



Incorporated Associations

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Introduction

Non-profit community groups such as sporting clubs, charities, interest groups and community associations can be formally incorporated and recognised by the law. The governing legislation is the *Associations Incorporation Act 1981* (Qld) (Associations Incorporation Act) and the *Associations Incorporation Regulation 1999* (Qld) (Associations Incorporation Regulation).

The Queensland Department of Justice and Attorney-General is responsible for administering this Act and incorporating associations, and does so through the Office of Fair Trading. The Office of Fair Trading maintains a website with digital forms and factsheets, and further material is also available from the Queensland University of Technology and Community Door.

Choosing Incorporation

What is incorporation?

Incorporation is the creation of a unique legal entity. On incorporation, an association of persons becomes a separate body in the eyes of the law, with rights and liabilities separate from those of its members. The incorporation certificate of an association is like an association's birth certificate. Similarly, when an association is terminated or wound up, the legal entity ceases to exist.

Incorporated associations can do most things that individuals can do, such as hold property, make contracts, sue and be sued and be left property under a will. For example, anyone wishing to sell goods to an unincorporated club would not contract with the club, because in the eyes of the law the club does not exist. The contract would probably be with all of the members, the committee of the club or a trustee. In many cases, the government will not give a licence or a financial grant to an organisation unless it is incorporated.

Organisations that can incorporate

The Associations Incorporation Act restricts the type of association that may incorporate. An association that seeks to incorporate must:

- be formed and carried on for a lawful object or purpose
- have at least seven (7) members
- not exist for the financial gain of its members. Financial gain is defined extensively in s 4 of the Associations Incorporation Act. The activities listed in ss 4(1) (a)–(h) will not of themselves constitute financial gain to the members of the association. For example, the mere fact that a member is employed by an association and receives a wage does not mean that the association is carried on for the gain of its members. Similarly, an association that supplies services or facilities to its members, allows its members to compete for trophies or prizes, or makes a surplus of income over expenditure is not necessarily carried on for the gain of its members.

Particular note should be taken of ss 4(1)(d)–(f), which deal with the trading activities of the association with its members or the public. A gain made as a result of these activities is not financial gain if:

- the trading is ancillary to the principal purpose of the association
- the public trading is not substantial in volume in relation to the other activities of the association.

Organisations that cannot incorporate

- Section 5 of the Associations Incorporation Act defines those bodies that cannot incorporate. They include:
 - associations with less than seven (7) members
 - a partnership or company
 - an organisation under the *Industrial Relations Act 1999* (Qld) that is incorporated because of the application of s 423 (i.e. an employer or employee association)
 - a school council or parents and citizens association formed under *the Education (General Provisions) Act 2006* (Qld)
 - a body formed or carried on for the purpose of providing financial gain for its members
 - a body that raises money by subscription and lends that money to its members
 - an association that is controlled by a special act of parliament
 - an association whose principal purpose is to hold property that the association's members may divide among themselves, dispose of their interest, or distribute income or the use of the property among members or nominees of the member.

To incorporate or not to incorporate?

Before a decision to incorporate is made, the committee of an association should carefully consider whether the interests of the association would be served by such a step, as it may be a very expensive and time-consuming exercise to change the adopted legal structure to a more suitable one. Factors to be considered include the:

- legal problems faced by unincorporated associations, which is really just a group of persons. The main difficulties are in owning land and other property, leasing an office, making contracts, being awarded government grants, suing or being sued, receiving gifts made in wills and, most importantly, the liability of the officials, committee or trustees of the association for the debts of the association. Courts have often decided that a contract between the members of an unincorporated association and another party or parties was not made by the members but by the officials or management committee of the association, however, those officials or committee members may be personally liable for any debts owing under the contract or any injury caused. In some associations, the liability may be burdensome and the members of the committee may face losing all of their possessions to satisfy the association's liabilities
- limitation of personal liability of committee members through incorporation
- possible entitlement of members to a pecuniary interest in the association (share of assets in a winding up of the association) that will be lost if it is incorporated

- cost of incorporation (e. g. ongoing government fees, and accounting and auditing fees especially for associations with assets or revenue over \$100 000)
- public scrutiny of incorporated associations' accounts
- higher degree of regulation that applies to incorporated associations (e.g. incorporated associations must include 'Inc.' or 'Incorporated' as part of the association's name and be noted on a public register)
- constitution required by an incorporated body, which may not suit some associations (e.g. incorporated associations are required to have a fairly democratic structure)
- restrictions on the activities that an incorporated association can carry on
- requirement for an incorporated association to have an annual meeting and a quarterly committee meeting at which proper minutes must be kept
- need for public liability insurance in most incorporated associations
- need to keep proper records of members of incorporated associations
- difficulty and expense involved in terminating an incorporated association.

