



Council of Social Service of New South Wales

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Associations Incorporation Regulation 2009
Fair Trading Policy
Department of Services, Technology & Administration
policy@services.nsw.gov.au

19th February 2010

Dear Madam/Sir

Re: Associations Incorporation Regulation 2009 – Public Consultation Draft

NCOSS welcomes the opportunity to comment on the draft Regulations under the *Associations Incorporation Act 2009* ("The Act"). Attached are the recommendations and suggestions NCOSS makes to inform the final version of the regulations.

In addition, we are also seeking further clarification on a number of the provisions and proposed model rules contained within the draft.

For further information, please contact:

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Yours Faithfully,

Alison Peters
Director

Associations Incorporation Regulation 2009.
Under the Association Incorporation Act 2009

Comments on the public consultation draft

About NCOSS and the NSW Human Services NGO Sector

The Council of Social Service of NSW (NCOSS) is an independent non-government organisation (NGO) and the peak body for the non-government human services sector in NSW.

NCOSS has a vision of a society where there is social and economic equity, based on cooperation, participation, sustainability and respect. NCOSS works with its members on behalf of disadvantaged people and communities towards achieving social justice in New South Wales.

Established in 1935, NCOSS is part of a national network of Councils of Social Service, which operate in each State and Territory and at the national level.

NCOSS membership is composed of community organisations and interested individuals. Through current membership forums, NCOSS represents more than 7,000 community organisations and over 100,000 consumers and individuals. Member organisations are diverse; including unfunded self-help groups, children's services, registered training authorities, emergency relief agencies, chronic illness and community care organisations, family support agencies, housing and homeless services, mental health, alcohol and other drug organisations, local indigenous community organisations, church groups, peak organisations and a range of population-specific consumer advocacy agencies.

Sector Development at NCOSS

The NCOSS Sector Development Unit works to comprehensively support the sector to effectively operationalise its social justice objectives and values. We aim to proactively enable and resource the development of a high quality and effective community sector through industry services, advocacy, research and policy development.

The major goals of the Sector Development Unit are to:

- 1: Support and resource the ongoing development of a high quality and effective community sector.
- 2: Positively influence key government policies that impact on the sustainability, capacity and vitality of the community sector.

Given our direct role in improving the sustainability and vitality of the non government human services sector, NCOSS has a significant investment in the Associations

Incorporation Regulation 2009. Of the 37,000 registered associations in New South Wales, approximately 6,400 are part of our sector. An effective and supportive regulatory framework is essential to these organisations; one that is aligned to the needs of contemporary NGOs and the critical role of most of them in delivering essential services on behalf of Governments and promoting social inclusion at community, regional and state levels.

General Comment.

The impacts and potential application of the new Act and associated regulations, on those associations incorporated under the Associations *Incorporation Act of 1984* (the “previous Act”) remains unclear.

Section 4 of Schedule 4 to the Act states:

4: Rules of existing associations

(1) The rules of a former association are taken to be its constitution under this Act and, until the former association changes them under this Act, are taken to comply with the requirements of this Act.

(2) To the extent to which a former association adopted the model rules established under the 1984 Act, and until it changes its rules under this Act, those model rules continue in force in relation to that association.

This could be interpreted to mean that once an association makes *any* change to its constitution, then the provisions of the new Act will be activated in relation to the content of its rules.

Consequently if an association has its own set of rules (or a modified version of the model rules that has been lodged with the Office of Fair Trading) then making even a minor change would mean that those rules will have to fulfill the requirements of the new Act. There could be unintended consequences of introducing a new provision from the new model rules into the association’s constitution. The reason for this is that section 10(4) of the new Act requires all associations to address each of the matters referred to in Schedule 1. While largely the same, there are variations, for example the kinds of resolutions that may be voted on by postal ballot.

The other possible effect would be where an association’s current constitution fails to address matters required under the previous Act. At present, any deficiencies are filled by the provisions in the old model rules. This would continue to be the case after the commencement of the new Act until such time as the association changed its rules. At that point the deficiencies (and only the deficiencies) would be filled by the provisions in the new model rules - which are generally the same but in some cases may be different. For example if an association’s rules do not address the issue of proxy voting then this would change from a situation where proxy voting is allowed to one where proxy voting is not allowed.

