

QUEENSLAND

LAW REFORM COMMISSION

SUPPLEMENTARY PAPER ON A DRAFT ASSOCIATIONS
INCORPORATION ACT

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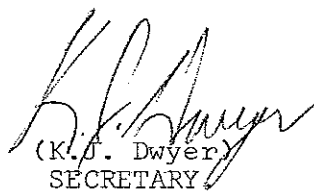
LAW REFORM COMMISSION

SUPPLEMENTARY PAPER ON A DRAFT ASSOCIATIONS
INCORPORATION ACT

In the preface to its working paper on a Draft Associations Incorporation Act (Q.L.R.C.W. No.22), dated 8th December, 1978 the Commission anticipated that it would make certain amendments to the working paper and that these would be circulated separately to those to whom the working paper had been sent.

The Commission has discussed the proposed amendments and Mr. Glen Williams, Q.C., a member of the Commission, has prepared a paper embodying the new proposals. I forward a copy of this paper for your information.

If you have any observations to make on this paper, we would appreciate your forwarding them to us no later than 23rd February, 1979.


(K.J. Dwyer)
SECRETARY

5th February, 1979.

LAW REFORM COMMISSION

SUPPLEMENTARY WORKING PAPER ON DRAFT ASSOCIATIONS
INCORPORATION ACT

In December, 1978 the Commission circulated a Working Paper on Draft Associations Incorporation Act. (Q.L.R.C.W. 22) As foreshadowed in a covering letter the Commission decided to issue a supplementary document after further discussion of that Working Paper and the accompanying material.

The proposal as contained in the Working Paper:-

- (i) Leaves it to each unincorporated association to decide whether or not it should seek incorporation under the proposed legislation;
- (ii) Excepts from its operation by definition "an association . . . formed or carried on for the purpose of trading or securing pecuniary profit to its members";
- (iii) Repeals The Religious Educational and Charitable Institutions Acts of 1861, 1895, 1959 and 1967;
- (iv) Gives to the Governor in Council the sole power to 'direct' incorporation, and places the responsibility for administering the Act on the Minister for Justice and Attorney General.

It must be remembered that the expression "unincorporated association" covers a multitude of "groups" within our society. If the Religious Educational and Charitable Institutions Acts referred to above (hereinafter referred to as R.E.C. Act) are to be repealed, all major religious bodies, not specifically incorporated by Statute, which desire corporate status, would either have to incorporate under The Companies Act or under the proposed legislation. They would be in the same category as wealthy licensed sporting clubs having a turnover of millions

of dollars per year. Other likely candidates for incorporation under the proposed legislation would be political organisations, large and small; most charitable organisations; many organisations formed for the purpose of advancing scientific research; and many bodies formed for the purpose of controlling and regulating professions and other callings. Of seemingly less importance, but numerically of greater concern, would be smaller sporting organisations, small (probably regional) cultural and charitable organisations, groups and clubs within major institutions such as the University of Queensland, and even perhaps a ladies suburban bridge club. The great diversity of groups within our society which could take advantage of or be made subject to this legislation must be borne in mind at all times. Even the above statement of the possible ambit of the proposed legislation does not delimit the conceptual problem which has to be recognised in preparing the legislation. The definition of 'Association' in the draft Bill accompanying the Working Paper permits of the incorporation of 'an integral part of an association'. Immediately that gives rise to various problems of determining when, and on what conditions, a branch of an association should be entitled to take advantage of the legislation, particularly if the parent body is not in favour of such a move. A further complication could arise if the parent body was not subject to Queensland law (e.g. it was constituted in New South Wales).

There are strong reasons in support of the contention that a "branch" ought not to incorporate unless the "parent body" either consented or was also incorporated under the proposed legislation.

These conceptual problems can best be resolved by adopting a pragmatic approach. A decision should be made as to the "type" of association which the Act is intended to cover, and that decision should be reflected in the legislation, either in the definition of "association" or in a specific section dealing with the scope of operation of the Act.