Other incorporation solutions

The most common alternative is incorporation under the Corporations Act 2001 (Cth) as a company limited by guarantee or as an Indigenous corporation under *the Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

Other Acts exist to incorporate or facilitate certain special types of associations:

- the *Education (General Provisions) Act 2006* (Qld) under which a parents and citizens association can be formed
- *Hospitals Foundations Act 1982* (Qld)
- *Cooperatives Act 1997* (Qld)
- *Roman Catholic Church (Incorporation of Church Entities) Act 1994* (Qld)
- *Industrial Relations Act 1999* (Qld) under which employer and employee associations can be formed.

The Incorporation Process

Non-profit organisations that are structured as a company limited by guarantee or structured using letters patent, a cooperative, formal trust or some other legislative structure should seek legal advice before attempting to incorporate under the Associations Incorporation Act. Your legal adviser will check to see if changing from one legislative scheme to another has any added requirements or costs, for example you may need to pay stamp duty or apply for an exemption from stamp duty if your organisation owns property that will be transferred to the new legal structure.

Incorporation of a new association

A provisional committee

The first step for an individual who wishes to form an association is to enlist the support of a few other people and form a provisional committee. A chairperson and secretary should be elected from this provisional committee.

The committee should do some planning about their proposed association. It is important for the committee to consider the aims and objects of the proposed association to not duplicate those of existing associations, and survey the public support needed to make the association viable. If the association seeks a sanction under the *Collections Act 1966* (Qld), the association will have to produce a good rationale for existence, or it will be unable to seek public donations.

The committee should consider whether it needs to hold a public meeting to discuss the proposed association. Some committees just hold a small meeting of invited supporters to fulfil the formal requirements of seeking incorporation.

Planning the initial meeting

Although attendees of the initial meeting called to discuss the proposal to form an association are free to elect their own chairperson and committee, and even decide not to support the idea of forming an association, the provisional committee should still plan the public meeting carefully. The public will expect the provisional committee to have an agenda, people primed to offer to become committee members, a draft set of motions, a model constitution for consideration and a plan of action. If attendees at a public meeting sense that the provisional committee has not done their homework, they may be disinclined to support the association. At the same time, the provisional committee should be ready to listen to the ideas and concerns of the initial meeting attendees.

The provisional committee should consider the following requirements, which will bear on the agenda of the initial meeting:

- the name of the association
- the objects of the association, which should be drafted with care, particularly if charitable purposes or deductible gift recipient status are intended
- a drafted motion for the formation of the association, with a person organised to move it and another to second it
- a list of candidates who are prepared to nominate as interim office holders in the new association (the minimum is a president and treasurer, although consideration should be given to the appointment of a secretary)
- the need for at least seven members
- a draft set of rules to be presented at the meeting
- a nominated address for service of documents on a person that is located in Queensland (a post office box is not allowed)

- a collection to offset the costs of arranging the public meeting, if any, and funds to establish the association (e.g. the filing fees that must accompany an application for incorporation).

The provisional committee should also consider whether it needs to engage a solicitor to help prepare the incorporation application and particularly the rules of the association.

The public meeting

The only task of the chairperson chosen by the provisional committee is to call the meeting to order and supervise the first item of business, which is the election of a chairperson for the meeting. It must be remembered that it is a fundamental right of a public meeting to elect its own chairperson.

The next item should be to elect a secretary for the meeting to keep minutes of the proceedings. The secretary should ensure that an attendance roll is kept with the addresses of the participants. This will be invaluable if the association is to seek further support. Apologies can also be recorded.

It is then appropriate for a spokesperson of the provisional committee to explain the nature of the proposed association, its objects and background. This should be followed by a motion to form the association. After this motion is seconded, the chairperson will open the matter for discussion by the general meeting. After discussion is concluded, the vote is taken and usually the association is formed.

The provisional committee could then introduce the draft constitution or elect a committee to consider a constitution and report back to a further meeting.

Incorporation requirements for all associations

When the rules of the association are settled, or in the case of existing unincorporated associations, members can, by special resolution, decide to apply for incorporation and adopt the rules (s 6(1) Associations Incorporation Act). A special resolution is one where three-quarters of those members present in person, by proxy or by an attorney and entitled to vote at the meeting, vote for the resolution. Matters such as proxy voting are considered in the context of the rules of association later in this chapter.

