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A Comparative Study of the Associations Incorporation draft statutes in New South Wales and Victoria and the Associations Incorporation Act 1981 of Queensland.

Research paper for Bodies Corporate and Unincorporate LL.M. (Laws 523).

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I. INTRODUCTION.

Legislation of a general character allowing various voluntary unincorporated non-profit associations to obtain voluntarily legal (corporate) status by incorporation or registration has been in force for sometime in New Zealand and certain Australian States and Territories.[1] These various legislative measures have many similar features but they are far from uniform in substance.[2] These Acts provide a simple, inexpensive and convenient method for a non-profit unincorporated association to become incorporated by registration as an incorporated association. But there is no similar legislation in New South Wales and Victoria. There was also no similar legislation in Queensland until recently.[3] However the Law Reform Commission in New South Wales and the Victorian Chief Justice's Law Reform Committee are considering the introduction of Associations Incorporation Acts.

At the present time in Victoria, an unincorporated, non-profit association may only become incorporated as a company limited by guarantee pursuant to the Uniform Companies Act, unless it happens to fall within the ambit of a more specialized statute such as the Co-operation Act 1958 (Vic.) or the Hospitals and Charities Act 1958 (Vic.).[4] In Queensland an unincorporated, non-profit association may become incorporated by virtue of the Companies Acts 1961-1978 or, if the nature and constitution of the association are appropriate, by virtue of the Religious, Educational and Charitable Institutions Acts 1861-1967 or by virtue of other statutes dealing with specific organisations.

Similarly in New South Wales the unincorporated, non-profit assocations may become incorporated by virtue of the Companies Act. This method of incorporation under the Companies Act would inevitably add considerably to the associations' expenses. It would also impose on them and their officers heavier duties and responsibilities than seem required having regard to the activities of most of them.[5] Thus one of the objects of the Associations Incorporation Act in Queensland is to provide a system of registration and regulation which is less complex and onerous than the Companies Act.

In Victoria, a draft Associations Incorporation Act was prepared in 1980 by the Chief Justice's Law Reform Committee. In New South Wales, the Law Reform Commission had so far prepared a 1977 Draft Bill, a 1979 Draft Bill and a 1979 Outline Scheme for Registration.[6] In Queensland a draft Bill was prepared by the Justice Department in 1975 followed by a draft prepared by the Law Reform Commission in December 1978, a supplementary Paper in February 1979 and finally the Act was enacted in 1981. These proposals set out a scheme for optional incorporation by registration and an incorporated association would have minimum statutory duties and restrictions.

The main purpose of this paper is to make a detailed comparative study of the proposed Associations Incorporation Acts in New South Wales and Victoria and the Associations Incorporation Act in Queensland. The precedent statutes will be used as a basis for evaluating the proposals in New South Wales and Victoria and the Queensland Act and to examine how adequately they deal with the existing problems arising from the law relating to unincorporated associations.

Piecemeal reforms were carried out in New Zealand on the Incorporated Societies Act 1908 since 1920. The latest reform was done in 1981. In concluding the paper, a question that need to be asked is whether the New Zealand legislation should be or ought to be amended in the light of the proposals in the three Australian States.

II. PROBLEMS AND UNCERTAINTIES ARISING FROM THE LAW WITH RESPECT TO UNINCORPORATED ASSOCIATIONS.

Generally the substantive and procedural problems associated with unincorporated associations stem from the fact that they are not recognised in law as legal entities distinct from their individual members.[7]

A. Definition of Unincorporated Association.

In Conservative and Unionist Central Office v. Burrell (Inspector of Taxes)[8], the Conservative and Unionist Central Office was assessed to corporation tax in respect of the income arising from its funds for a period of five years. The party appealed contending that it was not an unincorporated association and, therefore, not a "company" within the meaning of section 526(5) of the Income and Corporation Taxes Act 1970. Subsection (5) defines "company" as "...any body corporate or unincorporated association, but does not include a partnership, a local authority or a local authority association...". Vinelott J. in the High Court allowed the appeal holding that the party was a political movement with many parts working together towards a common end but was not an "unincorporated association" within section 526(5). The Crown appealed against Vinelott J's decision to the Court of Appeal where Lawton, Brightman and Fox L.JJ. affirmed the decision of Vinelott J.

The case mentioned above is authority for the proposition that the definition of unincorporated association has six characteristics, three necessary and three normal or usual. The three characteristics that must be present are:-

(i) There must be members (i.e. two or more persons bound together for one or more common non-profit purposes). A collection of unincorporated associations cannot constitute the membership of a separate unincorporated association;

(ii) There must be a contract binding the members inter se. The contract will usually be found in a set of written rules (sometimes it may not be written); and

(iii) There must, as a matter of history, have been a moment of time when a number of persons combined or banded together to form the association. In practice, once (i) and (ii) are satisfied, (iii) automatically follows.

The other three optional characteristics are:-

(i) There will normally be some constitutional arrangement for meetings of members and for the appointment of committees and officers;

(ii) A member will normally be free to join or leave the association at will; and

(iii) The association will normally continue in existence independently of any change that may occur in the composition of the association.

In Taunton Syndicate v. Commissioner of Inland Revenue [9] the High Court is asked to decide whether the five tenants in common of the two properties (three storey commercial building and two town houses) formed an unincorporated association for the purpose of income tax assessment. The five tenants in common objected to the Commissioner classifying them as a syndicate i.e. unincorporated association under section 212 of the Income Tax Act 1976 so as to tax them as a company. Bisson J. said: [10]

> In my view, the use of the word "unincorporated" in conjunction with the word..."association"...clearly indicates that the association is a body of persons who have bound themselves together by agreed terms and conditions and so have formed an association but stopped short of incorporation. A random number of individual is not an association until they have formed themsleves into an association and this formation does not occur until they have agreed upon an organisation whereby their relationship one with the other is determined and organised.

The judge also indicated that some definition of mutual rights and obligations of unincorporated association's members is essential.

It was held that the objectors did not form themselves into an unincorporated association because they acquired their individual interests in the properties by individually requesting a transfer in specie from the liquidator of the properties and without any

agreement whatsoever to establish their mutual rights and obligations.

The Conservative and Unionist Central Office v. Burrell (hereinafter referred to as the Conservative Party case) was not referred at all in the New Zealand decision mentioned above. However the criteria used for the definition of unincorporated association are similar to that of the Conservative Party case i.e. the three necessary characteristcs of unincorporated association.

B. The Nature of An Unincorporated Association

An unincorporated association has no legal existence separate from its members.[11] The courts have for a very long time declined to recognise unincorporated associations as legal entities distinct from their individual members, except where some statutory direction has been given.[12] As a consequence an unincorporated association owes its existence purely to the agreement of its individual members since it has no corporate personality. Thus the constitution of the association will be derived from the terms of the contract between the members inter se.[13] It is also usual for the common property of the unincorporated association to be vested in the trustees (trustees are not always present) for the benefits of the members and thus the nature of the trust may also constitute part of the governing rules of the association. For example where the trust is declared to be for the maintenance of some particular purpose, the trust property cannot be used for any other purposes even where the association has validly altered its rules and thereby changes its purposes unless the original terms of the trust itself allow for modification of this sort.[14]

C. Problems

1. The Gifts or Subscriptions to Unincorporated Association

The unincorporated association itself may not succeed in relation to the achievement of its objects because it may not receive property which someone tried to leave to it. The association itself is incapable of holding or owning the beneficial interest in the property (because it has no separate legal entity) and as such any gift needs to be read as a gift to the members for the time being in order to prevent its failure.

In Leahy v. Attorney-General for New South Wales [15] the Privy Council concluded that a testamentary gift to an unincorporated association simpliciter is prima facie valid as a gift to its members at the date of the gift as joint tenants or tenants in common; but that the presumption was rebutted by considering: the form of the gift; the number and distribution of the members; the subject matter of the gift; and the capacity of the members to put an end to the association and distribute the assets.[16] These circumstances might indicate that the gift was in fact intended as a trust for both present and future members in which case the gift would fail as infringing the rule against perpetuities; or they might indicate that it was not a trust for the benefit of individuals at all but stood revealed as a trust for some purpose or purposes disclosed by the terms of the bequest in which case the gift would fail unless the purpose was, in a legal sense, charitable.[17] This decision was followed in Bacon v. Pianta. [18] The gifts in both cases failed because the presumption was rebutted.

The position that now pertains is that a person who wishes to devise property to an unincorporated association as "an entity" to further the objects of the association, where they are not charitable in the legal sense, faces great difficulty in so doing.[19] For example, for the gift to be valid as a non-charitable purpose trust, it has to satisfy three prerequisites:

(i) certainty of purposes;

(ii) rule against perpetuities (the property must vest if at all within the perpetuity period and the purpose must not last forever); and

(iii) there must be human beneficiary. Factual beneficiary will probably be sufficient.[20]

The gifts or subscriptions to unincorporated associations may also be validated as property held on:-

(a) contract-holding theory i.e. the property is beneficially owned by the members of the association subject to their rights and duties inter se;[21]

(b) charitable purpose trust;

(c) suspended beneficial ownership coupled with contractual obligations.[22] This method could only be applied to intervivos gifts and not testamentary gifts. There is a contractual obligation on the part of the recipient to apply the money received for the pursuit of the purpose intended by the subscribers. While purpose remains unperformed or capable of performance the subscribers' beneficial ownership is suspended.

Rickett is of the opinion that "Vinelott J.'s view that the

obligation binding the legal owners of the "subscribed" property is a contractual one is not tenable".[23] Firstly, Vinelott J. indicated that donations from anonymous "subscribers" and "subscribers" by way of whist drives, etc., are as susceptible to the new construction as are more regular and identified forms of subscriptions. But talk of contractual obligations in these circumstances would simply be unreal because there are difficulties in finding an agreement. Secondly, there will be some difficulty in talking of a contractual obligation in all those cases where it is unreal to say that the recipient of the donations is inviting subscriptions. Thirdly, if the legal owners subscribe to the purposes themselves, can they be under a contractual obligation owed to themselves? Thus it would seem preferable to regard the obligation which makes possible the suspended beneficial ownership concept as a general equitable obligation.

The gifts from members and outsiders to the unincorporated association cannot be held by the trustees or committee beneficially for the association because even though it exists in fact, it has no legal identity in law. Thus for the gifts to be validly held, it has to be slotted into one of the available validating construction. The constitution (rules) of the association, the term/s of the gift (intention of subscriber) and the nature of the gift may be useful in determining how the property is held by the association.

2. <u>The Ability of Unincorporated Associations to Contract and Hold Property.</u>

The association itself may suffer in relation to what is in substance its own property because a lease or contract on which it

was relying may be legally ineffective. An association cannot be a party to a contract either directly or through an agent because it is not a legal entity (i.e. it has no legal existence separate from its members). However a contract may be made with members or officers of an association personally.

In Freeman v. McManus,[24] the landlord, The Melbourne Trades Hall Council, sought to evict certain tenants from a building. In order to sustain the action under the relevant legislation the landlord had to show, inter alia, that a relationship of landlord and tenant was created by the existence of a lease. In this case, the lease was alleged to be made with an unincorporated association simpliciter i.e. the Australian Labour Party. It was contended that the tenants were the members of the Party for the time being and this fluctuating body of persons' rights, obligations, powers and privileges as lessees of the premises would depend on whether they were members of the Party. However it was held that "such a lease or tenancy is unknown to the law" [25] and the action failed. This result was inconvenient for unincorporated association which wishes to lease premises to carry on its activities because the association simpliciter cannot hold property under a lease since it cannot be a party to any contract. To overcome this problem, certain members of the unincorporated association, often called the "trustees" will enter into the lease or tenancy agreement personally with the landlord. The trustees will be the legal owners of the "property", holding it on trust for the purposes of the association or the members themselves. However this device of using the trustees is in itself an inconvenient solution particularly where a "trustee" ceases to be a member of the association

because it may be stipulated that a precondition for being a trustee is that you must be a member. "[Furthermore] land held on trustees' names could not be dealt with should the trustees be removed, die or become a lunatic or unable to act."[26]

Carlton Cricket and Football Social Club v. Joseph[27] and Banfield v. Wells-Eicke[28] illustrated further the powerless position faced by a person and the members of an unincorporated association when the person purports to enter into an agreement with the association simpliciter. In the former case the plaintiff, a company, purportedly entered into an agreement with the Fitzroy Football Club, an unincorporated association. Under the agreement, Fitzroy agreed to play a certain number of its home football games at the Carlton ground for a period of 21 years. This agreement was duly executed by the President and Secretary of Fitzroy and the appointed Officers of Carlton. Later some officers of Fitzroy, not being those who had signed the agreement, intended to break the agreement with plaintiff by entering into an agreement with another cricket club. The plaintiff sought for interlocutory injunctions against Fitzroy, to restrain Fitzroy from breaching the agreement. The plaintiff failed because there was no agreement between plaintiff and Fitzroy and even assuming that the word "Club" referred to all the members of the club from time to time, to find the contract existed at the time of the action required resort to "the fantastic notion" that each time a person ceased to be a member of Fitzroy there is a novation of the contract and each time a new member is elected there is also a novation. In the latter case the facts were similar but both parties to the

purported contract were unincorporated associations. The plaintiff failed in the action to seek interlocutory injunction because if the agreement for use of a football ground was made with the then members of a club, it could not be enforced later by a different group of members. The purported agreements in both cases were of a type that is of considerable commercial value and the result is cause for alarm because there probably are in existence numerous similar agreements which are completely unenforceable. [29]

3. The Liability of Committee Members of Unincorporated Associations for Contracts and Torts.

The principle enunciated by Wise v. Perpetual Trustee Company Ltd [30] is that members of unincorporated association would only be liable at common law to the extent of their subscriptions as members unless there is contrary intention clearly expressed (the common fund is regarded as the limit of its members' liability). The members have acquired the privilege of limited liability but the committee members are personally liable as principals for damages in contract and tort, notwithstanding that the liability goes beyond their own agreed subscription as members.[31] The reason for this rule is that the courts, wanting to protect creditors and to provide a remedy for injured members and third parties, have had to choose the committee members [or other persons responsible for conducting the affairs of the association] because the association itself, not being a separate legal entity, could not be liable. [32] The imposition of liability as principals on the committee members, who are in reality agents of the associations, is conceded not to "depend entirely upon logical basis". [33]

In Bradley Egg Farm v. Clifford the plaintiffs allowed their fowls to be tested for certain diseases on the invitation of the

poultry society. The plaintiffs suffered damages because of the loss of the fowls. A servant of the society was also found to be negligent in this matter. The committee members of the poultry society were held to be personally liable in contract for the loss of the fowls and vicariously liable for the servant's negligence. The committee members contended that they should not be personally liable as the contracts were entered into by them on behalf of the society as a whole and that the negligence of the servant was at the risk of the society as a whole. This contention was rejected by the court which said that the fact that the members of the society by its constitution entrusted its affairs and management to a committee did not thereby give the committee authority to make contracts binding on them. The judge said:- [34] "...(the intention) on the plaintiff's part (was) to make the contract with the person or persons responsible. That cannot be the society for it does not exist...the businessmen who accept the office of being on the Executive Council, seem...to be the persons whom the law must regard as pledging their own credit in order to perform the duties which they voluntarily undertake for their so-called society...".