A matter of concern to the Commission was whether or not the legislation should require certain unincorporated associations to apply for corporate status so that the organisation became subject to the regulatory provisions thereof. The argument in favour of a limited compulsion is that otherwise the legislation would lose its effectiveness if each association could decide for itself whether it should become subject to the regulatory provisions. The burden so created could be thought to outweigh the obvious advantages of incorporation, and the very associations which as a matter of policy should be subjected to the regulatory provisions would not be so caught. The principal arguments against a compulsory provision are:-

1. there should not be any undue restriction on the freedom to associate;
2. there is no demonstrated need for a requirement of compulsion in this area;
3. once such a requirement was included in the legislation it would make the problems of administration enormous and costly.

The Commission has considered the arguments and looked at various indicia which could be used to define an area of compulsion, but has ultimately concluded that the decision whether or not to seek corporate status should remain

a voluntary one for each unincorporated association.

In the view of the Commission there are difficulties even in adopting as a criterion for compulsory incorporation the making of an appeal to the public for funds. No one really wants to force the local junior football team to incorporate because it makes an appeal for funds to send its members to Sydney for an end of the season match. If such groups were caught by a compulsory incorporation provision the problems and cost of administering the proposed legislation would be prohibitive.

To meet the problem of the incorporation of a "branch" the Commission considers that it is not sufficient merely in the definition to speak of the incorporation of "an integral part of an association". The New Zealand legislation (primarily by an amendment introduced in 1920) has expressly dealt with this problem, and that legislation, with necessary adaptations, should be included in the Queensland legislation. The Commission therefore proposes to alter the Draft Bill to include the following provisions:-

"1(a) Any association incorporated under this Act may apply in accordance with this Act for the incorporation of any local branch having not less than 15 members, or for the incorporation of a group or groups of such branches of that association.

(b) No application for the incorporation of a local branch shall be made except with the consent of a majority of the members proposed to be incorporated as a local branch, and no application for the incorporation of a group of branches shall be made except with the consent of a majority of

the members of each of those branches.

(c) Any group of local branches may be incorporated notwithstanding that the whole or any number of such branches may be already incorporated.

2. All the provisions of this Act relating to associations registered thereunder (including the powers conferred upon such associations to hold land) shall, so far as applicable, and with the necessary modifications, apply to branches of associations or to groups of such branches incorporated under this Act.

3. The incorporation of a branch of an association under this Act shall not relieve the members of that branch from any liabilities or obligations incident to their membership of such association, whether under the Act, or the rules of the association, or otherwise howsoever.

4. For the purposes of this Act membership of a branch of an association shall be determined in accordance with the rules of the association and the special rules (if any) of the branch in that behalf, and not otherwise, and every member of a local branch shall be deemed to be a member of the association and liable to all the obligations of membership.

5. Every application for the incorporation of a branch or group of branches of an association incorporated under this Act, shall be made by such association, and shall, so far as applicable, and with all necessary modifications, comply with the requirements of an application for incorporation under this Act."

The Commission has also given further consideration to the problem of excepting from the operation of the proposed legislation associations "formed or carried on for the purpose of trading or securing pecuniary benefits to its members". It would appear that this provision has been inserted in the various draft bills referred to in order to maintain the distinction between a partnership and an association. Partnership is a concept well known to the law, and though there is no body corporate, the partnership as such is recognised by law. Trading with a view to making profit for the members of the partnership is an integral part of any partnership. But in our modern society many unincorporated associations (particularly sporting clubs) now trade (for example, the trading of licensed clubs) and such trading often enables the club to give benefits to its members (for example, sell sporting equipment at a lower price). The Commission considers that the proposed legislation should recognise that many associations likely to seek incorporation so operate. To meet this objection the definition of "association" in the Draft Bill should be altered so that sub-paragraph (a) thereof reads:-

"(a) which is formed or carried on for the purpose of pecuniary gain to its members;"

There should then be inserted in the legislation a provision dealing with the concept of "pecuniary gain". Such a provision is to be found in the New Zealand legislation, and the Commission proposes that the Queensland section be moulded on Section 5 of the 1908 New Zealand legislation. The proposed provision would read as follows:-

" An association shall not be deemed to be formed or carried on for the purpose of pecuniary gain to its members merely by reason of all or any of the following circumstances, namely:

