

Q & A: NSW Associations Incorporation Act 2009

Background

On 1 July 2010, the *Associations Incorporation Act 2009* came into force to regulate incorporated associations in New South Wales, replacing the *Associations Incorporation Act 1984*. New regulations, *Associations Incorporation Regulation 2010*, were also adopted and provide further material related to the Act. This information sheet summarises the major changes under the 2009 Act and provides 'plain English' answers to some of the most frequently asked questions.

Summary of the major changes

The 2009 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 Act. In particular:

Audit requirement for larger associations

The 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 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 Act, offences can be enforced by NSW Fair Trading taking court proceedings against the association or its committee members. The Act also 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). Each offence is awarded one or more penalty point, where the value of an individual point is prescribed in s 17 Crimes (Sentencing Procedure) Act.¹ 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.

Official address

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

¹ At the time of writing (October 2015) the value of a penalty point is equal to \$110.

Committee requirements

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

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 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 2009 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 1984 Act. Are we operating under the 2009 Act now? Do we need to make any changes to comply with the 2009 Act?

All associations have been operating under the 2009 Act since 1 July 2010. Consequently changes introduced under the 2009 Act must be addressed by all organisations that are incorporated under the current Act or its predecessors. These include:

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 (excludes GST), or if its current assets exceed \$500,000. A Tier 2 association will have a total revenue of less than \$250,000 (excludes GST) and current assets less than \$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."

Fair Trading NSW clarifies these requirements on their webpage [Financial Reporting Requirements](#).

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, nor should the committee member be involved in the decision making process. However, a person who has disclosed a conflict of interests can participate in the decision making process if the committee has agreed to allow this, provided that the committee agrees 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 2010 Regulation of the Act?

You will need to comply with the requirements of the 2009 Act. It is not a requirement to take up the Model Constitution² as your organisation's constitution although many organisations do so. The Model Constitution is a suggested way of complying with the 2009 Act. It is acceptable to develop your own constitution on the condition it complies with the 2009 Act. It is recommended that if you take this approach, it is checked by a lawyer.

If your constitution complied with the requirements of the 1984 Act it is also taken to comply with the 2009 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
- 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

² See [Part 4.10 Miscellaneous: Model Constitution](#)

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

You do not have to adopt the same provisions as the Model Constitution and can address each of the required matters in any way that you like, on the condition that it reflects the requirements of the 2009 Act. 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 2009 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 do not have to change the number of committee members. Your rules under the 1984 Act automatically become your constitution under the 2009 Act. If your association lodged its own set of rules under the 1984 Act, those rules will be your constitution under the 2009 Act. Alternatively, if your association adopted the “Model Rules” from the 1984 Act, those “Model Rules” will be your constitution under the 2009 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 1984 Act provided for a committee of 11, this will continue to be the case under the 2009 Act until such time as you amend the relevant rule.

It should be noted that under the 2009 Act there is a minimum requirement of five members at all times. There is no maximum limit for the number of members³.

I have heard there are significant new penalties in the 2009 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 2009 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 60 units⁴ - in 2015 this would be \$6,600) or who use their position or information for a dishonest purpose (maximum 240 penalty unit, in 2015 = \$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 2009 Act also increases the maximum penalty for failing to provide the Director-General of NSW Fair Trading with information about the affairs of the association attracts 60 penalty units (in 2015 = \$6,600). Likewise, the maximum penalty for obstructing or hindering a NSW Fair Trading Officer in the exercise of their duties attracts 60 penalty units (in 2015 = \$6,600).

³ See NSW Fair Trading webpage [About Associations](#) under the section ‘Is there a limit to the number of members?’

⁴ At the time of writing (October 2015) the value of a penalty point is equal to \$110.

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 NSW 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, NSW Fair Trading has included the following information on its website⁵.

“The Director-General may refuse an application to register an association and may direct an association to apply for cancellation. The Director-General will consider, taking into account the objects of the Act, whether an association should not be registered:

- *because some provision of the association’s constitution is contrary to law, or*
- *where the nature or extent of the association’s activities exceeds NSW Fair Trading policy of \$2 million or more in income, assets or expenditure, or*
- *because of the nature or extent of the association’s dealings with the public, or*
- *for any other reason that appears sufficient to the Director-General.”*

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

This is a reference to [Regulation 16](#). It states that parts of Section 1322 of the [Corporations Act 2001\(Cth\)](#) 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.

⁵ NSW Fair Trading webpage *About Associations* under the section [‘Can an association be refused incorporation?’](#)

References and Resources

Legislation

- [Associations Incorporation Act 2009 \(NSW\) No 7](#)
- [Associations Incorporation Regulation 2010 \(NSW\)](#)

NCOSS Sector Support

- Wheeler, Graham (2012) [Incorporation: An explanation of the Associations Incorporation Act 2009](#)

NSW Fair Trading

- [About Associations](#)
Includes additional information, downloadable forms and details of fees. It also provides information and forms for obtaining a charitable fundraising authority. For further information contact Registry Services – FreeCall: 1800 502 042

Australian Charities and Not-for-profits Commission

- [Publications](#)
Includes guidance resources and templates. For further information call 13 ACNC (13 22 62) weekdays 9am to 6pm AEDT.

NSW Office of Communities, Sport and Recreation

- [Running your club](#)
Includes resources to assist non-profit organisations on topics such as governance, financial management, fundraising, grants, legal issues, etc.

NB: The above websites were accessible on 10th December 2015. If the links do not work search on the title of the document or go directly to the organisation's website.