

Registry Services

Determining Names for Incorporated Associations under the Associations Incorporation Act 2009

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1. Policy Statement

Registry Services is responsible for administering the legislation governing incorporated associations in New South Wales. This policy document is concerned with determining names for incorporated associations in accordance with the *Associations Incorporation Act 2009* (the Act) and the *Associations Incorporation Regulation 2016* (the Regulation).

1.1 Objectives

The key objectives of this policy are:

- to inform the community how a proposed word or name for an incorporated association will be determined as acceptable or unacceptable;
- to guide staff in determining the acceptability or unacceptability of a proposed word or name for an incorporated association in New South Wales.

1.2 Scope

This policy applies to all officers, consultants, contractors and outsourced service providers performing work for the Department of Customer Service. It applies to all activities connected with determining and approving the name or use of words within a name by an incorporated association in New South Wales.

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 must ensure they are not, or are not perceived to be, in a conflict of interest with any client or applicant seeking to register or reserve a proposed name for an incorporated association. 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, Regulatory Services
- Director, Registry Services
- Registry Services officers under delegation.

2.1.1 Secretary/Commissioner for Fair Trading

The Secretary is responsible for the administration of the Act. Within the meaning of the Act, Secretary means:

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

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 name is unacceptable (section 7(2)(b) of the Act).

The Secretary is also responsible for determining an application for reservation of a name by reserving the name or by refusing the application (section 16(1) of the Act). An application for reservation of a name may be refused if each of the nominated name is unacceptable (section 16(2)(a) of the Act).

An application for a change in an association's name may also be refused if it is unacceptable (section 12(2)(c) of the Act).

By Instrument of Delegation dated 13 April 2018 the Secretary made appropriate delegations to allow officers in specified positions to determine an application for reservation of a name and/or an application to register an association and/or an application to change an association's name.

2.1.2 Executive Director, Regulatory Services

The Executive Director is responsible for ensuring that staff, including consultants, contractors and outsourced service providers, comply 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
- reviewing and updating this policy.

2.1.4 Registry Services officers under delegation

Officers are responsible for implementing this policy in accordance with the relevant legislation and Instrument of Delegation dated 13 April 2018.

2.2 Legislation requirements

The Act states that an application to register an association is made to the Secretary on behalf of a proposed incorporated association. An existing incorporated association may also apply to change its name. The Act also provides that a proposed or existing incorporated association may reserve a name for three months before applying for registration or for a change of its name.

The application to initially reserve a name or to proceed with registering an incorporated association must be made on the approved form(s). The application may nominate a maximum of three alternative names and indicate the order in which they are to be considered.

The Secretary may approve or refuse the nominated name. An application may be refused if the Secretary determines that each of the nominated names is unacceptable.

2.2.1 The Act

Section 18 of the Act states:

(1) For the purposes of this Act, a name is unacceptable if:

- (a) it does not include, at the end of the name, the word “Incorporated” or the abbreviation “inc”, or
- (b) it contains foreign language characters, or
- (c) it includes the word “police” or “sheriff”, unless its use is the subject of a consent in force under section 204B of the Police Act 1990 or section 12 of the Sheriff Act 2005, or
- (d) the Secretary is of the opinion:

- (i) that it is identical to, or closely resembles, some other name that is registered, that is reserved or that is the subject of an earlier application for reservation, and
 - (ii) that the public would be likely to be misled if associations operated under both names, or
 - (e) the Secretary is of the opinion that it suggests a connection with the Crown or the State, or
 - (f) the Secretary is of the opinion that it is offensive or undesirable, or
 - (g) it is declared by the regulations to be unacceptable.
- (2) A name is not unacceptable on a ground referred to in subsection (1)(e), (f) or (g) if, in a particular case, the Minister directs that the name is acceptable.

The words and matters specified in sections 18(1)(a), (b) and (c) of the Act provide for an objective determination of the acceptability of a proposed name and therefore are not considered in this policy.

Schedule 2 of the Regulation referred to in section 18(1)(g) of the Act lists categories under which a name may be declared as unacceptable. Item 13 of Schedule 2 of the Regulation lists particular words or phrases which are declared to be unacceptable.

The words and matters specified in sections 18(1)(d), (e) and (f) of the Act and Schedule 2 Items 1-12 and 14 of the Regulation, require the Secretary to form an opinion as to the acceptability or otherwise of the proposed word or name.

2.2.2 The Regulation

Clause 7 of the Regulation states that the names set out in Schedule 2 are declared to be unacceptable names for the purposes of section 18(1)(g) of the Act. Schedule 2 of the Regulation lists the following categories under which a name may be declared as unacceptable:

- 1 A name that is identical to, or closely resembles, a business name registered under the *Business Names Registration Act 2011* of the Commonwealth unless:
 - (a) the public is not likely to be misled if the association operates under that name, or
 - (b) the applicant for registration of the relevant association has registered that name under the Act.

