



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 50

Omission of “Limited” from company names

Chapter 4 — Various corporations

Issued 29/3/1993

From 5 July 2007, this document may be referred to as Regulatory Guide 50 (RG 50) or Policy Statement 50 (PS 50). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 50.1) or their policy statement number (e.g. PS 50.1).

Editor’s note: This guide replaces Superseded Policy Statement 29 [SPS 29] issued 27 July 1992.

Headnotes

ASC’s powers to issue a licence under s383; company must be limited by guarantee; statutory restrictions to be included in memorandum and articles; payments to members and directors; commercial activities test (significance and exception for certain charitable companies); standard licence conditions; revocation; alterations of memorandum and articles; applications to be in form of statutory declaration; accounting relief under s313(11)(b).

Contents

Introduction	2
Background	2
The law	3
Policy	3
Compliance with the law and ASC policy	6
Licence conditions	8
Approval of alterations to memorandum or articles	10
Accounting relief	10
Applications	10

Introduction

RG 50.1 In this guide the ASC sets out its policy in respect of the exercise of its powers under s383 of the Corporations Law (Law). This guide supersedes Policy Statement 29.

RG 50.2 The NCSC Handbook on s66 of the Companies Code (Code), including the Model Memorandum and Articles of Association, which, until now has guided ASC policy in this matter, has been withdrawn. The ASC will not be providing replacement Model Memorandum or Articles of Association.

Background

RG 50.3 Section 383 of the Law stems from the *Companies (Literary Institutions) Act 1883* (Victoria). That Act permitted the Attorney-General to direct, by licence issued under his hand, that a company be incorporated with-out the word “Limited” in its name. The Act limited such licences to companies which were formed for the purpose of promoting commerce, literature, arts, science, religion, charity or any other useful or benevolent object; where it was the intention of such bodies to apply their profits or income to promote those objects; and which prohibited the payment of dividends to members. The class of body capable of obtaining a licence was later expanded to include bodies formed for the purposes of recreation or amusement.

RG 50.4 Section 383 of the Law is based on s66 of the Code. However, the omission of “Limited” has assumed less significance since the introduction of Australian Company Numbers (ACN). All companies, including those licensed under s383, must, as required by s219(2A), include the ACN on public documents and negotiable instruments.

The law

RG 50.5 Section 383 of the Law distinguishes between proposed and existing companies: s383(1) applies to proposed companies and s383(2) applies to existing companies.

RG 50.6 Under s383(1) and s383(2) the ASC must be satisfied about specified matters before it may issue a s383 licence. However, even where the ASC is satisfied about these matters, it has a discretion, under both subsections, as to whether to issue a licence.

RG 50.7 Under s383(1) the ASC may issue a licence authorising a proposed company to be incorporated as a limited liability company without the word "Limited" in its name. Under s383(2) the ASC may issue a licence authorising a company to change its name to a name approved by the ASC that omits the word "Limited".

RG 50.8 Subsection 383(6) permits the ASC to revoke a licence subject to the requirement of s383(7) that an opportunity be provided for the company to appear at a hearing before the licence is revoked.

RG 50.9 Under s383(9) a company which has a s383 licence must obtain the ASC's approval to any alteration to its memorandum or articles (other than an alteration consisting solely of a name change). Otherwise that alteration has no effect.

RG 50.10 A company which holds a licence under s66 of the Code is considered to hold a licence under the Law by virtue of s383(11). However, any exemption from the reporting requirements which may have been granted by the NCSC under s66(5) of the Code is no longer effective (see para 34 below).

Policy

Company structure

RG 50.11 No purpose is served by a licensed company having a share capital. This is because a share usually connotes a proportional right to the income and property of the company; to permit shares may result in persons being misled about the significance of the acquisition of those shares. Accordingly, each applicant for a s383 licence, regardless of whether it is a proposed or existing company, will be required to be a company limited by guarantee. As required by s117(1) of the Law, the obligation on members to contribute to the company's property in the event of a winding-up must be contained in its memorandum.

