



Tourism, Fair Trading and
Wine Industry Development
Queensland Government

Review of the

Associations Incorporation Act 1981

Consultation Paper

Office of Fair Trading

Disclaimer

This Consultation Paper does not represent the policy of the Queensland Government.

While every effort has been made to ensure the accuracy of the information contained in this Paper, no responsibility is taken for reliance on any aspect of it and it should not be used as a substitute for legal advice.

Submissions may be placed on the Office of Fair Trading's website at **www.fairtrading.qld.gov.au** in the interests of informing the public debate. If you do not wish your submission to be made publicly available, please state this when lodging your submission.

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List of abbreviations

The Act *Associations Incorporation Act 1981* (Qld)

AI Regulation *Associations Incorporation Regulation 1999* (Qld)

ASIC Australian Securities and Investment Commission

Collections Act *Collections Act 1966* (Qld)

Cooperatives Act *Cooperatives Act 1997* (Qld)

Corporations Act *Corporations Act 2001* (Cwth)

OFT Office of Fair Trading

Message from the Minister

Incorporated associations are a vital part of Queensland's non-profit sector and facilitate many worthwhile activities in the Smart State.

There are nearly 20,000 incorporated associations registered in Queensland, representing many important facets of our community including industry groups, sporting clubs, social or hobby-based activities and cause-related community groups.

In Queensland, associations can seek incorporation under the *Associations Incorporation Act 1981* (the Act). Since the introduction of the Act, the area of incorporated associations has developed and the profile of organisations wishing to be registered has changed significantly.

The Beattie Government is committed to ensuring legislative framework in the Smart State is relevant and addresses the issues being faced by associations. I am pleased to announce the Act is now undergoing a review and the Queensland Government is seeking your comments.

This Consultation Paper aims to generate debate about issues facing non-profit organisations in Queensland.

I am keen to hear the views of those involved in the management of incorporated associations, as well as the general membership, on matters raised in the Paper and any other issues relevant to the Act.

I encourage you to take time to consider the Paper and respond to it. Your views are important and will assist us in ensuring the laws governing incorporated associations in Queensland are relevant, user-friendly and meet the interests of all those affected by their operation.



A handwritten signature in black ink that reads "Margaret Keech".

Margaret Keech

Minister for Tourism, Fair Trading and Wine Industry Development

What's in the paper?

The Queensland Government, through the Office of Fair Trading (OFT), is conducting a review of the *Associations Incorporation Act 1981* (the Act).

The Consultation Paper (the Paper) addresses a range of issues including:

- who is eligible for incorporation under the Act;
- public liability insurance;
- Model Rules;
- management committee members;
- voting;
- requirements for first AGMs;
- privacy of personal information, including criminal history checks;
- reporting/auditing;
- issuing debentures;
- associations vesting property in trustees;
- administrative matters such as the need to have a registered office and being able to lodge information electronically;
- fees;
- penalties;
- resolving disputes;
- winding up;
- cancellation of incorporation; and
- a more proactive educational role for OFT.

The Paper aims to generate debate about the issues facing the many thousands of non-profit organisations in Queensland and following a consultation process, achieve a more relevant, user-friendly and contemporary Act which meets the interests of all those affected by its operation.

How can I have my say?

You are invited to comment on this Paper, which seeks community views on the legislation generally and issues of particular concern.

To assist OFT in collating responses to this Paper, please provide your feedback by completing the response form. If you would like to provide additional feedback, you may attach a separate sheet.

We have allowed an eight week period for submissions to be lodged with OFT. Completed response forms and submissions must reach OFT by close of business on Friday, 22nd April 2005 and should be addressed to:

*Review of the Associations
Incorporation Act 1981*
Office of Fair Trading
Department of Tourism, Fair Trading
and Wine Industry Development

By post to:
GPO Box 3111
BRISBANE QLD 4001

By fax to:
3119 0019

By email (preferred method) to:
assocreview@dtftwid.qld.gov.au

All responses will be collated and analysed. However, with 20,000 associations in Queensland, the number of submissions could be significant and it could take some time.

After considering all submissions the Minister for Tourism, Fair Trading and Wine Industry Development, the Honourable Margaret Keech MP, will then make recommendations to Cabinet and then present any changes to the Act to the Queensland Parliament.

About incorporated associations in Queensland

There are 145,000 incorporated associations Australia-wide, with nearly 20,000 of these based in Queensland. Incorporated associations are often social and sporting clubs, artistic societies, associations with religious, patriotic or political interests, professional associations, charitable organisations, youth, voluntary and community groups and political parties. Some associations have negligible assets and only a few members (although Queensland requires at least seven members) whereas others have an annual turnover of millions of dollars a year, substantial assets and thousands of members.

Associations incorporation legislation provides an alternative to forming, for example, a company limited by guarantee or a co-operative, and is particularly suitable for small, community based groups. It represents a voluntary, simple and inexpensive means of establishing a legal entity, and is adopted as the most advantageous way to incorporate by many organisations.

The advantages of incorporation under current laws are:

- an association can sue and be sued in its own name;
- an association can hold property in its corporate name without appointing trustees;
- the contractual liabilities of an association are enforceable against the association rather than members or committee members personally, unless the rules of the association specify otherwise;
- liabilities of members and committee members are limited to outstanding fees;
- associations can make a profit as long as that profit is not divided amongst its members; and
- the association has the statutory power to invest and to deal with money not immediately required, and to raise or borrow money.

In return for these benefits, associations incorporated under the *Associations Incorporation Act 1981* (the Act) are required to be accountable to the Office of Fair Trading (OFT), for example, by providing audited financial returns on an annual basis.

What's the current situation?