In Smith v. Yarnold the management of motor racing club was vested in the committee. The committee as "trustees" had taken lease of land at which club race meetings were conducted. The plaintiff, a paying spectator was injured when a grandstand on the land collapsed during a motor race. The committee were held to be liable in contract and in tort (as occupiers) for the damages suffered by plaintiff.

There were two practical difficulties revealed in the above-mentioned cases. Firstly, it seems that before any credit of the members of an

association may be pledged (and this may extend even to the common fund), authority must be given by the members of the association.[35] Thus it may well be impossible for the committee to carry out the objects of the association unless they are given such power to undertake the objects. Secondly, in the absence of special agreement, committee members who are personally liable in contracts and torts are not entitled to indemnity from the members. The judgment against the committee does not enable the plaintiff to recover against the common fund (association's funds and property) except perhaps on the basis of subrogation to the committeeman's right of indemnity against the common fund.

4. The Difficulties Face By Creditor If He Seeks To Sue All Members In Order to Recover Against The Common Fund.

The common law difficulties indicated in subheadings 2 and 3 above amounted to civil immunity for the unincorporated association simpliciter.[36] Equity met these difficulties by providing a means of suing an aggregate of persons (members of association) by means of a class or representative action. The representative action originated from the common law procedure in 1870's. In New Zealand the representative action is found in R. 79 of the Code of Civil Procedure in the following words: "Where there are numerous persons having the same interest in an action, one or more of them may sue or be sued, or may be authorised by the Court or a Judge to defend in such an action on behalf of or for the benefit of all persons so interested". It is a fair summary of decided cases to say that there is no certainty in law as to the practicability of the representative action, in particular in the case of representative

defendants.[37] Even if the plaintiff can show that in substance there is a basis for alleging personal liability against all the members at a particular time, it will usually prove impossible to bring a representative action if the number of members is great.[38] If the number of members if great, it is practically impossible for them either to sue or be sued in respect of transactions in which they may enter because membership will fluctuate between contract, breach, institution of proceedings, judgment and execution. Similarly in tort action, there would be difficulty because some members may have voted against the action complained of and therefore each defendant would be entitled to claim a separate defence and this would mean an absence of "the same interest" required by the rule of representative action.[39] Furthermore the exact meaning of the phrase "the same interest" which is a prerequisite for representative action is not clear.

The judgment against a member or a number of members personally cannot be enforced against the common fund because it belongs to the changing body of members for the time being. He only has the right to enjoy the club property when he remains a member. He has no alienable interest in the common fund which could be seized in satisfaction of personal judgment.

5. The Rights of Members of Unincorporated Associations to Maintain Legal Actions Against Fellow Members and/or Committeemen (Internal Disputes).

In Prole v. Allen[40] the plaintiff, a member of an unincorporated members' club was injured when she fell down an unlighted stairway in the club premises. The committee were in charge of the management of

the club but the steward of the club was responsible for seeing that the club premises were fit for use by the members. The plaintiff sued the defendants who were the members of the committee and included the secretary and steward of the club for damages for negligence. It was held that with regard to those defendants who were committeemen and secretary, they being members of the club as was the plaintiff, they owed no duties to her. The fact that they were committeemen made no difference to the above statement. Pritchard J. said at p. 477: "I find no facts produced which imposes any other relationship between them and the plaintiff than their joint membership of the club, and, therefore, I come to the conclusion that they did not owe a duty to her, and...[therefore no action for damages for negligence can lie against them]". But in the case of the defendant who in addition to being a member of the club, was also a steward of the club, this relationship places him in a different position towards the plaintiff from the others (who were not steward). He was appointed [as steward] by all the members, operating through the committee, and...thereupon became the agent of each member to do reasonably carefully all those things which he was appointed to do [i.e. inter alia lights were switched on and off when and where necessary], and in that way he came to owe a duty to each of the members to take reasonable care and to carry out his duties without negligence. [41] The judge concluded that the plaintiff was entitled to recover damages against the steward for the breach of his duty (negligence) but not against the members of the club.

In another case Healey v. Ballarat East Bowling Club [42] the plaintiff, a member of an unincorporated club suffered injuries in a fall in the club grounds. He brought an action to seek damages for injuries suffered against the defendants on the ground that they

breach their duty (were negligent) as occupiers of the premises (grounds). The defendants named were the president, secretary, committee and members of the club. The defendants contended that the plaintiff was both the plaintiff and defendant and this is fatal to his case. It is true that the plaintiff is and was at all relevant times a member of the club and in making a claim against the "members" of the club would be both a plaintiff and a defendant, which he could not be.[43] But this procedural objection can easily be overcome by amending the pleadings. The rules of the club provided inter alia that the officers and committeemen were members of the club and they managed the club grounds. It was held by Gavan Duffy J. at p. 208: "Looking at the rules, it appears most improbable that the president or secretary could be liable in anyway to the plaintiff for his injuries nor that the members of the club [including committeemen] as such could be liable, nor that the plaintiff as a member of the club could be either an invitee or a licensee of the president, secretary, committee or members of the club".

The two cases mentioned above illustrated one of the difficulties faced by a member of an unincorporated association who is injured on association premises and seeks to recover damages from other members (includes committeemen and officers) for breach of duty as occupier. The member will not succeed in the action because the other members owe no duties to him and he is unlikely to be an invitee or licensee of the other members. This difficulty would not arise if the occupier were a corporation.

Another difficulty faced by an unincorporated association is the question of locus standi of a member in an action against the committee or officers. In Cameron v. Hogan[44] the plaintiff

who was a member of a political party (voluntary unincorporated association) brought an action against the executive officers of the party for refusing to approve, endorse or submit to ballot his nomination as a person seeking selection by the party as a candidate at an election then pending and had by resolution expelled him from the party. The plaintiff alleged that both these actions were breaches of the rules of the association and he sought a declaration that he was still a member, that his expulsion and the non-endorsement were wrongful, an injunction to restrain his expulsion, and damages for the alleged breaches of contract. It was held:

1. The plaintiff was not entitled to a declaration or injunction against expulsion because the nature of the association did not give its member (plaintiff included) any civil right of a proprietary nature (i.e. a share in the property of the association during its existence or winding up) which is the foundation for granting such remedy.
2. The rules of the association in this case were not intended to create enforceable contractual rights and duties between members or between executive officers and members. Therefore the defendants by expelling the plaintiff or failing to observe the rules governing the affairs of the association, committed no breach of contract against the plaintiff.

The proposition of the case is that in order for a member to have locus standi in an action against the committee or in an action against the committee or officers of the association, he must have "some civil right of a proprietary native" (action for injunction or declaration).

However Wootten J. in McKinnon v. Grogan [45] regard Cameron v. Hogan as bad law. He distinguished Cameron decision as one involving the policy of judicial non-intervention in voluntary associations of a non-business character. He said at p. 298-299:

"The difficulties raised in Cameron...are capable of solution if a policy of intervention is adopted. I consider that citizens are entitled to look to the courts for the same assistance in resolving disputes about the conduct of sporting, political and social organizations as they can expect in relation to commercial institutions. [Furthermore]... people who joint the [unincorporated association]...and subscribe to its consitution and by-laws should be taken to intend to be bound by them and should be entitled to invoke in the courts in appropriate circumstances to have their disputes settled. The issues [raised in this case] are of major importance, as they deal with the election of a general committee of a club....They thus go to the heart of the control of the affairs of this...institution, and in terms of public importance, as well as of concern to individuals, are far more worthy of judicial time than many issues about "civil rights of a proprietary nature".

Cameron v. Hogan decision has not been expressly overruled but it has been ignored by other courts so that the true position is uncertain. In Harrison v. Hearne [46] the plaintiff, a member (student) of a university council (an unincorporated association), sought to restrain alleged ultra vires actions by the executive.

The defendants argued that the plaintiff had no locus standi because he had no proprietary rights in the funds or property of the

association and that there was no contractual relationship between the members or any member and the executive (arguments were based on Cameron decision). Helsham J. did not deal with Cameron decision but applied the words of Fletcher Moulton L.J. in Osborne v. Amalgamated Society of Railway Servants:[47] "There are many rights which in such a sense could not be called rights of property, which, nevertheless, the law will protect, as, for instance, if there was an association of men subscribing for a benevolent purpose, say for the endowment of a scientific institution, the whole funds of the association being dedicated to that charitable purpose on the terms that the administration should be under the control of the association, I can see no reason why membership of such an association should not have the same legal protection as would be given in the case of an association where the members had a beneficial interest in the funds".

It is generally accepted at common law that the rules of a voluntary unincorporated association constitute a contract between the members inter se. The contract may only be between the members inter se because an unincorporated association is not a separate legal entity which can enter into a contract.[48] It then became necessary to consider whether a breach of contract had been committed and who was responsible in a particular case.[49] If the member suing complained that his expulsion had been improperly resolved upon by a committee or officers of the association, he would be met by two answers. If the resolution was not authorised by the rules of the association, it would be a void act: his membership would be unaffected. The members are not responsible at law to another member for an act of the committee or officers not authorised by the rules. The committeemen or officers themselves in attempting to do

what, according to the hypothesis, they could not do, committed no breach of contract. However if it were determined that the committee or officers in attempting to exclude the member complaining, or in some other respect, had committed a breach of contract (i.e. failure to observe the rules), the remaining members of the association would not be liable. The committee or officers are plaintiff's agents as well as the agents for other members and since the act of the committee was ultra vires the rules, it is therefore not authorised by the other members and accordingly the other members would not be liable. Hence another problem faced by the aggrieved member is the difficulty of obtaining relief at common law, necessarily for breach of contract, if the act complained of was a mere nullity, or if the act could be attributed on an agency basis to the members generally, of whom the plaintiff (aggrieved member) was one.

The aggrieved member may bring a representative or class action against all the other members. However this action is unlikely to succeed if the number of members is very large (see sub-heading 4. above for a discussion of this problem). It seems then the only correct way that the plaintiff might have proceeded was to sue individually all those other members. However this will be cumbersome where there are numerous defendants on whom proceedings must be served e.g.: summons to appear in courts.

6. The Dissolution and Subsequent Disposition of Any Surplus Assets of Unincorporated Associations.[50]

The dissolution of unincorporated associations and the distribution of any of its surplus assets should be provided for in the rules of the associations, but interestingly in many cases[51] the rules do not deal with such matters at all. Thus the question

of dissolution and distribution has been generally left to be settled by judge-made law. The legal principles governing the disposition of the surplus property of a non-profit association after its dissolution appear now to be clearly established since the decisions in cases such as Re Bucks (No:2) and Re Grant's Will Trusts.[52] There still remain many problems concerning the procedure by which an unincorporated association...may be effectively dissolved and its assets disposed of, especially in instances where the association is for all practical purposes defunct. [53]

In the absence of a rule of an unincorporated association providing for dissolution, it could only be brought about by order of the court where "it appears just and equitable to do so" [54] or voluntary unanimous agreement of all the members [55] or the automatic dissolution upon the association's permanent loss of substratum. [56]

> Somer J. in Re Kaiapoi case said that in his opinion: [57]
> the provisions of Part XI (ss. 387-394) of the Companies Act 1955 relating to the winding up of unregistered companies do not apply to an unincorporated members club for the reference in s. 388 (2) to a place of business indicates that to be so wound up an association must be engaged in trade.

Sievers is of the opinion that "it is not clear whether a court today would allow [Part X Division 5]...of the Uniform Companies Act [1961 (Aust,), relating to the winding up of unregistered companies] to be used in the winding up of an unincorporated association". [58]

The manner in which the unincorporated association holds it property when it is 'existence' may affect the ultimate destination of its surplus assets on dissolution.[59] Another factor that may affect the ultimate destination of any surplus assets may be source from which an association's property has been derived.[60] Hence the first thing court should do when deciding the destination of surplus assets is to find out how the association's property is held when it was in existence.

If the property is held on contract-holding theory, then the existing members at the date of dissolution were the only persons with a valid claim to the surplus assets.[61] Those current members were entitled to equal shares in the surplus assets in the absence of contrary intention in the rules of the association.

If the property is held on valid non-charitable purpose trust, at the date of dissolution of the association, the property must be held on resulting trusts for the settlors in shares proportionate to their contributions. In Re Gillingham Bus Disaster Fund subscriptions were made by known persons and anonymous persons (street collections) to a memorial fund for cadets killed in an accident. The fund was held on non-charitable purpose trust. On the dissolution of the association, the fund that has not been exhausted will revert to the donor/settlor under a resulting trust. However to prevent practical nonsense or difficulty, a special category should be created to provide that surplus money resulting from anonymous gifts to a fund should pass bona vacantia.[62] This

will save the courts from the difficulty of deciding whether the anonymous gifts or donations are intended as contract-holding theory gifts or as a trust for association's purposes.

If the property is held on charitable purpose trust, then on dissolution of the association, the property must be applied cypres. In New Zealand, the common law doctrine of cypres no longer exists. It has been replaced by section 32 of the Charitable Trusts Act 1957 (scheme to vary a trust).

If the property is held on suspended beneficial ownership, then on dissolution of the association, any surplus assets representing intervivos gifts from known subscribers will be returned to them in proportion to their original contributions (resulting trusts) and those representing anonymous subscriptions (e.g. proceeds from raffle, drive, sweepstakes, street collections) might devolve as bona vacantia.[63]

If the property is held "...as a gift to the existing members of the association beneficially, as joint tenants or tenants in common, so that each member is entitled, (on severance as a joint tenant), (whether or not he continues as a member of the association) to an aliquot share...".[64] Cases within this category are relatively uncommon now.[65]

7. Overview

The discussions above illustrated some of the procedural and substantive problems faced by outsiders and members when they tried

to bring legal actions to enforce their rights for wrongs done by them as a result of the activities incorporated associations. For example, the unincorporated association cannot enter into contracts nor sue or be sued and there are serious difficulties confronting such a group wishing to hold any real property, or indeed, any form of tangible assets.

Next, we proceed to examine the proposals by New South Wales, Queensland and Victoria which would allow unincorporated associations an opportunity to seek incorporation under the relevant statute concerned. At the same time, the paper will also be assessing how far the existing problems are being eliminated and whether incorporation gives rise to any new problem/s.

