



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 21

**Associations Incorporation
Act 1895-1969**

REPORT

MARCH 1972

**REPORT
ON
THE ASSOCIATIONS INCORPORATION ACT**

To the HON. T.D. EVANS, M.L.A.,
ATTORNEY GENERAL

TERMS OF REFERENCE

1. To review the *Associations Incorporation Act 1895-1969*.

MOVEMENT FOR REFORM

2. Criticism has been expressed from time to time to the Under Secretary for Law about certain aspects of the *Associations Incorporation Act*. However so far as the Committee is aware there has been no general review of the Act and its working since it was first enacted in 1895.

3. The Committee therefore proposed that it be given the task of reviewing the Act, with the object of considering whether -

- (a) in view of the comprehensive provisions of the *Companies Act*, any need at all existed nowadays for a special Act dealing with the incorporation of non-profit associations;
- (b) assuming there was such a need, it should be catered for by radically reshaping the legislation, or merely by introducing specific amendments.

4. After studying the legislation of the other Australian States and of the United Kingdom, and after consulting those who have a practical knowledge of the Act, the Committee came to the provisional view that legislation providing for the incorporation of non-profit associations met a real need, and that the existing Act, although deficient in a

number of respects, had stood the test of time remarkably well, so that no radical revision appeared called for.

WORKING PAPER AND COMMENTS THEREON

5. The Committee issued a working paper in June 1971 setting out the provisional views expressed in the previous paragraph, drawing attention to certain defects shown to exist and suggesting ways of dealing with them. A copy of the working paper is attached.

6. Comments on the working paper were received from -

The Registrar of Companies

The Under Secretary for Law

The State Crown Solicitor

The Law Society

The Commissioner of Police

Professor E.K. Braybrooke (until recently Professor of Jurisprudence at the University of Western Australia and now Professor of Law at La Trobe University, Victoria)

Mr. S. Trivett (chairman of the W.A. Little Athletics Association)

Slade, Manwaring & Co. (solicitors for the Presbyterian Board of Missions)

The Hon. Mr. Justice Zelling (chairman of the South Australian Law Reform Committee).

7. The commentators were in broad agreement with the proposals put forward in the working paper. Some commentators suggested modifications and some suggested improvements in certain areas of the *Associations Incorporation Act* which were not touched upon in the working paper.

RECOMMENDATIONS

8. Having reconsidered the views expressed in the working paper, and having taken into account the views expressed by the commentators, the Committee now recommends that the *Associations Incorporation Act* be amended as follows:

Matters dealing with incorporation

- (a) The requirement that the Attorney General's approval must be obtained to the incorporation of associations not specifically described in s.2 of the Act should be abolished. The general restriction as to trading and securing profit to members (modified as suggested in recommendation (l) below) would of course continue to apply to all associations seeking incorporation.

Comment: This was suggested by Professor Braybrooke, who pointed out that the *Incorporated Societies Act 1908* of New Zealand has no such requirement. The New Zealand approach appears to have caused no difficulty.

It is true that under the present system the Attorney General occasionally has refused approval to incorporate, but a study of the files suggests that this has been because either the real purpose of the association was to trade, or because the rules of the association were deficient.

Taken in conjunction with the recommendations that an association can be wound up if its activities go beyond the Act (see recommendation (f) below) and that the rules of an association must provide for certain matters (see recommendation (p) below), the Committee can see no harm in the change. It would certainly make for administrative simplicity.

- (b) If the above recommendation is not accepted by the Government, the types of associations permitted to incorporate without approval should be extended to include those associations founded for the purpose of recreation and amusement, or for establishing community social or cultural centres.

Comment: Such bodies can incorporate without approval in Tasmania and South Australia, and there seems to be no reason why they should not be permitted to do so here.

- (c) If approval is still to be required in some cases, the power to grant approval should be given to the Registrar of Companies, with a right of appeal to the Attorney General.

Comment: The Under Secretary for Law suggested this change. Power to approve a change of object under s. 7A of the Act could similarly be given to the Registrar.

- (d) Only one advertisement of intention to incorporate should be required.

Comment: At present two advertisements are required, whereas other Australian jurisdictions require only one.

Professor Braybrooke queried the need to advertise at all and pointed out that no such obligation existed in New Zealand.

The Committee considers that publication of intention to apply for incorporation has value. Any person who objects to the proposed name of the association can do so: apparently disagreements over names do arise and the issue can be hotly contested. There could be other objections, such as that the association was not disclosing its true purpose.

