

# Restructuring or Winding Up NSW Incorporated Associations

The community sector in New South Wales has experienced a high level of change, in part due to the reform agendas of the State and Federal Governments but also legislative changes and a changing political environment.

These changes have led many organisations to reassess their purpose, structure and long term viability. Some are responding by restructuring and/or developing partnerships. Others are either reducing or closing services or winding up their organisation.

The following information is designed for incorporated associations registered with NSW Fair Trading. Its purpose is to provide an overview to successfully wind up a NSW organisation or close part of its operations and contains links to more detailed information. It includes general information about legal industrial and financial matters however it is not advice and should not be treated as such.

## Introduction

Closing a service and winding up an organisation have much in common. Both require an assessment of assets and liabilities. Both may lead to redundancies. However there are also areas which need to be managed differently and if handled badly could either impact on your organisation's long term viability or damage the memory of your organisation.

The first section of this factsheet outlines the processes required to close down an association registered in New South Wales. The second section is about closing part of an organisation. The final section covers the issue of client records.

## Winding up an organisation

Much has been written about winding up organisations in Australia however the focus is generally on for-profit organisations. Both the Australian Charities and Not-for-profits Commission (ACNC) and Justice Connect have developed material specifically for non-profit organisations:

- The ACNC fact sheet, [Wind up your charity](#), provides information on the legal, financial and more pragmatic aspects of winding up.
- Justice Connect have a webpage, [Ending an organisation](#), focusing on the legal aspects of winding up. (NB if the information is for Victorian Incorporated Associations check the drop-down Location Menu in the black bar in the top right hand corner and change to NSW.)

Both sites are designed for all forms of non-profit organisations irrespective of their legal structure. They are a good starting point to understand the issues and processes of winding up.

## Closing an incorporated association

There are several ways of closing an incorporated association in NSW:

- **Involuntary deregistration**

An association can be deregistered by NSW Fair Trading or may be wound up by the court. (see [Compulsory winding up](#) – Justice Connect)

- *Involuntary cancellation* The NSW Fair Trading outlines a number of reasons why it would cancel an organisation's registration. It can also be cancelled if the organisation has operated whilst insolvent. In these circumstances the property of the association comes under the control of Director-General of NSW Fair Trading who will determine what is to happen to the association's surplus (if such exists), the distribution of any property and the winding up of the association's affairs. For further information see Sections 54-61, 73 & 76 of the [Associations Incorporation Act 2009 \(NSW\)](#) (referred to as "The Act") or contact Registry Services, NSW Fair Trading: Email – [registryinquiries@finance.nsw.gov.au](mailto:registryinquiries@finance.nsw.gov.au) or Freecall – 1800 502 042
- A creditor or a member of the association who wishes to have the association wound up may do so via an application to the Supreme Court. This may occur if the organisation can no longer pay its debts. The association itself can also make an application for winding up. For further information see Section 63 of [the Act](#)

- **Voluntary deregistration**

This can only occur if the organisation remains solvent throughout the process of deregistering, has the approval of its membership and is not party to any ongoing legal action. There are two forms:

- *Voluntary Cancellation* requires a statement be provided to NSW Fair Trading indicating how surplus assets (ie money or property) are to be distributed, a statutory declaration from two board members that states the association has no outstanding debts or liabilities and the completed NSW Fair Trading application to deregister form.
- *Voluntary Winding Up* can only occur if the organisation is able to pay its debts and the costs of winding up. It requires the appointment of a liquidator at a general meeting of the association who will manage the property of the association and see that financial matters are finalised.

NSW Fair Trading website does not differentiate between the two voluntary processes however they are referred to in Sections 62 and 72 of [the Act](#).

Voluntary winding up is a more expensive and complex option but is appropriate if the association has obligations the Board is unable or unwilling to manage as part of closing down the organisation.

