Law Reform Commission

REPORT 30 (1982) - INCORPORATION OF ASSOCIATIONS

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REPORT 30 (1982) - INCORPORATION OF ASSOCIATIONS

Letter to Attorney General

NEW SOUTH WALES LAW REFORM COMMISSION

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are-

Chairman:

Professor Ronald Sackville

Deputy Chairman:

Mr R D Conacher

Full-time Commissioners:

Mr Julian Disney

Mr Denis Gressier

Part-time Commissioners:

Mrs B Cass

His Honour Judge T J Martin, QC

The Honourable Mr Justice P E Nygh

The Honourable Mr Justice A Roden, QC

The Honourable Mr Justice A Rogers, QC

The members of the Commission involved in this particular Report are shown on the following page.

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REPORT 30 (1982) - INCORPORATION OF ASSOCIATIONS

Preface

The Commission has a reference from the Attorney-General and Minister for Justice, the Honourable F J Walker, QC, MP, to review the law and practice relating to unincorporated associations. Before 4th August, 1981, the conduct of the reference was the responsibility of the Commission as a whole. Since that date it has been the responsibility of a Division of the Commission. The Division was established by the Chairman in accordance with amendments made to the Law Reform Commission Act, 1967, in March, 1981. Under section 12A (3) of the Act, a Division shall, for the purposes of the reference in respect of which it is constituted, be deemed to be the Commission. The Division consists of the following Commissioners:

Professor Ronald Sackville (Chairman)

Mr R D Conacher (Deputy Chairman)

Mr J Disney

His Honour Judge T J Martin, QC

The Honourable Mr Justice J H Wootten, Professor J D Heydon and Mr J M Bennett held office as Chairman, Commissioner and Executive Member respectively during a portion of the time the Commission has had the subject unincorporated associations under study.

The research staff of the Commission has contributed much to this report and to the studies leading up to it. Of those presently on the staff of the Commission, Miss Ruth Jones and Ms Philippa McDonald deserve particular mention.

REPORT 30 (1982) - INCORPORATION OF ASSOCIATIONS

1. Introduction

LAW REFORM COMMISSION NEW SOUTH WALES
To the Honourable F J Walker, QC, MP,

Attorney General for New South Wales, Sydney.

REPORT ON INCORPORATION OF ASSOCIATIONS

1.1 Terms of reference. We have terms of reference from you "to review the law and practice relating to unincorporated associations, and incidental matters".

1.2 Recommendations in brief. In this report we recommend the enactment of legislation under which associations might become incorporated by registration. The associations concerned are associations not for gain to private members. [1]

1.3 Structure of this report. The report is in two parts. The first part introduces the subject and discusses the general principles of the legislation we recommend and, in chapter 6, gives some notes on details of the draft legislative provisions. These draft legislative provisions appear in the second part.

1.4 Draft legislative provisions. These provisions, the second part of this report, are more or less in the form of a Bill for Parliament. They are, however, not intended for enactment in the form in which they appear in this report. We do not claim the skills of legislative draftsmen. The purpose of the provisions is rather to state in detail the substance of our recommendations. In particular, they do not deal with administrative arrangements relating to the Registrar, with proceedings for penalties, or with some provisions of the Companies Act which might with advantage be used as a guide for provisions of a Bill for incorporation of associations. We discuss these latter provisions in later paragraphs. [2]

1.5 In this report we shall refer to these draft legislative provisions as a draft Bill and to particular provisions as draft sections. We do so for the sake of brevity and convenience and for no other purpose.

1.6 The draft legislative provisions appended to this report do not include Schedules 1, 4, 5 and 6 to the draft Bill. These Schedules are of a detailed and technical character and have been submitted separately to the Attorney General. We shall supply copies of the Schedules to interested persons on request after this report has been presented to Parliament.

1.7 "Association". The relevant meaning of "association" has been expressed as - "A body of persons associated for a common purpose; the organization formed to give effect to their purpose; a society; eg. the British Association for the Advancement of Science". [3]

1.8 "Unincorporated association". Some associations are incorporated. Where an association is incorporated, in the eye of the law a new person is created, a person distinct from and additional to the members of the association. A leading example of an incorporated association is a company registered under the Companies Act. The new person is called a corporation. It continues until dissolved according to law. Itmayacquire,holdanddisposeofproperty,itmaysueandbesuedinthecourts,and it may do the things having a legal consequence which a natural person may do, save such things as marrying and making a will. [4] Our concern in this report is with associations which are not

incorporated. Our recommendation is that a new means should be provided by which a wide range of associations could become incorporated.

1.9 Partnerships. A partnership is an association formed to carry on business with a view to profit to members. Our terms of reference extend to partnerships, but this report has only a limited concern with partnerships. The scheme for incorporation which we recommend would exclude a partnership, save only where the partnership is not for gain to private members. The concept of not being for the gain of private members is discussed below. [5] For the present it is enough to give an example: a partnership amongst welfare organizations, formed with a view to profit to those welfare organizations, would be eligible to become incorporated.

1.10 Legal difficulties concerning associations. There are many legal difficulties facing associations, persons dealing with associations and persons suffering at the hands of associations. We received many submissions from individuals (including solicitors) and groups outlining the difficulties that unincorporated associations experienced, and the difficulties that they present to outsiders. The difficulties relate to the holding of property, the liability of members, whether merely as members or as office holders, the resolution of differences amongst members, and the rights of creditors and others having claims against associations or their members. One solicitor wrote to us about the problems experienced by a variety of organizations in his area ranging from the local tennis club to a retirement village. Particular difficulty arose over the need for land used by the club and village to be held in the name of trustees. Another lawyer with links with different ethnic communities in New South Wales pointed out that the very concept of a trust or trustee is unfamiliar to persons coming from countries with legal systems not based on the common law.

1.11 The legal difficulties facing associations have been ably explored by others and are not pursued in detail here. [6] A good many of the difficulties are the result of a divergence between the nature of an association in the common understanding of mankind and the nature of an association in the eye of the common law. In common understanding an association has an existence as an entity separate from its members from time to time. In many respects the law does not recognize that separate existence: for many purposes in law an association is merely the aggregate from time to time of its members.

1.12 Relief of the difficulties. The difficulties may be relieved in two ways, separately or together. One way is to change the law so that it accords more closely with the common understanding, that an association is a continuing entity distinct from the aggregate of its members from time to time. The second way is to make it easier for associations to become incorporated. This report pursues the second way.

1.13 Improving the law for unincorporated associations. We have given much thought and study to this subject. Ideally, the law ought to treat any association as an association is treated in ordinary life, as a continuing entity distinct from the aggregate of its members. And the law should do so whether or not the association gains entry to an official register. But such a change in the law would be fundamental. And it would change the rules under which a vast number of associations, nowhere identified and probably impossible to identify, conduct their affairs. Proposals of this kind raise serious technical questions. These were explored in a preliminary way in unpublished work carried out in the Commission but a good deal more work would be needed to deal with them, particularly bearing in mind that this approach has not been explored elsewhere in Australia or in England. We have come to the view that pursuit of the ideal should not delay achievement of the more modest objective on which we now report.

1.14 Is not the Companies Act Sufficient? This report recommends the passing of an Act to enable associations to become incorporated by registration. But an association which could register under our recommendations can today become registered and incorporated under the Companies Act, 1961. Why have a special Act for non-profit associations?

1.15 The first general Companies Act for New South Wales was passed in 1874. If that question had been asked in 1874, it would not have been easy to answer. The Companies Act of 1874 provided a simple means for the incorporation and regulation of non-profit associations.

1.16 But the Companies Acts have been elaborated and refined in the years since 1874. The elaborations and refinements have been mainly concerned with business associations, associations formed and carried on with a view to profit to members, that is, profit to shareholders. Protection of investors has been a leading concern.

1.17 There is indeed one form of company particularly suited to the non-profit association: the company limited by guarantee. Some of these companies may be authorized to omit "Limited" from their names. [7] But those concerned with non-profit associations find it an onerous and expensive matter to obtain the authority and, failing that authority, find it incongruous that a non-profit association should have "Limited" in its name, a label shared with commercial and industrial companies of all sizes and varying reputations. [8]

1.18 In the result, although today the Companies Act provides a means for the incorporation and regulation of non-profit associations, the means is neither simple nor inexpensive. The complexity and expense of registration and consequent regulation under the Companies Act leads many non-profit associations to look for simpler and less expensive ways to achieve incorporation. [9] This report attempts to point out such a way.

1.19 We hope that, if our recommendations are adopted, future Governments and Parliaments will bear in mind that it is a condition of the utility of the arrangements which we recommend that the laws for registration and incorporation of non-profit associations must remain simpler, and be less expensive to associations, than the Companies Act.

1.20 Guidance from other places. As we have said we recommend the enactment of a Bill to provide a simple and inexpensive means for the registration and incorporation of non-profit associations. There is legislation of that description in Queensland, South Australia, Tasmania and Western Australia, in the Australian Capital Territory and the Northern Territory, and in New Zealand. In Victoria the Chief Justice's Law Reform Committee has recommended like legislation. That legislation and the reports of law reform agencies on the subject have given us valuable guidance. We have also had the advantage of being able to study the non-profit corporations law of California, and a report on the subject by the American Bar Association. As will appear we take some guidance from the Canada Business Corporations Act.

1.21 Discussion papers. We published two discussion papers, one headed "Unincorporated Associations: Memorandum and Draft Legislation" and the second "Unincorporated Associations: Incorporation by Registration". The recommendations made in this report are largely based on the proposals in the second discussion paper, but modified in the light of submissions made to us, the reports of other law reform agencies and our own further thought.

1.22 This report does not pursue all the proposals in the second discussion paper. The most notable of the proposals not pursued are those relating to trusts for purposes. An officer of an association may hold property on the footing that the property will be used for the purposes of the association generally or for some project within the objects of the association. And property may be given to an association or to an officer of an association on a like footing. The law of trusts gives scant recognition to trusts for purposes (unless the purposes are charitable) and the intentions of donors and of those concerned with the management and activities of associations are too easily defeated. We have given the problems a good deal of study but have come to the conclusion that it would be wrong to recommend reform of this branch of the law of trusts merely in its bearing on the affairs of associations. The problem is more general and calls for a more general reform.

1.23 Submissions and consultation. We have received a wide, thoughtful and useful body of submissions on the subject matter of this report. Most came to us in response to our discussion papers. In addition, you have passed on to us submissions made to you. The names of those making submissions are listed at the back of this report. We are grateful to them. We refer here and there in this report to particular submissions bearing on a point under discussion. The presence of these particular references does not justify an inference that other submissions have been disregarded; we have given full consideration to all of them.

1.24 The main points arising out of the submissions were, first, the confusion and worry felt by many persons who joined an association about the legal position of the association and the rights and duties of its members. For example, the Polish Association in Newcastle wrote that the problem it faced was a lack of information with regard to its legal standing "especially in the area of finance . . . and the liabilities that a club member could face". Second, as indicated earlier, there is a demand for a system of incorporation outside the provisions of the Companies Act: Mr R B Starky, a solicitor, said that "a much less complex and simpler procedure" would be greatly welcomed, certainly by many of the groups for whom he acted. Third, community welfare groups pointed out that often corporate status was a condition of receiving funding. The lack of a simple system of incorporation created particularly pressing problems for such groups. Detailed comments were also received on particular issues such as whether associations should be obliged to file accounts. Some of these will be referred to at the appropriate paragraphs later in this Report.

1.25 We have had consultations of particular value with Professor Robert Baxt and Mrs A S Sievers of Monash University.

FOOTNOTES

1. On gain to private members, see paragraphs 2.1-2.12 below.

2. Paragraphs 5.2-5.16 below.

3. Shorter Oxford Dictionary.

4. We are not concerned in this paragraph with the doctrine *of ultra vires* by which the legal capacity of some corporations is limited. See paragraphs 6.57-6.74 below.

5. Paragraphs 2.1-2.12.

6. See for example Ford: Unincorporated Non-Profit Associations (1959).

7. Companies Act, 1981, s. 66.

8. Submission of Messrs Robert B Starky & Co, Solicitors.

9. The Association of Youth Organizations of New South Wales submitted to us that "many of its member organizations would benefit from incorporation and the legal indentity and limited liability afforded thereby. Most however are not in a position to afford the formalities required for the Companies Act incorporation". The Community Activity Centres Network submitted that the "present legal complications of incorporation are so complicated that many groups are totally overwhelmed and lose members who would otherwise be involved" . We received many submissions making such points.

2. Incorporation

2.1 Associations not for gain to private members. Our aim is to provide for registration of non-profit associations so as to assist them to overcome the legal problems affecting unincorporated bodies. “Non-profit association” is a concept which needs some examination.
2.2 First, we do not exclude an association on the ground that the association has some profit-making activity. Thus we would not exclude a community service association by reason that it carried on an enterprise for profit, say a shop selling handicraft work, so long as the association did not distribute profit to members. Submissions on this point, for instance from Mr K Fletcher, a lecturer in law in the University of Queensland, agreed that the test of a non-profit association should not be the making of pecuniary gains but the distribution of pecuniary gains to members.

2.3 Second, we do not exclude an association on the ground that members derive some advantages from membership, even where the deriving of those advantages is a main reason for being a member. Thus we would not exclude a golf club by reason that its members enjoyed the social and recreational facilities of the club. [10]

2.4 Third, we do not exclude an association by reason that it promotes the profit-making activities of members. Thus we would not exclude an association of furniture manufacturers, by reason that it promoted the business of furniture manufacture. [11]

2.5 Fourth, in some circumstances we do not exclude an association even though it does distribute profits to members. Thus we would not exclude an association of community service organizations, by reason that the association distributed profits to its member community service organizations. [12]

2.6 The associations which we would exclude are associations which conduct their affairs for the pecuniary gain of private members or dispose of property to private members so as to confer pecuniary gain on them. [13] We use “private member” to mean any member except a member which is itself a non-profit organization. [14] In this report, we use “non-profit association” to denote an association that does not act in the manners mentioned at the beginning of this subparagraph.

2.7 There are two ways in which the scheme might be confined to non-profit associations. First, an association seeking incorporation might be required to establish that it had the requisite non-profit character. Second, sanctions might be imposed against an incorporated association which acted for gain to private members. Either or both these ways might be followed.

2.8 Laws and proposals for laws in other places rely on the first: an association is not eligible for incorporation unless the Registrar is satisfied that the association has the requisite non-profit character. On this question the Registrar must look at the objects and activities of the association.

2.9 We think that this arrangement should not be adopted. A need to examine the objects and, more especially, the activities of every applicant association will, in respect of a significant proportion of associations, be troublesome to the Registrar, and troublesome and expensive to the associations. The steps for obtaining incorporation should be kept simple. Further, such an examination before incorporation would not be effective unless coupled with provisions directed against an association which, after incorporation, pursued activities for

gain. As appears in paragraphs 2.11 and 2.12 below, we think that provisions of this latter kind are not only necessary but are, with one reservation, sufficient.

2.10 Should the confinement to non-profit associations be ensured by looking at the objects of the association, but not at its prior activities? The Companies Act, 1961, (s.14(3)), provides that "an association or partnership consisting ... of more than twenty persons, which has for its object the acquisition of gain by the association or partnership or individual members thereof shall not be formed unless it is incorporated under this Act or is formed in pursuance of some other Act or letters patent". That Act thus looks to the "object" of the association and not, in terms at least, to its activities. If the forbidden object can be specified with sufficient clarity in legislation, there is something to be said for an arrangement by which an association is not eligible for incorporation where it has an object of gain to private members. The Registrar would need only to form an opinion on what, by the rules, is the "object" of the association. Neither he nor those concerned with the association would need to consider evidence of the activities of the association, unless that is necessary for the purpose of construing the rules. Simplicity would be promoted, but the Registrar would still have to reach a conclusion on the effect of the rules. Sometimes that would not be easy. But would it be an effective arrangement? Compliance may be no more than compliance on paper. Again, the essential safeguard would be in provisions directed against the pursuit of activities for gain by an association after incorporation.

2.11 We think that the problem would be tackled more directly, more simply and more effectively by an arrangement based on a prohibition of activities for private gain after incorporation. The prohibition would have effective sanctions, including a criminal liability on a member who aids or abets a breach,[15] a civil liability to restore money or other property distributed to members in breach of the prohibition,[16] and a liability of the incorporated association to be wound up by the Court on application by (amongst others) the Minister.[17] In addition, the Court might, on application by a member or by the Minister, restrain an infringement of the prohibition.[18]

2.12 Under the arrangement in paragraph 2.11 above, the Registrar, in dealing with an application for registration, would not be concerned to examine in detail the objects or activities of the association. But he should not be required to act in vain. He should not be required, that is to say, to incorporate an association where the outlook is that, on incorporation, there will at once be a ground for winding up by the Court. It is part of the scheme which we recommend that the Registrar, though not required to investigate these matters, should have a discretion to withhold incorporation in a case of that kind. [19]

2.13 Objects of non-profit associations. It is generally a common feature of the comparable legislation in other places that eligibility for incorporation even of non-profit associations is confined to associations with objects specified in the legislation, such as objects in promotion of benevolence, in support of the handicapped, or in promotion of literature, science or art. But it is also a common feature that a Minister is authorized to permit the incorporation of an association not having the specified objects.

2.14 We recommend against adoption of this course. A hundred and fifty years and more ago incorporation was regarded as a privilege to be conferred on the worthy (and usefulness to the Crown was one test of worth): indeed the growth of large associations was looked on with suspicion as tending towards sedition. But the first general Companies Acts swept those ideas away: a company might be formed for any lawful purpose. There have no doubt been abuses of the easy path to incorporation opened by the Companies Acts, but we are not aware of any abuse flowing from the absence of restriction on the objects for which an incorporated company may be formed.

2.15 Incorporation of an association is as much an advantage to outsiders dealing with the association as it is for members. The special safeguards of the Companies Act are no doubt appropriate for associations for the gain of private members. And we shall recommend a

means for compelling an incorporated association (under pain of minding up) to become registered under the Companies Act in proper cases. Finally, some kinds of association, registered trade unions for example, though not incorporated, are so far regulated by statute that incorporation under the present scheme is not appropriate. With those reservations, we think that an association for any lawful object should be eligible for incorporation.

2.16 Membership. It is in the nature of an association that it must have two or more persons as members. The legislation in some other places requires that, in order to be registered and incorporated, an association must have some number of members greater than two.

2.17 We would not so require. No doubt it would be unusual for an association of only two members to exist, or, if it existed, for it to seek incorporation. But we do not see why an association with as few as two members should not be allowed to incorporate. It could incorporate under the Companies Act. [20] And if it wanted to incorporate under a scheme like ours but requiring some greater number of members, it would not be hard to find dummies to make up the number. Thirdly, there may sometimes be a real case for allowing an association with only two members to incorporate. The two members might, for example, be community service organizations in a country town who wish to form an association for joint fundraising activities.

2.18 The members might be any combination of natural persons and corporations.

2.19 Eligible association. In the light of the foregoing discussion, we think that in general any association for any lawful object should be eligible for incorporation. “In general” leaves room for exceptions:

(i) Where the association is constituted so as to be a joint stock company, or otherwise so as to give a member shares or some other disposable interest in the association. [21] Apart from other possible reasons, our scheme is not designed for associations so constituted. If such an association wishes to become incorporated, it can do so under the Companies Act.

(ii) Where the association is already substantially regulated by special legislation or there is special legislation for the kind of association in question. [22]

Provision is made for the introduction of further exceptions by regulation. [23] We deal later with two cases in which incorporation might be withheld notwithstanding that the association is eligible for incorporation. [24] We have dealt already with measures to ensure that the scheme is confined to associations not for gain to private members. [25]

2.20 Incorporation. In our scheme, an eligible association may gain incorporation by adopting a statement of objects and other suitable rules and a suitable name and applying for incorporation to the Registrar. Some other matters must be dealt with: a committee and a public officer must be appointed. [26] The place in our scheme of the committee and the public officer are discussed below. [27]

2.21 In general, the Registrar would be concerned only to see that the rules complied with brief statutory requirements, to see that the name chosen for the incorporated association was not unsuitable and to see that the first committee and first public officer were duly appointed. Being satisfied on those points, he would have a duty to incorporate, not a discretion to grant or withhold incorporation. [28]

2.22 In two cases his duty to incorporate would be qualified. We have mentioned one case above: the case where the outlook is that, if the association were incorporated, it would at once be liable to be wound up by the Court on the ground that its activities were carried on for gain to private members. [29]

2.23 The second case where the duty of the Registrar to incorporate would be qualified is where the outlook is that, by reason of such matters as the scale of activities of the association when incorporated, it would be more appropriate for the association to become registered as a company. In that case the Registrar might refer the application to the Minister and the Minister might direct the Registrar not to incorporate the association. [30]

2.24 On incorporation, property, rights and liabilities relating to the unincorporated association would vest in the incorporated association. [31]

2.25 Special decision. In paragraph 2.20 we spoke of an association adopting rules and a name for the purpose of incorporation. The adoption would be by way of "special decision". In a broad way, a special decision would take the place of the special resolution of a company, both as regards an association before incorporation and as regards an incorporated association. [32]

2.26 The difference between a special resolution under the Companies Act and the special decision is this. A special resolution of a company is a resolution passed at a meeting of members of the company. [33] But prima facie, a special decision of an association is a decision made in the manner required by the rules of the association for a decision on the matter in question. [34] The arrangements for a special decision give latitude to an association to frame its constitution as it thinks fit.

2.27 For example an association may have rules designed to obviate the need for meetings of members. The association may be of persons under a handicap such that it is difficult or impossible to hold a meeting. Or the members may be widely scattered in places in or outside Australia. These are only instances of considerations which may lead an association to wish to avoid calling meetings of members. The point is that the question whether a meeting of members should be necessary for making a major decision is a question properly left to the framers of the rules of the association.

2.28 Further, the Companies Act, in its provisions for special resolutions, requires that the matters for which a special resolution is required shall be determined by members. The price of incorporation under the Companies Act is a submission to at least the forms of democracy. But an association may not be constituted as a democracy. Take the case where there are a parent association and a number of branch associations. It may be part of the constitution of a branch association that major decisions should be made by the parent association, not by the members of the branch association. Viewed in isolation, such an arrangement is the antitheses of democracy. But that is a matter for intending members to consider before they join.

2.29 In sum, there is no reason of policy why a scheme for the incorporation of associations should be restricted to associations which provide for the determination of major questions by resolution of members at a meeting.

2.30 In this respect, our scheme is that the special decision required for the determination of major questions should be made in the manner required by the rules of the association. But, for cases where the rules are silent, or it is impracticable or impossible to comply with the rules, the Registrar is authorized to settle a procedure for obtaining a special decision. One possible procedure would be for a special resolution of members at a meeting. [35]

2.31 Incorporation de novo. So far we have spoken of the incorporation of an existing association. But people may wish to form an incorporated association in the way in which they may form a company under the Companies Act. They may wish, that is to say, to form an incorporated association not formed out of an existing unincorporated association. [36]

2.32 Our scheme provides for that by enabling the adoption of a plan of incorporation, not only by an existing association, but also by any two or more persons. [37] An application for

incorporation based on a plan of incorporation adopted by two or more persons would follow the same course as one based on a plan of incorporation adopted by an existing association, save that there is no need to provide for succession to the property, rights and liabilities of an existing association. [38]

2.33 There are three advantages in having this second way of creating an incorporated association. In the first place, it enables those concerned to follow the well-known course for forming a company. Second, an incorporated association so formed starts with a clean sheet: there need be no inquiry into property and liabilities taken over from an unincorporated association. Third, while we think that the draft provisions for vesting of property and liabilities are appropriate for the general run of association, there may be cases where they are not appropriate. The existence of this second way of incorporation enables those concerned to do without the vesting provisions where that is their wish.

