SAME OLD INSTRUMENT SAME OLD TUNE?
CRITICAL PERSPECTIVES ON THE PUBLIC LIABILITY
INSURANCE PROVISIONS IN THE ASSOCIATIONS
INCORPORATION ACT 1981 (QLD)

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I INTRODUCTION

Voluntary not-for-profit associations are associations, clubs or societies that are created or conducted for any lawful purpose that does not conclude in the association’s members making any profit from its affairs or partitioning its property amongst the members while the association continues to subsist.¹ These associations play a significant role in community life as they include social and sporting clubs, artistic societies, groups with religious, patriotic or political interests, professional associations and charitable organisations. Voluntary not-for-profit associations may be unincorporated or incorporated associations.

In Queensland, a not-for-profit association has the option of incorporating under the Associations Incorporations Act 1981 (Qld)² or under the Corporations Act 2001 (Cth).³

In 2005 the Queensland Office of Fair Trading⁴ released a discussion paper entitled Review of the Associations Incorporation Act 1981 Consultation Paper.⁵ An expansive range of issues confronting incorporated associations in Queensland was canvassed in the paper. In response some 280 stakeholders expressed their views on the operation of the AI Act. A number of concerns were identified.⁶ One of these related to public liability insurance. Subsequently, the Associations Incorporation And Other Legislation Amendment Act 2007 (Qld)⁷ was enacted. It directed its attention in part to the issue of public liability insurance.⁸

The main purpose of this article is to discuss and critically analyse the provisions in the AI Act relating to public liability insurance.

There are two parts to this article. The first part briefly discusses the key alternative legislative regimes for incorporating not-for-profit associations in Queensland. The second and primary part of this article analyses the provisions relating to public liability insurance arising from the AIA Act. This analysis is informed by the discussion in the first part of the article. This analysis comprises the following: an outline of the former statutory position and the current statutory position; a brief analysis of how associations’ incorporation legislation in other Australian jurisdictions deals with the issue; a brief outline of how the Corporations Act deals with the issue particularly in relation to a company limited by guarantee; and a critical

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¹ Angela Sievers, Associations and Clubs Law in Australia and New Zealand (2nd ed, 1996) 1.
² Hereafter referred to as the AI Act.
³ Hereafter referred to as the Corporations Act.
⁴ Hereafter referred to as the OFT.
⁶ Explanatory Notes, Associations Incorporation And Other Legislation Amendment Bill 2006 (Qld) 2.
⁷ Hereafter referred to as the AIA Act.
⁸ Explanatory Notes, see above n 6, 2.
analysis of the current statutory position. In this last section, there are a number of focuses of critique. One significant critical perspective is whether the current provisions meet one of the key objects of the original legislation of providing not-for-profit associations with an uncomplicated and economical regulatory system that takes account of the interests of members, creditors and the public.9 Other focuses of critique relating to the current provisions are as follows: whether there are deficiencies in relation to the interpretation and the stated policy of the provisions; whether they are of a paternalistic nature given that the AI Act has been described10 as adopting a more interventionist approach with regard to an association’s internal affairs than associations’ incorporation legislation in some other Australian jurisdictions; whether they adopt a legislative approach that is uniform with other Australian associations’ incorporation legislation, unless some good reason of policy or principle justifies a departure from such an approach, given that a major criticism of this legislation has been its lack of uniformity across the jurisdictions;11 whether they are influenced by the legislative regime applicable to companies limited by guarantee under the Corporations Act given that this Act is designed to regulate companies formed for the purpose of making financial profits for their members rather than not-for-profit associations;12 and whether they provide the most efficient and effective means of dealing with a risk of public liability.

Conclusions are then reached as to the utility of the provisions relating to public liability insurance under the AI Act having regard to these focuses of critique.

II THE KEY LEGISLATIVE REGIMES FOR INCORPORATING NOT-FOR-PROFIT ASSOCIATIONS

In Queensland, a not-for-profit association has the option of incorporating as an incorporated association under the Associations Incorporations Act 1981 (Qld) or as a company limited by guarantee under the Corporations Act 2001 (Cth).

A Associations Incorporation Act 1981(Qld)

The regulatory regime under the AI Act is specially designed to serve the requirements of not-for-profit associations13 particularly small community organisations.14 However, it has also been described as a significant item of legislative infrastructure for those associations that facilitate the self-regulation of trades and professions and the provision of welfare and social services as well as those associations

9 Robert Baxt, Keith Fletcher and Saul Fridman, Corporations and Associations Cases and Materials (9th ed, 2003) [2.49].
12 Sievers, see above n 10, 321; JF Corkery and Bruce Welling, Principles of Corporate Law in Australia (2008) 29.
13 Sievers, see above n 10, 321; Fletcher, see above n 10, 22.
that have grown into enterprises of consequence to the state’s economy through the
production of state revenues such as licensed machine gaming clubs.15

Under the AI Act an ‘incorporated association means an association incorporated
under this Act’.16 ‘Association’ is defined to mean ‘an association, society, body, or other
entity formed or carried on, for a lawful purpose’.17

An association must be eligible for incorporation under the AI Act.18 The criteria
for eligibility for incorporation are that the association should not be constituted
primarily for the purpose of making profits,19 or for the purpose of providing gain for its
members either financially20 or by the holding of property,21 or the raising of loan funds.22 These criteria are long standing principles underlying eligibility for incorporation
under associations’ incorporation legislation throughout Australia.23

Where an association does make profits incidental to its activities, such as by
trading with the public or charging admission fees to displays, contests, sporting fixtures
or other occasions conducted to promote its objects, these must be applied exclusively for
the objects and purposes of the association.24 In this respect the AI Act recognises the
commercialisation of sporting clubs and other community organisations. These
provisions reflect the reality that such clubs and organisations quite often trade for the
benefit of the organisation, as distinct from its members, in the pursuit of its objects.25

An unincorporated association may incorporate under the AI Act by following the
designated procedure.26 As part of this procedure the association’s members are required
to pass incorporation resolutions and to adopt proposed rules for the incorporated
association, which may be the model rules promulgated under the AI Act, or the
association’s own drafted rules.27 The model rules are set out in the Associations
Incorporation Regulation 1999 (Qld).28 Where an association proposes to be registered
with its own rules, the AI Regulation requires that the rules must regulate specified
matters.29 It provides for certain mandatory rules and a minimum content of rules
statement.30 Consequently, it has been said that an association, by opting to incorporate
under the AI Act, chooses to subordinate its constitution to paramount statutory
requirements unequalled in Australia.31

