

INCORPORATED ASSOCIATIONS MANUAL

by

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To Incorporate or Not to Incorporate

Myles McGregor-Lowndes

Revised to March 2005

1-100 Introduction

The decision whether or not to incorporate involves choosing between the different legal structures of association. Some associations, because of the nature of their objects, require special Acts of Parliament to order their legal affairs; some become companies, others incorporated associations and many others just remain unincorporated associations.

The decision to incorporate your association needs careful consideration. The most discussed issue in a decision to incorporate is the desire to limit the personal liability of the committee members. While this is an important factor, other considerations such as incorporation cost, ongoing statutory fees, accounting and auditing fees, compliance with regulations and whether members are entitled to a pecuniary interest in the association are relevant. If the wrong legal structure is chosen, it may be a very expensive and time-consuming exercise to transfer the adopted legal structure to a more suitable one.

Some strategies for the committee to employ in making the decision are to seek the advice of a solicitor or establish how other similar associations have legally structured themselves. A questionnaire is found at the end of this Chapter (Precedent 1-1) which may help your committee decide whether the legal structure of an incorporated association is appropriate for your association.

1-200 What is incorporation?

Incorporation is the creation of an artificial legal person. The association becomes in the eyes of the law a legal body which has a personality, rights and liabilities separate from those of its members. The incorporation certificate of an association can be compared to a birth certificate and when the association is terminated (wound up) it dies. While it is incorporated it can do most things that a human can do in its own unique name such as hold property, make contracts, sue and be sued and be left property under a will.

How is this different from an association of people? In the eyes of the community it is little different, but in the eyes of the law there is a vast difference. The main difference is that the law does not recognise that an unincorporated association is anything more than a group of individuals; it has no identity other than the aggregation of all its members from time to time. Pure legal theory does not recognise the local “XYZ” club, as anything other than a group of people. Anyone wishing to sell some goods to the club would not contract with the “club,” because in the eyes of the law the club does not exist. The contract may be with all of the members of the club, be it just a dozen or thousands.

To overcome this problem the courts often decided that a contract was not made by the members, but it was made by the officials or management committee of the club on behalf of the members. This may seem to be a workable arrangement, but courts will often find that those officials or committee members are liable personally for any debts owing under the contract or any injury done. In some associations the liability may be burdensome and the members of the committee face losing all their possessions to satisfy the association’s liabilities. Don’t be lulled into a false sense of security with words such as “It will not happen to me”; it can happen and it does.

There has been much written about the legal problems faced by unincorporated associations (Fletcher 1986; Sievers 1996) but the main legal issues are:

- liability of the officials, committee or trustees of the association,
- difficulty of making contracts,
- difficulty in owning land and other property,
- difficulty in suing or being sued, and
- difficulty in receiving gifts set out in a person's will.

1-300 The *Associations Incorporation Act* solutions

The *Associations Incorporation Act* 1981 was enacted especially to overcome the problems mentioned at paragraph 1-100 after an exhaustive report by the Queensland Law Reform Commission. The Act seeks to remedy each of the previously noted areas of difficulty by allowing associations to apply for incorporation. Incorporation gives associations a legal status in the eyes of the law. The single greatest advantage is the limited liability of the committee members. The committee members are not personally liable for the debts of the incorporated association as they might be if the association was unincorporated.

There are some drawbacks to becoming incorporated that ought to be kept in mind. These are that the association will be regulated more closely by the State, incur expense in obtaining incorporation and ongoing accounting expenses, and the constitution required by an incorporated body may not suit some associations.

Specifically some drawbacks may be:

- having to include "Inc" or "Incorporated" as part of the association's name;
- the accounts of the association must be audited annually;
- the accounts are subject to public scrutiny;
- initial application expenses and annual expenses for audits;
- transfer costs of land and property to the incorporated association;
- it is difficult and expensive to terminate the incorporated association;
- restrictions on the activities that an incorporated association can carry on;
- the structure of the incorporated association must be fairly democratic;
- an annual meeting must be held every year and the committee must meet once every four months;
- most incorporated associations must have compulsory public liability insurance; and
- proper records of members and minutes must be kept.

Often these problems can be minimised by seeking volunteer assistance from lawyers, accountants and the general community. In some cases community organisations must incorporate to receive government grants or licences (eg. art union and bingo centre) and there is little alternative.

This manual is written especially for incorporated associations. Chapters 2 and 3 detail the incorporation process. Some precedents or forms are printed at the end of each chapter. The *Associations Incorporation Act* and regulations are found at the back of the manual. Current forms can be viewed and downloaded on the Department of Fair Trading's website at:
<http://www.fairtrading.qld.gov.au>

1-400 Other incorporation solutions

There are other forms of incorporation that can be used in appropriate circumstances. The most commonly used are incorporation under the *Corporations Law* or incorporation as a cooperative under the *Cooperative Act* 1997. There are approximately 1,200 companies limited by guarantee in Queensland, but the rate of incorporation of these companies has decreased substantially since the introduction of the incorporated association in 1982. There are co-operatives in Queensland, with fewer than ten a year being registered. A table of comparative characteristics of different types of legal structures is contained at the end of this chapter (P1-2).

Other special Acts exist to incorporate or facilitate certain special types of bodies such as:

- *Friendly Societies Act 1991*;
- a School Council or Parents' and Citizens' Association formed under the *Education (General Provisions) Act 1989*;
- the *Sporting Bodies' Property Holding Act 1975*;
- *Hospitals Foundation Act 1982*;
- *Cooperative and Other Societies Act 1967*, *Roman Catholic Church (Incorporation of Church Entities) Act 1994* and
- Employer and employee associations under *Industrial Relations Act 1999*

1-500 Can your association legally incorporate?

