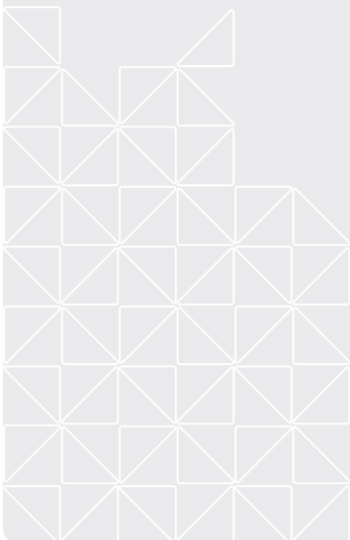


Submission to NSW Fair Trading

Statutory review of *Associations
Incorporation Act 2009*

7 September 2015



Sydney Office
PO Box 436
Darlinghurst NSW 1300
Tel +61 2 8599 2100

Melbourne Office
PO Box 16013
Melbourne VIC
DX 128 Melbourne
Tel +61 3 8636 4400
Fax +61 3 8636 4455

justiceconnect.org.au/nfplaw

About Justice Connect and Not-for-profit Law

About Justice Connect

Justice Connect was formed on 1 July 2013 when PILCH NSW (established in 1992) and PILCH Vic (established in 1994) formally merged.

We are a member-based organisation working with thousands of lawyers, including twenty of NSW and Victoria's largest law firms. We are financially supported by our members, federal and state government and philanthropic support, fee for services and donations. We are also supported by the in-kind contribution made by our pro bono lawyers.

We deliver access to justice through pro bono legal services to people experiencing disadvantage and the community organisations that support them.

We see the difference a legal remedy can make in peoples' lives and the benefit to society as a whole when rights are respected and advanced. We want to ensure that people experiencing poverty, homelessness or any other forms of disadvantage - as well as the community organisations that support them - are not further disadvantaged by being denied access to justice.

Our unique contribution is collaboration: by working with pro bono lawyers to develop and strengthen pro bono capacity and strategically match this with unmet legal need, we avoid duplication, ease access for clients and deliver a holistic response to disadvantage.

About Not-for-profit Law

Not-for-profit Law (**NFP Law**) is a specialist legal service established to provide free and low cost legal assistance to not-for-profit community organisations in New South Wales and Victoria.

NFP Law 'helps the helpers' by providing tailored legal information, advice and training to not-for-profit community organisations. By relieving the burden of legal issues, organisations can better focus their time and energy on achieving their mission - whether that's supporting vulnerable people, delivering community services, enhancing diversity or bringing together the community.

We are focused on improving access to legal help for not-for-profit community organisations, and on improving the legal landscape in which they operate.

Our policy and law reform work is focused on reducing red tape for the not-for-profit sector, helping not-for-profits be more efficient and better run, and ensuring that reform takes into account impacts on the not-for-profit sector. Our policy and law reform objectives include:

- Better regulation for not-for-profits: promoting efficiency and effectiveness in the regulatory approach to the not-for-profit sector
- Improved legal structures: advocating for an improved approach to available legal structures for NFP organisations and social enterprises in Australia
- Simplified tax concessions: addressing complexity and inaccessibility within the current application of tax concessions for the not-for-profit sector
- Oversight of reforms affecting not-for-profits: ensuring that policy development has adequate regard to the potential impact on the not-for-profit sector.

We have drafted this submission to NSW Fair Trading's statutory review of the *Associations Incorporation Act 2009* (NSW) (**Act**) as it fits into three of our four policy objectives.

Part 1: Key issues

In our view the following are the key issues in the Act that we believe need consideration:

▶ Duties of office holders

We support the inclusion of provisions that outline all of the fiduciary duties that are owed by committee members in the Act. It is core to good governance of associations that the duties being imposed on committee members are easily understood by an 'average' person who is volunteering in the role.

Given fiduciary duties apply to committee members via the common law even when legislation is silent, it is useful for provisions about the duties and any related defences, exceptions and penalties to be contained in the one place in the Act (or, at a minimum, with cross references). The Victorian incorporated associations' legislation (updated in 2012) has gone down this path as has the *Co-operatives National Law*.

Under the Act, only two of the four key fiduciary duties are set out in full (ss 31 to 33):

- duty to manage conflicts of interest (s 31), and
- duty not to dishonestly use position or information (ss 32 and 33).

A committee member's liability for the offence of allowing an association to trade while insolvent (which can be considered to be part of their broader fiduciary duty to act with reasonable care, skill and diligence) is in an altogether different part of the Act at s 68, without any cross-reference.

The following fiduciary duties are not included in the Act:

- duty to act in good faith for the best interests of the organisation and for a proper purpose, and
- duty to act with reasonable care, skill and diligence.

