

Changes to legislation governing associations incorporated in NSW

Legal information for NSW incorporated associations



This fact sheet covers:

- recent changes to the Incorporated Associations legislation, and
- the significance of those changes.

In NSW, the process of setting up an incorporated association is set out in the *Associations Incorporation Act 2009* (NSW) and its regulation.

The *Associations Incorporation Act 2009* (NSW) (the **Act**) and the *Associations Incorporation Regulation 2016* (NSW) (the **Regulation**) establishes the framework and regulation for not-for-profit organisations. It allows associations to incorporate as a separate legal entity.

1. Recent changes to the Associations Incorporation legislation

A review of the Act was undertaken in 2015 (**Review**) and all the recommendations of that Review were adopted in the amendments which took effect 1 September 2016. The *Associations Incorporated Regulation 2010* (NSW) was repealed and remade under the *Associations Incorporated Regulation 2016* (NSW), which also commenced on 1 September 2016.

The changes to the association laws include:

- amendments to **address requirements**
- amendments to provisions relating to the **association's name**
- amendments to the **additional information** required for the **registration** of an association
- amendments to provisions relating to the **Model Constitution**
- inclusion of new **duties and liability of committee members**
- changes to **fees**
- provision of **electronic ballot**
- new **winding up** provisions
- amendments to provisions relating to **cancellation of the registration** of an association, and
- other changes.

The key changes are explained below.

1.1 Address requirements

An association must now have an address in New South Wales:

- at which the public officer of the association can be generally found, and
- at which documents can be served on the association by post (section 6(4) of the Act).

Documents may be served on the association by post, but if the ‘Secretary’ (see ‘*Caution*’ box below) suspects that the official address is no longer in use, in some circumstances, the Secretary may:

- send the document to another address, or
- send the document by email to an email address,

that appears to be used by the association.

There were practical problems with the previous address requirements for an association which allowed an association’s official address to be ‘any premises used by the association’. This resulted in mainly unattended locations or premises being nominated as an address for the association. The recent change seeks to alleviate this problem by requiring an address where the public officer of the association can generally be found. Moreover, if the nominated address is not satisfactory or no longer relevant, the Secretary now has the power to determine an alternate address for service.

If the current official address does not satisfy the requirements, associations must update their official address or risk the Secretary nominating another address or an email address.

CAUTION

References (in the Act and the Regulation) to the ‘Director-General’ have been replaced with the ‘Secretary’. This is not to be confused with a committee member of an incorporated association who may bear the title of a ‘secretary’.

‘Secretary’, in the Act, is defined as:

- a) the Commissioner for Fair Trading, Department of Finance, Services and Innovation, or
- b) if there is no such position in the Department, the Secretary of the Department.



1.2 Association’s name

An application for registration can no longer be refused if the name of the association has not been reserved, but may still be refused if the name is unacceptable. If a direction is issued by the Secretary mandating a change in the association’s name, failure to do so may cause the association’s name to be changed to its registration number. The Secretary must give notice of this fact in the direction to the association. See section 11(3) of the Act.

These recent changes ease the previous restrictions relating to an association’s name. Associations have the option to reserve a name. As this is discretionary, the Review found that failure to reserve a name should not be grounds for the refusal of an application for registration. There is now an alternative to cancellation of the registration of an association on the basis of an unacceptable name. If an association fails to comply with an order from the Secretary to change its name, the Secretary may cause the name of the association to change to its registration number. This will allow the association to continue its operations but may cause practical difficulties for the association. Associations should note that registration may still be cancelled if a direction to change names is not complied with.

The types of unacceptable names have expanded to include:

- a name that is identical to, or closely resembles, the name of a criminal organisation or declared organisation within the meaning of the *Crimes (Criminal Organisations Control) Act 2012* (Cth), and
- a name that suggests a connection with a local council or local authority.

The scope for an unacceptable name, being one that is identical to or closely resembling a business name registered under the *Business Names Act 2002* (Cth), now excludes instances where the applicant for the registration of the association was the one who has registered the identical or closely resembling business name and where the public is not likely to be misled. For the full list of unacceptable names, see Schedule 2 of the Regulation.

