

29 July 2016

Ms Regina Haertsch
C/- The Department of Finance, Services and Innovation
Level 9, McKell Building
Rawson Place, Sydney NSW 2000

via email to policy@finance.nsw.gov.au

Dear Ms Haertsch

Associations Incorporation Regulation 2016 (NSW)

The Australian Institute of Company Directors (AICD) is pleased to provide a submission on the *Associations Incorporation Regulation 2016 (NSW)* (**the Regulation**).

The AICD is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director education, director development and advocacy. Our membership of more than 38 000 includes directors and senior leaders from business, government and the not-for-profit (NFP) sectors.

The AICD supports 'Option 3' outlined in the Regulatory Impact Statement, but notes that there is significant opportunity to improve the Regulation and, through it, the administration of the *Associations Incorporation Act 2009 (NSW)* (**the Act**).

<p>1. Are the procedures for electronic and postal voting set out in clause 13 and Schedule 3 fair and reasonable? If not, what procedures would be preferable and why?</p>
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The AICD supports an increased role for technology in voting and welcomes NSW Fair Trading's (**Fair Trading**) proposal to provide for electronic voting for incorporated associations (**associations**).

Digital technology has been a dominant medium of communication for some time now, as highlighted by the Australian Communications and Media Authority's *Communications Report 2014-15*, which demonstrated that Australia is ranked highly globally in terms of the use of digital communications technology, especially mobile devices.

However, the AICD considers that, to the extent possible, technology should be introduced into the Regulations through application of 'technology neutrality'. This is a concept which suggests that regulation should not assume or require the use of certain forms of technology. For example, where the law requires that certain communications happen by post (technology-specific regulation), preventing use of more efficient electronic means.

Importantly, technology neutrality regulation is distinct from 'technology-specific' regulation. Because it does not prescribe the use of certain forms of technology (either digital or

otherwise) it provides flexibility for entities to determine which approach best suits their needs. It also prevents the need to constantly revise regulations to ensure that they prescriptively capture emergent technologies as they become available to users.

The Australian Government Treasury is currently reviewing the application of technology neutrality to the distribution of meeting notices as papers in the *Corporations Act 2001* (Cth) (**the Corporations Act**) in response to recommendations from the Financial Systems Inquiry. This work may provide a useful guide in the application of technology neutrality to the Regulation.

Our further views on this issue are outlined under question 9.

2. Are the procedures for keeping of accounts and minutes of proceedings in clause 14 reasonable? If not, what procedures would be preferable and why?

Under Part 4, Section 14 (1)(b) requires that records be kept for no less than five years. This is a relatively short period and the AICD recognises Fair Trading's efforts to minimise regulatory burden for associations in this regard.

There are a number of different record keeping requirements to which an association may be subject in addition to those set out in these Regulations. These requirements may be based on sector, tax exemption status or operational activity. Often, these requirements are longer than five years. For example, under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth), Section 55-5 (4) requires registered charities to keep records for seven years.

The AICD is concerned that the five year period set out under Section 14 (1)(b) of the Regulation may cause confusion for some associations that are subject to other regulations which require the prescribed records to be held for periods longer than five years.

The AICD recommends that the requirements under the Regulations to keep records be changed to seven years to avoid confusion and to bring the NSW requirements into alignment with the national standard.

3. Is the effect of clause 19 clear?

The AICD considers the expression of clause 19 to be clear.

However, we note that clause 19 deals with a complex matter. Some readers of the Regulation and its model constitution will require further guidance to understand its effect, and to ensure its effective implementation.

4. Does the substitute provision for the financial year in the model constitution adequately address the issue for those associations registered under the former 1984 Act?

It is the view of the AICD that the proposed substitute provision will adequately address the transition of associations registered under the 1984 Act.

Schedule 1: The Model Constitution

- 5. Do the matters proposed in the model constitution properly address the requirements under Schedule 1 of the Act? If not, which matter(s) and why?**
- 6. Do you support the changes made to the model constitution? If not, explain which change you do not support and why?**

The AICD believes that the model constitution broadly addresses the requirements under Schedule 1 of the Act, with exception of:

2 – Register of members

Clause 7(1) sets out that a register of members must specify the “name and postal or residential address” of members. The AICD recommends that the requirements around a register of member be changed to refer to either a physical or electronic address at which a member can be contacted. This would better support the purpose maintaining a register through enabling members to be contacted more efficient means.