(a) that the association itself makes a pecuniary gain, unless that gain or some part thereof is divided among or received by the members or some of them;

(b) that the members of the association are entitled to divide between them the property of the association on its dissolution;

(c) that the association is established for the protection or regulation of some trade, business, industry, or calling in which the members are engaged or interested, if the association itself does not engage or take part in any such trade, business, industry, or calling, or any part or branch thereof;

(d) that any member of the association derives pecuniary gain from the association

by way of salary as the servant or officer of the association;

(e) that any member of the association derives from the association any pecuniary gain to which he would be equally entitled if he were not a member of the association;

(f) that the members of the association compete with each other for trophies or prizes other than money prizes;

(g) that the association provides as an ancillary service to its members the opportunity of purchasing from the association goods related to one of the primary purposes for which the association was formed at a discounted and/or subsidised price."

In accordance with those proposed amendments, Clause 14(b) of the Draft Bill should be altered to read:-

"to empower an incorporated association to trade for the purpose of securing pecuniary gain for its members;"

The Commission is also concerned that paragraph (b) in the definition of the term "association" could create difficulties in practice. That provision places the onus on the association of determining whether or not it could gain corporate status under some statute other than the Companies Act. That may be a question not capable of being readily answered. On the other hand there can be no doubt that an association which is in truth, for example, a building society should not be able to avoid the stringent statutory obligations

imposed on a building society by incorporating under the proposed statute and not under the statute regulating the conduct of such societies. This problem can best be resolved by deleting in paragraph (b) the reference to "any Act" and specifying certain Acts. The Commission recommends that incorporation under the proposed statute should not be available where the association may be incorporated under one or more of the following statutes:-

Building Societies Act 1886-1976

Co-operative and Other Societies Act 1967-1976

Co-operative Housing Societies Act 1958-1974

Friendly Societies Act 1913-1974

Primary Producers Co-operative Associations
Act 1923-1974.

The Working Paper and Draft Bill already circulated have as a central feature the repeal of the R.E.C. Acts. The Commission is of the view that these Acts have worked well and fulfil a need which can be distinguished from that requiring the introduction of an Associations Incorporation Act. In consequence the Commission is of the view that the R.E.C. Act should not be repealed, but should operate conjointly with the proposed legislation. There are obvious advantages in having major Religious and Charitable organisations incorporated by Letters Patent; they do have a status above that of the more commercially or socially orientated associations presently denied corporate standing. Further, there appears to be no necessity to compel the bodies presently enjoying corporate status pursuant to Letters Patent issued pursuant to the R.E.C. Act to be dissolved (if only notionally) and then deemed to be incorporated under the new statute. Many such bodies would object, probably justifiably, to the inclusion of the ugly term "Inc" at the end of their name. Once the proposed legislation became law without the repeal of the R.E.C. Act the Governor-in-Council could exercise a narrower

granted corporate status by Letters Patent.

There may be instances where an organisation having corporate status under the R.E.C. Act desired to relinquish the Letters Patent and seek incorporation under the new legislation. Clauses 53 and 54 in the Draft Bill accompanying the Working Paper should be substantially amended so that they only relate to such a situation.

If, as a matter of policy, it was considered that some organisations enjoying corporate status pursuant to the R.E.C. Act should be subjected to the regulatory provisions in the proposed legislation, the R.E.C. Act could be amended to provide that the Governor-in-Council could by proclamation in the Government Gazette require a specified organisation to comply with those regulatory requirements.

If the R.E.C. Act remains in force there is no reason why Show Societies granted Letters Patent thereunder ought to be disturbed. Any new association coming within that category could either apply for Letters Patent under the R.E.C. Act, or could obtain incorporation through the provisions of the proposed legislation. If that position were to be accepted Clause 52 of the Draft Bill would need alteration.

The last major matter of concern is that relating to the procedure for incorporation. The Draft Bill circulated with the Working Paper provides for the association to apply to the Minister who in turn, after making enquiries, makes a recommendation to the Governor-in-Council. It is then the Governor-in-Council who directs whether the association should be incorporated or not. That follows substantially the procedure which has existed for some years under the R.E.C. Act.