1.3 Additional information in an application for registration

The additional information necessary in an application for the registration of an association has changed to require only the **most relevant and up to date financial information** of the proposed association. The application must now include the financial statement for the financial year before the application and an estimate of the association's income and expenditure for the financial year in which the application is made, instead of financial statements for the last two financial years.

1.4 Model Constitution

If an association adopts all the provisions of the Model Constitution in Schedule 1 of the Regulation (**Model Constitution**) without modification, a statement to that effect must be provided when making an application for registration. If associations are looking to become incorporated under the Act, they must expressly state whether or not the provisions of the Model Constitution will apply (section 6(3)(d) of the Act).

A general statement has now been included in the Act which says that if an association's constitution adopts *all* of the provisions of the Model Constitution without modification (by reference or by reproducing the provisions) the provisions (the Model Constitution) are taken to be the associations constitution.

Any legislative amendments made to the provisions of the Model Constitution will apply automatically to any association's constitution if:

- that association has adopted the Model Constitution in its entirety, or
- the matter in the relevant amended provision has not been addressed in the association's constitution (in which case the Model Constitution provisions with respect of that matter are taken to be part of the association's constitution).

The amendments will apply without need for any other action by or on behalf of the association or its members or by or on behalf of the Secretary (i.e. no need for a special resolution, registration of change or an application) (section 25(4) of the Act). This provision applies to associations registered before the commencement of this provision. Previously, a legislative change to the Model Constitution would not have automatically been incorporated in the association's constitution, but would have required actions such as special resolutions or the submission of a registration of change of the constitution.

The provision for automatic updates in an association's constitution will maintain the currency of the Model Constitution and reduce administrative costs and time on the part of the association. Automatic updates also mean there will be less confusion as to which version of the Model Constitution applies to an association. However, an association which adopts all or part of the Model Constitution must keep up to date with any changes that are made to the Model Constitution and ensure that none of its practices or conduct breach the constitution.

1.4.1 Additional matters to be addressed in association's constitution

The following additional matters now have to be considered in an association's constitution:

- the maximum number of consecutive terms of office to be served by any office-bearer on the committee
- the types of resolutions that may be voted on by electronic ballot, and
- the winding up of the association.

If an association does not address any of the three matters above, or any other matter listed in Schedule 1 of the Act generally, the provisions of the Model Constitution with respect to that matter will be taken to be automatically form part of the association's constitution.

1.5 Duties and liabilities of committee members

The effect of incorporation means that generally committee members are not liable in relation to the association's liabilities and the winding up of the association. The recent amendments expressly provide for this limitation of liability, subject to certain provisions in the Act.

The legislation also provides that committee members must carry out their functions:

- for the **benefit**, so far as practicable, of the association, and
- with due care and diligence (section 30A).

If a matter or thing is done, or omitted to be done by a committee member (or by a person acting under the direction of a committee member), it does not, if the matter or thing was done or omitted to be done in **good faith** for the purpose of exercising the committee member's functions under the Act, subject that committee member (or person so acting) personally to any action, liability, claim or demand. This amendment secures the existing common law position on the duties of committee members, which includes the duty to act in good faith and with due care and diligence. For further information on the duties of committee members, see Not-for-profit Law's Duties Guide: Guide to the legal duties of not-for-profit committee members, directors and office holders on the Information Hub at www.nfplaw.org.au/governance.

1.6 Changes to fees

For one year from 1 September 2016, any association wishing to update its constitution as a result of the amendments to the legislation will not have to pay a fee to register the change.

Fee changes have also occurred. Fees for lodging an annual financial return has been reduced for Tier 2 associations and increased for Tier 1. For more information on other changes to the



RELATED RESOURCES

Changes to the fee schedule and a breakdown of the fees are available on the Associations fees page on the Fair Trading [website](#).

fees, refer to Schedule 5 of the Regulations.

1.7 Electronic ballot voting

An ordinary or special resolution of the association may be conducted through an electronic ballot. If a type of resolution may be voted on using electronic ballot, it must be specified in the association's constitution. This allows members from remote areas to vote and participate in the association's operation with greater ease. Schedule 3 of the Regulation sets out how electronic ballots must be conducted.

1.8 Winding up provisions

A new division with respect to winding up has been inserted in the Act. It provides an avenue for the Secretary to wind up the association under a section 61A certificate. The Secretary may issue the certificate if:

- the association ceases operation
- the association ceases to have 5 or more members
- the association's committee has not been able to form a quorum for 2 months, or
- the Secretary is satisfied that there is a significant public interest in winding up, or that not winding up the association may place public funds at risk (section 61A(1) of the Act).