For further information on voluntarily deregistering an incorporated association see:

- [Closing an association](#) and [Voluntary Cancellation: Incorporated Associations](#) (NSW Fair Trading)
- [Ending an organisation in NSW - FAQs](#) and [Ending incorporated association](#) (Justice Connect)

Whilst NSW Fair Trading is responsible for the oversight of an association's legal structure, the Australian Tax Office (ATO) and ACNC also have regulatory oversight for not for profit community organisations. This includes requirements that must be met when winding up an organisation.

The following steps apply to incorporated associations and are a general guide only. They also apply to services that are incorporated separately from their parent body, (ie have their own Management Committee or Board and a separate constitution).

PLEASE NOTE: The steps are not prescriptive. The process will vary for each association and the following information does not replace legal, industrial or financial advice.

<b>PREPARATION</b>		
1. Locate your governance documents	<ul style="list-style-type: none"> <li>• Constitution or Rules of Association</li> <li>• Objects of Association or equivalent</li> <li>• Certificate of Incorporation or equivalent</li> <li>• Deductible Gift Recipient (DGR) documentation</li> </ul>	<p>Constitutions or equivalent are required to include winding up clauses including guidance on the dispersal of assets. Under the Act, a constitution is required to provide that surplus assets are to be distributed to one or more non-profit organisations with similar objects. They cannot be distributed to the Board or membership.</p> <p>If your association has Deductible Gift Recipient (DGR) status see Section 1 in <a href="#">Ending an organisation in NSW - FAQs</a> (Justice Connect) and <a href="#">Winding up or revocation of endorsement</a>. (ATO)</p>
2. Locate all contractual agreements	<ul style="list-style-type: none"> <li>• Funding Agreements and contracts</li> <li>• Staff contracts</li> <li>• Leases (Property, equipment, cars, etc)</li> <li>• IT and other service agreements</li> <li>• MOUs</li> <li>• Partnership Agreements</li> <li>• Other</li> </ul>	<p>Funding agreements may include sections specific to winding up including clauses relating to the disposal of assets purchased with funding agencies' monies. Irrespective, any surplus property that was supplied by a government agency must be returned either to that agency or a body nominated by that agency. Unexpended grant monies must be returned once outstanding debts, liabilities and depending on the contract, winding up costs relevant to that funding are paid.</p> <p>Commercial contracts can have clauses which outline exit processes when prematurely ending a contract. These often include exit fees.</p> <p>NB if any clause pertinent to winding up the organisation or closing a service is unclear, seek legal advice.</p>
3. Locate staffing documents	<ul style="list-style-type: none"> <li>• Fair Work Ombudsman's requirements for <a href="#">Redundancy</a></li> <li>• Award(s) (eg <a href="#">SCHADS Award</a>)</li> <li>• Enterprise Agreement (may not apply)</li> </ul>	<p>These documents will outline what conditions must be met when considering redundancies.</p>
4. Appoint a Liquidator		<p>This step is optional in NSW unless your organisation is insolvent or is "winding up" as opposed to cancelling its registration.</p>