FOOTNOTES

10. Draft section 29 (7) (a) (iii).

11. Draft section 29 (7) (a) (vi).

12. Draft section 29 (1), 7 (b).

13. Draft section 29 (1).

14 Draft section 29 (7) (b). And see paragraphs 6.82-6.88 below.

15. Draft section 29 (4) (c).

16. Draft section 29 (6).

17. Draft section 67 (1) (e), (2) (g).

18. Draft section 29 (5).

19. Draft section 14.

20. Companies Act 1981, s.33(1).

21. Draft section 8 (2) (a), (b).

22. Draft section 8 (2) (c)-(f), (3).

23. Draft section 8 (2) (g).

24. Paragraphs 2.22, 2.23.

25. Paragraphs 2.1-2.12.

26. Draft sections 9-13.

27. Paragraphs 3.36-3.40.

28. Draft section 13 (1).

29. Draft section 14.

30. Draft section 15.

31. Draft sections 13 (6), 17, 18.

32. Draft section 6. And see paragraphs 6.2-6.9.

33. Companies Act 1981, s. 248. We refer to the Companies Act 1981 many times in this report. That Act is a Commonwealth Act. We assume that provisions substantially resembling the provisions of that Act will be adopted in New South Wales. It is convenient to refer to that Act, but the references depend on that assumption and should be understood accordingly. We refer to that Act as if it were in force: it has not yet commenced, but nothing turns on that fact so far as this Report is concerned.

34. Draft section 6.

35. Draft section 6 (1) (d), (e), (2)-(6).

36. The Companies Act 1981, s. 33 (1), does indeed speak of the founders of a company being, before the incorporation of the company, “associated for any lawful purpose”. But in practice the prior existence of an association need be no more than notional.

37. Draft section 9 (2).

38. Consequently draft sections 17 and 18 are expressed so as not to apply.

3. Incorporated Association

3.1 Rules generally. Under our scheme, in order to be incorporated, an association must have rules. [39] The rules must deal with specified matters, such as the objects of the association, the manner of making a special decision, and the appointment and proceedings of the committee. [40] The rules may also deal with other matters.
3.2 The Registrar would have a duty to see that the rules adopted on incorporation deal effectively with the specified matters referred to above. [41] Subject to that, there would not be a discretion to approve or disapprove the rules. Likewise, on an alteration of the rules, the Registrar would have a duty to see that the rules as altered dealt effectively with those matters. [42] The Registrar would not, as a matter of legal duty, be concerned with the manner of expression of the rules or their reasonableness. We suggest, however, that as a matter of administration, the Registrar should be willing, on request, to help with the framing of rules.

3.3 As we have said, the rules might deal with matters not required to be dealt with by the legislation. As a matter of good organization, the rules would usually deal with many other matters, much along the lines of the articles of association of a company.

3.4 The position as we intend it is that the rules must deal with specified matters and may deal with other matters. As regards any matter dealt with by the rules, the rules can only be altered in the manner provided for that purpose by the rules.

3.5 In paragraph 3.2 we spoke of the rules dealing effectively with specified matters. We give an illustration. One of the specified matters is “the manner in which a special decision may be made”. The rules might provide that a special decision might be made by a resolution of a specified majority at a meeting of members. Standing alone, that would not be an effective provision. It would need the support of provisions dealing with such things as the manner by which a meeting of members might be called.

3.6 Rather than go into great detail about what provision must be made by the rules, and probably unduly restrict the freedom of an association to make its own internal arrangements, we think that it should be the duty of the Registrar not to approve rules unless the provision they make on the specified matters is in his opinion effective. In some ways it is unfortunate to impose this duty on the Registrar, and to impose a requirement which is itself a restriction on the freedom of an association to make its own internal arrangements, but it is a necessary incident of the more important policy that the registrar should, subject to defined exceptions, have a duty, not a discretion, to register an association and, on being satisfied of specified matters, to approve an alteration to the rules.

3.7 On the question whether the rules make effective provision on the specified i-natters, there would be an appeal from the Registrar to the Court. [43]

3.8 The matters for which the rules make provision are not only those specified in Schedule 3 to the draft Bill, but also such matters as may be prescribed by regulation. [44] The latter requirement should be easy enough to apply on the original incorporation of an association: one would look at the regulations as they stood at the time of incorporation.

3.9 But what of a later alteration of the rules? Suppose that the association wishes to alter its rules so as to add something to its objects. Suppose further that, in the time between the original incorporation and the time of the alteration with respect to the objects, regulations have been made prescribing some distinct matter as being required to be dealt with by the rules, such a matter, for example, as the manner in which a member may resign his

membership. Must the association make a rule about resignation as a condition of being able to alter its objects?

3.10 The choice lies between leaving the necessary matters immutable (except by Parliament) in respect of an existing incorporated association, and requiring an alteration which the association does not wish to make (for example, the addition of a rule about resignation) as the price of obtaining approval to an alteration (for example, an addition to its objects) which it does wish to make. It seems to us that the first is the better course. The fact that an association wishes to make an alteration on one subject does not furnish a relevant occasion for requiring it to make an alteration on another subject. If it is thought appropriate that some new requirement should apply to all incorporated associations, regardless of their dates of incorporation, the proper course is that the Act should be amended.

3.11 It is part of our recommendations, therefore, that a regulation prescribing matters which must be dealt with by the rules should apply only to an association incorporated after the regulation comes into force. [45]

3.12 Alteration of rules. An alteration to the rules must prima facie be made by special decision. However, a departure from the procedure for a special decision may be authorized by the Court where the consent of some person to the alteration is required and that person unjustly or unreasonably withholds his consent. The justification for this is that the unreasonable withholding of consent may cause serious problems for the incorporated association. While the recommendation permits the rules to be overridden, the safeguard is that application must be made to the Court, and the Court must make a finding that consent has been withheld unreasonably. In such a case the Court may dispense with the consent. [46]

3.13 One of us does not concur in this part of the recommendations. He sees it as an unjustified intrusion into the affairs of associations and as being likely to make the scheme for incorporation unattractive to some associations. To take an example, he says that where there are a number of branch associations under a parent association, and the rules of a branch association require that an alteration to its rules must have the consent of the parent association, legislation under which a government authority, albeit a court, can override the powers of the parent association would go against the scheme of organization to which all members have submitted. For this he sees no justification. [47]

3.14 Model rules. Provision is made for the prescribing by regulation of model rules. An incorporated association might frame its own rules or adopt the model rules. It might adopt the model rules on its original incorporation or afterwards. The adoption might be of the model rules with or without modification. [48]

3.15 We have mentioned the requirement that any rules, whether the model or other rules, must include a statement of the objects of the incorporated association. Such a statement is special for each association and cannot be prescribed by regulation. Therefore, where the model rules are adopted they would have to be supplemented by a statement of the objects of the incorporated association. Objects so adopted would then be treated as part of the rules. [49]

3.16 Liability of members. Under the general law, a member of a corporation does not, merely as a member, have any liability to a creditor of the corporation. The same would be true of a member of an association incorporated under the scheme which we recommend. But this would not affect such liability as he may incur otherwise than as a member, for example, as a guarantor of a liability of the association, or a joint wrongdoer with the association. The rules might impose on a member a liability to the association for subscriptions, levies and so on.

3.17 In a winding up, money may be needed for three kinds of outgoing. These are the costs and expenses of the winding up, the claims of creditors, and whatever may be needed to

adjust the rights of members amongst themselves. Under our scheme, a member has such liability (if any) for these outgoings as may be specified in the rules, but to this there are exceptions. Two exceptions are of particular importance. First, a member of the committee may have a liability to contribute for payment of a claim which ought to be, but is not, covered by insurance. [50] Second, an officer of the association may be subjected to a liability where he has joined in incurring a debt while the association is insolvent, or has joined in fraudulent operations by the association. [51] A member may be an officer of the association for this purpose, for example where be is a member of the committee or is an employee of the association. There is another case of some importance in which a member would have a liability to contribute notwithstanding that the rules do not impose a liability on him: where the rules are changed so as to reduce or exclude liability, the change would not affect an existing creditor. [52]

3.18 The important point in paragraph 3.17 is that, in general, in a winding up, members have no liability to contribute unless the rules impose a liability. Is this right in policy?

3.19 The following may be said in favour of the arrangement which we recommend:

(i) It is an arrangement to which the community is well accustomed, however unjustly it may sometimes work against creditors. Thus, it is in substance the arrangement under the Companies Act 1981, the Co-operation Act, 1923, the Credit Union Act, 1969, and the Permanent Building Societies Act, 1967. And it is the common arrangement in the legislation for incorporation of associations in other Australian States and Territories and in New Zealand.

(ii) It puts members of most associations in no better position than that which they have as members of an unincorporated association under the present law.

(iii) The scheme puts creditors in a better position than that which they now have in relation to an unincorporated association, in that assets of an incorporated association would be directly available by way of execution of a judgment against the association, and that there are clear statutory procedures for recourse to the assets in a winding up.

(iv) People proposing to give credit to an association can decline to do so unless satisfied that the association will be able to pay, or unless the association’s debt is supported by an adequate guarantee or charge.

(v) People giving credit to an association often depend more on the reputation of the association for prompt payment of debts than on the prospect of the association being found solvent in a winding up.

(vi) It is part of the scheme that, where the liability of members is limited or excluded, the incorporated association is under a duty to insure against important possible liabilities in tort and that a member of the committee of an incorporated association in default will have substantial liability. [53] This would greatly improve the position of many involuntary creditors.

(vii) Further, remedies are given against an officer of an incorporated association in cases of known insolvency of the association or fraudulent conduct of its affairs. [54]

(viii) If the arrangement were not adopted, few associations would incorporate under the scheme. Some would remain unincorporated and creditors would be left in their present difficulties of substance and procedure. Others would register under the Companies Act or some other Act which allows limitation of liability of members. Thus on a broad view a scheme which imposed a substantial liability on members would not in fact improve the position of creditors.

(ix) An association for useful purposes, for example a community welfare association, would suffer a special disadvantage under a scheme which did not permit limitation or exclusion of liability. However good the purposes of the association may be, many people would hesitate to support it by joining as members if by doing so they undertook a liability in respect of the claims of creditors.

3.20 The following may be said against the proposed arrangement:

(i) The justification for the limitations of liability permitted under the Companies Act is that they permit the aggregation of risk capital for commercial and industrial ventures. It may be said that associations involved in these ventures should (if they are too big to be partnerships) be required to incorporate as companies rather than as associations, so that they will be subject to stricter controls. Accordingly, the above justification for limited liability would not apply to associations. In reply it may be argued that many associations have purposes which need and merit the encouragement afforded by limitations of liability at least as much as do the purposes of companies engaged in commerce and industry. Moreover, many companies do not engage in commerce and industry.

(ii) It is unjust that members, having enjoyed the advantages of membership, should remain in enjoyment of their own wealth, notwithstanding that creditors are left unsatisfied. This applies as well to an association for purposes useful to the public as to an association for the enjoyment or recreation of members: the satisfaction of supporting a good cause may be no less valuable than the more tangible advantages of being a member of a golf club.

(iii) It is unreal as a general proposition to say that people can decline to give credit to an association unless satisfied that it will be able to pay, or unless there is a guarantee or a charge on property. Some people are not in a position to do so. People applying to an association for jobs could hardly do so, yet realization of, for example, their expectations of long service leave may be defeated by the proposed arrangement.

(iv) Suppose that a dozen people pursuing some common purpose incur a debt. They are liable for the debt almost to the limit of their assets. Why should things be different, why in particular should a creditor suffer, if they choose to become an incorporated association?

3.21 We are impressed by the case against limited liability, but on balance we favour the case for limited liability. To make members, or even members of the committee, liable up to some specified amount would not solve the problem. The scheme now put forward does not, save in exceptional cases, put a liability on members unless liability is imposed by the rules. The weight of opinion amongst those making submissions on the point was in favour of limited liability of members.

3.22 Insurance. In discussing the liability of members in respect of the claims of creditors of an incorporated association, we referred to a duty to insure against important possible liabilities in tort. The duty would be imposed on the incorporated association unless, by its rules, members were under a liability to contribute in a winding up for payment of these liabilities. [55] In effect, an incorporated association could escape the statutory duty to insure by putting the members in the position of insurers.

3.23 The liabilities to be covered by insurance would be liabilities arising out of occurrences causing death or bodily injury or damage to property. The cover required for these liabilities would be $1,000,000 for each occurrence, unless a higher or lower cover is required by regulation. $1,000,000 is a large sum, but not large enough to cover several recent judgments for damages for personal injury. The current figure under the Strata Titles Act is $750,000, fixed by regulation published in the Gazette on 30th May, 1980. A requirement to insure in respect of other occurrences might be imposed by regulation, and for these other occurrences the required amount of the cover would be fixed by regulation. [56] A number of submissions

we received commented on the question of insurance. The New South Wales Bar Association was concerned about the possible cost of insurance for associations, but did note that public risk insurance is relatively cheap. That is the kind of insurance with which we are particularly concerned. Other submissions favoured insurance: the Registrar of Co-operative Societies thought it desirable that public liability insurance be compulsory. The Federation of Parents and Citizens Associations of New South Wales stated that it already administers a master policy insurance scheme for its member associations, one area covered being public risk.

3.24 Our main precedent for this duty to insure is in sections 84 and 156 of the Strata Titles Act, 1973. Compulsory insurance is of course well known in other cases, for example, the compulsory third party insurance for motor vehicles, and workers' compensation insurance.

3.25 We think that the imposition of a duty to insure is a proper counterpart to the power allowed to an incorporated association to limit or exclude the liability of members to contribute for the payment of claims against the incorporated association. In general, the contractual creditor may be left to look after himself: he can decline to deal with the incorporated association if he has doubts about its solvency. But the involuntary creditor is in a different position, in particular the person who has become a creditor by reason of suffering damage caused by a wrongful act for which the incorporated association is responsible. We think that there is a case for the protection of involuntary creditors such as these by insurance.

3.26 But why limit the duty to insure to cases where the rules do not impose liability on the members? Where the rules do impose liability, members may not, it may be said, have means enough to enable the incorporated association to meet a heavy liability in damages for serious personal injury. That is true, but the problem is not peculiar to the associations with which this report is concerned. The same problem of disappointment to an injured claimant exists in the cases of claims against a business partnership, a sole trader, or indeed any one in the community. Yet none of these is under a general duty to insure.

3.27 Where there is a failure to insure, a member of the committee responsible for the failure would be liable to contribute so as to put the claimant in as good a position as if there had not been a failure to insure. [57] A member of the committee would be responsible for the failure unless he could show that he had done all in his power to see that the insurance was duly effected, and could show also that at the time of the occurrence giving rise to the liability he did not know that there was no insurance or had, promptly after that fact had come to his knowledge, given notice to the Registrar. [58] We have no precedent for this part of our recommendations.

3.28 This possible liability of a committee member may be ruinous in its magnitude. Is the scheme too harsh? We suggest that it is not. First, an incorporated association that sees the scheme as too harsh may impose liability on its members: it may in effect make the members the insurers of the incorporated association. If that is done, the statutory duty to insure, and the statutory liabilities of committee members, are escaped. [59] The incorporated association can then make such arrangements (if any) as it thinks fit for insurance so that members will not be called upon to contribute.

3.29 Second, a committee member may escape liability by doing all he can to see that the insurance is effected and notifying the Registrar of any default. [60]

3.30 It should be borne in mind that the case in question is one where the claimant has suffered injury for which the incorporated association is responsible, injury which may be very serious. The incorporated association has the duty to insure, the committee has the means to see that the incorporated association insures in fulfilment of its duty, but in the case in question, the committee has not done so. Who should suffer by reason of the default, the injured claimant or the defaulting committee? We say the defaulting committee.

3.31 But yet there is the case of the committee member of good intentions who defaults but does not default deliberately. Steps should be taken to see that he is told of his duty and reminded of it. We have in mind steps of three kinds.

3.32 First, the duty of the incorporated association to insure, and the duty of a committee member to notify the Registrar of default, should be expressly stated in the rules of the incorporated association. [61]

3.33 Second, the form of annual return for lodgment with the Registrar should draw attention prominently to the duty to insure and should require particulars of the insurance effected.

3.34 Third, insurers should be required to lodge with the Registrar periodical returns of the insurances effected and to notify the Registrar if an insurance is allowed to lapse. [62] As a matter of administration, where it appears to the Registrar that an incorporated association is not insured as required, he should give notice to the incorporated association, referring to the default, drawing attention to the liability of committee members, and warning that the incorporated association is liable to be wound up by reason of the default. [63]

3.35 There remain questions of the terms of the insurance and the fitness of the insurer to undertake the business. We take from the Strata Titles Act, 1973, the device that the insurer must be an insurer approved by the Minister. [64] We contemplate that the Minister would, amongst other things, see to it that the terms of the insurances available to incorporated associations insuring pursuant to their statutory duty are such that the insurance provides an effective protection for the injured person claiming against the incorporated association.

3.36 Committee and governing body. In the ordinary course an association has a small number of people to direct and manage its affairs, just as a company has a board of directors. But we have heard of some associations whose constitution is one for a perfect democracy: all the members are entitled to take part in all matters of direction and management.

3.37 It is not necessary to force incorporated associations into a statutory mould in this respect. If an incorporated association wishes to have a governing body separate from the whole body of members, it should be free to do so. It should also be free to do so without such a governing body.

3.38 There are some functions, however, for which it is necessary, or at least convenient, to have a small responsible body generally answering to the board of directors of a company. There must be a body responsible for appointing and removing the public officer, to approve the annual return, and to see that the incorporated association is insured against liability for injury to person or property. Our scheme requires the appointment of a committee to do these things. [65] There is no minimum number: the rules of an incorporated association may provide for a committee of one. [66]

3.39 Commonly it would be convenient to provide that the governing body (if there is one) should also be the committee. But that would be a matter for the rules of the incorporated association concerned.

3.40 Public officer. Our recommendations include provision for a public officer. [67] In this we follow the lead of legislation elsewhere in Australia. The functions of the public officer are not extensive: they are to carry through the original application for incorporation, to lodge documents with the Registrar and otherwise deal with the Registrar on behalf of the incorporated association, and to receive documents by way of service on the incorporated association. [68]

3.41 Internal differences. Differences and disputes amongst members of associations, or between an association and one or more of its members, sometimes lead to difficult and protracted litigation. A rule has evolved in the courts that equitable remedies, such as an

injunction, may be withheld unless the applicant can show that he has an interest of a proprietary nature at stake. This rule has sometimes been an obstacle to the resolution of internal differences. [69] It is part of our recommendations that the rule be abolished. [70]

3.42 We think that there is room for the determination of internal differences by the Registrar, but only by submission of the parties. The Registrar may be able to contribute a special experience in the affairs of incorporated associations towards determination of these differences, and proceedings before him may be less formal and expensive than proceedings in a court. The submission might be embodied in a rule of the incorporated association, binding both the incorporated association and its members as regards all future internal differences or specified kinds of internal difference. Or the submission might be a particular submission by the parties to the difference. The Registrar would be authorized, but not required, to act on a submission: he could, that is to say, decline to hear the case and leave the parties to their ordinary remedies. There would be an appeal from the Registrar to the Court, but only by leave of the Court or the Registrar. The Minister would have power to appoint another person in place of the Registrar to exercise the powers under discussion. [71]

3.43 Submissions received generally favoured the provision of an option to bring internal disputes before the Registrar. However, the Registrar of Co-operative Societies was concerned that this would impose a considerable burden on a Registrar of Incorporated Associations. We think that the Minister's power to appoint a person in place of the Registrar is one way around this difficulty.

3.44 Accounts and information. Our recommendation is that an incorporated association should not, in general, be required to draw up accounts, to have them audited or to lodge them with the Registrar. A variety of views on compulsory filing of accounts was expressed in submissions. Professor Heydon saw no case for compulsory filing or publicity of accounts. The New South Wales Bar Association felt that small associations might incur expense over compulsory filing, but considered the point a matter of policy on which it should not make substantial comment. Other submissions, for instance that of Kazembe Vestates, argued it that the keeping and auditing of proper accounts was highly desirable at least in the case of publicly funded groups. It is to meet this last point that we recommend that the legislation should permit an incorporated association so to frame its rules that it accepts a duty to prepare and lodge accounts, with or without audit. [72] The purpose of this permissive arrangement is to accommodate those incorporated associations which see an advantage in being able to say that their accounts (or audited accounts) are on a public register and are available for public inspection. The possible advantages include an ability to make a more persuasive case for appeals to the public for support, or for support by Government and other funding authorities.

3.45 Apart from an incorporated association which frames its rules so as to undertake the duties just mentioned, our recommendation is that an incorporated association should not automatically be required to prepare accounts, to submit accounts to audit, or to lodge accounts with the Registrar. The recommendation calls for justification. Requirements for the publication of accounts are often seen as a proper price to be exacted for the privilege of limited liability of members. But the preparation, audit (if required) and lodgment of accounts would be an expense and a trouble to incorporated associations. It is necessary to look with more particularity at the advantages of a requirement to prepare and lodge accounts and to weigh the advantages against the disadvantages.

3.46 One advantage of published accounts is that people proposing to give credit to the incorporated association can get some guidance on the risk they are taking by looking at published accounts. The value of the guidance will depend on the nature of the required accounts and on how far out of date they are when they are looked at. The published accounts will at best be a crude and unsatisfactory guide to the extent of the risk. People proposing to give credit can make their own inquiries of the incorporated association and withhold credit if not satisfied with the information given. Or they can make the usual inquiries

of bankers and others on the creditworthiness of the incorporated association. There is another class of potential creditors to whom published accounts will be little or no protection. That class comprises those suffering damage by negligence or some other tort for which the incorporated association is liable.

3.47 Where the incorporated association carries on some activity for the public benefit, particularly where it has taxation privileges, or receives grants of public money, there may be a case for saying that there should be public access to its accounts. The case for publicity of accounts lies in the activities and privileges, and that case is neither strengthened nor weakened by the fact an association is incorporated under the present scheme: it applies with like force in relation to an unincorporated association, a corporation however formed, and an individual. If there is to be publicity of accounts by reason of particular activities or privileges, the scheme now under consideration is not the place for it.

3.48 Accounts lodged with the Registrar may be a help if occasion arises to investigate the affairs of an incorporated association, perhaps with a view to criminal charges against officers.

3.49 A member who wants to examine the conduct of the committee, perhaps with a view to attempting to make some change in the membership of the committee, may be in a weak position for want of information if there is not a statutory requirement to draw up and lodge accounts. A requirement to draw up accounts, without a requirement that they be lodged with the Registrar, may be disregarded because observance of the requirement may not be policed.

3.50 A statutory requirement to draw up and lodge accounts would be an incentive to keep proper records and thus would promote good management.

3.51 Those are the advantages as we see them. But there are disadvantages. The drawing up, audit (if required) and lodgment of accounts takes work and money. If the accounts when lodged are open to public inspection, in respect of many incorporated associations outsiders will have access to things which are not their business. There will be unnecessary invasions of privacy.

3.52 As a consequence of these disadvantages, incorporation under the scheme would be discouraged, particularly in the case of small associations with small resources both of funds and of clerical and accounting skills amongst their members.

3.53 What should be done? Taking the considerations of substance, there are in favour of a requirement for lodging accounts the possible advantages to investigators and to members and the incentive to good management. Against such a requirement are trouble, expense, invasion of privacy and discouragement to incorporate, especially of small associations. As regards investigations, it is better that investigators should put up with such difficulty as the lack of lodged accounts may produce: the number of associations which will be investigated will be small in comparison with the number which would have to lodge accounts.

3.54 As regards making information available to members, the better arrangement is to give power to the Court, on application by a member, to direct the incorporated association to furnish to the applicant or to any class or all of the members such accounts and other information relating to the association as the Court thinks reasonable. This is part of the scheme. [73]

3.55 The Court would be required to confine its order to such accounts and information as ought to be given in support of the proper interests of members as members, and would be required not to order the giving of accounts or information where that might impede the pursuit by the incorporated association in good faith of its objects. Privilege against disclosure would be preserved. [74]

3.56 The existence of this power in the Court would make an incorporated association more ready to keep members informed on the affairs of the incorporated association, by periodical accounts and reports, or by answer to particular inquiries. If such a power is given, the giving of information to members does not require that provision be made for the periodic preparation, audit and lodging of accounts.

3.57 As regards the incentive to good management, the case has the common difficulty that a duty and expense would be laid on all incorporated associations, although many fewer than all incorporated associations would need, and be responsive to, the incentive.

3.58 In the result, the scheme would not compel the preparation, audit or lodgment of accounts unless those duties are imposed by the rules of the incorporated association.

3.59 Annual return. Our recommendations do, however, call for an annual return. The annual return would give:

(i) the name, address and occupation of each member of the committee, of each member of any separate governing body, and of the public officer;

(ii) the date and short particulars of any alteration to the rules during the year;

(iii) particulars of the compulsory insurance (if any) discussed in paragraphs 3.22-3.35;

(iv) the matters prescribed. [75]

3.60 "The names and addresses mentioned in paragraph 3.59 (i) are matters properly made available to the public. The particulars of alterations to the rules would prompt a check that alterations have been duly made and have been approved by the Registrar. The particulars of insurance would serve as a reminder to the committee and are matters properly available to an injured person.