Notice of the meeting at which the special resolution is to be passed is governed by s 3 of the Associations Incorporation Act. A notice must be prepared that states the terms of the proposed resolution to incorporate and adopt the rules. It should be brought to the attention of each member who is entitled to vote at the meeting. Any other provisions in the association's rules must also be complied with (e.g. length of notice or placement on a notice board). If this is not complied with, the special resolution will be of no effect (s 3(3) Associations Incorporation Act). The important issue is that each member gets fair and reasonable notice of the resolution in writing. The resolution could be in the following form:

That the [INSERT NAME OF ASSOCIATION] incorporate as an incorporated association under the provisions of the *Associations Incorporation Act 1981* (Qld).

The result of the resolution should be noted in the minutes of the meeting, with numbers for and against, where possible. For existing associations, if the resolution is successful, a resolution ought to be passed adopting the new name of the association. It may be that the association decides merely to

add Inc. or Incorporated after its existing name as required by s 29 of the Associations Incorporation Act. Consideration should also be given to deciding on alternative names if the Office of Fair Trading decides that the first preference is not available.

The meeting should also appoint by ordinary resolution (over 50% of the members present and entitled to vote) a person to prepare the application to incorporate (s 7 Associations Incorporation Act). The person responsible for the preparation of this application should have a detailed knowledge of the association and be available during business hours to answer queries from the Office of Fair Trading.

Under the Associations Incorporation Act, the business and operations of an incorporated association are controlled by a management committee (s 60). The meeting should elect an interim president, treasurer (s 8) and perhaps a secretary (if the association has not already done so). Note that the committee members must be adults (s 61(2)) and not be in any of the circumstances described in s 61A of the Associations Incorporation Act (e.g. bankrupt or convicted of an indictable offence). The secretary must have similar qualifications (s 69(2)) and also be a resident in Queensland (or not more than 65 km from the border). A nominated address for service of documents should also be considered (s 17).

It is also necessary to have at least seven members before lodging the application to incorporate (s 5(1)(a) Associations Incorporation Act).

The final matter for discussion at the meeting is the adoption of the new rules of the association. Usually, the committee prepares a draft and circulates copies to the members for consideration before the meeting. This must also be considered as a special resolution (s 6(1)(b) Associations Incorporation Act).

Other Matters Relevant to Incorporation

Name of the association

An association will not be permitted to incorporate under a name that is unsuitable (s 43 Associations Incorporation Act). The name must contain Inc. or Incorporated and must be in English characters (s 29 Associations Incorporation Act). There are some minor exemptions to these two requirements, which are discussed below.

Section 32 of the Associations Incorporation Act requires that the association's name appear in legible English characters on all of its documents, including advertising material. The name must also appear on its common seal and be legible (s 31). Section 29(2) permits an association to use Inc. or Incorporated interchangeably.

The Associations Incorporation Act also seeks to regulate the name that an association can use (ss 43-45). The main policy objective of the provisions is to minimise any public confusion about different associations or confusion between an association and some other body.

An unsuitable name, as declared in the Associations Incorporation Regulation (regs 3, 5), includes a name:

- of another incorporated association

- of an incorporated association that a reasonable individual may mistake for another association
- registered or reserved under the Act
- registered or reserved under the *Business Names Registration Act 2011* (Cth)
- that would cause a reasonable individual to be offended
- that would cause a reasonable individual to be deceived about the nature and identity of the association.

It also includes specific names that:

- suggest a connection with a federal, state or local government, department or authority
- use words such as ANZAC, Bank, Red Cross or United Nations without written agreement from the appropriate government authority
- suggest a connection with the Royal family or Royal patronage if no such connection exists
- suggest an ex-serviceman's organisation or that an association's members are incapacitated, when this is not the case.

It is recommended that careful consideration of the terms of sch 1 of the Associations Incorporation Act be undertaken when determining a name for the association. Further, it is often prudent to conduct a search of the various name registers to ensure that the name for the intended association is available for registration and will not be declared unsuitable by the chief executive. A search can be undertaken through the Australian Securities and Investments Commission or the Trademark Register.

Once the application to incorporate is filed with the Office of Fair Trading, the chief executive of the department will give written notice to the association if the chief executive believes that the name chosen is unsuitable (s 44 Associations Incorporation Act). Within 40 days of receiving the notice, the association should choose a new name that is not unsuitable, seek the chief executive's consent to use an unsuitable name under s 45 of the Associations Incorporation Act or appeal the chief executive's decision to the Queensland Civil and Administrative Tribunal (s 113).

Rules of the new association

Drafting the rules of the association is one of the most important tasks in incorporating an association. It may take some time, expertise, thought and consultation.

