Associations Incorporation Act 2009
- Statutory Review

[Monday, November 02, 2015]

NSW Fair Trading
NSW Department of Finance & Services
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Executive Summary

Incorporated associations enable community interest groups to develop and provide services to their members in a manner which is consistent with their purpose and objects and as set out in their constitution. Their legal identity is provided by the *Associations Incorporation Act 2009*.

The requirement for the Minister to review the Act at this time is to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

This review finds that the legislation is popular with its users and that it could be improved with amendments to deal with certain aspects of running an organisation which are either unclear or proving to be impractical. The proposed amendments are set out in the recommendations of this report.

The report has benefited from both the input of organisations, whose constituency includes incorporated associations, and from the more than 1500 association members who completed a survey, thereby supplying the ‘grass roots’ perspective.

Aside from the requirements of the Act, many associations are part of other networks and comply with additional and different accountability arising from their affiliations such as to sporting federations or requirements imposed by financial providers including grant bodies. In this way the Act is the foundation to enable the achievement of an organisation’s purpose.
Background to Review

Requirement for Review

The Act requires that the Minister review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives (section 109).

The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act. A report of the outcome of the review is to be tabled in each House of Parliament within the twelve month period. The Associations Incorporation Act was assented to on 7 April 2009.

The Act commenced on 1 July 2010.

Associations Incorporation Act 2009

The Associations Incorporation Act 2009 (the Act) establishes a scheme for the registration of associations that are constituted for the purpose of engaging in small-scale, non-profit and non-commercial activities. It provides these not-for-profit organisations with a simple and low-cost means of becoming a legal entity.

The Act commenced operation on 1 July 2010 replacing the now repealed Associations Incorporation Act 1984. The Act made significant changes to the previous legislation by making it easier for associations to manage their own affairs while ensuring they remain accountable to their members and the public\(^1\). Most of the changes in the new Act were designed to modernise the law, reduce red tape and allow more flexibility for associations.

The Act repealed its predecessor, the Associations Incorporation Act 1984, and associations which were already incorporated were transitioned into and continued under the 2009 Act. The Act by way of difference from the original:

(a) distinguishes between large (Tier 1) and small (Tier 2) associations for the purposes of financial reporting, so enabling tighter reporting and auditing requirements to be imposed on the former

\(^1\) Second Reading Speech. NSW Parliament Hansard, 31 March 2009
(b) requires at least three of its committee members to be resident in Australia, and an association’s public officer to reside in NSW
(c) requires an association’s committee members to disclose their interests in any matters to be discussed at a committee meeting
(d) creates a number of offences with respect to fraudulent behaviour and misuse of confidential information by an association’s committee members
(e) enables an association to be ordered to change its name if the name under which it is registered is unacceptable for any of a number of specified reasons
(f) enables an association to allow postal voting by its members
(g) enables an association’s registration to be reinstated if its registration should not have been cancelled.

The registration of the association may be cancelled for grounds set out in section 76 of the Act.

2013 Improving Governance within Incorporated Associations Discussion Paper

Public submissions were invited at the end of 2013 in response to a Discussion Paper titled Improving Governance within Incorporated Associations. The outcome of that consideration is included in this report, both in Appendix 2 and in this report’s recommendations.
Policy Objectives of the Act

The Act also contains objectives, being:

(a) to establish a scheme for the registration of associations that are constituted for the purpose of engaging in small-scale, non-profit and non-commercial activities, including:
   (i) associations that are currently unincorporated (which become bodies corporate when they are registered), and
   (ii) associations that are currently incorporated under other legislation (which retain their corporate status following registration)

(b) to make provision with respect to the corporate governance and financial accountability of associations registered under that scheme.

These objectives make it clear that the policy intent is to facilitate the creation of a legal structure in a low cost environment and at the same time provide for self-governance and financial responsibility and accountability of the arrangement.

There are alternative forms of legal structure are which suited to different purposes and circumstances include company limited by guarantee, proprietary limited company, company limited by shares, cooperative and charitable trust. Incorporated associations are ideal for small community-based interest groups so that the members can practice and pursue their purpose within an easy to understand framework. Some groups do not incorporate at all to pursue their activity.

The second reading speech explained that the Act must provide for the flexibility which associations need to support their various endeavours without unnecessary regulatory requirements. In this sense, the Act must be simple to understand and able to be complied with in a manner proportional to the association’s scale, purposes and activities.
**Snap shot of the Sector**

There were 36,097 associations registered in NSW at 30 June 2015. Each year associations are created and register for the first time and other associations cease to be registered. In the year ending 30 June 2015 there were 1,770 new registrations, 453 voluntary cancellations and 2,198 involuntary cancellations. The number of associations thus decreased over the year, a trend which is expected to continue as registrations are actively managed by NSW Fair Trading.

An association incorporated in NSW has the status of a legal entity and must comply with the Act.

Approximately 93% of associations fall into the Tier 2 category. Their gross receipts or current assets do not exceed $250,000 or $500,000 for the last financial year. In contrast to Tier 2 associations, Tier 1 associations (2,588) must provide audited accounts.

Management committees overwhelmingly comprise volunteers and few employ staff.
NSW Grantees

The NSW Government funds some incorporated associations to deliver essential services. For example, a significant proportion of the non-government organisations funded by the Department of Family and Community Services are incorporated associations. Community housing organisations which also receive funds are required to be companies limited by guarantee or shares under the Corporations Act unless they are very small (that is managing fewer than 50 properties in a single State).