Associations Incorporation Act 1981

Before the introduction of the *Associations Incorporation Act 1981* (the Act), organisations were incorporated by means such as letters patent under the *Religious, Educational and Charitable Institutions Act 1861*, Royal Charter or under statutes dealing with specific organisations (for example *Guides Queensland Act 1970*).

The introduction of the Act provided a specialist method of incorporation for non-profit organisations. In general, the Act provides a framework for:

- determining which organisations are eligible to incorporate and the process for incorporating;
- establishing the powers of, and the rules by which, the association will operate, including the provision of a set of Model Rules (which can be used in part or as a whole);
- the calling and running of general meetings of the members;
- the election and membership of the management committee;
- the role and meetings of the management committee and its members (including the secretary);
- keeping records relevant to the association by the association and OFT, including access to registers;
- the rights of members and access to the Supreme Court where there are internal disputes;
- the winding up of an association; and
- appeal or review of decisions made under the legislation.

While there is strong community and government support for the Act, concerns about certain aspects of its operation have been raised by individuals and peak organisations, professionals, academics, and others. This review aims to address these concerns. The aim of the Queensland Government is for associations to have access to legislation which best meets the needs of associations, regulators and the general community.

Getting down to the detail

Organisations covered by the Act

Who is eligible for incorporation?

Currently: Associations incorporated under the Act must be genuinely established for purposes other than making profit for their members (section 5(1)(c)). Those which are formed or carried on primarily for trading or other business purposes, or which make profits or gains which are passed on to members, cannot become incorporated under the Act.

Issues:

- deciding when fundraising activities become a principal purpose or object in themselves (in such cases, the association may be more suited to another business structure), and
- deciding how to handle indirect benefits (those not provided in the form of dividends but which have a monetary value).

It may be beneficial to describe in more detail what would make associations genuinely not-for-profit. This would provide greater clarity about the criteria for incorporation under the Act and ensure the Act continues to operate in the interests of the non-profit sector. Groups which do not meet these criteria would not be eligible for incorporation under the Act.

OPTIONS

1A The Act should continue as it is, with no changes to the objects an association may adopt or the activities it may undertake while remaining incorporated under the Act.

OR

1B The Act should provide a clearer definition of objects an association may adopt, or activities it may undertake, consistent with a 'non-profit' character.

ADDITIONAL COMMENTS

What sort of definition should be considered if Option 1B is preferred?

Who is covered by the Act?

Currently: The range of organisations covered by the Act varies – some are small and focussed on their own locality, others turn over significant funds and operate across several States and Territories.

Issues: Some organisations are quite different to the small, voluntary, community based bodies which the Act was initially intended to cover. There needs to be serious consideration of whether the Act should continue to cover all the organisations it does or whether there are more suitable legal mechanisms for those at the ‘top’ end of the range.

Act to set out specific criteria

One approach is to set out criteria, or a combination of criteria to define the types of organisations which should be subject to the Act, such as:

- gross income (above or below a certain level);
- asset value (above or below a certain level);
- nature of trading activities;
- membership size;
- number/proportion of paid employees;
- source of income (those which receive funding from a single donor may not need the same level of scrutiny as those which receive a significant proportion of government funding); and
- holding a gaming licence.

Those which did not meet the criteria would not be eligible for incorporation under the Act but could incorporate under the Queensland *Cooperatives Act 1997* or the Commonwealth *Corporations Act 2001*.

Cooperatives Act 1997

The Cooperatives Act 1997 (Qld) (the Cooperatives Act) enables groups to form, register and manage both trading and non-trading cooperatives. Cooperatives are based on principles of mutual interest, and on providing goods and services to members rather than a financial return on members’ capital. They also allow members to obtain limited liability.

Trading cooperatives differ from incorporated associations in that they can be formed to establish a business which makes a profit for its members. Unlike private companies, cooperatives do not have an upper limit on membership numbers. Their ‘one member, one vote’ system also differs from public companies where voting rights are linked to share ownership.

Some associations may be more appropriately registered as cooperatives due to the nature of their activities. However, the Cooperatives Act contains more detailed reporting requirements than the Act.

Corporations Act 2001 (Cwth)

The *Corporations Act 2001* (Corporations Act) provides for the registration and regulation of companies and regulates financial products and services. Upon registration under that Act, a company becomes a separate legal entity. The Corporations Act, among other things:

- provides powers and imposes obligations on companies and on their directors and company secretaries;
- contains a basic set of rules for internal management of a company (appointments, meetings etc);
- provides for different types of companies, replaceable rules and constitutions, appointment of auditors, insolvency and winding up, and deregistration; and
- contains detailed reporting responsibilities.

The Corporations Act is administered by the Australian Securities and Investment Commission (ASIC).

Company limited by guarantee

Around Australia there are 9,817 companies limited by guarantee, 98.7% of which are not-for-profit. Their activities include community services, sport and recreation, arts/culture, religion, philanthropy and health. In effect, these organisations undertake similar functions to many associations and the majority appear to achieve compliance with the Corporations Act.

Companies limited by guarantee have a membership rather than shareholders. The members guarantee the debts of the company. Generally, the members' guarantees will be for a fixed amount (for example, \$10.00). This means that the liability of the members of the company is limited to the amount of their guarantee, even where the company is wound up with debts that exceed the amount of all the members' guarantees. Companies limited by guarantee do not have any means for distributing the company's earnings to the company's members which is why they are particularly suited to non-profit activities.

Some of the benefits of being a company are:

- Limited liability – for a company limited by guarantee, the liability of the members is limited to the amount of their guarantee. The amount of the guarantee is generally fixed at a nominal amount.
- Trading nationally – a company registered under the Corporations Act can operate anywhere in Australia.
- Indemnifying directors – the Corporations Act provides that, in certain circumstances, a company can indemnify its own directors and officers against personal liability that they may incur in the course of performing their duties.