In particular, care needs to be taken:

- if the association expects to receive taxation exemption, government licences and/or funds from governments, to be listed as an organisation to which donations will qualify as tax deductions or to be recognised as a charity
- to ensure that the rules that will govern the internal life of the association are suitable and will not be the cause of internal dispute or confusion in the future
- that the appointed persons make a statutory declaration that the rules comply with the Act and the Regulation. It is a serious matter in law to swear a false declaration.

The Associations Incorporation Act permits an incorporated association to adopt either a set of model rules (set out in sch 4 of the Associations Incorporation Regulation) or its own rules, provided that those rules do not conflict with the Act and contain matters provided for in sch 3 of the Associations Incorporation Regulation.

Adopting the model rules

Section 6 of the Associations Incorporation Act permits an association to adopt all of the model rules that are contained in sch 4 of the Associations Incorporation Regulation.

The model rules are suitable for many associations, but careful consideration should be given to determine whether any amendments need to be made.

In particular, the suitability of the following model rule clauses for an association should be considered before deciding to adopt the model rules:

- clause 38(2)—whether your association wishes all types of members to have a vote
- clause 18—whether the terms ‘president’, ‘treasurer’ and ‘secretary’ are appropriate
- clause 18(3)—whether a new committee is elected each year, rather than a rotating board which allows a three-year term for committee members, with a third of the board being elected each year
- clause 22(3)—whether borrowing or investing small amounts should require members’ approval
- clauses 24, 36—whether the quorum provisions are appropriate
- clause 37—whether the association is comfortable with proxy votes
- clause 49—whether the association is comfortable with the distribution of surplus assets on winding up, and whether this clause will satisfy taxation authorities for any exemptions that the association may seek.

In addition, the new association needs to ensure that any stipulations of government or funding bodies relating to an association’s constitution are met by the rules (e.g. rules governing tax, poker machines, liquor licensing, art unions, public collections and registration with the Australian Charities and Not-For-Profits Commission (ACNC)).

Even if the rules are adopted as they appear in sch 4 of the Associations Incorporation Regulation, there are still a few matters to be considered. These are:

- the association’s name, including Inc. or Incorporated (cl 2)
- the association’s objects (cl 3); care should be taken as often the wording of these objects is crucial for tax exemption, tax deductibility or charitable status through the ACNC
- the date on which the association’s financial year ends (cl 48); associations ought to consider this date carefully. If associations use the standard end of the financial year (30 June), it is often difficult to obtain services from their auditors, as it is the busiest time of the year for them. Some sporting clubs will find that the end of the financial year is out of their season, and it is difficult to obtain a quorum at an annual general meeting. Some government funding authorities stipulate a certain financial year as a condition of funding.

These matters must be inserted in the application for incorporation, which is discussed below.

Having ‘own rules’

If the existing association already has a workable set of rules, these rules can be adopted if they comply with the provisions of (s 9(3)(b) Associations Incorporation Act) and Associations Incorporation Regulation (sch 3). Section 46(3) of the Associations Incorporation Act refers to these rules as the association’s own rules.

The schedule is in two parts: one contains matters that must appear in the rules; and the other provides examples of matters from the model rules (sch 4 Associations Incorporation Regulation) that are to be provided for in the rules. Matters raised in both parts of the schedule must be provided for in the association’s own rules and identified as part of the application for incorporation. There are other requirements outside these schedules, such as the accounting rules in sch 5, which should also be considered.

Section 47(1) of the Associations Incorporation Act may imply certain model rules into an own rule association, where the association’s own rules do not provide for the matter, and the own rules do not provide that s 47(1) does not apply to the association.

If an association does not cover all matters contained in the model rules, then s 47(1) will imply the omission into the association’s own rules. For example, an own rule association may not wish to allow proxy voting and hence leave any reference to it out of their rules. As the model rules include proxies, it would be implied into the own rules, and proxy voting would be permitted in accordance with the model rules. If the own rule association does not wish this to occur, it would either need to state explicitly in its own rules that proxy voting is not permitted or that s 47(1) does not apply to the association.

Section 1B of the Associations Incorporation Act declares that if a rule of an association is inconsistent with the Act, then the Act prevails to the extent of the inconsistency. Note that under s 7 of the *Acts Interpretation Act 1954* (Qld), the word ‘Act’ includes statutory instruments made or in force under the Act. Thus the association’s rules must also be consistent with the Regulation.

Legal assistance

It is often necessary to obtain legal assistance with drafting clauses for the rules of an association to ensure that they properly mesh with the provisions of any previous rules, and they satisfy the constitutional requirements of other government departments for exemptions, licences or funds. In particular, care needs to be taken because the appointed persons must make a statutory declaration that the rules comply with the Associations Incorporation Act and Regulation.