15 McGregor-Lowndes, see above n 10, 10; McGregor-Lowndes, Paltridge and Mack, see
above n 14, 1.
16 Associations Incorporation Act 1981 (Qld) s2, sch dictionary.
17 Associations Incorporation Act 1981 (Qld) s2, sch dictionary.
18 Associations Incorporation Act 1981 (Qld) s5.
19 Associations Incorporation Act 1981 (Qld) s5(1)(b)(ii).
20 Associations Incorporation Act 1981 (Qld) s5(1)(c); s4(1).
21 Associations Incorporation Act 1981(Qld) s (1)(c).
22 Associations Incorporation Act 1981 (Qld) s5(1)(f).
23 R v Judges of the Federal Court of Australia; Ex parte Western Australia National Football
League Inc (1979) 143 CLR 190, 219.
24 Associations Incorporation Act 1981 (Qld) s5(1)(c); s4(1); Sievers, see above n 11, 1-2.
25 Philip Mendes, Law and Management of Clubs and Community Organisations in New South
Wales (1986) 107 referring to the equivalent provisions under the now repealed Associations
and Incorporations Act 1984 (NSW).
26 Associations Incorporation Act 1981 (Qld) ss6-13.
27 Associations Incorporation Act 1981 (Qld) s6.
28 Associations Incorporation Regulation 1999 (Qld) reg 8; sch 4. The Regulation is hereafter
referred to as the AI Regulation.
29 Associations Incorporation Regulation 1999 (Qld) reg 7.
30 Associations Incorporation Regulation 1999 (Qld) sch 3; Keith Fletcher, ‘Not-for-profit
31 Ibid 235.
Not-for-profit associations that elect to register under the AI Act obtain a number of benefits. More specifically, an incorporated association is a body corporate with perpetual succession that may sue or be sued in its own corporate name. It is a separate legal entity with all the powers of an individual such that it has the legal capacity to enter into contracts, own property without appointing trustees, and issue debentures. The debts and liabilities of an incorporated association are enforceable against the association itself. The members of the incorporated association and its management committee are generally not personally liable for such obligations except as provided in the rules of the incorporated association. Under the model rules, the personal liability of the association’s members is impliedly limited to the amount of their annual membership.

Not-for-profit associations that elect to register under the AI Act also attract a number of corresponding obligations. For example, associations must comply with various provisions in the AI Act which regulate their administration such as the requirements relating to general meetings of an association, financial reporting requirements, and requirements relating to the operation of the management committee.

A principal purpose of the AI Act from its inception was to permit not-for-profit associations to gain corporate status and avoid some of the disadvantages of the common law governing unincorporated associations.

The AI Act from its inception was also designed to provide not-for-profit associations with an uncomplicated and economical incorporation and regulatory system that takes account of the interests of members, creditors and the public. Indeed, the Queensland Law Reform Commission in its extensive report on 'a Draft Associations Incorporation Act' stated that 'it is one of the objects of the proposed legislation to provide a system of registration and regulation which is less complex and less onerous than the Companies Act'. However, in practice it is doubtful whether the legislation prior to the AIA Act achieved this object. While direct costs of incorporation have remained inexpensive, costs in the form of mandatory insurance, audit, and other

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32 Explanatory Notes, see above n 6, 3.
33 Associations Incorporation Act 1981 (Qld) s21.
34 Associations Incorporation Act 1981 (Qld) s25(1).
35 Associations Incorporation Act 1981 (Qld) s25(2)(a).
36 Associations Incorporation Act 1981 (Qld) s25(2)(b).
37 Associations Incorporation Act 1981 (Qld) s25(3).
38 Associations Incorporation Act 1981 (Qld) s27.
39 Associations Incorporation Regulation 1999 (Qld) reg 8, sch 4.
40 Explanatory Notes, see above n 6, 1.
41 Associations Incorporation Act 1981 (Qld) pt 6 div 1.
42 Associations Incorporation Act 1981 (Qld) pt 6 div 2.
43 Associations Incorporation Act 1981 (Qld) pt 7 div 2.
45 Baxt, Fletcher and Fridman, see above n 9, [2.49].
46 Queensland Law Reform Commission, see above n 44, 10.
47 Baxt, Fletcher and Fridman, see above n 9, [2.49].
48 Queensland Government, see above n 5, 8; Sievers, see above n 11, 10; Fletcher, see above n 30, 234.
49 Associations Incorporation Act 1981 (Qld) Former s70.
50 Associations Incorporation Act 1981 (Qld) Former s59.
reporting requirements have meant that incorporation has not always been economically desirable.\footnote{Baxt, Fletcher and Fridman, see above n 9, [2.49].}

The AI Act imposes more obstacles in respect of continuing governmental regulation on association freedom of action than associations’ incorporation legislation in some other Australian jurisdictions.\footnote{Fletcher, see above n 30, 235.} For example, an incorporated association may amend its rules by special resolution but any amendment must also be approved for registration by the chief executive of the OFT.\footnote{Associations Incorporation Act 1981 (Qld) s48.} For this reason the AI Act has been described as adopting a more paternalistic or interventionist approach with regard to an association’s internal affairs when compared with the flexibility of this other legislation.\footnote{Sievers, see above n 10, 315; McGregor-Lowndes, see above n 10, 18; Fletcher, see above n 10, 22.}

Australian associations’ incorporation legislation, including the AI Act, exhibits a number of major deficiencies. Firstly, there is generally a lack of legislative uniformity across the jurisdictions.\footnote{Sievers, see above n 11, 3, 10; O’Donnell and Doyle, see above n 11, 2.} This exists because the incorporation and regulation of not-for-profit associations have always been considered to be primarily matters for state and territory governments who have been motivated principally by local rather than national policy issues.\footnote{Sievers, see above n 11, 3, 6.} Consequently, it has been suggested that in relation to the AI Act the Queensland legislature should as a minimum follow the legislative approach of other jurisdictions unless there is some good reason to differ.\footnote{Ibid.} Secondly, there is a lack of mutual recognition across the jurisdictions.\footnote{McGregor-Lowndes, see above n 10, 11.} These two deficiencies make it complicated for not-for-profit associations that have a national focus to employ this corporate form to perform activities in more than one Australian jurisdiction.\footnote{O’Donnell and Doyle, see above n 11, 2.} Consequently, incorporated associations cannot undertake such activities unless they use the statutory procedure under Part 5B.2 of the Corporations Act for registration as a Registrable Australian Body.\footnote{Ibid 2, 3.} Thirdly, unlike the regulatory regime under the Corporations Act, legislatures have sometimes assigned comparatively little significance to ensuring that this legislation has a proper foundation in principle or policy.\footnote{Ibid.}

Despite the deficiencies of the AI Act, the preference for most not-for-profit associations has been to incorporate under it rather than under the Corporations Act.\footnote{Sievers, see above n 11, 3.} This is because it presents a specialist low cost incorporation service with paramount protection for members of the association and its management committee.\footnote{Fletcher, see above n 30, 234; Sievers, see above n 11, 10; Queensland Government, see above n 5, 8.}

In Queensland, there are about 20,000 registered associations.\footnote{Fletcher, see above n 30, 234.} They range from associations with a small membership and insignificant assets to associations that are licensed clubs staffed by professional managers with an annual financial turnover of millions of dollars a year, substantial assets and thousands of members.\footnote{Queensland Government, see above n 5, 8; Explanatory Notes, see above n 6, 1.}
A company limited by guarantee is a registered company formed on the principle of having the liability of its members limited to the respective amounts that they have undertaken to contribute to the property of the company in the event of its insolvent winding up.66 The application form for incorporation must state the amount of the guarantee that each member agrees to in writing.67 Usually, this is only a nominal amount.68 For example, in the case of The Royal Automobile Club of Queensland Ltd69 the specified amount is $20 per member.70

A company limited by guarantee has no power to issue share capital.71 Consequently, it has a membership rather than shareholders.72 There is no injection of working capital when the company is incorporated or when new members are admitted.73 For this reason this “form of incorporation is very suitable for not-for-profit associations”74 but not for commercial enterprises.75

The inability of a company limited by guarantee to raise initial working capital from its members means that it relies on funding from external sources such as membership subscriptions, public donations, government grants, or loans from outsiders.76 However, a company limited by guarantee can still be an important community body that operates a very substantial undertaking of a commercial and profit making nature. For example, RACQ Ltd for the financial year ended 31 December 2007 operated through at least 7 controlled entities, including a number of wholly owned subsidiary companies,77 to produce a net profit after tax and after making adequate provision for depreciation and all known contingencies of $62.4 million.78

