



Registry Services

Appointment of Administrator under the Associations Incorporation Act 2009

Date: Wednesday, January 08, 2020

Contact details

Name: Christine Gowland	Position: Director
Business Unit: Registry Services	Division: Regulatory Services
Phone: 1800 502 042	Email: registryinquiries@customerservice.nsw.gov.au

Table of Contents

1.	Policy Statement	2
1.1	Objectives	2
1.2	Scope	2
1.3	Ethical Conduct	2
2.	Policy Components	3
2.1	Responsibilities	3
2.1.1	Secretary/Commissioner for Fair Trading	3
2.1.2	Executive Director, Regulatory Services	3
2.1.3	Director, Registry Services	3
2.1.4	Registry Services officers under delegation	4
3.	Grounds for appointment of administrator	5
3.1	The Act	5
3.2	Persistent failure to comply	5
3.3	Relevant considerations and interests of members and creditors	5
3.4	Effect of appointment	6
3.5	Payment of administration expenses	6
4.	Procedural fairness	7
4.1	Review of decision	7
5.	Related Policies and Documents	8
6.	Document Control	9
6.1	Document Approval	9
6.2	Review Date	9

1. Policy Statement

Registry Services is responsible for administering the legislation governing incorporated associations in New South Wales. This policy document is concerned with the appointment of an administrator under the *Associations Incorporation Act 2009* (the Act) to administer an association's affairs in accordance with the Act and the *Associations Incorporation Regulation 2016* (the Regulation).

1.1 Objectives

The key objective of this policy is to set out the circumstances under which the Secretary may appoint an administrator to manage the affairs of an incorporated association.

1.2 Scope

This policy guides officers who are assessing whether in the circumstances it is appropriate to appoint an administrator.

This policy does not concern the appointment of an administrator on the grounds of insolvency.

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. 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/Commissioner for Fair Trading 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 Commissioner for Fair Trading has authority to appoint an administrator to administer an association's affairs under section 55 of the Act.

By Instrument of Delegation dated 13 April 2018 the Commissioner made appropriate delegations to allow officers in specified positions to appoint an administrator.

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
- administering and updating this policy.

2.1.4 Registry Services officers under delegation

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

3. Grounds for appointment of administrator

3.1 The Act

Section 55 of the Act provides as follows:

The Secretary may appoint an administrator to administer an association's affairs if:

- (a) the association has persistently failed to comply with the requirements of this Act or the regulations, and
- (b) having regard to those circumstances, the Secretary is satisfied that it is in the interests of the association's members or creditors for an administrator to be appointed.

Section 55 sets out two grounds that must be satisfied before the Commissioner (as Secretary under the Act) may exercise the power to appoint an administrator. First, under section 55(a) the Commissioner must be satisfied the association 'has persistently failed to comply with the requirements of the Act or the regulations' and section 55(b), 'having regard to those circumstances' the Commissioner must be 'satisfied that it is in the interests of the association's members or creditors for an administrator to be appointed'.

3.2 Persistent failure to comply

In the context of the Act, the term 'persistently' in section 55 is used in its ordinary meaning, with a particular reference to continuing conduct in the face of opposition. The term 'persistent' in its ordinary sense means, 'persisting, especially in spite of opposition, etc.; persevering; lasting or enduring; continued; constantly repeated'.

It is not possible to set out a comprehensive list of the circumstances in which an incorporated association may have 'persistently failed to comply with the requirements of the Act or the regulation'. However, an example could include the failure to comply with directions of the Commissioner in relation to a continuing failure to ensure that records are properly kept in accordance with section 50 of the Act.

3.3 Relevant considerations and interests of members and creditors

In determining whether or not the Commissioner can be satisfied under section 55(b) that the appointment of an administrator is in the interests of the association's members or creditors, the following considerations may be relevant:

- (a) Are the issues of significant public concern or potential detriment?

- (b) Is the association in receipt of government funding that may be placed at risk if the association continues to operate without intervention?
- (c) Are there other options available to members or creditors that are more appropriate than intervention by the Commissioner?

These actions may include the association applying for voluntary cancellation, utilising dispute resolution procedures or other actions that may be available to creditors to recover monies owing.

- (d) Are there other more appropriate compliance actions that are warranted?

These actions may include directing an association to cause the whole or a specified part of its financial records to be audited.

- (e) The probable length and expense of the administration and if it is likely the association will be able to meet the expenses of administration out of its resources.

3.4 Effect of appointment

Under section 56 of the Act when an administrator is appointed the committee members and the public officer cease to hold office.

The administrator has the functions of the committee and the public officer and may terminate any contract of employment with the association or contracts to provide services to the association.

3.5 Payment of administration expenses

The expenses of the administration are payable from the incorporated association's funds (section 58 of the Act).

4. Procedural fairness

Before a decision to appoint an administrator to manage the affairs of an association is considered, the Commissioner has a duty to afford procedural fairness to the incorporated association. Generally this would be exercised by:

- (a) giving the association notice of the failure to comply with the requirements of this Act or the regulations, and requiring the association to comply with those requirements within a specified period;
- (b) where the association persistently fails to comply with the requirements of the Act or regulations as specified in the notice, notifying the association of the Commissioner's intention to appoint an administrator under section 55 of the Act and specifying the grounds upon which the Commissioner intends to make the appointment;
- (c) providing the opportunity to make written submissions, including through a legal practitioner, in respect of the intention to appoint an administrator.

There may however be circumstances in which the appointment of an administrator would be frustrated by giving notice of the intention to make the appointment. For example, if the Commissioner is of the opinion that there are reasonable grounds to suspect the association may misappropriate money, or has already done so. In these circumstances, there may be no duty to afford procedural fairness as to do so would disadvantage the interests of the members or creditors.

4.1 Review of decision

A person aggrieved by a decision to appoint an administrator may apply to the Supreme Court for a review of the decision under section 104(3) of the Act.

5. Related Policies and Documents

Issuer	Reference	Document Name
NSW Government	No 7	<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

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 as required.