

Financial Threshold for Incorporated Associations under the *Associations Incorporation Act 2009*

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1. Policy Statement

NSW Fair Trading is responsible for administering the legislation governing incorporated associations in New South Wales. This policy document is concerned with assessing small scale activities, based on an upper financial threshold, for incorporated associations in accordance with the objects of the *Associations Incorporation Act 2009* (the Act).

1.1 Objectives

The key objectives of the policy are:

- To inform the community that an incorporated association would generally not be considered small-scale where its income and/or total assets exceed \$5 million or current assets exceed \$2 million.
- To guide staff in assessing the appropriateness of an organisation seeking to register or to remain registered as an incorporated association under the Act where its income and/or total assets exceed \$5 million and / or current assets exceed \$2 million.

1.2 Scope

This policy applies to all officers exercising delegated authority under the *Associations Incorporation Act 2009* and *Associations Incorporation Regulation 2016*.

1.3 Ethical Conduct

All activities must be conducted in an ethical and transparent manner and comply with the values, principles and articles in the agency's Code of Ethics and Conduct.

Staff will ensure they are not, or are not perceived to be, in a conflict of interest. Those staff who have, or may be perceived to have, a vested interest in the outcome of a decision should disclose any conflict to their manager and discuss whether they should exclude themselves from any role in the decision.

2. Policy Components

2.1 Responsibilities

Each of the following parties has specific assigned responsibilities under this policy:

- Secretary
- Commissioner for Fair Trading
- Executive Director
- Director, Registry Services
- Registry Services Officers under delegation.

2.1.1 Secretary

The Secretary is responsible for the administration of the Act.

Within the meaning of the Act, Secretary means:

- (a) the Commissioner for Fair Trading, or
- (b) if there is no such position in the Department, the Secretary of the Department of Customer Service.

The Secretary is responsible for determining an application for registration of an association by registering the association or by refusing the application (section 7(1) of the Act). An application for registration may be refused if the Secretary is satisfied that having regard to the objects of the Act, the association should not be registered, including because of the assessment of the likely nature or extent of the association's proposed activities (section 7(2)(c)(ii) of the Act) or for any other reason that appears sufficient to the Secretary (section 7(2)(c)(iv) of the Act).

The Secretary may direct an association to apply for cancellation of its registration (section 73(1) of the Act) if satisfied that having regard to the objects of the Act, the association should no longer be registered because of the assessment of the nature or extent of the association's activities (section 73(2)(b) of the Act) or for any other reason that appears sufficient to the Secretary (section 73(2)(d) of the Act).

Division 3 of Part 7 of the Act provides for the transfer of incorporation upon application.

By Instrument of Delegation dated 13 April 2018, the Commissioner, as Secretary, made appropriate delegations to allow officers in specified positions to determine an application for registration of an association.

2.1.2 Executive Director

The Executive Director, is responsible for:

- ensuring that their staff comply with this policy (see 1.2 Scope)
- monitoring compliance with this policy.

2.1.3 Director, Registry Services

The Director, Registry Services is responsible for:

- ensuring that Registry Services officers understand and comply with this policy
- administering and updating this policy.

2.1.4 Registry Services Officers under delegation

Officers are responsible for implementing this policy in accordance with *Associations Incorporation Act 2009* Instrument of Delegation dated 13 April 2018.

3. Objects of the Act

A stated key objective of the Act is 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 (section 3).

3.1 Assessing small-scale

An application to register an association includes a requirement to provide an estimate of gross receipts/total revenue and current assets for the association. If the association is a trustee of any trust(s) the estimated gross receipts/total revenue and current assets for the trust(s) is to be included in the estimate.

The Act establishes a two- tier financial reporting regime for associations registered in NSW. Tier 1 (large) associations annually report on gross receipts/total revenue,

expenditure, current assets and liabilities and are required to provide a copy of audited financial statements. Tier 2 (small) associations are required to certify that they have income of less than \$250,000 and current assets of less than \$500,000 for the association and notify if they have total assets of more than \$2 million.

Fair Trading's view is that exceeding the financial threshold of \$5 million in income or \$5 million in total assets or \$2 million in current assets, would be the first indicator that an association or proposed association's activities would not be small-scale in nature in accordance with the objects of the Act. The number of associations that fall within this range represent less than 0.25% of the total number of associations registered in NSW.

3.2 Considerations for setting the threshold

Adopting an upper financial limit of \$5 million in income or \$5 million in total assets or \$2 million in current assets, for the registration of an association in New South Wales is considered reasonable. In determining this figure as an appropriate upper financial threshold, consideration was given to legislation administered by other agencies regarding various thresholds and concessions, notwithstanding that there are significant differences between an incorporated association and other types of legal entities and businesses.

3.2.1 Australian Taxation Office categories

The Australian Taxation Office (ATO) administers legislation that affects incorporated associations, based upon the scale and individual nature of the association's activities.

Entities operating in Australia are categorised by the ATO according to the size of their annual turnover. A Small Business Entity is identified as having annual turnover of less than \$10 million. However, the annual turnover limit for the small business income tax offset is \$5m and the annual turnover limit for capital gains tax concession is \$2 million.