5. Notify members of possible closure and hold an annual or special general meeting		The purpose of the meeting is to agree on winding up the organisation and requires 75% of members entitled to vote and propose how surpluses might be distributed (ie identify the actual organisations as per Step 1)
6. Notify community of pending closure	<ul style="list-style-type: none"> <li>• Staff</li> <li>• Clients</li> <li>• Volunteers</li> <li>• Partner organisations</li> <li>• Referring organisations</li> <li>• Other stakeholders</li> </ul>	
7. Identify and calculate the value of your assets	<ul style="list-style-type: none"> <li>• Equipment (eg computers, photocopiers, etc)</li> <li>• Cars</li> <li>• Buildings</li> <li>• Investments</li> <li>• Other</li> </ul>	
8. Identify and calculate staffing liabilities	<ul style="list-style-type: none"> <li>• Calculate the number of staff requiring redundancies</li> <li>• Estimate their entitlements See applicable award(s) - and if relevant, Enterprise Agreement</li> <li>• Consider seeking industrial advice</li> </ul>	
9. Identify and calculate unused monies from contractual agreements	<ul style="list-style-type: none"> <li>• State and Federal Government funding agreements</li> <li>• Local Government grants</li> <li>• Philanthropic funding agreements</li> </ul>	<ul style="list-style-type: none"> <li>• Notify the relevant agencies of the pending closure.</li> <li>• Check agreements and/or confer with relevant agencies to assess how unexpended monies are to be treated.</li> </ul>
10. Notify creditors to organise final payments or return of monies	<ul style="list-style-type: none"> <li>• Funding bodies</li> <li>• Landlord(s)</li> <li>• Utilities</li> <li>• Other creditors</li> </ul>	
11. Identify and calculate general liabilities	<ul style="list-style-type: none"> <li>• Unpaid invoices – both current and anticipated</li> <li>• Contract exiting fees</li> <li>• Other</li> </ul>	
<b>FINAL STAGES</b>		
12. Finalise debts	<ul style="list-style-type: none"> <li>• Staff entitlements</li> <li>• Funding reimbursements</li> <li>• Other creditors</li> </ul>	

<p>13. Update all communication/promotional channels</p>	<ul style="list-style-type: none"> <li>• Organisation’s website</li> <li>• Organisation’s Facebook page</li> <li>• Other social networking sites</li> <li>• Community directories</li> <li>• HSNet</li> <li>• Other</li> </ul>	
<p>14. Cancel registration with NSW Fair Trading</p>	<p>Assemble documentation. For further information <a href="#">Incorporated Associations: Voluntary Cancellation</a></p>	<p>The documentation will include:</p> <ul style="list-style-type: none"> <li>• Completed <a href="#">Form A8 - Application for voluntary cancellation of registration of an association</a></li> <li>• Copy of the special resolution that was passed at the special general meeting</li> <li>• Statement indicating the distribution of assets to be approved by the Director-General</li> <li>• Statement, verified by statutory declaration by two committee members, that the association has no outstanding liabilities</li> <li>• Association's certificate of incorporation (if still held) or a statement that it has been lost or destroyed.</li> </ul>
<p>15. Distribute surplus assets</p>	<p>Having received approval from the Director General of NSW Fair Trading, distribute assets in accordance with constitution and ATO requirements</p>	<p>As noted in Step 1, surplus assets can only be distributed in accordance with the constitution and ATO requirements. The actual organisation(s) will have been decided by special resolution at a special or annual general meeting.</p> <p>If an organisation has DGR status, its assets must be distributed to another organisation, authority or institution that also has DGR endorsement. See ATO’s <a href="#">Winding up or revocation of endorsement</a>.</p>
<p>16. Close bank accounts</p>		
<p>17. Notify other Government agencies</p>	<ul style="list-style-type: none"> <li>• ACNC</li> <li>• Australian Business Register</li> </ul>	<ul style="list-style-type: none"> <li>• The ACNC, as the independent national regulator of charities, maintains a register of all organisations registered as charities. Before completing winding up or cancellation the organisations must deregister as a charity. <a href="#">Form 5A: Application to revoke charity registration</a>.</li> <li>• <a href="#">Cancel your ABN</a></li> </ul>

<p>18. Storage of organisations' records</p>	<ul style="list-style-type: none"> <li>• Register of committee members</li> <li>• Register of disclosed interests</li> <li>• Minutes of meetings</li> <li>• Financial records</li> </ul>	<p>There is no clear guidance in either the Act or the regulations on how long records must be kept however NSW Fair Trading recommends a period of seven years.</p>
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## Closing a service within an organisation

Most of the steps above are relevant to an organisation that is closing a service but should only be applied in relation to that part of the organisation that is closing.