NOTE

Winding up starts when the certificate is given.
A winding up under the certificate is a voluntary winding up, but section 490 of the *Corporations Act 2001* (Cth) does not apply.

Before the certificate is given, a notice of the proposed certificate and the grounds on which the certificate is given must be provided to the association. The association will have at least 28 days to make submissions to the Secretary in relation to the proposed certificate (section 61A(2) of the Act).

This winding up division is a significant change to the law of associations. In instances where there is ongoing litigation against an association, a cancellation of registration is not appropriate. The winding up provisions provide an alternative to cancellation and allow for the appointment of a liquidator. In light of these amendments, an association must consider the impact of the winding up clauses on its operations and decide whether to accept or reject the new Model Constitution provisions.

Liquidator

The Secretary may:

- appoint a liquidator on the giving of a certificate under s 61A
- fix the security to be given by a liquidator, and
- fix the fees payable to a liquidator.

A vacancy in the office of the liquidator is to be filled by a person appointed by the Secretary.

NOTE

A decision by the Secretary to give a certificate under s 61A is reviewable by the NSW Civil and Administrative Tribunal for an administrative review under the Administrative Decisions Review Act 1997 (NSW). However an association may not request an internal review of the decision as the internal review provision in the Administrative Decisions Review Act (s 53) does not apply to a decision under s 61A.



1.9 Cancellation of registration

There have been two key changes in relation to the cancellation of registration of an association. Firstly, in an application for cancellation, a statutory declaration by one committee member is required declaring that the association has no outstanding liabilities is sufficient (section 72(2)(c) of the Act). Previously, a statutory declaration of two committee members was required to be provided.

Secondly, the Secretary now has an additional power to cancel an association's registration if he or she is satisfied it is in the public's interest to cancel it (section 76(1)(k) of the Act). This means that the Secretary may cancel an association's registration in cases, for example, of misleading or deceptive conduct.

1.10 Other changes

The following are some of the other key changes:

- An association must now **keep each record and minute** required to be kept under section 50 of the Act and keep each record **for no less than 5 years** after it was made (section 14(1) of the Regulation). If the records and minutes are kept in electronic form, they must be convertible into hard copy which must be made available within a reasonable time to a person who is entitled to inspect the records (section 14(2) of the Regulation).
- The Regulation declares the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) as a **corresponding law** for the purposes of the Act (section 4 of the Regulation). This amendment will enable an association to transfer its incorporation to that Act.
- Previously, **written evidence** was required from an association's **funding body** that they had been advised of a **proposed transfer**. This is no longer required.
- The definition of an **authorised officer** has expanded to include an investigator under the *Fair Trading Act 1987* (NSW) to exercise the powers and obligations of an authorised officer under the Act.

2. Changes to the Model Constitution

Clauses	Associations Incorporation Regulation 2010	Associations Incorporation Regulation 2016
Membership generally	A person had to be nominated to become a member of an association.	It is sufficient if a person applies and is approved for membership.
Application for membership	Nomination had to be in writing and in the form set out in the regulation.	Application must be in writing (including by email or other electronic means) in the form determined by the committee.
Register of members	The public officer of the association must establish and maintain a register of members specifying the name and postal or residential address.	The secretary of the association must establish and maintain a register of members specifying the name and postal, residential or email address, and the date on which the person became a member
Composition and membership of committee	Committee member to hold office until the conclusion of the annual general meeting following the date of the committee member's election, but is eligible for re-election.	There is no maximum number of consecutive terms for which a committee member (including office-bearers) may hold office.
Appointment of association members as committee members to constitute quorum	No similar provisions.	<p>If the number of committee members is less than the number required for a quorum, the existing committee members may appoint a sufficient number of members of the association as committee members to enable the quorum to be constituted.</p> <p>Under this provision, a member so appointed will hold office until the next annual general meeting following the date of the appointment.</p> <p>This clause does not apply to the filling of a casual vacancy under clause 18 of Model Constitution.</p>
Allowances for technology	No similar provisions.	<p>Allowances for technology have been made throughout the Model Constitution. For example technology may be used at general meetings. If technology is used, the process for making decisions is no longer limited to a show of hands, but can be made in another way determined by the committee. Please see the Model Constitution for a more detailed understanding of allowances for technology.</p>
Association is non-profit	No similar provisions.	The association must apply its funds and assets solely in pursuance of the objects of the