If, however, the proposed legislation is to have wide scope of operation it is the view of the Commission that a procedure substantially similar to that applying to the incorporation of a company under the Companies Act should be adopted.

The office of the Commissioner for Corporate Affairs is clearly fitted to deal with the procedural matters pertaining to the incorporation of associations. If, as is considered likely, there were a large number of associations seeking incorporation it would be difficult for the Minister (and his immediate Departmental officers) to deal with the applications without the assistance of an office staff such as that of the Commissioner. The regulatory provisions of the Act would also be more readily implemented by the Commissioner and his staff. Again the Minister's office would hardly be equipped to handle the volume of work involved if the number of associations utilising the provisions of the Act approximated those which have sought incorporation under similar statutes in other States.

The Commission therefore considers that the Draft Bill should be altered along the following lines:-

- (i) include in Clause 4 a definition of "Commissioner" as the Commissioner for Corporate Affairs;
- (ii) in definition of "undesirable name" delete "Minister" and insert "Commissioner";
- (iii) in Clause 5(3) delete "Minister" and insert "Commissioner";

- (iv) Clause 6 should provide that the:-
"Commissioner shall on receipt of an application for incorporation and after making such enquiries as he shall think fit, determine whether the association should be incorporated or not".
- (v) Clause 7 should be deleted and be replaced by a provision giving a right of appeal to the Supreme Court against a decision refusing incorporation;
- (vi) amend clause 8 to provide that Commissioner issues certificate;
- (vii) Clause 10 should provide in addition that the Commissioner may give associations a dispensation from the requirement that word "Incorporated" or abbreviation "Inc" be included in its name in the circumstances set out in Section 24 of the Companies Act;
- (viii) Clause 11 - delete "Minister" insert "Commissioner";
- (ix) Clause 13(3) - delete "Minister" insert "Commissioner";
- (x) Clause 18(3) - delete "Minister" insert "Commissioner";
- (xi) Clause 24 - delete "Minister" insert "Commissioner";
- (xii) Clause 27 - delete "Minister" insert "Commissioner";
- (xiii) Clause 29 - delete "Minister" insert "Commissioner";
- (xiv) Clause 30 - delete "Governor in Council" insert "Commissioner";

There are a number of other aspects of the Working Paper and Draft Bill which have been the subject of further consideration, and the following alterations and additions are proposed.

(1) Clause 13 should provide that a transfer or vesting of property pursuant to incorporation should be free of "ad valorem" duty.

(2) Clause 32 dealing with amalgamation of incorporated associations should require notice of the proposed amalgamation to be given to all creditors of each association, so that practical effect can be given to sub-paragraph 6 of that clause. In all the circumstances probably the better solution would be to provide that if a creditor notifies the Commissioner for Corporate Affairs that he is opposed to the amalgamation on the ground that the amalgamation would prejudice his position, the amalgamation should not take effect without the order of a judge of the Supreme Court. The situation is really analogous to that where a company seeks approval for a reduction of its capital.

(3) Clauses 13 (4) and 14 (a) should be altered to provide simply that after incorporation 'property shall not be dealt with contrary to the provisions of any trust affecting the the property immediately before incorporation'.

(4) The bill should provide that incorporation under the provisions of the legislation would not invalidate or in any way affect any gift or disposition to the association whether on trust for the association or absolutely, at least where the document evidencing such gift or disposition was executed prior to the coming into force of the legislation and/or where the act evidencing the gift or disposition was performed prior to that date.

Also the legislation should facilitate the making of gifts to associations, whether they have sought incorporation under the Act or not. To achieve those objectives the following clause should be added to the draft Bill:-

"(1) A disposition in favour of an association (whether incorporated or unincorporated) shall be construed as a disposition in augmentation of the general funds of that association and not, unless the context otherwise requires, as -

- (a) a disposition in favour of the individual members of the associations; or
- (b) a disposition in trust for the objects or purposes, or any of them, of the association.

(2) A disposition in favour of an unincorporated association shall, unless the context otherwise requires, take effect in favour of the body corporate constituted pursuant to this Act where such incorporation is effected after the document evidencing the disposition was made or executed but before the disposition was perfected.