3.61 The general requirement to lodge an annual return would be an aid to the Registrar in identifying an incorporated association which is moribund, with a view to striking it off the register. [76]

3.62 Amalgamation. Provision is made for the amalgamation of two or more incorporated associations into a newly formed incorporated association. Provision is made against oppression of members and defeat of creditors in the course of amalgamation. [77]

3.63 Transfer of registration to and from other Acts. Provision is made for transfer of registration to the Companies Act. The Minister is authorized to direct such a transfer where the scale or nature of the activities of the incorporated association appear to him to require regulation under that Act. Provision is made against oppression of members and defeat of creditors. [78]

3.64 The Government may see fit to add provision for transfer of registration from the Companies Act, and to and from the Co-operation Act, 1923.

3.65 Direction to register as a company. The arrangements discussed in chapter 2 should be enough to ensure that the scheme now put forward will in general not be used by associations for gain to private members. [79] But some associations, although not for gain to private members, own or deal with property of great value and have a large volume of transactions with outsiders. We think that there should be a means by which a big organization of that kind, registered as an incorporated association, can be directed to become registered as a company, under pain of winding up.

3.66 The facts and circumstances justifying such a direction are hardly fit for judicial determination. What is called for is rather an administrative assessment of whether the scale of activities has reached such a size that the closer regulation of the Companies Act should be invoked.

3.67 We think that the Minister should be given power to direct an incorporated association to become registered as a company where in his opinion, by reason of the scale of its activities, the value or nature of its property, or the number or nature of its dealings with the public, the incorporated association cannot be conveniently or appropriately governed by the scheme we recommend. [80] If an incorporated association did not become so registered on direction by the Minister, it would be liable to be wound up by the Court on application by (amongst others) the Minister. [81]

3.68 Such a direction may bear hardly on an incorporated association. Yet, given the nature of the question, we do not think that a full appeal should be given. We do, however, recommend that the Minister be required to give his reasons for a direction, and that the Court be authorized to set aside the direction where it appears to the Court that the Minister did not have sufficient grounds to form the opinion on which the direction is based. [82]

FOOTNOTES

39. Draft section 9 (3) (c).

40. Draft section 24 (1) (b), Schedule 3.

41. Draft section 13 (1) (b) (i), 24 (1) (b).

42. Draft section 26 (9) (b).

43. Draft section 74 (1), (2).

44. Draft section 24 (1) (b).

45. Draft section 24 (2).

46. Draft section 26 (2), (3). The cases for exercise of the power are somewhat larger than those stated in the text. 41 Compare the Companies Act 1981, s. 73 (3), (4).

47. Draft section 25.

48. Draft section 5 (1) “rules”.

50. Draft section 43.

51. The draft Bill does not so provide, but we recommend that provisions like sections 556 and 557 of the Companies Act 1981 should be adopted: paragraph 5.16.

52. Draft section 70 (1), *(5).*

53. Draft sections 40-43. See paragraphs 3.22-3.35 below.

54. See note 2 above.

55. Draft section 42. 56. Draft section 42 (2) (a).

57. Draft section 43 (1)-(4), (6).

58. Draft section 43 (5).

59. Draft section 41.

60. Draft section 43 (5).

61. Draft section 24 (1) (b), Schedule 3 item 7.

62. Draft section 40 (3).

63 On winding up, see draft section 69 (1) (d).

64. Draft section 40 (1), Strata Titles Act, 1973, s.156(1).

65. Draft sections 13 (1) (b) (ii), 27, 69 (1) (e), (f).

66. Draft sections 5 (2), 9 (3) (d), 27 (1), 691(l) (e), Schedule 3 item 4.

67. Draft sections 11, 28.

68. Draft sections, 12, 26 (8), 37. We contemplate that the regulations would require that documents lodged with the Registrar on behalf of an incorporated association be lodged by the public officer.

69. *McKinnon v. Grogan (1974)* 1 NSWLR 295.

70. Draft section 44.

71. Draft section 43.

72. Draft section 32 (1).

73. Draft section 32 (6).

74. Draft section 32 (6), (7), (9).

75. Draft section 31 (4).

76. Under section 459 of the Companies Act 1981 as it would be applied by draft section 65.

77. Draft sections 46-51.

78. Draft sections 52-64.

79. Paragraph 2.1 above.

80. Draft section 54 (1).

81. Draft section 67 (1) (e), (2) (h).

82. Draft section 54 (3)-(5).

4. Winding Up and Dissolution

4.1 General. Winding up is the process by which the assets are realized, the debts paid and the surplus assets disposed of amongst members or otherwise as may be required. Dissolution brings to an end the corporate personality of the incorporated association.
4.2 We recommend adoption, subject to modification, of the provisions of the Companies Act relating to winding up and dissolution. [83] The Companies Act provides for two modes of winding up, a winding up by the Court and a voluntary winding up.

4.3 The modifications which we recommend are of three kinds. First, we introduce a third mode of winding up, upon a certificate of the Registrar. Second, we recommend a control of the disposal of surplus assets. Third, a number of minor modifications are necessary in order to accommodate the winding up provisions of the Companies Act to the principles of the general scheme which we recommend.

4.4 Winding up by the Court. Three new grounds for winding up are introduced:

(i) that the incorporated association would, if not incorporated, not be eligible for incorporation under the Act;

(ii) that the incorporated association has conducted its affairs for the pecuniary gain of a private member or has disposed of property to a private member so as to confer a pecuniary gain on him; and

(iii) that the Minister has required the incorporated association to become registered as a company and the incorporated association has failed to become so registered. [84]

The Minister is authorized to apply for a winding up on these grounds. [85]

4.5 Voluntary winding up. We recommend an arrangement following the substance of the relevant provisions of the Companies Act. [86] We adopt in addition a provision of some other Acts by which, if it appears to the Registrar that a vacancy in the office of liquidator is not likely to be filled in the manner provided by the Companies Act, he may appoint a liquidator to fill the vacancy. [87]

4.6 Winding up upon a certificate of the Registrar. This mode of winding up is taken from some existing Acts. [88] The grounds for a winding up under this mode are of two classes. The first class comprises cases where the incorporated association has become incorporated by fraud or mistake, or persists after notice in breaches of the Act, the regulations or its own rules. [89] The second class comprises cases where the incorporated association is not in substantial operation: its members are reduced below 2, it has not commenced to operate or it has suspended operations for a year, or there is no committee or too few members of the committee to form a quorum. [90] There would be an appeal to the Court against the certificate of the Registrar, by the incorporated association or any other aggrieved person. [91] Where the Registrar has given his certificate, the winding up would proceed generally in the same way as a voluntary winding up. [92]

4.7 Surplus assets in a winding up. The disposal of surplus assets would primarily be a matter for decision by members. However, in certain circumstances it may be unjust for members to have an unrestricted power to dispose of surplus assets. Accordingly, we recommend that the Court be given power to direct a disposal of surplus assets in a manner

which it considers necessary to prevent possible injustices. Our reasons may be summarized as follows.

4.8 The refusal of the common law to recognize an association as a entity distinct from its members seems to have encouraged the belief that the assets of an association must belong to those who happen to be members at the time of its dissolution. That the assets should not necessarily belong to them is clear enough when the association is a non-profit public benefit one. In such cases the rules often provide that on dissolution surplus assets should be applied to purposes similar to those for which the association exists. The rules recognize the fact that members dedicate gifts of money and work to purposes other than their own benefit. Similarly non-member donors do not envisage the members for the time being as the beneficiaries in the event of dissolution of the association.

4.9 Even in the case of an association established for the enjoyment and recreation of members it is our view that the members should not be allowed, without restraint, to treat the surplus assets of the association as their own. Those who form, say, golf or recreational clubs do not ordinarily do so on a joint stock basis. They may take debentures, but they do not ordinarily contemplate having a proprietary interest in the club's assets that is saleable when they resign. New members may pay a joining fee, but they do not purchase any share in club assets. Members, either foundation ones, or new ones, would probably be surprised to learn that if their golf course or clubhouse were compulsorily acquired in the next generation and the club dissolved, those who then happen to be members would be entitled to divide up the proceeds. It would be more reasonable to expect that the proceeds would be applied to the good of the game or to some other non-profit purpose.

4.10 A further possibility is that a voluntary non-profit association which had become rich in assets and low in membership might be "taken over" by commercial interests. There might be member 6 4 stacking" and rule changes to allow the new body of members to exercise their right of ownership.

4.11 A well-known example of the kind of case we have in mind occurred in the late 19th century. By that time the order of Serjeants-at-law (an ancient order of barristers) had become obsolete. The remaining Serjeants sold Serjeants' Inn, its London house, which had been bought in 1834, and divided the proceeds amongst themselves. They were criticised at the time, [93] but were entitled to follow that course of action since the common law did not recognize an association as distinct from its members. It might well have been more just for the money to have been devoted to assisting legal education or the continuing practice of the law.

4.12 Then there is the case where gifts may have been made to an association in the expectation that the property given would be applied in pursuit of its objects. It would be wrong if in such a case the members called for a distribution amongst themselves. Moreover, gifts to the association may have been made pursuant to a trust, and may have to be separated from the general property of the association. In the words of Professor Chesterman in his submission to us on this point, "questions as to how much has been expended from each of these two forms of property may sometimes prove very difficult to resolve". Even if the law is clear it may be advisable to call on the court to assist in solving complicated questions of fact. In more complex cases where the law and facts are not easily ascertained it would be advisable for the court to be empowered to make such distribution as it considers just, rather than pursue at length what may be a time-consuming and tortuous investigation to determine the general law position.

4.13 For these reasons the recommended scheme includes a power for the court to direct a disposal of surplus assets in some manner which the court thinks just. The court might do so on application by:

(i) a member or former member of the incorporated association;

(ii) a person who has provided property or services for the benefit of the incorporated association or in aid of the pursuit by the incorporated association of its objects;

(iii) an association or corporation having amongst its objects any object similar to anything within the objects of the incorporated association;

(iv) a person who might derive a benefit from the pursuit by the incorporated association of its objects; or

(v) the Minister. [94]

4.14 Such is the recommendation which a majority of us make. One of us, however, would, in general, leave the disposal of surplus assets in the control of members. He puts his views in the remainder of this paragraph. He recognizes that cases do arise where the proper course for members would be to direct that surplus assets should be disposed of in such a way that they would be devoted to purposes more or less like the purposes of the incorporated association. But he has the impression that when such cases arise the members do as a rule take such a course as that described. At all events, he knows of no case at any time in New South Wales or indeed in Australia, or within the last century in any other place, where the action of members' taking surplus assets for themselves has been seen as wrong by interested observers at the time of winding up. The distribution in 1877 in England of £57,000 representing the proceeds of sale of Serjeants' Inn [95] appears to him to be a slender foundation in fact for the arrangement recommended.

4.15 As regards an association for purposes of public significance, the recommendation appears to him to strike at an evil which is all but imaginary. As regards an association for the benefit of its own members, a golf club for example, the recommendation appears to him to be at once an officious intrusion on private rights and an offence to the values of freedom of association. For this intrusion by an arm of the State, even the Supreme Court, in the affairs of a private association he sees no justification.

4.16 To guard against this apprehended evil, evidenced only by a single instance in England more then a century ago, there would be, in the winding up of every solvent incorporated association, the need to make, lodge with the Registrar, and advertise the plan of disposal, to wait for 30 days in case someone decided to apply to the Court and, in that case, to litigate the question. The classes of potential applicants are very wide and the opportunities for vexatious litigation no less wide. The magnitude of the supposed evil would be far less than the sum of the trouble, expense, delay and uncertainty imposed in the winding up of every solvent incorporated association.

4.17 The illustration is given of the proceeds of sale of Serjeants' Inn being devoted to assisting legal education. Yet it does not appear that Serjeants' Inn had anything to do with legal education. The recommendation appears to contemplate a very wide discretion in the Court.

4.18 The recommendation is supported in paragraph 4.12 by reference to the possible difficulty of separating trust property from other property. But can that support be claimed without an examination of the present laws relating to compromise and apportionment of blended funds by trustees and liquidators? At all events, the difficulty is not met by the recommendation, for draft section 72 only operates on the unencumbered property of the incorporated association, not on property which it holds as a trustee, and only operates on that unencumbered property after it has been identified.

4.19 How will this recommendation influence the choice of an association to remain unincorporated, to incorporate under the Companies Act, or to incorporate under the present scheme? If the association makes the first or the second choice it is free to deal as it thinks fit

with its surplus assets, but if it chooses incorporation under the present scheme, it must submit to the trouble, delay and interference which has been described.

4.20 The foregoing subparagraphs are not intended to cover the case of a moribund incorporated association where, for example, no members can be traced but something has to be done with the assets. In such a case there is room for a discretionary power to dispose of surplus assets in favour of, for example, another body with similar objects. [96]

4.21 Defunct incorporated association. Our recommendations also include adoption of the scheme of the Companies Act for defunct companies. [97] The result would be that the Registrar might dissolve an incorporated association where the incorporated association is not carrying on business or is not in operation, or where the incorporated association is being wound up and no liquidator is acting or the affairs of the incorporated association are fully wound up. The Registrar would have to give notice before dissolving the incorporated association and there would be an appeal to the Court by a person aggrieved.

4.22 Outstanding property of dissolved incorporated association. Here too we recommend adoption of the arrangements in the Companies Act. [98] In brief, outstanding property would vest in the Registrar and the property or its proceeds would go to consolidated revenue. A person entitled to the property has means of obtaining payment.

FOOTNOTES

83. Draft section 65.

84. Draft section 67 (2) (f)-(h).

85. Draft section 67 (1) (e).

86. Draft section 68.

87. Draft section 68 (11). See for example-.the Permanent Building Societies Act, 1967, s.88.

88. See for example the Permanent Building Societies Act, 1967, s. 87 (3)-(6).

89. Draft section 69 (1) (c), (d).

90. Draft section 69 (1) (a), (b), (e), (f).

91. Draft section 74 (1), (2).

92. Draft section 69 (2)-(8).

93. Mr Serjeant Robinson (1891) *Bench and Bar Reminiscences of One of the Last of an Ancient Race,* Hurst and Blackett, London (3rd ed).

94. Draft section 72.

95. Jowitt's Dictionary of English Law, 2nd edn., Vol. 2 (1977), page 1636.

96. Under the Companies Act 1981 such assets, or their proceeds, would ultimately go to consolidated revenue: ss. 427, 428, 461, 462.

97. Companies' Act 1981, s. 459.

98. Companies' Act 1981, ss. 461, 462.

5. Draft Legislation

5.1 General. We recommend enactment of legislation on the principles of the attached draft Bill. [99] The draft Bill is intended to state in detail the nature of the special provisions which we think appropriate: the draft does not contain all that would be necessary in a Bill for Parliament. We go on to note some matters which, if our recommendations are adopted, call for attention in the framing of a Bill for Parliament, but are not dealt with in the draft legislative provisions attached to this report.

5.2 Registrar and administration. There should be provisions on these subjects. It should be open to appoint as Registrar a person who already holds some other office, for example, the Registrar of Co-operative Societies.

5.3 The Registrar and those in his office should be authorized to advise and assist people concerned with the organization and administration of incorporated associations.

5.4 Penal provisions. The attached draft Bill has numerous provisions for particular offences and penalties. A Bill for Parliament would need general provisions relating to offences and penalties. [100] The draft Bill speaks in many places of a penalty of $1,000: that is merely for illustration, we do not make any recommendation on the amount of penalties.

5.5 Regulations. Provision should be made for the making of regulations by the Governor.

5.6 Registration of charges. Arrangements like those of sections 199-210, 212, 215 of the Companies Act 1981, should be adopted. The reasons for adoption are:

(i) Those arrangements facilitate the conduct of the affairs of a corporation, especially by doing away with the need to register instruments under the Bills of Sale Act, 1898.

(ii) As a consequence of (i), incorporated associations and their lenders can use the floating charge, a common and well understood form of security given by a company.

(iii) A convenient register is open to inspection by creditors and prospective creditors.

5.7 "Corporation" under the Companies Act. In general the provisions of the Companies Act 1981, applying to a "corporation" as defined in that Act should apply to an incorporated association. [101] We make the following observations:

(i) *Section 17 (1) (c)-Registration as liquidator of specified corporation.* See also Companies Act 1981, s. 417 (1). We suggest that section 17 (1) (c) should apply. The closing words of paragraph (c) should be modified.

(ii) *Sections 94-109-Prospectuses.* These sections would apply to the issue of debentures by an incorporated association. But a prospectus must not be issued unless a copy of the prospectus has been registered (s. 103 (1)). And only a prospectus relating to a company or a registered foreign company (not an incorporated association) can be registered (s. 103 (2) (a)). However, the Commission has powers of exemption and modification (s.109). The result seems to be appropriate. It will be uncommon for an incorporated association to invite the public to take debentures, and the circumstances are likely to be special. If a few cases arise they can be dealt with under section 109. If many cases arise, the legislation can be amended.

(iii) *Section 160-Loans repayable.* The section appears to apply to an incorporated association. If it is right for a company it is also right for an incorporated association.

(iv) *Sections 222, 227-Bankrupt or convict director.* Section 222 (1) (c), (d), (3), (4) and section 227 appear to apply. In general the arrangements are appropriate. The provision for leave o the Court leaves enough room for a director of an incorporated association of bankrupts or convicts.

(v) *Section 224-Validity of acts or director or secretary.* This section is appropriate.

(vi) *Section 229-Duty and liability of officer.* This section ought to apply. The references to a company in section 229 (1) (b) appear to require consideration.

(vii) *Section 287-Borrowing and guarantor corporations.* If the section is appropriate in relation to a company, it is no less appropriate in relation to an incorporated association.

(viii) *Sections 289-313-Special investigations.* It is useful that these provisions should apply. Sooner or later there will be frauds and so on in connection with incorporated associations. If these sections apply, some adjustments should be made:

Section 290 (2) (f) speaks of a special resolution. It should be made to speak of a special decision.

Section 312 deals with winding up. The section needs to be adapted to the winding up provisions of the draft Bill.

The deemed amendments in Schedule 6 to the draft Bill leave section 442 untouched. Section 442 deals with (amongst other things) the expenses of a special investigation.

(ix) *Sections 317, 319-Reconstruction and amalgamation.* It seems that section 317 only comes into play where there has been an application under section 315 in relation to a company. If the reconstruction or amalgamation involves a "corporation" as well as a company, and an application in relation to the company has been made under section 315, then the Court may make orders under section 317 in relation to the "corporation". The section may have some utility in relation to incorporated associations. Likewise section 319 (2).

(x) *Section 327-Statement that receiver appointed.* The section is expressed in terms applicable to any "corporation". It should apply to an incorporated association.

(xi) *Section 533 (1)-Security for costs.* The section should apply to an incorporated association.

(xii) *Section 535-Relief to officer, etc.* The section should apply in relation to an incorporated association.

(xiii) *Section 538-Appeal from receiver, etc.* Section 538 (a) and (b) should apply. Draft section 73 adopts section 538 (d).

(xiv) *Section 539-Irregularities.* The section should apply. It should extend to things done, etc., under the draft Bill.

(xv) *Section 541-Examination of officer, etc.* The section should apply.

(xvi) *Section 542-Order against officer, etc.* The section should apply.

(xvii) *Section 544-Books.* Subsections (3) and (4) should apply, and should apply to a book required to be kept or prepared by or under the draft Bill. Section 5 (1) of the Companies Act 1981, gives an extensive definition to "books".

(xviii) *Section 552-Hawking of shares and debentures.* The section should apply: it would be useful as regards debentures.

(xix) *Section 564-False report by officer, etc.* The section should apply.

(xx) *Section 578-Perpetuities.* The section should apply. The section uses “corporation” in a sense wider than that of section 5 (1) of the Companies Act 1981.

(xxi) *Administration.* Many of the provisions of the Companies Act 1981, relating to “corporations” give functions to the Commission, or to the Minister or the Ministerial Council. It is a question whether these functions should be left where they are put by the Companies Act, or given to the Registrar or to the Minister administering the scheme.

5.8 Pre-Incorporation contracts. Difficult questions arise where a corporation is created and, before its creation, a contract has been made on its behalf, or an attempt has been made to make a contract in the name of the corporation. The corporation does not become a party to the contract on its creation, and it cannot ratify the contract. Those affecting to act for the non-existent corporation may themselves be held liable as parties to the contract, or may be liable in damages on a warranty of authority. [102] The law is unsatisfactory and statutory reforms have been made in a number of common law countries. [103]

5.9 A notable recent instance appears in section 14 of the Canada Business Corporations Act of 1975:

“(1) Except as provided in this section, a person who enters into a written contract in the name of or on behalf of a corporation before it comes into existence is personally bound by the contract and is entitled to the benefits thereof.

(2) A corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt a written contract made before it came into existence in its name or on its behalf, and upon such adoption,

(a) the corporation is bound by the contract and is entitled to the benefits thereof as if the corporation had been in existence at the date of the contract and had been a party thereto; and

(b) a person who purported to act in the name of or on behalf of the corporation ceases, except as provided in subsection (3), to be bound by or entitled to the benefits of the contract.

(3) Except as provided in subsection (4), whether or not a written contract made before the coming into existence of a corporation is adopted by the corporation, a party to the contract may apply to a court for an order fixing obligations under the contract as joint or joint and several or apportioning liability between or among the corporation and a person who purported to act in the name of or on behalf of the corporation and upon which application the court may make any order it thinks fit.

(4) If expressly so provided in the written contract, a person who purported to act in the name of or on behalf of the corporation before it came into existence is not in any event bound by the contract or entitled to the benefits thereof.”

5.10 The problem is attacked by section 81 of the Companies Act 1981. One approach for us would be to recommend the adoption of similar provisions, a mere verbal adaptation applying to incorporated associations provisions otherwise following the language of section 81. We might do so on the basis that section 81 must have had the recent and expert consideration of those responsible for the adoption of section 81. We do not so recommend because it seems to us that section 81 has unnecessary limitations as regards the transactions to which it

applies, that the section has difficulties of interpretation, and that the length of section 81 raises the question whether the difficulties of the common law might be met more simply.

5.11 Yet we do not offer an alternative form of legislation. We refrain from doing so because we think that it would be inappropriate to recommend a departure from what has so recently been adopted in section 81, because the Government may think it better for the sake of uniformity of laws within the State to adopt something like section 81 for incorporated associations, and because the problems are likely to be much less frequent in the case of incorporated associations than they are in the case of companies.

5.12 We have said that it seems to us that section 81 does not extend to an important class of pre-incorporation contract. Consider the contract in *Black v. Smallwood.* [104] The contract there was executed on the part of the non-existent company by writing the name of the non-existent company with a subscription of the signatures of two persons described as directors. That manner of execution falls within section 81(1)(a)(i), "a person executing a contract in the name of a company, where no such company exists".

5.13 But suppose that the contract was executed in another common way, in the form: The common seal of XYZ Limited was hereunto affixed in the presence of-(Seal).

(Signed)-John Doe, Director.

(Signed)-Richard Roe, Director.

(Signed)-Henry Styles, Secretary.

If what appears from the document is all that is known would any one have executed the contract in the name of the company? Not Messrs Doe, Roe and Styles: they signed merely as attesting witnesses. Not the persons who authorized the affixing of the seal, for they do not appear to have done anything by way of executing the contract. Not, surely, whoever it was, a junior clerk perhaps, who performed the ministerial act of applying the impression of the seal. The case seems to stand outside the section.

5.14 Section 81 (1) (a) (i), by its words "executing a contract", appears to be confined to a contract in writing. One can hardly speak of the "execution" (in the sense of making) an oral contract. Perhaps even a contract made by an exchange of letters of offer and acceptance is not properly described as "executed" by any one.

5.15 It is a question whether section 81 ought to be, as it is, confined to contracts, as distinct from other consensual transactions with legal consequence. It might well be extended to embrace any act of a kind which, when done by a person as agent, might be ratified by the principal. Instances are an assignment of property, a grant of a licence and an appointment of an agent.

5.16 Insolvency or fraud: liability of officer. Provisions like those of sections 556 and 557 of the Companies Act 1981, should be adopted.