A company limited by guarantee must incorporate as a public company because it lacks a share capital.79 Not-for-profit associations that elect to register under the Corporations Act obtain all the benefits of other companies capable of being registered under the Act. Two key benefits may be mentioned. Firstly, once a company limited by guarantee is registered it comes into existence as a body corporate.80 More specifically, it has the legal capacity and powers of an individual81 such that it has a plenary power to perform basic juristic acts such as entering into contracts and disposing of property. A company limited by guarantee also has the powers of a body corporate except for the power relating to the issue of share capital.82 For example, it has the power to distribute any of the company’s

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66 Corporations Act 2001 (Cth) s9; s517.
67 Corporations Act 2001 (Cth) s117(2)(m).
68 Queensland Government, see above n 5, 12.
69 Hereafter referred to as RACQ Ltd
71 Corporations Act 2001 (Cth) s124(1).
72 Queensland Government, see above n 5, 12.
73 Tony Ciro and Christopher Symes, Corporations Law in Principle (8th edn, 2009) [2.220].
74 Sievers, see above n 10, 313.
75 Ciro and Symes, see above n 73, [2.220].
76 Roman Tomasic, Stephen Bottomley and Rob Mc Queen, Corporations Law in Australia (2nd ed, 2002) 174.
77 The Royal Automobile Club of Queensland Ltd, see above n 70, 41-42.
78 Ibid 18.
79 Corporations Act 2001 (Cth) s112(1).
80 Corporations Act 2001 (Cth) s119.
81 Corporations Act 2001 (Cth) s124 (1).
82 Corporations Act 2001 (Cth) s124 (1).
property among the members in kind or otherwise. While it has this latter power of distribution, it does not have the conduit of share capital for distributing the company’s earnings to the company’s members. This is another reason that this corporate structure is particularly appropriate for not-for-profit activities. Secondly, once a company limited by guarantee is registered it may expand its activities throughout Australia.

Not-for-profit associations that elect to register under the Corporations Act also attract a number of corresponding obligations. For example, companies limited by guarantee are subject to the requirements that apply to public companies under the Corporations Act of appointing a secretary and holding an annual general meeting. They are also subject to a three tiered differential financial reporting framework.

While the company limited by guarantee provides a suitable corporate structure for not-for-profit associations, it is not a preferred option. There are a number of reasons for this. Firstly, a company limited by guarantee must, as a limited public company, have the word ‘Limited’ or ‘Ltd’ at the end of its name. Consequently, apart from one exception of narrow ambit, a not-for-profit association is unable to adopt a corporate structure that distinguishes its not-for-profit status from a normal commercial or trading company. Secondly, there is the cost of incorporation and of ongoing administration. It costs more to incorporate a company limited by guarantee than an incorporated association. Additionally, a company limited by guarantee is subject to higher ongoing costs for operating than an incorporated association because it is subject to more regulation. Thirdly, the Corporations Act as a regulatory structure generally makes no special provision for not-for-profit associations. In contrast to the AI Act, it is designed to regulate companies formed for the purpose of making financial profits for their members so that it is an innately unsuitable regulatory structure for many not-for-profit organisations. However, the Corporations Act does adopt a less prescriptive approach with regard to a company’s internal affairs than the AI Act so it is of particular significance to those not-for-profit associations that place a paramount value on preserving self-governing autonomy.

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83 Corporations Act 2001 (Cth) s124(1)(d); However, companies limited by guarantee incorporated on or after 28 June 2010 are now prohibited from paying a dividend to members: Corporations Act 2001 (Cth) s254SA; s1510B(1A).
84 Queensland Government, see above n 5, 12.
85 Fletcher, see above n 30, 239.
86 Corporations Act 2001 (Cth) s204A (2).
87 Corporations Act 2001 (Cth) s250N.
88 Corporations Act 2001 (Cth) s45B; s285A.
89 Fletcher, see above n 30, 239.
90 Corporations Act 2001 (Cth) s148(2); s149(1).
91 Corporations Act 2001 (Cth) s150.
92 Fletcher, see above n 30, 239; Sievers, see above n 10, 318-19.
93 Fletcher, see above n 10, 20; Presently, an application for incorporating an association under the AI Act is $90.60: Associations Incorporation Regulation 1999 (Qld) reg 17, sch 6 Item 1; An application to register a company limited by guarantee under the Corporations Act is $330: Corporations (Fees) Regulations 2001 (Cth) sch 1 Item 5(a)(ii).
94 O’Donnell and Doyle, see above n 11, 3.
95 Fletcher, see above n 30, 238. Only the three tiered differential financial reporting framework recognises the not-for-profit nature of companies limited by guarantee. See the Corporations Act 2001(Cth) s45B; s285A.
96 Sievers, see above n 10, 321; Corkery and Welling, see above n 12, 29.
97 Fletcher, see above n 10, 20.
98 Fletcher, see above n 30, 239.
As at January 2010, there were about 11,700 companies limited by guarantee registered under the Corporations Act with about 99% of these being not-for-profit organisations. A large proportion of these companies are relatively small.

III PUBLIC LIABILITY INSURANCE

Public liability insurance protects an insured against claims brought by third parties in respect of personal injury or property damage that may arise out of the activities of the insured. It is insurance under which the insurer agrees to indemnify the insured for the legal liability owed to the third parties who suffer any such loss or damage.

A Associations Incorporation Act 1981(Qld)

1 The Former Statutory Position

The former s 70 of the AI Act provided that on receiving a certificate of incorporation, the members of the management committee were required to ensure that the incorporated association took out insurance and kept it current at all times ‘in respect of damage to property, death or bodily injury occurring upon the property of the incorporated association’ for a cover of at least $1.1 million. If the provision was not complied with then each member of the management committee was liable for a criminal penalty unless the member proved that he or she took all reasonable steps to ensure compliance with the provision.

The term ‘property’ used in the former s 70 was not defined in the AI Act. The Acts Interpretation Act 1954 (Qld) defines the term widely as ‘any legal or equitable estate or interest ... in real or personal property of any description.’ While some commentary appeared to suggest that the former s 70 was restricted to activities on an association’s premises, this definition gave the former s 70 a wide ambit such that it was not restricted to interests in real property.

The purpose of the former s 70 is to be found in the second reading speech of the Minister for Justice and Attorney General in relation to the Associations Incorporation Bill 1981(Qld). The Minister referred to the benefits that incorporation would provide to associations and members of such associations having regard to the uncertainties that...
had arisen under the common law in respect of unincorporated associations.\(^{109}\) The Minister then referred to those provisions of the Act that associations would be required to comply with to regulate the running of the associations in return for such benefits.\(^{110}\) One of those requirements was the ‘compulsory taking out of public liability insurance’.\(^{111}\) The Minister concluded in the final paragraphs of the speech as follows:

> In return for the benefits incorporation shall have for those associations, they shall be required to comply with those provisions of the Bill to regulate the running of the associations, which provisions are for the benefit of the members and the community at large.\(^ {112}\)

While the purpose of the provision was clearly one having its genesis in providing some protection to members against financial risk\(^ {113}\) and in protecting the public interest it is useful to note that no such provision was contemplated by the Queensland Law Reform Commission in its extensive report on ‘a Draft Associations Incorporation Act’.\(^ {114}\)

