

Recent changes for incorporated associations

From 1 September 2016 amendments to the incorporated associations legislation came into effect. Section 25 of the *Associations Incorporation Amendment (Review) Act 2016* deems parts of the model constitution to be included in all the constitutions of associations, which do not address certain compulsory matters. The compulsory matters that must be addressed in every constitution at present are:-

| Compulsory matters added in 2009 & 2016 | Model clause | |
|---|--------------|--|
| Postal voting | 36 | |
| Financial year* | 47 | |
| Maximum consecutive term for office bearers | 14(5) | |
| Electronic voting | 37 | |
| Winding-up | 42 | |

* For older associations, incorporated under the 1984 legislation the deemed wording of clause 47 is different.

No action required for deeming provisions

For the deemed changes to the constitutions to take effect, associations do not have to pass a special resolution, do not have to register any change and need not do any other act or thing (section 25(4) *Associations Incorporation Act 2009* as amended).

Background to incorporation legislation

In NSW the first legislation was the *Associations Incorporation Act 1984*. The *Associations Incorporation Act 2009* commenced on 1 July 2010. The *Associations Incorporation Amendment (Review) Act 2016* commenced on 1 September 2016.

To be registered every association must have a constitution. Some new associations adopt the model constitution prescribed in Schedule 1 of the Regulations for the *Associations Incorporation Act 1984* or *Associations Incorporation Act 2009*. The model constitution has been changed from time to time. Under the 1984 legislation, it was called the Model Rules. Some old associations still refer to their “rules”.

Unfortunately, “one size does not fit all.” Many associations use the model constitution as the basis for their own constitution, which they adapt to suit their own requirements for membership and objectives.

Adopting model constitution

If all of the model constitution can be adopted by an association without modification (which will not be possible for many new and existing associations) the provisions of the constitution are taken to be the provisions that the legislation prescribes over time.

This means that an association’s constitution will always address all compulsory matters and will not have to be amended as the legislation changes (section 25(1) & (3) *Associations Incorporation Act 2009* as amended).

Compulsory matters

Both the *Associations Incorporation Act 1984* and *Associations Incorporation Act 2009* required associations to address in their constitutions certain compulsory matters. The number of matters that must be addressed over the years has increased.

The compulsory matters that must be addressed are prescribed by Schedule 1 of the *Associations Incorporation Act 2009* as amended. If the matters are not addressed in a constitution the relevant clause of the current model constitution will be deemed to be included in the constitution (section 25(2) *Associations Incorporation Act 2009* as amended).

Compulsory matters added in 2009 & 2016 that must be addressed in every constitution are:

- Postal voting
- Financial year
- Maximum consecutive term for office bearers
- Electronic voting
- Winding-up

If these compulsory matters are not addressed in an association's constitution the relevant clause from the model constitution will apply are as follows:-

36 Postal or electronic ballots

- (1) The association may hold a postal or electronic ballot (as the committee determines) to determine any issue or proposal (other than an appeal under clause 12).
- (2) A postal or electronic ballot is to be conducted in accordance with Schedule 3 to the Regulation.

47 Financial year

The financial year of the association is:

- (a) the period of time commencing on the date of incorporation of the association and ending on the following 30 June, and
- (b) each period of 12 months after the expiration of the previous financial year of the association, commencing on 1 July and ending on the following 30 June.

47 Financial year (for associations incorporated under the Associations Incorporation Act 1984)

The financial year of the association is each period of 12 months, or any other period (whether longer or shorter than 12 months) not exceeding 18 months that the association resolves, commencing at the expiration of the previous financial year of the association.

14 *Composition and membership of committee*

- (5) There is no maximum number of consecutive terms for which a committee member may hold office.

37 *Use of technology at general meetings*

- (1) A general meeting may be held at 2 or more venues using any technology approved by the committee that gives each of the association's members a reasonable opportunity to participate.
- (2) A member of an association who participates in a general meeting using that technology is taken to be present at the meeting and, if the member votes at the meeting, is taken to have voted in person.

42 *Distribution of property on winding up of association*

- (1) Subject to the Act and the Regulations, in a winding up of the association, any surplus property of the association is to be transferred to another organisation with similar objects and which is not carried on for the profit or gain of its individual members.
- (2) In this clause, a reference to the surplus property of an association is a reference to that property of the association remaining after satisfaction of the debts and liabilities of the association and the costs, charges and expenses of the winding up of the association.

Your organisation

If your organisation is older, it may have been incorporated under the *Associations Incorporation Act 1984*. The constitution may have been based on the model constitution (rules) at the time and your constitution modified at various times over the years.

It will not be possible for your organisation to simply adopt all the current model constitution without modification because your current constitution will be different from the model constitution in a number of respects now.

Use the following table to work out which compulsory matters are already addressed in your constitution and which matters have not been addressed. Listed are the model clause numbers. List next to them the number of the clause in your constitution, if any that deals with the particular matter. The clause in your constitution does not have to say the same thing as in the model constitution. The important thing is that your existing clause addresses the matter.

The compulsory matters that must be addressed in every constitution at present are:-

| Compulsory matters added in 2009 & 2016 | Model clause | Your clause |
|---|--------------|-------------|
| Postal voting | 36 | |
| Financial year* | 47 | |
| Maximum consecutive term for office bearers | 14(5) | |
| Electronic voting | 37 | |
| Winding-up | 42 | |

If for instance, postal voting and the financial year for your organisation has not been addressed in the constitution, clauses 36 & 47 of the model constitution referred to above are deemed to be included in your constitution. If you are an older organisation you may find that over the years you have resolved that its financial year will be 1 July to 30 June each year.

The deemed inclusions in the constitution take effect without your organisation having to pass a special resolution, registering any change or doing any other act or thing (section 25(4) *Associations Incorporation Act 2009* as amended).

Possible considerations for the future

Any organisation could consider in the future:-

1. Typing up a version of the current constitution for members' reference. This should incorporate all the amendments that have been made to your constitution over the years. Date the version so that members will know how current it is. The typed up version should agree with what has been registered with the relevant government department.
2. Including the provisions deemed by legislation or resolving to include clauses in the constitution that address the deemed provisions not already covered by your constitution.
3. Reviewing any out-dated requirements for membership.
4. Updating some of the layout and wording in your constitution to the modern wording used in the current model constitution. Some of the newer provisions, while not compulsory, might be good to use. This will make it a bit easier for members to follow and keep up to date with future legislation changes.
5. Reviewing the objectives of the organisation.

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