3 – Fees, subscriptions etc.

The AICD considers that Clause 8(2)(b) is unclearly worded and is not likely to be understood by users of the model rules.

The wording of Clause 8 should be simplified to explain that membership fees are due on becoming a member and in every financial year that the individual is a member thereafter.

If no change is made to Clause 8(2)(b), the AICD recommends that Fair Trading issue guidance explaining how it is to be interpreted.

6 – Internal disputes

Clause 10 sets out that internal disputes between members must be referred to a Community Justice Centre for mediation. The AICD recommends that the model rules include a grievance procedure which requires internal resolution of a dispute to be attempted prior to its being referred to a formal mediation.

The model constitution is also silent on the issue of who should be required to pay the costs of arbitration if an internal dispute could not be resolved through mediation.

The *Associations Incorporation Reform Regulations 2012* (Vic) sets out a detailed procedure for the handling of grievances (under Division 3) that may provide a useful guide for making improvements to this part of the Regulation.

7 – Committee

Eligibility requirements for members

The Act requires (Section 28 (2)) that the “committee must include 3 or more members, each of whom is aged 18 years or more and at least 3 of who are ordinarily resident of Australia”. The AICD recommends that the eligibility requirements for a member of the committee be set out in the model constitution.

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As a matter of good practice, the model rules should also require that committee members are not disqualified from managing a corporation within the meaning of the Corporations Act.

Duties of committee members

The Act gives rise to a number of duties through creating offenses around disclosure of conflicts of interest (Section 31), dishonest use of information (Section 32) and dishonest use of position (Section 33).

The AICD considers that these duties should be recorded in the model constitution in order to address the requirements under Schedule 1 of the Act.

To provide clarity and as a matter of good practice, the AICD recommends that a complete list of directors duties be included in the model rules. It is the AICD's view that the duties included in the model rules should reflect the duties set out by the Australian Charities and Not-for-profits Commission's (**ACNC**) Governance Standard 5 (duties of responsible persons):

- to act with reasonable care and diligence;
- to act honestly and fairly in the best interests of the entity and for a proper purpose;
- not to misuse their position or information they gain as a director;
- to disclose conflicts of interest;
- to ensure that the financial affairs of the entity are managed responsibly; and
- not to allow the entity to operate while it is insolvent.

Other matters

There are a number of additional matters that the AICD considers should be reviewed in the context of this consultation.

Inclusion of an objects clause

Many organisations choose to enshrine their objects within their constitution as a matter of good governance, and also to support them in demonstrating their purposes where required.

The ACNC considers an organisation's constitution as part of its work in evaluating whether or not an entity meets the eligibility requirements to become registered as a charity. The AICD recommends that a customisable clause be provided which allows incorporated associations to express their purpose in their constitutions.

An example of how this can be achieved can be found in Part 1, Clause 2 of the model constitution set out in the *Associations Incorporation Reform Regulations 2012* (Vic).

Rights and obligations of members

The AICD notes that the model constitution does not deal with the rights of the members of an incorporated association. Members are generally provided rights concerning their ability to attend, participate in, vote at and be appropriately notified of general meetings, and access to documents of the association (other than the register of members). The AICD recommends that the rights of members be included as part of the model constitution.

An example of how this can be achieved can be found in Part 1, Clause 13 of the model constitution set out in the *Associations Incorporation Reform Regulations 2012* (Vic).

Plain English drafting

The AICD considers that the a model constitution should provide practical and accessible guidance about the governance and administration of an association.

For this reason, components of the constitution that reference other legislation (such as the *Community Justice Centres Act 1983* (NSW) and the *Commercial Arbitration Act 2010* (NSW)) do not effectively achieve this aim as they require readers to source, access and potentially seek professional advice on its interpretation.

It may be most appropriate that the relevant except for the referenced legislation be included in its entirety in the Regulation for easy reference of readers.

Our further views on this issue are outlined under question 8.

Schedule 2: Unacceptable names

7. Are there any other circumstances in which a name should be declared unacceptable? If so, what are the circumstances and why?

