

**NCOSS Submission to  
NSW Fair Trading  
in response to**

***Improving governance within  
incorporated associations: Discussion paper***



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## **NCOSS Submission to NSW Fair Trading in response to *Improving governance within incorporated associations: Discussion paper***

### **About NCOSS**

The Council of Social Service of NSW (NCOSS) is 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.

Through its organisational membership, NCOSS represents a vast network of service delivery and consumer groups many of which are incorporated associations.

NCOSS supports a strong, dynamic and effective non-government community sector (sector) because of its capacity to address disadvantage and improve social justice outcomes. The sector is able to achieve this because

- It can take the long term view and is there for the long haul
- It works within communities to build relationships and trust that are necessary to support people
- It works collaboratively to support the particular needs of individuals or communities
- It is independent of governments and partisan interests.

These capabilities work for government and are complementary to the work of government. Together better outcomes are achieved.

These capabilities can be hindered however by legislation which imposes an unnecessary level of regulatory compliance.

NCOSS calls for balance in regulatory regimes that are sought to be imposed on the sector. These should be evidence based (do they work to achieve the benefit/outcome sought?), based on a risk management approach (do the costs in time and resources justify the regulation given the likelihood and severity of the risk?) and proportionate (sufficient to address the issue without placing onerous requirements on those regulated).

Most of all we would argue that proposed changes to legislation should not undermine the unique characteristics of the sector that allow it to deliver improved social justice outcomes.

## Response to Discussion Paper Questions

### 1. Should the Act provide for the appointment of an independent external person to act as returning officer in certain circumstances?

It is not unreasonable that in certain circumstances organisations be expected to appoint an independent returning officer. However we are concerned that the proposed changes have a very wide net and in their current form could have a deleterious impact on more associations than is actually beneficial or indeed reasonable.

The proposed circumstances which could be used to require the outgoing committee to appoint a person external to the association as the returning officer include:

- i. where the association is a tier 1 association (that is, associations with annual gross receipts exceeding \$250,000 or current assets exceeding \$500,000);*

Those associations whose gross receipts or assets just fall into Tier 1 are in many cases quite small. This is particularly true of associations whose service delivery and/or infrastructure costs are high. The cost of a returning officer could be a significant and unnecessary impost on organisations that are effectively governed.

It may be more appropriate to use the Australian Charities and Not-for-profits Commission (ACNC) definition of a large organisation (income more than \$1 million) as the basis for the requirement of an independent returning officer.

- ii. where five per cent of the membership lodge a written request with the association's public officer at least 28 days prior to an election;*

Small organisations frequently do not have large membership pools. It is not uncommon that the size of their membership is only slightly larger than their Management Committee and may amount to less than 15 people. Taking into account the figure of 15, five percent is two people who could easily be members of the same family, indeed husband and wife. It is inappropriate that such a small number could potentially create unnecessary expense and disruption.

NCOSS would recommend the figure of thirty percent as this would represent a sizeable minority. However, we are aware that under the *Model Constitution under the Associations Incorporations Act 2009*<sup>1</sup> in *Special General Meetings – calling of* it states that:

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<sup>1</sup> *Model Constitution under the Associations Incorporations Act 2009* Cl 25 (2)

*(2) The committee must, on the requisition in writing of at least 5 per cent of the total number of members, convene a special general meeting of the association.*

To maintain consistency five percent is probably the preferred option however we would recommend that this be extended to include *“or five people, whichever is the larger.”*

- iii. where the Commissioner for Fair Trading directs an association to appoint an independent returning officer if the Commissioner (or delegate) is satisfied that it would be in the public interest;*
- iv. where the association received in excess of \$50,000 in government funding in the previous year.*

The figure of \$50,000 is very small. This again would capture a lot of organisations whose governance and management is effective and force on them an unnecessary expense.

It should be noted that most organisations receiving government funding will have contracts which include governance accountability requirements.

In addition, this option does not appear to reflect the statement:

*“The NSW Government supports a light-touch approach to regulation that balances the need for transparency and accountability with simplicity and efficiency. The legislation therefore intends that associations be largely autonomous with minimal involvement by the regulator.”<sup>2</sup>*

NCOSS also has concerns regarding those deemed as appropriate to act as an independent returning officer:

*A person would be deemed to be external to the association if the person had not been a member of the association during the previous five years.*

It is assumed that such a requirement is intended to address potential conflict of interest. NCOSS notes that potential conflicts may also arise due to relationships beyond membership including contractual relationships. This is more likely to arise in smaller communities and may make sourcing of an independent returning officer difficult. NCOSS would recommend that membership not be the only test of independence.

