

## CLUB INCORPORATION – A TWO-EDGED SWORD

Incorporation of a club is indeed a two-edged sword. If the incorporation is handled properly it provides the ultimate protection for club members. If, at any time, it is handled carelessly or improperly, it not only exposes the members to many new areas of liability but substantially weakens the protection they incorporated to avoid in the first place.

Unfortunately, the law and processes relating to club incorporation, are not widely understood and have been frequently replaced by mythology. Most widespread of the myths are those hoary old chestnuts, “if nothing has gone wrong so far it must be ok” and “if anything needs fixing don’t worry, the government will tell us what to do”. Neither, of course, is correct. There are many thousands of incorporated clubs in Australia and the task of ensuring that each is structured properly and operates within the law is far beyond the capacity of the registries which conduct the process. Indeed, some states make no attempt to do so. They register whatever is lodged with them while making it clear through their enabling legislation that the responsibility for ‘getting it right’ lies totally on the shoulders of the club and its members.

Take some obvious examples. All Rotary clubs by law must ‘approve’ Council on Legislation amendments by special resolution at a general meeting of which 21 days’ notice must be given. But that counts for nothing unless the club also lodges a notice of the amendments with the appropriate registry within a specified time of the approval. Many will not do so, indeed, many have never done so. If a club fails to register amendments to its rules then those amendments have no force or effect; it is as if they have never been made. But the appropriate registry has no knowledge of this failure and will consequently do nothing to rectify it. The fact that the amendments have no force or effect will not become apparent until someone sues the club and its members, by which time it is too late to do much about it.

Another myth has it that some state registries sort out all the “problems” of incorporated Rotary clubs on their own initiative and on an ‘across the board’ basis. In other words, that all Rotary has to do is acquaint the registry with an issue and it will be taken care of. This is simply not the case. Rotary is well respected but still regarded by the state/territory registries as their single largest ‘problem’. Rotary clubs are not singled out for prosecution but this does nothing to ‘cure’ the flaws that have developed in their rules. That may occur when somebody takes advantage of one of the flaws for the purpose of suing the club and its members.

Many clubs believe they can incorporate using the “model rules” provided under most State/Territory legislation but subsequently use the rotary documents (constitution and bylaws) as their constitutional documents just as they did when they were unincorporated. This is clearly unlawful. It is also dangerous. Just think, if the club has to expel one of its members, which set of rules will apply? Whichever is chosen it is almost certain to be held by a court to be the wrong one. Courts are not impressed by incorporated clubs using the equivalent of ‘two sets of books’.

Many Rotary clubs incorporate by the simple expediency of submitting their by laws as their incorporated rules. This completely ignores Rotary’s standard club constitution as the club’s key constitutional document and leaves the way open for anyone (a member or a third party) to claim that its provisions are therefore irrelevant. Think what problems this would cause if applied in the process of court action.

In most States/Territories there is a provision that automatically inserts into an incorporated club’s rules the provisions of the model rules of that State/Territory in respect of any issue that is not covered in the club’s rules. This means that a club’s rules may in fact differ considerably from what its members have registered without the members having any knowledge that this has occurred, at least until legal action commences.

Finally there is ‘the amendment’ that members of any organisation like to make to correct, what appears to them, to be an error in the text of the club’s rules, whether in fact it is or not. So often this occurs without anyone reading the document involved to see if the amendment conflicts with one or more other parts of the existing text. The result in so many cases is to do more harm than good. These are only examples to which many more examples could be added if space permitted.

And there is another side to the matter as well. RI must always be consulted whenever a club incorporates and produces a set of rules for that purpose or subsequently amends those rules either by adding Council on Legislation amendments or its own. Rotary is a world wide organisation and, as I have come to learn from twice representing D9800 on the Council on Legislation, its governing body cannot afford to let the rules of individual clubs get out of line because it is those rules that legally constitute a contract between the members and the club and between both the club and its members and RI. So unless your club’s rules and all the amendments to it have been approved by RI they are not worth much at all.

In the club I belong to – Werribee, we had a set of rules, and by-laws developed for us by Ross Blair of McKean & Park a firm of Melbourne lawyers, in fact we were the first club to ask him to do so. That form is now available to clubs in all states and territories in Australia because it is designed to comply with the eight separate Acts that apply. Yes we have to pay for the service but we can be certain that the problems I have commented on have been avoided. We also have the normal protection afforded to those dealing with members of the legal profession. McKean & Park's website [www.mckeanpark.com.au](http://www.mckeanpark.com.au) contains full details.

PDG Ian Knight  
2007 District 9800 CoL Representative