- 2 A name that is identical to, or closely resembles, the name of a building society, co-operative, co-operative society, co-operative company, co-operative building society, co-operative housing society or credit union.
- 3 A name that is identical to, or closely resembles, a name reserved or registered under the *Corporations Act 2001* of the Commonwealth (unless the applicant for registration of the relevant association has reserved or registered that name under that Act).
- 4 A name that is identical to, or closely resembles, the name of a criminal organisation or declared organisation within the meaning of the *Crimes (Criminal Organisations Control) Act 2012*.
- 5 A name that suggests a connection with the government of the Commonwealth, New South Wales, another State or Territory or another country.
- 6 A name that includes the word “Commonwealth” or “Federal”, unless its use is in respect of a geographical location.
- 7 A name that suggests a connection with a government agency or public authority of the Commonwealth, New South Wales or another State or Territory.
- 8 A name that suggests a connection with a local council or local authority.
- 9 A name that suggests a connection with a member of the royal family if that connection does not exist.
- 10 A name that suggests a connection with an ex-service person organisation if that connection does not exist.
- 11 A name that suggests a connection with any person (alive or deceased) if that connection does not exist.
- 12 A name that suggest that royal patronage has been received if that is not the case.
- 13 A name that includes any of the following words or phrases (including abbreviations of such words and phrases):
 - aboriginal corporation
 - building society
 - credit union
 - co-operative
 - co-operative society

co-operative company

co-operative building society

co-operative housing society

executive

futures exchange

GST

guarantee

institute of advanced education

made in Australia

oxfam

starr bowkett

stock exchange

torres strait islander corporation

- 14 A name (including a name used by a former association) that is likely to mislead the public in relation to the nature, objects or functions of an association or proposed association or in any other respect.

3. Matters to be considered

3.1 Identical or resembling

3.1.1 Registered incorporated association

A name that is identical to, or which closely resembles, a name of a registered (or formerly registered) incorporated association, a name that is reserved or a name that is the subject of an earlier application for reservation will be determined as unacceptable if it is considered likely that the public will be misled if incorporated associations were operating both names (section 18(1)(d) of the Act). In determining whether the public is likely to be misled the Secretary would look at the circumstances of each application and consider any relevant issues such as the proposed activities and geographical location of the associations.¹

3.1.2 Registered business or company name

A name that is identical to, or which closely resembles, a registered business name will be determined as unacceptable (item 1 of Schedule 2 of the Regulation) unless the public is not likely to be misled or the applicant registering the association is the proprietor or holder of that business name.

A name that is identical to, or closely resembles, a reserved or registered company name will be determined as unacceptable (item 3 of Schedule 2 of the Regulation) unless the applicant registering the association has reserved or registered that company name.

3.1.3 Existing co-operative or society or credit union

A name that is identical to, or closely resembles, the name of a building society, co-operative, co-operative society, co-operative company, co-operative building society, co-operative housing society or credit union will be determined as unacceptable (item 2 of Schedule 2 of the Regulation).

3.1.4 Criminal organisation

A name that is identical to, or closely resembles, the name of a criminal organisation or declared organisation within the meaning of the *Crimes (Criminal Organisations Control) Act 2012* will be determined as unacceptable (item 4 of Schedule 2 of the Regulation).

¹ See *Phelps v Commissioner for Fair Trading (2005) NSW ADT*

3.2 Connection with government

A name that suggests a connection with government at a Commonwealth, State or Local government level will be unacceptable in the first instance (section 18(1)(e) of the Act and items 5, 6, 7 and 8 of Schedule 2 of the Regulation). In determining whether a name suggests a connection with government the Secretary will consider whether the name contains the following words, but not limited to:

- Australia, Commonwealth, Crown, Federal, Council, Authority, Municipal
- names of individual states, territories or local councils

Consideration will be given to the context in which the words are used. For example, where the Secretary is satisfied that a word such as Commonwealth, Australia or Federal is used in a geographical context then the word would ordinarily be acceptable. However, the fact that a name will be used in a different context does not necessarily remove the name's capability of suggesting a connection with the government.²

3.3 Offensive or undesirable

A name that is offensive or undesirable will be unacceptable (section 18(1)(f) of the Act). Individual words may or may not be considered offensive or undesirable, however consideration will be given to their context within a proposed name.³

In determining whether a name is offensive or undesirable the Secretary will consider the following matters, but not limited to:

- whether the name contains profane words or obscenities
- whether the name suggests illegal activity
- whether the name is capable of causing confusion, this could include where the words in a name are spelt differently but pronounced the same
- whether the name is likely to create disharmony and conflict
- if the use of particular words is restricted by individual pieces of legislation or legislation prescribes the conditions under which those words may be used, such as
 - *Defence Regulation 2016*

² *De Quincey Company Ltd v Commissioner for Fair Trading (2008) NSW ADT 152* provides general guidance when considering the phrase 'suggests a connection with' noting that the test is an objective one, ie what would be suggested in the context to a reasonable person.

