**Open Forum 31 August 2023**

**Questions Regarding Legal Matters and Constitution Issues**

**Responses Prepared by Peter Smith – ACDS Federal Vice President**

**This Document Will Be Placed on the ACDS Website Following the Forum**

**Part One – Legal Matters**

Questions on legal matters covering similar topics have been submitted by more than one member. In the interests of efficiency, the questions have been grouped and answered accordingly.

Before addressing questions that require specific answers Federal Council wishes to provide a full disclosure of legal matters that are currently being dealt with at the Federal level. There are 2 of these to report upon.

Item 1. A now former member of the ACDS was involved in a disciplinary process starting around August, 2022. The former member and the ACDS have been unable to agree a conclusion to the process. The now former member and the ACDS are at this very time finalising an agreement to enter Arbitration to be conducted by an independent arbitrator. The arbitrator has been agreed. It is anticipated that the Arbitration will be conducted and concluded in a timely manner. The ACDS has agreed to pay the fixed cost of the arbitrator. The fee is $1,000. We anticipate that each party will pay their own costs associated with the Arbitration.

As this Arbitration is in progress, we are obliged to maintain confidentiality on behalf of each party. The level of disclosure to members at the conclusion of the arbitration will be determined by agreement between the parties as part of the Arbitration.

For clarity, Arbitration is different to Mediation. An arbitrator will decide the result after both parties have presented their cases. The decision is binding on both parties. A mediator helps the parties to resolve their dispute but does not make a binding decision.

Item 2. At the previous member forum held on 30th March a report was provided to Members about the Supreme Court Mediation that took place in February this year. A copy of that report is held on the ACDS website under member resources.

That report in Point 9b contained a reference to the ACDS considering its options with respect to the legal advice it acted upon in relation to the proceedings.

Federal Council now reports that the ACDS has commenced proceedings in Western Australia to recover all costs incurred in defending the action against the ACDS including the settlement amount paid to the other party. This action has not been undertaken lightly and is supported by professional advice that the ACDS has a very strong case and a high likelihood of achieving a favourable outcome.

The cost to pursue this action is estimated to be no more than $5,000

Questions submitted by members will now be addressed.

Members Davina Gibbon and James White 1619V

Q3 It has been brought to our attention that there is once again a legal issue regarding membership which is heading down the same path and We would like an explanation of what has happened and what actions our Executive are taking to ensure it does not cost the society any more money.

Answer: Refer to the above statement. Costs will inevitably be incurred when Arbitration is undertaken. Federal Council will ensure that the costs will be kept as low as possible.

Q4 Given the recent and pending legal action, can the Committee reassure all ACDS Members, that every action taken has been in the best interest of the Society. That all-possible actions were taken to minimise any ongoing and future costs to the Society.

Answer: Refer to the report presented at the 30 March forum.

Q5 Can the Committee reassure the ACDS Members that the legal actions being taken against the Society are not in any way of a personal/wilful nature and that the issues are being handled by an independent mediator.

Answer: Refer to the above statement

Member Geelong Club

Q2 With the seemingly increased number of legal battles that need to be funded by the ACDS to resolve issues, what is Federals plan to cover any outstanding costs? Will Fed hit up States and Clubs to cover the expenses?

Answer: At this time there is no reason to believe that the Federal Council will not be able to pay its debts as and when they fall due. There should be no reason for the States and/or Clubs to be asked to contribute funds to Federal Council.

Member Belinda Drury 725V

Q2 I have heard the ACDS are facing additional legal cases in the near future. Is this correct and why is this occurring recently?

Answer: Refer to the above statement

Member Victoria

4 What was the cause of the legal action being taken against the ACDS by a Western Australian member?

Answer: If this refers to the case mentioned in 2 above then refer to the report presented at the 30 March forum. Otherwise see 1 above.

1. Where can we find a financial statement of all of the expenses pertaining to the legal action?

Answer: If this refers to the case mentioned in Item 2 above then refer to the report presented at the 30 March forum. Legal expenses relating to Item 1 above will be provided once the matter is finalised.

1. What actions are the ACDS taking to ensure legal action can be avoided in the future?

Answer: This was referenced in the report presented at the 30 March forum. To re-iterate, Federal Council has at no time sought to become embroiled in legal proceedings and has always acted in the best interests of the ACDS when dealing with such matters. Shortcomings in the ACDS Constitution have been identified as a significant factor in these matters and so it is essential that the proposed review of the Constitution and structure proceeds.

1. Is there new legal action being taken against the ACDS by another member and what are the strategies being employed to avoid it?

Answer: Refer to the above statement.

**Part Two – Constitutional Issues**

Questions on constitutional issues covering similar topics have been submitted by more than one member. In the interests of efficiency, the questions have been grouped and answered accordingly.

Member: Oliver Tester 536W

Q2 At the 2023 Federal AGM, a proposed special resolution to remove clause 12.2 (provisional suspension) was passed. Can the ACDS Federal Council please explain the justification for the removal of this clause and confirm whether any legal advice was sought in relation to this matter? If so, will this legal advice be made available to members?