5.17 Transfer of registration. We note again the question of provisions for the transfer of registration from the Companies Act to our recommended scheme and between the Co-operation Act and the scheme. [105]

FOOTNOTES

99. We have explained earlier the special sense in which we use "Bill".

100. Compare the Companies Act 1981, ss. 570, 571, 572.

101. As defined in section 5 (1) of the Companies Act 1981 with reference to the Australian Capital Territory, "corporation" includes a company, but also includes any other corporation, subject to specific exceptions. The only relevant exceptions are of bodies registered under the Co-operation Societies Ordinance 1939 or incorporated under the Associations Incorporation Ordinance 1953. For New South Wales, the definition of "corporation" in section 5 (1) of the Companies Act, 1961, excludes a body registered under the Co-operation Act, 1923, or the Permanent Building Societies Act, 1967.

101. *Black v. Smallwood* (1966) 117 CLR 52.

103. See generally Gross: Pre-Incorporation Contracts (1971) 87 LQR 367.

104. (1966) 117 CLR 52.

105. See paragraphs 3.63-3.64 above.

6. Notes on the Draft Bill

6.1 Introduction. In this chapter we deal with a miscellany of matters of detail arising on the draft Bill. In respect of many of the provisions it has not seemed useful to add to the discussion in earlier chapters and the references to comparable legislation at the foot of provisions of the draft Bill.
6.2 Draft section 6-Special decision. In the draft Bill, a special decision is generally comparable with a special resolution in the case of a company. A special decision is required for the adoption of a plan of incorporation by an unincorporated association. [106] Once an incorporated association has been created, a special decision is required for-

(i) change of name; [107]

(ii) alteration of rules; [108]

(iii) adoption of plan of amalgamation; [109]

(iv) adoption of plan of registration as a company; [110]

(v) decision for a winding up by the Court for or a voluntary winding up; [111]

(vi) matters arising in a winding up, under modifications of the Companies Act 1981. [112]

6.3 Primarily it would be a matter for an association or an incorporated association to say in its rules how a special decision should be made. [113] It is to be expected that commonly something like the special resolution of a company would be required. But an association may prefer some other arrangement. An association or an incorporated association might, for example, provide some way other than a meeting of getting the views of members, or on some or all matters requiring a special decision the power might be given to persons who are not members.

6.4 Where the rules do not provide a means for making a special decision on the matter in question, but do provide a means for altering the objects, a decision made by the latter means is a special decision. [114] Draft section 6 (1) (c) is designed to meet the case where different objects have different means of alteration. Thus an association may have as one object the promotion of a specified religious doctrine and as another object the relief of poverty. The first object may be alterable only in a way requiring the consent of a church authority, the second may be alterable by way of special resolution of members. The intention of draft section 6 (1) (c) is that, in the absence of other provision, a decision made in either of those ways would count as a special decision.

6.5 Failing the above, a special decision might be made by a form of special resolution. This special resolution differs from the special resolution under the Companies Act in that a meeting of members is not essential, and in that the Registrar is authorized to settle a scheme for obtaining the special resolution. [115]

6.6 The means of reaching a special decision discussed in paragraphs 6.4 and 6.5 should not be needed in the case of an incorporated association because, as mentioned above, the rules must deal with the manner of making a special decision. But they would cover oversights in the rules of an incorporated association. There is more likelihood of their use in the case of unincorporated associations adopting a plan of incorporation.

6.7 Yet another means of reaching a special decision may be provided by a scheme settled by the Registrar in cases where it is impossible or impracticable to follow the rules. [116]

6.8 In each of the cases where the Registrar may settle a scheme, he may afterwards approve a manner of teaching a special decision, even though there is a departure from the scheme. [117] These provisions are intended to save a special decision from being invalidated by reason of some insubstantial departure from the scheme. There is a further more general power to disregard defects of form or procedure. [118]

6.9 The security of a special decision is further supported by provisions for a certificate by the Registrar. [119] There is no need for the certificate in the ordinary course, but if any one interested thinks that the special decision may be attacked, on good grounds or bad, he can get the certificate, and the certificate is made conclusive of the validity of the special decision, subject only to appeal to the Supreme Court. We contemplate that regulations under the draft Bill would fix a time limit for an appeal.

6.10 Draft section 10-Committee pending incorporation. The plan of incorporation must appoint a committee to be the committee for the purpose of obtaining incorporation and to be the first committee of the incorporated association. [121] The committee may consist of one or more members. [122]

6.11 Why require the appointment of a committee for the purpose of obtaining incorporation? The reasons are that there may be something wrong with the arrangements in the plan of incorporation, and that provision must be made for appointing and removing a public officer for the purpose of the application for incorporating. To require a further special decision to deal with such matters may be to cause trouble, expense and delay. A committee, as a small responsible body, is appropriate to deal with these matters. [123]

6.12 Draft section 11-Public officer for obtaining incorporation. The public officer is the person to apply to the Registrar and to deal with minor matters relating to the application. [124] It is better to leave the appointment to the committee rather than require it to be made in the plan of incorporation because the duties of the public officer are of a minor and ministerial character, and because occasion may arise for removal and for filling of vacancies.

6.13 Draft section 13 (2)-No appeal on grant of incorporation. Draft section 13 (2) should be read with draft sections 3, 8 (6) and 39. Put together, the provisions are intended to make the fact of incorporation incontrovertible. In this the draft Bill follows the Companies Act 1981. [125] The intention is, indeed, to go further than the Companies Act (or at least former Companies Acts) as regards a body not eligible to be incorporated under the draft Bill, and as regards excluding the possibility of proceedings by the Crown for quashing or terminating the incorporation. [126]

6.14 It is a strong thing to make the fact of incorporation incontrovertible. The justification is no less strong. In 1867 Lord Cairns said of the Companies Act, 1862 (UK):

> ". . . when once the memorandum is registered, and the company is held out to the world as a company undertaking business, willing to receive shareholders, and ready to contract engagements, then it would be of most disastrous consequence if, after all that had been done, any person was allowed to go back and enter into an examination (it might be years after the company had commenced trade) of the circumstances attending the original registration, and the regularity of the execution of the document originally received by the Registrar. The Registrar, if he performs his duty carefully, will be the guardian of the public interest, by seeing that the memorandum is properly executed and properly brought for registration; but, whether he does so or not, when once the certificate of incorporation is given, nothing is to be inquired into as to the regularity of the prior proceedings." [127]

6.15 The conclusiveness of the certificate is limited to three things, the fact of incorporation, the date of incorporation and the name. [128] A consequence of the incorporation of an unincorporated association is that members of the unincorporated association become members of the incorporated association. [129] But the more substantial matters, the transfer of property, rights and liabilities, do not depend on mere incorporation. They depend on a further certificate of succession, and the latter certificate is open to review on appeal. [130]

6.16 Further, the fact that incorporation was obtained by fraud or mistake, and the fact that the incorporated association, if not incorporated, would not be eligible for incorporation, are grounds for winding up by the Court or by the Registrar. [131]

6.17 Finally, it is only the Registrar's decision to grant incorporation, expressed in the certificate of incorporation, which is put beyond controversy. The Registrar's decision to refuse incorporation is open to appeal by any person aggrieved, and the Registrar must give reasons for his decision. [132]

6.18 Draft section 17-Certificate of succession. Where an incorporated association is constituted by incorporation of an unincorporated association, as distinct from formation de novo, consequences follow in the shape of transfer of property, rights and liabilities to the incorporated association. It should not be necessary for the incorporated association or persons dealing with it to investigate the manner in which the incorporated association came into existence, including, for example, the validity of a resolution of members of the unincorporated association. The draft section therefore authorizes the issue of a certificate to establish the fact.

6.19 In some cases, perhaps in many cases, the affairs of the unincorporated association will be so simple that there is no need for the certificate. Therefore the Registrar is required to make a certificate and issue a copy only where someone applies for it. [133]

6.20 The general right of appeal against things done by the Registrar given to any person aggrieved is restricted, in the case of a certificate of succession, to the incorporated association and persons who were members of the unincorporated association immediately before the incorporation and their legal personal representatives. [134] It would not be right to give strangers an opportunity to question a matter arising between the unincorporated association or its members and the incorporated association.

6.21 The relief from stamp duty in draft section 17 (8) is justified because the instruments in question are brought into existence merely for the purpose of putting right the consequences of a certificate which, in the view of the Court, the Registrar, a public official, should not have made.

6.22 Draft section 18 and Schedule 2 clauses 1, 2-Vesting of property, etc., on incorporation. We have considered a number of precedents in New South Wales Acts. [135] But the possibilities in relation to associations are so numerous and diverse that the precedents do not seem appropriate for adoption.

6.23 Schedule 2 clause I gives an expanded meaning for the expression "if the association continued unincorporated". It is no doubt dangerous to legislate by reference to an untrue state of fact. But here the advice is useful for several purposes. For example, it aids dealing with the problem of a cause of action based on a negligent act before incorporation but causing damage after incorporation. [136] And the device aids dealing with a gift to the association by the will of a person dying after incorporation. [137]

6.24 Schedule 2 clause 2 deals with the vesting of property generally. "Property" is defined very broadly, by language found also in the Conveyancing Act, 1919, and the Stamp Duties Act, 1920. [138]

6.25 Schedule 2 clause 2 (1) speaks generally of "property of the association". It speaks in language more appropriate to the ordinary understanding of the nature of an association than to the legal concept of an association as no more than the aggregate of its members. It should, however, state the general rule in terms comprehensible to the layman.

6.26 It is of some importance to note that clause 2 vests in the incorporated association property of the unincorporated association or its members, nothing more. Thus if A holds land under a legal title but on trust for the association, what vests in the incorporated association is the interest of the association under the trust, not the legal title to the land.

6.27 There is another aspect of the same proposition. If, in the example given, the title of A to the land is subject to a leasehold interest, or a mortgage, or a restriction arising under a covenant, those interests are the property of other people and are a diminution of the property of A as trustee and of the association as beneficiary under the trust. It is only the property of the association, so diminished, that would vest in the incorporated association.

6.28 Schedule 2 clause 2 (2) speaks in language consonant with the lawyers' idea of an association.

6.29 We have already given one example of the operation of clause 2 (3), the case of the gift by will to the association where the testator dies after incorporation. For another example, we pursue the case where A holds land upon trust for the association. Suppose that X's negligent act before incorporation causes damage to the land after incorporation. A has a cause of action for damages. If the association had continued unincorporated he would hold it on trust for the incorporated association.

6.30 Clauses 2 (5) and (6), are concerned with the rules against perpetuities. One possibility in the eye of the law where property is given to be held on trust for the association is that the beneficiaries are the members of the association from time to time indefinitely into the future. Such a gift fails under the rules against perpetuities. It fails not only as regards persons who become members at a time outside the perpetuity period, but also as regards all present and future members, because the quantum of their interests would grow or shrink by reference to the number of members from time to time.

6.31 Apart from the rules against perpetuities, the effect of clause 2 (3) would be that every possible interest of members (of the hypothetically continuing association) would vest in the incorporated association as soon as the interest arose. In sum, all these interests would equal the totality of the beneficial interest in the property given on trust for the association. The case does not offend the policy of the rules against perpetuities. Hence clause 2 (5).

6.32 Another device sometimes found in legislation for similar purposes is a provision that in any instrument a reference to the association is to be read as a reference to the incorporated association. [139] It seems to us that the device may lead to difficulty. While it may solve the perpetuity problem just mentioned, and it does not call for the hypothetical continuance of the association unincorporated, such a provision operates very much in the dark. Who can say what would be the effect on the infinite number of possible instruments? What, for example, of an instrument which purports to convey land to an association? At the outset the conveyance is void, because the grantee is a fluctuating and indefinite group of persons. Suppose then that the association afterwards becomes incorporated. Will the conveyance be validated? If so from what date and with what consequence as regards the interim? Such a provision may raise as many problems as it solves.

6.33 If, before incorporation, a disposition is void for remoteness, those entitled in consequence of the voidness should be secure in their title to the property. In particular, their title should not be liable to defeat by the future uncertain event of the association becoming incorporated. Hence clause 2 (6).

6.34 Schedule 2 clause 2 (7) deals with pending legal proceedings. On the principle of some comparable legislation, pending proceedings by the association or by a person for or on behalf of an association would become proceedings by the incorporated association. [140] But the legislation leaves questions unresolved. For example, does the former plaintiff or applicant cease to be a plaintiff or applicant? And what about pleadings and admissions by the former plaintiff or applicant: would they bind the incorporated association?

6.35 No doubt some of the problems, if anticipated, could be dealt with by rules of court. But problems may not be anticipated, and rules of court may not be made. And some problems may be beyond the reach of rules of court: for example, the former plaintiff or applicant may have had a cause of action which is not vested in the incorporated association. We prefer the simpler course taken by clause 2 (7). Pending proceedings are not disturbed, but property of the incorporated association recovered in the proceedings is to be held on trust for the incorporated association.

6.36 Schedule 2 clause 2 (8) is concerned with property devoted to a purpose. The subclause does not attempt to make valid a trust for a purpose which fails through one of the common infirmities of a trust for a purpose, for example, uncertainty, or indefinite duration.

6.37 Schedule 2 clause 2 (9) is based on precedents in New South Wales. [141]

6.38 Schedule 2 clause 2(10) is concerned with payments, etc., without notice of the vesting-Compare the effect of notice of an equitable assignment or of an assignment under section 12 of the Conveyancing Act. The debtor, etc., should not be damnified by a vesting of which he does not have notice.

6.39 Draft Schedule 2 clause 3-Power of appointment, etc. In a sense, in the context of clause 2 (1)-(3), clause 3 is unnecessary. Thus if there was a power to appoint property amongst associations A, B and C, and association A became Association A Incorporated, an appointment to association A would enure for the benefit of Association A Incorporated. But if the appointor knew of the incorporation such an appointment would be artificial. And it would still be a question whether an appointment directly to Association A Incorporated would be within the power.

6.40 Draft Schedule 2 clause 4-Power of officer. We give an example of the operation of the clause. A trustee of land of the association may have granted a lease. The lease may say that the leasehold term is liable to forfeiture if the term is assigned without the consent of the president for the time being of the association. Clause 4 is intended to put the incorporated association in the place of the president of the association. By whom in the name of the incorporated association the power might be exercised would be a matter for the rules of the incorporated association and things done under the rules.

6.41 Draft Schedule 2 clause 5-Duty to account. Part of the effect of clause 5 may be implicit in clause 2, but is better to make it explicit. A person receiving money or other property of the association, or expending money or otherwise disposing of property of the association, would in general have a duty to account to the association, including a duty to pay over or deliver what money or other property of the association is or ought to be in his hands. These duties should enure for the benefit of the incorporated association.

6.42 Draft Schedule 2 clause 6-Liability. The general effect of subclauses (1) to (3) will be evident from their terms.

6.43 An important instance of a liability of an association or of its members is a prima facie liability (to the extent of the assets of the association) to indemnify a member of a committee or other officer in respect of a liability incurred by the member or other officer while acting under the authority of the rules or under an authority given pursuant to the rules. Thus where the officer, being duly authorized, pledges his own credit, or pays his own money, to buy

goods for the use of the association, he is, prima facie, entitled, as against members, to an indemnity out of the assets of the association. [142] This liability to indemnify should be imposed on the incorporated association.

6.44 We give an instance of the operation of clause 6 (3). An officer of the association, acting within his authority, does a negligent act. After incorporation, the negligent act causes damage and a cause of action accrues against the officer. Clause 6 (3) would make the incorporated association liable to indemnify the officer.

6.45 Clause 6 (2) closes with a reference to the Limitation Act, 1969. The intention is that the Limitation Act should apply to a derivative liability imposed on the incorporated association with the same result as that Act would have on the liability of the association or its members. Thus if a liability of members of the association would become statute barred on a particular date, the derivative liability of the incorporated association would become statute barred on the same date.

6.46 Clause 6 (3) does not require any reference to the Limitation Act, 1969: the liability incurred by the incorporated association is incurred on the date on which the hypothetical liability of the association or its members would have been incurred.

6.47 The converse case, of the benefit of a debt or chose in action vesting in the incorporated association by clause 2 (1), (2), does not require any reference to the Limitation Act. This is because that Act fixes limitation periods by reference either to the date on which the cause of action accrues to the plaintiff *or to a person through whom he claims* or to a date fixed otherwise than by reference to the accrual of the cause of action. [143]

6.48 The effect of clause 6 (4) will be evident from its terms. It is right to preserve the original liability because a person contracting with an officer may have been content to give credit to the officer without concerning himself with the question how far the assets of the association were sufficient to meet the claims of himself and other creditors.

6.49 Clause 6 (5) is concerned with the liability of members to contribute in a winding up. [144]

6.50 Draft Schedule 2 clause 7-Title by registration. The clause is intended to maintain the integrity of the register under the Real Property Act, 1900, and other registers.

6.51 It must be borne in mind that, under the scheme of clause 2, a vesting of a legal title to land would be a very uncommon thing. It would only occur where an association, or its members collectively, held land by a legal title. Such a state of affairs is hardly conceivable except in the case of an association having very few members and not contemplating frequent changes of membership. In the more common case, where the legal title to land is held by a person upon trust for the association or its members, clause 2 would leave the legal title in the trustee, but vest the beneficial interest in the incorporated association. The natural course would be for the incorporated association to call for a transfer of the legal title. The ordinary law provides a means for compelling the trustee to transfer or for obtaining a vesting order. It is better to leave these things to the ordinary law so that incidental matters can be dealt with. For example, the trustee may have a lien for expenditure in respect of the trust property, or for his own remuneration.

6.52 The clause does not adopt devices such as those in section 134B (4), (5), now repealed, of the Liquor Act, 1912, dealing with the vesting of property on the incorporation of a club. Those subsections were dealing with associations of a known character, associations already closely regulated by the Liquor Act. But the associations which are our concern may be very diverse in their arrangements for holding property.

6.53 We think that the better course is to rely on the ordinary law. If necessary parties to a transfer cannot be found or refuse to join in a transfer, there are remedies in the Equity

Division of the Supreme Court. One such remedy is a vesting order under sections 71 and following of the Trustee Act, 1925. A vesting order would be an example of "an instrument appropriate to give effect to the vesting" within the meaning of the draft clause 7 (a).

6.54 Draft Schedule 2 clause 8-Relief against forfeiture. The clause intrudes on private rights. It is, however, consistent with the idea of the continuance of the existing association in the new form of a corporation.

6.55 Draft Schedule 2 clause 9-Stamp duty. The clause has a precedent in the Co-operation (Amendment) Act, 1981, Schedule 2, clause 7 (3). The clause can be justified on the grounds that where an existing association is incorporated what happens in substance is that a continuing organization is merely given a new legal form, and that the incorporation is as much for the advantage of the community generally as it is for the association and its members.

6.56 Draft section 21-Name. The Government may see fit to link the provisions relating to the name of an incorporated association to the provisions of the Companies Act, 1981, relating to the reservation of a name of a company. [145]

6.57 Draft section 22-Powers. A corporation created by statute has power to do only such things as are directed to the pursuit of its objects. An attempt to do anything else is *ultra vires* and void. Such is the position unless other provision is made by statute. The doctrine of *ultra wires,* that is, the doctrine stated in the first two sentences of this paragraph, is now generally condemned. Amongst its worst consequences is the harm suffered by strangers dealing with the corporation, where the corporation can treat its own contract as void. [146]

6.58 The doctrine being generally condemned, legislative measures have been taken against it, both in New South Wales and elsewhere. The first general legislative measure in New South Wales was taken in section 20 of the Companies Act, 1961, a provision substantially reproduced in section 68 of the Companies Act 1981. We shall consider the measure by reference to the latter section.

6.59 Section 68 (1), stripped to essentials, says that an act of a company is not invalid by reason only that the company lacks capacity or power to do the act. The subsection thus takes the curious course of giving a statutory acknowledgement of the continuing existence of the doctrine of *ultra vires* and then of taking away the consequences of the doctrine. The more direct way would be to abolish the doctrine, the way taken by the Canada Business Corporations Act of 1975 to which we come below.

6.60 Section 68 (2) again legislates on the assumed continued existence of the doctrine of *ultra vires.* The subsection forbids the assertion or reliance on a lack of corporate capacity or power except in proceedings of specified kinds. It goes some way to support, or repeat, the substance of section 68 (1), in that it does not specify proceedings for relief arising out of the avoidance of a transaction under the doctrine of *ultra vires.*

6.61 In one respect section 68 (2) is too restrictive. In proceedings for winding up by the Court, it permits reliance on a lack of corporate capacity or power only where the Corporate Affairs Commission is the applicant (or one of the applicants) for the winding up order. There is no reason why such a lack of corporate capacity or power should not be asserted in proceedings for. a winding up on the just and equitable ground. But the Commission is not a competent applicant on that ground. [147]

6.62 Section 68 (3) of the Companies Act 1981, gives the Court power to set aside a contract where the *ultra vires* act is being done or is to be done pursuant to the contract. Save that the Court is not to do so unless the Court deems it just and equitable, the power appears to be a strong one against a stranger contracting with the company without knowledge of the lack of

corporate capacity or power. Perhaps the subsection acts on the view that the stranger has constructive notice of the contents of the company's memorandum of association. [148]

6.63 The treatment by the Companies Act 1981, of the doctrine of *ultra vires* has another feature. A consequence of the doctrine was that the memoranda of association of companies came to be expressed with prolixity with respect to the objects of the company. The statement of objects embraced a lengthy statement of powers, in addition to objects properly so called. In an attempt to encourage the promoters of companies to keep the statement of object within due limits, common provisions were put in the Companies Acts. In the Companies Act 1981, these provisions appear in Schedule 2. In the official print of the Act Schedule 2 takes up nearly 2 pages of close print.

6.64 To follow the precedent of the Companies Act would be to adopt a great mass of verbiage, some of it questionable in policy.

6.65 The Interpretation Act, 1897, deals generally with the powers of statutory corporations. A statutory corporation-

> (i) may, for the purposes for which it is constituted, purchase, exchange, take on lease, hold, dispose of and otherwise deal with property; and
>
> (ii) may do and suffer all other things that bodies corporate generally may, by law, do and suffer and that are necessary for or incidental to the purposes for which it is constituted. 149

Each limb of these powers is restricted by reference to the purposes for which the corporation is constituted. Thus the provisions are not concerned with doing away with the doctrine of *ultra vires* or its consequences.

6.66 The Canada Business Corporations Act of 1975 deals thus with the doctrine of *ultra vires*

> "15. (1) A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person."
>
> "16. . . .
>
> (2) A corporation shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor shall the corporation excercise any of its powers in a manner contrary to its articles.
>
> (3) No act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer contrary to its articles or this Act." [150]

6.67 This Canadian provision leads us to deal with the doctrine with similar brevity. But we have some comments. We make these comments with diffidence, and in consciousness of the dangers of attempting to assess the effect of legislation in a place with whose laws we are not familiar.

6.68 Section 15 (1) of the Canadian Act gives to a corporation the capacity of a natural person without any qualification. Yet it gives to a corporation the powers of a natural person only "subject to this Act". To many lawyers in New South Wales the distinction of this context between capacity and powers would, we think, be a fine one, and the distinction is one which may lead to trouble. We would speak of power but not of capacity.

6.69 In enacting that a corporation has the powers of a natural person the Canadian Act, read literally, may appear to go beyond the possibilities of effective legislation. It may, for example, import to the literal reader that a corporation has power to marry, or to make a will.

6.70 Further on section 15 (1), we are not aware of any special problems in New South Wales relating to the rights and privileges of corporations.

6.71 In the light of these considerations, we therefore recommend an enactment in the terms of section 22 of the draft Bill.

6.72 We turn to section 16 (2) of the Canadian Act. It prohibits a corporation from carrying on a business or exercising a power in a manner contrary to its articles of incorporation." [151] Given that some exercise of a power is in a manner contrary to the articles, section 16 (2) thus makes the same exercise contrary also to the Act. Unqualified, an enactment in those terms in New South Wales would have at least three possible consequences. One is a criminal liability in case of breach.[152] A second is the avoidance of a contract or other transaction made in breach. A third possible consequence is the availability of an injunction to restrain a breach.[153] The second of these possible consequences is taken away by section 16 (3) of the Canadian Act. In the absence of section 16 (3), the abolition of the doctrine of *ultra vires* by section 16 (1) might have been replaced by a doctrine of comparable effect, the doctrine of the avoidance of transactions made illegal by statute.

6.73 We respectfully agree with the policy of section 16 (3). We think it a strong thing, however, to apply a criminal sanction to a breach of a corporation's articles, as sections 16 (2) and 244 appear to do.