		association and must not conduct its affairs so as to provide a pecuniary gain for any of its members.
Distribution of property on winding up of association	No similar provisions.	On the winding up of the association, any surplus property of the association is to be transferred to another organisation with similar objects and which is not carried on for the profit or gain of its individual members. Surplus property is property remaining after satisfaction of the association's debts and liabilities and the expenses relating to winding up. See section 65 of the Act for more details.
Custody of books etc	The public officer must keep in his or her custody or under his or her control all records, books and other documents relating to the association.	All records, books and other documents relating to the association must be kept in NSW, either at the main premises, in the custody of the public officer or a member of the association (as the committee determines) or, if there is no main premises, at the official address in the custody of the public officer.
Refusal to inspect records etc	No similar provisions.	The committee may refuse to permit a member of the association to inspect or obtain a copy of records of the association that relate to confidential, personal, employment, commercial or legal matters or where to do so may be prejudicial to the interests of the association.

CHECKLIST

- Check the legislative changes made to the Model Constitution.
- Consider the topic in section 1.4.1 '*Additional matters to be addressed in the association's constitution*' (This may apply whether or not the Model Constitution currently applies to your association).
- If the changes are acceptable, circulate a document with the updated constitution of the association. If the changes are not acceptable, make the necessary changes in accordance with the association's constitution. Please note any association wishing to update its constitution as a result of the amendments to the legislation will not have to pay a fee to register the change until 1 September 2017.
- Check to see whether the official address for the association complies with the new requirements, otherwise update the official address.
- Ensure that the members of the association are aware of the recent legislative amendments. Consider circulating this fact sheet amongst members.

Resources

Related Resources

The Not-for-profit Law Information Hub at www.nfplaw.org.au has a variety of resources on the following related topics:

✔ [Toolkits – www.nfplaw.org.au/secretaryguide](http://www.nfplaw.org.au/secretaryguide)

This page features a comprehensive guide for running NSW incorporated associations.

✔ [Checklist – www.nfplaw.org.au/constitution](http://www.nfplaw.org.au/constitution)

This is a checklist of the items that must be addressed in an association's constitution. If any of the items in the checklist are not covered by the association's constitution, the Model constitution will apply.

Legislation

✔ [Associations Incorporation Act 2009 \(NSW\)](#)

This is the legislation that governs the setting up and running of an incorporated association in New South Wales.

✔ [Associations Incorporation Regulation 2016 \(NSW\)](#)

This is the regulation that governs the setting up and running of an incorporated association in New South Wales. The Model Constitution is set out in Schedule 1 of the Regulation.

Other resources

✔ [Fair Trading – Running an association](#)

This page contains resources to assist those running not-for-profit organisations to understand and comply with legal requirements.

✔ [Fair Trading – Incorporated associations](#)

Visit the incorporated associations section of the Fair Trading website for information on how to become, manage or close an incorporated association.

✔ [Fair Trading – Summary of changes to the Model Constitution](#)

NSW Fair Trading has also compiled their own table, outlining the main changes to the Model Constitution following the recent reforms.

✔ [Fair Trading – Changes to the associations incorporation laws](#)

Fair Trading's website summarises the recent changes made to the incorporated associations legislation.

✔ [Fair Trading - Associations fees](#)

This page breaks down the different fees payable by an association.

A Not-for-profit Law Information Hub resource. Access more resources at www.nfplaw.org.au. Justice Connect Not-for-profit Law acknowledges the generous support of our funders and supporters. Find out more at www.nfplaw.org.au

© 2017 Justice Connect. You may download, display, print and reproduce this material for your personal use, or non-commercial use within your not-for-profit organisation, so long as you attribute Justice Connect as author and retain this and other copyright notices. You may not modify this resource. Apart from any use permitted under the *Copyright Act 1968* (Cth), all other rights are reserved.

To request permission from Justice Connect to use this material, contact Justice Connect at PO Box 16013, Collins Street West, Melbourne 8007, or email nfplaw@justiceconnect.org.au.