In April 2015 the Social Policy Research Centre surveyed leaders from 513 of 1,429 target group (funded) organisations. In relation to governance the findings were:

Community service organisations have strong governance arrangements in place. The vast majority (87.2%) had a strategic plan, and most organisations (69.0%) had a financial reserve to cover expenses for three months. Most organisations (78.2%) have financial or business management experts on their boards or management committees. The overwhelming majority of respondents agreed that their organisations’ governance body was working effectively with management. However, compared with larger organisations, small organisations faced more difficulties recruiting, retaining and training board and management committee members.2

The requirements of receiving funding impose accountability beyond the requirements of the Act.

Charities - ACNC

The Australian Charities and Not-for-profits Commission Act 2012 (Cth) (ACNC) provides the legislative base for the operation of Australia’s regulator of charities. The ACNC began operation on 3 December 2012. The Charities Act 2013 (Cth) introduces a statutory definition of charity that sets out more clearly the common law meaning of charity and clarifies some areas of uncertainty. The Charities Act applies from 1 January 2014.

As at 30 September 2015 there were 54,145 charities registered with the ACNC. Registering with the ACNC is not compulsory, but it is a pre-requisite for receiving Commonwealth charity tax concessions. To be eligible for registration with the ACNC, charities must demonstrate that they are not-for-profit, that they are pursuing a charitable purpose, and that they meet minimum governance standards. Only an organisation can register.

• At 14 August 2015\(^3\) there were 18,180 ACNC-registered charities based in NSW. Of those, 6,924 charities are incorporated associations (38%). 32% are unincorporated associations, 16% are companies and 14% are trusts.

• 2,165 charities based in NSW operate in at least one other state or territory (12%) (the type of legal entity has not been provided)

• The majority of charities in NSW are small (68%), which means that they have less than $250k in annual revenue. Medium charities ($250k - $1m) make up 17%, and large charities ($1m or more in annual revenue) make up 15% of NSW charities.

• The top activities of NSW charities are (in order): education, religion, economic, social and community services, emergency relief, and culture and arts.

Despite the strong incentive to register with ACNC, compliance by charities with ACNC requirements appears to be leading to a reduction in the number of charities claiming charity tax benefits. Annual reporting appears on the ACNC homepage. As at 28 September 2015 only 81% of registered charities had submitted their annual report document compared with 98% at the same time in 2013 (8,999 charities were outstanding in their reporting requirements to ACNC of the 49,849 charities due to report).

\textit{In the ACNC Commissioner’s Column of 29 September 2015, it was reported that ‘There are more than 300 charities that have had unopened mail returned to the ACNC. These charities are at risk of outstanding lodgements of the Annual Information Statement and incurring the associated penalties. If a charity does not submit an Annual Information Statement for two consecutive years, the ACNC will progress towards revoking the charities registration.’}\(^4\)

\section*{Federated bodies}

Many types of incorporated associations including sporting groups operate under affiliation to their District, State and National organisation. For example, in NSW there are 350 swimming clubs affiliated to 11 districts and to Swimming NSW Ltd which is in turn affiliated to Swimming Australia Ltd. The clubs and districts are usually incorporated associations which are guided by, and compliant with, their own policies and those of the peak organisations.

Some service groups use a constitution which is consistent internationally.

\footnotesize\(^3\) ACNC provided these statistics for a meeting with Fair Trading’s Policy and Legislation Branch\(^4\) \url{http://www.acnc.gov.au/ACNC/Comms/Com_Col/CC_20150929.aspx} accessed 6 October 2015 at 12.13
The affiliations provide another level of governance and financial accountability which is relevant in policy development.

**Association activity categories**

Associations self-classify and the information is voluntary. While some of these activities are opaque, they reflect the range of unique enterprises of human interest. Although there are definitions which could be imported to clarify activity, for example from the Commonwealth Charities Act, such as for education, religion, economic, social and community services, emergency relief, and culture and arts this would not further the objectives of this Act.
Consultation

Survey August 2015

The experience of grass roots association members was sought for this report and 1,504 association members answered the survey (Appendix 1). The responses came from the entire spectrum of activity groups and clubs including for: historic and antique machinery, social motoring, fellowship amongst retired business/professionals, art, photography, various occupations, men’s sheds, landcare, tidy towns, natural disaster fundraising responses, aspects of health, quilting, aged care, woodturning, tourism, country music, gardening, disability services, model railways, ex-military fraternity, community hall maintenance, recreational cycling, computer training for seniors, family support groups for various needs, neighbourhood progress associations, youth groups, sports clubs, bridge clubs etc.

The individual views, opinions and experiences have been valuable to identify what can be done to support them. Their suggestions have informed the recommendations. The majority of responses want practical assistance such as easily understood legislation, focus on essentials from the perspective of a very small organisation and reduced fees for compliance particularly as many associations have very low revenue. Many suggestions are able to be accommodated within an association’s own constitution such as clarifying how membership operates in their circumstances and specifying the term of committee members. This information will be used to amend the Model Constitution and to consult on fees, as these are prescribed in the Association Incorporation Regulation which will be remade in 2016.

Governance Survey in 2013

The legislation intends that associations be largely autonomous with minimal involvement by the regulator.