6.74 Amongst the possible consequences we have mentioned of the Canadian section 16 (2), we think that the power to restrain by injunction something done or intended to be done in breach of the articles should in substance be adopted here. In the scheme of the draft Bill, that should take the form of legislating for a power in the Court to restrain an act not in pursuit of the objects of the incorporated association. [154]

6.75 Draft section 24-Rules generally. Draft section 24 (3) differs from section 78 (1) of the Companies Act 1981, in that covenants are imputed to the incorporated association as well as to the members. [155]

6.76 Draft section 24 (4) is based on section 18 (a) of the Canada Business Corporations Act. Section 18 (a) is as follows-

"18. A corporation or a guarantor of an obligation of the corporation may not assert against a person dealing with the corporation or with any person who has acquired rights from the corporation that

> (a) the articles . . . have not been complied with, except where the person has or ought to have by virtue of his position with or relationship to the corporation knowledge to the contrary."

6.77 Draft section 24 (4) differs from the Canadian section 18 (a) in two ways. First, we have altered the expression in ways which may help a reader in New South Wales more easily to gather the import of the subsection. [156] Second, at the end of the provision we omit, in respect of a person who ought to have knowledge, the confinement in the Canadian section to specified circumstances.

6.78 Draft section 27-Committee. Draft section 27 (3) is necessary because the committee need not be the governing body and the rules of the incorporated association may not give to the committee powers sufficient to enable it to perform their duties.

6.79 Draft section 28-Public officer. On the address for service, provision is made for two things. The "proper place for service" is a place where documents may be left during ordinary business hours.

It is a place for service by delivery. It might be, for example, the office or residence of the public officer or a box at a document exchange, if the document exchange permitted the public generally to leave documents there for him. [157]

6.80 The other address for service is a proper address for service by post. It might be the postal address of the office or residence of the public officer, or it might be a post office box. [158]

6.81 Either of these places or addresses for service would have to be in New South Wales unless the regulations permitted an address in a place outside New South Wales. Wodonga, Mildura and Coolan-gatta, for example, might be permitted by the regulations. [159]

6.82 Draft section 29-Gain to members. The definitions in draft section 29 (7) of "pecuniary gain" and "private member" are complex and call for discussion. The first point to note is that the definitions speak of an "association" and a "corporation". "Association" means an unincorporated association. "Corporation" means any corporation, including not only an incorporated association but also, for example, a company under the Companies Act and a co-operative society under the Co-operation Act, 1923. The significance of these words of extensive meaning will appear in our discussion below of "private member".

6.83 The forms of gain specified in the subparagraphs of draft subsection (7) (a) are forms of gain which in our view should not take away the non-profit character of an incorporated association, or any other corporation, or an unincorporated association. Similar forms of gain are excepted by the legislation of other places. There is an important qualification at the end of draft section 7 (a): a gain of a kind specified in any of the subparagraphs is not to be disregarded unless it occurs "in or in consequence of the pursuit by the association or corporation in good faith of its objects". For example, a disposal of assets amongst members by a sham lottery would not be disregarded.

6.84 Draft section 29 (8) is intended to meet the case where the objects of an association or corporation extend to the provision of gain to private members. To the extent that the objects do so extend, the objects are to be disregarded in applying the closing words of subsection (7) (a). Subsection (8) uses 4 6 gain in money or money's worth" instead of "pecuniary gain" so as to escape introducing a circularity into subsection (7) (a).

6.85 Draft section 29 (7) (b) defines "private member". The intention is that, however complex the arrangements may be amongst associations, corporations, trustees for charity or for associations or corporations, and other persons, so long as there is no person who is to get a pecuniary gain for his own purposes by virtue of membership, draft section 29 will not be infringed. Suppose, for example, that an incorporated association (A Incorporated) has for its members a company (B Limited), a trustee for a charitable purpose (C charity trustee), an unincorporated association (D association), another person as trustee for another unincorporated association (E association trustee), and another incorporated association (F Incorporated). A Incorporated may, without breach of draft section 29, confer a pecuniary gain on any of its members, so long as each of its members itself has the requisite character of not being for the pecuniary gain of private members. And a member of A Incorporated may have that requisite character by reason of its own members having that same requisite character. And so on indefinitely.

6.86 In three places draft section 29 allows for relief from its provisions by regulation. First, by subsection (2), the regulations may dispense wholly or partly with the requirements of subsection (1), in respect of any incorporated association or class of incorporated association. We have in mind, for example, an association of blind people which runs a sheltered workshop in which members work for their own profit. It seems better to deal with cases like these by regulation, so that changes can readily be made in the light of experience.

6.87 Secondly, by subsection (7) (a) (vii) regulations may extend the kinds of gain which are not to be counted as pecuniary gain. We have in mind that further particular matters may crop up in the future which ought not to be counted as pecuniary gain, matters not worthy of attention by Parliament.

6.88 The third avenue of relief by regulation is in subsection 7 (b) (iii). It permits further exceptions to be made from the description "private member". For example, a shire council may wish to join with local welfare associations in forming an incorporated association to run a broadcasting station. [160] That council, or a class which includes that council, might be excepted by regulation.

6.89 Draft section 32-Accounts and information. Draft section 32 (2), (3), deal with the approval of the Registrar to rules relating to the lodgment of accounts and other documents. The approval is desirable for the sake of good public administration. To take an extreme case, the Registrar should be able to see to it that his records are not burdened with the lodgment each month of accounts running into hundreds of pages.

6.90 Draft section 33-Common seal. An incorporated association would be at liberty, but would not be required, to have a common seal. [161]

6.91 It seems that section 38 (II), (III), of the Interpretation Act, 1897, would apply. Section 38 (I) speaks of "a corporation constituted . . . under an Act", a description which would include an incorporated association under the present scheme. Subsections (II) and (III) are as follows-

> "(II) The common seal of a corporation so constituted shall be kept by the president, chairman or other principal officer of the corporation and shall only be affixed to an instrument or document in the presence of at least two members of the corporation with an attestation by the signatures of those members of the fact and date of the affixing of the seal.
>
> (III) All courts and persons acting judicially-
>
> > (a) shall take judicial notice of the seal of a corporation so constituted that has been affixed to any instrument or document; and
> >
> > (b) shall until the contrary is proved presume that the seal was properly affixed."

6.92 Draft section 37-Service. The draft section facilitates service on the public officer and service on the incorporated association. A person appointed to be public officer can cease to be public officer only in one of three ways. They are, lodgment with the Registrar of notice of his resignation, lodgment with the Registrar of notices of his removal and appointment of a successor, and the death of the public officer. [162] Thus, except in the case of some fraud or mistake leading to a false notice of appointment being lodged, and except in the case of death, the documents lodged with the Registrar will show accurately who is public officer.

6.93 The draft section puts the risk of defective documents being lodged with the Registrar on the incorporated association rather than on the person on whose behalf service is effected, unless the latter knows or ought to know of any relevant fraud or mistake. [163] So also in the case where the public officer has died and notice of his death has not been lodged with the Registrar, service is good as against the incorporated association unless the person effecting service, or the person on whose behalf service is effected, knows of the death. [164]

6.94 Draft section 37 (2) (c), (3) (c), provide that service may be effected in such manner as the Registrar may direct. The provisions are inspired by section 170 (1) (d) of the Conveyancing Act, 1919, but the power of direction is given to the Registrar rather than to the Court.

6.95 Draft section 36 (2) (d), (3) (d), leave room for service in accordance with the general law, for example by personal delivery to the public officer, and for service in accordance with particular rules for service, such as rules about substituted service, and service on corporations generally. [165]

6.96 Draft section 38-Constructive notice. A stranger dealing with a company is affected with notice of what is contained in its memorandum and articles of association. [166] The foundation of the rule is the fact that these documents are open to public inspection at the Corporate Affairs Commission. The rule does not accord with the way business is carried on: it is by no means a universal practice for a stranger dealing with a company to read its memorandum and articles of association so as to ascertain the objects and powers of the company, and the powers which might be given to directors and other officers. The rule is a trap for a stranger dealing with a company and it has been widely condemned. [167]

6.97 It is to be expected that, in the absence of something like draft section 38, a like rule would be applied to an incorporated association. [168] We think that it should not apply. Draft section 38 is taken without change in substance from section 17 of the Canada Business Corporations Act of 1975.

6.98 Draft sections 44-48-Amalgamation. The arrangements for original incorporation in draft sections 9-15 are adapted to the case of amalgamation. Creditors have a means of protection in draft section 48.

6.99 The Registrar must issue a certificate of incorporation of the new association and that certificate is given a degree of finality equal to that of a certificate of incorporation given on the original incorporation of an association. [169]

6.100 There is provision for a certificate of amalgamation in addition to the certificate of incorporation. The certificate of amalgamation is concerned with transitory matters comparable with those the concern of the certificate of succession under draft section 17. It is given an evidentiary effect, and is subject to a limited right of appeal, in like manner. [170]

6.101 The question of succession to property and liabilities on amalgamation is dealt with by continuing the legal personalities of the existing associations in the new association. [171] This device enables the question to be dealt with briefly.

6.102 Draft sections 52-64-Registration as a company. With one exception, the provisions are of a procedural character, designed to adapt an incorporated association to the scheme of the Companies Act, but with safeguards for members and creditors. The exception is the power given to the Minister to direct an incorporated association to become registered as a company, under pain of winding up. The matter is discussed above. [172]

6.103 In framing provisions to adapt an incorporated association to the scheme of the Companies Act, we have been led to adopt some language which may appear incongruous in its context of the draft Bill. We refer particularly to the statement of the incidents of incorporation in draft section 60 (1) (d)-(e) and the statement in draft section 59 (1) (a) of objects of a company wishing to omit “Limited” from its name. It has, however, seemed better not to depart from the language of the Companies Act for corporations to be regulated by that Act.

6.104 It would, we think, be uncommon that an incorporated association becoming registered as a company would become anything but a company limited by guarantee and not by shares. We therefore deal briefly in draft section 61 with a company having a share capital and put some more detailed provisions in Schedule 5.

6.105 Draft sections 65-73-Winding up and dissolution. We have discussed winding up and dissolution above. [173] It remains for us to draw attention here to the liability of members

to contribute in a winding up. The provisions special to incorporated associations, as distinct from those taken in substance from the Companies Act, appear in draft section 70 (5), (6) and (7) and in draft section 71.

FOOTNOTES

106. Draft section 9 (1).

107. Draft section 21 (6).

108. Draft section 26 (1) (a).

109. Draft section 46 (1).

110. Draft section 52 (1).

111. Draft sections 67 (2) (a), 68 (1).

112. Companies Act 1981, ss. 408 (1) (a), 409 (1), 412 (1) (a).

113. Draft section 6 (1) (a), (b). The rules of an incorporated association must provide a means for making a special decision: draft section 24 (1) (b), Schedule 3 item 2.

114. Draft section 6 (1) (c).

115. Draft section 6 (1) (d), (2), (3), (5), (6).

116. Draft section 6 (1) (e), (4).

117. Draft section 6 (1) (e), (2).

118. Draft section 6 (8).

119. Draft section 6 (7), (8), (9).

120. Draft section 74. See also Supreme Court Act, 1970, s. 124 (1) (c).

121. Draft section 9 (3) (d).

122. Draft section 9 (3) (d).

123. Draft section 9 (6), 11 (1), (2).

124. Draft sections 11 (4), 12 (1), (3).

125. Companies Act 1981, ss. 537, 549.

126. See, on the first point, *Ex parte Bread Manufacturers Ltd* (1937) 37 SR 242 and, on the second point, Halsbury's Laws of England, 4th edn., Vol. 7, paragraph 81 and note 10.

127. *In re Barned's* Banking Company; *Peel's Case* (1867) L.R. 2 Ch. App. 674, 682.

128. Draft section 39.

129. Draft section 16.

130. Draft sections 17, 18.

131. Draft sections 67 (2) (f), 69 (1) (c).

132. Draft sections 13 (7), 74.

133. Draft section 17 (1), (3).

134. Draft sections 17 (4), 74.

135. Amongst the more recent is section 134B (3)-(5) of the Liquor Act, 1912, as inserted by the Liquor (Amend-ment) Act, 1969, and repealed by the Registered Clubs Act, 1976.

136. Schedule 2 clauses 2 (3), 6 (3).

137. Schedule 2 clauses 2 (3).

138. Draft section 5(1).

139. See for example section 12 (2) of the Federation of Parents and Citizens Associations of New South Wales Incorporation Act, 1976.

140. See for example the Federation of Parents and Citizens Associations of New South Wales Incorporation Act, 1976, s. 12 (3) (c).

141. See for example section 12 (1) (b) of the Federation of Parents and Citizens Associations of New South Wales Incorporation Act, 1976, and clause 7(1)(a) in Schedule 2 to the Co-operation (Amendment) Act, 1981.

142. We have found no authority directly in point on this proposition. Besides its manifest justice, the proposition is consistent with the authorities on the indemnification of directors of companies, incorporated and unincorporated, and the indemnification of partners. See Palmer's Company Law, 22nd edn., Vol. I (I 976), Paragraph 62.3 1, Lindley on Partnership, 14th cdn. (f 979), chapter 20. In the case of a non-profit association it is necessary to limit the right of indemnity to a right measured by the amount of the assets of the association: *Wise v. Perpetual Trustee Company Ltd.* (1903) A.C. 139. See also *Minniit v. Talbot* (1876) LR 1 Ir Ch. 143.

143. For examples of the first kind, see sections 14, 16, 17, 18, 20, 21, 24, 27. For examples of the second kind, see sections 14A, 15,19.

144. Draft section 70 (5), (6).

145. Companies Act 1981, ss. 38, 40-64.

146. See generally Palmer's Company Law, 22nd edn., Vol. 1 (1976), pages 83-99.

147. Companies Act 1981, s. 363 (1) (e).

148. See paragraphs 6.98-6.101 below.

149. Interpretation Act, 1897, s. 38 (1) (d), (e).

150. Canada Business Corporations Act (23-24 Eliz. 11 c.33), ss. 15 (1), 16 (2), (3).

151. The articles of incorporation appear generally to answer to the memorandum and articles of association of a company in New South Wales. There is a significant difference in that, while in New South Wales the memorandum of association must state the objects of the company, under the Canadian Act there is no requirement for a statement of the objects of a corporation, but any restrictions on the businesses that the corporation may carry on must be set out in the articles of incorporation: Canada Business Corporations Act, s. 6 (1) (f).

152. And see Canada Business Corporations Act, s. 244.

153. And see Canada Business Corporations Act, s. 240.

154. Draft section 23 (1).

155. See *Australian Coal and Shale Employees' Federation v. Smith* (1937) 38 SR 48, 55.

156. As regards "a person dealing ... with any person who has acquired rights from the corporation", the question at issue between the first person and the corporation is likely to be whether the second person has acquired rights from the corporation: if the second person has indeed acquired rights it is hard to see what work the section has to do. On another point, in the closing words, who is "the person", the person first mentioned in the opening words or the person second mentioned? Probably the person first mentioned. But then a person who has acquired property from the corporation under the protection of the section may find it unsaleable if the non-compliance becomes general knowledge. Compare the rule of equity that once the legal title to property alienated in breach of trust has got into the hands of a bona fide purchaser for value without notice, a subsequent transferee (except the trustee himself) gets a good title notwithstanding that he does not take bona fide, is not a purchaser for value, and does have notice of the breach of trust.

157. Draft section 28 (16) (a).

158. Draft section 28 (16) (b).

159. Draft section 28 (16) (a), (b).

160. Local Government Act, 1919, s. 483A.

161. Draft section 33 (1). Compare the Companies Act 1981, s. 35 (5) (c), and the Interpretation Act, 1897, s. 38 (1)

162. Draft section 28 (9)-(14).

163. Draft section 37 (1). See also draft section 28 (8) as regards a defect in appointment.

164. Draft section 37 (4).

165. See for example the Supreme Court Rules, 1970, Part 9 rules 3 (2), 10.

166. Halsbury's Laws of England, 3rd edn., Vol. 6 (1954), page 129.

167. See, for example, Gower: Modern Company Law, 3rd edn., (1969), page 98.

168. Broadlands Finance Ltd v. Gisborne Aero Club Inc. (1975) 2 N.Z.L.R. 496.

169. Draft sections 39, 47 (1).

170. Draft section 49.

171. Draft section 50, especially subsection (2).

172. Paragraphs 3.63-3.64.

173. Paragraphs 4.1-4.22.

REPORT 30 (1982) - INCORPORATION OF ASSOCIATIONS

Associations Incorporation Bill, 1981

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PART I - PRELIMINARY

Short title.

1. This Act may be cited as the “Associations Incorporation Act, 1981”.

Commencement.

2. (1) This section and section 1 shall commence on the date of assent to this Act.

(2) Except as provided in subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Act binds Crown.

3. This Act binds the Crown, not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Arrangement.

4. This Act is divided as follows:-

PART I-PRELIMINARY-ss. 1-6.

PART II-INCORPORATION-ss. 7-18.

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PART IV-INSURANCE-ss. 40-43.

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SCHEDULE 5.-COMPANY HAVING A SHARE CAPITAL.

SCHEDULE 6.-APPLICATION OF COMPANIES ACT 1981 TO WINDING UP AND DISSOLUTION.

Interpretation.

5. (1) In this Act except in so far as the context or subject-matter otherwise indicates or requires-

“address for service by post” means an address for service by post in a noticed lodged under section 28.

“amalgamation” means a course by which the members, affairs, property and liabilities of two or more incorporated associations are made members, affairs, property and liabilities of a newly formed incorporated association.

“Commission” has the meaning which it has in the Companies Act 1981.

“committee” includes a committee appointed by a plan of incorporation or by a plan of amalgamation and a committee of an incorporated association as required to be appointed by this Act.

“contributory” means-

(a) a member of an incorporated association;

(b) a person liable as a past member to contribute to the property of an incorporated association in the event of its being wound up; and

(c) before the final determination of the persons who are contributories by virtue of paragraphs (a) and (b)-a person alleged to be such a contributory.

Cth. Act No. 89, 1981, s. 5 (1).

“creditors’ voluntary winding up” has the meaning given in section 68 (8).

“existing association” means an incorporated association whose members, affairs, property and liabilities are made members, affairs, property and liabilities of a new association in the course of amalgamation.

“governing body,” in relation to an association or an incorporated association-

(a) means a body of one or more persons who, whether called president, chairman, council, directors, board of governors or of management, or committee of management, or called by some other name, have, by the rules, the general direction and governance of the affairs of the association or incorporated association, whether or not subject to control or direction by members in general meeting or otherwise; and

(b) includes a person in accordance with whose directions or instructions such a body is accustomed to act; but

(c) where there is no body (other than the committee) of the nature mentioned in paragraph (a), means the committee.

Cth. Act No. 89 1981, *s. 5* (1) "director" (b).

"internal difference" means a difference amongst any two or more of-

(a) an incorporated association; and

(b) members and officers of the incorporated association, present and past, as members or officers as the case requires, and their legal personal representatives-

relating to the affairs of the incorporated association.

"members' voluntary winding up" has the meaning given in section 68 (8).

"new association" means an incorporated association formed in the course of amalgamation.

"officer", in relation to an association or an incorporated association-

(a) includes-

(i) a member of a governing body;

(ii) a member of the committee;

(iii) the public officer;

(iv) a secretary, treasurer, executive officer or employee;

(v) a receiver of property; and

(vi) a liquidator-

of the association or incorporated association; and

(b) includes a person occupying or acting in any of those positions, whether or not validly appointed to occupy or duly authorised to act in the position.

Cth. Act No. 89, 1981, *s.* 5 (1) "director" (a).

"place for service" means a place for service in a notice lodged under section 28.

"plan of amalgamation" means a plan of amalgamation adopted under section 46.

"plan of incorporations" means a plan of incorporation adopted under section 9.

"plan of registrations" means a plan of registration adopted under section 52.

"property" includes real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest.

Act No. 6, 1919, s. 7 (1).

"Registrar" means the registrar of incorporated associations under this Act.

Act No. 1, 1924, s. 5.

"regulations" means regulations made under this Act.

“rules”, in relation to an association or an incorporated association, means rules of the association or incorporated association and, in relation to an incorporated association, where a statement of objects has been adopted by a plan of incorporation, that statement so far as the statement remains in force from time to time.

“special decision” means a decision in accordance with section 6.

(2) Where, by the rules of an association or an incorporated association, provision is made for a governing body of one or a committee of one, a person holding office as governing body of one or a committee of one is a member of the governing body or committee, as the case requires, for the purposes of this Act.

(3) For the purposes of this Act, where an incorporated association incurs a liability for damages or contribution in respect of a wrongful act or omission, the liability is contracted at the time of the wrongful act or omission.

Special decision.

6. (1) In this Act, “special decision”, in relation to an incorporated association, means, with respect to any matter for decision-

(a) where the rules provide for a decision on that matter, a decision made in accordance with that provision;

(b) where the rules provide that a decision made in a specified manner shall be a special decision for the purposes of this Act, a decision made in that manner, subject however to any provision of the rules relating to a decision on the matter in question or relating to a decision on a matter within a class which includes the matter in question;

(c) where neither of paragraphs (a) and (b) applies, but the rules provide for a decision to alter any object of the incorporated association, a decision made in accordance with that provision, whether or not the rules make other provision for a decision to alter some other object;

(d) where none of paragraphs (a) to (c) applies, a special resolution of members of the incorporated association; or

(e) where the Registrar has settled a scheme under subsection (4), a decision made in accordance with the scheme or made in a manner afterwards approved by the Registrar.

(2) For the purposes of this section, a special resolution of members of an incorporated association is a resolution passed by not less than three-quarters of the votes of the members of the incorporated association voting at a meeting of members or in a postal ballot or other procedure called and conducted in a manner which accords with a scheme settled by the Registrar under subsection (5) or in a manner afterwards approved by the Registrar.

(3) In computing the votes of members for the purposes of subsection (2), reference shall be had to the number of votes cast for and against the resolution and to any provision of the rules of the incorporated association relating to the number of votes to which each member is entitled.

Cth. Act No. 89, 1981, 9. 248 (7).

(4) Where, on application to the Registrar, it appears to him that in respect of a proposal for a special decision it is impossible or impracticable to observe a provision of the rules relating to the making of a decision having effect as a special decision by virtue of this section, he may settle a scheme for the making of the decision, as nearly as may be in accordant with the rules.

(5) The Registrar may, on application, settle a scheme for the calling and conduct of a meeting, postal ballot or other procedure for obtaining a vote of members on a special resolution, and for reporting the result.

(6) Without limiting the generality of subsections (2), (4) and (5), a scheme settled by the Registrar may include-

(a) provision for identification of members, for the purposes of a special decision or special resolution; and

(b) provision to the effect that, at a meeting at which a resolution is submitted, a declaration of the chairman that the resolution is carried is conclusive evidence of the fact, unless a poll is demanded.

(7) Where it appears to the registrar that a special decision has been made, he shall, on application by any interested person, certify accordingly, stating the terms of the special decision.

(8) The Registrar may certify as mentioned in subsection (7) notwithstanding any defect in form or procedure, where in his opinion the defect has not caused and is not likely to cause substantial injustice.

(9) A certificate of the Registrar under subsection (7) is conclusive of the fact that the special decision has been made and of the terms of the special decision, subject only to appeal under section 74.

(10) Subsections (1) to (9) apply in relation to an association as they apply in relation to an incorporated association.

PART II - INCORPORATION

Application of Part II.

7. This Part applies to the incorporation of an association under this Act.

Eligible association.

8. (1) An association of two or more persons for a lawful object is eligible for incorporation.

(2) Notwithstanding subsection (1), an association referred to below in this subsection is not eligible for incorporation-

(a) an association having a capital divided into shares or stock and held by members of the association;

(b) an association holding property in which members have a disposable interest, whether directly or in the form of shares or stock in the capital of the association or otherwise;

(c) an association registered as a trade union or as a branch of a trade union under the Trade Union Act 1881;

(d) an association registered or required or authorised to be registered under or by the Friendly Societies Act, 1912;

(e) an association formed with a view to registration under the Co-operation Act, 1923;

(f) an association having the objects mentioned in section 4 of the Credit Union Act, 1969;

(g) an association which is incorporated by or under any legislation;

(h) an association of a description prescribed.