Cancellation, dissolution and amalgamation

- (e) The Registrar of Companies should be empowered to cancel the incorporation of associations which are defunct. A right of appeal to the court should be given against the cancellation (see recommendation (v) below).

Comment: This recommendation follows the proposal in paragraph 15 of the working paper and would enable the Registrar to clear his records.

- (f) Engaging in an activity not permitted by the Act should be a ground for the winding up of an association by the court (see recommendations (h) and (v) below).

Comment: This is a modification of the proposal in paragraph 16 of the working paper that such activity should be a ground for cancellation (which could have led to difficulties about ownership of property, payment of debts, and so on).

- (g) The Registrar of Companies should be empowered to:
- (i) require evidence of the continued operation of an association;
 - (ii) require information about the activities of an association for the purpose of determining whether it is acting outside the scope of the Act;
 - (iii) apply to the court for a winding up order.

Comment: This follows proposals in paragraphs 15 and 16 of the working paper and seems necessary to ensure the effectiveness of recommendations (e) and (f) above.

- (h) The Act should provide for the voluntary and compulsory winding up of an association and prohibit voluntary winding up without a statutory declaration as to solvency.

Comment: Except for the requirement of a declaration of solvency (which is based on a similar obligation in s.257 of the *Companies Act*) this recommendation follows the proposals in paragraph 17 of the working paper.

- (i) The Act should provide for the disposal of surplus assets on a winding up or cancellation as follows -
 - (i) On a winding up (whether voluntary or compulsory) they are to be transferred, in accordance with a special resolution of members, to some other association having similar objects or to a charity. In the absence of a special resolution of members, they are to be transferred as directed by the court to some similar association or to a charity.
 - (ii) On a cancellation of a defunct company by the Registrar (see recommendation (a) above), the assets are to be sold by him and, after payment of expenses, the surplus is to be paid to the State Treasurer. Any creditor of the association claiming the money may apply to the Treasurer. No member, by virtue only of his membership, should be entitled to claim any part of the money.

In the case of assets held on trust, the association should be empowered to apply to the court to dispose of them in accordance with an appropriate plan. This power should be general, applying whether or not the association is being wound up.

Comment: This recommendation generally follows the proposals in paragraphs 18 to 20 of the working paper, but it is expressed with greater particularity.

Although the working paper does not call attention to the fact, as the law now stands an association can provide in its rules for distribution of its surplus assets in any way it chooses, including distribution to those who are members at the time. Such persons could therefore vote themselves a substantial windfall by dissolving a long established club and sharing among themselves assets built up over many years. The Committee considers this is wrong, and recommends that the power of disposal on a winding up be limited as above.

In regard to (ii), the responsibility of the Registrar in regard to payment of liabilities should be no greater than his responsibility under ss. 311 and 312 of the *Companies Act*.

- (j) An association should be empowered to amalgamate with another similar body, subject to the approval of the Registrar.

Comment: This follows the proposal in paragraph 33 of the working paper.

- (k) The Registrar should be given power to destroy documents filed by an association that has ceased to be incorporated for not less than 15 years.

Comment: This was suggested by the Registrar. A similar power exists in s.12(7) (b) of the *Companies Act*.

Activities and powers

- (1) An association should be permitted to trade -
- (i) with its own members, providing the trading is ancillary to the main purposes of the association;
 - (ii) with the public, providing the trading is ancillary to the main purposes of the association and is not substantial in volume in relation to its other activities.

Distribution of profits to members should continue to be prohibited, unless, in the case of an association for a charitable or benevolent purpose, the distribution is for such a purpose and is approved by the Attorney General. The Attorney General should be free to impose such conditions as he thinks fit.

Comment: This recommendation follows the proposals in paragraph 25 of the working paper, except that the Committee does not now recommend that the Attorney General should be empowered to relax the limits as to trading.

In recommending that the Attorney General should be empowered to permit distribution of profits in the circumstances specified above, the Committee has in mind bodies like the War Widows Guild, which builds flats for those of its members in need of accommodation. As the rent may not be an economic one this activity could be the "securing of pecuniary profit" to those members. It seems unduly dogmatic to inhibit desirable forms or self help.

- (m) Section 5(4) of the Act, which suspends the powers of an association during the time it fails to file information about changes of objects, rules and the like, should be repealed and replaced by a provision which provides that the changes are to be inoperative until

the information is filed. The association should be liable to a penalty for failure to file the information.

The rights of third parties who in good faith have relied on the validity of the changes should be protected.