Some of the disadvantages of being a company are:

- Costs – a company can be expensive to set up – generally, a company limited by guarantee will cost approximately \$1200 to set up and register. There are also annual fees of approximately \$300.

- Disclosure and reporting requirements – the administrative requirements associated with a company are more onerous than for incorporated associations. Companies limited by guarantee are subject to the disclosure requirements that apply to public companies under the *Corporations Act 2001*. There are also specific financial and auditing requirements that need to be met.

In general, whether a group is incorporated as an association or company limited by guarantee will not affect its income tax liability which is based on the organisation's purpose.

OPTIONS

2A The Act should remain as it is, with no further changes to the criteria defining an association incorporated under the Act.

OR

2B The Act should contain more detailed criteria which associations must meet for registration under the Act. These criteria could include matters such as annual turnover, the value of their assets, the number of their employees, or possession of a gaming licence.

ADDITIONAL COMMENTS

What criteria should be adopted and what concessions should be made if Option 2B is preferred?

Power for OFT to cancel registration/direct transfer

The OFT would have greater flexibility if there was an additional general power to cancel the registration of associations, if it was considered to be in the interests of the administration of the Act to do so. Organisations no longer eligible under the Act would be free to apply to incorporate under Acts such as the *Corporations Act 2001* or the *Cooperatives Act 1997*.

OPTIONS

3A The Act should remain as it is, with no general discretion to cancel registration.

OR

3B The Act should provide the Minister or the Chief Executive (Office of Fair Trading) with a general discretion to cancel registration, where, in their view, it is appropriate.

ADDITIONAL COMMENTS

At which level should the decision be made?

Allow for easier transfer to other incorporation structures

There is clearly some overlap between the Corporations Act, the Cooperatives Act and the Act. The Act does not permit an association to simply move to the Corporations Act as a company limited by guarantee. Queensland associations which are transferring need to ‘wind up’ (which can be expensive) and then apply to ASIC.

There is also no process for ‘migration’ of charities. Charities moving from the charities legislation need to cancel their registration under the *Collections Act 1966* and apply again to become associations.

OPTIONS

4A The Act should continue as it is, with no changes to facilitate organisations moving between charities, cooperatives and corporations Acts.

OR

4B The Act should make it easier for charities registered under the *Collections Act* and companies limited by guarantee under the Corporations Act to transfer to the Act, and for associations to transfer to the Corporations Act as companies limited by guarantee.

Operational issues

Public liability insurance

Currently: The Act requires associations which have property to hold \$1.1 million in public liability insurance (in some circumstances) to provide some protection against financial risk.

Issues:

Difficulty obtaining cover

Associations are increasingly unable to obtain insurance, due to the cost of premiums and/or cover no longer being available.

Difficulty with enforcement

Smaller organisations may not comply due to difficulties and costs associated with obtaining cover.

Inadequate amount

Any figure chosen for the required insurance level is arbitrary, and there is no correlation between the identified risks facing an association and the value of insurance required to be held. Awards of damages may far exceed the \$1.1 million figure.

Not all risks covered

Associations and their members, staff, volunteers and the public face risks other than those specified in the section – for example fraud, theft, professional negligence, and workplace health and safety and discrimination legislation. They may also result in loss or damage to third parties, but the Act does not require insurance in relation to these risks.

Not all associations covered

The requirement only extends to those associations which hold property. Associations who do not hold property may face some risk as well.

OPTIONS

5A The Act should continue unchanged, with no changes to the requirements for insurance.

OR

5B The Act should require all associations to obtain comprehensive public liability insurance.

OR

5C The Act should require associations to undertake a risk assessment and take out insurance cover appropriate to the risk identified.

ADDITIONAL COMMENTS

What sorts of amounts should be prescribed if option 5C is adopted?

OR

If it is decided to have a tiered reporting scheme for reporting auditing purposes (see Reporting/Auditing Section, page 25), should the insurance requirement follow the tiered scheme too?

Should the section be changed in other ways?

If so, how? Should additional information be disclosed in annual reports?

Model Rules

Rules not properly adopted

Currently: Section 47 of the Act provides the Model Rules which apply to matters not covered by an association's rules.

Issues: The section does not provide for the situation where an association's rules are not properly adopted.

OPTIONS

6A The Act should remain unchanged, so that the Model Rules do not apply if they are not properly adopted.

OR

6B The Act should deem the Model Rules to be the rules of the association if the association's rules are not properly adopted.

Adopting new versions of the rules

Currently: Associations are deemed to have adopted the rules at the time of their incorporation without subsequent changes (section 46(1)(c)).

Issues: The provisions of the Model Rules have been changed many times since the introduction of the Act but if an association wishes to adopt a newer version of the Model Rules, then it must consider a special resolution.

It has been suggested that associations could be deemed to adopt the latest version of the Model Rules as they are proclaimed, as happens with replaceable rules under the Corporations Act. This is because officers of associations may have difficulty in ascertaining which version of the Model Rules applies, and in locating copies of the applicable version, particularly after several management committee meetings and elections have passed. Associations which wish to retain the old Model Rules would always have the option of reverting to the old Model Rules if they pass the appropriate resolution. This approach would also allow them to locate copies easily.

However, the disadvantage of this approach is that associations may not know of changes which applied to them. Updating of OFT's website would make current and past versions of Model Rules more accessible to associations and their members.

OPTIONS

7A The Act should remain unchanged, so that the Model Rules which apply when an association first incorporates continue to apply to that association.

OR

7B The Act should provide that the latest version of the Model Rules applies to all associations.

Reviewing the Model Rules

Issues: The Act, *Associations Incorporation Regulation 1999* (AI Regulation) and Model Rules are not always consistent. The Model Rules could also possibly be improved and modernised. For example, it has been suggested that the rules could include a short statement of points in a 'Charter of Members' Rights' which sets out basic rules such as in relation to procedural fairness.