 Answer: The shortcomings in the current Constitution of the ACDS Inc have been recognised following the resolution of the Supreme Court action in Western Australia in which ACDS Inc was a party. Specifically, clause 12.2 was identified as being detrimental to the interests of members subject to disciplinary action in that it failed to provide for a member to have the benefit of the opportunity for rebuttal as provided for in Clauses 12.4 and 12.5 that apply to actions under Clause 12.1. No specific legal advice was provided; rather the position was highlighted in discussions with our advisors after the mediation was completed. There is therefore no legal advice per se to be made available.

Members: Davina Gibbon and James White 1619V

Q2 Comparison of the Model Rules from the Victorian and NSW authorities show the ACT rules are a little short on substance in respect of the needs of the Society. There needs to be clear differentiation of membership, procedural and constitutional rules, and technical rules for competition, and this is not the case. The notion that an independent mediator does not have the skill set to adjudicate disputes? tell that to a Judge!!!.

Answer: The shortcomings in the current Constitution of the ACDS Inc have been recognised following the resolution of the Supreme Court action in Western Australia in which ACDS Inc was a party. It was recommended to the Federal Council that a thorough review of the Constitution and its suitability to the needs of the ACDS should be undertaken. Consequently, the Federal Vice President undertook to investigate options and report back to Federal Council. This report was presented to the Federal Council meeting on 14th March, 2023.

K&L Gates, specialists in the legal structuring of organisations, were consulted on a preliminary basis and at no cost to the ACDS, regarding the current structure of the ACDS. It was made clear that the current structure as an Incorporated Association was not suitable for an organisation operating on a national basis and that the correct structure would be as a Public Company Limited by Guarantee. This formed the basis of the report referred to in the excerpt from the minutes below.

It is to be noted that as of today no further progress has been made as regards changing the structure and constitution of the ACDS and in particular NO costs have been incurred. The amount of $4,000 to $6,000 referred to in the minutes was the estimated cost quoted by K&L Gates to undertake the project on behalf of the ACDS up to the point of presenting the change to the members for approval.

The resolution at the meeting was to authorise the Federal Council to incur costs up to the estimated expense to take the project forward.

As regards the authority to incur such costs, this is clearly a matter for Federal Council to decide in its role under the Constitution Section 14 Powers of the Council.

Q7 The Minutes of Federal Council Meeting, 14th March 2023 speak to a proposal to fund a change from an incorporated body under ACT Incorporated Association rules to a Public Company Limited by Guarantee. The statement clearly indicates a federal desire to bypass the State incorporated Societies and direct the various local clubs via a standard set of rules. However, I am told that for example Equestrian Australia is a Public Company Limited by Guarantee, but that it is controlled by State registered Incorporated Associations That is a model that is not a Top-Down approach.

Answer: Refer to the answer to Q2 above and the excerpt from the Minutes of the meeting reproduced below.

*There needs to be review of the ACDS structure, in that the States Branches are only mentioned in the By-laws, but there is not any structure or a list of their roles and responsibilities. In real terms, the States are branches of the ACDS and they should not be an independent body, be registered with the State body or have their own Constitution. States are not affiliated with the ACDS, clubs are and will remain an Incorporated Association in their State, but a standardised Club Constitution could be formulated where all aspects cover the needs of the ACDS and the Club.*

*There needs to be a top-down approach to membership but there is a need to organise a structure, get this information to members and allow for feedback before any decision is made.*

*There needs to be a Project Team put together to investigate all aspects and put recommendations to members. It must be considered that all members of the ACDS, including Federal Council are volunteers, have a family and work life and are not experts on a lot of things and professional help should be welcomed.*

***Resolution***

*That actions shown in Peter Smith’s presentation be accepted.*

***Carried***

***Resolution***

*That $4000 - $6000 be available for changes to the Constitution and from Incorporated Association to a Public Company Limited by Guarantee.*

***Carried***

*This is subject to finalisation of an agreement between the ACDS and K & L Gates (Solicitors) and agreement by members for change from an Incorporated Association* to a Public Company Limited by Guarantee.

Additional information: The minutes make no reference to the role of States in a new structure. There will always be a need for input from members at a State level. The reference in the minutes to States was that in order to simplify the structure of the ACDS overall it MAY NOT be necessary for State Branches to be incorporated bodies in their own right but instead be structured as Branches of the ACDS Inc with a clear and important place in the decision making and policy formulation processes of the organisation. As already stated, a position on this has not been formulated and any change in that direction would clearly come about (as stated in the minutes) following appropriate consultation with members.

Q8 There may well be a Business Case for the changes proposed but the depth of actions taken to date are not any part of consultation with and Delivery of, Services to members (16-18 Mission Strategic Plan Mission Statement)

Answer: See Q7 above

Q9 It appears that Federal council (ACDS) wishes to write State Branches out of the picture, why would members of a member driven organization want this? What are the benefits to members?