We also note that the existing duties are not drafted as being positive obligations on a committee member and in fact are not referred to as 'duties' at all.

To overcome these concerns, we suggest that the review recommend:

- a separate part be created titled 'Committee member duties'
- this part should include a summary table with all the duties, defences, exceptions and penalties plus signposts to other relevant sections (we note that tables have been used successfully in this way in the *Corporations Act 2001*)
- each duty, corresponding penalty/exceptions, and any specific defences, should be contained together in one section per duty
- after the specific duty sections, the general provisions that apply to all the duties (eg defences such as in s 1317S of the *Corporations Act*) should be outlined, and
- a simple description of each of the committee member duties imposed by the Act should be included in the model rules.

▶ Winding up

The incorporated associations' regime was intended to be a simple and inexpensive means of incorporation for NFP groups.

With this objective in mind, it is imperative that the Act can be easily understood and applied by non-lawyers (ie. by members of the public involved in associations), without requiring the assistance of a lawyer.

The winding-up and administrative provisions of the Act are neither simple nor inexpensive to apply, in particular:

- the application of certain sections of the *Corporations Act* by reference and without inclusion of their text in the Act means that legal assistance is often required just to understand the winding up and administration provisions of the Act and the relevant applied *Corporations Act* provisions. Obviously where there are complexities like staff and other creditor entitlements, leases and/or significant assets etc it is appropriate that professional advisers are involved, but where this is not the case it should be possible to at least understand what is required, and
- the appointment of an administrator to an association by Fair Trading is currently only available to organisations on application by the Director-General of Fair Trading (s 55), but we believe additional avenues for appointment of an administrator, such as on application by a group of members or the committee of an association, could provide greater assistance for small, struggling incorporated associations.

The perverse outcome of the overly complex winding-up/administration regime in the Act is that many incorporated associations that have reached the end of their life do not formally cancel or wind-up.

These non-operational groups simply stop operating, but remain registered with Fair Trading. We often receive phone calls from associations who feel that they have no choice but to 'abandon' the organisation rather than formally wind it up as they do not have funds to pay, what for them, are the significant costs of an external administrator.

It is often the case with these associations that they do not meet the criteria for voluntary cancellation because they are unable to pay their debts, but their debts are less than what it would cost to appoint an administrator/liquidator. It would be helpful if consideration could be given to another mechanism by which associations in this situation could "come off" the register without having to go down the costly path of appointing an administrator/liquidator.

These non-operating groups no doubt contribute to the high number of associations that do not submit annual statements to Fair Trading each year.

▶ Transfer of registration and amalgamation

(a) Complex process

While it is beneficial to have a statutory process in place to allow an association to transfer its registration to a company limited by guarantee or a cooperative, or for two or more associations to amalgamate, the process involved in implementing the change can be complex and expensive. Without the appropriate legislative provisions, it can also have unintended consequences for

associations such as the loss of valuable charity tax concessions and/or deductible gift recipient (DGR) endorsement.

Again, this works against the founding objects of the incorporated associations' regime, which was intended to be a simple and inexpensive means of incorporation and governance for NFP associations.

In our view, the current process for transferring registration or amalgamation should not be attempted by an association without legal and accounting support, which can be expensive and beyond the reach of most small, volunteer-run associations.

We encourage Fair Trading to consider how these processes may be made simpler and more user friendly, including through the provision of support and written guidance to organisations going through such a process.

(b) Transfer to CATSI organisation

Fair Trading may also be aware that the under the commonwealth government's Indigenous Advancement Strategy Guidelines (released July 2014), any organisation receiving grant funding of \$500,000 or more (per financial year) from the government under the Strategy is required to:

- for an indigenous organisation, be incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI)*, or
- for other organisations, be incorporated under the *Corporations Act 2001*.

The Act does not currently allow for a transfer of registration from an incorporated association to a CATSI organisation.

It is worth noting that Victoria's *Associations Incorporation Reform Act 2012* and every other incorporated associations regime allows for the transfer of registration of an incorporated association to a CATSI organisation.

We recommend that in the interests of reducing the administrative and cost burden on associations that are covered by the Indigenous Advancement Strategy Guidelines and other groups wishing to move to the CATSI regime, the Act incorporate a provision that also allows associations to use the statutory process to transfer their registration to become a CATSI organisation.



Part 2: Model rules – form and content

It is our view that the accessibility and usability of the Act generally, and particularly the model rules, would be improved by adopting the following suggestions.

▶ Plain language drafting

Given the audience for their use, it is critical that the proposed model rules are drafted in simple, plain language, to maximise their accessibility to those people involved with incorporated associations.

There are high rates of associations forming among culturally and linguistically diverse groups and migrant groups. These are the organisations most likely to be reading and using the model rules, because they are the groups least likely to have the resources and/or know how to draft their own rules.