OPTIONS

8A The Model Rules should continue unchanged, with no modernising or review for inconsistencies.

OR

8B Inconsistencies between the Act, AI Regulation and Model Rules should be identified and addressed and the Model Rules modernised.

Management Committee members

Duties

Currently: Section 60 of the Act states ‘the business and operations of an incorporated association shall be controlled by a management committee’ and the general law imposes a number of duties on members of management committees.

Issues: Management committee members frequently seek a clearer explanation about their roles and responsibilities, but this is not contained in the Act. Specifying these duties need not increase legal obligations but would provide greater certainty for association members.

OPTIONS

9A The Act should continue unchanged, with no statement of the duties of management committee members.

OR

9B The Act should specify the duties of management committee members.

Conflicts of interest

Issues: The issue of committee members voting on contracts which will benefit them directly has been raised by concerned association members.

One letter to OFT stated: ‘in some clubs, the electrician, plumber or builder on the management committee always gets the work to build club extensions’. While in some cases, the electrician, plumber or builder on the management committee will genuinely be the best person to undertake such work, this will not always be the case.

Associations without adequate procedures may allocate contracts in ways which are not in its best interests.

Some association members have suggested there should be greater disclosure of financial information in associations’ reports. For example, wages of senior employees could be disclosed.

OPTIONS

10A The Act should continue unchanged, with committee members not required to disclose their interests in relation to contracts with the association, allowed to vote on decisions about those contracts and allowed to enter into contracts for any financial amount.

OR

10B Committee members should be required to disclose their financial interests when dealing with contracts and should be prohibited from voting when such an interest exists.

OR

10C The Act should prohibit members of management committees entering into contracts with the association for contracts over certain prescribed monetary amounts.

ADDITIONAL COMMENTS

What sorts of amounts should be prescribed if option C is adopted?

Should additional information be disclosed in annual reports?

Insolvent trading

Currently: The Act does not stop associations trading when they are insolvent (that is, unable to pay their debts when they fall due). The Corporations Act specifies that directors who knowingly continue to trade when their company is insolvent may face personal liability for debts, orders to compensate and civil and criminal penalties. This protects traders and suppliers who deal with companies in the legitimate belief that they will be paid for their goods and services.

Issues: The financial growth of some associations into major business enterprises raises the question of whether creditors and members need greater protection from losses arising from actions of associations. Many associations are involved in trading at some level and some of those associations will face financial difficulties. Are those who trade with associations entitled to the same protections as those who trade with companies, so that they have some recourse where an association cannot afford to trade but continues to do so?

Insolvent trading provisions would create certainty for management committee members as well as those who trade with associations. If the provisions applied only to those with substantial income and/or assets, members of smaller associations would be protected from liability, but not those who trade with them.

OPTIONS

11A The Act should continue unchanged, not stating that associations must not trade while insolvent.

OR

11B The Act should provide that insolvent trading provisions apply to associations.

OR

11C The Act should provide that insolvent trading provisions apply to associations with substantial income and/or assets.

ADDITIONAL COMMENTS

What threshold should be adopted if Option C is preferred?

Secretary's role

Currently: The Act is not clear about the role of the Secretary or whether the Secretary is a member of the management committee.

Issues: Many association members would believe that the Secretary is a member of the management committee, and is therefore required to be over 18 and subject to the other restrictions or requirements in the Act applying to management committee members.

OPTIONS

12A There should be no change to the Act, leaving it unclear whether the Secretary is a member of the management committee or not.

OR

12B The Act should provide that the Secretary is a member of the management committee.

OR

12C The Act should provide that the Secretary is not a member of the management committee.

‘Public Officer’

A previous report recommended that the Act should establish a Public Officer role to simplify administration and reporting by associations. In Queensland, having a Public Officer rather than a Secretary would essentially reflect just a change of name. It would not create additional powers or remove current powers of the Secretary.

OPTIONS

13A The Act should remain unchanged, with no mention of a public officer.

OR

13B The position of Secretary should be renamed ‘Public Officer’.

Procedures for signing cheques

Currently: Clause 7 of Schedule 5 of the AI Regulation requires that ‘negotiable instruments’ (cheques) are signed by two of the following: the President; the Secretary; the Treasurer; another member approved by the association’s management committee.

Issues: Some association members have complained that this ‘places an undue strain on all volunteers involved in the management of non-profit organisations’ and have noted that the Act allows other tasks to be delegated provided there are adequate controls.

OPTIONS

14A The Act and regulation should remain unchanged, with only those currently listed able to sign cheques.

OR

14B The Act and regulation should clarify that the management committee may delegate the signing of cheques to any two people considered appropriate.

Voting

Voting rights of minors

Currently: The Act states that management committee members must be adults. However, the Act does not prevent minors from being members of an association but is not clear as to whether minors who are association members may vote.

Issues: Voting rights for minors may be warranted for some associations, particularly those set up to address the interests of young people. In some associations, minors play a significant role in fundraising and other activities of public benefit. However, the law relating to minors can be complex (for example, they will generally not have the legal capacity to sign contracts) and there may be implications for other management committee members if minors take on additional responsibilities.

OPTIONS

15A The Act should continue unchanged, leaving it unclear whether minors can vote or not.

OR

15B The Act should give associations the right to decide whether minors may vote.

OR

15C The Act should clarify that minors may not vote in any association.

Methods of holding and voting at AGMs

Currently: Nothing in the Act stops Annual General Meetings (AGMs) being held by phone or electronically, however it is not clear whether such methods are allowed.