The effect of the provision was that where any party dealing with an association made a claim in tort against it in respect of damage to property, death or bodily injury occurring upon the property of the incorporated association the claimant was able to claim on the assets of the association including the public liability insurance that was required to be taken out.\(^ {115}\)

The OFT consultation paper recognised that were five issues relating to this statutory provision.\(^ {116}\) Firstly, associations were increasingly incapable of getting insurance, due to the price of premiums and/or cover no longer being obtainable. Secondly, the OFT was impeded in its enforcement of this provision as less significant organisations became incapable of complying with it due to the problems and costs connected with gaining cover. Thirdly, any amount selected for the obligatory insurance level was random and there was no connection between the recognized risks confronting an association and the value of insurance that it was compelled to maintain. Fourthly, the provision did not require insurance cover for all risks that might confront an association, its members, its staff as well as members of the public such as those risks relating to fraud, theft, professional negligence and workplace health and safety and discrimination legislation. Fifthly, the provision only extended to incidents ‘occurring upon the property of the incorporated association’. Consequently, it was restricted to those associations which held property whereas associations that did not hold property could also be confronted with risk.\(^ {117}\)

The OFT consultation paper canvassed three options in relation to this statutory position.\(^ {118}\) Firstly, there were to be no amendments to the requirements for insurance. Secondly, the AI Act should compel all associations to obtain comprehensive public

\(^{109}\) Ibid 1031-32.

\(^{110}\) Ibid 1032.

\(^{111}\) Ibid.

\(^{112}\) Ibid.

\(^{113}\) Queensland Government, see above n 5, 15.

\(^{114}\) Queensland Law Reform Commission, see above n 44.


\(^{116}\) Queensland Government, see above n 5, 15.

\(^{117}\) Mary Westcott, ‘Reform of the Associations Incorporation Act 1981’ (Research Brief No 2005/25, Queensland Parliamentary Library, 2005) 7; See also Mc Gregor- Lowndes, see above n 10, 15.

\(^{118}\) Queensland Government, see above n 5, 16.
liability insurance. Thirdly, the AI Act should compel all associations to undertake a risk assessment and take out insurance cover suitable to the risk identified.119

2 The Current Statutory Position

A key policy objective of the AIA Act was to address the matter of mandatory public liability insurance in view of the issues raised in the OFT consultation paper in relation to the former statutory position.120

The AIA Act jettisoned the former s 70 insurance requirements.121 It removed the mandatory requirement for incorporated associations to take out public liability insurance122 except for those associations specified in s 70A. It enacted a new s 70 that specifies the steps the management committee of an association must take in considering the need to take out public liability insurance.123

(a) Section 70 — Public Liability Insurance Generally

The current s 70 requires an association’s management committee to examine the need to take out public liability insurance and give an account of its decision to all members and notify specified parties that might be affected.124 These requirements are to have the policy outcome of raising association members’ consciousness in relation to the association’s public liability insurance status and issues relating to it.125

The specific requirements of s 70 are as follows. The management committee of an incorporated association must at least annually consider whether there is a need for the association to take out public liability insurance.126 It must then report its decision to the association’s members at its next annual general meeting.127 If the management committee decides there is no need to take out public liability insurance it must at the annual general meeting provide members with reasons for its decision and advise them that the association’s assets would be at risk if there is a successful claim against the association.128 The management committee must ensure that before a person becomes a member of the association or before a person is appointed as a member of the management committee that person must be advised as to whether or not the association has public liability insurance and if it does the amount of the insurance.129 The management committee must also ensure that any person with whom the association may have dealings and which could be expected to have an interest in knowing whether or not the association has public liability insurance is advised if the association does not have public liability insurance.130 These requirements are, however, subject to s 70A.131 A note to s 70 states that ‘this section imposes obligations on a management committee but does not impose any criminal penalties in relation to breaches of those obligations’.

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119 See also, Mc Gregor-Lowndes, see above n 10, 15.
120 Explanatory Notes, see above n 6, 3.
121 Explanatory Notes, see above n 6, 22.
122 Ibid 3.
123 Ibid 22.
124 Ibid 3.
125 Ibid.
126 Associations Incorporation Act 1981 (Qld) s70(1).
127 Associations Incorporation Act 1981 (Qld) s70(2).
128 Associations Incorporation Act 1981 (Qld) s70(3).
129 Associations Incorporation Act 1981 (Qld) s70(4).
130 Associations Incorporation Act 1981 (Qld) s70(5).
131 Associations Incorporation Act 1981 (Qld) s70(6).
(b) Section 70A – Particular Incorporated Associations Must Have Public Liability Insurance

Section 70A preserves the compulsory public liability insurance requirement in the case of particular incorporated associations. Firstly, it is preserved in the case of associations that own or lease land. The stated policy rationale for this is that these associations are commonly more substantial associations that would ordinarily obtain public liability insurance as a consequence of performing a risk assessment of the need for such cover. Secondly, it is retained in the case of associations that hold land on trust under the Land Act 1994 (Qld). The stated policy rationale for this retention is that in the case of these associations this requirement was fundamental to the basis upon which such land was granted. Such associations hold the land on trust to manage it because it is public land owned by the State such as parks and heritage and recreation reserves that are used for community purposes.

The specific requirements of s 70A are as follows. If an incorporated association is an owner of land, a lessee of land or a trustee of trust land under the Land Act 1994 (Qld) then the members of the management committee must ensure that the association takes out public liability insurance in relation to the land in an amount decided by the management committee and that the insurance cover is kept current at all times. If the provision is not complied with then each member of the management committee is liable for a criminal penalty unless the member proves that he or she took all reasonable steps to ensure compliance with the provision.

B Associations Incorporation Legislation in Other Australian Jurisdictions

There are no public liability insurance requirements in the associations’ incorporation legislation of other Australian jurisdictions. However, it is instructive to consider the history of the legislative position in the jurisdiction of New South Wales.

In New South Wales, Part 6 of the Associations Incorporation Act 1984 (NSW) dealt with insurance. Section 44 required an incorporated association to have such insurance against a liability of the association as might be required by the regulations for an amount not less than the amount required by the regulations. Section 44 further provided that the regulations could require an incorporated association to have public liability insurance. Section 45 of the Act stated that s 44 did not operate if the members of the association were each liable to contribute in a winding up of the association to an amount which was not less than the amount of the cover required under the section in respect of the liability.

Prior to 10 May 2002, incorporated associations were required to maintain public liability insurance. The Associations Incorporation Regulation 1999 (NSW) regulation 14 provided that, unless exempted by s 45 of the Act, an incorporated association had to effect and maintain public liability insurance with an approved insurer for a cover of at least $2 million. Additionally, the rules set out in schedule 1 of the regulation that

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132 Explanatory Notes, see above n 6, 3, 24.
133 Ibid.
134 McGregor-Lowndes, Paltridge and Mack, see above n 14, 8.
135 Associations Incorporation Act 1981 (Qld) s70A (1), (2).
136 Associations Incorporation Act 1981 (Qld) s70A (2).
137 Associations Incorporation Act 1981 (Qld) s70A (3).
138 Associations Incorporation Act 1984 (NSW) ss42-45.
139 Associations Incorporation Act 1984 (NSW) s44(1).
140 Associations Incorporation Act 1984 (NSW) s44(2).
141 Associations Incorporation Act 1984 (NSW) s45.
were prescribed as model rules for the purposes of the Act\textsuperscript{142} provided in rule 34 that
the ‘association must effect and maintain insurance under s 44 of the Act’.\textsuperscript{143}

