



# Report of the Commission on the incorporation, structural and constitutional issues of the AEA

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## **PART ONE**

### **1.1 Introduction**

In January 2006, the General Meeting the AEA committee (hereafter called “the committee”) commissioned Miranda Lutz, Heather Heldzingen, Ivan Heldzingen, Stephen Pitney (hereafter called “the commission”) investigate the procedures and requirements to relocate the Incorporation of the Australian Esperanto Association from the ACT to Victoria and any other related matters.

The motion to relocate from the ACT to Victoria had previously been approved by the members of AEA at the Annual General Meeting in January 2005 in Adelaide. The members also approved at that time a budget of \$3,000 for the AEA to obtain professional advice on this project and also in relation to examining our legal status and on financial matters as deemed appropriate by the Treasurer.

An application was subsequently made to the Statutory Authority - Consumer Affairs Victoria for registration of the AEA in Victoria. In a letter in response, a number of deficiencies in the current Constitution of our Association were identified and these were required to be addressed prior to acceptance of registration in Victoria.

In addition, the firm Enterprise Care (EC) was commissioned in November 2005 to review the corporate Governance structure of the AEA, advise on the question of protection AEA provided to affiliated ‘branch’ groups and make recommendations as they considered appropriate.

Enterprise Care is a firm of consultants who specialise in providing services for ‘Not for Profit’ organisations - For more information refer to [www.enterprisecare.com.au](http://www.enterprisecare.com.au)

This report aims to presents the findings of the Commissions to the Estraro. It discusses matters considered relevant and makes objective recommendations based on the facts for the greatest benefit of the organisation and our members.

### **1.2 Reason for the Relocation**

Our current Incorporation requires that the Association’s Public Officer reside in the ACT.

The main purpose for the relocation of Registration reason for this move was that the AEA currently has only one member living in the ACT – our Public Officer, Hugh Malcolm where as a number of potential officers are available in Victoria.

### 1.3 Action Taken

On 3 February 2006, two weeks after the AGM at the Summer School, the report from Enterprise Care was received and was immediately distributed to the committee.

The main recommendations of EC, that AEA become a 'Company Limited by Guarantee', was generally unexpected and made it necessary to alter the term of reference of the original commission to be changed from a relatively simple move to Victoria to a wider review of the structure of the organisation.

As the commission dealt with the EC report, we became aware that amongst the commission, and also amongst the committee, much interest, and occasionally disputes arose about the significance or the objectives of some of the proposals in the report, or because of the inclinations of some of the personalities amongst us.

The commission decided that we compose a set of questions to EC in order to clarify parts of their proposals that were not well-understood. The committee was also invited to participate. The list of questions was compiled and sent to EC, and they replied.

After further consideration of the proposal and replies from EC, on 15 May 2006, the commission met with Mr. Mark Rudd of EC. Present at the meeting were, Miranda Lutz, Stephen Pitney, Ivan Heldzingen and Mark Rudd. Heather Heldzingen made her apology.

Some subsequent clarifications via telephone and email communication took place with EC and a final report was received on 31 May 2006 with clarified items that were requested at the meeting.

Miranda Lutz also accepted the invitation to meet with the solicitor who provides legal advice to the Esperanto Federation of NSW, Mr. Graham Wheeler, there was no charge to the AEA for this advice. Igor Couto also received advice with no charge to the AEA from a personal friend who is a lawyer.

In the meantime, Ivan Heldzingen prepared a draft update of our Constitution addressing the requirements of Consumer Affairs Vic. and inserting model rules as appropriate. Ivan also did much research on the various legislation relating to associations.

## PART TWO

### 2.1 Problems identified

The following items in the Constitution of AEA were identified by the **Department of Consumer Affairs** as needing to be addressed in order to comply with the current requirements of the contemporary Victorian legislation:

- Unclear definition of the relationships between AEA and its allied organisations
- No definition of a “Federation”, despite “Federations” having the right to appoint committee members!
- Some important processes are not sufficiently clear
- Lack of currently required processes (eg. Process for dispute resolution)
- Urgent need to update the constitution (this has not happened for some time)
- Lack of an official seal (This was in Canberra however seems to have been lost)
- And others

The following areas of current operation were identified as being legally problematic and may be putting the AEA at risk:

- Protection for volunteers (outside of the ACT)
- Protection for staff employed outside of the ACT (Currently one employee in NSW),
- Having bank accounts (outside of the ACT – currently accounts are held in WA, NSW, VIC & QLD),
- Summer schools / events held in various states (outside of the ACT),
- Correspondence course in QLD,
- ESK edited in WA and published in Victoria,
- AEA does not hold at least three committee meetings per year,
- The AEA AGM is not held within five months of the end of the financial year.