(3) Notwithstanding subsection (1), where it appears to the Registrar in respect of an association that, by or under legislation relating specially to the association or to a class which includes the association-

(a) a governing body or trustee of property of the association is incorporated;

(b) the association may, in New South Wales or elsewhere, sue or be sued or hold property in its own name or in the name of an officer of the association; or

(c) the affairs of the association, in New South Wales or elsewhere, are specially regulated-

it is not appropriate that the association should be incorporated under this Act, the Registrar may determine that the association is not eligible for incorporation under this Act.

(4) In subsections (2) (g) and (3) “legislation” means an Act, an Act of another State of the Commonwealth, an Act of the Commonwealth, an Ordinance of a Territory of the Commonwealth, an enacted law of any other place, or a Royal Charter.

(5) In the case of an application for incorporation adopted by two or more persons under section 9 (2), subsections (3) and (4) apply as if the proposed incorporated association were an association.

(6) The incorporation of an association under this Act is valid notwithstanding that the association is not eligible for incorporation under this Act.

Plan of incorporation.

9. (1) An association may, by special decision, adopt a plan of incorporation.

(2) Two or more persons may, by instrument under their hands, adopt a plan of incorporation by way of formation of an incorporated association.

(3) A plan of incorporation must embody-

(a) a decision to apply for incorporation;

(b) where an association adopts a plan of incorporation pursuant to subsection (1), a statement of the name of the association and other particulars sufficient to identify the association;

(c) an adoption of a name, objects, and other rules for the incorporated association; and

(d) an appointment of a committee of one or more persons to be the committee for the purpose of obtaining incorporation and to be the first committee of the incorporated association.

(4) Rules may be adopted in a plan of incorporation by adopting the model rules or any of them, with or without modification, or by adopting other rules.

(5) Section 25 (4), (5), apply in relation to an adoption of model rules in a plan of incorporation.

(6) A plan of incorporation may authorise the committee, with or without restriction, to alter the plan of incorporation in respect of any of the matters mentioned in subsection (3) (b) or (c).

Committee pending incorporation.

10. (1) The plan of incorporation may adopt provision for appointment to or removal from the committee before incorporation of the association and for the proceedings of the committee before incorporation of the association.

(2) Subject to any provision made in a plan of incorporation pursuant to subsection (1), where the committee has two or more members, Schedule 1 has effect.

Public officer.

11. (1) The committee shall appoint a person to be public officer for the purpose of obtaining incorporation and to be public officer of the incorporated association.

(2) The committee may remove a public officer from office but, if it does so, shall appoint another person to be public officer.

(3) Where an application for incorporation has been lodged with ,he Registrar, an appointment or removal of a public officer does not affect ,he Registrar unless notice of the appointment or removal is lodged with the Registrar.

(4) The public officer may do all things necessary or convenient for obtaining incorporation of the association and for carrying the plan of incorporation into effect.

(5) The powers of the committee under this section cease on the incorporation of the association.

Application for incorporation.

12. (1) The public officer may lodge an application for incorporation with the Registrar.

(2) The application must be made as prescribed and must be supported by a copy of the plan of incorporation and by the documents prescribed.

(3) The public officer may, by notice lodged with the Registrar, amend an application for incorporation.

Incorporation.

13. (1) Where an application for incorporation pursuant to a plan of incorporation is lodged with the Registrar, and-

(a) the Registrar is satisfied-

(i) in the case of a plan of incorporation adopted by an association under section 9 (1), that the association is eligible for incorporation; or

(ii) in the case of a plan of incorporation adopted by two or more persons under section 9 (2), that an incorporated association formed in accordance with the plan of incorporation would, if not incorporated, be eligible for incorporation;

(b) the Registrar is satisfied-

(i) that on incorporation the rules of the incorporated association will comply with the requirements of this Act; and

(ii) that the first committee and first public officer for the incorporated association have been duly appointed; and

(c) the Registrar is not of the opinion that the name adopted by the plan of incorporation is undesirable-

the Registrar shall issue a certificate of incorporation of the association or of the proposed incorporated association, as the case requires.

(2) The issue by the Registrar of a certificate of incorporation under this section is not subject to an appeal under section 74.

(3) Subsection (1) has effect subject to subsection (5) and to sections 14 and 15.

(4) The Registrar-

(a) may act on any statement made in, or inference drawn from., an application pursuant to section 12 or any document lodged in connection with the application; and

(b) shall not be concerned to inquire into the truth of a statement so made.

(5) Subject to subsection (4), the Registrar may require further information, statements and documents relating to any matter appearing in an application pursuant to section 12 or relating to any document concerning the association lodged with the Registrar.

(6) On the issue of a certificate under subsection (1), a corporation is constituted under this Act as an incorporated association on the date of the certificate and with the name appearing in the certificate.

(7) Where the Registrar refuses to issue a certificate of incorporation under this section pursuant to a plan of incorporation, he shall give notice of the refusal, and a statement of his reasons, to the public officer.

Refusal of incorporation: pecuniary gain to private members.

14. (1) Where it appears to the Registrar that it is likely that if the association is incorporated it will infringe section 29 (1), the Registrar may refuse to incorporate the association.

(2) The Registrar is not bound to investigate the matters mentioned in subsection (1).

(3) The Registrar shall give notice of the refusal, and a statement of his reasons, to the public officer.

Refusal of incorporation: scale of activities etc.

15. (1) Where it appears to the Registrar that there are or may be grounds on which the Minister might give a direction under subsection (5), the Registrar may refer the application to the Minister.

(2) The Registrar is not bound to investigate the matters mentioned in subsection (1).

(3) The Registrar shall give notice of the reference to the public officer.

(4) A reference by the Registrar under subsection (1) is not subject to an appeal under section 74.

(5) Where the Registrar refers an application to the Minister under subsection (1), and the Minister forms the opinion that-

(a) the scale of the activities of the association after its incorporation;

(b) the value or nature of the property of the association after its incorporation; or

(c) the number or nature of the dealings with the public of the association after its incorporation,

are likely to be such that the association cannot be conveniently or properly governed by the provisions of this Act, the Minister may direct the Registrar to refuse incorporation.

(6) Where the Minister gives a direction under subsection (5), he shall give notice of the direction, and a statement of his reasons, to the public officer.

(7) Where the Minister gives a direction under subsection (5), the public officer may commence proceedings in the Court for an order setting aside the direction.

(8) In proceedings under subsection (7), the Court shall set aside the direction if, but shall not set aside the direction unless, it appears to the Court that the Minister did not have sufficient grounds to form the opinion on which the direction is based.

First members.

16. The first members of an incorporated association are-

(a) where the incorporated association is incorporated pursuant to a plan of incorporation adopted by an association by special decision, the members of the association on the date of incorporation; or

(b) where the incorporated association is incorporated pursuant to a plan of incorporation adopted by two or more persons by instru-ment under their hands, those persons.

Certificate of succession.

17. (1) Where, on application by any person, it appears to the Registrar that an incorporated association is constituted by incorporation of an unincorporated association, the Registrar shall make a certificate of succession.

(2) The certificate must state the name of the incorporated association, the name of the unincorporated association, and such other matters as are in the opinion of the Registrar necessary or convenient for the purpose ,of identifying the unincorporated association.

(3) The Registrar shall, on application by any person, issue a copy of the certificate of succession.

(4) An appeal against the making of a certificate of succession may be instituted under section 74 by the incorporated association or by a person who was a member of the unincorporated association immediately before its incorporation, or by his legal personal representative, but not by any other person.

(5) As to the fact that the incorporated association is constituted by incorporation of the unincorporated association-

(a) the certificate of succession is evidence, unless set aside on appeal; and

(b) in favour of-

(i) a person dealing with the incorporated association in good faith and for valuable consideration and without notice of any defect or error in the certificate of succession, or notice that the certificate of succession has been set aside or altered on appeal;

(ii) a person claiming under a person so dealing; and

(iii) the Registrar General, the Crown Solicitor and any other person registering or certifying title or registering any instrument-

the certificate of succession is conclusive evidence, whether or not set aside on appeal.

(6) (i) Subsection (5) (b) (i) and (ii) do not have effect where, at the time of the dealing; and

(ii) Subsection (5) (b) (iii) does not have effect where, at the time of registering or certifying the certificate of succession has been set aside on appeal and a copy of the order setting aside the certificate is available for public inspection in the office of the Registrar.

(7) Where, on appeal under section 74, the Court sets aside or alters a certificate of succession-

(a) the setting aside or alteration does not of itself affect the previous operation of the certificate;

(b) subject to subsection (5) (b), the Court may make orders for putting all interested persons as nearly as may be in the positions in which they would have been if the certificate had not been issued;

(c) a person who knows of the setting aside or alteration and has a copy of the certificate in his possession or power shall deliver the copy to the Registrar; and

Penalty: $1,000.

(d) a person who knows of the setting aside or alteration shall not deal with a copy of the certificate except for the purpose of complying with paragraph (c).

Penalty: $1,000.

(8) An order on an appeal against the making of a certificate of succession or a document or instrument executed or registered pursuant to the requirements of such an order, or ancillary to or consequential on such an order, is not liable to stamp duty.

Vesting of property etc. on incorporation.

18. Schedule 2 has effect-

(a) where the Registrar makes a certificate of succession under section 17; and

(b) in respect of the association named in the certificate as the unincorporated association and in respect of the incorporated association named in the certificate.

PART III - INCORPORATED ASSOCIATION

Application of Part III.

19. This Part applies to and in respect of an incorporated association.

Members.

20. The members are those persons who are the first members by virtue ,of section 16 and every other person who, with his consent, becomes a member by virtue of the rules.

Cth. Act No. 89, 1981, s. 35 (4), (7), (8).

Name.

21. (1) The Registrar shall not approve a change of name to a name which is in his opinion undesirable.

Cth. Act No. 89, 1981 s. 38 (1) (b).

(2) For the purpose of forming an opinion on the question whether a name is undesirable, the Registrar may give directions for notice to any person and for advertisement.

(3) The name must include at its end the word “Incorporated” or the abbreviation “Inc.”.

Cth. Act No. 89, 1981, s. 39 (1).

(4) The Minister may exempt an incorporated association from compliance with subsection (3).

(5) Where the name includes at its end the word “Incorporated”, it is sufficient to use instead the abbreviation “Inc.”.

Cth. Act No. 99, 1981, s. 39 (4) (c).

(6) An incorporated association may change its name by special decision, but subject to the approval of the Registrar.

Cth. Act No. 89, 1981, s. 65 (1).

(7) A change of name takes effect on its approval by the Registrar.

Powers.

22. (1) An incorporated association has power to do and suffer all those things which a person may do or suffer, save only those things which only a natural person may do or suffer.

(2) Without limiting the generality of subsection (1), the powers of an incorporated association are not affected by its objects.

Act outside objects.

23. (1) Where an incorporated association threatens or intends to do an act otherwise than in the pursuit of its objects, the Court may, on application by a member, restrain the act by injunction.

Cth. Act No. 89, 1981, s. 68 (2) (a).

(2) Where the act sought to be restrained is being done, or is to be done, pursuant to a contract to which the incorporated association is a party, and each other party to the contract is a party to the proceedings, the Court may, if the Court considers it just and equitable to do so-

(a) set aside and restrain the performance of the contract; and

(b) allow to the incorporated association or to another party to the contract (as the case requires) compensation for loss or damage that may result from the setting aside or restraint of performance of the contract.

Cth Act No. 89. 1981. a. 68 (3).

(3) The Court shall not allow compensation under subsection (2) (b) for loss of anticipated profits to be derived from the performance of the contract.

Cth. Act No. 9, 1981, s. 68 (3).

Rules generally.

24. (1) The rules must-

(a) be divided intdnumbered paragraphs; and

(b) make provision, effective in the opinion of the Registrar, for the matters specified in Schedule 3 and the matters prescribed.

(2) A regulation prescribing a matter for the purposes of subsection (1)(b) does not apply in relation to an incorporated association incorporated before the date when the regulation comes into force.

(3) Subject to this Act, the rules bind the incorporated association and the members to the same extent as if the rules were a deed executed by the incorporated association and by each member and contained covenants on the part of the incorporated association and of each member to observe an the provisions of the rules.

Cth. Act No. 89, 1981, s. 79 (1).

(4) An incorporated association or a guarantor of an obligation of an incorporated association may not assert against a person dealing with the incorporated association, or against a person claiming under a person so ,dealing, that the rules of the incorporated association have not been complied with, except where at the time of the dealing the person so dealing has or ought to have knowledge of the non-compliance.

Canadian Act 23-24 Eliz. la c. 33, s. 18 (a).

Model rules.

25. (1) Model rules for incorporated associations may be prescribed.

(2) An incorporated association may adopt the model rules or any of them, with or without modification, as rules of the incorporated association.

(3) An adoption pursuant to subsection (2) must be carried out in the manner required for an alteration of the rules and section 26 applies in relation to the adoption as it applies in relation to an alteration of rules.

(4) An adoption of model rules is an adoption of the model rules as they stand at the time of adoption and is not an adoption of any later change in the model rules.

(5) Notwithstanding subsection (4), an adoption of model rules may be expressed to extend to any later change in the model rules, and an adoption so expressed has effect accordingly.

Alteration of rules.

26. (1) The rules may be altered-

(a) by special decision; or

(b) in a manner authorised or approved by an order of the Court under this section.

(2) Where, on application to the Court by the incorporated association or by a member, it appears to the Court that-

(a) by the rules, a proposed alteration of the rules cannot be made except with the consent of a specified person or the holder of a specified office;

(b) that person, or the holder of that office-

(i) has not, within a reasonable time after request, declared whether he consents or does not consent to the proposed alteration;

(ii) has unjustly or unreasonably refused his consent; or

(iii) has consented subject to a condition which is unjust or unreasonable-

the Court may, by order-

(c) authorise the making of the alteration without the consent; and

(d) make further provision authorising a manner of making the alteration, as nearly as may be in accordance with the rules.

(3) In subsection (2) “consent’ includes approval, authority, concurrence, direction and other like act.

(4) Where, on application to the Court by the incorporated association or by a member, it appears to the Court that there has been a defect or irregularity in the making of an alteration to the rules, or that there has been a failure to follow the manner of altering the rules provided by the rules or by a scheme settled by the Registrar under section 6 or authorised by an order of the Court under this section, but that the alteration may be approved under this subsection without doing substantial injustice to any person, the Court may, by order, approve the alteration, either immediately or on performance of such terms and conditions as the Court may impose, and thereupon the alteration shall be treated as duly made, notwithstanding the defect, irregularity or failure.

(5) In exercising its powers under subsection (4), the Court may direct that the alteration be treated as having been made on the date on which it would have been made if the defect, irregularity or failure had not happened, or on a later date specified by the Court.

(6) An alteration to the rules takes effect when the Registrar registers the alteration.

(7) Where the alteration is made in a manner authorised or approved by an order of the Court under this section, a minute of the order must be lodged with the Registrar.

(8) Subject to subsection (7), for the purpose of being satisfied that the alteration has been duly made, the Registrar may act on a certificate of the public officer to that effect.

(9) Where the Registrar is satisfied-

(a) that the alteration has been duly made; and

(b) that the rules as altered are in accordance with section 241 (l)-

he shall register the alteration.

(10) Where an alteration of the rules has been registered by the Registrar, the alteration shall be taken to have been duly made.

(11) Subsection (10) does not, during the year first after registration of the alteration, operate in favour of-

(a) the incorporated association;

(b) a person who was a member on the date when the alteration was made;

(c) the public officer; or

(d) a person claiming under any of the above.

Committee.

27. (1) An incorporated association shall have a committee for the purposes of this Act, of the number (whether one or more) specified in the rules.

Cth. Act No. 89, 1981, s. 219 (1).

(2) Where default is made in complying with subsection (1), the incorporated association and any officer in default are each guilty of an offence.

Penalty: $1,000.

Cth. Act No. 89, 1981, s. 219 (5).

(3) An officer shall give all information and assistance and produce all documents and do all other things reasonably required by the committee for the purpose of the discharge of its functions under this Act.

Penalty: $1,000.

Public Officer.

28. (1) A natural person is qualified for appointment as a public officer, but a corporation is not so qualified.

(2) The committee may appoint a public officer.

(3) Where the committee appoints a public officer, the committee shall cause notice of the appointment to be lodged with the Registrar within 14 days after the date of the appointment.

(4) Where there is a default in the observance of subsection (3), each member of the committee, being an officer in default, is guilty of an offence.

Penalty: $1,000.

(5) The notice of appointment must-

(a) contain an acceptance of the appointment by the person appointed;

(b) state the address of a proper place for service and a proper address for service by post;

(c) be signed by the committee or, where the committee has more than two members, by two of them; and

(d) be signed by the person appointed.

(6) On lodgment of notice of the appointment with the Registrar, the appointment takes effect on and from the date of the acceptance.

(7) The public officer may lodge with the Registrar a notice of change of address stating the address of a proper place for service and a proper address for service by post.

(8) A thing done or suffered by a person as public officer is valid notwithstanding a defect afterwards discovered in his appointment.

(9) The committee may remove a public officer from office, by notice of removal lodged with the Registrar.

(10) The notice of removal must be signed by the committee or,. where the committee has more than two members, by two of them.

(11) The removal takes effect on the lodgment of the notice, or on lodgment of notice of appointment of another public officer, whichever is the later.

(12) A public officer may resign his office, by notice lodged with the Registrar.

(13) The resignation takes effect on the lodgment of the notice.

(14) A person ceases to hold office as public officer-

(a) on his removal or resignation taking effect; or

(b) on his death.

(15) Where a vacancy in the office of public officer occurs by a resignation taking effect or by death, and the committee does not make an appointment to fill the vacancy within 14 days, after the vacancy occurs, each member of the committee, being an officer in default, is guilty of an offence.

Penalty: $1,000.

(16) In this section-

(a) "proper place for service" means a place in New South Wales or in a prescribed locality outside New South Wales where a document may be left for the public officer during ordinary business hours; and

(b) "proper address for service by post" means a sufficient address in New South Wales or in a prescribed locality outside New South Wales for sending a document to the public officer by post.

Gain to members.

29. (1) Subject to subsection (2), an incorporated association shall not-

(a) conduct its affairs for the pecuniary gain of a private member; or

(b) dispose of property to a private member so as to confer a pecuniary gain on him.

(2) The regulations may, in respect of an incorporated association or class of incorporated association, dispense wholly or partly with the requirements of subsection (1).

(3) Subsection (1) (b) does not apply to a disposal of surplus assets in a winding up in accordance with section 72.

(4) Where an incorporated association infringes subsection (1)-

(a) the infringement is not an offence by the incorporated association; and

(b) the infringement does not affect the validity of any transaction; but

(c) a member who wilfully aids and abets the infringement is guilty of an offence.

Penalty: $ 1,000.

(5) The Court may, on application by a member or by the Minister, restrain an infringement or intended infringement of subsection (1).

(6) Where a private member of an incorporated association derives a pecuniary gain in consequence of an infringement by the incorporated association of subsection (1), the amount or value of the pecuniary gain is a debt due from the private member to the incorporated association.

(7) In this section-

(a) "pecuniary gain", in relation to a private member of an association or corporation, means any gain in money or money's worth, but does not include-

(i) gain by way of payment for goods supplied or services rendered to the association or corporation by the private member;

(ii) gain by way of supply of goods or rendering of services to the private member by the association or corporation at a price special to members;

(iii) gain by way of enjoyment by the private member of facilities or services provided by the association or corportion for social, recreational, educational or other like purposes;

(iv) gain derived by the private member otherwise than by reason of the fact that he is a member or in consequence of that fact;

(v) gain derived by the private member by way of a prize in a contest or game of chance;

(vi) gain to the private member consequent on the protection, regulation or promotion by the association or corporation of business in a profession, trade, industry or calling in which the private member is engaged or interested;. or

(vii) gain of a description prescribed-

occurring in or in consequence of the pursuit by the association or corporation in good faith of its objects;

(b) "private member", in relation to an association or corporation, means any member of the association or corporation except-

(i) an association or corporation whose affairs are not conducted for the pecuniary gain of private members of the last mentioned association or corporation;

(ii) a trustee of a trust exclusively for an association or corporation of the description in subparagraph (i) or for a charitable purpose or for both; and

(iii) a person of a description prescribed.

(8) For the purposes of subsection (7) (a), the objects of an association or corporation shall be read as not including the provision by the association or corporation to a private member of gain in money or money's worth on the disposal by the association or corporation of property to a private member so as to confer on him a gain in money or money's worth.

Liability of member or officer.

30. (1) A person is not, merely by reason of his being or having been a member, liable to a creditor of the incorporated association in respect of a liability of the incorporated association to the creditor.

(2) A person is not, merely by reason of his being or having been a member, liable in a winding up to contribute for the payment of the debts and liabilities of the incorporated association or for any other thing, subject however to sections 70 and 71 and the rules.

(3) A member is not bound by an alteration made to the rules after he becomes a member so far as the alteration increases his liability to contribute in a winding up, or otherwise to pay money to the incorporated association, unless before or after the alteration is made he agrees in writing to be bound by the alteration.

Cth. Act No. 89, 1981, s.78 (3).

(4) A person is not, merely by reason of his being or having been an officer-

(a) liable to a creditor of the incorporated association in respect of a liability of the incorporated association to the creditor; or

(b) liable in a winding up to contribute for the payment of the debts and liabilities of the incorporated association or for any other thing.

Annual return.

31. (1) In this section, in relation to an annual return “closing date” means a date specified in the annual return, a date not more than one month before the lodgment of the annual return with the Registrar.

“opening date” means.-

(a) where the incorporated association has not previously lodged an annual return under this section-the date of incorporation of the incorporated association; or

(b) where the incorporated association has previously lodged an annual return under this section-the date of the day next after the closing date for the annual return last previously lodged under this section.

“period under report” means a period commencing on the opening date and ending on the closing date for the annual return.

(2) An incorporated association shall lodge an annual return approved by the committee with the Registrar on the yearly date fixed by the rules for that purpose or within 14 days after that date.

(3) Where an incorporated association does not lodge an annual return as required by subsection (2), the incorporated association and an ,officer in default are guilty of an offence.

Penalty: $1,000.

(4) The annual return must state-

(a) the name of the incorporated association;

(b) the commencing date and the closing date for the period under report;

(c) for each person who has been a member of the committee during the period under report-

(i) his name, address and occupation; and

(ii) the dates during the period under report between which he was a member of the committee;

(d) where, during the period under report, there has been a governing body other than the committee, for each person who has been a member of the governing body during the year under report-

(i) his name, address and occupation; and

(ii) the dates during the period under report between which he was a member of the governing body;

(e) the name and occupation of the public officer, his place for service and his address for service by post as appearing in the last notice of those matters lodged with the Registrar;

(f) whether, during the period under report, any alteration has been made to the rules and, if so, the date and a short description of each alteration;

(g) where section 42 applies, the names of the approved insurer with whom insurance has been effected and maintained, the nature and amount of the cover, and the date on which the cover expires; and

(h) the matters prescribed.

Accounts and information.

32. (1) The rules may provide for the lodgment with the Registrar of accounts and other documents relating to the financial and proprietary affairs of the incorporated association, including reports of auditors.

(2) Rules making provision as mentioned in subsection (1) do not have effect for the purposes of this section unless they are approved by the Registrar.

(3) The Registrar may revoke an approval given for the purposes of this section, but, unless it appears to the Registrar that his approval was obtained by fraud or mistake, he must give to the incorporated association at least 6 months' notice of his intention to revoke.

(4) Where the rules provide for the lodgment with the Registrar of accounts and other documents as mentioned in subsection (1), the accounts and other documents and their lodgment, must be in accordance with such requirements as may be prescribed.

(5) Where the rules require lodgment of accounts or other documents with the Registrar, and accounts or other documents are not lodged as required by the rules, or the accounts or other documents are not, or their lodgment is not, in accordance with the regulations, the incorporated association and an officer in default are guilty of an offence.

Penalty: $1,000.

(6) The Court may, on application by a member, direct the incorporated association or any officer to give to any member such accounts and other information relating to the incorporated association as, in the opinion of the Court, ought to be given in support of the proper interests of the member as member.

(7) The Court shall not direct the giving of accounts or information under subsection (6) where it appears to the Court that the giving of the accounts or information may impede the pursuit by the incorporated association in good faith of its objects.

(8) Where the Court gives a direction under subsection (6), the Court may give further directions with respect to the time and manner of giving the accounts or information.

(9) A direction given by the Court under subsection (6) does not require a person to give any accounts or information which he might lawfully object to give in evidence in the Court on grounds of privilege or of the public interest.

Common seal.

