an identified member of the association, unless the Committee considers there is no case to answer, or an allegation is trivial or frivolous, the Committee will give notice to the Member that it is considering whether or not to take disciplinary action, and the grounds on which it might do so.

The grounds for disciplinary action have been simplified in language, and modified by addition of a ground of refusal to support the objects of the Association. The disciplinary actions for breach of those grounds have been widened to include both counselling and reprimand. The procedures throughout are designed to comply with all the statutory requirements in sections 50 (natural justice generally) and 65C of the Act.

Proposed new subrules 15(5) and (6) provide that a Member of the Committee who is not unbiased on the matter must not take part in the Committee’s consideration or decision on a complaint, and that the member facing possible disciplinary action may seek disqualification of a member of the Committee from participating in the process on that ground. The President of ARF must rule on that contention, and may exclude the person from participation in the Committee’s deliberations if justified.

A decision by the Committee to take disciplinary action may be appealed against. In place of the current provision for an appeal to a General Meeting, redrafted rule 16 now provides a detailed procedure for an appeal to be conducted by a panel of 3 unbiased ARF members of at least 12 months standing who are not members of the Committee. Challenge for bias is again provided for. Once again the processes are designed to meet all statutory requirements. As before, but with some minor change of language, a disciplinary action does not take effect until the time for an appeal has expired, or an appeal has been made by but is unsuccessful (subrule 15(9)). While the appellant and the Committee are bound by a decision of the appeal panel, that does not prevent any party taking legal action seeking a different outcome (subrules 16(11) & (12)).

1. **Insertion of new rule 16A to provide for a dispute resolution procedure**

Section 65B of the Act contains new requirements for inclusion in an association’s rules of **a dispute resolution procedure,** applying to disputes between Members in their capacity as Members or between a Member and the Association/Committee, and setting down requirements for any **determinative** disputes resolution procedure.

*Changes to ARF* Rules: The Committee decided in the first instance to propose a new rule 16A that would reflect the specific principles required by section 65B and the requirement to accord natural justice in section 50 of the Act. **That rule would ideally be complemented later by a protocol adopted by the Committee for handling actual complaints. A draft protocol for later discussion will be provided by the drafting advisor.** The protocol is expected to include a panel appeal provision similar to that contained in new rule 16 for disciplinary matters.

The Committee noted that there was no specific provision for mediation in section 65B, but that Access Canberra had advised another association that that did not preclude individual associations from including provision for mediation either in their new rule, or as part of their protocols for dealing with disputes, as long as any determinative procedure is in accord with section 65B. At least one association, Manning Clark House Inc, has adopted a procedure in its Rules that includes mediation as the first step to resolving disputes the parties themselves have not been able to resolve.

After obtaining advice on the matter, it was decided not to include provisions for mediation in the new rule 16A, because of potential costs, but to explore later whether to build mediation into a specific protocol. If later guidance or Model Rules on this matter are provided by government, further changes could then be proposed to the ARF Rules and any protocols adopted by the Committee.

1. **Newly-defined duties of office bearers of associations**

New Division 4.2 of the Act (sections 66A to 66D) has **introduced legally-binding duties that office-bearers must fulfil.** The reformsprovide for: duties of care and diligence, acting in good faith and for proper purposes, and not improperly using their positions, or information gained from holding those positions, to gain advantage for any person or to cause detriment to the association. While there is no need to include these duties in the ARF Rules, for the benefit of Members and Committee Members a Note has been inserted after rule 18, ‘Constitution and Membership’ (of the Committee).

The new statutory provisions concerning office-bearers’ duties will be brought to the attention of all present ARF office-bearers, and of new office-bearers on election or appointment. In effect these duties also apply at common law to all directors and committee members, and should therefore be complied with by all committee members.[[1]](#footnote-1)

1. **Minor amendment concerning resignation of a Committee Member**

New section 64A of the Act provides that a ‘member of the committee of an incorporated association may resign as a committee member by written notice given to the public officer’.

*Change to ARF rule 24(c)*:Subrule 24 sets out the circumstances in which a vacancy occurs in the office of a Member of the Committee. Paragraph (c) of that provision has been amended to bring it into line with new section 64A by providing for written notice of resignation to be provided to the Public Officer.