## PART THREE

### Outline of Possible Governance Structures

To provide a general understanding of the options available we have included the following descriptions which have been extracted from Consumer affairs Victoria [www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)

#### 3.1. Incorporated Association

The Associations Incorporation Acts provide a simple and more affordable means of creating a separate legal entity for small, community based groups with limited resources. The Acts impose less onerous conditions than the Corporations Act 2001 that governs the activities of companies.

Associations are incorporated under State and Territory Associations Incorporation legislation, which is not administered by ASIC, but by the various state authorities. An incorporated association is also a legal entity separate from its individual members.

Incorporation allows Association to:

- **continue** regardless of changes to membership
- **accept** gifts and bequests
- **buy and sell** property
- **enter** into enforceable contracts
- **sue or be sued**, and
- **invest** and **borrow** money.

Incorporation also provides benefits for members and officers, including:

- **protection** against personal responsibility for any debts or liabilities incurred by the association, and
- **limiting** of personal liability to outstanding fees.

Incorporated Associations are non-profit organisations - any profits made should be put back into the association and not provided as personal gain for its members

Incorporating an association in a State or Territory restricts the organisation to operating in its home jurisdiction. There is no reciprocal statutory arrangements under the associations incorporation legislation whereby incorporation in one state or territory confers corporate status in another. For example, an association incorporated under the Associations Incorporation Act of New South Wales may only carry on business in New South Wales.

As legislation differs in each state or territory, it is difficult to outline detailed requirements for incorporated associations, but basically an incorporated association may need to:

- Have a committee, responsible for managing the association;
- Have a public officer and notify any changes in that position;
- Have a registered office in its state of incorporation;
- Act in accordance with its objects and rules;
- Hold an Annual General Meeting once every calendar year;
- Lodge an Annual Statement every year;
- Keep proper accounting records and, in some states prepare, have audited and lodge financial statements;
- Keep minutes of all committee and general meetings.
- Keep registers of members and all committee members
- Have a common seal

Also refer to **Register General's Office – Australian Capital Territory** [www.rgo.act.gov.au](http://www.rgo.act.gov.au)

Each State/Territory administers its own legislation in relation to incorporating an Association in their jurisdiction. Therefore, an Association wishing to be incorporated Australia wide would need to incorporate separately in each State/Territory. In that situation some confusion would arise because Australian Associations incorporation legislation is not uniform, members and committee members in each jurisdiction would have different rights, remedies, liabilities and obligations. Documentary and lodging requirements would be duplicated.

### 3.2 Incorporated Company

Under a company structure, charitable or not-for-profit organisations will generally be registered as public companies that are limited by guarantee. Limited by guarantee means the liability of the company's members is limited to the amount the members undertake to contribute to the property of the company if it is wound up.

Registration of a company creates a legal entity separate from its members. The company can hold property and can sue and be sued.

Companies are registered under the Corporations Act 2001, which is Commonwealth legislation administered by ASIC. A company's registration is recognised Australia wide.

At the very least a public company must:

- Have at least 3 directors and 1 secretary;
- Have at least 1 member;
- Have a registered office address and principal place of business located in Australia;
- Have its registered office open and accessible to the public;
- Be internally managed by a Constitution or Replaceable rules;
- Maintain a register of its members;
- Keep a record of all directors' and members' meeting minutes and resolutions;
- Appoint a registered company auditor within 1 month of its registration;
- Keep proper financial records
- Prepare, have audited and lodge financial statements and reports at the end of every financial year;
- Send to its members a copy of its financial statements and reports, unless the member has a standing arrangement with the company not to receive them;
- Hold an Annual General Meeting once every calendar year within 5 months of the end of its financial year;
- Receive and review an annual company statement and pay an annual review fee. A charitable or not-for-profit company may be eligible for a reduced annual review fee if it meets the criteria under the definition of 'special purpose company' in regulation 3(a), (b), (c) or (d) of the Corporations (Review Fees) Regulations 2003; and
- Lodge notices whenever changes to its officeholders, office addresses, constitution and its name occur within specified timeframes as determined by the Corporations Act 2001. As a general guide please refer to "Legal obligations of a company" on our website at [www.asic.gov.au/companies](http://www.asic.gov.au/companies) for more information.

A company limited by guarantee may also be registered without the word "Limited" in its name. This is only possible if its constitution:

- a. requires the company to pursue charitable purposes only and to apply its income promoting those purposes; and
- b. prohibits the company making distributions to its members and paying fees to its directors; and
- c. requires the directors to approve all other payments the company makes to directors.

If the organisation is registered as a company with the Australian Securities and Investments Commission (ASIC) the organisation will be registered Australia wide.

### 3.3 A Registrable Australian Body

A mechanism to has been established to operate nationally without the need to Associations to incorporate in all States.

An incorporated association may become registered under Part 5B.2 of the Corporations Act 2001, to enable it to carry on business in other states or territories outside of its home jurisdiction without the need to register as a company. The incorporated association will become an Australian Registered Body with the Australian Securities and Exchange Commission (ASIC) and upon registration will be allocated an Australian Registered Body Number (ARBN).