III. OPTIONAL OR VOLUNTARY INCORPORATION?

In California and Ohio, there is in existence legislation which gives all unincorporated non-profit associations (within the definition in the statute concerned) a basic status as a legal entity without any action being taken on their part (i.e. without incorporating them).[66] If the association desires full status as a corporation it may apply for and obtain registration as a non-profit corporation on compliance with provisions of the relevant non-profit corporations statute.

The aim of Associations Incorporation legislation in Australia or Incorporated Societies Act 1908 of New Zealand (hereinafter referred to as the New Zealand Act) is to encourage associations to obtain corporate status by registration. It has been suggested[67] that at least in a relatively small country (like New Zealand) the

availability of a limited legal status without registration would act as a powerful disincentive to associations making use of an Associations Incorporation Act or New Zealand Act (as the case may be).

The Australian and New Zealand statutes all require an unincorporated association to take active steps to become incorporated, and apart from in Tasmania and South Australia [68] there are not eben procedural rules to allow unincorporated associations to sue or be sued in the name of the association. Similarly the proposed legislation in New South Wales and Victoria and the Queensland Act deliberately leaves to the members of the unincorporated association the choice whether they will take the steps to incorporate i.e. no automatic incorporation upon the formation of an unincorporated association. However in New South Wales, in addition to an optional registration scheme, a novel scheme has been devised under which an unregistered association might be given specified attributes more or less analogous to some attributes of corporations. [69]

Compulsory incorporation of the associations would be impracticable. The Queensland Law Reform Commission [70] rejected the idea of compulsory incorporation or automatic incorporation because:-

1. since an unincorporated association is no more than a physical fact of the association of persons each of legal status, the formation of a cricket team or a car club or a choir, anyone of which might have the most transient existence, would cast upon the members an obligation to file returns and to subject themselves to the provisions of the legislation;

2. it is foreseeable that the members of many corporations that would come into existence would fail to file returns and as a result no formal record could ever be kept;

3. it is forseeable that there would be many corporations which would existed as a matter of law and continue to exist long after the association itself, as a physical fact, had ceased to exist;

4. there should not be any undue restriction on the freedom to associate;

5. there is no demonstrated need for a requirement of compulsion in this area;

6. compulsory incorporation would make the problems of administration enormous and costly.

I agree fully with the arguments set out by the Queensland Law Reform Commission against compulsory incorporation. In New Zealand, the optional incorporation scheme for unincorporated associations or societies is indeed working very well. Thus this is a proof that there is no great need for compulsion in this area.

IV. FORMALITIES OF INCORPORATION

A. Definition of a Non-Profit Association

An association (or society) to be eligible for registration must satisfy one very basic requirement i.e. there must be in existence a group of persons associated together for a common purpose (definition of an unincorporated association). It is

submitted that since the New Zealand Act did not define this term, the general definition of unincorporated association can be adopted but modified to comply with section 4 i.e. persons must associate for lawful purpose/s but not for pecuniary gain.

"Association" is given a wide meaning in the Queensland Act. Section 5 (1) provides that " "association" means an association, society, institution or body that is formed or carried on for any lawful object or purpose but not for pecuniary gain to its members". Similarly the term "association" is also widely defined in the New South Wales draft Associations Incorporation Bill 1977 (hereinafter referred to as the New South Wales draft Bill). Section 5 defined "association" as:

> an association of members established for the pursuit of certain objects, on the basis that
>
> (i) the pursuit of those objects,
>
> (ii) the application of any common property to those objects, and
>
> (iii) the rights and obligations of the members for the time being,
>
> will continue in accordance with the rules of the association (whether written or not), notwithstanding changes in the membership of the association, but does not include a partnership..., or an association the dominant purpose of which is the holding of property -
>
> (iv) in which the members have a disposable interest, whether directly or in the form of shares in the capital of the association or otherwise;
>
> (v) of which members are entitled to require a division; or

(vi) with a view to the distribution of the property, or of income derived from the property or the use of the property amongst members or persons claiming through or nominated by members.

The definition in the New Zealand Act, the New South Wales draft Bill and Queensland Act allow a non-profit association set up for "any lawful" purpose but not for pecuniary gain to its members to apply for incorporation. [71] The Victorian Law Reform Committee [72] termed this as an "economic" definition for non-profit associations. The crucial factor is the economic relationship between an association and its members rather than the purposes for which the association concerned has been formed.

On the otherhand, the Associations Incorporation Acts inforce in other Australian States and the Victorian draft Bill use a "functional" definition to specify the kinds of non-profit association to which the Acts and Bill a ply. [73] The definition sections list out a number of purposes which are considered acceptable for a non-profit association seeking to become incorporated and they also included a general provision allowing administrative approval to be given to an application by an association whose purposes do not fall within those listed. Associations formed or carried on for the purpose of trading or obtaining pecuniary benefits for its members as individuals are exluded by the definition.

There has been a vast growth in the number and kind of non-profit associations. Thus it will be very difficult to formulate a definition clause along functional lines which would adequately provide for all

types of association likely to use the statute. The functional definition must be in very wide terms or else special approval could be needed in so many cases resulting in the increase in time needed for the incorporation procedure, and increase in the administrative work. As a consequence the fundamental purpose of the Act as a means of allowing and encouraging easy incorporation of non-profit associations will be defeated. These problems existed in Western Australia. Hence the 1972 Report of the Western Australian Law Reform Committee recommended (in paragraph 8) the abolition of ministerial approval for associations whose purposes were not listed in the Act or at least widening the scope of the listed categories. At present the definition section in the Victorian draft Bill may be wide enough to include all existing associations wishing to incorporate under it. But it is foreseeable that in the future, similar problems that existed in Western Australia may occur in Victoria.[74]

The New Zealand Act has no definition of "association" perse unlike the New South Wales draft Bill and Queensland Act. Although the term "association" per se is undefined, it presents no problem to the administration and thus the Act need not be amended to include definition for that term. There is no reported case in New Zealand dealing with the issue as to what is an association before it can be incorporated under the Act. This support my view that all the parties concerned have no difficulty with this term.

B. Membership

Section 4 (1) of the New Zealand Act requires a minimum membership of fifteen for an association to be incorporated. Apart

from enabling a single rugby team to register, there is no apparent reason for making fifteen the magic number.[75]

The existing Australian statutes do not specify a minimum number of members for an association (except South Australia which required a minimum of ten members). The Queensland Law Reform Commission recommended a minimum membership of fifteen as well.[76] It considered a number below fifteen is too small because of the possiblity of the group only having a transient existence.[77] However the Queensland Legislature did not adopt this recommendation when it passed the Act in 1981. It followed the other existing Australian statutes by not specifying a minimum number of members.[78]

The minimum membership under the Victorian draft Bill and New South Wales draft Bill is two.[79] The New South Wales Outline Scheme takes the view that an association perse must have at least two members and that there is no point requiring any larger membership as dummies may be easily used. This avoid an artificial minimum number of members while still complying with the concept of an association being persons associated together for a common purpose.

By contrast the American statutes do not prescribe a minimum number of members for non-profit corporations and in some cases they followed the Business Corporations Act envisaging the incorporation of "one-man" non-profit corporations. e.g.: New York not-for-profit Corporation Law sections 401-405.

The Assistant Registrar of Incorporated Societies (N.Z.) is of the opinion that "the minimum requirement of fifteen members before an association can be incorporated presented not much problem to

those associations that wish to incorporate under the Act".[80] It is obvious that at present there is no great pressure on the New Zealand Legislature to alter the minimum number of membership requirement.

Since incorporation is optional, a minimum membership of two is a better approach. Any association that is having a transient existence obiously will not apply for incorporation. Hence in view of the trend in other precedents, New Zealand should consider reducing the minimum membership to two or any number lesser than fifteen.

C. Exclusion From Incorporation

The New Zealand Act contained no specific provision dealing with the exclusion of certain bodies from incorporation under the Act. [But] generally, associations already incorporated under other statutes will not be entitled to register under the Incorporated Societies Act either by definition, as in the case of companies formed for profit, or by virtue of express prohibition, as in the case of industrial unions and charitable trusts.[81] However any corporate body, whether incorporated under the Incorporated Societies Act or in any other manner, may be a member of a society incorporated under that Act and every corporate body is equivalent to three members.[82]

The New South Wales draft Billl and the Queensland Act specifically provide that incorporation is not available to anybody which is already incorporated or otherwise regulated in relevant aspects i.e. having corporate or quasi corporate status.[83] Some examples of "association" that are excluded from incorporation are as follows:[84]

(i) a corporation;

(ii) an association which is subject to a special Act which incorporates the executive committee or other governing organ or the trustees of the property of, the association, or provides that it may sue or be sued or hold property in its own name or in the name of an officer of the association, or otherwise specially regulates the affairs of the association;

(iii) a trade union within the meaning of the Industrial Conciliation and Arbitration Act 1961-1980 (Queensland) or Trade Union Act 1881 (N.S.W. - section 31);

(iv) a society or branch required to be registered under the Friendly Societies Act 1913-1978 (Queensland) or Freindly Societies Act 1912 (N.S.W) or which has been registered under the respective Act;

(v) a body one of the objects of which includes the raising of a fund by subscriptions of members and the making of loans from that fund to its members (credit unions).

The New South Wales Outline Scheme recommended that a further class of unincorporated associations that should be excluded from incorporation are those organised on the joint stock principle.[85] Such associations should be incorporated under the Companies Act in view of the requirement of, non-profit for members of incorporated associations under the Associations Incorporation Scheme.

In both Queensland and New South Wales the friendly societies are regulated by the Friendly Societies Acts whether or not they are registered under those Acts. But in New Zealand the Friendly Societies Act 1909 only regulate those societies that are registered under it.

Therefore in New Zealand, any friendly society that is not registered under the Friendly Societies Act is eligible to be incorporated under the New Zealand Act.

There is no specific provision in the Victorian draft Bill dealing with associations that are excluded from incorporation under it because the 'functional' definition of "association" in section 2 is exhaustive. Thus any association that does not fall within those purposes listed in section 2 is not eligible for incorporation under the proposed Victorian legislation.

In all the existing Australian statutes, the proposed legislation in New South Wales and Victoria and the Queensland and New Zealand Acts, any association or society that is formed or carried on for the purpose of pecuniary gain to its members is not eligible for incorporation under those Acts.[86] The phrase "pecuniary gain" is not defined but the Acts and Bills do list out numerous circumstances where association shall not be deemed to be formed or carried on for the purpose of pecuniary gain to its members.[87] This shows that the respective Bill or Act is concerned with determining the main objects of association and not its activities.[88] The Registrar would need only form an opinion on what by the rules, is the "object" of the association. There is no need to consider evidence of the activities of the association, unless it is necessary for the purpose of construing the rules.

The definition of what is not deemed pecuniary gain in the relevant sections of Queensland Act, and Victoria and New South Wales proposed legislation is largely based on that found in section 5 of

the New Zealand Act. But it is modified to give greater recognition to the fact that most associations in our present society trade to some extent. For example the association trades or may trade with its members or with the public, provided that:

(i) the trading is ancillary to the main purpose of the association, and

(ii) any trading with the public is not substantial in volume in relation to its other activities. Maybe the New Zealand Act should be amended to provide for this exception in express term.

D. Resolution To Incorporate.

Section 4 (2) of the Incorporated Societies Act 1908 (N.Z.) provides that application to register under this Act must be consented by a majority of the members of the society (association).

Section 8 (1) of the Queensland Act provides that the members of an association may decide to incorporate under the Act by special resolution. According to the Queensland Law Reform Commission this procedure has appears to work well in other Australian states.[89] A special resolution is one that is passed by a majority of not less than three quarters of members that are entitled to vote under the rules.[90]

Section 3 of the Victorian draft Bill provides that the committee of an association; a majority of the members of an association; or any two or more persons who desire to form an association may authorise the application for incorporation under it. The New South Wales draft Bill contains no provision relating to the question of who shall decide to apply for incorporation under it. Since both the Victorian and New South Wales Bills required the same minimum number of membership (two) before an association can be incorporated, the same class of persons who are entitled to authorise application for

incorporation under the Victorian Bill are equally applicable to the New South Wales Bill. The majority consent in the New Zealand Act is a reasonable requirement.

E. Application for Incorporation

There is no requirement for an application for incorporation to be advertised by the association or Registrar or notice about it to be given to certain persons at the discretion of the Registrar under the New Zealand Act. [91]

Under the Australian statutes there is a requirement for an application for incorporation to be advertised and objections can be made to it. [92] South Australia originally had a general requirement for advertising the application, but this was deleted after experience showed that advertising brought no response by way of objections to the application. [93] Such a requirement is also not included in the proposed legislation by New South Wales and Victoria and Queensland Act. They thought that it was an unnecessary complication to the procedure of incorporation since the aim of the statute is to encourage the incorporation of non-profit associations. The members of the associations are the persons entitled to decide whether or not to incorporate and not the outsiders and anyway "we doubt the efficacy of advertising, which is expensive but meaningless gesture". [94]

However the New South Wales and Queensland Law Reform Commissions adopted a half-way house approach. The Queensland Act [95] and the New South Wales draft Bill (1977) [96] provided the Registrar (or Under Secretary of Justice in the case of Queensland) with discretionary power to give notice or require the association to give notice, of the application

to incorporate to certain persons or require advertising to be made in circumstances he sees fit and he may have regard to representations made in response to the notice or advertisement.

In view of the problems experienced in South Australia and the aim of the statute, it is submitted that the New Zealand Act should not be amended to include the "advertising" requirement. If however the legislature decide to do otherwise, then the approach taken in Queensland and New South Wales is to be preferred.

Section 7 of the Incorporated Societies Act 1908 (N.Z.) provides that every application to register under the Act must be made to the Registrar by delivering to him two copies of the rules of the society duly signed by not less than fifteen members of the society, together with a statutory declaration verifying the fact that a majority of the members have consented to the application and that the rules so signed are the rules of the society. Section 6 listed out some of the matters that are to be provided for in the rules e.g: society's name, its objects etc. The prescribed fee for incorporation is $20.[97]

Similarly in New South Wales, Queensland and Victoria an application for incorporation of an association shall be made to the Registrar (or Under Secretary) in the prescribed form.[98] The application "form" shall provide for several matters e.g: association's name, annex a statutory declaration verifying the fact that decision has been made to incorporate the association, annex a copy of the rules etc. A fee has to be paid for incorporation as well.