It appears this is a complex area, involving various consequences for different situations. In the interests of clarity and maximising compliance with the Act, NCOSS strongly recommends that the above issues are clarified before the Regulation is made.

Explanatory Note

- (i) Provide for the application of certain provisions of the *Corporations Act 2001* of the Commonwealth to associations –

These provisions should be made explicit throughout the regulations. In its current form it is too derivative. If compliance with these clauses is expected, the actual provision should be stated and in plain English.

Part 3. Financial reporting

Regulation 7 (1) details how gross receipts are to be calculated for the purpose of determining Tier 1 (large) and Tier 2 (small) associations. However it is unclear whether gross receipts are inclusive or exclusive of GST.

NCOSS recommends that this is clarified.

The NCOSS submission to the *Exposure Draft Associations Bill 2008* recommended that the definition of “small” be made consistent with NSW Government funding agencies.

NCOSS is seeking further detail regarding the definitional alignment of Tiers 1 and 2 to NSW Government funding agencies.

Regulation 7 (3). The prescribed amount of gross receipts is the same figure suggested in the *“Review of the Associations Incorporation Act 1984. Consultation Paper”*, April 2003. As it is nearly 7 years since that paper was published, it seems reasonable that the threshold is increased.

Regulation 15. Penalty notice offences and penalties.

The Act details jail terms for some offences but the draft regulations are silent on this issue. If this is because these offences are covered by the *Crimes Act* (and associated regulations) then these should be made explicit in the Act’s regulations.

NCOSS also restates its position that in those situations where there has been a breach but no loss or damage, committees already have the option of removal and the membership has the right not to re-elect. In the case of serious breaches, there are already existing remedies available under the *Crimes Act*. Consequently we did not support the inclusion of jail terms in the Act.

NCOSS recommends that the Office of Fair Trading clarify what is intended and include the provisions that will apply to jail terms for offences under the Act in the Regulation.

Regulation 16. Application of Corporations legislation to associations.

It appears this is a legalistic way of ensuring that some minor provisions in the *Corporations Act 2001* (s 1322) are applicable to incorporated associations. Section 1322 of the *Corporations Act 2001* contains provisions that deal with procedural irregularities such as the absence of a quorum, the accidental failure to give a member notice of a meeting, etc.

This approach is too derivative and obscure, and it's unlikely that most associations will be aware that these provisions exist.

NCOSS recommends that the actual provisions from the *Corporations Act 2001* are incorporated in plain English into the Regulation.

Schedule 1. Model Constitution

Rule 1 a) & b). Definitions

According to this rule, in the absence of a person holding the office of Secretary, the public officer is taken to hold this position. It is fairly common practice for the public officer of associations to be a staff member e.g. CEO, Manager. As an employee they are not eligible to be a Committee member. Consequently, they cannot be considered the 'Secretary' as currently defined in the draft regulations.

Rule 2. Membership.

Not all members are 'natural persons' often they are entities- as in 'organisational members' or affiliates. Members may be incorporated associations, companies limited by guarantee, cooperatives, and in some cases Government agencies or businesses (affiliates). This is quite common in the non government human services sector and NCOSS therefore recommends that this be included in the model rules.

Rule 4 (d). Cessation of membership

It appears that under this rule a member ceases to be member if they have been an unfinancial member for 3 months. However, in Rule 32, unfinancial members are eligible to vote at general meetings on payment of outstanding monies. This seems to be contradictory.

Rule 7 Register of members

Rule 7(1)

NCOSS recommends that the "public" register be limited to full name and category of membership (as appropriate) due to privacy and confidentiality reasons.

Rule 7 (5)

Use of an 'opt out' request by members regarding 'name only' could be very time consuming for the association. NCOSS suggests this is made consistent and that the register available to members only includes name and category of membership. There are privacy considerations that inform the disclosure of members' addresses.

Rule 8 (2) a) & b) Fees and subscriptions

NCOSS is aware of many associations that have new memberships and renewals occurring at any time during the year. They are not necessarily aligned to the financial year. Consequently NCOSS recommends that a) and b) are deleted.