A Registrable Australian body is a **body corporate** which has been formed or incorporated in Australia. Registrable Australian bodies include bodies corporate that are *not* companies, recognised companies, exempt public authorities, corporation's sole, foreign companies or financial institutions. Certain unincorporated bodies can also be Registrable Australian bodies. An association which is registered under a State law not recognised in other States will generally be a Registrable Australian body.

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Further details are available at

[http://www.asic.gov.au/asic/ASIC\\_PUB.NSF/byid/CA256AF60076AF11CA256AF60077FC87?opendocument](http://www.asic.gov.au/asic/ASIC_PUB.NSF/byid/CA256AF60076AF11CA256AF60077FC87?opendocument)

- [Bodies eligible for Registration](#)
- [How to register as a Registered Australian Body](#)
- [Post Registration Obligations](#)
- [Relevant Forms of Notice](#)
- [More Information](#)

### 3.4 ASIC Recommendation

ASIC is unable to provide you with advice on what structure is best for your charitable or not-for-profit organisation. You should consult the relevant legislation including the Corporations Act 2001, Corporations Regulations 2001 and each of the State and Territory legislation on Associations Incorporation on any specific matter of law.

If you have any doubt about whether your organisation needs to be registered, or the nature of its obligations after registration, you should seek advice from a solicitor, accountant or other professional person.

Whether a body is *carrying on business interstate* will depend on certain legal principles and on the circumstances of the case. Where a body is in any doubt as to whether it may be *carrying on business interstate* it should seek its own legal advice.

## PART FOUR - Findings of the Commission

The investigation concluded that there are two preferred options available to the AEA:

1. To remain an Incorporated Association but become a Registered Australian Body  
or
2. To become Incorporated as a company limited by Guarantee

### **4.1 Option A - Incorporated and become a Registered Australian Body**

It would be possible to remain incorporated in the ACT however the lack of membership and the Public Officer remains a problem. A solution may be to engage a firm of Accountants in the ACT to act as our official address.

Whether registered in the ACT or Victoria, it would appear that AEA would be permitted to legally carry on business in one or more States or Territories other than its home jurisdiction once it is registered with ASIC under the Corporations Act and obtains an ARBN (Australian Registered Body Number).

The process to register the AEA as an incorporated association in Victoria appears to be a relatively simple however it should be noted that this requires us to incorporate a new legal entity. This is different to a transfer of incorporation and hence our members would need to join this new entity, the ACT association would need to agree to transfer its assets to the new entity and then cancel its incorporation in the ACT (if it wished to do this). The new association would also need to apply for its own ABN, confirm its income tax status, open bank accounts, etc.

It would then require us to de-incorporate and 'wind-up' the Association in the ACT however this could be done after the Association is registered in Victoria.

This process is likely to take a period of time to make the necessary amendments to the Constitution, making application and receive registration.

This structure would allow State Federation and other incorporated associations, who wish to do so, de-incorporated and become legally part of the AEA. The AEA then provides personal legal risk protection for members against the potential for being personally liable for any debts incurred by their "club", as well as having the potential to reduce the administrative, governance and compliance burden and the cost to the local groups.

It should be noted that members could still establish their own "branch" and Bank accounts however under this structure, all members must become members of AEA.

Affiliated organisations are of two types.

1. Independent, incorporated entities such as the NSW Federacio, Melburna Asocio, et al
2. Special groupings (branches?) of AEA - New or short-duration groups (eg Summer school) or small or financially weak (such as the recently deincorporated QLD Federacio)

Affiliated branches must be unincorporated entities. In order to protect the Association, the AEA committee would be required to give written approval for local clubs to carry out activities in the name of the AEA and that they are entitled to have a separate bank account. These details would be agreed at the time of affiliation.

See the APPENDIX at the end of this report for possible proposed treatment of affiliated organisations.



## **4.2 Option B - Company Limited by Guarantee**

A company limited by guarantee means a company formed on the principle of having the liability of members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up, e.g. AEA may choose to nominate a guarantee amount of \$10 which all members would be liable to pay, in the event of AEA winding up its operations, towards any outstanding debts of AEA. This amount is separate from any annual subscriptions, which AEA may choose to collect from its members.

This type of company is not a commercial company - it is a structure essentially setup for Not for Profit organisations. Instead of having shareholders you have members, who agree to contribute a nominal amount. The term commercial implies a business being undertaken for a profitable outcome. Whilst Not for Profit organisations need to make a "surplus" to be sustainable and they sometime carry out "commercial activities", as some of AEA's activities could be classified, the company as such would not be regarded as "commercial".

An increasing trend is for 'Not for Profit' organisations, operating on a national basis to become 'companies limited by guarantee'.

The AEA could be registered in any State and would be able to operate nationally and throughout Australia.