F. Grant of A Certificate of Incorporation.

All the Austarlian statutes except that of South Australia give the Registrar an absolute discretion to grant or refuse a certificate of incorporation. It has been argued that in allowing any type of non-profit association to become incorporated as of right without any administrative control leads to the abuse of the statute by organisations wishing to avoid the more stringent requirements of other legislation such as the Companies Acts. [99] A contrary argument is that since the purpose of the statute is to encourage the incorporation of as many and varied non-profit associations as possible, any controls or regulations felt necessary by the Government may at least be imposed on a legal entity rather than upon an unincorporated association.

In New Zealand and New South Wales, the grant of a certificate of incorporation is as of right once the formalities required by the statute have been fulfilled i.e. the Registrar has a duty not a discretion, to register the association. [100] However in Queensland and Victoria, [101] the (Under Secretary or) Registrar has a discretion to grant or refuse a certificate of incorporation once the statutory formalities are satisfied.

G. Appointment of Public Officer or Secretary

Western Australia and New Zealand Acts do not provide or require the appointment of public officer or secretary for the association.

Some Australian statutes [102] required the committee to appoint a public officer within fourteen days after incorporation, and within

fourteen days after the occurrence of a vacancy. The public officer is to give notice to the Registrar of his appointment, name and address within fourteen days of his appointment. He is primarily responsible for seeing that the association complies with the provisions of the legislation. [103] This requirement is adopted by the Law Reform Commissions in New South Wales, Queensland and Victoria. [104] However in the cae of New South Wales, the first public officer must be named in the application for incorporation. [105]

In view of the trend in other precedents it may be a good idea for New Zealand Act to provide for the compulsory appointment of public officer or secretary. This officer will help to ease the administrative burden of the Registrar and to make sure that the incorporated association complies with all its statutory requirements.

V. EFFECTS OF INCORPORATION

A. Corporate Status.

In all the Australian statutes, the New Zealand and, Queensland Acts and the New South Wales and Victoria draft Bills, one of the main advantages of incorporation is that the association becomes a separate legal entity, with a common seal and perpetual succession. It may acquire, hold and dispose of real and personal property and is capable of suing and being sued in its corporate name. [106] As a consequence many of the disadvantages or problems associated with unincorporated associations are overcome by being incorporated. For example bodies corporate have long been held answerable for acts of a servant or agent of the corporation committed within the scope of his authority or employment. [107] Therefore incorporation removes the substantive problems associated with attempting to attach vicarious

liability to unincorporated associations. It also put creditors in a better position than which they have in relation to an unincorporated association, in that the assets of an incorporated association (common funds) are directly available by way of execution of a judment against the association.

B. Vesting Of Propery In Incorporated Associations.

There is no specific provision dealing with the vesting of property on incorporation in the New Zealand statute. But since incorporation gives it a corporate status e.g. it is able to own and deal with property in its own name and members have no right to property of society (section 14) - this suggests that on incorporation all property held on trust for the association or its objects must be transferred to it. In Hastings Volunteer Fire Brigade (Inc.) v. Bransche [108] it was held that the trustees of a previously unincorporated association must transfer its property to the incorporated society.

Property cannot be legally held by unincorporated association unlike the case of incorporated association. The draft statutes in New South Wales and Victoria and the Queensland Act provide [109] "that on incorporation of an association, any personal or real property held by a person, in trust or otherwise, for or on behalf of the association or its objects, shall become vested in the association". Thus trustees are no longer required, the incorporated association may own or lease real or personal property in its own right and name. But any trust, covenant, contract or liability affecting the property immediately before incorporation are not affected and would still be enforceable. A consequence of vesting provision is that members

have no rights in respect of the association's property except when otherwise expressly provided by the Act or by its rules. [110] Normally the only rights the members have (if any) will be those on winding up. Even though there is no specific provision in the Victorian draft statute dealing with this matter, the general principle in New Zealand, New South Wales and Queensland is equally applicable in Victoria i.e. members have no rights in respect of association's property.

C. Capacity To Make Contracts.

It is expressly provided in the New Zealand Act, the draft Bills in New South Wales and Victoria and the Queensland Act that an incorporated association has capacity to make contract unlike unincorporated association which has no capacity to make contract because it is not a legal entity. [111] The capacity of an incorporated [association]...to enter into contracts is limited only to the requirements of the Act and objects and powers of the [association]... contained in its rules. [112]

The provisions that governed the form of contracts made by incorporated association is substantially the same in New Zealand, New South Wales, Queensland and Victoria. Contracts on behalf of the incorporated association may be made as follows:-

(a) a contract which if made between private persons, must be by deed shall, when made by an association, be in writing under the common seal of the association;

(b) a contract which if made between private persons, must be in writing signed by the parties to be charged therewith may, when made by an association be in writing signed by any person

acting on behalf of and under the express or implied authority of the association; and

(c) a contract which if made between private persons, might be made without writing may, when made by an association, be made without writing by any person acting on behalf of and under the express or implied authority of the association. This provision will make it easier for a party entering into a contract with an incorporated association to enforce the latter's contractual obligations.

D. Limited Liability of Members.

In New Zealand, one of the main advantages of incorporation is that membership does not impose any liability on the members, in respect of contracts, debts, or other obligations incurred by the society except when otherwise expressly provided in the Act (section 13). Therefore subject to any express provision to the contrary, the members of a corporate body have a general immunity from personal liability. Wise v. Perpetual Trustee Co. Ltd. [113] is the authority for the proposition that a member of unincorporated association has no liability to contribute beyond his periodic contribution and the committee have no authority to pledge his personal credit. In view of this general princle, section 13 which contains express modifications of the general immunity from personal liability seems superfluous. These statutory modifications are found in section 20 (3) where penalties and liability are imposed on members if they are found to aid, assist or procure the association in operations involving pecuniary gain to its members i.e. they shall be jointly and severally liable to any creditor of the assoiciation for all debts and obligations incurred by the association in or in consequence of the "offensive" operation. This exception to the general immunity

emphasises the non-profit scheme of the Act and provides a measure of protection for creditors.[114] But members will not be personally liable for the debts or obligations incurred in the course of any non-profit operation whether it be ultra vires or intra vires the association.

In New Zealand the Registrar would refuse to register the rules of a society which attempted to introduce any form of personal liability for its members [because of the particular wording of section 13].[115] In contrast with this, it is a common feature in other Australian statutes and the draft statutes in New South Wales, and Victoria, that a member of an incorporated association is not liable to contribute in its winding up except as provided in its rules.[116] Those Acts permit the rules of the associations to provide for personal liability of their members. In view of the precedents in Australia, it is submitted that section 13 of New Zealand Act should be amended by inserting after the words "Except when otherwise expressly...in the Act" the words "or rules" so that in future, the members are free to pledge their personal liability by having it written down in the rules of the association.

Section 34 of the Victorian draft Bill is substantially similar to section 20 (3) of New Zealand Act i.e. statutory modifications of the members' general immunity from personal liability with regard to act or operation that is ultra vires the association by reason of the provision of the Act (association shall not engage in the act involving pecuniary gain for its members). An act that is ultra vires the association will be void and creditors will have no claim

against the association. The fact that the association is liable to pay fines for breaching section 34 (or section 20 (3) in New Zealand) is of no consolation to the creditors who are left without recourse against the association.

In New Zealand and Victoria the ultra vires rule (to be discussed more fully later in the paper) is not excluded from applying to incorporated associations by the Act and proposed Act respectively. But as a general rule, the ultra vires rule is excluded from applying to incorporated associations in the proposed statute in New South Wales and Queensland Act. [117] Thus in New South Wales and Queensland, even if the act is ultra vires the association, it will not affect the validity of the act (or transaction) with the outsider/ creditor - he or she is still entitled to claim damages etc. against the association and as a consequence there is no equivalent (and there is no need for it) of section 20 (3) of the New Zealand Act in New South Wales and Queensland. In New Zealand and Victoria, its statutory provisions came to the resuce of the creditors by giving them a right of action to make mmebers who were involved in the ultra vires act to be personally liable for such debts and obligations that are incurred (section 20 (3) in New Zealand and section 34 in the Victorian draft Bill). This approach is consistent with one of the aims of the statute which is to protect the creditors.

E. Liability Of Committee Members Or Officers.

In the past, committee men were personally liable because of the inability to hold the unincorporated association responsible in tort or in contract. Normally they have a right of indemnity from

the common fund, enforceable by a lien. But as a result of incorporation a creditor or injured party gains greatly, as he can sue the incorporated association directly and can enforce his judgment against the common funds. The claimant would not have a right to proceed against committee men or members unless the individual officer or member has done something to fix himself with personal liability.[118] For example, the committee members and officers of an incorporated association may still be liable in certain circumstances: personally liable to outsiders when they negotiate contracts ultra vires the Act or the rules or when they exceed their authority under the rules and the contract is not ratified by the association, or in breach of their delegated authority they enter into a contract which is valid because of the rule in Royal British Bank v. Turquand (1856) 6 E. & B. 327, or liable for breach of duty in entering into an ultra vires transaction on behalf of the association.[119] This will be a much more satisfactory situation for the claimant, and for the committee men, and will make little practical difference to members in their personal capacity [because their liability are already limited before incorporation].[120]

The New Zealand legislation "...contains no provisions...delimiting the liability of societies and their officers [or committee men] to members and outsiders...." [121] Section 13 of the Victorian draft Bill provides that no member, trustee or officer of incorporated association is liable to contribute in its winding up except as provided in its rules. [122] Presumably there may still be instances where committee men/officers can be made personally liable especially in respect of transactions ultra vires the association. In New South Wales and Queensland the instances where committee men or officers would be personally liable are very rare because of the exclusion of

the ultra vires rule from applying to incorporated associations. Since the ultra vires rule is applicable to incorporated associations in New Zealand, it may be desirable to expressly limit the liability of committee men or officers.

F. Compulsory Insurance

In New South Wales, the members of an incorporated association are not liable to contribute towards payment of the debts and other outgoings of the association in a winding up except as provided in its rules. [Hence] where someone suffers a tort for which the association is liable, his remedy against the association may be of little value if members are not liable to contribute for payment of damages to which he is entitled.[123] In order to relieve the harshness of this result, the association is required [i.e. under a duty] to insure against liability for a wide range of claims in tort.[124] Workers' Compensation insurance is also required. This requirement that the association is under a duty to insure against important possible liabilities in tort does not apply where the rules of the association impose on members on unlimited liability to contribute for payments of those tort claims in a winding up.

If the association fails to effect and maintain the required insurance, there are two consequences. First, this is a ground for winding up by the Registrar whether or not an application is made to him for that purpose. Second, a committee man has an unlimited liability to contribute in a winding up for a claim which ought to have been covered by insurance, unless he shows -

(a) that he did all he reasonably could to see that the association did effect and maintain the insurance; and

(b) either -

(i) that, at the time when the claim arose, he did not know that the association was in default in its duty to insure; or

(ii) that, promptly after it came to his knowledge that the association was in default, he gave notice of that fact to the Registrar.[125]

This compulsory insurance scheme will substantially improve the position of many involuntary creditors.

The New Zealand Act contains no provisions for compulsory insurance by incorporated associations and as a matter of fact there is no need for it because of the operation of Accident Compensation Act 1972. Section 38 of Queensland Act also provides for compulsory insurance by incorporated associations. The Victorian draft Bill contains no provision for compulsory insurance. However in view of the proposals in Queensland and New South Wales and the Accident Compensation Scheme in New Zealand, the Victorian Legislature ought to consider introducing a provision for compulsory insurance by incorporated associations.

G. Ultra Vires Transactions.

It is generally accepted that corporations can be liable in tort and crime when these are committed in the course of intra vires activities. In Police v. Hawke's Bay and East Coast Aero Club Inc.[126] the club was convicted under the Air Navigation Regulations 1944 for operating an illegal and ultra vires of flight members scheme. In Boulcott Golf Club Inc. v. Engelbrecht,[127] the club was held liable for the damages caused by a fire which spread from the golf course after having been negligently started by a player (who was a licensee

pursuing the main intra vires activity of the club at that time). An incorporated association would also be vicariously liable for the tortious acts of its officers committed in the course of the association's intra vires activities.

The company law doctrine of ultra vires restricts the powers of companies to matters within the objects of the company in the memorandum of association or reasonably incidental to those express objects.[128] Acts done that are beyond the powers of the company are treated as void ab initio because it has no capacity to do such acts. As a consequence such acts cannot be ratified by the company or any of its organs.[129] In the case of an incorporated association, its capacity to pursue its objects are restricted by the requirement of the Act and those permitted by the rules of the association. In New Zealand it would seem that the ultra vires rule will be applied to incorporated societies by the courts as a result of Automobile Association (Wellington) Inc. v. Daysh[130] and Meeanee Sports and Rodeo Club Inc. v. Cabaret Holdings Ltd.[131] The decision in Broadlands Finance Ltd v. Gisborne Aero Club Inc.[132] established that the doctrine of constructive notice, as it applied to companies, also applied to the rules of an incorporated society which had been registered and could be inspected at the office of the Registrar. It was also held that the outsiders dealing with the incorporated society need not inquire whether all the internal regulations of the society have been observed if they are not put on inquiry.

There is no provision in any of the Australian statutes and New Zealand Act dealing with the ultra vires rule in relation to incorporated associations. The Victorian Law Reform Commission is of

the opinion that the inclusion of a clause dealing with ultra vires doctrine may be an unnecessary complication of the Associations Incorporation Act. However, especially in view of the decision in Broadlands Finance's case, such a provision was considered by the Victorian Law Reform Commission. [133] But at the end of the day such provision was not included in the Victorian draft statute.

In Australia, the confusion and hardship which the ultra vires rule causes for those who deal with statutory corporations has been abolished in respect of companies incorporated pursuant to the Australian Uniform Companies Act 1961 (section 20). I do not propose to discuss the details of the difficulties caused by the ultra vires rule in this paper . [134] It is sufficient to say that "the ultra vires rule has long outlived any utility which it might have had". [135] The Queensland Law Reform Commission recommended that a provision similar to section 20 of the Australian Uniform Companies Act 1961 is desirable and has been included to exclude the operation of ultra vires rule in respect of associations incorporated pursuant to the proposed statute. [136] Similarly the ultra vires rule is also included in the South Australian amending Bill for Associations Incorporation Act (Bill 87).