The *Associations Incorporation Act* restricts the type of association that may incorporate. An association which seeks to incorporate must (Section 5 of the Act):

- be formed and carried on for any lawful object or purpose; have a membership of 7 or more persons; and
- **NOT** be for the purpose of providing financial gain for its members.

“Financial gain” is defined extensively in Section 4 of the Act. This section can be scrutinised in the legislation section at the back of this manual. It is a difficult section to understand as it is written in double negatives, but a little persistence will reveal its true intention. The activities listed in Section 4 (a) to (h) will not of themselves constitute pecuniary gain to the members of the association. An example is Section 7 (h)(i). The mere fact that a member is also employed by the association and receives a wage, does not mean that the association is carried on for the purpose of financial gain of its members. The same applies to the association supplying services or facilities to its members, or competing for trophies or prizes, or that the association itself makes a surplus of income over expenditure.

Particular note should be taken of sub-section 4(d), (e) and (f) which deals with the trading activities of the association with its members or the public. It is **not** financial gain if:

- trading with the association's **members** is ancillary to its principal purpose; or
- trading with the **public** is ancillary to the principal purpose of the association; and
- **public** trading is not substantial in volume in relation to the other activities of the association; or
- if the association makes a financial gain itself from trading, charging admission fees, subscriptions or donations to further its objects.

The following organisations cannot incorporate under the Act (refer s 5 of the Act):

- an industrial organisation under the *Industrial Relations Act 1999*
- a society registered under the *Friendly Societies Act 1991*;
- a School Council or Parents' and Citizens' Association formed under the *Education (General Provisions) Act 1989*;
- a body which raises money by subscription and loans that money to its members;
- an association which is under a special Act of Parliament; and
- an association whose principal purpose is to hold property in which the association's members may divide among themselves, dispose of their interest, or distribute income or the use of the property among members or nominees of the members.

An exception to these prohibitions was placed in the 1995 amendments to the Act and is now found in s 5(2). The chief executive may allow an association to incorporate if its main purpose is the holding of property for meeting the associated medical costs of an individual who is suffering from a serious medical condition or injury. It is now possible with the permission of the chief executive to create such an association which would otherwise be in breach of s 5 (1) (e)(iv).

Further reading:

Fletcher, K.L. (1986), *The law relating to non-profit associations in Australia and New Zealand*, Sydney, Law Book Company.

Sievers, A.S. (1996), *Associations and Club law in Australia and New Zealand*, (2nd edition), Sydney, The Federation Press.

McGregor-Lowndes, M., K. Fletcher & S. Sievers, (1996), *Legal Issues for Non-profit Associations*, Sydney, LBC Information Services.

PRECEDENTS

P1-1

ROUGH GUIDE TO WHETHER AN INCORPORATED ASSOCIATION STRUCTURE IS SUITABLE FOR YOUR ASSOCIATION

If you answer “yes” or “not applicable” or “does not matter” to the following questions an incorporated association may be appropriate. If you answer “no”, consideration ought to be given to whether an incorporated association is really the most appropriate structure for your organisation.

- Do your committee members require limited liability as far as the possible debts and liabilities of the association are concerned?
- Does your association need to borrow money from a financial institution?
- Does your association intend to buy or lease land?
- Does your association intend to enter into contracts to buy property (other than land) or services?
- Could your association be left a gift under a will?
- Will your association be given grants by a government department or local council?
- Can your association function along democratic lines?
- Will it make any difference to the public or members of the association if the word “Inc.” or “Incorporated” must form part of its name?
- Can your association afford to have its accounts prepared and audited properly each year or find volunteers to do this task?
- Does your committee meet at least once in every four months in the year?
- Can your association afford the incorporation fees?
- Can your association afford the premiums on at least \$1,100,000 of public liability insurance?
- Will the association’s members be willing not to receive any distributions of money from the association?
- Has your association at least three committee members and at least 7 members?
- Will all the committee members be adults?
- Do the members of the association mind if their annual report and financial statements are made public?
- Will the association exist for the foreseeable future?
- Is the association prepared to keep accurate minutes of its decisions and a register of members?
- Is the income and property of the association to be used solely in promotion of its objects?
- Will your association conduct art unions, raffles or bingo?

	Incorporated Association	Co-operative Society	Section 150 Company
Basic Cost of Incorporation	\$99.80	\$116.00	\$330.00
Number of Officers	Minimum of 3	Minimum of 3 but no stipulation in Act	Minimum of 3
Members	Minimum of 7	Minimum of 5 members	Minimum of 5
Age restrictions	Management committee must be adults	Directors must be over 18 years	Directors must be between 18 and 72 years
Registered office	Reg. Office in Qld required	Notice of registered office required	Notice of current address must be filed and the office must be open to the public at least 3 hours a day
Registers required	Register of members and assets	Members, directors and shares and loans, securities	Members, directors, secretaries and managers
Annual financial report	Submit to AGM and lodge within 1 month. Fee \$35.10	Lodge annual return and accounts. No fee if on time	Submit to AGM and lodge within 1 month. Fee \$40.00
Auditor	Required	Required	Required
Insurance	Compulsory if own property	None	Not compulsory
Reservation of name	Not required	Not required	Required on application
Administrative discretion as to incorporation	Yes	Yes	Yes
Eligibility for incorporation	An association formed for any lawful purpose but not for the purpose of financial gain for its members	Trading or Nontrading with or without shares	A public company limited by guarantee which is formed for purposes beneficial to the community and prohibits payment of dividends to its members

Fees current as a 31/03/05