*A regulation would be made specifying the types of persons permitted to act as a returning officer, including lawyers, accountants and police officers.*

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<sup>2</sup> NSW Fair Trading (2013) *Improving governance within incorporated associations* p7

NCOSS is concerned that this is very restrictive and not necessarily realistic. Isolated communities do not necessarily have a lawyer, accountant or police officer within a reasonable distance. The cost of acquiring such a service could be prohibitive. NCOSS would suggest that peak bodies could provide this service for their membership. Local government staff or representatives could also be considered. NCOSS would recommend that employees from funding bodies and agencies not be eligible to act as returning officers.

NCOSS would also suggest that there be a limit on the number of times an individual can act as returning officer for a specific association.

## **2. Should the Commissioner for Fair Trading issue public warnings for incorporated associations?**

In principle NCOSS supports this amendment but would recommend that it be made very clear that this only applies to offences relevant to the operation of an association. A criminal offence which has no bearing on the running of an organisation should not be reason for a public warning.

## **3. Should mediation be mandatory before going to court?**

NCOSS supports the proposal that mediation take place before going to any Court. However it should be clear that it is not mandatory to use the Community Justice Centre services, any accredited organisation providing mediation services should be acceptable.

## **4. Should the Commissioner for Fair Trading be permitted to issue mandatory practice directions?**

The list of areas proposed appears very wide ranging and out of scope with Fair Trading operations. In addition legislation already exists which oversees these areas, for example employment law oversees the employment of staff and contractors, whilst the *Associations Incorporation Act 2009 (NSW)* makes direct reference to the other matters raised.

It is unclear what the actual issue is and whether mandatory practice directions are a suitable solution or indeed necessary.

**5. Should the Commissioner for Fair Trading have the power to ban individuals from holding a position on a management committee?**

NCOSS supports this proposal on the condition that the grounds upon which an individual is banned or has restrictions placed upon their participation as an office holder, is directly linked to matters impacting on their capacity to assist in the running of an association.

Using the same criteria as applies in the *Corporations Act 2001 (Cth)* would provide consistency and uniformity. (Sec 206F) Whatever the criteria, they need to be clear and the guidelines publically accessible.

**6. Should association members be able to enforce rules in the Local Court?**

NCOSS supports this proposal on the grounds that there be a realistic attempt at mediation before going to court. This proposal would provide access to a more accessible and affordable legal remedy than currently exists.

**7. Should the legislation allow action to be taken in the Local Court for oppressive or unreasonable conduct?**

NCOSS also supports this proposal on the same grounds as above, that being there be a realistic attempt at mediation before going to court.

**8. Should disclosure of interests be recorded in the minutes?**

Disclosure of interests in the minutes would require board members to declare a conflict of interest on each and every occasion the matter arose. This seems excessive particularly if the minutes are not normally made public. This could make it even more difficult for associations to attract management committee members.

General members have responsibilities too and ideally this includes making themselves aware of what is contained in the disclosures register. The changes, including substantial penalties for failing to disclose any conflict of interest between their own affairs and the affairs of the association, introduced under the current Act should be enough. Possibly the solution lies in sufficient resourcing of the relevant division of Fair Trading to enforce the current legislation.

**9. Should the Commissioner for Fair Trading have the ability to cancel the registration of an incorporated association if it is considered in the public interest to do so?**

NCOSS is of the view that aligning the *Associations Incorporation Act 2009 (NSW)* with the *Corporations Act 2001 (Cth)* is reasonable and appropriate however there needs to be clear guidance regarding the circumstances under which this may occur.

Two obvious examples are where an organisation is providing misleading or false information under the guise of providing evidence-based information or where its actions are contrary to its stated purposes (eg established as a community service organisation but whose purpose is to further the activities of a for-profit organisation).

It is assumed that associations facing cancellation will be provided avenues for requesting a review of the decision.

**10. Should the legislation prohibit an incorporated association from engaging in conduct that is misleading or deceptive, or would be likely to mislead or deceive?**

The issue at point is what is being defined as “misleading or deceptive conduct”. It must be made clear that participating in advocacy and public debate is not to be confused with “misleading or deceptive conduct”, that the two concepts are quite separate. There must be boundaries around this in terms of the purpose of the association and the breach of actual laws. Ideally it would be preferable if the purpose of an organisation could be assessed against the public interest at the point of registering as an association.