The Macarthur Report [138] in New Zealand recommended that legislation along the lines of section 20 of the Australian Uniform Companies Act 1961 be adopted if the legislature decide to reform the ultra vires rule in respect of companies. Till now this recommendation has not been acted upon. In view of the current trend in many jurisdictions (Australia, Ghana, Ontario, British Columbia) which is in favour of wholly or almost wholly abolishing the ultra vires rule applicable

to corporations, there is a need for New Zealand to do the same.[139] If the New Zealand legislature decide to reform the ultra vires rule in respect of incorporated societies, it could adopt a provision along the lines of section 23 of the Queensland Act. However this approach is deficient in a number of respects. It still enables the question of ultra vires to be raised by certain classes of persons (in this case it would be members of the association) and vests in the court power to set aside transactions which have not been fully executed.[140] It also raises the problem of interpretation.[141] Other alternatives which could be adopted are: section 9 (1) of the European Communities Act 1972 (U.K.)[142] and the provisions drafted by Professor Gower in the Report on Company Law for Ghana.[143]

VI. NAMES

A. Desirable Name.

A name is a usual and convenient characteristic of an association. In the New Zealand and Queensland Acts and the proposed legislation in New South Wales, and Victoria, the administrative act of incorporation is made conditional on the existence of an acceptable name.[144] The Registrar has a discretion to reject an "undesirable name".

In New Zealand, Queensland and Victoria, the word "Incorporated or Inc." must be included as the last word of the association's name when an application for incorporation is made to the Registrar (or Under Secretary).[145] Strangely enough, however, there is no requirement in New Zealand "...that the word "Incorporated or Inc." must be used by societies other than in their rules...."[146] The same applies to Victoria. Queensland is the only one that required the name of incorporated association (e.g.: A B Inc. or A B Incoroporated) to appear

on all its documents so that persons dealing with it are aware of that fact that it is incorporated.[147] However the New South Wales draft statute does not even require the use of the word "Incorporated or Inc." in the name of the incorporated association at all because to many "Incorporated or Inc." means nothing but to those who understand it, it will be a warning of the limited liability of members (which has existed even before incorporation).

If the ultra vires rule continues to apply to incorporated associations/societies in New Zealand, it may be desirable to include a provision that requires the association to include its name together with the word "Inc." on all its documents so that persons dealing with it are at least given a warning that they have the opportunity to examine the public register for information regarding that association (e.g: about the extent of its capacity/power or financial position).

B. Change of Name.

There are porivisions in the New Zealand and Queensland Acts and the draft Bills in New South Wales and Victoria for an incorporated association to change or alter its name.[148] The change of name must be registered once it is approved by the Registrar. The change of name does not affect the association's rights and obligations or pending proceedings.

C. Reservation of Name.

Section 12 (1) of New South Wales draft Bill provides that:

> a person may apply...to the Registrar for the reservation of a name under which it is desired to incorporate an association or to which an incorporated association desires to change its name.

The reservation is limited to a period of two months. This provision for reservation of name does not appear in precedent legislation in Australia (include Queensland Act), New Zealand Act or Victorian draft Bill. The New South Wales Law Reform Commission is of the opinion that "...[this] provision...can create certainty and prevent a wasted effort when an association is being formed with a view to incorporation".[149] In view of the great number of association seeking incorporation under the New Zealand Act annually, a provision for reservation of name is desirable.

VII. RULES

A. Registration

"Rules" here menas the constitution of the association, corresponding to the memorandum and articles of association of a company, but not day-to-day by-laws regulating such things as the introduction of guests to the association's premises and the hours of opening of the association's dining room.[150] It is desirable in the interests of the association itself, its members, and those dealing with it, as well as for administrative purposes, that an association should have at least some rules, and these should be readily ascertainable.[151] In New Zealnad, New South Wales, Queensland and Victoria a registered association will have a set of written rules approved and registered by the Registrar (or Under Secretary).[152]

These statutory obligations distinguish an incorporated association from an unincorporated one i.e. there is no requirement at common law for unincorporated association to have any written rules regulating its affairs [153] and if rules are adopted, they need not follow a particular form as to their contents. [154] These obligations are imposed in return for the benefits of incorporation.

The rules must make provision on some fundamental matters, including the objects of the association, the means of altering its rules, the destination of its surplus assets, the management of the association and the modes of becoming a member or cease to be a member. [155] But the formulation of each rule is left to the draftsmen in the incorporated associations who may make errors. [156] In South Australia and New Zealand most of the relatively few problems relate back to deficiencies in the rules of those associations because important matters are frequently omitted in the rules drafted by well meaning but ignorant amateur draftsmen. The main areas of deficiency appear to be -

(i) Financial matters;

(ii) Settling disputes between members;

(iii) The rights of members, especially in questions of expulsion and other disciplinary matters;

(iv) the distribution of the property of an association on dissolution. [157]

The general opinion is that most of these problems would be solved by the introduction of Model Rules.

B. Model Rules.

The Tasmanian Associations Incorporation Act 1964 prescribes Model Rules which may be adopted wholly or in part by an incorporated association.[158] The Victorian draft Bill and Queensland Act have followed the Tasmanian precedent also provide for prescribed Model Rules.[159] The Model Rules may simply be adopted, and are deemed to be adopted if for any reason there appears to be no other rules in force and no formal adoption of the Model Rules.[160] However no Model Rules are to be prescribed under the New South Wales draft Bill but the Registrar may assist associations by providing one or more sets of Model Rules which may be used by associations if they wish.[161]

At present in New Zealand, there is no provision for prescribed Model Rules nor is there statutory recognition that the Registrar may provide set/s of Model Rules. In practice the Registrar could point out to an association which wishes to incorporate to have a look at the rules of similar association that has been registered.[162] In view of the problems discussed earlier, the New Zealand Legislature might consider the advantages of adopting the Tasmanian precedent for a set of Model Rules for incorporated societies.[163] Alternatively, the Legislature could adopt the approach in clause 9 of Friendly Societies and Credit Unions Bill 1982 (N.Z.) which provides that the Registrar may from time to time prepare, cause to be circulated, or publish, for the use of societies such model rules (substantially similar to section 20 (4) of New South Wales draft Bill).

C. Alteration of Rules.

The rules of unincorporated association constitute the terms of contract between members inter se and therefore it could only be altered with the consent of all the members, unless there is express provision to the contrary.[164]

In the case of incorporated associations the legislation in New Zealand and Queensland and the proposed legislation in New South Wales and Victoria made it a condition of eligibility for registration that the rules provide a means for their own alternation.[165] Clear provisions are also included specifying the manner in which the rules of an incorporated association may be altered,and also stating that such alteration has no validity until it has been registered or certified by the Registrar or lodged and/or approved by the Registrar (or Under Secretary).[166] If irregular alteration is discovered after its registration, the Court in New Zealand is empowered by section 21 (3A) to consider the validity of those alterations and may declare them "ultra vires" and void. In New South Wales and Queensland the irregularities may be validated by the Court restrospectively with terms and conditions imposed (if any).[167] In Victoria, there is no provision dealing with the validity of irregular alteration (except that the public officer will be fined for committing an offence against the Act). In view of the approach in New Zealand, New South Wales and Queensland, Victoria should include a provision governing irregular alteration of rules.

D. Implied Powers.

In Porter v. Prain[168] it was held that an unincorporated association had no implied power to borrow money. In New Zealand,

section 6 (1) (j) of the Incorporated Societies Act 1908 stipulates that the rules of society must provide for "the powers (if any) of the society to borrow money". Thus a power to borrow money is not mandatory, but if members wish to give the society that power an express provision is required. [169] In South Australia and Tasmania, the incorporated associations are given a number of implied powers including the power to mortgage their property. [170] Similarly the Queensland Act and Victoria draft Bill also include provision for a number of implied powers for incorporated associations. [171] It is necessary to include such a provision to ensure that there is no possibility of dispute as to the basic powers of an incorporated association. If it were not included members and persons dealing with the association could seek to set aside decisions or contracts made in good faith. [172] Therefore the New Zealand Legislature might consider the advantages of adopting such provision which includes a number of implied pwoers for incorporated societies. [173]

In New Zealand the rules of the incorporated society must also provide for a power to make by-laws before the society can make by-laws or regulations. This approach is consistent with Queensland and Victoria where such a power is not included in the implied power provision.

E. Legal Nature of the Rules.

It is generally accepted in common law that the rules of an unincorporated association constitute a contract between the members inter se. Section 34 (1) of the Companies Act 1955 (N.Z.) provides that on registration, the memorandum and articles of company have the effect of creating a contract between the members

inter se and between the company and each member. [175] But the New Zealand Act contains no provision relating to the effect of the registered rules. It may be expressly provided in the rules of the incorporated society that its rules constitute a binding contract between the society and the members. [176] Neverthless it has been clearly settled by case law in New Zealand, that the rules of an incorporated society constitute a contract between the society and its members. [177] However, there is some doubt as to whether the rules form a contract between the members inter se. [178] In re Animal Rescue Society Incorporated and Tucker v. Auckland Racing Club.[180] there is some support for the view that there may be a contract between the members of an incorporated society inter se in some circumstances. In Henderson v. Kane and The Pioneer Club [181] there is no enforceable contract between the members inter se when an action for breach of contract should be brought against the society itself. But it is possible that such contract may be discerned when other remedies are sought.

The New South Wales Outline Scheme [182] stated that the eligibility for registration is not confined to those associations whose members are linked by contract. An agreement not intended to create legal obligations is sufficient. [183] In New South Wales once the association is registered, contractual links amongst members and between each member and the incorporated association are imputed. [184] In Queensland, the Law Reform Commission recommended that the rules of an incorporated association shall constitute the terms of a contract between the members inter se and between the

members and the association in order to overcome the difficulties relating to the enforceability of membership rights.[185]

In the Victorian draft Bill, there is no provision relating to the legal nature of the association's registered rules.

In view of some of the doubts caused in New Zealand, it may be advisable for the New Zealand Legislature and the Victorian Legislature simply to provide in the statutes the legal effect of the rules of incorporated associations along the lines adopted in New South Wales and Queensland. This approach would put the incorporated association's rules in the same position as the rules of companies and industrial unions (trade unions).[186]

VIII. RECORDS, ACCOUNTS AND AUDITS

A. Register of Members

There are no requirements as to the keeping of records by the incorporated associations in the Australian Capital Territory Tasmania, Southern Australia or Western Australia.

Section 22 of the New Zealand Act requires every society to keep a register of its members, which shall contain their names, addresses, occupations, and the dates they became members, and shall send the Registrar a list of members when required. The list of members so sent will be kept by the Registrar and is subject to public scrutiny. The register of members may be inspected by the Registrar or by any person authorised by him.[187] This obligation means a loss of privacy for incorporated associations.

Similar obligation is imposed on incorporated associations in New South Wales but not in Queensland and Victoria. In Queensland, Victoria and New South Wales there are provisions requiring prompt lodging with the Registrar (or Under Secretary) of particulars relating to its rules, its Public Officer or Secretary and membership of the management Committee. Therefore the need for register of members is not that great (known as annual return).

B. Accounts and Audits

The grant of corporate status and limited liability to incorporated associations would necessarily be followe at least by some provision for minimal disclosure of its annual financial matters (accountability to,its members, creditors and community generally.). The South Australian and Western Australian statutes are deficient in not requiring at least a minimal degree of accountability from incorporated associations.

Section 23 of the New Zealand Act requires an incorporated society to keep proper accounts so that it can deliver its simple annual financial statement to the Registrar or Assistant Registrar. Although the Act does not oblige a society to appoint an auditor, the desirability of having the accounts audited will be appreciated.[188] The financial statement assists the Registrar in ensuring that a society is conforming with the non-profit scheme of the Act and it enables persons dealing with the society to discover its assets and liabilities.[189] The Victorian draft Bill adopted a similar approach as New Zealand (i.e. no compulsory appointment of auditor) because the costs of an audit by a registered auditor would be beyond the resources of many small voluntary associations and this may operate

as a strong disincentive for them to become incorporated. [190]

The Queensland proposal require the annual financial statement to be audited by a registered auditor, lodgment of the statement must be made with the Under Secretary and it also includes a provision which enables the Under Secretary to direct publication of accounts in cases where there is felt necessary. [191] Such materials could then be searched by members or public.

The New South Wales draft Bill requires:

(a) the appointment of an auditor in a manner prescribed by the rules;

(b) that the auditor be an independent registered company auditor;

(c) that an annual financial statement be prepared, audited and filed but empowers the Registrar to dispense with any of the requirements. [192]

But later the New South Wales Outline Scheme purports to impose much lesser obligation. [193] The new proposal provides that an incorporated association should not, in general, be required to draw up accounts to have them audited or to lodge them with the Registrar (no compulsion). However the legislation, would permit an association so to frame its rules that it accepted a duty to prepare and lodge accounts, with or without audit. The purpose of this permissive arrangement is to accommodate some associations which see an advantage in being able to say that their accounts (or audited accounts) are on a public register and available for public inspection. [194]

The Queensland Act should include a provision giving the Under Secretary a discretion to dispense with the stringent requirements for preparing the annual financial statement. At least this would be a half-way house between the New Zealand approach and the New South Wales Outline Scheme.

IX. WINDING UP, CANCELLATION AND DIVISION OF SURPLUS ASSETS.

A. Winding Up.

The Associations Incorporation Act 1895 - 1962 (Western Australia) has no provisions at all dealing with the winding up of incorporated associations or the subsequent disposition of its surplus assets. The 1972 Report of the Law Reform Committee recommended that the Act should be amended to provide for both the voluntary and the compulsory winding up of an incorporated association, and for the proper disposition of any [surplus] assets....[195] No action has been taken to implement these recommendations in Western Australia.

The South Australian Act merely includes a brief section (i.e. section 24) deeming an incorporated association to be an unregistered company for the purposes of winding up. The Associations Incorporation Acts in Tasmania, the Australian Capital Territory and the Northern Territory go further than the South Australian statute by providing that provisions of the Uniform Companies Act dealing with winding up of unregistered companies shall apply to the winding up of incorporated associations.[196] All the incorporated associations in the abovenamed jurisdiction may only be wound up voluntarily if its rules contain the necessary provisions. Thus the winding up of incorporated associations are not adequately regulated by those precedent statutes.

The New Zealand Act unlike the Australian statutes, provides for both voluntary and compulsory winding up of incorporated societies. Section 24 provides that a general meeting of the members of an incorporated society may resolve to wind up the society voluntarily. The resolution required is an ordinary one and it has to be confirmed at a later general meeting called at least one month afterwards for the purpose of confirming it.[197] Under section 24 (2) the rules of the Companies Act dealing with voluntary winding up are incorporated by reference. Sections 25 and 26 deal with compulsory winding of incorporated society. Under section 26 (3) the relevant rules of the Companies Act dealing with compulsory winding up are incorporated by reference. The statute sets out clearly the grounds upon which an incorporated society may be wound up by the Court (section 25). Section 26 sets out clearly as to who has the right to petition to Court for compulsory winding up (i.e. the society itself, a member, creditor or Registrar).

The Law Reform Commission in New South Wales, Queensland and Victoria have all preferred the approach taken in New Zealand in respect of winding up of incorporated associations.[198] However special resolution not ordinary resolution is needed for voluntary winding up. In Queensland the incorporated association or its member or creditor or Under Secretary of Justice has the right to petition for compulsory winding up by the Court.

