

21 April 2020

Mr Michael Barnes
Under Treasurer
Department of Treasury
David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000

By Email: department@treasury.gov.au

Dear Mr Barnes

**REQUEST FOR AMENDMENT TO CORONAVIRUS ECONOMIC RESPONSE PACKAGE
OMNIBUS ACT 2020 - INCORPORATED ASSOCIATIONS**

The Law Society of Western Australia is aware of requests made to the Department of Treasury that the Department consider urgent legislation to amend the Associations Incorporations Act 2015 (WA Act) to provide temporary relief to officers of incorporated associations from their duties not to trade while insolvent. We write to express support for those requests which are in line with the temporary relief for directors of Corporations Act companies provided under the Coronavirus Economic Response Package Omnibus Act 2020 (Cth) (Response Package Act).

As a result of the unanticipated challenges caused by the Coronavirus global pandemic, the members of management committees of incorporated associations will need to carefully consider their duties regarding ongoing financial management, including the requirements under 127 of the WA Act which is similar in its scope and provisions to the insolvent trading restrictions in section 588G of the Corporations Act.

The Response Package Act provides temporary relief for directors of corporations from the insolvent trading restrictions under section 588G of the Corporations Act, establishing a safe harbour so that directors of companies may make decisions to appropriately deal with the global pandemic without the risk of breaching their duties not to trade while insolvent (Part 3 of the Response Package Act).

We are not aware of any proposed amendments to the WA Act which provide members of management committees with the “safe harbour” relief that has been enacted under the Response Package Act. If our view is correct, then management committees of incorporated associations are not receiving the temporary relief that boards of companies incorporated under the Corporations Act are receiving. This omission is difficult to justify. From our review of the Explanatory Memorandum to the Coronavirus Economic Response Package Omnibus Bill 2020 (Cth), we note that the policy reasons for the safe harbour relief being offered to companies will in many cases apply equally to incorporated associations. Members of the management committees of many incorporated associations are presently dealing with the same type of liquidity and solvency issues that directors of Corporations Act companies are dealing with. In our view, officers of incorporated associations – many of which operate substantial enterprises (including charities, and independent schools) and provide essential

Level 4, 160 St Georges Terrace, Perth WA 6000, DX 173 Perth

Phone: (08) 9324 8600 | **Fax:** (08) 9324 8699

Email: info@lawsocietywa.asn.au | **Website:** lawsocietywa.asn.au

services to the community - should not be in a less favourable position than companies incorporated under the Corporations Act, who with effect from 25 March 2020 have the benefit of the new safe harbour. We note that the obligations of officers of incorporated associations were only formalised under the WA Act so as to bring them in line with the obligations imposed on company directors in 2015.

We also note that it is our understanding that there is no distinction between companies incorporated under the Corporations Act and incorporated associations under the WA Act for the purposes of qualifying for fiscal stimulus under the Response Package Act. We would recommend similar equal treatment is offered in respect of the safe harbour protections.

In light of the above, we respectfully support the requests that the Department of Treasury considers amending legislation to extend the current safe harbour to Western Australian incorporated associations. We note the urgency of this matter given the current financial management decisions being made by management committees of those incorporated associations. We also suggest that the Department consider whether there should be any temporary modification of the duty of care and diligence in section 44 of the WA Act to reflect the unprecedented circumstances and the special position of officers of incorporated associations, many of whom are volunteers.

Yours sincerely

A handwritten signature in blue ink, consisting of a stylized 'N' and 'H' followed by a long horizontal line.

Nicholas van Hattem
President

cc: Hon. Ben Wyatt MLA, Treasurer – Minister.wyatt@dpc.wa.gov.au