The Act makes an association’s constitution the centrepiece for governance. Each association must adopt a constitution, which then confers rights and obligations on all members of the association. A dispute resolution procedure is required to be included in every association’s constitution. If a dispute arises, parties should attempt to resolve the matter directly, in accordance with this procedure.
On 25 October 2013, Fair Trading released the Discussion Paper: "Improving governance within incorporated associations". Proposals in the Discussion Paper are aimed at strengthening governance within incorporated associations without placing undue burdens on them. Some focused governance solutions were explored that aimed to strengthen governance in incorporated associations, whilst not placing an undue burden on them. Broadly the paper looked at assuring sound leadership and honest behaviour by an association as well as considering what an appropriate response by government might be to association conduct which is contrary to the public interest.

The closing date for submissions on the Discussion Paper was 13 December 2013, with 157 received in total: 119 online and 38 written submissions.

The outcomes are at Appendix 2, including a reason and proposed action.

Associations do a huge variety of activities and it is essential the requirements of the activity do not alter the focus of the incorporating statute, which is to provide for governance and accountability to their members. As with any group, an association can potentially experience internal disagreement. As conflict can be unpredictable and is usually unique, the association is best placed to respond to their issues; if the association ceases to function, its registration can be cancelled.
Findings

General

Unsurprisingly as the legislation is relatively new, most respondents found the Act easy to understand. This has been verified in the survey responses. Nevertheless the review has found that some improvements could be made to the Act to assist and support associations to comply with the legislation. The Regulation which contains the model constitution is also vital in assisting operationalise the Act’s provisions. The Regulation, which will be remade before 1 September 2016, will be drafted for the public exposure and consultation process which is part of a Regulation remaking process and draw on the material obtained for this Review.

Tier 1 and Tier 2 associations

The Tiers have the effect of distinguishing small associations which are the target audience of this Act. Accordingly there is no proposal to change these Tiers. The Act is designed for small-scale, non-profit and non-commercial activities.

There should be a ceiling to Tier 1 organizations, at which point they should be forced to become Companies Limited by Guarantee - because too much is happening at the "big end of town" which requires (and will require) additional measures of accountability & compliance, beyond the reach, scope or relevance to either Tier one or two organizations. So (for example) Organizations with turnover $2.5million should be forced to become Guarantee companies. Associations need to be kept simple & easy enough to be run by the common man – the professionalization of the sector is just hobbling small local bodies & frightening off volunteer leadership (survey comment)

The active management processes undertaken by Fair Trading to encourage Tier 1 organisations to transfer to another form of incorporation is consistent with the treatment of organisations by funding bodies insofar as a corporation provides the appropriate structure for more complex and/or wealthier organisations. A corporation is also appropriate for facilitating cross-border (ie non-local) activities.

In relation to Tier 2, the majority of respondents supported that Tier 2 associations continue to be required to lodge financial statements of any trusts they hold in addition to the association’s annual financial statement.
The majority of respondents believed that the Act should more clearly explain the effect of a transfer of registration on an association’s rights, claims, liabilities and actions, and any other matters relevant to the prior function of the association. This can be achieved without legislative amendment by revising the guidance material which is produced by Fair Trading.

**Effect of incorporation**

The limitation of rights and liabilities of members is a significant matter for associations and their members. For many associations this is a major factor in the decision to become incorporated. To avoid confusion section 26(2) should be amended to clearly state a member’s liability is limited in all cases of debt/liability, not just at winding up. The repealed former **Associations Incorporation Act 1984** set this out as:

### 16 Rights and liabilities of members and officers

1. Subject to this Act and the rules of the incorporated association, a member or officer of an incorporated association shall not by reason only of being such a member or officer be liable to contribute towards the payment of the debts and liabilities of the incorporated association or the costs, charges and expenses of the winding up of the association.
2. Unless expressly provided by this Act or the rules of an incorporated association, membership of the association must not be taken to confer on a

Victoria provides as follows:

**Associations Incorporation Reform Act 2012 (Victoria)**

### 52 Limitation of rights and liabilities of members

1. Except as otherwise provided by this Act or the rules of an incorporated association, a member of the committee, the secretary or a member of the association is not, merely because of being such a member or the secretary, liable to contribute towards the payment of—
   a. the debts and liabilities of the association; or
   b. the costs, charges and expenses of the winding up of the association.
2. Unless expressly provided by this Act or the rules of an incorporated association, membership of the association must not be taken to confer on a
person any right, title or interest (whether legal or equitable) in the property of the association.

This matter should be addressed in the Act and a recommendation is made to that effect.

Names of associations

In the survey the majority of respondents preferred to retain the current option that prospective associations may reserve a name (section 15). As this is a discretion, failure to reserve a name should not be grounds for the refusal of a registration application; the ground should be removed from section 7(2)(b).

The majority of respondents agreed that on registration, the new association may nominate up to three names in order of preference. This is a provision in the Regulation which will be retained (clause 5).

The majority of responses agreed that if an association has failed to change its name as directed by the specified date, there should be an alternative to cancellation of registration. The alternative in that circumstance is that the Director-General may change the association’s name to its registration number. This will require amendment of the Act.

Where an association adopts model constitution – maintaining currency

When an association incorporates, it may adopt the model constitution as its constitution or it may customise its constitution (section 25(2)).

It is proposed that a new provision be made to the effect that where the association that has adopted the model constitution as its constitution, it is taken to have adopted the model constitution as in force from time to time. This will avoid the need for the association to adopt or register any changes to the model constitution.