An information document issued by the Department of Fair Trading (NSW) suggested that the policy rationale for the requirement of public liability insurance was as follows:

The public liability insurance ensures that an incorporated association has some
capacity to meet liabilities arising from an injury or damage to a person or property for
which the association is legally responsible. It also ensures the people who are
involved in activities organised by the incorporated association can be compensated
for an injury or damage they sustain because of the activities of the association.\textsuperscript{144}

Consequently, public liability insurance was said to provide ‘organisations with
protection against losses that they may suffer as a result of future events, and ensures
consumers and other members of the public are protected if they suffer loss or
injury’.\textsuperscript{145} Further, it was said that ‘being properly insured could therefore benefit the
whole community’.\textsuperscript{146}

On 10 May 2002, the \textit{Associations Incorporation Regulation 1999 (NSW)} was
amended to abolish the statutory obligation of associations to undertake and maintain
public liability insurance. The regulation was amended by the \textit{Associations Incorporation
Amendment (Public Liability) Regulation 2002 (NSW)} by the omission of regulation 14.
Additionally, the model rules in schedule 1 of the regulation were amended by the
omission of rule 34 and its replacement with a new rule. The replacement rule provided
that an ‘association may effect and maintain insurance’.\textsuperscript{147}

An information document issued by the Department of Fair Trading (NSW) prior
to the amendment provided some indication of its policy rationale. It stated as follows:

The New South Wales government is aware that some community… groups are facing
difficulties in relation to public liability insurance policies. These difficulties include
significant increases in premiums, decreased availability of certain types of insurance
cover, and slow processing of applications for some compulsory cover. A small
number of services have been unable to obtain insurance at all.\textsuperscript{148}

Subsequently, the \textit{Associations Incorporation Act 2009 (NSW)} was passed by the
New South Wales Parliament and it commenced by proclamation on 1 July 2010.\textsuperscript{149} It
repealed the \textit{Associations Incorporation Act 1984 (NSW)} and the \textit{Associations
Incorporation Regulation 1999 (NSW)}.\textsuperscript{150} The new Act has no equivalent of the
insurance provisions in Part 6 of the \textit{Associations Incorporation Act 1984 (NSW)}. It is
revealed in the Minister’s Second Reading speech to the \textit{Associations Incorporation Bill
2009 (NSW)} that it was intended to repeal these redundant provisions given that

\textsuperscript{142} \textit{Associations Incorporation Act 1984 (NSW)} s19(2)(b); \textit{Associations Incorporation
Regulation 1999 (NSW)} reg 9.
\textsuperscript{143} \textit{Associations Incorporation Regulation 1999 (NSW)} r 34 (1).
\textsuperscript{144} New South Wales Government, Department of Commerce Office of Fair Trading, ‘Public
Liability Insurance Information for Non-Government Organisations’ (date unknown) 3.
\textsuperscript{145} Ibid 2.
\textsuperscript{146} Ibid 2.
\textsuperscript{147} \textit{Associations Incorporation Regulation 1999 (NSW)} r 34.
\textsuperscript{148} New South Wales Government, see above n 144, 2.
\textsuperscript{149} \textit{Association Incorporation Act 2009 (NSW)} s2; Commencement Proclamation 2010, No 237
LW 11.6.2010.
\textsuperscript{150} \textit{Association Incorporation Act 2009 (NSW)} s108.
amendments to the regulations in 2002 had already removed any legislative requirement to hold public liability insurance.151

C Corporations Act 2001 (Cth)

The Corporations Act contains no public liability insurance requirements for companies generally or companies limited by guarantee in particular. The Corporations Act does, however, contain provisions that regulate various types of insurance contract. For example, there are provisions that relate to directors’ and other officers indemnity insurance.152 These provisions apply to all companies whether public or proprietary and whether commercial or not-for-profit.153 They therefore apply to companies limited by guarantee.

Under the Corporations Act regime, a company, including a company limited by guarantee, must therefore consider insurance cover, including public liability insurance, as part of a comprehensive risk management program or strategy.

D Critical Analysis of the Current Statutory Position relating to Public Liability Insurance

The former s 70 of the AI Act adopted the position of mandatory public liability insurance.

The current statutory regime has resiled from the position of mandatory public liability insurance except in the case of those associations specified in s 70A. In the case of all other associations, s70 of the AI Act requires the management committee to undertake a risk assessment of the need to take out public liability insurance and give an account of its decision to all members as well as notify interested third parties if insurance is not taken out.

1 Issue of Interpretation and Policy of the Provisions

The current statutory regime largely addresses the issues identified by the OFT consultation paper in relation to the former s 70 both in respect to its drafting and in respect to its practical operation. However, it does have deficiencies of its own.154

(a) Section 70 Deficiencies

In relation to s 70 there are deficiencies with respect to the interpretation of the provision.

Firstly, the specific requirements of s 70 focus on the ‘need’ for an association to take out public liability insurance.155 On a literal interpretation the need decision might be restricted to an assessment of the likelihood of the association attracting legal liability and the ability of the association to satisfy a claim for damages rather than broader issues such as whether an association has sufficient funds to pay for premiums or whether insurance is available.156

152 Corporations Act 2001 (Cth) ss199B, C.
154 McGregor-Lowndes, Paltridge and Mack, see above n 14, 4-12.
155 Associations Incorporation Act 1981 (Qld) s70(1).
156 McGregor-Lowndes, Paltridge and Mack, see above n 14, 9.
Secondly, s 70 is a ‘one size fits all’ provision.\textsuperscript{157} If the management committee decides there is no need to take out public liability insurance, it is required to advise members in terms of the legislation ‘that the failure to take out public liability insurance means that the association’s assets would be at risk if there were a successful claim against the association’.\textsuperscript{158} This is so even though it believes on good grounds that the statement is deceptive or perhaps even inaccurate because the association has engaged in risk management strategies such that the association’s assets would not be at risk if there were a successful claim against the association.\textsuperscript{159}

Thirdly, s 70 does not impose any criminal sanction or civil liability upon a non-complying association or management committee in relation to its breach. S 70 does not explain what effects arise from a contravention of its provisions. Nor does s 70 explain how the OFT is to enforce it given that it contains no specific provision that requires a management committee to issue a notice of compliance to the OFT.

An incorporated association that contravenes the requirements of s 70 may nonetheless be subject to some sanctions enforceable by the chief executive of the OFT. Firstly, the association may be liable to have its incorporation cancelled under the AI Act. One ground of cancellation is where the chief executive has reasonable cause to believe that circumstances exist, which in the public interest, justify its cancellation.\textsuperscript{160} Secondly, it may ground a case for winding up the association by the Supreme Court, on application made by the chief executive or a member of the association,\textsuperscript{161} where it is of the opinion that it is just and equitable to do so.\textsuperscript{162} Under the Corporations Act a company may be wound up, on application by ASIC\textsuperscript{163} or a contributory,\textsuperscript{164} including a member, under a corresponding provision. The ‘just and equitable’ ground under s 461(k) of the Corporations Act confers upon the Court a very wide discretion.\textsuperscript{165} There is case law decided under this provision that, on the application of ASIC, it is just and equitable to wind up a company on the basis that it is in the public interest where there is a failure by a company to comply with its statutory and constitutional requirements\textsuperscript{166} including where there are regular or repeated threatened breaches of the Corporations Act.\textsuperscript{167} In practical terms, it is likely that these sanctions will only be pursued by the OFT in the context of s 70 where there has been an appropriate complaint by the membership of an association.

