



Management Support Unit MSU

Q & A Information Sheet 26:

ASSOCIATIONS INCORPORATION ACT 2009

Background

On 1 July 2010, a new law regulating incorporated associations in NSW came into force. The new law is called the *Associations Incorporation Act 2009* and it replaces the *Associations Incorporation Act 1984*. There is also a new regulation called the *Associations Incorporation Regulation 2010* that provides further material related to the new Act. This information sheet summarises the major changes under the new Act and provides 'plain English' answers to some of the most frequently asked questions.

Summary of the major changes

The new Act continues the previous system of providing non-profit associations with a relatively inexpensive and simple means of incorporation. However, there are some significant differences under the new Act. In particular:

Audit requirement for larger associations

The new Act requires larger associations with an annual income exceeding \$250,000 or current assets exceeding \$500,000 (Tier 1) to have their annual financial statements audited. Although the Act does not place an audit requirement on smaller associations (Tier 2) they may still need an audit for other reasons, such as funding obligations.

New offences

The new Act places extra legal obligations on committee members that, if breached, could result in significant penalties. The new obligations on committee members are

- to disclose any conflict of interest between their own affairs and the affairs of the association;
- not to use their position or information for a dishonest purpose.

Penalty notices

Under the old Act, offences could only be enforced by NSW Fair Trading taking court proceedings against the association or its committee members. The new Act allows NSW Fair Trading to also issue penalty notices for certain minor offences (e.g. failure to notify of change in

official address, failure to keep a register of committee members). If a penalty notice is issued to a person or association they can either pay the fine, or dispute it by having the matter determined in a Local Court. Fines are set at about half the maximum penalty for the offence and range from \$50 to \$200 depending upon the offence.

Official address

The official contact address for an association can now be the address where the association is located, the public officer's home address or the public officer's business address.

Committee requirements

All committee members now must be at least 18 years of age and at least 3 committee members must be resident in NSW.

Handover of documents

A committee member who has possession of any documents that belong to the association must give these documents to the public officer within 14 days after he or she ceases to be a member of the committee.

The public officer has a similar obligation to hand over documents to a committee member within 14 days after he or she ceases to be the public officer.

Common seal

Associations can now determine whether or not they wish to have a common seal. Associations that incorporated under the old Act should already have a clause in their constitution dealing with the use of a common seal. Under the new Act there is no requirement to include a provision in your constitution relating to a common seal.

Common Questions & Answers

My organisation was incorporated under the old Act. Are we operating under the new Act now? Do we need to make any changes to comply with the new Act?

All associations have been operating under the new Act since 1 July 2010. If you are familiar with your obligations under the old Act, you should consider the following new issues.

Audit - Determine whether you are a Tier 1 or Tier 2 association so you know whether you will need to provide your members and NSW Fair Trading with an auditor's report after the end of the financial year.

An association is classified as Tier 1 if its gross receipts for the financial year last ended exceed \$250,000, or if its current assets exceed \$500,000.

"Gross receipts" are defined as "the total revenue recorded in the association's income and expenditure statement for that financial year."

“Current assets” are defined as “the assets (other than real property or assets capable of depreciation) held by the association as at the end of the association’s last financial year, including amounts held in financial institutions, stocks and debentures.”

Conflict of interests – All committee members should consider whether they have any personal interest (either direct or indirect) in a matter being considered by the committee. If so, and if the interest appears to create a conflict with the person’s duty to the association, then this should be disclosed to the committee and details of the interest entered into a “Disclosure of Interests” book.

A committee member who has disclosed a conflict of interests must not be present when the committee considers the matter. The committee member also should not be involved in the decision making process in any way. However, a person who has disclosed a conflict of interests can participate in the decision making process if the committee decides to allow this – provided that the committee decides this without the involvement of the person who has the conflict.

Official address – The public officer should consider whether he or she wants to change the association’s official address from their own residential address to the address where the association is located or to some other address he or she can usually be found, such as a business address. This is optional as the public officer’s residential address may still be used as the official address.

My organisation is considering making a couple of minor changes to our existing constitution later this year. Does this mean we will need to comply with the whole of the Model Constitution detailed in the Regulation of the new Act?

You will need to comply with the new Act, not the new Model Constitution. The Model Constitution is just a suggested way of complying with the new Act.

If your constitution complied with the requirements of the old Act it is also taken to comply with the new Act. This means there is no obligation to change your existing constitution unless you wish to do so. However, if you decide to make any change to your constitution there are a couple of new requirements under the new Act that should be considered.

Under the new Act your constitution must also include provisions dealing with:

- the kinds of resolution that may be voted on by means of a postal ballot, and
- the association’s financial year.