Importantly when the model constitution is changed, this change will avoid confusion and the need to ascertain which ‘version’ of the model constitution applies to a particular association as the model constitution is published in the Regulation.

This proposed provision would not affect any association that has adopted its own customised constitution.
Unacceptable names

A slight majority of respondents do not believe there should be any other grounds for deeming a name to be unacceptable eg. where a name is identical to or closely resembles the previous name of a registered association or the name of an association that is no longer registered. Nevertheless practical experience has shown that:

1. a name should be unacceptable if it is identical to or substantially similar to a name used by a former association where in the Director-General's opinion the public would be misled if the association is to operate with that name;
2. the name should be in characters used for English due to the difficulties of publishing in another script;
3. the existing prohibition on registering an association with a name that is identical to, or closely resembles, a business name registered under the Business Names Registration Act 2011 (Cth) should be changed to allow some flexibility to permit registration where in the Director-General's opinion it is unlikely the public would be misled or where the applicant for registration of the relevant association has reserved or registered the business name;
4. a name that is the name of a “criminal organisation” or “declared organisation” under Part 2 of the Crimes (Criminal Organisations Control) Act 2012 or a variation of such a name should be an unacceptable name.

These circumstances can be added to Schedule 2 Unacceptable Names of the Associations Incorporation Regulation when it remade in 2016.

Electronic voting

The majority of survey respondents agreed electronic voting should be allowed when association members are voting remotely, provided this is permitted by the association’s Constitution. This will require amendment to section 38.

Record keeping

The obligation on the Committee to keep records that correctly record and explain its financial transactions and financial position, and minutes of the proceedings of its committee meetings and general meetings, is set out in section 50. The section provides that the Regulations may make provision for or in respect of the keeping and inspection of records and minutes under this section. When the Regulation is remade, provision should be made that the records can be kept in electronic format and to
provide that financial records must be kept for at least 5 years. This is the view of the majority of survey respondents.

**Official address**

There are practical problems with the current requirements for an association’s proposed official address which must be an address within New South Wales, being (section 6(4)):

(a) at which any premises used by the association are located, or
(b) at which the proposed public officer resides, is employed or carries on business.

Fair Trading has had a number of situations where the nominated official address of the premises of the association is a club house or, on a few occasions, a playing field which is unattended most days and to which postal deliveries cannot be made. This makes it difficult, if not impossible, to serve notices on the Association in accordance with section 101 of the Act.

An amendment is required to clarify that the official address of an association must be for the public officer (who is the official contact) and must be an address at which it is possible to serve documents on the association personally or by post in accordance with section 101 of the Act.

**Duties of committee members**

At common law there are duties on committee members. The Act currently only deals with the duty to manage conflicts of interest (section 31) and the duty to not dishonestly use position or information (sections 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 section 68, without any cross-reference.

Two key duties are missing being the responsibility 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.

The current exposure draft Strata Schemes Management Bill 2015 proposes to deal with these duties as follows:

**37 Duty of members of strata committee**
It is the duty of each member of a strata committee of an owners corporation to carry out his or her functions for the benefit, so far as practicable, of the owners corporation and with due care and diligence.

**Note.** Section 255 provides protection from personal liability for members of strata committees who act in good faith.

### 255 Personal liability of officers and strata committee members

A matter or thing done or omitted to be done by an officer of an owners corporation or any other member of a strata committee, or a person acting under the direction of an officer or any such member, does not, if the matter or thing was done or omitted to be done in good faith for the purpose of executing this or any other Act, subject the officer, member or person so acting personally to any action, liability, claim or demand.

Association committees have many similarities with a strata committee and this proposal would be suitable.

The responsibilities of committee members could then be included in the Model Constitution in the Regulation and be the basis for governance advice to associations. It is recommended that amendment to the Act to include all the duties on the committee.

### Cancellation of association registration in the public interest

Proposed responses to situations where an association exhibited nuisance or non-exemplary behaviour was canvassed from a number of perspectives in the 2013 Discussion Paper.

The paper queried how the public could be made aware that an association or officer of an association had committed an offence. As occurred over 2013 and 2014 media releases were issued about the then registered Australian Vaccination Network Inc. This option which is currently available is effective and sufficient.

The grounds for cancellation of an association’s registration are set out in section 76. The paper proposed that these should include a ground where the Director-General believes that it is in the public interest to do so. This amendment is recommended and the association has the opportunity to seek review and appeal against a decision provided in section 104.

The paper also sought feedback about a response to misleading and/or deceptive conduct by an association. Despite the duties on committee members, poor conduct by the association potentially may still occur. Section 73 gives the Director-General grounds to direct an association to apply for cancellation because of, having regard to
the objectives of the Act, the Director-General’s assessment of the nature or extent of the association’s activities and/or dealings with the public. The association has the opportunity to seek review and appeal against a decision provided in section 104. This, together with the proposed power for the Director-General to cancel an association’s registration where it is in the public interest to do so, gives an appropriate remedy in cases of misleading or deceptive conduct.

**Voluntary cancellation (Section 72)**

An application for cancellation must be accompanied by a statement (verified by statutory declarations by two committee members) that the association has no outstanding liabilities. An application for voluntary cancellation must be refused if the Director-General suspects the association had outstanding liabilities.