Section 70 is also deficient in respect of its underlying policy analysis. The policy rationale of raising association members’ consciousness in relation to an association’s public liability insurance status is achieved by compelling the management committee of the association to undertake a risk assessment of the need to take out such insurance. No consideration was given to the achievement of this policy objective through the adoption of a self-regulatory approach. This is so even though a research brief provided by the Queensland Parliamentary Library noted that insurance was ‘not mentioned in most other

\begin{itemize}
  \item 157 Ibid 10.
  \item 158 Associations Incorporation Act 1981 (Qld) s70(1).
  \item 159 McGregor-Lowndes, Paltridge and Mack, see above n 14, 10.
  \item 160 Associations Incorporation Act 1981 (Qld) s93(1)(e), (2).
  \item 161 Associations Incorporation Act 1981 (Qld) s90(2).
  \item 162 Associations Incorporation Act 1981 (Qld) s90(1)(e).
  \item 163 Corporations Act 2001 (Cth) s462(2)(c).
  \item 164 Corporations Act 2001 (Cth) s462(2)(c). ‘Contributory’ is defined in s9.
  \item 165 Lock v John Blackwood Ltd [1924] AC 783.
  \item 166 Australian Securities and Investments Commission v Barrack Mortgage Managers Pty Ltd [1999] NSWSC 272; Australian Securities and Investments Commission v Drury Management Pty Ltd [2004] QSC 068.
\end{itemize}
jurisdictions incorporated associations’ legislation\textsuperscript{168} and that the New South Wales legislative regime relating to insurance at that time was a discretionary one.\textsuperscript{169}

(b) Section 70A Deficiencies

In relation to s 70A there are also deficiencies in respect of interpretation. Firstly, there are no provisions detailing the nature of the public liability insurance, such as scope or exclusions, to be undertaken by the relevant associations.\textsuperscript{170} Consequently, where the terms of a policy are narrowly drafted or contain extensive exclusions then it would provide limited social utility.\textsuperscript{171} Secondly, s 70A could be readily circumvented by the use of the mechanism of a closely controlled property holding entity.\textsuperscript{172} An association that is an owner or lessee of land could assign its interest in the land to another entity closely controlled by it and then enter into an agreement for a simple licence to use the property.\textsuperscript{173}

Section 70A is also deficient in respect of its underlying policy analysis. Firstly, the policy rationale for requiring those associations that own or lease land to compulsorily take out public liability insurance is illogical given the compliance costs for them and the regulatory costs of enforcement for the OFT when such associations are likely to take out the insurance either voluntarily or at the instance of a landlord.\textsuperscript{174} Secondly, the policy rationale for requiring associations that hold land on trust under the \textit{Land Act 1994 (Qld)}\textsuperscript{175} to compulsorily take out public liability insurance appears misconceived.\textsuperscript{176} There is no reference either in the second reading speech of the Minister launching the Land Bill 1994 (Qld)\textsuperscript{177} or in the explanatory notes to it\textsuperscript{178} that mandatory public liability insurance is fundamental to the granting of deeds in trust.\textsuperscript{179}

2 Key Object of an Uncomplicated and Economical Regulatory System Taking Account of the Interests of Members, Creditors and the Public

While the stated policy rationale of the former s 70 of the AI Act was to provide some protection for members of incorporated associations against financial risk and to protect the public interest, it did not meet one of the key objects of the original legislation of providing not-for-profit associations with an uncomplicated and economical regulatory system. In particular, it imposed a set of compliance costs that were inimical to the economical desirability of incorporation under the AI Act.

The current statutory regime largely meets this key object. While it has been asserted that ‘the main changes have simplified the…public liability insurance requirements for many of the 20,000 registered associations in Queensland’,\textsuperscript{180} the regime retains an element of complexity in that the management committee of an

\textsuperscript{168} Westcott, see above n 117, 14.
\textsuperscript{169} Ibid.
\textsuperscript{170} McGregor-Lowndes, Paltridge and Mack, see above n 14, 7.
\textsuperscript{171} Ibid.
\textsuperscript{172} Ibid 12.
\textsuperscript{173} Ibid 8.
\textsuperscript{174} Ibid 7.
\textsuperscript{175} Ibid.
\textsuperscript{176} Queensland, \textit{Parliamentary} Debates, Legislative Assembly, 16 November 1994, 10407.
\textsuperscript{177} Explanatory Notes, Land Bill 1994 (Qld) 7-11.
\textsuperscript{178} McGregor-Lowndes, Paltridge and Mack, see above n 14, 7.
association must consider on a continuing basis whether any person with whom it may have dealings could be expected to have an interest in knowing that the association does not have public liability insurance. The regime also undoubtedly imposes its own set of compliance costs. However, the more onerous compliance costs of mandatory insurance are now borne by the more substantial associations that are specified in s 70A. In the case of all other associations, the compliance costs of the s 70 requirements are less onerous. These arise from the obligations on the management committee to notify intending members and management committee members as well as interested third parties of the association’s public liability insurance status. It is doubtful that the compliance costs of the current statutory regime are inimical to the economical desirability of incorporation under the AI Act.

3 Issue of a Paternalistic Approach

The former s70 of the AI Act was one based on an interventionist approach. While the OFT consultation paper canvassed three options in relation to the former statutory position, the Queensland Legislature did not adopt any of these approaches. The final approach adopted by the legislature is less interventionist than the three options canvassed. However, it is still one that has its genesis in paternalism. The explanatory notes to the Associations Incorporation And Other Legislation Amendment Bill 2006 state that the s 70 requirements provide a protective measure that establishes an exacting level of accountability in relation to public liability insurance. While the policy rationale for retaining mandatory public liability insurance under S 70A in the case of associations that own or lease land is that they are commonly more substantial associations that would ordinarily obtain public liability insurance as a consequence of performing a risk assessment of the need for such cover, the legislature has nonetheless adopted a protective stance. Undoubtedly, this protective stance has its genesis in the further policy rationale of the former s 70 of the protection of members and of the public interest. However, this paternalistic approach stands in sharp contrast to the self-regulatory approach applicable to not-for-profit associations under associations’ incorporation legislation of other Australian jurisdictions and under the Corporations Act.

4 Issue of Uniformity with Associations’ Incorporation Legislation in Other Australian Jurisdictions

The former s 70 of the AI Act adopted an approach that, after 10 May 2002, was not mirrored in the associations’ incorporation legislation of any other Australian jurisdiction.

The current statutory regime does not adopt a legislative position that is reflected in associations’ incorporation legislation in any other Australian jurisdiction. Perhaps even more relevant is that the AIA Act did not follow the approach adopted by the New South Wales legislature whereby it resiled from a statutory position of mandatory public liability insurance in favour of a self regulatory approach. The New South Wales legislature adopted this approach to address issues similar to those identified by the OFT consultation paper in relation to the practical operation of the former s 70 of the AI Act.

180 Cf, McGregor-Lowndes, Paltridge and Mack, see above n 14, 10-11.
181 Queensland Government, see above n 5, 16.
182 Hereafter referred to as the AIA Bill.
183 Explanatory Notes, see above n 6, 3.
184 Ibid 22.
185 Ibid 3, 24.
It is suggested that the Queensland legislature could have met the key policy objective of the AIA Act of addressing the matter of mandatory public liability insurance, in view of the issues raised by the OFT consultation paper in relation to the former s 70, by adopting the self-regulatory approach that applies under associations’ incorporation legislation in other Australian jurisdictions.

