



THE LAW SOCIETY
OF NEW SOUTH WALES

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2 August 2016

Associations Incorporation Regulation 2016
Policy and Legislation
NSW Fair Trading
PO Box 972
Parramatta NSW 2124

By email: policy@finance.nsw.gov.au

Dear Sir/Madam,

Associations Incorporation Regulation 2016 ("Regulation")

The Law Society of NSW appreciates the opportunity to comment on the public consultation draft of the Regulation and the Regulatory Impact Statement ("RIS").

General

We note that the Regulation will commence on 1 September 2016, at the same time as the remaining parts of the *Associations and Incorporation Amendment (Review) Act 2016* ("2016 Act") have been proclaimed to commence.

The Law Society supports the changes made by the Regulation to modernise and facilitate the workings and management of associations, subject to our comments below.

We support the efforts which have been made, including the deeming provisions of section 25 of the 2016 Act, to save existing associations, where possible, from the time and cost of having to amend their constitutions every time there is a change in the Act, rules or model constitutions. However we believe this process has become convoluted with the passage of time and the number of changes which have been made.

One suggested remedy is to prepare a fact sheet to inform existing associations of the effect of the changes made, at least since the earlier 2009 Act, on associations' constitutions. This should also be widely publicised.

We also consider that it is regrettable that section 25 only applies to those associations whose constitutions adopt "all the provisions of the model constitution without modification (either by reference or by reproducing the provisions)". Many existing constitutions adopt (whether by reference or by reproduction) part only of the

model constitution – because, for example, they may want the calendar year as their whole financial year or a different number of committee members. In our opinion section 25 should be revised to also apply to those associations whose constitutions adopt some, but not all, the provisions of the model constitution.

Our specific comments on the numbered questions in the RIS are set out below.

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?

The Law Society welcomes the introduction of electronic voting, in addition to postal voting. The new Schedule is commendable for catering for a wider range of options, without being as prescriptive as the existing Schedule 3. The Law Society believes the procedures for electronic and postal voting, to be fair and reasonable. However we make the following comments:

- a) Sections 38 and 39 only allow postal and electronic voting if permitted by the constitution of the association. While the model rules give this permission, we see no reason in principle to confine electronic and postal voting to those associations which specifically provide for it in their constitutions.
- b) In clause 5(5)(c) of Schedule 3, the secret ballot vote must be received by the returning officer "no later than 24 hours before the close of the ballot". While this may speed up the process, we see no reason in principle for this otherwise unnecessary complication.
- c) In clause 6(2) of Schedule 3, discretion to treat an informal vote as valid is limited to the situation when a postal ballot paper "contains an unnecessary mark". In our opinion; this is too restrictive and the returning officer should have an unlimited discretion where "the voter's intention is clearly indicated on the ballot paper for a postal vote."
- d) Similarly, there is no reason why a clause of this nature (6(2)), giving the returning officer a discretion to treat an invalid vote as valid, should not also apply to electronic voting as well as currently only to postal ballots.

Clause 6(3) of Schedule 3 confines the warning message about informality to "electronic voting using a voting website". There is no reason in principle why a warning of this nature should not be prescribed for all forms of postal and electronic voting.

In our opinion clause 8(3) of Schedule 3 should precede clause 8(2). The natural progression is that the statement from the returning officer should precede the entry in the minute book of the association.

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?

The Law Society supports clause 14 which introduces electronic record keeping for accounts and minutes and provides that "each record" be kept for not less than 5 years.

3. *Is the effect of clause 19 clear?*

The Law Society supports the concept of not putting affected associations to the trouble and expense of amending their constitutions in order to accommodate changes to the law, such as needing to specify their financial year in their constitution.

However, we do not think the effect of clause 19 is sufficiently clear. Many affected associations are small community groups who do not have lawyers or other professionals on their committees, so will need simple and detailed explanations of what is required by clause 19 and how it operates.

2016 Act and the Regulation

The combined effect of the 2016 Act and the Regulation is to continue the "grandfathering" of pre-2009 constitutions in relation to their financial year.