Verification by one committee member is sufficient in the context of the other requirements for the application to allow the delegate of the Director-General to be satisfied the association has no outstanding liabilities. It is required that the application must also

(a) must be in the approved form, and  
(b) must include a copy of the special resolution by which the association has approved:  
   (i) the cancellation of its registration, and  
   (ii) the proposed distribution of its assets

An application for deregistration of a company or a co-operative only requires the secretary or one director certify the company or co-operative has no outstanding liabilities. It is proposed that section 72(2)(c) be amended to refer to a statutory declaration by one committee member.

**Winding up on certificate of the Director-General**

The winding-up provisions for associations are set out in Part 6 Division 3 of the Act. These could be enhanced. There has been some experience with a number of associations funded by government where they have failed because the entire committee resigned. This left the association without leadership and with no prospect of recommencing operations. The funding body has then had no choice other than to commence Supreme Court proceedings to appoint a liquidator to recover government funds.
In some circumstances it may be possible for Fair Trading to cancel the association’s registration, however this is not always appropriate because there is ongoing legal action against the association (often WorkCover claims by staff).

A suitable proposal would be to provide the Director-General with the power to appoint a liquidator on the Director-General's certificate in a similar manner to section 443 of the Co-Operatives National Law (NSW). The liquidator need not be a registered company liquidator. Relevant grounds may include:

- Where the number of members is reduced to less than the minimum number of persons required under the Act; or
- The association had, for a specified period of time immediately before the date of the Director-General’s certificate, insufficient committee members to form a quorum under the Association’s constitution; or
- The Association has ceased operations; or
- The Director-General is satisfied there is a significant public interest and public funds at risk.

Such as provision is aimed at saving the expense from government funds to access the Supreme Court winding-up proceedings.

**Lodging of financial statements by Tier 2 organisations - fees**

The requirement to lodge an annual financial statement for associations at the end of an association’s financial year is the main tool for Fair Trading to monitor an association’s compliance with the Act. Where financial statements are not lodged for three consecutive financial years, the Director-General may cancel registration.

It is this requirement which caused comments from Tier 2 associations about the cost of compliance with the Act. Many are set out below because they colour the subject of this report:

> Maybe a distinction could be made between NFPs with only volunteer staff and budgets of less that say $50,000. We are a very small outfit...donations and memberships totalling less than $5000. I feel we are a different category than those whose income is closer to $250,000. Making life simpler for those associations run only by volunteers, many of who have limited experience in the administrative responsibilities they take on, would help us to find members willing to take on organisational responsibilities and run our associations better.

> I manage the affairs of two Associations. One of these has little activity or income. Form 12 fees become a major annual expenditure. It is suggested that
Form 12 fees be waived for Associations having an annual turnover of (say) less than $1000.

Most of the questions asked in this survey, do not apply to Associations that only run with Membership Fees, therefore it is irrelevant to some Associations to be asked about trust, companies and assets when their financial reports are less than $300, as some Associations only wish to make a difference and are flexible and willing to support our Multicultural Society that Australia has the privilege to have.

Very small associations should be exempt from payment of an annual fee for providing summaries.

Our association has around 50 members of which only 50% actively ride with the group, with another 25% taking part in social activities. We have never had more than $2500 in the bank, as we work on the not for profit principal - if the bank balance builds up, we spend some on the members by way of training, subsidised social events etc.

The need for compliance by volunteers on small inc organisations such as our swimming club with minuscule revenue of around $10,000 and assets of around $6,000 is outrageous. It penalises severely those who volunteer (especially the President and the Treasurer) and it rules out participation of many volunteers. Red Tape like lodging annual accounts + plus a fee + plus a penalty fee for "late" lodgement is a disgrace.

Some associations have a much smaller budget (in our case less than $3500 per annum) and should be treated with lower overheads. The fees for the submission of mandatory reporting items should be waived to lighten overheads.

I believe the fee to lodge the annual financial report for Tier 2 Associations should be reduced or on a sliding scales for smaller groups. We pay $54 in 2015 to lodge and our bank balance is approx. $1000. This is a huge amount for a small volunteer organisation.

We believe Associations should not be required to have to pay an annual lodgement fee for the Form A6 and A12 - the latter is now over $1 per week - this is not a fair cost to charities, particularly ones that are providing a service to Government and the community.

We continuously struggle with regulatory requirements which takes time and energy away from what we want to be doing. The lodgement of financial affairs (A12) cost us $52 with an annual income of $86. That doesn’t make sense. Would it be possible to introduce Tier 3 organisations with incomes of less than $1000 with much less regulations?

Maybe a distinction could be made between NFPs with only volunteer staff and budgets of less that say $50,000. We are a very small outfit...donations and memberships totalling less than $5000.

There should be at least 5, up to 10 financial tiers of incorporated associations. How can an association with assets under $1000 and a gross income of less
than $2500 be in the same class as those whose gross receipts are under $250,000 or current assets do not exceed $500,000?

In our case revenue is less than $1,000 per annum generally so the reporting surrounding it is excessive. Prior to my involvement financial summaries had not been done for 6 years yet there was no effect good or bad on the organisation. During those years the turnover was less than $20, yet the cost of the return for example was greater than turnover. It seems to have served little or no purpose.

We are a small sporting club. We would be lucky to have $10k come into our accounts over a year. The requirements for financial returns are beyond what is reasonable for a small club with insignificant funds. We are talking about volunteers with at least one other full time job. The requirements need to be wound back for such small clubs.