³ *Australian Vaccination Network Inc v Department of Finance & Services (2013) NSW ADT 266*

- if particular words are associated with institutions of long standing within the wider community and if used would be capable of causing confusion
- if particular words are recognised peak bodies and if used would be capable of causing confusion
- if particular words are considered to be of a sensitive or cultural nature concerning a particular Aboriginal language group
- current community standards
- if the words used may offend or be repugnant to any members of a section of the community.⁴

3.4 Connection with royalty

A name that suggests a connection with a member or the royal family or that royal patronage has been received will be unacceptable in the first instance (items 9 and 12 of Schedule 2 of the Regulation). In determining whether a name suggests a connection with a member of the royal family or that royal patronage has been received, the Secretary will consider whether the name contains the following words, but not limited to:

- royal
- individual names of known members of the royal family

A proposed name that suggests a connection with royalty may be acceptable if the application to register the association or reserve the name is supported by written evidence of a genuine connection.

3.5 Connection with ex-service person organization

A name that suggests a connection with an ex-service person organisation will be unacceptable in the first instance (item 10 of Schedule 2 of the Regulation). In determining whether a name suggests a connection with an ex-service person organisation the Secretary will consider whether the name contains the following words, but not limited to:

- a military description
- the word 'veteran'
- the word 'returned'

⁴ See *Little v Australian Securities Commissioner* 22 ASCR 226

- the letters 'RSL' or the words 'Returned Services League'
- the words 'national service'

A proposed name that suggests a connection with an ex-service organisation may be acceptable if the application to register the association or reserve the name is supported by written evidence of a genuine connection with an ex-service person organisation.

3.6 Connection with an individual person

A name that suggests a connection with an individual person, whether that person is alive or deceased, will be unacceptable in the first instance (item 11 of Schedule 2 of the Regulation). In determining whether a name suggests a connection with an individual person, the Secretary will consider whether the proposed name identifies a person.

A proposed name that suggests a connection with an individual person may be acceptable if the application to register the association or reserve the name is supported by written evidence of a genuine connection with the individual or, in the case of a deceased person, the estate of that individual person or next of kin.

3.7 Misleading the public

A name (including a name used by a former association) that is likely to mislead the public in relation to the nature, objects or functions or an association or proposed association will be unacceptable (item 14 of Schedule 2 of the Regulation).

In determining whether the public is likely to be misled, the Secretary will consider community standards in reviewing the nature, objects or functions of a proposed association upon receipt of an application to register the association. The same considerations will apply upon receipt of an application to change the name of an existing incorporated association.⁵

3.8 Ministerial consent

An application to register an association or reserve a name which may be refused in the first instance, because the Secretary is of the opinion that it suggests a connection with the Crown or the State (section 18(1)(e)), or that it is offensive or undesirable (section 18(1)(f)) or the Regulation declares it to be unacceptable, may be acceptable if the Minister directs that the name is acceptable (section 18(2) of the Act).

There is no review by the NSW Civil and Administrative Tribunal of a direction by the Minister. Therefore, any application for a direction by the Minister should include all relevant material the Applicant may wish to provide to support their application.

⁵ Australian Vaccination Network Inc v Department of Finance & Services (2013) NSW ADT 266

3.9 Direction to change name

If the name of an existing incorporated association is identified as unacceptable, including where a name has become unacceptable, then the Secretary may direct the association to adopt a new name (section 11 of the Act). Changing circumstances may mean that a name that was acceptable when the association was incorporated has since become unacceptable because of a matter identified in this policy.

The Secretary may change an association's name to its registration number or may cancel an association's registration if the association fails to comply with a direction to change its name (section 11(4) and section 76(1)(i) of the Act).

4. Unacceptable words listing (UWL)

NSW Fair Trading has established a list of individual and/or groups of words each of which will fall into one or more of the categories referred to in sections 18(1)(d), (e) and (f) of the Act and items 1-14 of Schedule 2 of the Regulation.

The purpose of the list is to provide a system based procedural mechanism to guide Registry Services officers in achieving consistency and minimising subjectivity in determining the acceptability, or otherwise, of a proposed word or name for an incorporated association in New South Wales.