In the event that you change your constitution and do not include clauses dealing with these issues then the clauses on these issues in the “Model Constitution” will apply. Those clauses state that:

- an association may hold a postal ballot on any issue (apart from an appeal by a disciplined member) and provides a mechanism for holding a postal ballot.

- the financial year of an association will be the 12 month period from 1 July to 30 June.

However, you don't have to adopt the same provisions as the Model Constitution and can address each of the required matters in any way that you like. For example, you could address the above issues by including a rule that "The association may not vote on any resolution by means of a postal ballot." and that "The financial year of the association shall be a period of 12 months from 1 January to 31 December."

The Model Constitution in the new Act states that our committee must have 7 members. Our committee currently has 11 people. Do we need to change the number of committee members?

No, you don't have to change the number of your committee members.

This is because your rules under the old Act automatically become your constitution under the new Act. If your association lodged its own set of rules under the old Act, those rules will be your constitution under the new Act. Alternatively, if your association adopted the "Model Rules" from the old Act, those "Model Rules" will be your constitution under the new Act. The new "Model Constitution" will not replace your own rules or the Model Rules unless you pass a special resolution to that effect.

Therefore, as your rules from the old Act provided for a committee of 11 this will continue to be the case under the new Act until such time as you amend the relevant rule.

I have heard there are significant new penalties in the new Act, including possible jail terms for committee members. What are these penalties and how can we ensure we comply and thus avoid attracting fines and possible jail terms?

The new Act includes penalties that can be imposed on a committee member who fails to disclose any conflict of interest between their own affairs and the affairs of the association (maximum penalty \$6,600) or who use their position or information for a dishonest purpose (maximum penalty \$26,400 and or 2 years imprisonment).

The best way to ensure compliance with these obligations is for all committee members to know what constitutes a conflict of interests and to understand the need to place the interests of the association ahead of their own interests.

The new Act also increases the maximum penalty for failing to provide the Commissioner for Fair Trading with information about the affairs of the association from \$550 to \$6,600. Likewise, the maximum penalty for obstructing or hindering a Fair Trading Officer in the exercise of their duties has also increased from \$550 to \$6,600.

As there are no penalty notice provisions in relation to these more serious offences, NSW Fair Trading would need to prove the allegations in a Local Court before any penalty could be imposed.

I've been told that if my organisation has an annual income over \$500,000 we could be directed by the Office of Fair Trading to become a company under the Corporation Act. Is this the case and if so, why?

It is unlikely that you would be directed to become a company unless your annual income was around \$2 million.

Incorporation as an association is designed to regulate small to medium non-profit associations. However, neither the old nor new Act provided a specific definition of when an association would be regarded as being too big. In order to clarify this, the Office of Fair Trading has included the following information in one of its recent Fact Sheets.

“An association will be refused incorporation or directed to transfer its incorporation if the Director General ... is satisfied that incorporation is inappropriate or inconvenient by reason of:

- the likely nature or extent of the activities of the proposed incorporated association
- the likely value or nature of the property of the proposed incorporated association (as a guide, the amount of \$2 million as a measure of assets, income or expenditure is used)
- the likely nature or extent of the proposed incorporated association's dealings with the public.”

I see that the Associations Incorporation Regulation makes some parts of the Corporations Act 2001 applicable to incorporated associations. What does this mean?

This is a reference to Regulation 16 which states that parts of section 1322 of the Corporations Act will apply to incorporated associations. One purpose of this Regulation is to enable decisions made by an association or its committee to remain valid, despite a procedural irregularity in the decision making process. The types of irregularities covered by this provision include:

- the absence of a quorum at a meeting;
- an accidental defect in calling a meeting or in giving notice of the meeting; or
- the inability of a member to participate in a meeting that is held at 2 or more venues (e.g. at a meeting held using video conference).

If any of these irregularities occur in the decision making process the decision that is made will not be invalid - unless a Court decides that the decision will result in a substantial injustice that cannot be fixed.

Useful Web Based Resources and Links

NSW Fair Trading –downloadable forms, details of fees and information sheets.

http://www.fairtrading.nsw.gov.au/Cooperatives_and_associations/Associations.html

NSW Associations Incorporation Act 2009

<http://www.legislation.nsw.gov.au/maintop/view/inforce/act+7+2009+cd+0+N>

NSW Associations Incorporation Regulation 2010

<http://www.legislation.nsw.gov.au/maintop/view/inforce/subordleg+238+2010+cd+0+N>

NCOSS Management Support Unit -Information Sheet No 14 – Managing Conflicts of Interest

<http://ncoss.org.au/projects/msu/downloads/resources/information%20sheets/14-Managing-Conflicts-of-Interest-UPDATE.pdf>

Australian Securities and Investments Commission – not-for-profit information

<http://www.asic.gov.au/asic/asic.nsf/byheadline/Registering+not-for-profit+or+charitable+organisations?openDocument>