

# Changes to legislation governing associations incorporated in NSW

Legal information for NSW incorporated associations

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## This fact sheet covers:

- ▶ changes to the Incorporated Associations legislation made in 2016, and
  - ▶ the significance of those changes
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In NSW, the process of setting up an incorporated association is set out in the *Associations Incorporation Act 2009* (NSW) (the **Act**) and the *Associations Incorporation Regulation 2016* (NSW) (the **Regulation**).

## Changes to the associations incorporation legislation made in 2016

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 The *Associations Incorporated Regulation 2010* (NSW) was repealed and remade under the *Associations Incorporated Regulation 2016* (NSW), which also commenced on 1 September 2016.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

## 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 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:

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

## 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.

Changing the name of the association to its registration number allows the association to continue its operations, but may cause practical difficulties. 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.

## 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.

## 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 want to be incorporated under the Act, they must expressly state whether 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* 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 association's 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 the need for any other action by or on behalf of the association or its members or by or on behalf of the Secretary (ie. 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 this provision came into effect. 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 about 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.

## Additional matters to be addressed in association's constitution

The following additional matters now must 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 doesn't 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.

## 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 2016 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 thing is done or omitted by a committee member (or by a person acting under the direction of a committee member), it does not, if the thing was done or omitted 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.

### Related Not-for-profit Law resource

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](#).

## Changes to fees

There was a one year grace period between 1 September 2016 and 1 September 2017 for any association wishing to update its constitution as a result of the amendments where such fees would be waived. This grace period has now expired.

Fees have also changed. Fees for lodging an annual financial return have been reduced for Tier 2 associations and increased for Tier 1. For more information on other changes to the fees, refer to Schedule 5 of the Regulations.

### Related resource

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

## 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.

### Note – temporary COVID-19 measures

Until 26 September 2020, incorporated associations may:

- conduct committee meetings and general meetings using technology, and
- pass ordinary and special resolutions by either postal or electronic ballot even if this isn't stipulated in their constitutions

See [Fair Trading NSW's website](#) for more information.

## 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 five or more members
- the association's committee has not been able to form a quorum for two 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)

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. Considering these amendments, an association must pay attention to 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.

## Cancellation of registration

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

Second, the Secretary now has an additional power to cancel an association's registration if they are satisfied it's 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.

## 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 **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

## Changes to the Model Constitution

Clauses	Associations Incorporation Regulation 2010	Associations Incorporation Regulation 2016
<b>Membership generally</b>	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.
<b>Application for membership</b>	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.
<b>Register of members</b>	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
<b>Composition and membership of committee</b>	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.
<b>Appointment of association members as committee members to constitute quorum</b>	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 further 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>
<b>Allowances for technology</b>	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> <p> Also note any temporary measures legislated during the COVID-19 outbreak. See <a href="#">Fair Trading NSW's website</a> for more information.</p>
<b>Association is non-profit</b>	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 to provide a pecuniary gain for any of its members.
<b>Distribution of property</b>	No similar provisions.	On the winding up of the association, any surplus property of the association is to be



<b>on winding up of association</b>		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.
<b>Custody of books etc.</b>	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 are no main premises, at the official address in the custody of the public officer.
<b>Refusal to inspect records etc.</b>	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 '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. **Note** – any association that wants to update its constitution as a result of the amendments to the legislation must pay a fee to register the change following the expiry of the grace period on 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 2016 legislative amendments. Consider circulating this fact sheet among members.

# Resources

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## Not-for-profit Law resources

▶ [Toolkits](#)

This page contains a number of comprehensive guides for running NSW incorporated associations.

▶ [Checklist](#)

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 changes made to the incorporated associations legislation.

▶ [Fair Trading - Associations fees](#)

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