There should be a ceiling to Tier 1 organizations, at which point they should be forced to become Companies Limited by Guarantee - because too much is happening at the "big end of town" which requires (and will require) additional measures of accountability & compliance, beyond the reach, scope or relevance to either Tier one or two organizations. So (for example) Organizations with turnover $2.5 million should be forced to become Guarantee companies.

The fees are in Schedule 5 the Regulation and are currently:

9. Lodgement of summary of Tier 1 association’s financial affairs for the previous financial year, financial statements, auditor’s report and a copy of any resolution passed at the association’s AGM in connection with those documents (section 45 (1) of the Act) $54

10. Application for further time in which a Tier 1 association can lodge documents pursuant to section 45 (1) of the Act (section 45 (2) (a) of the Act) $30

11. Additional fee for late payment of prescribed fee for lodgement of documents pursuant to section 45 (1) of the Act:
   if the documents are lodged after the due date for lodgement, but less than 1 month after the due date $26
   if the documents are lodged 1 or more months after the due date $33

12. Lodgement of summary of Tier 2 association’s financial affairs for the previous financial year (section 49 (1) of the Act) $54

13. Application for further time in which a Tier 2 association can lodge a summary of the association’s financial affairs pursuant to section 49 (1) of the Act (section 49 (2) (a) of the Act) $30

14. Additional fee for late payment of prescribed fee for lodgement of summary of the association’s financial affairs pursuant to section 49 (1) of the Act:
   (a) if the summary is lodged after the due date for lodgement, but less than 1 month after the due date $26
   (b) if the summary is lodged 1 or more months after the due date $33
It is recommended that the fees be reviewed for the remaking of the Regulation particularly to reduce a fee for Tier 2 association which lodges its annual financial statement within the due period. To offset this revenue loss, other fees will be increased so that the fee revenue for the administration of the Act will be maintained.

As fees are included in the Regulation there will be public consultation on this aspect when the Regulation is remade in 2016.

**Voting for new committee – independent returning officer**

The 2013 Governance Review sought response to a query as to whether the Act should provide an independent returning officer in certain circumstances. Currently a returning officer is only required for a postal ballot, details of which are set out in Schedule 3 of the Regulation. It is unclear how the behaviour of the returning officer in a postal ballot affects the counting of votes.

If an association wished to ensure more variety in its leadership, an alternative could be amendment to require that if the Constitution provides for office bearers, the number of terms that the same person can hold the office for is specified. This requires amendment to the Act and the Model Constitution and will enable an association to provide for its leadership in a suitable manner.

*Members on the governing committee should have a time limit for sitting the governing committee. (survey comment)*

*Committee members maximum of no more than 5 years. (survey comment)*

It is therefore recommended that section 28, which requires that a committee be established, be amended to include a provision to the effect that if the Constitution provides for office bearers, the number of terms that the same person can hold the office for is specified.
Recommendations

It is recommended that the amendment to *Associations Incorporation Act 2010* be made as follows:

1. Provide for limitations of rights and liabilities of members of an association;
2. Remove the ground being failure to reserve a name as a ground for the Director-General refusing a registration application (section 7(2)(b));
3. Where an association has failed to change its name as directed, enable the Director-General to change the association’s name to its registration number (section 11);
4. Amend section 25 so that where an association’s constitution is the model constitution, any amendments to the model constitution take effect on the day the relevant amendment to the model rules comes into operation; and takes effect without the requirement of a special resolution of the association; and does not require the approval of the Director-General;
5. Electronic voting to be allowed when association members are voting remotely, provided this is permitted by the association’s constitution (section 38);
6. An amendment is required to clarify that the official address of an association must be for the public officer (who is the official contact) and must be an address at which it is possible to serve documents on the association personally or by post in accordance with section 101 of the Act;
7. Make provision for the duties of the Committee to include the duty of each member of a committee of an association to carry out his or her functions for the benefit, so far as practicable, of the association and with due care and diligence and include protection from personal liability for members of committee who act in good faith. (Part 4 Division 1);
8. Amend section 76 to include a ground where the Director-General may cancel the registration of an association where if satisfied that it is in the public interest to do so.
9. Amend section 72(2)(c) to refer to a statutory declaration by one (and not two) committee member;
10. Provide for winding-up of an Association on certificate issued by the Director-General in a manner comparable to the Co-Operatives National Law (NSW);
11. Amend Schedule I of the Act to require that the Association’s constitution deal with winding-up.

12. Amend section 28 to include a provision to the effect that if the Constitution provides for office bearers, the number of terms that the same person can hold the office for is specified.

**Remaking of the Associations Incorporation Regulation 2010**

When the Regulation is remade it is recommended that the draft for public consultation contain:

1. A provision for or in respect of the keeping and inspection of records and minutes so that the records can be kept in electronic format and for financial records to be kept for at least 5 years (new clause);

2. A revised Model Constitution in plain English containing amendments made to the Act (Schedule 1);

3. Additional circumstances unacceptable names for associations as set out in this document (Schedule 2);

4. Reduce the fee for a Tier 2 association which lodges its annual financial statement within the due period (Schedule 5) to the extent possible by increasing other fees.

**Guidance material produced by Fair Trading**

It is recommended that the guidance material produced by Fair Trading be reviewed by verifying whether the guidance material is suitably responsive to the enquiries being made by associations. For example, the material could better explain the effect of a transfer of registration on an association’s rights, claims, liabilities and actions, and any other matters relevant to the prior function of the association. Guidance material should also be prepared to illustrate to best practice meeting procedures including the recording of any conflict of interest and how it was managed.
What is your involvement with your incorporated association?