As with association incorporation + ARBN, this structure would also allow incorporated groups to de-incorporate and obtain personal legal risk protection for members against the potential for being personally liable for any debts incurred by their "club", as well as having the potential to reduce the administrative, governance and compliance burden for each State group.

In addition, it provides protection to the members of AEA against potential claims made by non members, local and international visitors to the Clubs, attendees at summer schools and other events which is not available under the incorporated association structure. This has been identified as a high risk area for the AEA and it should be noted that fifty percent of attendees at recent Summer schools were not AEA members.

It should be noted that members could still establish their own "branch" e.g. Gold Coast, Tasmania etc, but ultimate responsibility for Governance of the new company would rest with the elected Board of Directors (committee / Estraro) of the AEA.

Unlike the Association option, it is possible to transfer incorporation from the existing incorporated association to a company and preserve its identity. With a transfer of incorporation there is no need to close the old association and transfer its assets across - the organisation, its members and assets remain the same - however the legal entity undergoes a metamorphosis from an association to a company.

This structure also allows for completely separate Esperanto groups organisations to function completely separate from the AEA.

The AEA constitution would prohibit the company making distributions to its members and paying fees to its directors.

## **PART FIVE    Issues Considered**

The Commission considered the following Issues:

### **5.1    Intent of the Incorporations Act**

As stated previously, the Associations Incorporation Acts was designed for small, community based groups with limited resources. It was specifically intended for voluntary not for profit groups such as sporting clubs, church and school councils, community service clubs whose members live locally and the business of the Association is conducted at regular committee meetings throughout the year.

The Act states that the affairs of the Association shall be managed by the committee of management - the committee shall control and manage the business and affairs of the Association. The committee must meet at least 3 times in each year at such place and such times as the committee may determine.

An Association is able to do teleconferencing to conduct normal meetings only if the rules of its Constitution allow for it, otherwise teleconferencing cannot be used.

Protection to the members may be determined by the question "... does AEA comply with the intent of the legislation?"

### **5.2    ARBN**

Does becoming a Australian Registered Body comply with the intention of the Act?

ASIC advise organisations to seek independent legal advice. The solicitor Graham Wheeler advised us that having an ARBN is intended more for once off events outside the home State of Incorporation rather than for ongoing activities. We have been unable to obtain verification of this view.

### **5.3    Legality of Operation**

EC confirmed that technically the Australian Esperanto Association's national body's current structure and registration, as an Association registered in the ACT, does not support the carrying out of activities outside of the ACT.

It is therefore apparent that some of the activities undertaken by AEA outside the ACT could be considered illegal – these activities could include:

- Employing staff
- Publishing books and magazines
- Running summer schools and Congresses in various States
- Operating Bank Accounts

It appears that both options address the legality of national operation – EC have confirmed that either structure will allow AEA to:

- Undertake business and social activities throughout Australia
- Have separate branches (clubs) throughout Australia
- Provide the option for members of unincorporated bodies to join and thus having corporate structure to facilitate any business undertakings

## 5.4 Financial Risk

A level of risk currently exists for both the Association and a Company structure. The AEA is exposed to several types of risk including :

1. Public Liability to protect both members and third parties in the event of personal injury or damage to property.
2. Risk to the Association for failure to act legally and to comply with regularity and Statutory requirements. This risk is complicated due to differing compliance requirements in each State. In addition providing safe environments to carry out our activities in workplace environments.
3. Risk of affiliated members of groups entering into unauthorized contracts on behalf of the Association
4. Risk due to loss of assets of the AEA. This includes books, libraries, computer equipment
5. Risk of losses due to deception or breach of fidelity
6. Risk of personal loss of members of the Committee due to failure of act diligently and 'with due care'

The exposure to risk can be managed through establishing formal processes to ensure our activities are legal and necessary actions have been carried out. For example, checklists confirming the annual statements have been correctly submitted to the Authorities, Workcare and other insurances have been put in place annually.

## 5.5 Insurance matters

Appropriate insurance covers should be considered to provide for the protection of the Association for the above risks.

The cost of public liability insurance appears not to be affected by the type of incorporation provided that we remain a not for profit organisation. The relevant factors are more the location of registration the size of membership and the nature of our activities.

Heather has investigated Public Liability Insurance and it appears that we can obtain \$5 million cover for @ \$700 per year.

Some insurers only provide policies for not for profit association or companies limited by guarantee for the State in which they are registered. For example <http://www.communityinsurance.com.au/default.asp>

The AEA currently has insurance for replacement of the Library in Canberra and the computer used by Don Broadribb. The Libroservo book stock and the building is Insured by Esperanto Federation of New South Wales. AEA has Work cover insurance for our employee, Nicole Else.

## 5.6 Regulatory Compliance

An Association can arrange its structure (in its constitution) the same as a Company. The main difference being that a company comes under the one regulatory environment, that of the national body, the ACCC, while an Association is registered in a State and its committee must know the difference between the diverse

state laws for associations, in the states and territories in which it wishes to operate if able to do so (via ASIC).