In the New South Wales Outline Scheme a beneficiary of surplus assets is a person to whom surplus assets are to be disposed of under

the rules or under some other requirement of law, but excluding a member of the incorporated association who, as a member, is entitled to share in a distribution of surplus assets.[199] The beneficiary of surplus assets is put in a position similar to that of a member, as regards standing to apply to the Court for a winding up order, and conduct of the winding up. He can apply to the Court for orders giving effect to his right to surplus assets. Should the New Zealand Act be amended to give 'beneficiary' standing to petition for winding up by Court?

B. Cancellation Of Certificate of Incorporation and Dissolution.

Apart from the Western Australian statute, which has no provision dealing with this, the Associations Incorporation Acts of other Australian jurisdictions all include a section allowing the Registrar to cancel the certificate of incorporation of an association on the ground that he "has reasonable cause to believe that an incorporated association has ceased to exist or that the transactions of an incorporated association are such that it is not or has ceased to be an association within the meaning of the non-profit requirements of the Act in question.[200] Section 28 of the New Zealand Act contains almost similar provision except that it speaks of dissolution by Registrar rather than of cancellation of the certificate of incorporation. This power of cancellation [or dissolution in New Zealand] appears to be intended to allow the Registrar to remove defunct associations from the register and also to give him some control over the operations of an existing association.[201]

As the Australian statutes do not set out the powers of the Registrar in regard to surplus assets of an association whose certificate

has been cancelled, these provisions have proved to be of little practical use. But in New Zealand, the statute has recently been amended (1976) to give the Registrar clear powers to deal with the surplus assets and thus section 28 has proved to be of practical use.[202]

The power of the Registrar under section 28 of the New Zealand Act is framed in different terms from the powers of the Registrars of Companies and Industrial Unions where they must have "reasonable cause" to believe that a company or union is defunct and notice must be given to the company or union or its officers before it can be dissolved. The proposed statutes in New South Wales and Victoria and the Queensland Act contain provisions that give power to Registrar or Under Secretary to cancel the certificate of incorporation of an incorporated association.[203] They are phrased in terms similar to the power of Registrar of Companies and Industrial Unions in New Zealand. The Registrar of Incorporated Societies in New Zealand does not have to make inquiries, he needs only to be satisfied that a society is defunct. For instance, it is suggested that it would not be open for a Registrar to be "satisifed" merely as a result of a society's failure to file its annual accounts.[204] He needs to have reasonable ground to satisfy that the society is defunct.

In the Victorian draft Bill there is a provision giving the Registrar powers to deal with the surplus assets of an association whose certificate of incorporation has been cancelled by him.[205] In Queensland on cancellation of certificate, the surplus assets may vest in the Public Trustee by Order in Council.[206] The New South Wales draft Bill contains no provisions dealing with surplus assets on cancellation by the Registrar. This deficiency needs to be

corrected or else the 'cancellation' provision will be of little practical use.

C. Distribution of Surplus Assets.

Under section 27 (1) of the New Zealand Act, upon a winding up or the dissolution by the registrar, the surplus assets of the society after payment of all costs debts and liabilities, but subject to any trust affecting it, shall be disposed of in the manner prescribed for in the rules or if the assets cannot be disposed of in accordance with the rules, then as the Registrar directs. The Court has no supervisory power with regard to the distribution of surplus assets in New Zealand.

The rules of the association may provide that the surplus assets be distributed between the members of the society (such a provision is permitted by section 5 (b) of the New Zealand Act). If the rules are inadequate, the Registrar has a duty to direct how the assets should be disposed of. The existence of this duty means that there can be no undisposed of property to be bona vacantia and to vest in the Crown.[207] In practice, the Registrar attempts to obtain a consensus from the existing members as to the disposition of the surplus assets or, if there are no members, he will apply the cypres doctrine and direct that the assets be disposed of to a body operating in a field similar to the society being dissolved or wound up.[208] Under section 27 (2) no appeal from any decision of Registrar shall lie unless notice is delivered to Registrar within one month after the date on which the decision was given.

The Queensland Act [209] provides that the surplus assets of an incorporated association on winding up should be disposed of according to a special resolution of the association passed by its members. If no there is no special resolution passed, the Governor in Council may be Order in Council vest all or any of the surplus assets in the Public Trustee of Queensland to be dealt with under the provisions of section 35 of the Collections Act 1966-1977. Similarly on cancellation of its certificate of incorporation its surplus assets may vest in the Public Trustee by Order in Council. [210]

In the Victorian draft Bill, the surplus assets of incorporated association on winding up should be disposed of according to a special resolution of the association and failing that, be divided among the members in equal shares. [211]

The New South Wales draft statute includes a provision requiring a court order to implement any special resolution of the members relating to the distribution of surplus assets and also giving the court an overriding discretion (supervisory power) to refuse to make such an order if it was not felt to be just, and to substitute a different distribution. [212]

The draft statutes in New South Wales, and Victorian and the ~~New South Wales~~ Queensland Act are superior when compare to the other Australian statutes because they at least have included provisions dealing with winding up and dissolution (or cancellation of certificate of incorporation) and disposition of its surplus assets.

Whichever course is preferred by a particular statute, the important point is that an adequate and fair procedure should be provided by which any surplus assets may be disposed of when a non-profit association has been wound up or has become defunct.[213] The New Zealand procedure is preferable because it is fairer and less cumbersome than the others.

X. MISCELLANEOUS

A. Amalgamation

The draft Bills in New South Wales and Victoria and the Queensland Act include substantially similar provisions for amalgamation (or merger) of two or more incorporated associations by special resolution of those associations.[214] The incorporated associations would amalgamate and become one incorporated association with or without dissolution or division of the funds of those incorporated associations. The amalgamation will take place without affecting the liability of the associations to third parties and/or the rights of members.

The statutes in Australian Capital Territory, Northern Territory, Western Australia and New Zealand have no provisions for amalgamation of incorporated associations. The need for amalgamation provisions would appear to be important only in the case of substantial associations with significant assets.[215] In other cases it would be adequate for one or more of the associations to be dissolved and its or their members to join the remaining association, which might or might not change its name.[216] Presumably this is what would happen under these statutes.

Amalgamation provisions are retained in the Friendly Societies

and Credit Unions Bill 1982 (N.Z.) in clause 82 in respect of registered friendly societies. Perhaps such provisions for amalgamation should be included in the Incorporated Societies Act 1908 (N.Z.) in view of some of the problems experienced by those incorporated societies when they amalgamated with another. For example in the case of the amalgamation between Waikato University Students Association Inc. and Teachers' Training College (which amalgamated under the new name Waikato Students Union Inc.). [217]

B. Incorporation of Branches.

Provision is made in the Incorporated Societies Amendment Act 1920 (N.Z.) for the incorporation of branch societies. Such branches will be separate corporate bodies with their activities controlled by the 1920 Amendment, the principal Act, and the rules of the parent society, as well as their own rules.

Queensland Act is the only one containing a provision for incorporation of branches of parent incorporated associations.[218] This provision is somewhat novel and is introduced to meet the peculiar needs of Queensland. [219] It is novel because other Australian statutes contain no such provision.

C. Migration

The New South Wales draft Bill and Outline Scheme include a provision giving the Registrar a discretion to direct an organisation to incorporate pursuant to a different Act if this appeared more appropriate. [220] The New South Wales Outline Scheme envisages a further provision which would enable the Registrar to direct an

already incorporated association to 'migrate' to a different Act if this became necessary to ensure proper supervision and control of its operations.

The New Zealand Act, the draft Bill in Victoria and the Queensland Act have no provisions dealing with 'migration' of incorporated associations to other Acts e.g: Companies Act.

The 'migration' provision will remove doubts that an Associations Incorporation Act would be used as a means of avoiding the closer supervision of the Companies Act by organisations involved in large-scale trading or other business activities. But safeguards of this nature would increase administrative and other costs and entail the creation of a considerable bureaucracy. This will be inconsistent with the aims of the legislation which is to provide a simple and inexpensive means of incorporation. In view of these disadvantages, it is unlikely that the New Zealand Legislature will consider introducing a 'migration' provision in the New Zealand Act. At present, if an incorporated society does carry out business activities or other activities that will bring pecuniary gains to its members after it was incorporated Registrar can petition for its winding up by Court under sections 25 and 26. If the society wishes to continue having the benefits of corporate status, it will have to seek incorporation under other Acts e.g: Companies Act. Thus more expenses will be incurred and more time wasted. Perhaps a provision similar to the new clause 84 of the Friendly Societies and Credit Unions Bill 1982 (N.Z.), which authorises the conversion of a society into a company under the Companies Act 1955 could be the answer to this problem. This alternative is more attractive than the

'migration' provision because it is up to the society itself to determine whether it wishes to convert into a company. Hence the arguments that more administrative costs will incur by the Registrar and an increase of bureaucracy will not be that strong.

D. Unincorporated Associations.

The New South Wales draft Bill is the only one that proposed to legislate directly for unincorporated associations. [221] It will confer "quasi-corporate" status on all associations to which it applies i.e. include most associations which do not already enjoy either a corporate status or some degree of "quasi-corporate" status. The association will be recognised by the law as bearing the capacities, rights and obligations provided in the Act. The aim of this provision is to protect the outsiders/creditors dealing with unincorporated associations.

The existence of Part III of the New South Wales draft statute may act as a strong disincentive for associations to seek incorporation under that statute. Perhaps the New South Wales Law Reform Commission was more concerned with the immediate and existing problems involving unincorporated associations when it made such recommendations in Part III. It takes time for all or majority of associations to become incorporated under the Act and therefore at the meantime (period between application for incorporation and actual registration) some of them may have enter into transactions with outsiders or incurred other sort of obligations in their unincorporate status. Hence it may be a better view if Part III is seen as transitional provision

dealing with the above mentioned situation. If Part III is seen as a transitional provision and a time limit has been put on its operation, the argument that it acts as a disincentive for seeking incorporation will not be valid.

The total number of societies registered or incorporated under the New Zealand statute as at May 1982 is 16,837.[222] Thus the problems which may have arisen because associations have decided not to incorporate, is in practice avoided because great majority of associations do in fact incorporate. Furthermore the absence of any reported case law involving an unincorporated association since Millar v. Smith[223] support this conclusion. The only recent cases involving unincorporated association are the unreported decisions of Re Kaiapoi case and Taunton Syndicate v. CIR. Thus it is unlikely that the New Zealand Legislature will ever consider legislating directly for unincorporated associations.

E. Internal Disputes and Legal Impasses.

In New Zealand, once the rules are registered the society must abide by them. If disputes arise between the executive and/or members the registrar has no power to intervene.[224] The society must proceed according to its constitution, and if this proves unsatisfactory the remedy lies in either an appropriate alteration to the rules or an application to the Court.[225]

In Bouzaid v. Horowhenua Indoor Bowls Centre Inc.[226] alterations to the rules of the society had been adopted at irregular meetings. It was held that section 21 (3) of Incorporated Societies Act 1908 conferred no power on the Registrar to cancel registration of the

alterations and that the Court had no jurisdiction to intervene in the internal management of an incorporated society except to protect a member's right of a substantial kind. The Incorporated Societies Amendment Act 1971 (which inserted section 21 (3A)) has reversed part of the decision in this case. Now any member of a society may apply to the High Court for a declaration that the irregular alteration is void in whole or in part and for an order that the registration of such alteration be cancelled.

The courts have justified their intervention in the internal disputes of incorporated societies (or associations) on the ground that there is a contractual relationship between the society and its members or on the ground of natural justice principle.

In Nicholson v. N.Z. Kennel Club Inc.[227] the court intervened to make a declaration that a penalty imposed on a member by the executive of the club was in contravention of the rules of natural justice. In Byrne v. Auckland Irish Society Inc.[228] it was held that the failure of an incorporated society to comply with the procedures set out in its rules for the expulsion of members was both a breach of contract for which damages could be awarded and a denial fo natural justice. In Stininato v. Auckland Boxing Association[229] a professional boxer was refused a licence because of misconduct without being given an opportunity to be heard. The Court emphasized that while it refused to interfere in this particular case, the principles of natural justice applied in these circumstances. A refusal of licence could be regarded as an unreasonable restraint of trade although a full time occupation was not involved here.

In Nevele R. Stud Ltd v. N.Z. Trotting Conference [230] the Court noted that a majority in an organisation could not justify the restraint of an individual's right to carry out his trade according to his wishes unless there was a legitimate public interest to preserve. Thus the respondent body's regulations that purported to impose blanket restrictions on artificial insemination was declared void as being contrary to public policy.

[However] it appears from the South Australian, Western Australian and New Zealand experience that the problems associated with disputes between members of an association or between members and the association itself are not cured by the incorporation of the association. [231] White [232] suggested that it might be preferable for the New Zealand legislature to clarify the position either by giving the courts jurisdiction to consider all disputes on their merits or by giving power to members to refer their internal disputes to the Registrar (e.g: Part IV of New South Wales draft Bill).

The Queensland Act has specific provisions governing the enforceability of rights and obligations of members. [233] The rules of the association shall constitute the terms of a contract between the members interse and between the members ~~of~~ and the association. The Supreme Court may be called upon to adjudicate upon the validity of a decision taken by the incorporated association depriving such member of his rights. The general rules of natural justice shall apply in deciding questions concerning the rights of members and the existence of a proprietary right will no longer be a condition precedent to the exercise of the court jurisdiction. Many actions could be brought

before the court by way of notice for an injunction and this will provide a cheap and ready method of resolving most internal disputes. Irregularities associated with association's proceedings or acts (legal impasses) may be validated by the Court under section 70 of the Queensland Act.

In the Victorian draft Bill there is no specific provisions giving the Court jurisdiction to deal with internal disputes of incorporated associations. However its proposed Model Rules seem to provide a minimum standard safeguarding the rights of members in relation to meetingsand expulsion.

Part IV of New South Wales draft Bill is designed to provide effective and appropriate machinery for resolving internal disputes and overcoming legal impasses in associations regulated by the proposed statute. Like in Queensland, in New South Wales, the existence of proprietary right is not a condition precedent to the exercise of court jurisdiction. [234] Part IV will regulate association that vary greatly in size, property and importance. The Supreme Court has primary jurisdiction to adjudicate on matters of great importance or value. [235]

But an inexpensive, informal and speedy alternative should be available for small associations and for small issues. Therefore a concurrent jurisdiction is given to the Registrar who may depute the hearing of a matter to another person. [236] There is a provision for easy transfer of matters between the two jurisdictions and for appeal to the Court from the Registrar. [237] The Registrar's jurisdiction is confined to incorporated associations, whose rules

will be registered by him, and who come generally under the part of the Act administer by him.