(3) In this section disposition means any disposition by will, written instrument, or otherwise, which takes effect after the commencement of this Act."

(5) Clause 12 should be amended to provide that an advertisement, in whatever form it may take, should contain the name of the association. The amended clause should read:-

"An incorporated association shall cause every notice, bill of exchange, promissory note, endorsement, order, way-bill, invoice, receipt or other document given, published, drawn, endorsed or issued by it, and any advertising material whatsoever, to contain the name of

the association in legible characters."

(6) Clause 19 should be amended. The provision as it stands is too stringent and would allow a dissident member to thwart the reasonable wishes of all other members. The amendment should be along the following lines:-

- (i) no alteration of rights without a two-thirds majority of members at a general meeting;
- (ii) dissentient members can then apply to Court for:-
 - (a) an order invalidating the proposed alteration; or alternatively,
 - (b) a winding up order;
- (iii) court would only grant the dissentients such relief if:-

- (a) the proposed alteration substantially altered the rights of the dissentients in some material respect;
- (b) the existing rights of the dissentients could not otherwise be protected, and for this purpose the court could have powers to order a partial distribution in specie of the association's property to satisfy the claims of the dissentients.

(7) Clause 20 should be amended by inserting the words "or by proxy" after the words "in person".

(8) Clause 23 (1) should be amended to read:-

"(1) Subject to this Act, the business and operations of an incorporated association shall be controlled by a committee, in this Act called the Management Committee."

9. Clause 31 should be deleted. The decision in this regard should be considered in the light of the proposed amendment dealt with in Paragraph 4 above. Any relevant trust would either have to be a charitable trust, or a trust for the members of the association individually. The law does not recognise a non-charitable purposive trust. If it is a charitable trust, then the cy pres provisions of the Trusts Act 1973 apply. If it is a trust for the individual members of the association then it cannot be said in any meaningful sense that the trusts have come "to an end".

10. The Commission considers that amendments should be made to Clause 14 and the Fourth Schedule. Paragraph 1 of the Fourth Schedule is not strictly necessary, nor is paragraph 2. The whole of that Schedule could be deleted and the introductory provisions of Clause 14 altered to read:-

"Unless expressly excluded or modified by its rules, the powers of an incorporated association include and shall be deemed always to have included the power to own, take or otherwise acquire real and personal property of any kind or description but nothing . . ."

11. Clause 15 of the draft Bill should be altered by inserting after the phrase "without capacity or power" appearing in sub-paragraph (1) thereof the words in brackets:-

"(whether by provision of this Act or by its Rules or otherwise)"

12. Sub-paragraph (2) of Clause 38 should be deleted in view of the alterations to the draft referred to above. If the trust is charitable, the cy pres provisions of the applicable legislation would govern the situation. If the trust was not

charitable, it would be for the benefit of the members individually, and such trust monies ought not to be distinguished from other assets of the association.

13. Clause 39 should be altered by inserting the words "or that its affairs have been fully wound up" after the words "cease to exist" where they appear in the third line of subparagraph (1) thereof. This would remove any doubt as to the course to be followed in such circumstances.

There are other areas of the law relating to unincorporated associations which have caused a deal of concern to the Commission. Such associations are playing an increasingly important part in the day to day affairs of the average citizen in our community. More and more people are finding their conduct and affairs regulated by the decision making power conferred on such associations by the rules thereof. Such decisions, though not affecting what has been called in numerous common law decisions "proprietary rights", have significantly affected the livelihood of such persons. The perfect example of the problem in question is provided by the decision in Heale v. Phillips (1959) Qd. R. 489. In that case the plaintiff's income earning capacity was severely limited by the decision of the Canine Control Council (Queensland), but the Court held that it had no jurisdiction to adjudicate upon the validity of the decision, even on the ground that it breached the rules of natural justice. There is clearly a need for reform in this area, but again the difficulty is in formulating a legislative provision which would be of practical value, but which would be "workable". The danger is that if the Courts are given the power to review all decisions of an association having some tenuous connection with a substantive right of one of its members, the Courts would be completely inundated with "vexatious litigation". It would be unthinkable that a sportsman, dropped by selectors from a team

thus incurring some loss of income which he would otherwise obtain, could apply to the Court for an injunction restraining the selected from playing on the ground that he had been denied the rights of natural justice. The Commission puts forward for consideration the proposal that the legislation include a section along the following lines:-

"(i) Upon incorporation the rules and/or constitution of the association shall constitute the terms of a contract between the members from time to time of the association and the association itself.