Issues: Holding AGMs by phone or electronically may not have been foreseen when the Act was first passed. In contrast, meetings of the management committee are able to be held 'by telephone, video link or another form of communication' (section 63). Where associations do not require their members' physical presence at a meeting (other than in relation to passing special resolutions and for proxy voting) these options allow technology to provide greater and more convenient access for members.

OPTIONS

16A The Act should continue unchanged, leaving it unclear whether more flexible procedures are allowed for AGMs.

OR

16B The Act should allow more flexible procedures for AGMs: video links, telephone, etc.

OR

16C The Act should clarify that more flexible procedures are not permitted.

Requirements for first AGMs

Currently: In regard to annual reports, sections 58 and 59 of the Act (and the Model Rules) state the first AGM must be held within 18 months.

Issues: Some associations misunderstand the requirements for annual reports. They act on section 55 only, not taking into account sections 58 and 59 and assume that they do not need to have an AGM before they have been incorporated for 18 months. This leads to non-compliance with the Act.

OPTIONS

17A The Act should continue unchanged, leaving the due dates for annual reports unclear.

OR

17B The Act should clarify when annual reports are due.

Privacy of personal information

Availability of personal information on the register.

Currently: The Act allows members of the public to inspect or obtain copies of documents held by OFT and registers containing personal information relating to associations and their members to ensure that associations are accountable.

Issues: Concerns have been raised about privacy issues involved in allowing such information to be accessed. The Act needs to balance the public interest in the free flow of information with the public interest in respecting privacy and protecting personal information. There is a potential conflict between the ready availability of personal information under the Act and the principles of the Queensland Public Sector Privacy Regime.

OPTIONS

18A The Act should remain unchanged, with no change to the availability of personal information on the register of associations.

OR

18B The Act should clearly specify that the Chief Executive may withhold information from the register in certain circumstances. Individuals should be able to request that information be withheld in circumstances where health or safety may be affected by disclosure.

Access for purposes unrelated to the Act

Currently: There is nothing in the Act which would prevent information on the register held by OFT, being used for purposes other than those related to the Act, for example direct marketing to associations or their members. In contrast, the Cooperatives Act and the Corporations Act provide offences of strict liability where information from registers is used for direct marketing purposes.

OPTIONS

19A The Act should remain unchanged, with no change to the availability of personal information on the register of associations.

OR

19B The Act should state that information on the register may not be used for direct marketing purposes.

Access to register of members

Currently: The AI Regulation requires certain records, including a register of members, to be kept by an association. The Model Rules also specify that the management committee must maintain a register of members which includes their names and residential addresses and the register must be open for inspection at all reasonable times (Clause 11(3)).

Issues: The argument for making the register of members available is that it is the only way of ensuring the democratic management of associations. If the management committee members are the only people with knowledge of members and their contact details, that committee can become entrenched in power. This is because the only effective way that disgruntled members can challenge management policy between annual general meetings is by calling a special general meeting. Most rules require a petition for a special general meeting to be signed by a specified number of members. This can be impossible if members cannot determine who the members are.

There may, however, be different considerations where someone outside of an association wants to obtain the personal details of the management committee members as opposed to the name, number and contact details of an association.

OPTIONS

20A The Act should remain unchanged, with no change to the availability of personal information in the register of members.

OR

20B The availability of information in the register of members should be broadened or restricted.

Criminal history

How a person's criminal history affects their eligibility for election to a management committee, and how and when their criminal history can be checked for this purpose is being considered and feedback on these issues would be welcome.

OPTIONS

21A The Act should continue unchanged, with no changes to the criminal history provisions.

OR

21B The Act should be amended.

ADDITIONAL COMMENTS

Do you have any suggestions about how?

Reporting/auditing

Reporting/auditing requirements

Currently: Section 59(1) requires associations to submit professionally audited annual statements setting out their income and expenditure during the previous financial year, as well as their assets and liabilities and all mortgages, charges and securities affecting their property. Compliance with these requirements is required as a balance to the legal indemnity and limited liability which the Act provides to members of associations.

Issues: Perhaps the obligations on small organisations should be reduced, with continued or increased reporting in other cases. Problems identified to OFT relating to the existing requirements include the following:

High costs

Recent large increases in auditors' insurance premiums mean that the costs of audit for small organisations will increase greatly and auditors will be less available to carry out such tasks. Some auditors are refusing to carry out the honorary audits they have traditionally done as such audits make their insurance cover ineffective.

Audits may not be warranted for smaller organisations

Many associations are small and/or are 'low risk' in that they deal with small amounts of money – around 80% of associations have both turnover and assets of less than \$50,000.

'One size fits all' reporting may not be appropriate

Given the financial complexity and large amounts of money controlled by some associations (including funds generated by gaming machines and liquor sales) there may be a need for greater scrutiny and accountability in some cases than in others.

A form of ‘tiered reporting’ based on the turnover of an association may avert some of these problems, meeting the need for accountability and yet reducing the costs of compliance. Below is an example of how a tiered reporting scheme might work.

1. Organisations with a turnover of less than \$20,000 and net assets of less than \$20,000 would not be required to submit any formal financial statement, but should keep their accounts in such a way as to allow auditing if necessary. These organisations would however still be required to lodge annual returns verifying details as to their address etc and confirming that their turnover was below the requisite level.
2. Organisations with a turnover of between \$20,000 and \$100,000¹ and net assets of between \$20,000 and \$100,000 would not be required to undertake a compulsory audit. They need to submit a statement and a checklist sighted, verified and signed by an accountant accompanying their annual return. The statement would certify that they had maintained a number of nominated (prescribed) items over the course of the year (eg cash receipts, bank statements, monthly reconciliations).
3. Organisations with a turnover of \$100,000 per year and/or net assets greater than \$100,000 should continue to be fully audited as per current requirements.