An additional way of solving internal disputes is also considered in the New South Wales Outline Scheme.[238] It proposed to give the Registrar a power to arbitrate in internal disputes. Arbitration is a cheap and speedy means of resolving disputes. New Zealand legislature should consider introducing a provision giving Court or Registrar power to resolve internal disputes.

F. Legal And Other Proceedings.

In New Zealand, New South Wales, Queensland and Victoria, a certificate or document issued under the seal of the Registrar (or Under Secretary) shall be admissible as evidence in various legal proceedings.[239]

One disadvantage of being incorporated is that the Court may require security for costs where the incoporated association is the plaintiff in a legal proceeding. This requirement is found in New Zealand statute and in the proposed statute in New South Wales but not in Victoria and Queensland.[240]

Section 16 of New Zealand Act provides that service of summons, notice or other document required to be served upon a registered society may be served by leaving it at the society's registered office or sending it through as registered letter addressed to the society at that office. The draft Bills in New South Wales

and Victoria and the Queensland Act adopted similar approach except that the addressee is the public officer (or secretary) not the society.[241]

G. Dispositions of Property

Section 65 of the Queensland Act contains a provision which is not found in other Australian statutes or the draft Bills in New South Wales and Victoria or the New Zealand Act. Section 65 provides:

> (1) A disposition in favour of an association shall, unless the context otherwise requires, take effect in favour of that association where that association is incorporated under this Act, where such incorporation is effected after the document evidencing the disposition was made or executed but before the disposition was perfected.
>
> (2) In this section "disposition" means any disposition by will, written instrument or otherwise, which takes effect after the commencement of this Act.

Presumably the definition of "association" in section 5 is applicable here. This section only applies to incorporated associations unlike the draft Act where a substantially similar provision was recommended by the Law Reform Commission to apply to dispositions of property to both incorporated and unincorporated associations.[242]

Since incorporation confers a legal status on the association and thus it is capable of holding property legally and beneficially for itself, section 65 seems to have no practical purpose. Hence a provision similar to this is unlikely to be passed by the New Zealand legislature.

H. Appointment of Inspector

Section 34A of the New Zealand Act (inserted by section 5 of the Incorporated Societies Amendment Act 1981) and section 50 of the Queensland Act provide for the Registrar or Under Secretary to have power to appoint an inspector to investigate into the affairs of the incorporated associations.[243] This power of inspection is desirable in view of the obligations imposed upon incorporated associations. The Queensland Law Reform Commission is of the opinion that the power of inspection is desirable because "the Registrar or Under Secretary himself would not be able to follow up matters requiring detailed investigation, and it could well be that "white collar crime" could extend to the activities of incorporated associations".[244] For example the incorporated associations may be carrying on illegal activities or its officers or committee men may be using its name to perpetrate fraud. These provisions give wide powers to the Registrar or Under Secretary or his depute so that thorough and effective investigation can be carried out even though this may be an invasion of association's privacy. The New South Wales Outline Scheme also provide for official investigations of the affairs of incorporated associations.[245] But no such provision is provided in the Victorian draft Bill.

In New Zealand, when Part II of the Securities Act 1978 came into force, it would include power to investigate the affairs of an incorporated society which involved fund raising from the public. This can be seen as a further intrusion of the privacy of the incorporated societies. However this power of inspection is desirable because it helps the donors of gifts to ensure that their money are given to genuine cause.

XI. CONCLUSION.

The draft Associations Incorporation Bills in New South Wales and Victoria and the Queensland Act are better equipped to deal with the problems associated with unincorporated associations as well as those that remained unresolved after incorporation as experienced in other prececents, especially winding up, disposition of surplus assets, jurisdiction of court and Registrar in dealing with internal disputes. The New South Wales draft Bill is unique in that it legislates directly for unincorporated associations. On the whole the proposals in New South Wales, Victoria and Queensland are far more superior in substance when compare to precedents. This should be the case since the Law Reform Commissions there have the valuable opportunity of looking at precedents and their experience and thus having the chance to cover up all the "loopholes" experienced by precedents.

The New Zealand legislature might consider implementing some of the proposals mentioned by New South Wales and Victoria and those found in Queensland. For example provisions may be made to

exclude ultra vires rule, to give express jurisdiction to court and Registrar to deal with internal disputes, to provide for necessary implied powers, to have prescribed Model Rules or giving Registrar a discretion to make such Model Rules, and giving an incorporated society the option of converting into a company if so desires.

FOOTNOTES.

1. Incorporated Societies Act 1908 (N.Z.) (hereinafter referred to as the New Zealand Act), Associations Incorporation Ordinance 1953-1966 (A.C.T.) (hereinafter referred to as the A.C.T. Act), Associations Incorporation Ordinance 1968 (N.T.) (hereinafter referred to as the N.T. Act), Associations Incorporation Ordinance 1966-1968 (T.P.N.G.) (hereinafter referred to as the T.P.N.G. Act), Associations Incorporation Act 1956-1965 (S.A.) (hereinafter referred to as the S.A. Act), Associations Incorporation Act 1966-1964 (Tas.) (hereinafter referred to as the Tas. Act) and Associations Incorporation Act 1895-1969 (W.A.) (hereinafter referred to as the W.A. Act).

2. For example the W.A. Act has no provisions dealing with dissolution or winding up of incorporated associations unlike the New Zealand Act (see sections 24 and 25).

3. Associations Incorporation Act 1981 (Queensland) (hereinafter referred to as the Queensland Act). This Act shall commence on a day to be fixed by Proclamation (section 2).

4. A.S. Sievers "The Dissolution of Non-profit Associations" (1981) 17 Monash U.L.R. 141, 159.

5. Queensland, Report of the Law Reform Commission on a draft Associations Incorporation Act - commentary 10 (Q.L.R.C. 30) (hereinafter referred to as the Queensland's Report).

6. See Victoria, Chief Justice's Law Reform Committee Report on Unincorporated Associations (1980) 54-55 (hereinafter referred to as the Victorian Chief Justice's Report).

7. See Baxt "The Dilemma of Unincorporated Associations" (1973) A.L.J. 305 for an interesting discussion on the problems which confronted the courts when dealing with cases involving unincorporated associations.

8. [1980] 3 All E.R. 42 (High Court), [1982] 1 W.L.R. 522 (Court of Appeal).

9. (1982) Unreported, Hamilton Registry, M242/81, 6.

10. Idem.

11. Wise v. Perpetual Trustee Co. Ltd [1903] A.C. 139, Williams v. Hursey (1959) 103 C.L.R. 30.

12. For example in New Zealand: the friendly societies (Friendly Societies Act 1909) and the trade unions (Trade Unions Act 1908) registered under the respective Act. See also The Taff Vale Rly Co. v. The Amalgamated Society of Rly Servants [1901] A.C. 426, Bonsor v. Musicians' Union [1956] A.C. 104 and Willis v. Association of Universities of the British Commonwealth [1965] 1 Q.B. 140.

13. Dawkins v Antrobus (1881) 17 Ch.D 615.

14. See Overtoun v Free Church of Scotland [1904] A.C. 515.

15. [1959] A.C. 457.

16. Queensland's Report 2-3.

17. Ibid. 3.

18. (1966) 114 C.L.R. 634. An appeal from the decision of Hart J. in the Supreme Court of Queensland.

19. Supra n.17.

20. Re Lipinski's Will Trusts, Gosschalk v Levy [1976] 3 W.L.R. 522, Re Denley's Trust Deed [1969] 1 Ch. 373.

21. Neville Estates Ltd v Madden [1962] Ch. 833, 849, Re Grant's Will Trusts [1979] 3 All E.R. 359, Re Bucks Constabulary Widows and Orphans' Fund Friendly Society Thompson v Holdsworth and Others (No:2) (hereinafter referred to as Re Bucks (No.:2) [1979] 1 All E.R. 623, Re Kaiapoi Woollen Mills Employees' Welfare Society, Gray v Kaiapoi Textiles Ltd (hereinafter referred to as Re Kaiapoi) (1976) Unreported Christchurch Registry, No. A211/74, 16, 17 ,18.

22. In Re Grant's Will Trusts op.cit and Conservative Party Case, Vinelott J. was of the opinion that this new validating construction occupied an intermediate position between property held on contract-holding theory and that which was held for non-charitable purpose trust. The latter case went on appeal and is reported in [1982] 1 W.L.R. 522. Brightman L.J. at p. 529 talked about a simple case of mandate or agency - where the recipient would have authority to make use of the money in the indicated way. As long as the money is used within the scope of the mandate, the recipient discharges himself vis-a-vis the contributor. No trust arises, except the fiduciary relationship inherent in the relationship of principal and agent.

23. C.E.F. Rickett "Mr. Justice Vinelott on Unincorporated Associations and Gifts to Non-charitable Purposes" (1982) 12 V.U.W.L.R. 1, 22 & 23.

24. [1948] V.R. 15.

25. Ibid. 22. See Francis v. McKay (1967) Qd. R.554, where a similar conclusion was reached.

26. D.J. White, The Law Relating to Associations Registered Under the Incorporated Societies Act 1908, (1972), V.U.W., LL.M Thesis, (unpublished), at 15.

27. [1970] V.R. 487. This decision was followed in Amey v Fifer (1971) 1 N.S.W.L.R. 685.

28. [1970] V.R. 481.

29. Queensland's Report 5.

30. [1903] A.C. 139.

31. Carr v. Shaw [1913] 32 N.Z.L.R. 726, Bradley Egg Farm v Clifford [1943] 2 All E.R. 378, Smith v Yarnold (1969) 90 W.N. (Pt.1) (N.S.W.) 316 and Peckham v. Moore [1975] 1 N.S.W. L.R. 353.

32. White, op.cit 161.

33. Smith v Yarnold op.cit 323.

34. Bradley Egg Farm v Clifford op.cit 386.

35. Queensland's Report 6.

36. The courts have permitted actions against some special class of unincorporated associations in their own names and the judgment can be enforced against its common fund e.g.: trade unions - Taff Vale Rly Co. v A.S.R.S. and Bonsor v Musicians' Union (see n.12).

37. B.T. Brooks "Actions Against Voluntary Associations" (1970) N.Z.L.J. 111, 112.

38. Hardie & Lane Ltd v Chiltern [1928] 1 K.B. 663.

39. London Association for the Protection of Trade v Greenlands [1916] 2 A.C. 15, Barker v Allanson [1937] 1 K.B. 463.

40. [1950] 1 All E.R. 476.

41. Ibid. 477-478. The steward was treated as servant of the members as a whole and not of the committee (in tort cases). In claims in contract a servant is normally treated as the servant of the committee - Bradley Egg Farm v Clifford op.cit.

42. [1961] V.R. 206.

43. Ibid. 207.

44. (1934) 51 C.L.R. 358.

45. (1974) 1 N.S.W. L.R. 295.

46. (1972) 1 N.S.W. L.R. 428. See also Steven v Keogh (1946) 72 C.L.R. 1.

47. [1911] 1 Ch. 540, 562. A similar approach was taken in Re Sick and Funeral Society of St. John's Sunday School, Golcar [1972] 2 W.L.R. 962.

48. See Woodford v Smith [1970] 1 W.L.R. 806, 817, Baker v. Jones [1954] 1 W.L.R. 1005, 1009.

49. Cameron v. Hogan op.cit 372-373 - it is submitted that the dicta concerning this aspect of the case is still good law.

50. There are some very interesting articles dealing in detail some of the problems highlighted by this particular aspect of law relating to unincorporated associations - see W.R. Atkin "Unincorporated Associations - Distribution of Surplus Assets on Dissolution" (1979) 8 N.Z.U.L.R. 217; B. Green "The Dissolution of Unincorporated Non-profit Associations" (1980) 43 M.L.R. 626; C.E.F. Rickett "Unincorporated Associations and their Dissolution" (1980) Camb. L.J. 88 (hereinafter referred to as Rickett (No. 1)); and Sievers' article (see supra n.4).

51. Re Bucks (No:2), Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts (hereinafter referred to as Re West Sussex) [1971] Ch. 1.

52. Sievers, op.cit. 164 Re Grant's Will Trusts is a case concerning the validity of gift left by a testator for the benefit of the Chertsey Headquarters of the Chertsey and Walton Constituency Labour Party. But the judgment also contains dicta relevant to the distribution of surplus assets upon dissolution of unincorporated association.

53. Sievers, op.cit 146-151, 164; Green, op.cit 630-637.

54. Re Lead Co's Workmen's Fund Society [1904] 2 Ch. 196, Blake v Smither (1906) 22 T.L.R. 698.

55. Re Producers' Defence Fund [1954] V.L.R. 246, Re Kaiapoi case where it was held that the resolution by the majority members to dissolve the society was ineffective.

56. Re Kaiapoi case - the society was regarded as having terminated by the destruction of its substratum i.e. the company had ceased trading, there were no members left since there were no employees. Green, op.cit 630, 631 and 634 prefers to relabel this method as "frustration of the contract of association". Hence where a contract of association has been frustrated, no further act of dissolution will be required.

57. See page 11 of the judgment.

58. Sievers, op.cit 151.

59. Re Bucks (No:2) 626, 628.

60. Re Gillingham Bus Disaster Fund [1958] 1 All E.R. 37, Re West Sussex supra n.51.

61. Supra n.21.

62. Rickett (No;1), op.cit. 120 - suggested this solution.

63. Conservative Party case [1980] 3 All E.R. 42, 63.

64. Rickett (No:1), op.cit 98.

65. Re Grant's Will Trusts op.cit 364.

66. California Code of Civil Procedure ss.388, 412-417; Corporations Code Part 4 Title 3 Unincorporated Associations. Ohio Revised Code 1971 Chpt. 1745.

67. Letter from D.J. White (N.Z) dated 9 April 1980 to the Victorian Law Reform Committee on Unincorporated Associations. I would like to acknowledge my thanks to Mr White for allowing me to see the correspondence.

68. E.g. Order 54 Rules 13-35 of the Tasmanian R.S.C..

69. New South Wales Law Reform Commission, Unincorporated Associations - Discussion Paper - Outline Scheme for Incorporation by Registration (1981) paras. 3-4 (hereinafter referred to as the N.S.W. Outline Scheme). See also N.S.W. draft Associations Incorporation Bill 1977, Part III

(ss. 38-43) - Unincorporated Associations (hereinafter referred to as the N.S.W. draft Bill). This novel scheme will be discussed more fully in Chpt. X of this paper.

70. Queensland's Report 9-10.

71. New Zealand Act s.4(1), N.S.W. draft Bill ss.6 & 7, Queensland Act ss.5 and 6.

72. Victorian Chief Justice's Report 9.

73. Tas. Act s.2, S.A. Act s.4, W.A. Act s.2 and Victorian Revised draft Associations Incorporation Bill (hereinafter referred to as the Victorian draft Bill) s.2(1).