Completing the application form

An application form (Form 1) can be downloaded from the Office of Fair Trading website or posted by the Office of Fair Trading upon request. Attention to detail in the preparation of this form will ensure its speedy processing. Again, it is important to remember that a declaration must be sworn that states that the Associations Incorporation Act has been complied with in all respects. It is a serious matter in law to swear a false declaration.

The completed application is lodged, together with a fee, at the Office of Fair Trading.

Post-incorporation Requirements

When the application has been approved, a certificate of incorporation will be forwarded to the association. The newly incorporated association's management committee needs to meet within a week of the certificate's issue to comply with the time limits imposed by the Act.

Financial management

A successful management committee will ensure that the financial records and minutes of its first term are properly and clearly kept.

The time, effort and expense involved in maintaining comprehensive records is always worthwhile, because a proper system of bookkeeping and minutes will give future management committees a clear understanding of the history and financial position of the association. The Westpac Guide for Community Treasurers is a useful guide, and material on a standard chart of accounts is also available on the ACNC website.

Taxation

The newly incorporated association is required to advise the Australian Taxation Office of the name of its public officer for the purposes of the various income tax laws.

Management committees should carefully consider their tax obligations. The association may be able to apply for exemption from income tax through application to the ACNC. Consideration should be given to whether an Australian Business Number is required and also whether the association needs to register for the Goods and Services Tax.

Formal endorsement by the ACNC and taxation authorities is required if the association is a charitable institution, trustee of a charitable fund or a deductible gift recipient.

Land owned by the association

Land that an unincorporated association owned before it was incorporated must be transferred into the name of the new incorporated association. This must be done within 30 days (s 24 Associations Incorporation Act).

A solicitor should be consulted about the transfers to avoid pitfalls and obtain the exact paperwork required to affect the transfer.

Name of the incorporated association

As discussed above, the association must ensure that its full name appears on all of its documents, including its cheques, advertisements, newsletters and correspondence. The full name is that which appears on the incorporation certificate and includes Inc. or Incorporated. The department strictly enforces this requirement.

A checklist for the management committee upon incorporation

The matters that ought to be considered at the first meeting after incorporation are:

- election and appointment of a secretary
- safe custody of the certificate of incorporation
- production of the common seal and its approval
- drafting of by-laws
- appointment of a public officer for taxation purposes and direction of the public officer to notify the Taxation Office
- application for ACNC registration, taxation exemption, Australian Business Number and/or Goods and Services Tax
- directions about new books of accounts
- resolutions about bank accounts
- notice to creditors
- transfer of any registered assets (land or cars) into the name of the incorporated association
- insurance arrangements
- appointment of an auditor (if required)
- register of members and assets.

Business Names and Trading Outside Queensland

If an association carries on business in Queensland under a name other than the name of the association, it should consider whether to register that name as a business name. For example, XYZ Environment Group Inc. may operate a chain of retail shops selling nature books to subsidise its activities. It may trade under the name ‘Nature Books’, and this would probably be required to be registered as a business name.

Forms for registration can be downloaded from the Australian Securities and Investments Commission website or can be requested over the telephone. The commission’s website hosts an online database that people can use to search all registered business names and company names in Australia. However, such a search does not guarantee that the name chosen is available for registration.

It may also be prudent for an association to consider issues of trade marks. Trade mark information is available through IP Australia, the Commonwealth government agency responsible for administering patents, trade marks, designs and plant breeders’ rights.

Interstate offices

Some incorporated associations do carry on activities or establish an office outside Queensland. Large sporting organisations, charities and those associations that are geographically close to the border may need to establish such an office.

The *Corporations Act 2001* (Cth) (Corporations Act) requires incorporated associations that carry on business outside Queensland to register as a registrable Australian body (s 601CA). Sections 18–21 of the Corporations Act define what is meant by carrying on business. Section 18 makes it clear that carrying on business will include business other than for profit. Section 21(3) sets out a number of matters which in themselves do not mean that business is being carried on in that place. For example, merely investing funds, holding property, maintaining a bank account or conducting an isolated transaction that is completed within a period of 31 days by itself will not be regarded as carrying on business.

Section 601CB of the Corporations Act sets out the requirements for registration:

- a completed Form 401
- a certified certificate of incorporation and constitution
- a list of the management committee
- the principal place of business being in Queensland
- the registered office of the association (s 601CT Corporations Act)
- the registration fee.

The Corporations Act is administered by the Australian Securities and Investments Commission.

Legal Notices

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