Payments to members and directors

Payments to members

RG 50.12 For proposed companies, the Law requires the ASC to be satisfied that payments of dividends to members will be prohibited. For existing companies the ASC must be satisfied that the memorandum or articles prohibit such payments. The ASC will not issue a licence where a company might avoid this prohibition by a distribution to members on winding-up. It therefore must be satisfied (by means of a statutory declaration) that the memorandum or articles of the company stipulate that any surplus (which would otherwise be available to members) be transferred, on winding-up of the company, to another body with objects which are restricted to those specified in s383(1)(a) and which prohibit the distribution of income, profit or assets to its members. It is not necessary for this body to hold a s383 licence or to be eligible for a s383 licence.

Payments to directors

RG 50.13 It would be inconsistent with the non-profit nature of a licensed company for the directors to benefit financially from their relationship with the company. However, the ASC recognises that to prohibit payments to directors for services provided to the company may be unnecessarily restrictive where companies rely on the professional or technical expertise of their directors. Nevertheless, it is of the view that some restrictions are appropriate.

RG 50.14 The payment of directors' fees (no matter how commercial the rate) is not consistent with the intention of s383 and the ASC will require the company's memorandum or articles to include a prohibition on any payments to directors for serving in that capacity. Despite this prohibition it is prepared to issue a licence even if the company's articles permit payments to be made to directors in the following circumstances:

- (a) for the payment of out-of-pocket expenses incurred in carrying out the duties of a director where the payments do not exceed an amount previously approved by the board;
- (b) for any service rendered to the company in a professional or technical capacity, where the provision of that service has the prior approval of the board and the amount payable is approved by a resolution of the board and is on reasonable commercial terms; or
- (c) as an employee of the company, where the terms of employment have been approved by a resolution of the board.

Commercial activities

RG 50.15 Section 383 does not expressly prohibit commercial activities. Instead, the capacity to distribute any profit from such activities is restricted. While there is a risk that third parties (in particular creditors) entering into transactions with the company may not be aware that they are dealing with a limited liability company, encouragement of charitable or other community activities provides the corresponding benefit.

RG 50.16 Persons conducting commercial transactions with companies which enjoy limited liability are entitled to know that the liability of the members is limited. This becomes more imperative as the level of a company's commercial activities increases.

RG 50.17 Where the commercial activities of a company which holds, or which has applied for, a s383 licence are significant, the right of the public to know that it is an entity with limited liability assumes a greater importance than the public good which is served by encouraging the incorporation of these organisations under the Law. This takes into account that:

- (a) limited liability bodies which trade with the public ought, in general, be required to indicate their limited liability status, either as part of their name, or on every public document they issue, sign or publish by the body (see for example s362(2) of the Law);
- (b) the commercial activities of some licensed companies are at least as large a part of their activities as the promotion of the original objects (even though the commercial activities generate the income to further those objects). However, it is immaterial to creditors how the income generated by those activities is used;
- (c) the risk that persons conducting commercial dealings with licensed companies may not appreciate their legal status either as companies or companies with limited liability; and
- (d) "not for profit bodies" may now also be incorporated under associations incorporation legislation in most States and Territories of Australia. This method of incorporation is more appropriate for many bodies than incorporation as a limited liability company without "Limited" in their names.

RG 50.18 Accordingly, the ASC will, subject to the exception described below, only issue a s383 licence where it is satisfied that the level of commercial activity is not, or will not be, significant.

RG 50.19 For this purpose, the ASC regards the level of commercial activity as significant if:

- (a) the company holding the licence has a related corporation, other than a related corporation acting as a bare trustee, which does not itself hold (or is not eligible under s383(2) to hold) a s383 licence; or
- (b) the company, or a group of which it is a member, has current liabilities (not including membership fees received in advance) in excess of \$500,000 at its annual balance date.

Exception to significant commercial activities policy

RG 50.20 The ASC recognises that some charitable companies rely on a combination of commercial operations and public donations to finance their charitable activities. Such companies may be adversely affected by the denial of a s383 licence because the use of a name ending in “Limited” may impede the raising of funds by donation from the public. The ASC is, therefore, prepared to make a partial exception from its stated policy in relation to significant commercial activities for certain charitable companies.