Note that the difference amongst them is not big enough to impact the current activities of AEA, and the States are always endeavoring to harmonise the diverse association laws, so that the diversity doesn't create problems.

For example, a known difference is, that in Queensland an association must submit audited (by a professional) financial reports whilst in Victoria it is only mandatory for "prescribed organisations whose assets are greater than \$500,000, or with income of more than \$200,000" which AEA is not. This mandatory requirement and associated cost caused much grief to the QLD federacio.

An Association which is an Australian Registered Body must also comply with the Corporations Act 2001

## **5.7 Cost of Compliance**

The cost associated with meeting statutory requirements – these include auditing, accounting costs and filing costs.

Annual filing costs of \$50.

Annual auditing which is currently \$1,600 should increase if the accounts of any of the affiliated groups are included in the Audit. This cost increase should be offset against the saving in auditing costs made by the affiliated groups via high affiliation fee. In Victoria, submitting audited accounts, under the Associations ACT is mandatory for "prescribed Organisations" only. AEA does not qualify as a "prescribed Organisation".

The difference in registration fees between an association and a company is relatively small – Association Incorporation in Victoria requires an application fee of \$104 compared to annual ASIC filing costs of \$ 212 for Incorporating as a Company.

To incorporate as a company, an establishment fee of \$ 1760 is required.

The auditing fee should be the same as for an Association

A simple tax return is required which could be prepared by the Treasures and expertise within the membership

Under both structures, the potential annual cost saving by removing auditing costs of affiliated groups could be in the order of \$3,000 (excluding MEA, EFNSK and others), however, submitting audited accounts is mandatory for companies.

## **5.8 Workload of the Committee**

Under both structures, the statutory work for the AEA Estraro is likely to increase from the current requirements due to requirements to grant permission of groups to form, have bank accounts, conduct activities and be properly organized. It may be possible to delegate some of this work back to the branches eg memberships,.

The AEA Estraro must also review activities, accounts, member lists, and permit renewal if deemed appropriate.

The statutory work of unincorporated member organisations would be reduced as they are not required to audit and submit their accounts to the Authorities however they must still submit their constitution to the AEA committee, give evidence that they are properly constituted and support the aims of the AEA.

Company directors have more risk than association committee members. According to Enterprise Care:” There is greater onus, under the Corporations Act, for Directors than there is for committee members of State Associations” This should not, however, be the sole reason to reject the company option as the elected/appointed Estraro should be expected to act with honesty, prudence and diligence.

## **5.9 Tax Matters**

We have been advised that becoming a Company should not affect our current status as being exempt from income tax.

The AEA tax status as a ‘self assessing entity’ would not change by simply transferring incorporation to a company. It would only change if we altered our primary objects or character as a not-for-profit body.

As a company, AEA would need to submit a return for assessment to the Tax Department each year.

The current arrangement is that we are required submit an annual report to the Department of Consumer Affairs in the state or territory of registration. AEA also returns a- quarterly activity statement to the Tax Office for our one staff member.

We are not currently required to or are registered for GST. On the recommendation of our accountant, we do not claim back the GST and do not return BAS statements.

As a company we would not be required to lodge quarterly BAS statements.

## **5.10 Precedence for a Company in the Australian Esperanto Movement**

The Esperanto Federation of New South Wales has been registered as a “Company Limited by Guarantee” since September 1968 (38 years).

The following brief report has been provided by the Federation’s current Treasurer, Tim Wade-Ferrell.

The Federation acts according to our Memorandum and Articles of Association as set out by our founding members however we are currently in the process of updating our M & A’s. All amendments will put to our members to vote on.

The Board of Management consists of a President, Vice President and 5 committee members (one of these to be Secretary and one to be Treasurer). These positions are for a term of one year when all step down and they may be re-elected. All positions are voluntary and no financial benefit is received by any of the directors.

By law we are required to hold one annual general meeting. Board has also decided to meet monthly and this meeting is open to all members.

The Federation reports to ASIC when there is a change the members of the board and to report on our balance sheet and pay fees to ASIC which this year consisted of 2 payments totaling \$105.00.

By law the accounts must be audited at the end of the financial year which at present costs the Federation \$726.00. The Federation does not currently employ any staff however it owns a property in Redfern, part of which is commercially leased for which we receive rent. We are required to submit an annual tax return.

As far as I can see, having served on the boards of various associations over the last 30 years (starting with the local cricket club aged 16) our \*real\* responsibilities as a company are no different to our responsibilities as an association. While there may be a little more paperwork to report to ASIC (this year requiring a total of 30 minutes work) it is what I believe are the basic responsibilities of any board - company or association.

The structure has operated very satisfactorily for many years and the fact that we are a company simply makes us accountable where some associations overlook this (and are permitted to do this by the governing bodies).

### **5.11 The Constitution**

The new AEA constitution, whether company or association will be able to cater for the various types of affiliations.