It is clear that the more specific policy objective of the current s 70 of raising association members’ consciousness in relation to the association’s public liability insurance status is not a policy objective under associations’ incorporation legislation in other Australian jurisdictions. It is suggested that in some of these jurisdictions the issue of an association’s public liability insurance status is one that is intentionally left to the association itself as part of the development of a comprehensive risk management strategy. It is also suggested that in these jurisdictions the regulator of the relevant legislation plays a pivotal role in terms of providing information and guidance.

It is clear from previous discussion that the stated policy grounds of retaining public liability insurance in the case of those associations specified in s 70A are deficient. It is suggested that the Queensland legislature has not demonstrated any good reason of policy or principle to justify its departure from the uniform approach adopted in all other Australian jurisdictions.

5 Issue of Influence of the Corporations Act

The statutory regime relating to public liability insurance under the AI Act is clearly not influenced by the legislative approach that applies to companies limited by guarantee under the Corporations Act. Specifically, the requirement under s 70A of the AI Act for those associations that own or lease or hold land on trust under the *Land Act 1994* (Qld) to compulsorily take out public liability insurance is clearly inconsistent with the treatment of companies limited by guarantee under the Corporations Act. This inconsistency is explicable to some extent given that the Corporations Act is designed to regulate companies formed for the purpose of making financial profits for their members rather than not-for-profit associations. However, it remains a very concerning anomaly in the Australian legislative framework given that those incorporated associations that own or lease land are generally, like companies limited by guarantee, the more substantial associations.

The lack of influence of the Corporations Act legislative scheme in this context is not surprising when it is considered that no reference was made to it by the OFT consultation paper, the Queensland Parliamentary Library research brief or the explanatory notes to the AIA Bill.

6 Effectiveness in Dealing with a Risk of Public Liability

It has already been noted that associations incorporated under the AI Act range from associations with a small membership and insignificant assets to associations with large annual financial turnovers, substantial assets and thousands of members. It follows that each incorporated association has disparate insurance requirements. The issue of whether an association should obtain public liability insurance is in part

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187 Ibid.
188 McGregor-Lowndes, Paltridge and Mack, see above n 14, 7.
189 Ibid.
190 Queensland Government, see above n 5.
191 Westcott, see above n 117.
regulated by the nature of the particular activities undertaken by the association. In addition, in some cases, a financial institution that provides financial assistance to an incorporated association will require the association to have particular minimum levels of insurance cover including public liability cover.193

As a general principle, public liability insurance is fundamental for the future viability of most incorporated associations.194 If there is successful litigation against an incorporated association by an injured member or member of the public as a consequence of the negligent actions of an association member, it could be plunged into insolvency.195 Notwithstanding this, some incorporated associations in jurisdictions such as Queensland, New South Wales and Western Australia have been faced in the past with the practical consideration that public liability insurance has not been attainable.

Public liability insurance is not, however, the only means of managing risks that face an incorporated association. Alternatively, an incorporated association may develop a comprehensive risk management program or strategy.196 'Risk management' is an expression used to explain a formal and structured procedure of identifying and managing risk.197 Ordinarily it involves assessing, and then actively managing, an organisation's likely exposure to loss, damage or litigation.198 The risk management strategy would include the following basic steps:199 identification of risks; evaluation of the risks to determine the probability of a loss and the extent or severity of the loss; the design of a risk management program including the adoption of such risk strategies as risk avoidance, risk control, risk financing and risk transfer; and implementation and review of the strategy by the management committee or a dedicated sub-committee. This strategy has been effectively utilised by many associations disconcerted about their exposure to risks.200 It is evident then that purchasing insurance is only one component of a risk management program.201 It may also not be the most efficient and effective means of dealing with a risk of public liability particularly where insurance is unattainable or too expensive or too limited in its scope. It may be more risk efficient, for example, to transfer the risk to a third party by the contracting of a particular high risk activity to an expert independent contractor203 or to finance the risk by gaining an indemnity from another party for any liability.204 Additionally, while a public liability insurance policy provides compensation for loss after the event it does nothing positive to prevent harm to members of an association and the public.205

It is therefore suggested that the public liability insurance provisions under the AI Act are not the most efficient and effective form of dealing with a risk of public liability.206 Those associations specified in s 70A are compelled to take out public

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193 Government of Western Australia, see above n 101, [12.1].
194 Caxton legal centre inc, see above n 192, [10-200].
195 Ibid.
196 Ibid. [10-100].
197 Government of Western Australia, see above n 101, [12.5].
198 Ibid.
199 Caxton legal centre inc, see above n 192, [10-500]-[10-560]; Government of Western Australia, see above n 101, [12.5.1].
200 Caxton legal centre inc, see above n 192, [10-100].
201 Government of Western Australia, see above n 101, [12.5].
202 Caxton legal centre inc, see above n 192, [10-100]; McGregor-Lowndes, Paltridge and Mack, see above n 14, 9.
203 Caxton legal centre inc, see above n 192, [10-553]; McGregor-Lowndes, Paltridge and Mack, see above n 14, 10.
204 McGregor-Lowndes, Paltridge and Mack, see above n 14, 10.
205 Ibid 5.
206 Ibid 5,9,11.
liability insurance. In the case of all other associations, s70 of the AI Act requires the management committee to undertake a risk assessment of the need to take out public liability insurance.

Australian associations’ incorporation legislation, apart from Queensland, makes no specific provision in relation to public liability insurance. It is suggested that at least some of this legislation intentionally adopts a self-regulatory approach having its genesis in the underlying policy rationale or premise that incorporated associations will consider taking up public liability insurance, if attainable, as part of developing a risk management program.

This underlying premise is correct if the regulator of the relevant associations’ incorporation legislation adopts, as a minimum, a policy of encouraging incorporated associations to actively investigate risk management strategies to ascertain the most efficient and effective form of dealing with a risk of public liability of which public liability insurance may only be one component.

This underlying premise is confirmed by the approach of relevant regulators of associations’ incorporation legislation in some jurisdictions. One example is to be found on the website of the New South Wales Government Office of Fair Trading. It states that after the removal of the statutory obligation to effect public liability insurance, the question of whether an association should obtain such insurance “is now one for the association to make, taking into account relevant risk factors”. 207 It also refers associations to the New South Wales Council of Social Service as a body that “undertakes an insurance program to assist non-government community service organisations to identify their insurance and risk management needs”. 208 A second example is to be found on the website of the West Australian Government Department of Consumer and Employment Protection. In a publication entitled ‘INC. A Guide for Incorporated Associations in Western Australia’, 209 there is a chapter on ‘Insurance and Risk Management’. It states that ‘buying insurance is one part, but not the only part, of a risk management programme’ 210 and that ‘in many cases, effective practical strategies for reducing risk... can work together with insurance to reduce risk exposure’. 211 It refers to a government publication called ‘Can you risk it? – An introduction to risk management for community organisations’ which encourages active risk management by community organisations. 212 It then sets out and explains the basic steps involved in the process of managing an incorporated association’s risks. 213 It concludes with a number of hints and key points including that an incorporated association should ‘undertake regular risk management to identify, assess and manage risks’ 214 and that it ‘should have a proper risk management program’. 215

It is suggested that this self-regulatory approach provides a far more efficient and effective means of dealing with a risk of public liability. It could only be improved upon if the relevant regulator provides a best practice statement regarding the development of a risk management program that includes a reference to the risk of public liability.

At a more general level, this self-regulatory approach is consistent with the statements and recommendations of recent inquiries into the not-for-profit sector by the Senate Standing Committee on Economics and the Productivity Commission.

