BRIEFING NOTES

Background

The Castlemaine Art Gallery and Historical Museum is an unincorporated entity.

Its Constitution and Rules dated 7 December 1935 stated its objects as “the cultivation of a taste for the Fine Arts by the collection and exhibition of works of especially Australian Artists and the collection and exhibition of articles of local historical interest”.

The statement is repeated in the 1974 Rules, which added a provision that “[t]he Institution shall not be carried on for the purposes of profit or gain to its individual subscribers”, likely to make it clear that the CAGHM was a non-profit association.

The CAGHM was formed for educational, literary, artistic, and therefore charitable purposes. It can be involved in profit-making activities such as, for example, raising money by holding functions; selling publications, operating a shop and so on as long as these are incidental to the non-profit purpose.

The lack of status as a separate legal entity causes a number of problems for unincorporated associations in areas such as ownership of property, personal liability of committee members, conduct of legal proceedings, members’ rights, gifts and bequests, and dissolution. These issues have prompted many to incorporate as an association under Associations Incorporation legislation or as companies limited by guarantee.

The 1974 Rules

These form the current “constitution”. In summary:

- Three trustees are to hold the “real and personal property” of the CAGHM on trust for it on the terms of the original trust deed (the deed dated 29 December 1929);
- The trustees are elected by the membership of the Gallery and hold office for life; or until they resign or special general meeting of the membership called for that purpose;
- The Committee members are the Mayor of Castlemaine; the Trustees, and 12 others elected by the members at the AGM;
- Elected Committee members’ terms are three years and by rotation 4 elected positions are filled at each AGM;
- The Committee’s President; Vice President; Secretary and Treasurer are elected at the first Committee meeting after the AGM;
- The Committee can co-opt from the membership to full any vacancies on it;
- The Committee meets as it decides and frames all “regulations, rules and orders for the government of the Institution”;
- Subject to the terms of the deed dated 29 December 1929 the Committee has the entire control and management of the property, funds, investments and expenditures of the CAGHM;
- The Committee appoints the Director and may appoint her as an ex-officio member of the Committee;
- An auditor is appointed at each AGM but a vacancy in that appointment is filled by the Committee during the year;
- By resolution the Committee may call, or any 10 CAGHM members may requisition, a special general meeting of the CAGHM membership.
The Trust Deed

- The original Trust Deed is dated 23 December 1929
- As far as can be determined, the trust deed has not been altered since save as to retirement and appointment of new trustees over time.
- The Gallery’s real estate (including Buda) is registered to the current trustees, George Milford, William Ian Maltby and Sarah Ferguson (recently retired), as joint proprietors as at 19 August 2013.

The Trustees’ Powers

- To act as trustees of the money raised for the acquisition of the land for and the building of the Gallery itself “and all other real and personal property now acquired or hereafter to be acquired on behalf of the said Art Gallery” and to receive and apply the same for the carrying out of the objects of the Gallery;
- Building on and making improvements to the Gallery’s real estate;
- Leasing the real estate for terms not exceeding 20 years at such rent and upon such terms and conditions “as the Committee may think proper”;
- To sell and purchase real estate “for the benefit of the members of the Gallery”;
- To borrow on security of the real estate to finance buildings and improvements;
- None of the above powers may be exercised by the Trustees without the authority of a resolution of the Committee;
- To invest monies including rents and profits in such manner and in such securities as may be authorised by a resolution of the Committee;
- To operate a trust account and delegate its operation to a person as directed by a resolution of the Committee to open two or more accounts one of which may be a capital account and the other a maintenance account;
- The trustees if so directed by a resolution of the Committee direct that delegate to withdraw from the maintenance account such sums without limitation as to amount as shall from time to time be necessary or expedient.

Removal of a trustee

A legally unfit or incapacitated trustee may be removed by resolution passed at a meeting of the Art Gallery provided that the meeting be held in accordance “with the Rules of the Gallery” and the notice of that meeting specify the removal subject to a resolution of the Committee being “duly passed” requesting the Art Gallery to act in exercise of this power.

The “resolution of the Committee” for the purposes of the trust deed is one carried by a majority of the members present at meeting called for the purpose of which at least 7 days’ notice has been given.

The Trustees must present annual accounts to the AGM of the Gallery.

The Castlemaine Art Gallery Foundation

The Foundation was established by a deed dated 18 July 1997.

There was a resolution of the Committee in 1996 to “provide a capital sum by which to earn sufficient income to ensure that the Gallery was properly funded and independent of the restraints of Government and Local Government funding”.