RG 50.21 To be eligible for this exception, the company must further satisfy the ASC that:

- (a) fundraising by donation from members of the public is, or will be, a significant and continuing feature of its operations; and
- (b) (i) gifts made to the company have, or will have, tax deductible status for the purposes of the *Income Tax Assessment Act 1936* (Cth)(ITAA); or
 - (ii) if gifts are not tax deductible, the company’s objects (as stated in its memorandum) are restricted to promoting charity, religion or education and objects incidental or conducive to that object and the company is, or will be, exempt from income tax by virtue of s23(e), 23(ea), 23(ec) or 23(j) of the ITAA.

Compliance with the law and ASC policy

RG 50.22 To satisfy itself that a company applying for a licence under s383 complies with the provisions of the Law and the requirements of this guide, statutory declarations will be required.

Proposed company

RG 50.23 In relation to a proposed company, the ASC must be satisfied that the company is being formed for one or more of the purposes specified in s383(1)(a). It must also be satisfied as to the matters referred to in s383(1)(b) and 383(1)(c). The ASC will be satisfied about these matters and the additional matters referred to in this guide where all subscribers to the memorandum provide a statutory declaration to the effect that:

- (a) the company will be a company limited by guarantee and the proposed name (which must not include the word "Limited") has been reserved in accordance with the Law;
- (b) the company is being formed for one or more of the specified purposes;
- (c) its main objects, as stated in the memorandum, are restricted to those purposes and that any other object is merely incidental or conducive to those objects;
- (d) by its memorandum or articles the company is required to apply its profits (if any) or other income in promoting its objects and is prohibited from paying any dividend to its members and that, on dissolution, any assets may not be distributed between its members;
- (e) there is a prohibition in the memorandum or articles on payments to directors other than as permitted under para 14 of this guide; and
- (f) the company will not be engaging in significant commercial activities or will be within the exception for certain charitable companies described in para 21 above.

Existing company

RG 50.24 Where the applicant is an existing company the Law does not require it to have been formed for a specified purpose. Rather the ASC must be satisfied that the company's objects comply with s383(2)(a) and that the company's memorandum or articles comply with s383(2)(b). The ASC will be satisfied that the company complies with these provisions and the additional matters set out in this guide if it receives a statutory declaration, made by two directors of the company in accordance with a resolution of the board, to the effect that:

- (a) the company is a company limited by guarantee;

- (b) the company's objects are restricted to one or more of the objects specified in s383(1)(a) of the Law and to objects incidental or conducive to those objects;
- (c) by its memorandum or articles the company is required to apply its profits (if any) or other income in promoting its objects, is prohibited from paying any dividend to its members and that, on dissolution, any assets may not be distributed between its members;
- (d) there is a prohibition in the memorandum or articles on payments to directors other than as permitted under para 14 of this guide; and
- (e) the company does not engage in significant commercial activities or comes within the exception for charitable companies described at para 21 above.

RG 50.25 Pro forma statutory declarations have been prepared (see Pro Forma 29 and Pro Forma 30). It is the responsibility of the signatories to ensure the accuracy of the matters referred to in the declaration. However, the ASC may, in the course of its surveillance activities, check on these matters and, if the information is not correct, a licence issued on the basis of that declaration may be revoked.

Licence conditions

RG 50.26 Sample standard licences are attached (see Pro Forma 31 and Pro Forma 32. All s383 licences will be subject to standard conditions which, in summary, are that:

- (a) the company remains a company limited by guarantee;
- (b) the company's activities must be confined to attaining the purposes set out in its objects and that there will be no breach or amendment of any provision included in the memorandum or articles as required by the Law or this guide;
- (c) the ASC is notified of any breach of the licence conditions;
- (d) the company does not conduct significant commercial activities or, if the charitable company's exception applies, that the company complies with the requirements to be eligible for this exception;
- (e) neither the company nor anyone associated with it in any way indicates that, by issuing the licence, the ASC endorses or is giving a warranty in respect of the activities of the company; and

- (f) in the case of a company which falls within the exception for charitable companies, the company sets out, in legible characters, on all documents which require display of the Australian Company Number (ACN) under s219 of the Law, notice of the fact that the liability of the company's members is limited.