Under either structure, the changes required of our constitution are twofold:

1. Obligatory because it is deficient in contemporary requirements (simple update)
2. Structural clarification concerning the affiliated organisations

The first is mechanical and is easy to achieve. We just need to follow the advice of the authority in which the jurisdiction(s) reside(s) (commonwealth, state or territory).

The second is complicated and possibly needs the help of an expert plus the collaboration of the entire committee. Of course, the entire membership must be advised of any proposed amendments of the Constitution according with our Statute and it is recommended that a draft changes be advised by post.

The bulk of the legal costs associated with the changes under consideration are related to drafting changes to the constitution. The work on the constitution will be much the same whether we chose to transfer to a company, amend the constitution of the association in the ACT, or incorporate a new association in Victoria.

### **5.12 Assets**

If local groups elect to de-incorporate – issues in relation to assets need to be addressed. It is not expected that stronger groups such as NSW Federacio and Melburna Asocio would want to de-incorporate to become branches of the AEA.

It is more likely that they would remain as “member organizations”, managing their own affairs - see below, however if they chose to do so, their assets would be transferred to AEA for protection and clearly specific agreement on their use would need to be reached. Capital Gains Tax would not be applicable on such a transaction.

In the case of a smaller group such an Newcastle, they would retain the use of their assets in the form of their bank account(s) however in the case of such a group “winding up” then their assets would be transferred by the AEA.

The bank accounts of such groups are technically the property of the AEA and each year, the groups submit their reports and the balance of the accounts to the AEA for auditing and inclusion in the balance sheet of the Association.

### **5.13 Promoting Esperanto**

The current situation there is considerable work in establishing an incorporated association and considerable cost in auditing. Under both of the proposed governance structures, the work and more particularly, the costs will be removed thereby making it easier to establish and maintain local groups

### **5.14 Image / Face of Esperanto to ‘outside world’**

A cohesive (corporate?) structure, either as an Association or Company, may create a more credible and persuasive image to Authorities such as the education departments, schools, businesses and our critics in the language industry.

It may instill more pride in the membership and the ability to demonstrate to the outside world and our critics that are a structured and creditable organisation rather than a group of small united groups. This should promote confidence and encourage members to promote our language.

### **5.15 Philosophical Consideration**

Members are likely to have varying and legitimate views on this subject.

Some members have expressed to the commission that a company structure is not appropriate for the AEA as they don't like the concept of a corporate structure and people in positions of "power". They believe it is contrary to the ideals of the Esperanto movement however it should be noted that by becoming an Australian Registered Body, the AEA must register under the Corporation Act – the same regulatory body as for a company.

Other members have a view that the AEA must conform to the legal regulations of Australia and are philosophically opposed to running the AEA in a non-compliant manner.

Questions that could be posed are "How well has the past structure served the movement?", "Where do we want to go in the future?" and "How legally correct do we want AEA to be?".

### **5.16 Combined Structure - An Association and a Company**

As a possible solution to satisfy those members who are not comfortable with the AEA having a corporate structure, it was suggested that the AEA could have a governance structure having two sections.

The principal section under which the general activities of the organisation would be conducted would be incorporated Association, and the second section would be a commercial arm which would be incorporated as a company. All financial matters including the sale and publishing of books, employment of staff, etc. would be carried out under the Company.

The Commission considered the possibility of this arrangement and agreed that it had merit however concluded that it would place too much unnecessary compliance a burden on the Estraro.

## **PART SIX**

### **Summary - Association Vs Company Comparison**

The Commission concluded:

#### **Advantages of an Association (in Victoria)**

1. Marginally easier statutory compliance work (some members more familiar with this structure)
2. Option to save on audit costs if the constitution allows (unlikely to be accepted by the members due to the current level of assets however it might be accepted in the future. This will ultimately depend on how well the books are maintained and the level of trust in the Treasurer(s) and account signatories.)
3. Possibly less need for professional advice
4. Slightly Less expensive Annual Fees.

#### **Difficulties with remaining an Association**

1. Complexity of dealing with 8 state/territorial jurisdictions
2. Must be compliant with two jurisdictions the Incorporations Acts and to ASIC under the Corporation Act 2001
3. It is questionable whether our association complies with the intent of the Incorporation Acts (state vs national organisation)
4. Arguably. it provides a reduced level of protection as for a company if point three is correct .
5. New people and visitors to clubs would be required to immediately become members of AEA to join affiliated groups. In practice this will be impractical and will expose the AEA to a level of risk.