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207 New South Wales Government, see above n 102.
208 Ibid.
209 Government of Western Australia, see above n 101.
210 Ibid [12.1].
211 Ibid.[12.5].
212 Ibid [12.5.1].
213 Ibid [12.6].
214 Ibid [12.7].
In December 2008, the Senate Standing Committee on Economics delivered its report on ‘Disclosure regimes for charities and not-for-profit organisations’. Under its terms of reference, the Committee undertook an examination into the Australian not-for-profit sector with particular reference to: ‘(a) the... appropriateness of current disclosure regimes for charities and all other not-for-profit organisations; (b) models of regulation... that would improve governance and management of [such] organisations...; and (c) other measures that can be taken by government and the not-for-profit sector to assist the sector to improve governance, standards, accountability and transparency in its use of public and government funds’. 216

The Committee considered that the regulatory system for not-for-profit organisations was unduly complex given the existence of legislation and regulations across Australian jurisdictions lacking a coordinated approach. 217 The committee believed that this formed a significant barrier to transparency and accountability of such organisations.218 Additionally, the Committee expressed its concern over the existence of multiple regulators. 219

The Committee believed that there is a place for voluntary codes or standards developed by some industry associations and peak bodies within a new system of regulation.220 However, it considered that the not-for-profit sector required more than a system of self-regulation through compliance with voluntary codes or standards.221 It recommended that there be regulation of not-for-profit organisations by a single independent national regulator.222 It recommended that the duties of the regulator should as a minimum cover a number of specified functions including the development of best practice standards for the operation of not-for-profit organisations and the provision of education and advice to such organisations on these best practice standards.223

In January 2010, the Productivity Commission delivered its report on the ‘Contribution of the Not-for-Profit Sector’. Under its terms of reference, the Committee undertook a research study on the contributions of the not-for-profit sector with a focus in part ‘on removing obstacles to maximising its contributions to society’.224 In undertaking the study, the Commission was in part to ‘identify unnecessary burdens or impediments to the efficient and effective operation of community organisations generally, including unnecessary or ineffective regulatory requirements and governance arrangements...’225 and to identify the measures needed to improve their productivity.226

The Commission recognised that the regulatory framework for not-for-profit organisations is characterised by uncoordinated regimes at the Commonwealth and state/territory levels.227 It acknowledged that this produces disparate reporting and other requirements that lead to complexity, a lack of coherence and sufficient transparency for the public, and an imposition of relatively high compliance costs, especially for smaller incorporated organisations and those operating in more than one jurisdiction. 228

217 Ibid 1.9, 3.18.
218 Ibid 1.9, 3.18, 5.38.
219 Ibid 5.38.
220 Ibid 5.12.
221 Ibid 5.38.
222 Ibid 5.39, 5.46.
223 Ibid 6.36.
225 Ibid v.
226 Ibid xxv, 1.
227 Ibid 113.
228 Ibid xxiii, xxxiii,113, 114, 147.
The Commission considered a role for self-regulation among not-for-profit organisations. It considered that self-regulation instead of government regulation could often be a more adaptable and a less onerous way to make regulation more customized to relevant parts of the not-for-profit sector and to provide quality assurance to stakeholders.\(^\text{229}\) It believed that there is merit in considering the suitability of self-regulation, on a case-by-case basis, to deal with issues where government regulation is an option.\(^\text{230}\) It acknowledged that not-for-profit organisations ‘should be encouraged to develop and implement codes of conduct and other self-regulatory regimes where these would enhance public trust and confidence in their activities’.\(^\text{231}\)

The Commission recommended the establishment of a national ‘one-stop-shop’ for Commonwealth regulation by consolidating various regulatory functions into a new national Registrar for Community and Charitable Purpose Organisations in order to improve and consolidate regulatory oversight and enhance accountability to the public.\(^\text{232}\) It recommended that the Registrar should undertake a number of key functions including the provision of appropriate guidance in relation to governance matters.\(^\text{233}\) Additionally, in the context of improving arrangements for effective sector development, the Commission recommended that State and Territory governments should reassess their full array of support for sector development to improve the efficacy of such measures, and strengthen strategic focus, including on: improving the knowledge of management committees and their capacity to meet the governance requirements for not-for-profit organisations; and building skills in evaluation and risk management of management committees.\(^\text{234}\)

IV CONCLUSION

A key policy objective of the AIA Act was to address the issue of mandatory public liability insurance. In enacting the current statutory provisions relating to public liability insurance, the Queensland legislature undoubtedly made a genuine attempt at ensuring that it had a proper foundation in principle and in policy.

The current statutory regime has generally resiled from the position of mandatory public liability insurance in addressing the issues raised by the OFT consultation paper. The provisions do, however, exhibit their own deficiencies in respect of interpretation and underlying policy analysis.

The current statutory regime largely meets one of the key objects of the original legislation of providing not-for-profit associations with an uncomplicated and economical regulatory system that takes account of the interests of members, creditors and the public. It cannot, however, be described as lacking all complexity. Further, it has its own set of compliance costs. However, these costs are not inimical to the economical desirability of incorporation under the AI Act.

The current statutory regime is still one that maintains a protective stance. While it is less interventionist than the former statutory position and the three options canvassed by the OFT consultation paper, it is still one having its genesis in paternalism.

The current statutory regime does not adopt a legislative approach that is uniform with other Australian associations’ incorporation legislation. All of this legislation adopts a self-regulatory approach. Some of it is based on the underlying policy or premise that

\(^\text{229}\) Ibid 146.
\(^\text{230}\) Ibid 146.
\(^\text{231}\) Ibid 113.
\(^\text{232}\) Ibid xxxiii, xxxvi, xliii, 152. (Recommendation 6.5)
\(^\text{233}\) Ibid xliii, 152. (Recommendation 6.5)
\(^\text{234}\) Ibid xlvii, 237. (Recommendation 9.2)
incorporated associations will consider the need for public liability insurance as part of a comprehensive risk management program.

The current statutory regime, particularly s 70A, is clearly inconsistent with the treatment of companies limited by guarantee under the Corporations Act.

While the writer accepts the general principle that public liability insurance is fundamental for the future viability of most community organisations, there is no good reason of principle or policy to justify the Queensland legislature’s departure from the self-regulatory approach to public liability insurance that applies under associations’ incorporation legislation in all other Australian jurisdictions. This approach would accord with the statutory position originally contemplated by the Queensland Law Reform Commission in its extensive report on ‘a Draft Associations Incorporation Act’.235 This approach would meet the key object of the original legislation of providing not-for-profit associations with an uncomplicated and economical regulatory system that takes account of the interests of members, creditors and the public. Compliance costs would be nil such that there would be no impediment to the economical desirability of incorporation under the AI Act. This approach would eschew the paternalism that has traditionally been a trait of this legislation. It would also provide a legislative approach that is uniform with other Australian associations’ incorporation legislation and the Corporations Act in relation to the issue of public liability insurance. This approach is consistent with the statements and recommendations of recent inquiries into the not-for-profit sector by the Senate Standing Committee on Economics and the Productivity Commission. This approach would also allow the OFT, through the use of a best practice statement, to promote the alternative policy objective of persuading incorporated associations to actively investigate a risk management strategy or program to ascertain the most efficient and effective form of dealing with a risk of public liability.

In conclusion, the writer takes the view that the public liability insurance regime for associations incorporated under the AI Act is aptly described by the words ‘same old instrument same old tune’.

235 Queensland Law Reform Commission, see above n 44.