Reduced reporting requirements for some organisations would be balanced by a number of safeguards, in recognition of the possibility of disputes about financial matters and the potential for fraud or mismanagement. Safeguards could include:

- a requirement to maintain records in such a way as to permit auditing/inspection at any time;
- a requirement to present financial statements to the membership at the AGM;
- a requirement that audited accounts be prepared if requested by a majority of members, the court or the OFT, with the cost of such audits to be borne by the association; and
- a provision allowing OFT to conduct random inspections and audits, with penalties provided for organisations which fail to comply with the requirements: a refusal to allow inspections could constitute grounds for cancellation of the association under the Act. The cost of random audits would be borne by associations but this would be balanced by not being required to undertake regular, annual audits.

The Act would continue to require all organisations to present their annual financial report (including income and expenditure, asset register etc) to their membership as a form of accountability.

¹This issue raises the question of whether all money received by an association should be defined as turnover. In particular, should income which is received as part of a Government grant and immediately spent be treated in the same way as income from gaming revenue?

The significance of this \$100,000 figure is that firstly when this figure is reached, many associations will be required or register and account for GST for the first time, and secondly the comparative number of associations with turnover above this level is small.

OPTIONS

22A The Act should remain unchanged, with all associations required to submit an audited report every year.

OR

22B The Act should have a tiered reporting scheme, whereby associations with high levels of turnover are required to submit more detailed information than those with lower levels. This would be supported by safeguards such as those set out above.

ADDITIONAL COMMENTS

22B Which criteria should be used if the above Option is adopted?

Power for OFT to request additional information

Currently: Financial reports are currently submitted with annual reports. OFT has no express power to ask associations to supply information such as lists of members, minutes of meetings, or additional financial reports at other times of the year, unlike sections 243 and 244 of the Cooperatives Act (also administered by OFT).

Issues: There may be cases where OFT has identified concerns and wants additional information to address the possibility of, for example, fraud or mismanagement. In these circumstances it is important that that annual reports and accompanying financial statements are submitted on time and that additional information is provided if required.

Giving OFT the power to request information would assist in ensuring adequate oversight of financial matters, and would provide the chief executive with the same power in relation to associations as the registrar of cooperatives has in relation to cooperatives.

OPTIONS

23A The Act should remain unchanged, with no change to the information OFT can ask associations to provide.

OR

23B The Act should allow OFT to obtain additional information from associations in similar terms to the Cooperatives Act.

Issuing debentures

A debenture is a certificate or voucher acknowledging a debt, on which interest may be paid by the issuer. It is not secured and has a high 'risk factor' for the holder because if the issuer of the debenture is liquidated, the holder becomes a general (as opposed to a secured) creditor.

Currently: The Act allows an association to issue secured and unsecured notes, debentures and debenture stocks for the association. It is not clear how frequently associations use this provision, as there is no requirement to notify OFT about any debentures being issued. The Corporations Act contains a number of requirements to ensure appropriate accountability where debentures are issued by companies and to allow ASIC to take action if necessary. The Cooperatives Act similarly contains detailed provisions regulating the issue of debentures. However, the Act does not provide for matters such as recording or notifying the issue of debentures.

Issues: Given the essentially 'non-profit' nature of associations, it is questionable whether it is appropriate for them to engage in financial transactions of this nature.

OPTIONS

24A The Act should remain unchanged, with associations allowed to issue debentures, not required to notify OFT that debentures have been issued, and with no power for OFT to maintain a register or intervene.

OR

24B The Act should require associations to notify OFT about the issue of debentures, provide for a register of debentures and provide for departmental intervention.

OR

24C The Act should no longer provide for the issue of debentures.

Associations vesting property in trustees

Currently: Associations are permitted to be trustees in some circumstances: for example, they may be trustees of land under the *Land Act 1994*. However, some associations seek to vest their own property in trustees, who then hold that property on trust for the association and its members.

Issues: An association recently asked OFT to approve a change to its rules which would allow it to transfer property in this way. However, it is not clear that such transfers are permitted by the Act.

As the Act clearly provides for trusts established before incorporation to continue, it could be argued that an association which is already incorporated should similarly be able to choose this way of dealing with its property. This argument is supported by section 25 of the Act which provides that associations have all the power of an individual, including

the powers to purchase, to hold legal and equitable title to, and to dispose of real and personal property.

The Act could be amended to make it clear that associations are permitted to vest their property in trustees. It would provide additional flexibility for associations, allowing them to manage their property as they see fit.

However, section 60 of the Act requires the business and operations of an incorporated association to be controlled by a management committee. Allowing property to be held on trust removes what may be a significant asset from the immediate control of the management committee.

Another option is to provide associations may not vest their property in trustees. This would ensure the management committee remains effectively in control of all assets. This could present difficulties for those associations who receive property via bequests under the wills of certain individuals who may attach to the bequest a condition that the asset be held in trust.

OPTIONS

25A The Act should continue unchanged, leaving it unclear whether associations can vest their property in trustees.

OR

25B The Act should state that associations may vest their property in trustees.

OR

25C The Act should state that associations may not vest their property in trustees.

Administrative matters

Registered offices

Currently: Section 17 of the Act states members of a management committee must ensure that an association has a registered office and a change in its address must be notified within one month. Section 138 now provides that documents may be served on an incorporated association by leaving it at, or sending it by post, telex, facsimile or similar facility to, the address of the secretary, president or treasurer of the association shown in the records kept under this Act by the Chief Executive. Although associations may choose to keep their books and other documents at their registered office, the Act contains no requirement they must do so and makes no reference to, for example, the hours such an office must be open. This is in contrast with the Cooperatives Act and the Corporations Act.

Issues: Some argue there is no longer a need for associations to maintain a registered office and that this imposes an unnecessary burden.

OPTIONS

26A The Act should continue unchanged, with associations required to have a registered office.