- Empty Responses: 22
- Other: 117
- Provide financial and/or…: 31
- Provide legal services to…: 2
- Public officer: 92
- Committee member: 533
- Member: 92

How many years have you been involved in incorporated associations?

- Empty Responses: 28
- More than 20 years: 378
- 10-20 years: 462
- 5-10 years: 346
- 2-5 years: 208
- 1-2 years: 58
- Less than 1 year: 24

Are you a volunteer?

- Yes: 1292
- No: 186
- Empty Responses: 26

Is the incorporated association you are involved with a Tier 1 or Tier 2 association?

- Tier 2 association (where gross receipts for the…): 255
- Tier 1 association (where gross receipts for the…): 11
- Don’t know: 45
- Empty Responses: 29

How well do you feel you understand the Associations Incorporation Act 2009?

- Very well: 156
- Quite well: 819
- Not very well: 431
- Not at all: 46
- Empty Responses: 52

How clear and simple do you find the laws regulating incorporated associations?

- Very clear: 929
- Quite clear: 416
- Not very clear: 33
- Not clear at all: 30
- Empty Responses: 96
Has your association adopted the model constitution set out in Schedule 1 of the Associations Incorporation Regulation 2010 or established its own constitution?

Does your association hold an Authority to Fundraise in NSW?

Is your incorporated association registered with the Australian Charities and Not-for-profits Commission (ACNC)?

Do you believe the objects of the Act are still relevant?

Do you believe the Act is achieving these objectives in practice?

Do you believe the requirement for prospective associations to reserve a name before applying for registration should be removed?
Do you believe that upon registration, the new association should be able to nominate up to three names in order of preference?

If an association has failed to change its name as directed by the specified date, do you believe there should be an alternative to cancellation of registration, where the Director-General may change the association’s name to its registration number?

Do you believe there should be any other grounds for deeming a name to be unacceptable eg. where a name is identical to or closely resembles the previous name of a registered association or the name of an association that is no longer registered?

Do you believe the list of matters required to be addressed in an association’s constitution is sufficient?

Should committee members be allowed to appoint additional committee members to make up a quorum until the next AGM?

Should the Act also provide for the keeping of such records in electronic format?
Should electronic voting be allowed when association members are voting remotely, provided this is permitted by the association’s constitution?

Should Tier 2 associations be required to lodge financial statements of any trusts they hold in addition to the association’s annual summary?

Should the Act provide for circumstances when an auditor ceases to hold office? For example, if he/she dies, resigns, is disqualified as a registered auditor or is removed by a general meeting of members of which 2 months notice has been given.

Should associations only be required to keep such records for a certain period of time?

How long should associations only be required to keep such records?

Should the Act more clearly explain the effect of a transfer of registration on an association’s rights, claims, liabilities and actions, and any other matters relevant to the prior function of the association?
Are you:

- Male: 606
- Female: 866
- Empty Responses: 32

How old are you?

- Over 75: 19
- 65-74: 155
- 55-64: 274
- 45-54: 108
- 35-44: 36
- 25-34: 8
- 18-24: 1

What is your involvement with your incorporated association?

- Member: 533
- Committee member: 291
- Public officer: 371
- Provide legal services to...: 371
- Provide financial and/or...: 22
- Other: 19
- Empty Responses: 22

What is the main activity of your incorporated association?

- Empty Responses: 42
- Other: 291
- Sporting: 371
- Social services/community: 371
- Religious: 74
- Environment/horticulture: 84
- Education/training/emplo...: 111
- Arts/culture/heritage/litera...: 160
- Religious: 84
- Social services/community: 74
- Empty Responses: 22
This survey was available in October 2013. A summary of the responses is below:

<table>
<thead>
<tr>
<th>QUESTION</th>
<th>Yes</th>
<th>No</th>
<th>Nil</th>
<th>STAKEHOLDER COMMENT/SUGGESTIONS</th>
<th>FT COMMENT</th>
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</thead>
<tbody>
<tr>
<td>Discussion Paper: ‘Improving governance within incorporated associations’ Total 157 submissions (119 online and 38 written)</td>
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<tr>
<td>1</td>
<td>Should the Act provide for the appointment of an independent external person to act as returning officer in certain circumstances?</td>
<td>108</td>
<td>35</td>
<td>14</td>
<td>1. Cost concerns. Tier 1-only application and increase proposed $50,000 threshold 2. Internal process rather than statutory requirement 3. Include definition of ‘independent returning officer’ rather than prescribed categories in regulation as too restrictive</td>
</tr>
<tr>
<td>2</td>
<td>Should the Commissioner for Fair Trading issue public warnings for incorporated associations?</td>
<td>115</td>
<td>25</td>
<td>17</td>
<td>1. Clarify circumstances under which a public warning would be made. Offences with no impact on running of IA should be exempt. 2. Support opportunity to state why they shouldn’t be named publicly. 3. More open communication between IAs and FT 4. Impact on volunteering and community support</td>
</tr>
<tr>
<td>QUESTION</td>
<td>Yes</td>
<td>No</td>
<td>Nil</td>
<td>STAKEHOLDER COMMENT/SUGGESTIONS</td>
<td>FT COMMENT</td>
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<tr>
<td>Should mediation be mandatory before going to court?</td>
<td>130</td>
<td>15</td>
<td>12</td>
<td>1. Majority support cost-effective benefits of pre-litigation dispute mediation.</td>
<td>The Act establishes a system for self-governance for associations. If the Act was to provide for dispute resolution for member disputes, a source of funding would be required. This is a matter for each association to determine for itself. Mediation is mandatory under the Model Constitution. No further action recommended as the existing provisions appear sufficient.</td>
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<td>2. Associations should be able to choose their own dispute resolution process.</td>
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<tr>
<td>Should the Commissioner for Fair Trading be permitted to issue mandatory practice directions?</td>
<td>108</td>
<td>32</td>
<td>17</td>
<td>1. Practice directions should be established by an independent body.</td>
<td>This option would increase red-tape and compliance costs for FT. FT would need to ensure all affected IAs were informed of practice directions and monitor their compliance to these. Enhanced guidance material is recommended.</td>
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<td>2. Would not allow flexibility for best governance practices according to needs/culture of particular organisation.</td>
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<td>3. Would not reduce red tape.</td>
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<td>5. Issue to particular IAs only if issues identified.</td>
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<td>6. NCOSS raises the point that some of these areas are outside the scope of FT operations and are appropriately addressed by other laws such as employment law.</td>
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</tr>
<tr>
<td>Should the Commissioner for Fair Trading have the power to ban individuals from holding a position on a management committee?</td>
<td>112</td>
<td>34</td>
<td>11</td>
<td>1. Clarification needed on circumstances under which person may be banned (initial non-compliance may be due to lack of awareness)</td>
<td>This proposal has practical problems as there is no requirement or utility in Fair Trading being notified of the composition and membership of a committee. No further action recommended.</td>
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<td>2. Too much power given to Commissioner</td>
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<td>3. Banning process should include a review process</td>
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<td>4. May prevent participation by people with minor/unrelated offences</td>
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<tr>
<td>Should association members be able to enforce rules in the Local Court?</td>
<td>104</td>
<td>39</td>
<td>14</td>
<td>1. Alternative process through NCAT suggested</td>
<td>The Act establishes a system for self-governance for associations. If the Act was to provide for dispute resolution for member disputes, a</td>
</tr>
<tr>
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<td>2. Still existing costs to smaller IAs and a deterrent</td>
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</tr>
<tr>
<td>QUESTION</td>
<td>Yes</td>
<td>No</td>
<td>Nil</td>
<td>STAKEHOLDER COMMENT/SUGGESTIONS</td>
<td>FT COMMENT</td>
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<td>------------------------------------------------------------------------</td>
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</tbody>
</table>
| 7 Should the legislation allow action to be taken in the Local Court for oppressive or unreasonable conduct? **64% support** | 101 | 37 | 19  | 1. More cost effective  
2. Alternative NCAT process suggested  
3. Some argue cost is still a deterrent  
4. More focus on ensuring constitution is an effective mechanism to resolve disputes internally  
5. Unnecessary escalation of trivial matters                                                                                                                                                                                                                                           | Oppressive or unreasonable conduct has been understood in a commercial context as the exercise of power by a larger shareholder over a smaller shareholder. An association is prohibited under s40 from conducting its affairs so as to provide pecuniary gain for its members. The status quo should remain and any litigation be in the Supreme Court. **No further action recommended.**                                                                                       |
| 8 Should disclosure of interests be recorded in the minutes? **82% support** | 128 | 19 | 10  | 1. Improve transparency and cost-effective  
2. Internal decision should be made on how to disclose. Suggestions to report conflict at next AGM.  
3. Concern that disclosures could be taken out of context, not ongoing or inappropriate to disclose (particularly for smaller IAs).                                                                                                                                                                                                 | Yes, this is best practice in standard meeting procedure and guidance material produced by Fair Trading can be so amended. **Enhanced guidance material is recommended**                                                                                                                                             |
| 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? **75% support** | 118 | 28 | 11  | 1. Clear outline of when and how this would occur is needed – strong and evidence-based decision based on non-compliance on more than one occasion.  
2. Education-based warning process before deregistration  
3. Appeal process  
4. Deregistration only if civil or legal proceedings against IA exist  
5. Too much power given to Commissioner                                                                                                                                                                                                                                           | Agreed. This ground will be recommended for inclusion in s76. It is proposed to provide an additional ground for involuntary cancellation (s76) being that to cancel the registration of an incorporated association if it is considered in the public interest to do so. This will provide an opportunity the association to seek review and appeal against a decision is provided in s104.                                                                      |
| 10 Should the legislation prohibit an incorporated associating from engaging in conduct that is misleading or deceptive, or would be likely to mislead or deceive? | 124 | 17 | 16  | 1. Essential to maintain integrity of sector  
2. Concern about censoring public debate                                                                                                                                                                                                                                           | This is already provided for in the Act at s73(2)(c) whereby the Director-General may direct the association to apply for cancellation of registration within a specific time because                                                                                                                                                                                     |
<table>
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<tr>
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<tbody>
<tr>
<td>79% support</td>
<td></td>
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<td>he or she is satisfied that, having regard to the objects of this Act, the association should no longer be registered because of the Director-General’s assessment of the nature or extent of the association’s dealings with the public. <strong>No further action recommended as the existing provisions appear sufficient.</strong></td>
</tr>
</tbody>
</table>