33. (1) An incorporated association may adopt and use a common seal.

(2) An incorporated association shall not use a common seal unless it bears the name of the incorporated association in legible characters.

Penalty: $1,000.

(3) Subsection (2) has effect subject to section 21 (5).

(4) Failure to comply with subsection (2) does not affect the validity of a transaction.

(5) A document to which the common seal of an incorporated association is affixed is not invalid by reason only that a person attesting the affixing of the common seal is interested in the document or in a matter to which the document relates.

Cth. Act No. 89, 1981, s. 80 (3).

Contracts.

34. (1) In so far as the formalities of making, varying or discharging a contract are concerned, a person acting under the express or implied authority of an incorporated association may make, vary or discharge a contract in the name of or on behalf of the incorporated association in the same manner as if the contract were made, varied or discharged by a natural person.

Cth. Act No. 89, 1981, s. 80 (1).

(2) The making, variation or discharge of a contract in accordance with subsection (1) is effectual in law and binds the incorporated association and other parties to the contract.

Cth. Act No. 89, 1981, s. 80 (2).

(3) Subsections (1) and (2)-

(a) do not prevent an incorporated association from making, varying or discharging a contract under its common seal; and

Cth. Act No. 89, 1981, s. 80 (4).

(b) do not affect the operation of a law that requires a consent or sanction to be obtained, or a procedure to be complied with, in relation to the making, variation or discharge of a contract.

Cth. Act No. 89, 1981, s. 80 (6).

Authentication of document or proceeding.

35. A document or proceeding requiring authentication by an incorporated association may be authenticated by the signature of an officer and need not be authenticated under the common seal.

Cth Act No. 89, 1981, s. 80 (7).

Appointment and authority of agent.

36. (1) An incorporated association may, by writing under its common seal, empower a person, either generally or in respect of a specified matter, as its agent or attorney to execute deeds on its behalf, and a deed signed by such an agent or attorney on behalf of the incorporated association and under his seal binds the incorporated association and has the same effect as if it were under the common seal of the incorporated association.

Cth. Act No. 89, 1981, s. 80 (8).

(2) The authority of an agent or attorney empowered pursuant to subsection (1), as between the incorporated association and a person dealing with him, continues during the period (if any) mentioned in the instrument conferring the authority or, if no period is so mentioned, until notice of the revocation or termination of his authority has been given to the person dealing with him.

Cth. Act No. 89, 1981, s. 80 (9).

Service.

37. (1) In this section “public officer” means, in respect of service on an incorporated association, a person appearing by the documents lodged with the Registrar to be public officer, notwithstanding any fraud or mistake relating to any document lodged with the Registrar, except in the case of fraud or mistake of which the person on whose behalf service is effected has or ought to have knowledge.

(2) A document may be served on the public officer-

(a) by addressing it to him and leaving it at the place last shown as the proper place for service on him in a notice lodged with the Registrar under section 28;

(b) by posting it to him at the place last shown as the proper address for service by post on him in a notice lodged with the Registrar under section 28;

(c) in such manner as the Registrar may direct; or

(d) in any other manner in which the document may be served on the public officer.

(3) A document may be served on an incorporated association-

(a) in any manner by which the document may be served on the public officer;

(b) by serving a copy by post or otherwise on each member of the committee or, where there are more than 2 members of the committee, on each of 2 members of the committee;

(c) in such manner as the Registrar may direct; or

(d) in any other manner in which the document may be served on the incorporated association.

(4) Subsection (3) (a) has effect notwithstanding that the public officer has died, unless-

(a) notice of his death has been lodged with the Registrar be-fore the time of service; or

(b) the person effecting service or the person on whose behalf service is effected knows at the time of service that the public officer is dead.

Constructive notice.

38. A person is not affected by, and is not deemed to have notice or knowledge of the contents of a document concerning an incorporated association by reason only that the document is lodged with the Registrar or is available for inspection at an office of the incorporated association.

Canadian Act 23-24 Eliz. 11, c. 33, s. 17.

Certificate of incorporation.

39. (1) A certificate of incorporation must be signed by the Registrar and must-

(a) state the name of the incorporated association; and

(b) state that the incorporated association is incorporated under this Act and the date of incorporation.

(2) Where the name of an incorporated association is changed, the Registrar shall issue a certificate of incorporation stating-

(a) the matters mentioned in subsection (1) (a), (b);

(b) the name of the incorporated association immediately before the change; and

(c) the date of the change.

(3) Where there is a mistake in a statement in a certificate of incorporation of the name of an incorporated association, the Registrar may issue under his hand a certificate of incorporation correcting the mistake.

(4) A certificate of incorporation is conclusive evidence of the matters required by this section to be stated in it, subject only to a later certificate of incorporation of the same incorporated association.

(5) Subsection (4) has effect notwithstanding-

(a) that the incorporated association is not eligible for incorporation under this Act; or

(b) that there is a defect (whether by reason of fraud, mistake or otherwise) in a matter precedent or incidental to incorporation.

(6) Subsection (5) does not limit the operation of subsection (4).

PART IV - INSURANCE

Approved insurer.

40. (1) The Minister may, by order in writing, approve of any person or class of persons as an approved insurer for the purposes of this Part.

Act No. 68, 1973, s.156 (1).

(2) The Registrar shall maintain a record of approved insurers.

Act No. 68, 1973, s. 156 (2).

(3) An approved insurer shall make returns to the Registrar as prescribed of insurances effected by incorporated associations with the approved insurer in respect of liabilities referred to in section 42.

Application of sections 42, 43.

41. Sections 42 and 43 apply in relation to any incorporated association .except one whose members are each liable in a winding up to contribute to the property of the incorporated association for payment of the liabilities of the incorporated association referred to in section 42 to the extent of the cover referred to in that section in respect of the last mentioned liabilities.

Insurance

42. (1) The incorporated association shall effect and maintain insurance with an approved insurer against liability of the incorporated association arising out of-

(a) an occurrence causing death or bodily injury to a person or damage to property; and

(b) a prescribed occurrence.

(2) The insurance must be for a cover-

(a) in respect of an occurrence mentioned in subsection (1) (a) $1,000,000 or, where another amount is prescribed, that amount; and

(b) in respect of a prescribed occurrence-the prescribed amount.

Act No. 68, 1973, s. 84 (1), (2).

Liability of member of the committees

43. (1) Where the incorporated association-

(a) incurs a liability arising out of an occurrence referred to in section 42; and

(b) is not insured with an approved insurer against the liability-

in a winding up of the incorporated association, a person who was a member of the committee at the time of the occurrence is liable to contribute for payment of the liability in accordance with this section.

(2) In respect of a liability of the unincorporated association referred to in section 42, the amount of the liability to contribute of a member of the committee is the amount referred to in section 42 in respect of the occurrence out of which the liability of the incorporated association arises, after deducting the amount if any of any insurance covering that liability of the incorporated association effected by the incorporated association with an approved insurer.

(3) Where 2 or more persons are liable under subsection (1) to contribute for payment of the same liability of the incorporated association, their liability to contribute is joint and several.

(4) Subject to subsection (2), the liability of a person to contribute under subsection (1) is a liability in an amount sufficient for payment in full of the liability of the incorporated association without defeating or impairing the rights of any other creditor of the incorporated association.

(5) It is a defence to a claim for a contribution under this section that, as to the member of former member of the committee in respect of whom the claim is made-

(a) he had, at the time of the occurrence, done all that he reasonably could to see that the incorporated association was insured with an approved insurer against the liability; and

(b) either-

(i) at the time of the occurrence he did not know that the incorporated association was not so insured; or

(ii) the fact that the incorporated association was not so in-sured having come to his knowledge before that time, he gave notice of that fact to the Registrar promptly after the fact came to his knowledge.

(6) The liability of a person to contribute under this section is in addition to any other liability he may have to contribute in the winding up.

PART V - INTERNAL DIFFERENCES

Justiciable notwithstanding no proprietary interest.

44. A court or the Registrar or another person acting under section 45 does not lack jurisdiction to grant an injunction, declaration of right or other relief in relation to an internal difference by reason that a right of a proprietary nature is not involved, or that a party to the internal difference does not have an interest in the property of the incorporated association.

Determination of internal difference.

45. (1) Subject to any exclusion or limitation in the rules-

(a) the Registrar, on application by a party to an internal difference, may in his discretion elect to hear and determine the internal difference; and

(b) the Court may, on application by a party to an internal difference, direct the Registrar to hear and determine the internal difference.

(2) Notwithstanding any exclusion or limitation in the rules-

(a) the Registrar, on application by a party to an internal difference, and with the consent of all parties to the internal difference, may in his discretion elect to hear and determine the internal difference; and

(b) the Court may, on application by a party to an internal difference, and with the consent of all parties to the internal difference, direct the Registrar to hear and determine the internal difference.

(3) Where, under this section, the Registrar elects to hear and determine an internal difference, or the Court directs him to do so, the Registrar has jurisdiction to hear and determine-

(a) the internal difference in respect of which the election or direction is made;

(b) any incidental internal difference between the same parties; and

(c) with the consent of the parties, any other difference.

(4) In proceedings before the Registrar on an internal difference-

(a) the Registrar shall in all proper cases attempt to effect a conciliation;

(b) if so agreed by the parties, the Registrar may decide any matter according to equity and good conscience;

(c) the Registrar is not bound by the laws of evidence;

(d) the Registrar may administer oaths and affirmations;

(e) the Registrar may direct a person to attend to give evidence and, subject to the laws relating to privilege and the public interest, direct a person to produce any document or thing;

(f) the Registrar may make an interim determination or order and shall do so if the Court so directs in relation to any matter in difference;

(g) the Registrar may make orders for costs, but shall not do so without special reason, and if the Registrar makes an order for costs he shall assess their amount;

(h) if a party dies, the proceedings may continue with his personal representative as a party in his place; and

(i) subject to this section, the procedure shall be as prescribed or, subject to the regulations, as the Registrar may direct.

(5) Proceedings before the Registrar on an internal difference shall be removed into the Court where-

(a) the Court on application by a party so orders; or

(b) the Registrar so orders.

(6) A determination or order of the Registrar under this section is not subject to an appeal under section 74.

(7) An appeal lies to the Court from a determination or order of the Registrar, but only by leave of the Court or of the Registrar.

(8) Where the Court hears an appeal from a determination or order of the Registrar, a further appeal to the Court of Appeal lies only by leave of the Court.

(9) The Court may make orders for the enforcement of an order of the Registrar under this section.

(10) Where the Registrar directs a person to attend to give evidence, or to produce a document or thing, and that person fails to comply with the direction without just cause., or fails to answer any question without just cause, the person so failing and any officer of the incorporated association in default are guilty of an offence.

Penalty: $1,000.

Act No. 8, 1969, s. 70 (14).

(11) The Minister may, by notice published in the Gazette, appoint a person to take the place of the Registrar for the purposes of this section, in respect of any internal difference, or any class of internal difference, or all internal differences, as may be specified in the notice.

PART VI - AMALGAMATION

Plan of amalgamation.

46. (1) Two or more incorporated associations may, by special decision of each of them, adopt a plan of amalgamation.

(2) A plan of amalgamation must embody-

(a) a statement of the names of the existing associations;

(b) a decision to apply for incorporation of an association by way of amalgamation;

(c) an adoption of a name, objects and other rules for the new association; and

(d) an appointment of a committee of one or more persons to be the committee for the purpose of obtaining incorporation of the new association and to be the first committee of the new association.

(3) Rules for the new association may be adopted in a plan of amalgamation by adopting the model rules or any of them, with or without modification, or by adopting other rules.

(4) Section 25 (4), (5), apply in relation to an adoption of model rules in a plan of amalgamation.

(5) A plan of amalgamation may authorise the committee, with or without restriction, to alter the plan of amalgamation with respect to the name, objects and rules of the new association.

(6) The plan of amalgamation may adopt provision for appointment to or removal from the committee before incorporation of the new association, and for the proceedings of the committee before incorporation of the new association.

(7) Subject to any provision made in a plan of amalgamation pursuant to subsection (6), where the committee has two or more members, schedule 1 has effect.

(8) Sections 11 and 12 apply in relation to incorporation of a new association pursuant to a plan of amalgamation as they apply to the incorporation of an association pursuant to a plan of incorporation.

Incorporation of new association.

47. (1) Subject to section 48, where an application for incorporation pursuant to a plan of amalgamation is lodged with the Registrar, and-

(a) the Registrar is satisfied-

(i) that an incorporated association formed in accordance with the plan of amalgamation would, if not incorporated, be eligible for incorporation;

(ii) that on incorporation the rules of the new association will comply with the requirements of this Act; and

(iii) that the first committee and first public officer for the new association have been duly appointed; and

(b) the Registrar is not of the opinion that the name adopted for the new association by the plan of amalgamation is undesirable-

the Registrar shall issue a certificate of incorporation of the new association.

(2) The issue by the Registrar of a certificate of incorporation under this section is not subject to an appeal under section 74.

(3) The provisions of sections 13 (4) to (7), 14 and 15, apply in relation to the incorporation under this section of a new association pursuant to a plan of amalgamation as they apply in relation to the incorporation under section 13 of an association pursuant to a plan of incorporation, and subsection (1) has effect subject to those provisions as so applied.

Creditors.

48. (1) Where an application for amalgamation is lodged with the Registrar, he may direct advertising of the application and the giving of notice of the application to any creditor of an existing association.

(2) A person claiming as a creditor of an existing association may apply to the court for an order restraining the amalgamation.

(3) Where, in proceedings under subsection (2)-

(a) it appears to the Court that, if a winding up of the existing association commenced on the date on which the Court gives its decision, the applicant would be entitled to prove as a creditor in the winding up; and

(b) it is not shown to the satisfaction of the Court that the new association will, on its incorporation, have assets sufficient for the payment of its debts-

the Court may restrain the incorporation of the new association unless the debt of the applicant is paid or is, in the opinion of the Court, sufficiently secured.

Certificate of amalgamation.

49. (1) The Registrar shall, on or after incorporation of the new association, on application by any person, make a certificate of the amalgamation.

(2) The certificate of amalgamation must state the names of the new association and of the existing associations, and state that the new association is formed by amalgamation under this Act of the existing associations.

(3) The Registrar shall, on application by any person, issue a copy of the certificate of amalgamation.

(4) An appeal against the making of a certificate of amalgamation may be instituted under section 74 by the new association or by a person who was a member of an existing association immediately before the incorporation of the new association, or by his legal personal representative, but not by any other person.

(5) As to the fact that the new association is constituted by amalgamation of the existing associations, the provisions of section 17 (5) and (6) have effect as if the references in those provisions to a certificate of succession were references to a certificate of amalgamation.

Amalgamation.

50. (1) The first members of the new association are the members of the existing associations at a time immediately before the incorporation of the new association.

(2) On and after the incorporation of the new association, the legal personality of each existing association continues and merges in the new association.

(3) Without limiting the generality of subsection (2), on and after the incorporation of the new association-

> (a) property and liabilities of an existing association are property and liabilities of the new association;
>
> (b) in a legal proceeding to which an existing association is a party, the new association continues as the same party, and the legal proceeding may be carried on accordingly, subject to any necessary change of name.

(4) Notwithstanding subsection (3), on and after the incorporation of the new association, rights and liabilities as between the existing associations are discharged, but not so as to discharge a right or liability of any other person.

(5) The Registrar General and any other person registering or certifying title to any property shall, on production of a certificate of amalgamation and payment of the appropriate fee, make all proper entries and recordings to give effect to subsections (2) and (3), in the same way as nearly as practicable as in the case of a change of name of a corporation.

(6) Subject to subsections (2) and (3), on the incorporation of the new association, the existing associations are dissolved.

Liability of meinber.

51. A member of an existing association is not bound by the rules of the new association adopted by the plan of amalgamation so far as the rules of the new association-

> (a) require him to contribute in a winding up of the new association in an amount greater than the amount which he would have been required to contribute in a winding up of the existing association commencing immediately before the date of incorporation of the new association;
>
> (b) require him otherwise to pay money to the new association in an amount greater than the amount required to be paid by him by the rules of the existing association as they stood immediately before the date of incorporation of the new association-

unless before or after the rules of the new association are adopted by the plan of amalgamation he agrees in writing to be bound by the requirement concerned.

Cth. Act No. 89, 1981, s. 78 (3).

PART VII - REGISTRATION AS A COMPANY

Plan of registration.

52. (1) An incorporated association may, by special decision, adopt a plan of registration under this Part as a company to be regulated by the Companies Act 1981.

(2) The plan must embody-

(a) a decision to apply for registration of the incorporated association as a company, with a view to its subsequent regulation under the Companies Act 1981; and

(b) an adoption of a memorandum of association and articles of association for the incorporated association when so registered.

Memorandum and articles of association.

53. (1) The memorandum of association and any articles of association adopted in a plan of registration as a company must comply with the requirements of the Companies Act 1981.

(2) The subscribers to the memorandum of association must be members of the incorporated association.

Direction to register.

54. (1) Where the Minister forms the opinion that, by reason of-

(a) the scale of activities of an incorporated association;

(b) the value or nature of the property of an incorporated association; or

(c) the number or nature of the dealings of an incorporated association with the public-

the incorporated association cannot be conveniently or appropriately governed by the provisions of this Act, the Minister may, by notice to the incorporated association, direct the incorporated association to become registered under this Part as a company to be regulated by the Companies Act 1981 within a time fixed by the notice.

(2) The time fixed by a notice under subsection (1) must be not less than 3 months after the date on which the notice is given.

(3) A notice given under subsection (1) must be accompanied by a statement of the reasons of the Minister for giving the direction.

(4) Where the Minister gives a direction under subsection (1), the incorporated association may commence proceedings in the. Court for an order setting aside the direction.

(5) In proceedings under subsection (4), the Court shall set aside the direction if, but shall not set aside the direction unless, it appears to the Court that the Minister did not have sufficient grounds to form the opinion on which the direction is based.

Notice to members.

55. (1) An incorporated association proposing to apply for registration as a company pursuant to this Part shall, not less than 7 days before lodging the application with the Commission, take such steps with

a view to bringing the proposal to the knowledge of members, whether by way of notice posted to members, published advertisement or otherwise, as the Registrar may direct or afterwards approve.

(2) A notice or advertisement under subsection (1) must draw the attention of members to the powers of review given to the Court by section 37.

Application for registration.

56. (1) The incorporated association may apply for registration under this Part as a company by lodging with the Commission-

(a) the plan of registration as a company;

(b) the memorandum of association and articles of association (if any) adopted by the plan of registration;

(c) a declaration that notice has been given as required by section 55;

(d) a list, certified by the public officer to be correct, of the persons who have consented to be directors of the incorporated association when registered as a company; and

(e) such other documents as are required to be lodged by or under this Act or the Companies Act 1981.

Cth. Act No. 89, ss. 35 (i), 220 (4).

(2) The Commission shall not register the incorporated association pursuant to section 58 until after the lapse of 7 days after the lodgment of the documents required to be lodged by subsection (1), except with the consent in writing of every member.

(3) Where an incorporated association applies for registration under this Part as a company, the Commission shall give notice of the application to the Registrar.

(4) Where the Commission gives notice to the Registrar under subsection (3), and it appears to the Registrar that the incorporated association is being wound up, or that proceedings for a winding up of the incorporated association by the Court are pending, the Registrar shall give notice to the Commission accordingly.

Review.

57. (1) Where a plan of registration as a company has been lodged with the Commission, and a member is aggrieved by anything contained in or adopted by the plan, the aggrieved member may apply to the Court for review in accordance with this section.

(2) In proceedings under subsection (1), where it appears to the Court that anything contained in or adopted by the plan is oppressive to a member, the Court may-

(a) give directions for proceedings, whether by the holding of a meeting of members or otherwise, for the purpose of considering a variation of the plan or of anything adopted by the plan;

(b) give directions for the purchase by the incorporated association or any other person of the interest of a dissenting member;

(c) make other orders for protection of the interests of a dissenting member; or

(d) direct that the incorporated association be not registered as a company pursuant to this Part.

(3) Where proceedings are commenced in the Court for a review under this section-

(a) the registrar of the Court shall, within 2 days after the commencement of the proceedings or such other time as the Court may direct, give notice of the proceedings to the Commission; and

(b) after being given notice of the commencement of the proceedings m the Court, the Commission shall not deal further with the application for registration of the incorporated association as a company pursuant to this Part except by leave of the Court.

Registration.

58. (1) Subject to this Act and the Companies Act 1981, the Commission shall, on lodgment of a plan of registration of an incorporated association as a company under this Part and lodgment of the other documents required to be lodged by section 56 (1), register the incorporated association accordingly by registering the memorandum of association and articles of association (if any) adopted by the plan of registration.

Cth. Act No. 89, 1981, s. 35 (1).

(2) An incorporated association shall not be registered under subsection (1) as a company unless the name under which the incorporate(association is proposed to be registered as a company is reserved under section 40 of the Companies Act 1981 in respect of the company.

Cth. Act No. 89, 1981, s. 35 (9).

(3) An incorporated association is not entitled to be registered as a company under this Part if it is in the course of being wound up or proceedings for a winding up by the Court are pending.

Cth. Act No. 89, 1981, s. 85 (2) (a).

Omission of “Limited” in name.

59. (1) Where the plan of registration as a company adopts a memorandum of association for a limited company within the meaning of the Companies Act 198 1, and it is proved to the satisfaction of the Commission that when the incorporated association is registered as a company under this Part-

(a) the objects of the company will be restricted to providing recreation or amusement or promoting commerce, industry, art, science, religion, charity, patriotism, pension or superannuation schemes or any other object useful to the community, and to objects incidental or conducive to the foregoing;

(b) the company will be required by its memorandum or articles of association to apply its profits (if any) or other income in promoting its objects; and

(c) the company will be prohibited by its memorandum or articles of association from paying any dividend to its members-

the Commission may (after requiring, if it thinks fit, the application for registration to be advertised in such manner as it directs either generally or in a particular case), by licence, authorise the incorporated association to be registered as a company with limited liability without the addition of the word “Limited” to its name, and the incorporated association may be registered as a company accordingly.

Cth. Act No. 89, 1981, 9. 66 (1), (2).

(2) Section 66 of the Companies Act 1981 (subsections (1), (2) and (6) excepted) apply in relation to a licence under subsection (I) as it applies in relation to a licence under that section.

Certificate of incorporation of company.

60. (1),On the registration of the memorandum of association, the Commission shall certify under its common seal that, on and from the date specified in the certificate, the incorporated association (named by its name as a company contained in the memorandum of association)

(a) is registered under this Part;

(b) is a company for the purposes of the Companies Act 1981;

(c) is, as, the case may be-

(i) a company limited by guarantee;

(ii) an unlimited company;

(iii) a company limited by shares;

(iv) a company limited both by shares and by guarantee; or

(v) a no liability company; and

(d) where applicable, that it is a proprietary company.

Cth. Act No. 89, 1981, s.35 (2).

(2) The certificate shall state that before the date specified in the certificate the company so named was an incorporated association, and state its name immediately before the date specified in the certificate and the date of its incorporation under this Act.

(3) The certificate is a certificate of incorporation for the purposes of the Companies Act 1981 and section 549 of that Act applies to the certificate.

(4) The Commission shall give a copy of the certificate to tie Registrar.

(5) The Commission shall keep a copy of a certificate under this section and subsections 31 (2) and (5) of the Companies Act 1981 apply to that copy as if it were a document lodged with the Commission.

Cth. Act No. 89, 1981, a. 33 (3).

Effect of registration.

61. (1) On and from the date of registration specified in the certificate under section 60, the incorporated association-

(a) remains the person it was before that date;

(b) is not an incorporated association for the purposes of this Act;

(c) is a company for the purposes of the Companies Act 1981;

(d) is capable of performing all the functions of a body corporate;

(e) is capable of suing and being sued;

(f) has perpetual succession and shall have a common seal; and

(g) has power to acquire, hold and dispose of property.

Cth. Act No. 89, 1981, s. 35 (5).

(2) Subsection (1) (d) to (g) do not limit the operation of sections 13 (6) and 22.

(3) Schedule 4 has affect.

Members of company.

62. (1) On and from the date of registration specified in the certificate under section 60, but subject to the Companies Act 1981, the persons who were members of the incorporated association immediately before that date -

(a) shall be deemed to have agreed to become members of the company;

(b) are members of the company, together with such other persons as from time to time afterwards become members of the company; and

(c) shall be entered by name in the register of members of the company.

Cth. Act No. 89, 1981, s. 35 (7).