We believe that the accessibility of the model rules can be further enhanced by consistent cross-referencing to the Act. The majority of associations we deal with use their rules as the primary source of their obligations and responsibilities under the Act. For this reason the model rules need to consistently state (or, at the very least, cross-reference) the obligations imposed on the association and its office holders by the Act. For example, the general duties of committee members are not referred to in any form in the model rules. As a result, we find that committee members are often unsure of their obligations.

Further, we recommend that the model rules can be made significantly more user-friendly by way of improvements to their layout and formatting. We suggest that the version of the model rules available on Fair Trading's website should contain aids to navigation (such as an index), "more help" bubbles (eg, definitions of terms, or more practical information), and hyperlinks to relevant sections in the Act (especially where a relevant requirement is not fully stated in the model rules).

With this in mind, we see the review as providing an ideal opportunity to revisit the language, structure and formatting of the model rules to ensure that they are as simple and easy for small volunteer-run groups to understand as possible.

▶ Objects clause

We recommend that the model rules include a placeholder for the association's objects at the start of the document to avoid associations putting their objects in a separate document which often leads to confusion.

Further, a "more help" bubble that provides tips on how to draft objects (including the difference between the mission and the objects) would provide much-needed guidance.

▶ Eligibility to be a committee member

We note that the model rules do not mirror s 18 of the Act in respect of who is eligible to be a committee member, namely that they must be aged 18 years or over and at least three of whom have to be ordinarily resident in Australia. It is also unclear from the model rules that a committee member must also be a member of the association (as is required by s 18).

The model rules need to be redrafted in order to accurately reflect, in accordance with the Act, who is eligible to be a committee member.

▶ [Minimum number of members](#)

We recommend that the model rules include a provision that clearly states the minimum number of members as required by the Act. The model rules currently do so in an indirect way by stating that five members make up a quorum [rule 27(2)].

▶ [Duties of committee members](#)

As recommend above, the model rules need to include a clear statement of the four key duties of committee members and the duty to avoid insolvent trading.

▶ [Rights and obligations of members](#)

We recommend that the rights and obligations of members including voting rights, right to notice, right to access certain documents, and obligation to follow the rules of the association, be clearly set out together in the model rules.

▶ [Use of technology to conduct meetings](#)

We support the inclusion of a provision in the model rules to enable the use of technology to conduct meetings. Sections 30 and 37 of the Act already allow for it, subject to an organisation's constitution. We recommend that it be a default provision in the model rules.

▶ [NFP and winding up clauses](#)

We recommend that the model rules contain a NFP clause and a winding up clause that are consistent with the Australian Charities and Not-for-profits Commission's (**ACNC's**) and Australian Taxation Office's (**ATO's**) requirements. This would allow organisations to apply for charitable status as well as tax concession charity endorsement and/or DGR status without the need to make further changes to their rules. We receive numerous calls to our advice line from associations needing assistance with amending their rules to include the NFP and winding up clauses before applying to the ACNC and/or ATO. This time consuming exercise could be avoided with the inclusion of those clauses in the model rules.

In addition, the model rules could include alternative model provisions for associations wishing to set up a public fund for the purposes of obtaining DGR status.

Part 3: Consider harmonising reporting obligations with ACNC requirements

As Fair Trading is aware, in 2012 the federal government set up the ACNC and enacted legislation to regulate charities for the purposes of federal law. The reality is that many of these charities are incorporated under state association legislation. For the NFP sector in NSW, there would be a significant reduction in red-tape if state legislation was harmonised with that enacted by the federal government, particularly in relation to financial reporting. This would include aligning the thresholds for 'tiers' of association, as well as the reporting standards and requirements. There are also other possibilities for harmonisation, including adopting registration with the ACNC as an automatic eligibility criteria for the purpose of charitable fundraising laws. Some other jurisdictions have already aligned (or are about to align) their association legislation in this way.

We suggest that to undertake a statutory review of the Act, without looking at the possibility of harmonisation with the other similar (or more extensive) reporting requirements that many associations now have to the ACNC, would be a significant missed opportunity – and one that would seem to be contrary to the NSW government's mission of reducing red-tape for the NFP sector.



Part 4: Fair Trading 2013 governance review

We note that in 2013, Fair Trading put out in a Discussion Paper titled '*Improving governance within community organisations*' a series of proposals for reform of the Act. Our key submission to that paper was that the issues raised in that paper be deferred for consideration until the Act came up for statutory review, so as to reduce the number of amendments that resource-strapped NFP organisations had to understand. However, in our submission to that Discussion Paper, we went on to address the proposals for reform discussed in the paper.

We are unsure whether these proposals are being considered again as part of the current statutory review but we have **attached** our submission to the Discussion paper for your **further** consideration.