RG 50.27 A company that is required, as a condition of its licence, to disclose its limited liability status, will not be required to make this disclosure on documents which canvass for public donations for the company's charitable purpose. Similarly, it will not be required to set out its limited liability status in written or spoken advertisements seeking donations or advertising for donations. However, the company will still be required to display the ACN on certain documents as required by s219.

RG 50.28 Where an existing licence is subject to a condition not called for by this guide, the ASC will ordinarily agree to a variation of licence conditions so that they accord with the standard conditions. In practice, this will mean revocation of the existing licence and the issue of a new licence subject to the standard conditions.

Revocation of licences

RG 50.29 A licensed company is required, under the terms of its licence, to notify the ASC if it is in breach of its licence conditions.

RG 50.30 In this event, or if the ASC otherwise becomes aware of a breach, the ASC may revoke the licence, subject to the company's right to a hearing under s383(7). There may, however, be additional circumstances which would warrant the issue of a new licence (for example, if the exception for charitable companies applies). These matters should be brought to the attention of the ASC either on notification by the company or on receiving notice of intended revocation from the ASC.

RG 50.31 Additionally, if the ASC becomes aware that a company holding a licence issued before the introduction of the commercial activities test is conducting significant commercial operations, the company will be notified of the ASC's intention to revoke the licence or replace it with one subject to the charitable company's condition. If the company can satisfy the ASC (by statutory declaration) that it complies with the requirements of this guide, including those for the charitable companies exception, a new licence, subject to the standard conditions will (if required) be issued.

Approval of alterations to memorandum or articles

RG 50.32 Section 383(9) provides that any alteration to the memorandum or articles of a licensed company will not have effect unless the alteration or proposed alteration has been approved by the ASC.

RG 50.33 To obtain the ASC’s approval to an amendment to the company’s constitution, a statutory declaration made by two directors of the company to the effect of the matters referred to in s383(9) of the Law must be lodged with the ASC. In summary, the declaration must state that the alteration is made in accordance with the company’s articles and the provisions of the Law and that any changes will not affect the status of the company as a company limited by guarantee or compliance with the requirements of the Law or this guide. A pro forma declaration has been prepared (see Pro Forma 33).

Accounting relief

RG 50.34 Subsection 66(5) of the Code empowered the NCSC to exempt a company licensed under s66 from some or all of the provisions of the Code relating to annual returns or returns of particulars of officers. There is no corresponding provision in the Law. The ASC takes the view that relief granted under s66(5) is no longer operative and all licensed companies are required to submit the relevant returns.

RG 50.35 Subsections 313(2) and 313(6) allow the ASC to grant relief from compliance with specified requirements of the Law relating to accounts and reports of companies. To be eligible for relief as a non-profit company the company must meet the pre-conditions specified in s313(11)(b) of the Law. Regulatory Guide 43 sets out the ASC’s policy in relation to the exercise of its powers under s313.

Applications

RG 50.36 All applications for the exercise of the ASC’s discretionary powers under s383 are processed by the Information Section of the Information Processing Centre at Traralgon (IPC).

RG 50.37 Applications for a licence or applications by an existing licensee for the ASC’s approval of changes or proposed changes to the

company's memorandum or articles must be accompanied by a statutory declaration and must be accompanied by the relevant fee. Under this policy, applicants are not required to provide any information other than the relevant declaration.

RG 50.38 For reasons of certainty and consistency in relation to the exercise of its discretionary powers under s383, the ASC will only grant licences in accordance with this guide. The policy may, however, be varied if the ASC is satisfied that variation is appropriate. Any application which requires consideration of whether the policy should be varied, will be referred by IPC to the Office of the Chairman for joint consideration. Applicants should be aware that the determination of such an application will take longer than would be the case where the application is within current policy.

RG 50.39 Applications should be addressed to:

Australian Securities Commission
Information Processing Centre
Information Section
Gippsland Mail Centre
MORWELL VIC 3841

and may be sent directly to IPC or lodged with any Business Centre of the ASC. Inquiries should be directed to Information Processing Centre on (051) 77 3700.