Answer: See Q7 above

Q10 If we change to a Company Limited by Guarantee our annual fee would increase from $57.60 for an Association to $1,267 for a CLG, with more responsibility for the directors. Why should members want this? Additionally, the Audit Requirements for a Public Company are significantly more involved and expensive.

Answer: This is not true. Preliminary advice received on restructuring indicates that the ACDS would be incorporated as a not-for-profit small special purpose public company limited by guarantee. Audit/review requirements for such a company are no more onerous or costly than that already in place for the ACDS as an incorporated association. The ASIC annual fee would be $59.

Refer to the following Information Sheets available on the ASIC website –

INFO 31 Lodgement of Financial Reports

INFO 131 Obligations of Companies Limited By Guarantee

INFO 215 Companies Limited by Guarantee – Disputes About Members’ Rights

Q11 Why would a volunteer group like the ACDS wish to expose its officials such as President, Secretary etc. to penalties such as the civil and criminal penalties for Directors of companies who breach their duties? They may be individually liable for penalties of up to $200,000. The company also may be liable for penalties up to $1 million.

Answer: Refer to Q2 above

Q12 As a company limited by guarantee, there are no restrictions on the entity’s ability to trade, earn and distribute profits. Why would the ACDS members want to distribute profits to anybody else instead of using them to further carriage driving?

Answer: This is not true. Any profits generated by the ACDS as a Public Company Limited by Guarantee could only be used to further the objectives of the ACDS and would be governed by the Constitution of the company approved at the time of incorporation.

Refer to the following Information Sheets available on the ASIC website –

INFO 31 Lodgement of Financial Reports

INFO 131 Obligations of Companies Limited By Guarantee

INFO 215 Companies Limited By Guarantee – Disputes About Members’ Rights

Q13 Why did Federal Council believe it was a good idea for the ACDS to spend a further $4000 to $6000 on changing our constitution to make us a company? Why should members feel that this cost to the ACDS is justified? (It seems money has been spent)

Answer: This money has not been spent. Refer to Q2 above

Q14 Why would members want to pay someone to take their voice away? This should have been more widely discussed before the Money was committed and seemingly spent.

Answer: Refer to Q2 above

Q15 All of this would say that the States should have branches with their own constitution.

Answer: Refer to Q2 above

Q16 What will happen to States Bodies Funds when they are dissolved.

Answer: Whatever the outcome from the structure and constitution review all State Branches will retain control of all funds currently held by them and generated by them going forward.

Member Belinda Drury 725V

Q1 I have heard that someone has been paid to investigate the ability of federal to remove the states from the constitution.  Is this True?

If so, who gave permission for the money to be spent on this task? It belongs to the members of ACDS to run the organization on behalf of the members.

Answer: Refer to Q2 above.

Member Geelong Club

Q1 Can you share the ACDS’s Disciplinary Procedure or Policy for when members are in clear breach of ACDS Code of Conduct, Bullying Policies etc. Please explain how issues should be raised and how Fed should deal with concerns when raised if not resolved at State level. There seems to be inconsistencies around the way breeches are handled.

Answer: As this question is from a Victorian club the response will relate directly to the Victorian Branch Rules and Regulations. However, similar processes will be in the rules or constitution for each state.

It is important to differentiate between Dispute Resolution and Disciplining of Members as the process to arrive at a conclusion is different and covered by specific sections in the Rules & Regulations. It should be noted that the dispute procedure cannot occur in relation to a matter that is the subject of a disciplinary procedure until the disciplinary procedure has been completed.

1. **Disputes**
2. Disputes under the Rules are covered by Clause 12. Disputes can be a) between a Member and another Member; b) between a Member and the Executive Committee; or c) between a Member and the Branch.
3. In summary, the onus is on the parties to resolve the dispute themselves as per Clause 12.3. If that cannot be done then a process is laid out in Clauses 12.4 to 12.9 to go to Mediation for resolution.
4. There is no provision for Disputes to be referred to Federal Council for action.
5. **Disciplining of Members**
6. Disciplining of members is covered by Clause 13 of the Rules. Member discipline actions are reserved for the Branch Executive Committee to determine. There are 13 sub-sections in Clause 13.1 that govern conduct of a member that may warrant the instigation of disciplinary action against a member. If the Branch Executive is reasonably of the opinion that a member has transgressed then the only action the Branch Executive Committee can take is to refer the matter to the ACDS Federal Council for resolution where it will be dealt with in accordance strictly with the Disciplinary procedures as laid down in the ACDS Federal Constitution.
7. In order to form a reasonable opinion that would trigger a referral to Federal Council the Executive Committee would need to assess all relevant evidence and conduct reasonable inquiry regarding any alleged transgression. It is for the Executive Committee to seek what evidence they require from a Member or Members in order to make their reasonable opinion determination. The rules of natural justice apply and thus the Member alleged to be transgressing should be given an opportunity to rebut the allegation.
8. A referral to Federal Council should not be undertaken lightly and as stated in the Rules the Executive Committee must have formed a reasonable opinion that in fact a transgression satisfying 1 or more of the 13 identified in the Rules has taken place.