The main areas of difference are:

- Unexpended grant monies (Step 2) relevant to the operation of the service being closed must be returned, however this only applies after paying outstanding debts, liabilities and, depending on the contract, winding up costs that relate to that specific service within the organisation.
- It is unlikely that it will be necessary to appoint a liquidator (Step 4), cancel registration as a legal structure (Step 14), close a bank account (Step 16), or cancel either your ABN or registration as a charity (Step 17)
- It is important that members be aware of and agree to the change but it can be dealt with in most cases in an ordinary Board meeting (Step 5)
- In addition to calculating redundancies (Step 8) it may be necessary to calculate the number of staff with reduced hours and assess possible liabilities
- There are unlikely to be separate registers for committee members, meetings of minutes, etc (Step 18) consequently there are unlikely to be storage issues.

The most important difference relates to Step 1. When closing a service it is very important to ensure, if you wish to continue accessing tax concessions relating to your charity (eg retain, if relevant, your PBI and DGR status) that:

- your Objects of Association remain applicable to your organisation (ie the focus of your work continues to be reflected in your Objects)
- you remain a not-for-profit organisation. (See the fact sheet [What does 'not-for-profit' mean?](#) from Justice Connect)

If there is a risk that either of these situations could apply it is recommended you seek legal advice before contacting the ACNC and ATO to advise of any changes.

Depending on the context of the closure it may be necessary to change your organisation's legal structure. Both Justice Connect ([Changing your legal structure](#) NB Remember to select NSW from the Location Menu in the top right hand corner) and the ACNC ([Change my charity's legal structure](#)) have information on the issues to be considered and the requirements that need to be addressed.

## Client Records

There is a lack of clarity on what happens to clients' records once an organisation or a service is no longer operational. Funding agreements and contracts may provide some guidance, as may the funding bodies themselves.

Under the *Privacy and Personal Information Protection Act 1998 (NSW)* there is a requirement that personal information will continue to be held securely, kept no longer than necessary and disposed of appropriately. Personal information should also be protected from unauthorised access, use, modification or disclosure. (See *Information Protection Principles* (IPP) point 5 in the Information and Privacy Commission's fact sheet on IPPs)

In relation to disclosure, point 11 of the *IPP* fact sheet states:

*Only disclose personal information with a person's consent or if the person was told at the time that it would be disclosed, if disclosure is directly related to the purpose for which the information was collected and there is no reason to believe the person would object, or the person has been made aware that information of that kind is usually disclosed, or if disclosure is necessary to prevent a serious and imminent threat to any person's health or safety.*

Transferring information could be considered a form of disclosure and therefore must be done with the client's consent. There does not appear to be any guidance where records must be held if the client cannot be contacted and the organisation ceases to exist.

Section 25 in the *Health Records and Information Privacy Act 2002 (NSW)* (HRIP) clarifies how long health records must be retained. Two sections in *Schedule 1* of the HRIP Act refer to transferring health information:

- Section 15 provides guidance on transferring health information to a second health records linkage system
- Section 14 provides guidance on transferring client health information to an agency in a jurisdiction outside New South Wales or to a Commonwealth agency.

As health information is also personal information, the IPP provisions around disclosure and security could also be assumed to apply here and therefore it is essential to get the client's permission if transferring records to another organisation.

It is recommended that legal advice be obtained before final decisions are made regarding the transfer or storage of client records.

## Conclusion

Having made the decision to wind up your organisation or close part of your service, there are three things to keep in mind throughout the process:

- It is imperative that at all stages leading up to finalising the process your organisation remains solvent. To trade whilst insolvent is illegal – your organisation must be able to pay its debts, as and when they are due

- Plan a dignified closure where you and stakeholders, both past and present, celebrate your successes and everything you have contributed to your community
- Leave the memory of your organisation or service intact and positive. Avoid a PR disaster by paying all your creditors and ensuring staff are paid their full entitlements.

Finally, it is advisable to seek expert advice to ensure all obligations and requirements are met. If at any stage you have concerns about becoming insolvent or are uncertain about the process, seek expert advice, be it legal, financial or industrial.

NB: The above websites were accessible on 12 December 2015. If the links do not work search on the title of the document or go directly to the organisation's website.