1. **Amendments concerning disclosing and managing ‘material personal interests’**

Major reforms in sections 65 and 65A of the Act make it mandatory for an association’s **committee members with a ‘material personal interest’ in a matter before the committee** to immediately disclose the extent and nature of that interest, and its relation to the association’s activities, and to disclose those matters in full to the next general meeting. Under the strengthened provisions, a committee member who is required to make such a disclosure **must NOT be present during either discussion or voting on the relevant matter**.

The disclosure and how it has been managed must be included in the minutes of those meetings (subrule 28A(2)).

There are heavy penalties (up to 20 penalty points) for breach of **all** these requirements. These obligations are similar to those in section 191 of the *Corporations Act 2001* (Cth).

*Insertion of new rule 28A:* There are no existing provisions in the ARF Rules on disclosure of material interests (or broadly speaking conflicts of interest). Although the new statutory provisions do not require changes to the Rules, there is real benefit to the proper functioning of an association’s committee in including a summary of the new statutory provisions in the Rules, as some other associations have done. The new statutory provisions have been brought to the attention of the ARF Secretary.

**Note***:* While there is no statutory definition of ‘material personal interest’, the courts and commentators agree that the essence of the concept is that ‘directors should disclose interests that have the capacity to influence the vote of the particular director upon the decision to be made’ (Rosemary Teele Langford, *Company Directors’ Duties and Conflicts of Interest*, 2019, page 212). The word ‘material’ indicates the interest must be of ‘a real or substantial kind’.

1. **Changes to the auditing requirements for small organisations**

The Act has been amended so that only a professionally reviewed statement of accounts is required for small organisations with total annual revenue of less than $400,000 (see definition in new section 70B). However, this provision does not apply to ARF as a registered charity with the ACNC, which has similar requirements. Consideration will be given in the future to whether a specific provision should be introduced on this matter.

1. **Inspection of records, books etc including the register of members**

Subject to the Act, the Regulation and the ARF Rules, existing misnumbered rule 44 (now 47(1)) provides, for inspection by members of the records, books and other documents of the association, while new subrule 47(2) provides for mandatory free of charge access to all the records, books and documents of the association by the ARF auditor or reviewer, the Public Officer or the Registrar. (And see item 13 below on sections 35 as amended and 35A concerning access.)

New rule 7(6) provides that the ARF must keep and maintain a register of its members which includes particulars required by the Act, the Regulation or an association’s Rules (reflecting section 67 of the Act).

New sections 67A and 67B of the Act) provide that a Member may apply to **inspect the register of members,** subject to **mandatory** refusal of access to personal information that a Member has successfully requested the Committee should be restricted on the ground of ‘special circumstances’ (section 67B), or a **discretion** to refuse access in certain other circumstances (use of information for a purpose not directly related to management or purposes of association, or a purpose that is prohibited by the association’s Rules, or an improper purpose) (section 67A(3)(b)). Access in those circumstances could normally be expected to be refused.

There is provision in the Act (section 67A(5)) for making regulations for how to deal with requests to inspect the register of Members, but none seems to have been made.

*Changes to ARF Rules, rule 47*: New subrule 47(3) does not reproduce the applicable provisions of sections 67A and 67B of the Act, but simply refers to the access provisions of section 67A which also incorporate exclusions from access provided for in section 67B.

Note that the association may make rules relating to access to its documents (see Item 13 below on section 35), including a rule requiring a requesting member to ‘state the purpose for requiring access to the document’ (section 35A(2). The Committee may wish to consider making rules in this area, but none have been suggested at this stage.

1. **Provisions relating to use of the common seal or alternatives to its use**

Some small but important changes have been made to section 55 of the Act, which has been amended to provide not only that (a) the public officer or secretary if any can by signature authenticate a document without using the common seal, but also (b) that an incorporated association may execute a document without using a common seal if the document is signed by two committee members, and (c) an incorporated association may, by signature of two committee members, empower a person as its agent or attorney, either generally or in relation to a stated matter, to execute deeds on its behalf, and that (d) a deed signed by the agent or attorney on behalf of the association binds the association (see new subsections 55(2), (2A) and (2B) – the other provisions remain the same).

*Addition of a Note to ARF rule 45:* A Note to ARF rule 45 (currently misnumbered as rule 42), ‘Common Seal’, refers to the provisions of section 55 providing an alternative to use of the common seal, so that Committee Members and others are aware of their existence.