(ii) Where a member of an association is deprived of a right conferred on him by the rules and/or constitution of the association as a member thereof, by a decision of the association, the Supreme Court shall have jurisdiction to adjudicate upon the validity of that decision under the rules and/or constitution of the association.

(iii) An incorporated association shall be bound by the rules of natural justice in adjudicating upon the rights of its members which rights are conferred by the rules and/or constitution of the association on such member."

Another, possibly controversial, provision of concern to the Commission is to be found in Clause 23 of the draft Bill. Sub-section (2) radically alters the existing law. Not infrequently Courts have to determine where the loss lies when a member of an association wrongly (perhaps criminally) incurs a liability in the name of the association. After discussion the Commission has concluded that sub-section (2) should remain in

the form in which it appears in the draft. The deeming provision is not absolute, because the deemed agency will only exist where the member of the Management Committee has been "acting in the business or operation of the incorporated association". That will, in many instances, be a significant restriction on the operation of the clause.

However, the draft provision should be amended to the extent that in addition to members of the Management Committee, a Manager of the affairs of the association is also deemed to be its agent in like circumstances. To achieve that end after the words "Management Committee" the following words should be inserted:-

"and any Manager duly appointed by the Management Committee".

Finally, the Commission is of the view that a provision similar to Section 366 of the Companies Act should be inserted in this legislation. In particular sub-section (3) thereof could have extreme importance in this area of the law. Experience has shown that frequently such associations do not strictly follow the constitution of the association in the appointment of officers, or in the carrying out of some transaction. Indeed, situations have arisen where an unincorporated association having extremely valuable assets had no office bearers validly appointed, and indeed no members validly admitted in accordance with the governing rules. Usually such potentially catastrophic events occur without there being any bad faith on the part of the members of the association. Clearly it is in the interests of all affected thereby that the Court have the power of validating, for example, the appointment

of office-bearers, the admission of members, and the undertaking of a particular transaction. The power to validate should be retrospective, in the sense that where a body has incorporated under the proposed legislation, the Court could validate something which occurred prior to incorporation. In consequence the Commission proposes that the following clause be included in the Bill:-

"(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by an order of the Court.

(2) The Court may if it thinks fit make an order declaring that such proceeding is valid notwithstanding any such defect, irregularity or deficiency.

(3) Without affecting the generality of sub-section (1) and sub-section (2) of this Section or of any other provision of this Act, where any omission, defect, error or irregularity (including the absence of a quorum at any meeting of the association or of the Management Committee) has occurred in the management or administration of an association incorporated under this Act (whether or not such omission, defect, error or irregularity occurred before or after the passing of this Act and whether it occurred before or after the association became incorporated under this Act) whereby any breach of any of the provisions of this Act has occurred or whereby there has been default in the observance of the rules or constitution of the

association or whereby any proceedings at or in connection with any meeting of the association or of the Management Committee thereof or any assemblage purporting to be such a meeting have been rendered ineffective, the Court -

(a) may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission, defect, error or irregularity, or to validate any act matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission, defect, error or irregularity;

(b) shall before making any such order satisfy itself that such an order would not do injustice to the association or to any member or creditor thereof;

(c) where any such order is made, may give such ancillary or consequential direction as it thinks fit; and

(d) may determine what notice or summons is to be given to other persons of the intention to make any such application or of the intention to make such an order, and whether and how it should be given or served and whether it should be advertised in any newspaper.

(4) The Court may enlarge or abridge any time for doing any act or taking any proceeding allowed or limited by this Act or any rules or regulations made thereunder upon such terms (if any) as the Justice of

the case may require and any such enlargement may be ordered although the application for the same is not made until after the time originally allowed or limited."

The observations contained in this supplementary paper will be further considered by the Commission after the receipt of material from interested organisations. They do not represent the final view of the Commission on this topic.