Every affected association is deemed to have the substituted clause 47 as part of its constitution (whether or not being the model constitution) and under that clause can resolve whether its financial year shall be a fiscal year, calendar year or some other period "not exceeding 18 months".

Consequently, clause 47 requires every affected association to pass a resolution nominating its financial year.

While this clause does save affected associations the cost and trouble of amending their constitutions and does "grandfather" their existing financial year, unless further information is provided, we note the following issues:

- a) we assume that the words "commencing at the expiration of the previous financial year of the association", refer to when the nominated financial year commences and not to when affected associations must pass the necessary resolution – but this should be clarified;
- b) how will affected associations be notified of this requirement?
- c) is there a time limit for passing the necessary resolution?
- d) as this resolution will not amend the constitution of affected associations, an ordinary resolution should be sufficient and we see no reason why this resolution could not be passed at a regular committee meeting, rather than requiring the formality necessary for it to be passed at a general meeting – since for many associations the annual general meeting is the only general meeting held each year; and
- e) should there be any method of checking that a complying resolution has been passed by every affected association?

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?*

We reiterate that clause 19 requires the clarification and additional information we have suggested above.

5. Do the matters proposed in the model constitution properly address the requirements of Schedule 1 of the 2016 Act? If not, which matter(s) and why?

The short answer is yes. For any new association registered under the 2016 Act or any other association adopting the 2016 model constitution, the requirements of Schedule 1 of the 2016 Act will be satisfied.

However, we have some concerns about these matters in relation to the constitutions of affected associations.

Schedule 1 to the 2009 Act added, as a new matter to be addressed in addition to those required under the 1984 Act, the kinds of resolution that could be voted on by postal ballots (item 11).

There appears to be a conflict between section 25 of the 2009 Act (importing clause 34 of the 2009 model constitution) and clause 4 of Schedule 4 to the 2009 Act (deeming the current rules of an affected association to comply with the requirements of the 2009 Act). Accordingly, until the introduction of the 2016 Act, it was not clear (unless specified in the constitution of any association) whether or not postal ballots were deemed to be authorised by section 25 of the 2009 Act.

This problem seems to have been remedied by the new section 25, introduced by the 2016 Act which now deems the constitutions of all associations to include such provisions of the 2016 model constitution as are necessary to enable the association to address all matters referred to in Schedule 1 to the 2016 Act.

As a result, the constitutions of all existing associations will now comply with the requirements of Schedule 1 to the 2016 Act. However we recommend that all associations should be notified of the new provisions deemed to be incorporated into their constitutions and told that any reprint of their constitutions should contain the new provisions imported from the 2016 model rules, as applicable.

6. Do you support the changes made to the model constitution? If not, explain which change you do not support and why?

Yes, the Law Society supports these changes and believes they adequately address the requirements of Schedule 1 to the 2016 Act.

8. Are the 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?

See our answer to question 1 above.

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 also be permitted?

Subject to our answers to question 1, we believe the methods by which electronic voting may be conducted are sufficient and satisfactory.

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

See our answer to question 1 above.

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?

The Law Society supports any fee reduction, as all associations (including Tier 1 associations) are not-for-profit and most are community groups, with limited financial resources.

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

We applaud the fee reduction for lodging the annual financial statements of a Tier 2 association from \$54 per annum per annum to \$44 per annum.

Conversely the fees for lodging the annual financial statements of a Tier 1 association have been increased from \$54 per annum to \$187 per annum. This is despite the fact that the financial criteria for a Tier 1 association have remained unchanged since the 2009 Regulation (and possibly earlier). All Tier 1 associations registered under the 2009 Act or Regulation (or their predecessors), have done so in partial reliance on the level of annual fees for lodging returns.

We do not believe this fee increase is justified and request that it be reconsidered.

Conclusion

If you have any questions in relation to this submission, please contact Liza Booth, Principal Policy Lawyer, by email at liza.booth@lawsociety.com.au or phone (02) 9266 0202.

Yours faithfully,



Gary Ulman
President