

7.1 Governance and structure of Orienteering Australia

At the 2015 Conference, the option of Orienteering Australia moving from being an incorporated association to being a company limited by guarantee was raised. This is a model strongly favoured by the Australian Sports Commission, and is a mandatory funding condition for the 21 largest sports.

A company limited by guarantee is a federally-regulated body under the Corporations Act, whereas incorporated associations are regulated by state and territory legislation - the ACT in Orienteering Australia's case. (It is sometimes stated that incorporated associations cannot trade outside the boundaries of their home jurisdiction, but in fact they can do so providing they register with ASIC as a "registrable body", which OA has done).

When the question was considered at the 2015 Conference, we considered only the "ASC template" model for a company limited by guarantee. This involves all operational decision-making authority being vested in a CEO, and staff (paid or voluntary) reporting to the CEO, with the Board's role being one of strategy and oversight rather than operational. The greatest disadvantage we saw of such a model was that this would involve a significant increase in both the workload and the responsibility of the CEO (compared with the current EO) and that we could not justify the additional expenditure which would be required.

Since the 2015 Conference, further research has indicated that this structure is not, in fact, inherent to legal status as a company, and that if we wish to do so, we could essentially retain our current operational structure as a company. (In fact, the Corporations Act is less prescriptive in many ways as to what a body has in its rules/constitution than state Associations Incorporation Acts are).

The Board is of the view that the time is appropriate for Orienteering Australia to transition to becoming a company limited by guarantee. The major motivation for making the transition at this point in time is the position of ASC. However, we also now believe that, on balance, OA will not be disadvantaged by making the transition now, and that doing so will position us for future growth. We are also aware of other NSOs of comparable or smaller size to ourselves who are either making this transition or have already done so.

Advantages and disadvantages of the company model

The Board has identified a number of advantages and disadvantages of the company model. These differ somewhat from those tabled at the 2015 Conference since we are no longer committing to the "CEO model".

These include:

Advantages

- ASC preferred option for NSOs – may have implications for funding down the track.
- More consistent with what is seen as modern corporate governance best practice.
- Only need to deal with one regulator (ASIC) (currently we have to deal with both ASIC and the ACT authorities, which could become a problem if we no longer have an ACT presence on the Board or in the office).
- Easier to get professional support if needed (e.g. legal and accounting), since the Corporations Act is studied by all law students, whereas associations law is a more specialised area.

- Makes it easier for us to attract external directors should we wish to do so. (These could be people with specialised expertise which we are unable to find within the sport).

Potential disadvantages

- Although changes to the Corporations Act in recent years have reduced the filing and audit requirements for smaller organisations with income below \$1 million, ASIC enforces filing deadlines, and consequent late fees, more rigorously than state jurisdictions tend to. Note that most states also have different tiers of compliance requirements for incorporated associations – in the ACT, the threshold for the higher tier was formerly \$500,000 (which OA exceeded in 2011, with significant consequences for audit costs and time) but has now been increased to \$1 million.
- The obligations imposed by the *Corporations Act 2001* on directors of companies are more onerous than the obligations imposed on officers of incorporated associations; however, they are more clearly defined. In contrast the equivalent obligations of members of the committee of an incorporated association have not been as well defined through court processes.
- Transition from old to new structure likely to be a complex exercise.

Two background papers which were presented to the 2015 Conference are also included with this paper for reference.

Key aspects of the proposal

Key aspects of the proposal are below. All of these are open for discussion at the Conference. Items in italics are directed, in whole or part, towards meeting ASC governance principles. Where an item is not specifically mentioned below (except for membership, which is covered by a separate paper), it is intended to retain current provisions.

- *That OA become a company limited by guarantee.*
- That the position of Chief Executive Officer be defined in the Constitution, with the Board given the power to delegate powers to the CEO as it sees fit. It is not proposed that any of the delegated powers be specified by name in the Constitution – this gives us more flexibility.
- That the President remain directly elected for a two-year term (or three-year if that is also adopted for the Board).
- *That the positions of Director (Finance), Director (High Performance) and Director (Technical) remain, but that, rather than these being specifically elected by the AGM, these be elected by the Board from within its membership at the first Board meeting following the AGM.*
- *That there be six at-large Board members, with three elected every year for a two-year term (an alternative could be to elect two each year for a three-year term). We may also wish to extend the term of elected Committee chairs from one year to two.*
- That any Australian IOF Council member remain an ex officio member of the Board.
- *That the Board retain the ability to co-opt up to two members.*
- *That there be a maximum term of 12 years on the Board (except for IOF Council members). (Although it does not form part of the ASC governance principles, we could also consider a maximum term for the President).*
- *That a conflict-of-interest clause be adopted similar to Triathlon but also applying to State Presidents (or equivalent) (i.e. that any state or club-level position would need to be declared, but only holding a paid position or President would be disqualifying – with a*

suitable transition period to allow anyone elected to the OA Board time to vacate other positions if necessary).

- *That conditions of State Association affiliation be that they endorse the national strategic plan, and that they agree to make necessary membership information available to OA (the latter is required to formalise a national membership database).*
- *We may want to consider a gender-balance clause for Board membership (subject to sufficient nominations, as for IOF).*

Under the 'ASC model', Board members are elected as directors and then elect their Chair (and allocate other responsibilities). The structure above goes some way towards this whilst still retaining an elected President. It also retains the existing operational roles of Board members whilst broadening the 'at large' membership.

We are not proposing any measure which would radically change the nature of the relationship between OA and State Associations – whilst an ASC priority (in fact, probably their highest governance priority) is for NSOs and states to be working together towards common strategic goals, we believe this can be done through policy, and through a suitable preamble in the Constitution, rather than codifying specific measures in the Constitution. We are also not proposing to make any changes to voting rights at OA general meetings.

The process from here

The Conference will be asked to vote in principle on whether OA should transition to being a company limited by guarantee.

Should this vote be in favour, a process will be undertaken to prepare the formalities for this. This would include:

- The drafting of a new Constitution, based on the existing Constitution and the outcomes of discussions on the questions posed above (as well as the outcome of the separate agenda item regarding membership).
- The obtaining of legal advice on this, including resolving the question of whether this is best done by repealing and substituting the existing Constitution, and whether this would require fresh elections for the newly constituted body.

There would then be a final vote on the questions of becoming a company limited by guarantee and the adoption of a new Constitution. We would anticipate that this vote would take place at the June 2017 Special General Meeting, but it could potentially be deferred to the 2017 Conference if more time is required for the formalities.

Blair Trewin
6 November 2016