#### **Advantages of becoming a Company**

1. Only one regulatory jurisdiction, nation-wide ASIC - provides more certainty in legislations as it is a more established system
2. More appropriate for a national organization, and recommended by legal authorities
3. Smoother and continuous transition than re-establish in Victoria
4. Greater governance transparency (refer comments of EC)

#### **Difficulties with becoming a Company**

1. There is a greater responsibility concerning risk for the directors of a company. However this should never be a reason why you don't become a company as the expectation is that the directors will act with prudence, diligence and honesty,
2. There is set up cost to establish a company (\$1,760),
3. There is marginally more extensive and costly statutory reporting by the Treasurer and Secretary,
4. Philosophical issues for some members with a change to corporate registration

Under both structures, the AEA may have a similar structure and will be able to offer smaller groups the possibility to be affiliated as branches thereby:

1. Helping new groups to become established quickly without the cost of incorporation,
2. Helping the less wealthy groups avoid liquidation
3. Providing protection to their members
4. Promoting the growth of Esperanto



## **PART SEVEN**

### **Recommendation of the Commission**

After due consideration, the commission was unable to reach consensus – individual assessments have therefore been provided:

#### **Recommendation of Heather**

Heather favoured Option 1 - to register in Victoria as an Incorporated Association and also register with ASIC a Registered Australian Body operating throughout Australia.

She felt that Incorporation in Victoria with an ARBN will offer a similar level of protection to the members of AEA, allow us to operate legally in all States and help avoid discontentment of members in the Association who oppose a corporate registration.

The association should be at a similar 'constitutional level expressed in its constitution' as a company as there appears to be no difference in power. In addition, should it be decided to become a company in the future, the transition should be easier and more palatable to members who oppose forming a company.

#### **Recommendation of Miranda**

Miranda concluded that AEA should become a Company Limited by Guarantee.

On looking at the differences between associations and companies it was found that AEA is currently acting more like a company than an association due to the nation wide operation rather than a community based State organization.

Because AEA does not currently comply with the requirements of Incorporation Acts, she feels that a company offers greater protection to the organisation.

It should be noted that, in addition to the NSW Esperanto Federation, there are many companies limited by Guarantee' operating in Australia that have similar aims and goals to what AEA has and they are not evil and causing damage to society – they include Amnesty international, Oxfarm, Care Australia, Amnesty International and many others.

#### **Recommendation of Stephen**

Stephen also agreed that Company Limited by Guarantee would appear a more appropriate structure – especially after considering the intent of the Incorporations Act and the advice of specialist consultants.

Although it is an important matter, he felt that we should decide quickly and put it behind us – he will not be disappointed with either option. While the anti corporate structure argument held be come members is understood he believes it is not valid as both options come under the jurisdiction of the Companies Act.

**Recommendation of Enterprise Care**

The recommendation of EC remains that we become a “Company Limited by Guarantee” however, after becoming aware of the particular political and philosophical views of a few members in our Association, EC have stated that, although they believe their original advice is technically preferred, they are also comfortable with AEA remaining an incorporated association but as a Registered Australian Body.

EC claim that this proposal to become a company would make the overall structure less complicated than the current arrangement and provide greater transparency.

Heather does not agree with this and believes it actually doesn't change onus on the Estraro because the estraro is supposed to annually review all member organizations. She feels that the proposal actually requires more diligence from the estraro in granting rights to groups to form.

**Recommendation of Lawyers – Graham Wheeler**

Graham Wheeler recommends that a “Company Limited by Guarantee” is most appropriate as did Igor's personal friend who is a lawyer.

**Recommendation of Ivan Heldzingen**

Ivan decided not to continue his involvement with this fact finding commission in May 2006.

**Disclaimer**

The authors of this report have attempted to consider the relevant facts however do not accept responsibility for errors on fact or interpretation.

## **APPENDIX A**

### **Heather's suggested Implementation Programme**

Heather suggests the following timetable:

<b>30 July 2006</b>	<b>Commission to make recommendation to the committee (LA ESTRARO)</b>
<b>30 August 2006</b>	<b>1. Committee to decide on constitutional recommendation 2. Submit proposal to the members and invite participation</b>
<b>30 September 2006</b>	<b>Make changes to the constitution along the lines recommended by the Victorian Consumer Affairs, as set out in their model rules (attached),</b>
<b>30 October 2006</b>	<b>Make changes in the constitution to reflect the structure of AEA with respect to affiliated organisations as discussed in this report and reflect these changes in the constitution.</b>
<b>20 November 2006</b>	<b>Make changes to the constitution as advised by the members (if any) that are additional to the above.</b>
<b>30 November 2006</b>	<b>Prepare a draft of the proposed constitution to the committee for submission to the membership.</b>
<b>January 2007</b>	<b>Membership to approve new constitution.</b>
<b>February 2007</b>	<b>The committee to submit the new approved constitution to the Victorian authority and register in Victoria as an association.</b>

Please note that the dates are not accurate now and our actions will depend on what the Estraro and the members decide.

## APPENDIX B

### Possible AEA Member Organisations

#### AFFILIATED INDEPENDENT ORGANISATION MEMBER

For the independent stronger, groups, a membership category is proposed and paying subscriptions to AEA, based on a formula of how many members it has (one subscription for each complete group of 7 members, eg 8 = once, 18 = twice, 21 = thrice). It receives a proxy vote for each subscription that it pays which must be justified by submitting its member list to the secretary of the AEA.