Comment: This follows the proposals in paragraph 27 of the working paper, except that the association itself, and not any of its officers, is to be liable to a penalty for failure to file. Officers of many associations are voluntary workers, and it may be an unwarranted hardship to subject them to prosecution.

- (n) Section 6 of the Act, which deals with the effect of incorporation of an association, should be amended to ensure that the corporate body -
- (i) can hold property as trustee as well as beneficial owner, and exercise all the powers given a trustee under the *Trustees Act 1962*;
 - (ii) can do all things necessary for or incidental to the purposes for which it is constituted;
 - (iii) completely absorbs the unincorporated association, leaving no scope for the unincorporated body to function as such.

Comment: (i) and (iii) above are recommended on the suggestion of the Hon. Mr. Justice Zelling, who drew attention to a 1948 South Australian case in which doubt was cast on the capacity of a corporate body to be trustee unless authorised by statute. He also drew attention to a High Court case in which it was suggested that, as s.6 is at present drafted, the association may be held to be incorporated for some purposes only.

(ii) is based on a suggestion of Slade, Manwaring & Co., and is designed to avoid the harsher implications of the *ultra vires* rule.

Although it may be doubted whether s.6 has in fact these defects, there seems no reason why it should not be redrafted to put the matter beyond dispute.

- (o) Associations should be obliged to use the word 'incorporated' or 'Inc.' as part of their name and to use it on their documents. The use of the term by an association not incorporated under the Act should be prohibited.

Comment: This follows the proposals in paragraph 29 of the working paper.

- (p) Associations should be obliged to make provision in their rules for such things as procedure at meetings, management of funds, custody and use of seal. To avoid

misunderstanding, the provisions of the Act relating to voluntary winding up and to disposal of surplus assets should also be included in the rules of associations.

Comment: This recommendation is based on a suggestion by Professor Braybrooke. Tasmania and New Zealand have useful precedents.

(q) The Act should provide model rules for adoption by any incorporated association that saw fit.

Comment: This proposal follows paragraph 32 of the working paper. Tasmania and Papua-New Guinea have useful precedents.

(r) Section 7(1) of the Act should be amended to -

- (i) make it clear that the time within which a proposed change of name is to be advertised runs from the date of the resolution of the association;
- (ii) permit an association to reserve a proposed name for a limited period.

Comment: These are suggestions of the Law Society. A similar power to reserve a name is given in s.22 of the *Companies Act*.

(s) The power of the Registrar of Companies to refuse to approve a name should be extended to include a name which is identical with one registered under the *Business Names Act*, or which may be confused with it.

Comment: This was suggested by the Registrar of Companies.

(t) The Act should provide for verification of documents by statutory declaration instead of by affidavit.

Comment: This change was proposed in paragraph 34 of the working paper. Professor Braybrooke questioned the need for verification at all, and suggested that it would be sufficient to provide a penalty for making a false statement. The Committee is not satisfied that this is a desirable step. The obligation to make a statutory declaration automatically carries legal consequences, such as a penalty for false statements, which must otherwise be specifically provided for.

The Committee has recently been given the task of investigating the need for statutory declarations generally (C.L.D. 2826/67). If a study shows that an alternative procedure is adequate, the Committee would recommend the change at that stage.

- (u) The Registrar should be empowered to extend the time for performing or doing any act or thing under the legislation.

Comment: This follows the proposal discussed in paragraphs 30 and 31 of the working paper.

Court having jurisdiction

- (v) The District Court should be given jurisdiction to hear objections to incorporation of an association, applications for the winding up of an association (see recommendation (h) above) and appeals against a decision of the Registrar to cancel incorporation (see recommendation (e) above).

Comment: At present objections to incorporation are heard by the Supreme Court. There seems no reason why this matter should not be dealt with by the District Court. Similarly that court seems the appropriate body to hear a winding up application and an appeal against a cancellation of incorporation.

Professor Braybrooke suggested the Local Court as the most appropriate body to hear objections to incorporation but the Committee is of the view that procedural difficulties could attach to Local Court applications of this nature. The originating processes of the District Court would seem appropriate for many of the matters likely to arise, and the appeals would be more properly dealt with by the District Court.

- 9. The Committee has not attempted to draft amendments to give effect to its recommendations, but will of course do so if requested. In any case the Committee will gladly assist the Parliamentary Counsel in preparing a draft for legislation.

E. J. Edwards

Chairman

C. le B. Langouant

Member

B. W. Rowland

Member

14 March, 1972