OR

26B The requirement for a registered office should be removed.

Electronic lodgement of information

Currently: The Act does not provide for electronic lodgement of information.

Issues: There is considerable scope for the use of such technology to provide information about changes of addresses and office holders and updating and altering rules. Allowing electronic submission would benefit both members of associations with internet access and OFT staff. This would provide clarity and recognise the impact and advantages of modern technology and would allow faster lodgement of documents. OFT would continue to accept 'hard copy' information from associations who prefer this option. Such a change would be particularly beneficial for rural or regionally based associations which may have a widely dispersed membership base.

OPTIONS

27A The Act should continue unchanged, not providing for electronic lodgement of documents.

OR

27B The Act should provide for electronic lodgement of documents, subject to addressing security concerns.

Fees

Issues: It has been noted 'The fee structure generally is unwieldy and its administration imposes unnecessary work.' There has been no comprehensive review of fees set under the Act and there may be other ways in which the fees could be structured to make its administration more efficient. A review would not necessarily lead to fee increases.

OPTIONS

28A The fee structure should continue unchanged, with no review.

OR

28B The fee structure should be reviewed to ensure that it assists the administration of the Act.

Penalties

Currently: The Act provides penalties which apply if the Act is not complied with. For example, where members of a management committee fail to lodge annual returns as required by section 59, a maximum penalty of 10 penalty units (\$750) applies.

Issues: While penalties are not the only means of encouraging compliance with the Act, they play a role in contributing to the way that the legislation is viewed by those who are required to comply. For this to be an effective strategy, penalties need to be appropriate for the offence and should be reviewed from time to time.

OPTIONS

29A The Act should continue unchanged, with no review of penalties.

OR

29B The penalties provided under the Act should be reviewed to see whether they are adequate or excessive, and consistent with those provided in other States and in other comparable Queensland legislation.

Resolving disputes

Who should resolve disputes?

Currently: Where it is alleged an association or a member is not acting in accordance with the rules of the association, the Act provides that the Supreme Court decide the matter. Few disputes however reach the courts as this is expensive, legalistic and out of the reach of many small organisations or members of associations.

Issues: Many association disputes are brought to the attention of OFT. They frequently involve more than conflicting interpretations of rules and may indicate other broader issues and personal conflicts. OFT cannot formally become involved in an association's internal disputes and cannot provide legal advice on a specific situation to consumers. However, it provides information to associations about processes (such as mediation) which are available to resolve disputes. It also provides general information for associations about the requirements of the Act and regulations through the *Good Business Guide* and via its website. OFT may also write to an association at any time to urge compliance with the Act, and there is a power to cancel an association's registration.

Alternative options for a forum to address disputes include:

Magistrates Courts

Magistrates courts are reasonably accessible, both physically and financially, and have some expertise in areas related to the resolution of associations' conflicts (such as neighbourhood disputes). Hearings are generally available within a short time frame, at relatively low cost and without the need for legal representation.

Commercial and Consumer Tribunal (CCT)

The CCT aims to deal with matters in a way that is just, fair, informal, cost efficient and speedy. The *Commercial and Consumer Tribunal Act 2003* provides for the Tribunal to use mediation as a means to resolve disputes on the basis that successful mediation saves time and money for the parties and government.

Tribunals share many of the advantages of magistrates courts (relative accessibility, short time frames, cost, and no requirement for legal representation). Although tribunals are not distributed throughout Queensland in the way that magistrates courts are, they do have access to technology such as videoconferencing and the capacity to schedule hearings outside metropolitan areas. Moreover, they may appear to applicants and those unfamiliar with the legal system to be less formal than a court.

Any dispute resolution process adopted in relation to associations would make it clear that mediation must be attempted before proceeding to the next level.

OPTIONS

30A The Act should remain unchanged, with the Supreme Court continuing to rule on associations' disputes.

OR

30B The Magistrates court should be given jurisdiction to rule on associations' disputes.

OR

30C The Commercial and Consumer Tribunal should be given jurisdiction to rule on associations' disputes.

Other ways to address disputes include the following:

Grievance procedures within associations' rules

Currently: The Act and AI Regulation do not address grievance procedures and as a result, many associations have no procedures specified.

Issues: Because the heightened tension generated by disputes is not conducive to working out how best to resolve them, the lack of procedures to resolve conflict often exacerbates a difficult situation.

OPTIONS

31A The Act, AI Regulation and Model Rules should remain unchanged, with no requirement to set out grievance procedures.

OR

31B The Act should require that associations' rules specify a dispute resolution process and the Model Rules should include such a process.

Winding Up

Procedures

Winding up a company or an association terminates its existence. An association may be wound up where, for example, members believe that the purposes for which it was established cannot be achieved, it has suffered losses and is insolvent, or its members have reached a deadlock on an issue. It may also occur where an association has ‘run out of steam’ and members wish to finalise the association’s affairs rather than having its registration cancelled by OFT.

From OFT’s perspective, voluntary winding up is a preferable alternative for associations to cancellation of registration, particularly where associations are experiencing financial difficulty. It allows them to get their financial affairs in order and to make decisions about where any surplus property is to be distributed.

While the provisions of the Corporations Act providing for winding up are no doubt appropriate for companies, they may involve considerable expense. There is some confusion in this area among associations about the appropriate procedures to be followed.

A tiered system for winding up may be warranted and specifying them in the Act rather than the Corporations Act may be helpful. For example, if large organisations continue to be subject to the Act, the procedures set out under the Corporations Act may need to be followed in their entirety but smaller associations may not require such detailed compliance.

OPTIONS

32A The Act should remain unchanged, with the provisions of the Corporations Act in relation to winding up applying equally to all associations.