(2) Each other person who agrees to become a member of the company and whose name is entered in the register of members of the company becomes a member of the company.

Cth. Act No. 89, 1981, s. 35 (8).

Liability of member.

63. (1) Where an incorporated association is registered as a company under this Part and, if a winding up of the incorporated association by the Court had commenced immediately before the date of registration, a person would have been liable as a member or former member of the incorporated association (or as the legal personal representative of a member or former member) to contribute to the property of the incorporated association in respect of a debt or liability of the incorporated association, that person has a like liability to contribute in respect of the debt or liability in a winding up of the company, subject however to section 360 (1) (a) and (d) of the Companies Act 1981.

(2) Where an incorporated association is registered as a company under this Part, a member of the incorporated association who becomes a member of the company by virtue of section 62 (1) is not bound by the memorandum of association adopted by the plan of registration as a company or any articles of association so adopted so far as the memorandum or articles of association-

(a) require him to contribute in a winding up of the company in an amount greater than the amount which he would have been required to contribute in a winding up of the incorporated association commencing immediately before, the, date of resignation of the incorporated association as a company under this Part; or

(b) require him otherwise to pay money to the company in an amount greater than the amount required to be paid by him by the rules of the incorporated association as they stood immediately before the date of registration of the incorporated association as a company under this Part-

unless before or after the plan of registration as a company is adopted he agrees in writing to be bound by the requirement concerned.

Cth. Act No. 99, 1981 s. 78 (3).

Company having a share capital.

64. Where the plan of registration as a company adopts a memorandum of association for a company having a share capital, Schedule 5 has effect.

PART VIII - WINDING UP AND DISSOLUTION

Application of Companies Act 1981.

65. (1) Subject to this Act, the provisions of Divisions I to 4 of Part XII of the Companies Act 1981, and of sections 531 and 532 of that Act, apply in relation to the winding up and dissolution of an incorporated association as those provisions apply in relation to the winding up and dissolution of a company within the meaning of that Act.

(2) Schedule 6 has effect.

Modes of winding up.

66. (1) The winding up of an incorporated association may be-

(a) by the Court;

(b) voluntary; or

(c) upon a certificate of the Registrar..

Cth. Act No. 89, 1981, s. 359 (1); Act No. 18, 1967, s. 87 (1).

(2) Unless the contrary intention appears, the provisions of this Act with respect to winding up apply to the winding up of an incorporated association in any of those modes.

Cth. Act No. 89, 1981, s. 359 (2).

Winding up by the Court.

67. (1) An incorporated association (whether or not it is being wound up voluntarily) may be wound up under an order of the Court on the application of-

(a) the incorporated association;

(b) a creditor, including a contingent or prospective creditor, of the incorporated association;

(c) a contributory;

(d) the liquidator; or

(e) the Minister, but only on the grounds mentioned in subsection (2) (f), (g) or (h);

or any two or more of those persons.

Cth. Act No. 89, 1981, s. 363 (1).

(2) The Court may order the winding up of an incorporated association if-

(a) the incorporated association has by special decision resolved that it be wound up by the Court;

(b) the incorporated association does not commence to operate within a year from its incorporation or suspends it operations for a whole year;

(c) the number of members is reduced below 2;

(d) the incorporated association is unable to pay its debts;

(e) the governing body has acted in the affairs of the incorporated association in the interests of the governing body or members of the governing body rather than in the pursuit of the objects of the incorporated association, or in any manner whatsoever that appears to the Court to be unfair or unjust to members of the incorporated association;

(f) the incorporated association would, if not incorporated, not be eligible for incorporation under this Act;

(g) the incorporated association has conducted its affairs for the pecuniary gain of a private member or has disposed of property to a private member so as to confer a pecuniary gain on a private member, in either case in contravention of section 29 (1);

(h) the Minister has, by notice under section 54 (1), directed the incorporated association to become registered under Part VII as a company, and the incorporated association has not become so registered within the time fixed by the notice; or

(i) the Court is of opinion that it is just and equitable that the incorporated association be wound up.

Cth Act No. 89, 1981, s. 364 (1).

Voluntary winding up.

68. (1) An incorporated association may be wound up voluntarily if the incorporated association so decides by special decision.

Cth. Act No. 89, 1981, a. 392 (1).

(2) Notwithstanding subsection (1), where an application has been filed with the Court for the winding up of an incorporated association on the ground that it is unable to pay its debts, the incorporated association is not, without the leave of the Court, entitled to decide that it be wound up voluntarily.

Cth. Act No. 89, 1981, s. 391.

(3) Where it is proposed to wind up an incorporated association, voluntarily, the committee of the incorporated association, or, in the case of an incorporated association having a committee of more than 2 persons, a majority of the committee, may, before the special decision for a voluntary winding up is made, make a written declaration to the effect that they have made an inquiry into the affairs of the incorporated association and that they have formed the opinion that the incorporated association will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up.

Cth. Act No. 89, 1981. s. 395 (1).

(4) There shall be attached to the declaration a statement of affairs of the incorporated association showing, in the prescribed form-

(a) the property of the incorporated association, and the total amount expected to be realised from that property;

(b) the liabilities of the incorporated association; and

(c) the estimated expenses of the winding up made up to the latest practicable date before the making of the declaration.

Cth. Act No. 89, 1981, s. 395 (2).

(5) A declaration so made has no effect for the purposes of this Act unless it is-

(a) made within 5 weeks immediately preceding the making of the special decision for voluntary winding up or within such further period as the Registrar, whether before or after the expiration of those 5 weeks, allows; and

(b) lodged with the Registrar before the date of the making of the special decision for voluntary winding up, or such later date as the Registrar, whether before, on or after the first mentioned date, allows.

Cth. Act No. 89, 1981, s. 395 (3).

(6) A person who makes a declaration under subsection (3) (including a declaration that has no effect for the purposes of this Act by reason of subsection (5)) without having reasonable grounds for his opinion that the incorporated association will be able to pay its debts in full within the period stated in the declaration is guilty of an offence.

Penalty: $5,000 or imprisonment for 1 year, or both.

Cth. Act No. 89, 1981, s. 395 (4).

(7) If the incorporated association is wound up pursuant to a special decision for voluntary winding up made within a period of 5 weeks after the making of the declaration but its debts are not paid or provided for in fun within the period stated in the declaration, it shall be presumed, until the contrary is shown, that a person making the declaration did not have reasonable grounds for his opinion.

Cth. Act No. 89, 1981, s. 395 (5).

(8) Where there is a voluntary winding up, for the purposes of this Act-

(a) it is a members' voluntary winding up if a declaration has been made and lodged pursuant to subsections (3) to (5); and

(b) it is a creditors' voluntary winding up if a declaration has not been so made and lodged-

subject however to section 397 (6) of the Companies Act 1981 as applied by section 65.

Cth. Act No. 89, 1981, s. 5 (1).

(9) An incorporated association shall-

(a) within 7 days after the making of a special decision for voluntary winding up, lodge a printed copy of the special decision with the Registrar; and

(b) within 21 days after the making of the special decision, cause notice of the resolution to be published in the Gazette.

Cth. Act No. 89, 1981, s. 392 (2).

(10) Where the incorporated association fails to comply with the provisions of subsection (9), the incorporated association and any officer of the incorporated association who is in default are each guilty of an offence.

Cth. Act No. 89, 1981, s. 392 (3).

(11) Where an incorporated association is being wound up voluntarily, and a vacancy occurs in the office of liquidator, and in the opinion of the Registrar the vacancy is not likely to be filled in the manner

provided by the Companies Act 1981 as applied by section 65, the Registrar may appoint a person to be liquidator.

Act No. 18, 1967, s. 88.

Winding up upon a certificate of the Registrar.

69. (1) An incorporated association may be wound up upon a certificate of the Registrar where the Registrar is satisfied, and so certifies, that-

(a) the number of members is reduced below 2;

(b) the incorporated association has not commenced to operate within a year from its incorporation, or has suspended its operations for a whole year;

(c) the incorporation of the incorporated association was obtained by mistake or fraud;

(d) the incorporated association has, after notice by the Registrar of any breach of or non-compliance with the provision of this Act, of the regulations, or of the rules of the incorporated association, failed to remedy the breach or non-compliance, or a further breach of, or non-compliance with, the same provision by the incorporated association has occurred;

(e) the rules of the incorporated association provide for a committee of two or more persons, and there are, and have been for one month next before the date of the certificate, too few members of the committee to form a quorum as provided by the rules of the incorporated association; or

(f) there is no committee, and there has not been a committee for one month next before the date of the certificate.

Act No. 18, 1967, s. 87 (3) (4).

(2) Where the Registrar so certifies, he may appoint a person to be the liquidator of the incorporated association.

Act No. 18, 1967, s. 87 (5).

(3) Where the Registrar so certifies, he shall-

(a) within 7 days after the making of the certificate, send a copy of the certificate to the incorporated association; and

(b) within 21 days after the making of the, certificate, cause notice of the certificate to be published in the Gazette.

Cth. Act No. 89, 1981, s. 392 (2).

(4) A liquidator appointed by the Registrar under subsection (2) -

(a) shall within 10 days after his appointment give notice of his appointment by notice in the Gazette;

(b) shall give such security as may be prescribed; and

(c) is entitled to such fees as may be prescribed.

Act No. 18, 1967, s.87 (5), (6).

(5) A winding up upon a certificate of the Registrar commences at the time of the giving of the certificate.

Act No. 18, 1967, s. 87 (6); Cth. Act No. 89, 1981, s.393.

(6) Subject to this section the laws applying in the case of a members' voluntary winding up of an incorporated association (section 68 (9) and (10) excepted) apply in the case of a winding up of an incorporated asso-ciation upon a certificate of the Registrar.

Act No. 18, 1967, ss. 87 (7) (b) (v), 88.

(7) For the purposes of subsection (6), the certificate of the Registrar has the same effect as a special decision of the incorporated association made on the date on which the Registrar makes the certificate.

(8) For the purposes of subsection (6)-

(a) it shall be deemed that a declaration has been made and lodged pursuant to section 68 (3) to (5); and

(b) the winding up shall be deemed to be a members' voluntary winding up, subject however to section 397 (6) of the Companies Act 1981 as applied by section 65.

Contributories.

70. (1) On an incorporated association being wound up, every present and past member is liable to contribute to the property of the incorporated association to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up and for the adjustment of the rights of the contributories amongst themselves, subject to the qualifications in this section and section 71.

Cth. Act No. 89, 1981, s. 360 (1).

(2) A past member is not liable to contribute if he has ceased to be a member for one year or more before the commencement of the winding up.

Cth. Act No. 89, 1981, 9. 360 (1) (a).

(3) A past member is not liable to contribute in respect of any debt or liability of the incorporated association contracted after he ceased to be a member.

Cth. Act No. 89, 1981, s. 360 (1) (c)

(4) A past member is not liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them pursuant to this Act.

Cth. Act No 89, 1981, s. 360 (1) (d).

(5) Where a member was a member at the time when a debt or liability was contracted, no contribution is required from him in respect of the debt or liability beyond-

(a) the contribution (if any) required from him in that respect by the rules at that time; or

(b) the contribution (if any) required from him in that respect rules at the time of the commencement of the winding up-

whichever contribution is the greater.

Cth. Act No. 89, 1981, s. 360 (1) (f).

(6) Where a member was not a member at the time when a debt or liability was contracted, no contribution is required from him in respect of the debt or liability beyond the contribution (if any) required from him in that respect by the rules at the time of the commencement of the winding up.

Cth. Act No. 89, 1981, s. 360 (1) (f).

(7) No contribution in respect of the costs, charges and expenses of the winding up or the adjustment of the rights of the contributories amongst themselves is required from a member beyond the contribution required of him in that respect by the rules at the time of the commencement of the winding up.

Cth. Act No. 89, 1981, s. 360 (1) (f).

(8) A sum due to a member in his capacity as a member shall not be treated as a debt of the incorporated association payable to that member in a case of competition between himself and any other creditor who is not a member, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.

Cth. Act No. 89, 1981, s. 360 (1) (k).

Contribution after amalgamation.

71. (1) This section applies in relation to a debt or liability where-

(a) the debt or liability was contracted by an incorporated association (in this section called the original debtor association) otherwise than by virtue of section 50; and

(b) the debt or liability became a debt of the incorporated association being wound up by virtue of section 50, in consequence of one or more amalgamations.

(2) Section 70 (5) and (6) do not apply in relation to the debt or liability.

(3) Section 70 (1) has effect in relation to the debt or liability subject to the qualifications in subsections (4) and (5) in addition to the qualifications in section 70 (2) (3), (4), (7) and (8).

(4) Where a member was a member of the original debtor association at the time when the debt or liability was contracted by the original debtor association, no contribution is required from him in respect of the debt or liability beyond-

(a) the contribution (if any) required from him in that respect by the rules of the original debtor association at that time; or

(b) the contribution (if any) required from him in that respect by the rules of the incorporated association being wound up at the time of the commencement of the winding up-

whichever contribution is the greater.

(5) Where a member was not a member of the original debtor association at the time when the debt or liability was contracted by the original debtor association, no contribution is required from him in respect of the debt or liability beyond the contribution (if any) required from him in that respect by the rules of the incorporated association being wound up at the time of the commencement of the winding up.

Disposal of surplus assets.

72. (1) Where, in a winding up, property of the incorporated association remains after payment of the debts and liabilities of the incorporated association, and the costs, charges and expenses of the winding up, and the adjustment of the rights of contributories amongst themselves, the property constitutes surplus assets for the purposes of this section.

(2) Where there are surplus assets, the liquidator shall settle a plan of disposal of the surplus assets.

(3) The plan must be for-

(a) a disposal as provided by or under the rules; or

(b) so far as any provision by or under the rules does not extend, a distribution amongst the members according to their rights and interests in the incorporated association.

Cth. Act No. 89, 1981, s. 403.

(4) The liquidator shall lodge the plan of disposal with the Registrar.

(5) The liquidator shall advertise the lodgment of the plan of disposal-

(a) in a Sydney daily newspaper; and

(b) where, within a year before the commencement of the winding up, the incorporated association has carried on its operations at a place in New South Wales outside the County of Cumberland, in a newspaper circulating in that place-

within 10 days after lodging the plan of disposal with the Registrar.

(6) The advertisement must draw attention to the right to commence proceedings for review under subsection (8).

(7) The liquidator may, with the leave of the Registrar, amend a plan of disposal, with or without further advertisement as the Registrar may direct.

(8) A person with standing to object may, within 30 days after the last publication of an advertisement required by subsection (5) or under subsection (7), commence proceedings in the Court for review of the plan of disposal.

(9) The following persons have standing to object-

(a) a member or former member of the incorporated association;

(b) a person who has provided property or services for the benefit of the incorporated association or in aid of the pursuit by the incorporated association of its objects;

(c) an association or corporation having amongst its objects any object similar to anything within the objects of the incorporated association;

(d) a person who might derive a benefit from the pursuit by the incorporated association of its objects; and

(e) the Minister.

(10) In proceedings under subsection (8), where the Court is of opinion that the plan of disposal is unjust, the Court may settle a plan of disposal of the surplus assets.

(11) The Court may make orders for payment of the costs and expenses of any person of or incident to proceedings in the Court under this section out of the surplus assets.

(12) The power under subsection (11) is in addition to any other power of the Court relating to costs.

(13) The liquidator shall dispose of the surplus assets in accordance with the plan of disposal settled by him, unless the Court has settled a plan of disposal under subsection (10), and in that event the liquidator shall dispose of the surplus assets in accordance with the plan of disposal settled by the Court.

Appeal from decision etc. of liquidator.

73. A person aggrieved by any act, omission or decision of a liquidator or provisional liquidator of an incorporated association may appeal to the Court in respect of the act, omission or decision, and the Court may confirm, reverse or modify the act or decision, or remedy the omission, as the case may be, and make such orders and give such directions as it thinks fit.

Cth. Act No. 89, 1981, s. 538 (d).

PART IX - MISCELLANEOUS

Appeal from Registrar and Commission.

74. (1) Subject to this Act, a person aggrieved by the refusal of the Registrar to register an incorporated association or to register or receive a document, or by any other act, omission or decision of the Registrar, may, ,within such period (if any) as is prescribed, appeal to the Court.

(2) On appeal under this section, the Court may confirm, reverse or modify the refusal, act or decision, or remedy the omission, as the case may be, and make such orders and give such directions in the matter as it thinks fit.

Cth. Act No. 89, 1981, s. 537.

(3) Section 537 of the Companies Act 1981 applies in relation to a refusal, act, omission or decision of the Commission under this Act.

SCHEDULE 2

(Sec. 18.)

VESTING OF PROPERTY ETC. ON INCORPORATION

Interpretation.

1. In this Schedule, “if the association continued unincorporated” means-if the association continued in existence as an unincorporated association and all elections and other appointments of members of committees and other officers were duly made as occasion arose.

Property generally.

2. (1) Property of the association at the time of the incorporation vests in the incorporated association.

(2) Property of members of the association, held by them collectively as members at the time of incorporation, vests in the incorporated' association.

(3) Property which, if the association continued unincorporated, would, at any time after the incorporation-

(a) become property of the association; or

(b) become property of members of the association, held by them collectively as members---

vests in the incorporated association at that time.

(4) Subclauses (1) to (3) have effect subject to clause 7.

(5) For the purposes of this clause, where a disposition of property is intended to take effect as a disposition in favour of the members from time to time of an association, and the disposition is such that

it must take effect (if it takes effect at all) in favour of any member within the time allowed by the rules against perpetuities, the validity of the disposition is not affected by the rules against perpetuities.

(6) Subclause (5) does not apply to a disposition *inter vivos* made before the time of incorporation, or to a disposition made by the will of a person who dies before the time of incorporation.

(7) Subclauses (1) to (4) do not affect a legal proceeding pending at the time of incorporation, but a person recovering property vesting in the incorporated association by force of any of those subclauses shall hold the property upon trust for the incorporated association.

(8) Where, by trust or contract or in any other manner, property is devoted to the pursuit by the association of a purpose, then, after the time of incorporation, the property is devoted in like manner to the pursuit by the incorporated association of the purpose.

(9) Property under the management or control of the association or any governing body or other officer of the association immediately before the time of incorporation comes under the management or control of the incorporated association.

(10) A dealing, whether by way of payment, delivery or otherwise, by a person acting without notice of a vesting of property by this clause, has the effect by way of discharge or otherwise in his favour, and in favour of a person claiming under him, which the dealing would have had if the vesting had not happened.

Power of appointment or other disposition.

3. (1) Where, by the terms of a settlement, a power is created to appoint or otherwise dispose of property in favour of the association or members of the association collectively, then, except in so far as a contrary intention appears by the settlement, the power has effect as a like power to appoint or otherwise dispose of property in favour of the incorporated association.

(2) In subclause (1), “settlement” includes any disposition *inter vivos* and a win, and includes a settlement made at any time, whether before or after the incorporation of the incorporated association, and, in the case of a will, whether the testator dies before or after the incorporation of the incorporated association.

Power of officer.

4. Where a power in respect of property or under or in respect of any contract or trust is exercisable by an officer of the association, on behalf of the association, the power is, after the time of incorporation, exercisable by the incorporated association.

Duty to account.

5. Where a person-

(a) has, immediately before the time of incorporation; or

(b) would have, at any time after the time of incorporation, if the association continued unincorporated-

a duty to account to the association or any officer of the association, that person has a like duty to account to the incorporated association.

Liability.

6. (1) In this clause, “liability” includes a liability at law or in equity to pay a debt or other money, and a duty at law or in equity to do any other thing.

(2) Where, immediately before the incorporation, the association or the members of the association collectively have a liability, the incorporated association has a like liability, subject, however, to such effect as the Limitation Act, 1969, may have in respect of a cause of action for the first mentioned liability.

(3) Where, if the association continued unincorporated, the association or members of the association collectively would incur a liability, the incorporated association incurs a like liability.

(4) Where a person has a liability and by virtue of this clause the incorporated association has or incurs a like liability-

(a) this clause (paragraph (b) excepted) does not affect the liability of that person;

(b) the liabilities of that person and of the incorporated association are joint and several; and

(c) that person is entitled to be indemnified by the incorporated association in respect of his liability

(5) For the purposes of this Act, notwithstanding section 5 (3), a liability incurred by the incorporated association by virtue of subclause (2) is contracted on the date of incorporation of the incorporated association.

Title by registration.

7. Where, by virtue of the Real Property Act, 1900, or otherwise, an instrument of transfer or other disposition of any kind of property by one person to another takes effect at law only on registration or recording of the instrument-

(a) the vesting of property of that kind by virtue of this Schedule does not take effect at law until registration or recording, as the case requires, of an instrument appropriate to give effect to the vesting; and

(b) the incorporated association is entitled to require the execution by all necessary parties and delivery to the incorporated association of an instrument appropriate to give effect to the vesting.

Relief against forfeiture.

8. A leasehold or other interest in property does not determine or become liable to determination or forfeiture, by re-entry or otherwise, by reason of the operation of this Schedule or of any disposition of property to the incorporated association made pursuant to a duty arising under this Schedule.

Stamp duty.

9. A document or instrument executed or registered for a purpose ancillary to or consequential on the transfer of any property in pursuance of this Schedule is not liable to stamp duty.

SCHEDULE 3

(Sec. 24, 26.)

MATTERS TO BE PROVIDED FOR IN RULES

1. The objects of the incorporated association.

2. The manner in which a special decision may be made.

3. The manner in which the committee for the purposes of this Act is to be appointed, including the manner of filing any casual vacancy, and the term of office and manner of removal of member of the committee.

4. Where the rules provide for a committee having 2 or more members, the manner in which meetings of the committee may be called and the quorum and procedure at meetings of the committee.

5. The manner of appointment and removal of the public officer.

6. The yearly date for the lodgment of the annual return pursuant to section 31.

7. Where section 42 applies, the duty to insure pursuant to that section.

8. The manner in which any surplus assets are to be disposed of in a winding up.

9. In respect of a voluntary winding up, the manner powers of the incorporated association are to be exercised in relation to the following-

> (a) in the case of a members' voluntary winding up, the appointment of a liquidator, fixing his remuneration, and approving the continuance of the powers of the committee or of a governing body, and the destruction of books; or

(b) in the case of a creditors' voluntary winding up, nominating a person to be liquidator.

REPORT 30 (1982) - INCORPORATION OF ASSOCIATIONS

Submissions

Submissions were received from-
Association of Apex Clubs of Australia.

Association of Youth Organizations of New South Wales.

Mr R. P. Austin, Senior Lecturer in Law, Faculty of Law, University of Sydney.

Australian Council of Social Service Inc.

Mr V. A. Axtens, Lismore.

Professor M. Chesterman, University of New South Wales.

Commissioner for Corporate Affairs.

Community Activity Centres Network.

Community Child Care Co-Operative Ltd.

Mr J. Dempsey.

Department of Services.

The Dubbo Chamber of Commerce and Industry.

Federation of Parents and Citizens Associations of New South Wales.

Mr K. L. Fletcher, Lecturer in Law, University of Queensland.

Messrs V. F. Gordon, John Wilson & Co., Solicitors, Bathurst.

Mr F. W. Hansford, Law Reform Commission of British Columbia.

Professor J. D. Heydon, Dean of the Faculty of Law, University of Sydney.

The Hon. Mr Justice F. C. Hutley, Judge of Appeal, Supreme Court of New South Wales.

Kazembe Vestates, Sydney.

The Law Society of New South Wales.

Lions International, Multiple District 201,

Local Community Services Association, Sydney.

Mr V. Menart, Solicitor, Fairfield.

Mr C. Mills, Fairfield.

Mr C. P. Mills, Reader in Commercial and Industrial Law, Department of Accounting,

University of Sydney.

The New South Wales Bar Association.

New South Wales Consultative Council on Ethnic Affairs.

Outer Western Regional Council for Social Development, Blacktown.

Professor R. W. Parsons, Faculty of Law, University of Sydney.

Police Department.

Polish Association, Newcastle.

Registrar of Co-operative Societies.

Messrs A. W. Simpson & Co., Solicitors, Armidale.

Small Business Development Council of New South Wales.

Messrs Robert B. Starky & Co., Solicitors, Cronulla.

Sydney Chamber of Commerce.

Table of Cases

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Black v. Smallwood,(1966) 117 CLR 52.	5.8, 5.12
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Broadlands Finance Ltd. v. Gisbome Aero Club Inc.(1975) 2 NZLR 496	6.97
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