Noting that incorporated associations are not business enterprises, in considering an appropriate upper financial threshold for incorporated associations, consideration was given to the ATO definition of small business entities, the turnover for income tax offset and the turnover limit for capital gains tax concessions under the Commonwealth Income Tax legislation.

3.2.2 Australian Charities and Not-for profits Commission

Incorporated associations may register as a charity with the Australian Charities and Not-for-profits Commission (ACNC) in order to be eligible for tax concessions and to be endorsed as a Deductible Gift Recipient. A charity is categorized by the ACNC as large, when it has annual revenue of \$1 million or more.

3.2.3 Co-operatives National Law (NSW)

The *Co-operatives National Law (NSW) (CNL)* is administered by NSW Fair Trading. Co-operatives are democratic organisations that are owned and controlled by their members and may be either distributing or non-distributing in nature. Under the CNL co-operatives have annual financial reporting obligations to Fair Trading. A co-operative is determined to be small for financial reporting purposes if it satisfies at least two of the following at the end of the financial year: the co-operative's consolidated revenue is less than \$8 million or it has consolidated gross assets of less than \$4 million or it has fewer than 30 employees.

3.3 Other factors considered in assessment process

The financial threshold is the first indicator that an association's activities may not be small-scale in nature in accordance with the objects of the Act. Other factors that are considered include, but are not limited to, the nature of the association's activities, the composition of assets held including cash on hand, whether the association is an employer or a recipient of grant funding and any potential risk to third parties arising from the association's activities. In particular, the extent and nature of any dealings with members of the public will be considered. Other factors particular to the nature of an association's activities may also be considered in the assessment process where relevant. The circumstances of each association will be reviewed on a case by case basis on their merits.

3.4 Next steps

Once it has been identified that an association's activities may not be small scale in nature, they are requested to take steps to transfer registration to another more appropriate corporate structure, such as a co-operative or a company limited by guarantee, both of which provide a more robust legislative framework. A procedural guide to assist with the transfer process is available.

The committee should seek suitable legal and/or financial advice regarding the process and options in transferring registration to an alternative structure which more appropriately supports its operation. This would include the legislative requirements, the legal and financial implications and ensuring that there are no impediments to the association transferring its registration. The association is then requested to advise Fair Trading of its intended course of action and to provide regular updates on its progress.

However, if an association considers it has grounds for remaining registered under the Act, it may provide a written submission to Fair Trading outlining the cogent circumstances. The submission will be reviewed by Fair Trading and the association will be informed of the decision.

4. Review of decisions

4.1 Internal review

Applications to register an association require estimates of gross receipts/total revenue, total assets and current assets. Where these figures exceed the financial threshold of \$5 million in income or \$5 million in total assets or \$2 million in current assets, a decision is likely to be made refusing the application to register the association. If an application to register an association is refused the applicant will be informed of that decision and that they may seek an internal review of that decision.

If an existing incorporated association refuses a request to transfer its registration, the Secretary may direct the association to cancel its registration (section 73). If such a direction is made then the association may seek an internal review of that decision.

At the time of being notified of the refusal to register or of being given a direction to cancel, the applicant or association is to be informed of its rights to seek an internal review of the decision under the Administrative Decisions Review Act 1997.

An application for internal review must be made within 28 days after the applicant is notified of the decision to refuse the application to register the association or of being given a direction to cancel the association's registration.

The review process is dealt with in the policy *'Decisions reviewable by the NSW Civil and Administrative Tribunal under the Associations Incorporation Act 2009'*.

4.2 NSW Civil and Administrative Tribunal (NCAT)

If an applicant is dissatisfied after the internal review, then they may apply to the NCAT Administration and Equal Opportunity Division for a review of a decision by the Secretary to refuse an application to register an association or a direction by the Secretary to an association to cancel its registration.

The application to NCAT needs to be lodged within 28 days from when the applicant is notified of the internal review decision. A review of the decision or direction by NCAT will be dealt with under the Administrative Decisions Review Act 1997.

If an officer receives notice of a review application to the NCAT this should immediately be referred to the Legal Services for action and to Registry Services for information and collation of the relevant background information.

5. Related Policies and Documents

Issuer	Reference	Document Name
NSW Government	No 7 of 2009	<i>Associations Incorporation Act 2009</i>
NSW Government		<i>Associations Incorporation Regulation 2016</i>
NSW Government	No 76 of 1997	<i>Administrative Decisions Review Act 1997</i>
Commissioner for Fair Trading		Associations Incorporation Act 2009 Instrument of Delegation dated 13 April 2018
DFSI	2 September 2015	Code of Ethics and Conduct
NSW Government	No 17 of 1998	State Records Act 1998 No 17
NSW Fair Trading	September 2016	Decisions reviewable by the NSW Civil and Administrative Tribunal under the Associations Incorporation Act 2009

6. Document Control

6.1 Document Approval

Name & Position	Signature	Date
Christine Gowland Director, Registry Services		
Suzanne Crowle Executive Director, Regulatory Services		

6.2 Review Date

This policy will be reviewed in October 2022.

It may be reviewed earlier in response to post-implementation feedback from Business Units.