1. It must have at least 7 members (as in the current constitution)
2. Its members must be verifiably living persons, and at least 5 must also be members of the AEA
3. It is entitled to - vote at every ballot of the AEA, for which it is a paid up member, giving its proxy vote(s) to a delegate or delegates, who must be a member(s) of the AEA
4. It must be a company or incorporated association, as AEA does not protect it for its own activities.
5. Any activity undertaken for, or on behalf of AEA, must be clearly agreed in writing, and appropriate assurances/insurance be agreed between it and AEA
6. Its aims, written in its constitution, must be in accord with the aims of the AEA
7. It must, annually, present its constitution (if there are changes), and yearly report to the secretary of the AEA when it refreshes its membership of AEA (as in the current constitution).
8. It must, annually, present its membership list to the secretary of the AEA.
  - The secretary of AEA guards its membership list to check the correct subscription payable, and not for any other purpose
  - No one apart from the secretary and treasurer of AEA are entitled to see its membership list, and they must be satisfied that those in the list are verifiably living persons.

#### The benefits for the independent organisation member (of AEA) are that:

- It receives proxy vote(s) in AEA ballots according to its member numbers
- Its activities are independent of the AEA

#### The benefits for AEA are:

- Receives subscription according to its member numbers
- Receives the support of strong entities

#### AEA AFFILIATED BRANCHES/ SPECIAL GROUPS

For the second category AEA must treat them with special rules, because these special groups are by themselves not members of AEA, but special groupings of individual members of AEA.

Therefore AEA must not have a special category of member for this kind of group, because it itself does not have a voting right, apart from the voting rights of its members. The constitution must have a separate

paragraph dealing with affiliated branches and special groups. Perhaps in a paragraph dealing with rights of members?

It exists for groups of AEA individual members wanting to organise their own group to achieve goals helpful to the movement, and with the permission of the committee.

After consideration of their goals and plans, and if the committee agrees, AEA will give them (bestow) the right to act in the name of AEA. AEA must treat it like this because if they act in the name, and under the protection of AEA, AEA takes their risk onto itself. Therefore, it is an important responsibility of the committee that the affiliated branches and special groups be treated with prudence and diligence.

1. These bestowed rights should be clear, limited in time, and annually renewed; eg:
  - Choose amongst themselves office bearers: chairman, secretary etc:
  - Own a bank account which remains an asset of the AEA in the case of winding up
  - Collect donations from the members up to a certain previously agreed amount
  - Organise activities to progress Esperanto, eg. Lessons
  - Organise certain social events, picnics, theatre visits etc
  - Organise a general meeting to elect, plan activity etc
  - Request permission from the AEA committee if it wants to do anything outside that already agreed
  - Follow the constitution of the AEA
2. It must have at least 5 (sufficient?) members and every member must be a member of AEA, in order to receive protection.
3. On an annual basis, it must submit its goal(s), plan(s), accounts (for incorporation into the AEA accounts), membership list and annual report to the committee if it wants to renew as a special, or affiliated group
4. At the same time as it requests renewal, send to the committee what it plans to do in the coming year.
5. At the discretion of the committee, AEA can subsidise it, depending on the merit of its proposal for action, propagation, advertising or recruiting for the movement.
6. On winding up the assets of the group are transferred to the AEA account.

The benefits for these special groups are:

- It enjoys the protection of AEA
- It does not have to bear the cost of incorporation
- Although small, it can coherently function as a group
- If new, it receives encouragement and help to start its activity

The benefits for AEA are:

- It helps new groups to form
  - AEA can set up groups for specific purposes, and which will last for a specific time period (6 months, 1 year, eg. Summer school)
- It helps small groups to continue their efforts for Esperanto
- The assets (accounts) of the group are nominally the assets of the AEA

The AEA committee retain the right to continue its existence or not. And each year, the AEA committee decides about it.

The arrangement with these affiliated branches and special groups has advantages for AEA. For example, if a group wants to help organise a summer school, AEA can acknowledge the group, and, under the rules in the proposed constitution, give them rights, means and time to do the work in the name of AEA.

If any incorporated body wants to become an affiliated branch (such as NSW, Melbourne) they must deincorporate, and transfer their assets to the AEA. That, most likely, won't happen with the stronger Esperanto organisations, but it gives the former Queensland federation the opportunity to regroup if that is what they want.

## **FEDERATIONS**

It is recommended that we get rid of the notion that state federations are entitled to name members to the committee. The problem is that the current constitution neither defines what a federation is nor requires that a federation should be a member of the AEA as an affiliated organisation.

Federations would be required to be one of the two types mentioned above, independent or an affiliated branch. That means that their rights/obligations as an affiliated organisation depends as to which category they belong.

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