An application seeking to register an association or reserve a name that contains a word or group of words included in the Unacceptable words listing (UWL) may be refused in the first instance.

4.1 Words included on the list

The UWL is a dynamic listing with words being included and removed as necessary. The specific words identified in the Act and the Regulation are included in the UWL. In addition to these specific words, other groupings of words are included to assist officers to determine if a word may be unacceptable. These words and/or groupings include, but are not limited to the following categories:

4.1.1 Restricted by other legislation

Certain words will be included on the UWL which have been restricted for use by specific pieces of legislation such as the *Defence Regulation 2016*. The piece of legislation may prescribe the conditions under which the words may be used.

4.1.2 Connection with government

Words and names that are associated with known government organisations and/or programs at Commonwealth, State or Local government level will be included on the list.

4.1.3 Long standing institutions

Words that are associated with long standing institutions within the wider community will be included on the list. These institutions will include recognised churches, political parties and community organisations.

4.1.4 Peak bodies

Words that are associated with recognised peak bodies will be included on the list. These will include words such as Chamber of commerce, Rotary and Lions clubs.

4.1.5 Words that may be considered offensive

Particular words may be included on the UWL which may be from time to time considered offensive to different sectors within the community.

4.1.6 Aboriginal words

Aboriginal words which are considered to be of a sensitive or cultural nature to a particular Aboriginal group may be included on the UWL.

4.2 Assessment of words for inclusion on the UWL

4.2.1 Requests to include words on the UWL

Requests to include a word or group of words on the UWL will be considered on a case by case basis.

Factors which will be considered in the screening of words or group of words for inclusion on the UWL will include, but are not limited to:

- the source of the request for inclusion of a word/s on the UWL
- the reasons for requesting a word/s be included on the UWL
- the public interest in including a word/s on the UWL
- the requested time period for inclusion of a word/s on the UWL
- whether the particular word/s may be used such as upon production of additional information or specified form of approval.

4.2.2 Trade marks

A word or groups of words which are trade marked do not appear on the UWL. NSW Fair Trading does not check proposed names against trade marks. It is the applicant's responsibility to check whether any other impediments exist which may preclude the use of a word or groups of words in a proposed name. In particular, the onus is on the applicant to check with IP Australia to ensure that the proposed word or name is not subject to a trade mark or copyright.

IP Australia is the Australian Government agency that administers intellectual property rights and legislation in relation to patents, trade marks and designs.

5. Review of decisions

5.1 Internal review

Applications to register an association or reserve a name can nominate three alternative names. The nominated names will be considered in order of preference to determine the acceptability for registration or reservation. If none of the names are acceptable, then the applicant will be so advised. The applicant may nominate additional name/s for consideration or may seek an internal review of the decision refusing to register or reserve the name.

5.2 Requesting an internal review

The Reviewable Decisions Team conducts the internal review of the administrative decision and the review is conducted in accordance with the requirements of the *Administrative Decisions Review Act 1997* (ADR Act).

A request for an internal review must:

- be in writing and include an Australian address for the applicant
- be lodged within 28 days of receiving notice of the original decision
- include reasons as to why the original decision was unreasonable, unfair or incorrect
- include relevant material supporting the review application
- be emailed to the Reviewable Decisions Team at revdec@customerservice.nsw.gov.au or posted to PO Box 972 Parramatta NSW 2124.

The internal review will be undertaken by an independent person who was not substantially involved in making the original decision.

The reviewer may affirm the original decision, vary the decision or set aside the decision and replace it with a new decision made by the reviewer.

5.3 NSW Civil and Administrative Tribunal (NCAT)

If the applicant is not satisfied with the outcome of the internal review, then they can seek an external review of the original decision with the NSW Civil and Administrative Tribunal (NCAT).

Further information concerning the NCAT, its jurisdiction and procedures can be obtained from the NCAT on 1300 006 228 or www.ncat.nsw.gov.au

6. Related Policies and Documents

Issuer	Reference	Document Name
NSW Government	No 7 of 2009	<i>Associations Incorporation Act 2009</i> <i>Associations Incorporation Regulation 2016</i>
Commissioner for Fair Trading		<i>Associations Incorporation Act 2009</i> Instrument of Delegation dated 13 April 2018.
Department of Customer Service	September 2015	Code of Ethics and Conduct
Commonwealth of Australia	No 126 of 2011	<i>Business Names Registration Act 2011</i>
Commonwealth of Australia	No 50 of 2001	<i>Corporations Act 2001</i>

7. Document Control

7.1 Document Approval

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

7.2 Review Date

This policy will be reviewed as required.