74. Note however the W.A. Act s.2 definition is narrower as it refers to some kinds of association by name rather than by reference to the purpose for which they are formed.

75. White, op.cit 25. The minimum number of membership required by other New Zealand Acts are: 7 for friendly societies (s.13 of Friendly Societies Act 1909), 15 for charitable corporations (Charitable Trusts Act 1956 s.8(3)) and 20 for building societies (Building Societies Act 1965).

76. Queensland draft Associations Incorporation Act 1979 (hereinafter referred to as the Queensland draft Act) s.5.

77. Queensland's Report 13.

78. Queensland Act ss.5 & 6.

79. Victorian draft Bill s.3(c), N.S.W. Outline Scheme

para. 24(previously s.6 of the N.S.W. draft Bill envisaged a minimum membership of ten).

80. Interview with Miss J.A. Arnott, the Assistant Registrar of Incorporated Societies.

81. White, op.cit 25. Section 7(2) of Industrial Conciliation and Arbitration Act 1954, s.8(2) (a) of Charitable Trusts Act 1957.

82. New Zealand Act ss.29 & 31.

83. N.S.W. draft Bill s.8(a) - (e), Queensland Act s.5(1)(a) - (h).

84. Idem.

85. N.S.W. Outline Scheme para. 27.

86. Section 4(1) of New Zealand Act, N.S.W. draft Bill s.7(1), Queensland Act s.5(1), Victorian draft Bill s.2(1).

87. New Zealand Act s.5, N.S.W. draft Bill s.7(2), Queensland Act s.7 and Victorian draft Bill s.2(2).

88. White, op.cit 21, N.S.W. Outline Scheme para. 15.

89. Queensland's Report 13.

90. Queensland Act s.30(1).

91. New Zealand Act ss. 7 & 8.

92. E.g. Tas. Act ss.3-7.

93. Queensland's Report 14.

94. New South Wales Law Reform Commission, Unincorporated Associations - Memorandum and Draft Legislation (1977) (hereinafter referred to as N.S.W. Report) 50.

95. Section 11. The Under Secretary of Justice is in charge of administrating the Act.

96. Section 10(2).

97. Pamphlet on Guide to the Incorporated Societies Act 1908 Part 1: Information for Societies seeking Incorporation (March 1972).

98. N.S.W. draft Bill s.9, Victorian draft Bill s.4 and Queensland Act s.9.

99. Victorian Chief Justice's Report 9-10.

100. New Zealand Act s.8, N.S.W. draft Bill s.10(1) and N.S.W. Outline Scheme para. 30.

101. Queensland Act s.11(1), Victorian draft Bill s.5(1).

102. A.C.T. Act s.9, N.T. Act s.12, T.P.N.G. Act s.15(1), Tas. Act s.14(1).

103. Queensland's Report 17.

104. N.S.W. draft Bill ss.22-24, Victorian draft Bill s.14, Queensland draft Act ss.34 & 35 (now found in Queensland Act ss. 37 & 39 where "public officer" is substituted by "secretary").

105. N.S.W. darft Bill s.9.

106. New Zealand Act ss 10 & 16, Victorian draft Bill s.8, Queensland Act s.13, N.S.W. draft Bill s.14, A.C.T. Act s.7, Tas. Act s.11 and T.P.N.G. Act s.12.

107. Pettersson v Royal Oak Hotel Ltd [1948] N.Z.L.R. 136.

108. (1915) 17 G.L.R. 653.

109. N.S.W. darft Bill s.15, Queensland Act s.21, Victorian draft Bill s.12.

110. New Zealand Act s.14 as followed by s.19 of N.S.W. draft Bill and s.21(7) of Queensland Act.

111. New Zealand Act s.15, s.16 of N.S.W. draft Bill, s.15 of Victorian draft Bill and s.25 of Queensland Act.

112. White, op.cit 145.

113. [1903] A.C. 139.

114. White, op.cit 160.

115. Ibid. 159.

116. Tas. Act. s.27, S.A. Act s.29, W.A. Act. s.8, Queensland Act s. 24, Victorian draft Bill s. 13, N.S.W. draft Bill s.18.

117. N.S.W. Outline Scheme para 11(g), Queensland Act s.23.

118. Henderson v. Kane & The Pioneer Club [1924] N.Z.L.R. 1073 the committee would not be liable for breach of contract when the society is the proper party nor will they be liable for the tort of inducement to breach a contract when a member is expelled.

119. See generally White, op.cit. 161. The rule in Turquand's case is that "persons who enter into transactions with companies are deemed to have notice of the contents of the memorandum and articles of association of company, but they need not inquire whether all the internal regulations of the company have been observed if they are not put on inquiry".

120. N.S.W. Report 58.

121. White, op. cit. 193.

122. Similar provision is found in section 24 of Queensland Act.

123. N.S.W. Outline Scheme para. 50.

124. Idem.

125. N.S.W. Outline Scheme para. 51.

126. (1948) 5 M.C.D. 454.

127. [1945] N.Z.L.R. 556.

128. D. Patterson "Incorporated Societies" LL.M. Bodies Corporate and Incorporate Seminar Paper (1982) V.U.W. 6.

129. Ashbury Railway Carriage and Iron Co. Ltd. v. Riche (1875) L.R. 7 H.L. 653.

130. [1955] N.Z.L.R. 520

131. (1979) Unreported, Wellington Registry, A. 527/79.

132. [1974] 1 N.Z.L.R. 157; [1975] 2 N.Z.L.R. 496.

133. Victorian Chief Justice's Report 20.

134. For the discussion of those difficulties caused - see J.F. Northey Introduction to Company Law (9th ed; Butterworths, Wellington, 1981) 115-116; L.S. Sealy Cases and Materials in Company Law (2nd ed; Butterworths, London, 1980) 79, 108-110 (reform of ultra vires rules).

135. Northey, op. cit. 115.

136. Queensland draft Act s. 20 (found now in s. 23 of Queensland Act).

137. N.S.W. Outline Scheme para. 11 (g).

138. Macarthur Report on the New Zealand Companies Act 1973 (Final Report) paras. 89-98.

139. E.g: Queensland Act s. 23, Companies Act 1973 of British Columbia s. 23 (1).

140. Victorian Chief Justice's Report 21.

141. See Hawkesbury Development Co. Ltd v. Landmark Finance Pty. Ltd.(1969) 2 N.S.W.L.R. 782.

142. See also section 5 of the Companies Bill 1973 (U.K.). This approach adopts the assumption that only actual notice will defeat a claim against the company where the company sets up as its defence the lack of authority on the part of its agents.

143. Sections 139-142.

144. New Zealand Act ss.6, 7, 11 & 11A; Queensland Act s. 16; N.S.W. draft Bill s. 9 (a) and Victorian draft Bill ss. 4(2) (a) & 6 (1).

145. New Zealand Act s. 6(a), Queensland Act s.16(2) and Victorian draft Bill s. 6 (2) & (3).

146. White, op. cit. 41.

147. Queensland Act s.18.

148. New Zealand Act ss. 11A, 21(5); Queensland Act s.17; N.S.W. draft Bill s. 12 and Victorian draft Bill s.7.

149. N.S.W. Report 53.

150. N.S.W. Outline Scheme para. 28.

151. N.S.W. Report 60.

152. New Zealand Act ss.6, 7 & 8; Queensland Act s.26; N.S.W. draft Bill ss.9(c) & 20; and Victorian draft Bill ss. 4(5) & 16.

153. Millar v. Smith [1953] N.Z.L.R. 1049 - the golf club had no rules (written) in existence.

154. The rules of unincorporated associations may very widely and may omit matters depending on the whims and skill of the founding members and draftsmen.

155. The minimum requirement for the contents of the rules - New Zealand Act s.6, Queensland Act s.26(2), N.S.W. draft Bill s.20(1) and Victorian draft Bill s.16.

156. E.g: McLeod v. Doherty, Hawke's Bay and East Coast Aero Club Inc. [1971] N.Z.L.R. 348. Some simplified precedents for rules can be found in the New Zealand Encyclopaedia of Forms and Precedents (1965) Vol. 5, 401 ff.

157. Victorian Chief Justice's Report 14.

158. See the Associations Incorporation (Model Rules) Regulations 1965 (Tasmania S.R. 1965, No.164).

159. Victorian draft Bill s.16, Queensland Act s.27.

160. Queensland's Report 16.

161. N.S.W. draft Bill s. 20(4).

162. Interview with Miss J.A. Arnott, Assistant Registrar of Incorporated Societies.

163. This recommendation was made by White, op.cit. 192.

164. Dawkins v. Antrobus (1881) 17 Ch. D. 615, Re Tobacco Trade Benevolent Association [1958] 3 All E.R. 353, Abatt v. Treasury Solicitor [1969] 3 All E.R. 1175.

165. New Zealand Act s.6(1)(e), Queensland Act s.26(2), N.S.W. draft Bill s.20(1)(c) and Victorian draft Bill -Model Rules.

166. New Zealand Act s.21, Queensland Act s.28, N.S.W. draft Bill s.21 and Victorian draft Bill s.18.

167. N.S.W. Outline Scheme para. 34, N.S.W. draft Bill s.46; Queensland Act s.70.

168. (1914) 9 M.C.R. 111.

169. Pamphlet for guide to the Incorporated Societies Act 1908, Part I (1972).

170. S.A. Act s.13, Tas. Act s.12.

171. Queensland Act s.22, Victorian draft Bill s. 10.

172. Queensland's Report 15.

173. Suggestion by White, op.cit. 192.

174. Incorporated Societies Amendment Act 1953 s.4 (1) as amended as amended by s.3 of the Incorporated Societies Amendment Act 1965.

175. Hickman v. Kent or Romney Marsh Sheep Breeders' Association [1915] 1 Ch. 881, Rayfield v. Hands [1960] Ch. 1.

176. Supra n. 162.

177. Henderson v. Kane and the Pioneer Club [1924] N.Z.L.R. 1073, 1076; O'Neill v. Pupuke Golf Club Inc. [1932] N.Z.L.R. 1012, 1016; Temple v. Hawke's Bay Football Association [1970] N.Z.L.R. 862, 864; Byrne v. Auckland Irish Society Inc. [1979] 1 N.Z.L.R. 351.

178. Patterson, op. cit. 5.

179. (1977) Unreported, Dunedin Registry. M.120/77,8.

180. [1956] N.Z.L.R. 1.

181. supra n. 177

182. Para. 25.

183. E.g: Cameron v. Hogan (1934) 51 C.L.R. 358 type of situation.

184. Similar to section 33 (1) of the Australian Uniform Companies Act 1961 (equivalent to s. 34 of the Companies Act 1955 (N.Z.)).

185. Queensland draft Act ss. 37 & 38 (now found in ss. 41 & 42 of the Queensland Act).

186. D.L. Mathieson Industrial Law in New Zealand (Sweet and Maxwell, Wellington, 1970) 143 - suggested that the rules of industrial unions create a contractual relationship between the union and its members and between the members interse.

187. New Zealand Act ss.33, 34 & 34A.

188. Pamphlet on Guide to Incorporated Societies Act 1908, Part II: Requirements after Incorporation (Sept. 1969) 6.

189. White, op. cit 44.

190. Section 21.

191. Queensland Act s. 40.

192. N.S.W. draft Bill s. 26.

193. N.S.W. Outline Scheme paras. 40 & 41.

194. Ibid. para 40.

195. Sievers, op. cit. 160.

196. Tas. Act s. 32, A.C.T. Act s.17, N.T. Act. s.20.

197. Section 24 (1) & (1A).

198. Victorian draft Bill ss. 27 & 28, N.S.W. Outline Scheme para 61-64, Queensland draft Act ss. 40 & 41 (now found in ss. 44 & 45 of the Queensland Act).

199. N.S.W. Outline Scheme paras. 66 & 67.

200. Sievers, op.cit. 163. See S.A. Act s. 25, Tas. Act s. 34, A.C.T. Act s. 25(a), N.T. Act s. 23A.

201. Sievers, op.cit. 163.

202. Section 27 (1). In New Zealand about 100 incorporated societies per annum are dissolved by the Registrar under section 28 (information provided by the Registrar to White, op. cit. 184 n. 35).

203. N.S.W. draft Bill s. 30, Victorian draft Bill ss. 23 & 24, Queensland Act s. 48.

204. White, op.cit. 185.

205. Section 26.

206. Queensland Act s. 49.

207. White, op. cit. 189.

208. Ibid. n.52 (information given by Registrar to White).

209. Section 47.

210. Queensland Act s. 49.

211. Victorian draft Bill - draft Model Rule 45.

212. N.S.W. draft Bill s. 33, N.S.W. Outline Scheme para. 68.

213. Sievers, op. cit. 164.

214. N.S.W. draft Bill s. 36, Victorian draft Bill s.20 and Queensland Act s.20.

215. N.S.W. Report 76.

216. Idem.

217. Interview with Miss J. A. Arnott - Assistant Registrar of Incorporated Societies. Unable to obtain details of this amalgamation.

218. Queensland Act s.19.

219. Queensland's Report 14.

220. N.S.W. draft Bill s. 37, N.S.W. Outline Scheme paras 20 - 23.

221. N.S.W. draft Bill Part III ss. 38-43.

222. Supra n.217.

223. [1953] N.Z.L.R. 1049.

224. Pamphlet on Guide to the Incorporated Societies Act 1908, Part II, 11.

225. Idem.

226. [1964] N.Z.L.R. 187.

227. [1968] N.Z.L.R. 529.

228. [1979] 1 N.Z.L.R. 351.

229. [1978] 1 N.Z.L.R. 1.

230. Butterworths Current Law (18 May 1982) 141.

231. Victorian Chief Justice's Report 17.

232. White, op. cit. 194.

233. Queensland Act ss. 41-43.

234. N.S.W. draft Bill s. 45(2).

235. Ibid ss. 45 & 46.

236. N.S.W. draft Bill ss. 47 & 48.

237. Ibid ss. 47 (2) & (3), 53.

238. N.S.W. Outline Scheme para. 39.

239. New ZealandAct s. 34 (3), Queensland Act s.64, N.S.W. draft Bill s.27, Victorian draft Bill s.30.

240. New Zealand Act s.17, N.S.W. draft Bill s.28.

241 N.S.W. draft Bill s. 29, Victorian draft Bill s. 31 and Queensland Act s.62.

242. Queensland draft Act s.54.

243. In New Zealand the word "inspector" is not mentioned but the Registrar himself may conduct the inspection or authorised someone else to do it.

244. Queensland's Report 20.

245. N.S.W. Outline Scheme para. 11 (ae) (viii).

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