1. **‘Remote’ general meetings and committee meetings conducted by technological means**

In April 2020 the ACT Legislative Assembly passed COVID-19 emergency legislation which included empowering committees of associations during the emergency to authorise holding general meetings, including Annual General Meetings, by using technological means that enable association members to take part in such meetings, in particular by hearing or otherwise knowing what other participant members are saying without the members being in each other’s presence. The legislation is to expire in 12 months from commencement.

Drawing on several different models, new rules 26A and 34A make provision for permanent rules to enable associations to hold meetings by technological means that fulfil the main principle to give participants in such ‘remote’ meetings ‘a reasonable opportunity to participate’ in the meeting. In addition, both rules supply instances of what is needed to provide reasonable opportunity to participate – being able to hear what other members contribute, being able to speak and otherwise communicate their views, and furnishing all participants with the same written material.

Current subrule 28(4) on remote Committee meetings has been deleted as no longer necessary. It was adequate, but new rule 26A contains more detail of what is required which should be helpful to the Committee.

For those unable to access or use the technology required to access a general meeting remotely, subrule 34A(3) refers to the provisions in the Rules for proxy voting.

The way the rules are expressed also makes it possible, especially in more normal times, for one or more committee members to be able to take part in committee meetings from another venue to that where the majority of the committee are meeting.

1. **Rule 49 (currently misnumbered 46) relating to surplus property on winding up of ARF Inc or the ARF Gift Fund**

Subrule 49(1) has been amended to clarify that, on the winding up of ARF, it is clear on the face of the rule that designation of another association or fund, authority or institution, as the successor body to receive any ARF surplus, must be made either by its nomination in the Rules or by special resolution of ARF at a general meeting.

Renumbered subrule 49(3) has been amended to make clearer what kinds of Funds are permissible under the Income Tax Assessment Act 1997 as successor bodies to which any surplus assets of the ARF Gift Fund may be transferred. New subrule 49(4) provides that where possible a general meeting of the former association should make the transfer decision, but where that doesn’t occur, allows it to be made by the Committee of the former association.

1. **Information about a member that must appear on the membership register**

Replacement section 67 of the Act now provides for the following information about members to be included in the membership register: the person’s name and contact details; the class of membership (if applicable); the date the person became a member of the association; anything required by the association’s Rules; and anything else prescribed by Regulation. New subrule 7(6) in effect implements this requirement.

At the time of writing there do not appear to be any additional requirements in the Regulation or the ARF Rules, other than ARF subrule 12(3) which now provides that when a person ceases to be a Member, ‘the Committee will ensure that an appropriate record is maintained’.

1. **Other significant legislative changes not requiring changes to the ARF Rules**
2. **Members’ access to documents of an association and right to obtain a summary of the minutes of a meeting of the committee**

A new provision of the Act (section 35(1)(d)) gives members of an association the right to obtain a summary of the minutes of a meeting of the committee, in addition to existing rights in that section to access the objects and rules of the association, and the deeds of any relevant trust. The association may charge a scheduled fee for documents that are provided (see sections 35(2) and 125).

However, new section 35A also provides that the committee may refuse access to any documents to which a member would otherwise have a right of access under the Act or the association’s Rules, if the committee is ‘satisfied that allowing access to the documents would be prejudicial to the interests of the association’.

Moreover, section 35A(2) provides that the rules of an association ‘may provide for the circumstances in which access to documents is allowed or restricted’, including requiring the requesting member to ‘state the purpose for requiring access to the document’. This last provision is relevant to decision-making about requests for inspection of the membership register (see item 8 above). No such rules have been made by ARF at this stage.

1. **Change to provision for a new public officer to give notice to Access Canberra – does not apply where the relevant association is an ACNC entity**

Section 59 of the Act provides that changes to appointment as a public officer or to the public officer’s address must be reported to the registrar–general within a month. New subsection 59(3) provides that those provisions do not apply to the public officer of an association that is an ACNC registered entity (the ACNC is the Australian Charities and Not-for-profits Commissioner). ARF is such an entity.

**Note**: However, there seems to be a gap between the intention of the legislation and the application of the agreement between Access Canberra and the ACNC, in that an association’s public officer does not at present seem to be among those ‘responsible persons’ whose details are required to be supplied to the ACNC. Hopefully, some association will take this up with both Access Canberra and ACNC in the future.

1. See eg Justice Connect/Not-for-profit Law, online Duties Guide (Cth).pdf, Part B, updated May 2019. See also ACNC Governance Standard 5, ‘Duties of responsible persons’. [↑](#footnote-ref-1)