The purposes of the Foundation are:

- To assist the Gallery to maintain curate exhibit and develop its collection;
- To attract financial support from the community at large;
- To attract donations and bequests;
- To raise finance for the acquisition of works of art and items of historical interest, to buy land and to make structural alterations and improvements to and maintenance of the Gallery’s building and facilities;
- To establish and administer trusts and funds for charitable and educational purposes;
- To financially assist educational programs and publications, research and the like;
- To fund interstate and overseas travel by the Gallery’s employees;
- To widen knowledge and understanding of the Gallery and its activities and needs.

The trustees of the Foundation are the Trustees for the time being of the Gallery.

The powers of the trustees include:

- To lease acquire and sell works of art;
- To enter into any arrangement with government or any Authority which is incidental or conducive to the Gallery’s activities “which the Trustees may think it desirable to obtain”;
- To advance moneys to the Gallery on terms and in such manner as the trustees should determine including power to advance funds for the general operation of the Gallery;
- To manage the affairs of the Foundation;
- To invest monies as they may determine without being restricted by any rules of law governing the investment of trust funds by Trustees provided that if any contingent liability attaches to any investment the prior approval of the Committee shall be obtained;

Under the heading of “Gifts or Purchase of Art Works” there is a discretion given to the trustees to in respect of any real or personal property transferred to them by any person to invest the proceeds of that transfer as they see fit and in respect of which the “donors thereof attach special conditions” as to the expenditure disposal retention or sale…” to hold the proceeds of the donation upon and subject to such special conditions.”

Further:

- If the terms of any bequest require the purchase of objects of art; sculpture; ceramics etc. or other articles “worthy of a position” in the Gallery as shall be selected by the trustees or proffered by a donor the trustees before the acceptance or purchase “consult and take the advice of the director and the Committee” “or in the case of a difference of opinion as to the director’s recommendation on consultation with the Director of the NGV.

As with the Trustees generally, a legally unfit or incapacitated trustee of the Foundation may be removed by resolution passed at a meeting of the Art Gallery provided that the meeting be held in accordance “with the Rules of the Gallery” and the notice of that meeting specify the removal subject to a resolution of the Committee being “duly passed” requesting the Art Gallery to act in exercise of this power.

The Foundation is to have the same auditor as the Gallery.
Advice obtained from legal counsel (Michael Morrison, barrister) is that:

“It occurs to me that the 1997 Deed which appears to have been treated as a trust cannot be a trust because for there to be a trust there must be property which is both defined and identifiable. Here in 1997 there does not appear to be property capable of being held by the trustees. If there is no trust then there is a “Foundation” which has no legal standing.”

The Stoneman Foundation - a Brief Overview

- This is established by the terms of SR Stoneman Deceased’s will.
- Tony Nesbit, one of the Committee members is a Trustee.
- George Milford, a trustee of the Gallery, is also a trustee.
- The will directs that there be always at least 6 trustees, one of which always must be a nominee of the CAGHM “so long as its remains an unincorporated association”.
- The trustees are directed without the imposition of any continuing requirement to do so, to provide from the income of the trust that may be surplus to its requirements for the CAGHM “so long as its remains an unincorporated association”.
- Any additions to the capital of the trust may also be dealt with in a similar way.
- If “Duneira” becomes impracticable to maintain the trustees may in cooperation with the CAGHM Committee build a new gallery reading room and library “preferably adjacent” to the existing Gallery.
- It seems clear from the will’s terms that the CAGHM Committee has only the right as the object of a discretionary trust to ask to be considered from time to time as a possible recipient of funds from the Foundation.

The condition that the CAGHM “remain an unincorporated association”:

Advice from legal counsel is that:

“I confirm that I am instructed that “the Gallery”, must for a number of reasons, become incorporated. This should not affect the Gallery’s rights under clause 5(3) of the Stoneman will re Duneira.

“On the other hand it seems to affect the Gallery’s situation under clause 5(2)(d). I do not think that this clause is an error in typing. It seems Stoneman wanted the Gallery to remain unincorporated. It is a very curious and unexplained exclusion. It may be argued that it is contrary to public policy. It could be put that it is unfair to the Gallery to have this exclusion because it may force it to remain unincorporated when this is not a proper situation noting that gifts or trusts in wills cannot generally be made to an unincorporated association. Such a body cannot own the gift. It may be that the history of the Gallery contains invalid gifts.

“The Gallery may have to become incorporated accepting that it may as a result lose gifts under clause 5(2)(d) but at the same time reserving the position of challenging this clause in the Supreme Court.”

3 May 2015
Andrew Pickles
Secretary
CAGHM