The AICD does not have a view on other circumstances in which business names could be declared unacceptable.

Schedule 3: Conduct of postal or electronic ballots

8. Are voting procedures clearly expressed and easy to understand? If not, which procedures(s) is/are difficult to understand and explain how it can be improved?

The AICD considers that the voting procedures are clear, but that some of the expressions could be improved through the application of plain English legal drafting.

For example, the term 'ballot' is no longer in common usage, and other parts of the Regulation (such as Section 1 (1)(a)) use the expression 'cause' to create an obligation which could be redrafted in a clearer way.

Given the size and nature of many associations, the AICD considers that Fair Trading should regard plain English in drafting, where possible and appropriate, as a priority in any review of the Regulation.

9. Is the method in which electronic voting may be conducted (email or accessing a voting website) sufficient? If not, what other electronic voting methods should be permitted?

10. Are there other ways the voting procedures can be improved? If so, what are they?

The provisions outlined in Section 4 (2) stipulate the use of 'email' or a 'voting website' as acceptable vehicle for electronic voting.

Prescribing acceptable technologies excludes the use of other methods already available (such as polling features integrated into webinar clients and Skype, or mobile applications)

and technologies not yet developed. Because of this, the way Section 4 (2) is currently drafted would prevent associations from using any existing alternative method for electronic voting, or making use of methods not yet available.

The AICD believes the application of technology neutrality to the Regulation, as explained in answer to question 1, would improve the electronic voting procedure outlined in Section 4.

Schedule 5: Fees

11. Are the new fees for applications to register an association or change its name (if the name has previously not been reserved) reasonable? If not, why?

12. Are the other changes to the fee amounts appropriate? If not, which fee amounts are inappropriate, and why?

The AICD does not have a view as to whether the changes to fees are appropriate.

Other matters not considered by the Regulatory Impact Statement

Part 2: Registration of organisations

The AICD supports the removal of the provision requiring applicants on to supply evidence of two years of financial statements being provided to the Australian Securities and Investments Commission (ASIC) or the NSW Registry of Cooperatives and Associations.

For incorporated associations that are charities registered with the ACNC and are classified as 'medium' or 'large', the information proposed to be collected under Section 5 (1)(b) and (2)(d) is accessible by Fair Trading through the ACNC's 'Charity Passport'.

The AICD does not support the collection of any information by Fair Trading which would otherwise be available through the 'Charity Passport' as this would represent regulatory duplication for charities that are associations.

Part 3: Financial reporting

The AICD notes that New South Wales is the only jurisdiction in Australia that applies assets as a criteria in the assessment of 'Tiers'. Tiers should, to the extent possible under this regulation, be aligned with the tiers set out by the ACNC to provide clarity to associations and to move towards, so far as is possible, a nationally-consistent regulatory regime for not-for-profits.

The AICD does not support the use of 'assets' as an assessment criteria for 'tiers' under the Regulation.

For incorporated associations that are charities registered with the ACNC and are classified as 'medium' or 'large', the information proposed to be collected under Section 10 (a) is accessible by the Department through the 'Charity Passport'.

The AICD does not support the collection of any information by Fair Trading which would otherwise be available through the 'Charity Passport' as this would represent regulatory duplication for charities that are associations.

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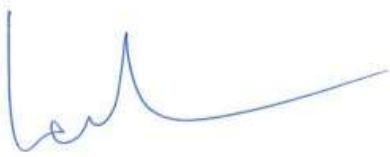
Part 4: Miscellaneous (12 Register of committee members – prescribed particulars)

For associations that are charities registered with the ACNC, the information proposed to be collected under Section 12 is accessible by the Department through the 'Charity Passport'.

The AICD does not support the collection of any information by Fair Trading which would otherwise be available through the 'Charity Passport' as this would represent regulatory duplication for charities that are associations.

We hope our comments will be of assistance to you. Should you wish to discuss any aspect of this submission, please contact our NFP Policy Adviser, Lucas Ryan via lryan@aicd.com.au or (02) 8248 6671.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Louise', with a long horizontal stroke extending to the right.

LOUISE PETSCHLER
General Manager, Advocacy