Rule 10 (1) (2) & (3). Resolution of disputes

It is unclear why this rule stipulates that disputes are to be referred to Community Justice Centres. Not all associations have ready access to CJsCs (e.g. rural groups) and some disputes are better handled by different types of mechanisms/ processes that are not provided for in the model rule.

In some instances the *Commercial Arbitration Act 1984* may appropriately apply when a dispute is referred to arbitration. But it is unlikely to be appropriate in all instances. Additionally, if there are relevant sections of the *Commercial Arbitration Act 1984*, then they should be stated in plain English.

Rule 11. Disciplining of members

This rule appears to imply that a complaint can only proceed if the member 'persistently and willfully' refuses, neglects or acts. This does not take account of a *single but serious* breach. NCOSS recommends the removal of the word 'persistent'. It is also the case that while complaints may be upheld that the circumstances do not warrant expulsion or suspension. NCOSS therefore, recommends that Rule 11(3) be amended to provide that expulsion or suspension only be considered where circumstances warrant such action. In some circumstances, complaints may be found to be vexatious through the complaint process. Such complaints have the capacity to seriously affect the operation and good governance of associations as well as undermining the goodwill amongst members towards the common purpose of the association. Such complaints need to be dealt with accordingly. NCOSS recommends that the making of vexatious complaints be considered as a ground for making a complaint under Rule 11(1).

Rule 12. (4) (a). Right of appeal of disciplined member

Excluding any other business being 'transacted' at this meeting seems unnecessary and is likely to increase the costs for the association. NCOSS recommends deletion of 12 (4) (a).

Rule 14 (2). Constitution and membership of committee

It is unclear why the total number of the Committee is 'to be' restricted to 7. NCOSS is seeking clarification on whether variations to this are possible.

Rule 18. (2). Casual vacancies

Rule 18 (2)(f) NCOSS recommends that the term "mentally incapacitated person' is defined.

Rule 18 (2)(g) States that one of the reasons for a vacancy is if a member of the committee is absent without consent for 3 consecutive meetings. This seems rather prescriptive. The other implication is that if a member does not attend three meetings in a row, (without consent) they cease to be eligible to be on the Committee. NCOSS is seeking clarification of the status of a committee member in these circumstances.

Rule 20. Committee meetings and quorum.

Is it a requirement that Committee members be present 'in person'? The Act refers to "using any technology that gives each of the committee members a reasonable opportunity to participate". If yes, then NCOSS recommends that this is included under this rule.

Rule 27. (2) Quorum for general meetings.

Five members constituting a quorum for a general meeting seems arbitrary and does not take account of the variations in the size of memberships. An association may have 50 or 200 members. NCOSS suggests that consideration is given to stipulating a proportion of the membership, rather than a number.

In addition, with the Regulation in its current form, this could mean that five members of the *Committee* are sufficient to constitute a quorum at a general meeting. This rule also states that 'Five members *present in person* constitute a quorum". This seems inconsistent with the provision in the Act that business can be conducted using any technology that gives a reasonable opportunity to participate and should be allowed for in the model rules.

Rule 32 (2). Voting

If all votes must be given 'personally', this excludes the use of proxy votes. NCOSS is seeking the rationale for the exclusion of this form of voting.

Rule 35. Insurance.

Given the increased penalty regime, and the new importation of clauses from the *Corporations Act 2001*, NCOSS recommends that insurance should be mandatory.

Rule 36. (1) Funds- source

Funds are often derived from Government agencies- they are not donations, but funded contracts. NCOSS recommends the addition of 'Government funding' as a source of funds.

Rule 40. Inspection of books etc

Rule 40 (1)(a) Some "records" should not be open for inspection by members- e.g. staff and personnel files.

Rule 40 (1) (c) Committee meetings may include 'in camera' sessions with the specific intention of allowing confidential discussion on sensitive matters. NCOSS recommends that this rule be modified to exclude minutes relating to "in camera" discussions.

Schedule 2. Unacceptable Names

The term 'consumer' should not be considered 'unacceptable' as part of the name of an association. Some associations are *consumer* advocate/ self help groups and the word 'consumer' seems legitimate in this context. NCOSS recommends the deletion of 'consumer' from the list of acceptable names.