OR

32B The requirements for associations which are winding up should set out in the Act and be ‘tiered’, with more detailed requirements applying in relation to larger organisations .

Voluntary administration

Currently: The Act does not provide voluntary administration procedures and so they are not available if associations experience financial difficulties, despite their potential usefulness and capacity to resolve issues in a way that suits all parties. In some instances, administrators are appointed by banks holding security over the association’s mortgage but the bank’s interests differ from those of the association and will not necessarily prioritise the needs of the association, its members or other creditors.

An option would be to provide for an administrator to be appointed for a fixed term of, say, 12 months, with a power of reappointment beyond this time period in extenuating circumstances. During the specified period, the administrator would:

- manage the association and exercise all the powers of the committee and the members in a general meeting;
- act so that the association's finances are 'turned around' and management of its affairs can be handed back to the committee; and
- be required to do what is necessary by way of a change of rules or committee members to re-establish the association as a viable organisation, or recommend the association's cancellation or winding up.

If the administrator is not able to achieve this result, the association would be cancelled or wound up under the Act.

OPTIONS

33A The Act should continue unchanged, leaving it subject to interpretation.

OR

33B The Act should contain a power for the Chief Executive to appoint a voluntary administrator.

OR

33C The Act should clarify that a voluntary administrator cannot be appointed.

Cancellation of incorporation

Cancellation when annual returns are not provided

Currently: The procedure for the cancellation of an association's incorporation is set out in section 93 of the Act. It applies where the Chief Executive has reasonable cause to believe that cancellation is desirable on public interest grounds, or because an association is acting beyond its objects, has ceased to exist, is doing something which would have excluded it from incorporation, or has less than seven members. If an association fails to submit an annual return, OFT is left without critical information about that organisation's status and contact details.

Issues: Despite reminders from OFT, some associations routinely fail to comply with these obligations. This may be because the association is no longer functioning, in which case cancellation may be an appropriate option. It may be because an association which is still functioning has just not 'got around' to supplying relevant information. However, it may also indicate that the association's membership is not fully informed about its financial status. At worst, there could be fraudulent activity which is not exposed.

OPTIONS

34A The Act should continue unchanged, with no changes to the grounds on which incorporation can be cancelled.

OR

34B The Act should provide that an association's incorporation may be cancelled if annual returns are not lodged on time.

ADDITIONAL COMMENTS

When should OFT be able to cancel registration if Option B is adopted?

Freezing associations' assets

OFT may identify serious concerns about fraud or impropriety in an association and may need to act quickly to make sure that assets are not disposed of. A power in the Act to freeze the assets of the association may then be warranted in order to protect its property. The significant nature of such a power means that it would need to be carefully defined, so as to apply only in certain limited circumstances. Government agencies which have, for example, provided funding to such associations would also need to be advised.

OPTIONS

35A The Act should remain unchanged, with no power for OFT to freeze associations' assets.

OR

35B The Act should provide a power for OFT to freeze assets of associations in limited and defined circumstances and to inform relevant Government agencies when the power is exercised.

Removing need to advise by prepaid registered post

Currently: When the Chief Executive proposes to cancel an association's registration on the grounds set out in section 93, notice must be given to *a person appearing from the records to be a relevant officer of the association* setting out the proposed grounds for cancellation and requiring information to satisfy the Chief Executive why cancellation should not go ahead. Section 93(1) requires that a notice under this section must be served by *prepaid registered post*. If the Chief Executive is not satisfied with the explanation provided in response to the show cause notice, then the association can be cancelled. The association's relevant Public Officer must be advised of this cancellation, again by prepaid registered post.

Issues: The requirement to send notices by prepaid registered post has significant cost implications for OFT. An option which would produce cost savings for OFT is to send these notices by regular mail. An audit by accounting firm KPMG of Australia Post's delivery performance for business letters found that for the three months to September 2001, 96.6 percent of bulk, pre-sorted letters reached their destination on time or early. In addition, 99 percent of business letters reached their destination within one extra day. The general legal requirement for service of documents by post is by ordinary prepaid mail.

OPTIONS

36A The Act should remain unchanged, with OFT required to advise associations of cancellation by prepaid registered mail.

OR

36B The requirement under section 93 to advise associations of cancellation by prepaid registered mail should be removed.

A more proactive educational role for OFT

OFT currently provides explanatory material to associations and its staff routinely provide information in response to phone calls. However, there may be benefits to a more structured or enhanced educational role.

Educational material

Currently: OFT has recently developed a *Good Business Guide* on the operation of incorporated associations which is distributed to new and existing associations and is developing a *How to Incorporate Guide* which will be distributed to people enquiring about this business structure. Information is also available on the website and reviewed on an ongoing basis.

Issues: Due to the relatively complex range of obligations for incorporated associations under the legislation, face-to-face information sessions with management committee members and other relevant stakeholders may increase understanding and compliance with the law. OFT could partner with other organisations such as universities and other agencies to deliver the seminars.

OPTIONS

37A The current information provided is adequate.

OR

37B Information sessions are not needed.

OR

37C Information sessions would assist in understanding the law and I would be interested in attending.

Statements of policy

It has been suggested that another area in which OFT could take a more proactive approach is by publishing statements which disclose its policy position and administrative guidelines. Although OFT cannot provide legal advice to associations, internal policies for the administration of the Act and for the exercise of discretion could be made available and updated as necessary. Such rulings are prepared by the Australian Taxation Office and the English Charities Commission. This would allow for formal comments on procedures adopted by OFT rather than allowing news of policy positions to spread ‘on the grapevine.’ Information of this type may also be available in the form of ‘statements of affairs’ under freedom of information legislation and would complement existing fact sheets and other publications.

OPTIONS

38A The current arrangements should continue unchanged.

OR

38B OFT should communicate statements of policy to incorporated associations.



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