

Part 2

Appointing and removing a public officer

This part of the guide covers the legal requirements for appointing and removing a public officer of an incorporated association in New South Wales.

Summary of key points

Public officers

The *Associations Incorporation Act 2009* (NSW) (**AI Act**) regulates who can be the official 'public officer' of an incorporated association. In addition, an association's own constitution and policies may have particular requirements.

Under section 34 of the AI Act it's compulsory for the association's committee (or board) to appoint a public officer to the association.

The public officer is, by virtue of being appointed to that office, an authorised signatory for the association.

How is the public officer appointed?

In the case of a new association, the public officer is nominated in NSW Fair Trading's application form for registration of the association.

Whenever there is a vacancy in the position of public officer, the association's committee must appoint a new public officer within 28 days after the vacancy arises (section 34 of the AI Act).

The position of a public officer can, but does not need to, be held by a committee member.

What happens after the public officer is appointed?

Every new public officer must notify NSW Fair Trading within 28 days of their details (full name, date of birth, address and the fact of the appointment) after they have been appointed, and update those details if they change.

Associations may also need to notify the Australian Taxation Office of a change of public officer.

When will the public officer's position become vacant?

The AI Act and an association's constitution set out the circumstances in which the position of public officer will be automatically terminated (vacated).

Such circumstances may include the public officer becoming bankrupt, dying, becoming mentally incapacitated or if they cease to ordinarily reside in New South Wales (section 35 of the AI Act).

A public officer's position also becomes vacant if they resign or if the association removes the public officer from their position (section 35 of the AI Act).

Who can be the public officer?

The public officer is the principal contact point between NSW Fair Trading (and other regulators, for example, ATO, ACNC) and your association.

The public officer is legally responsible for a number of specific tasks required by the AI Act — see part 8: Reporting to NSW Fair Trading in this guide, and NSW Fair Trading's webpage on the public officer.

The public officer role is very important to your association. Your association should appoint a person who has the experience, skills and qualifications to carry out the role of public officer.

Effective public officers should have a range of skills, including:

- enthusiasm for, and knowledge of, the association and its mission
- adequate time for the task
- interest in committee work
- good working relationships with other people involved in managing the association, and
- reliability and good organisational skills

In choosing your public officer, you should also take into account:

- any restrictions or qualifications required by law, particularly the AI Act (such as the requirement to reside in New South Wales and be at least 18 years of age)
- your association's constitution, and
- any policies your association has about this issue

More details about these requirements are outlined below.

AI Act requirements

A public officer of an association incorporated in New South Wales:

- must be a person who is at least 18 years old and ordinarily a resident in New South Wales (section 34(2) of the AI Act)
- can, but does not have to, be a committee member of the association (section 34(3) of the AI Act), and
- must not be bankrupt or mentally incapacitated (sections 35(d) and (e) of the AI Act).

The AI Act requirements about being a public officer are explained below in more detail.

Unless the constitution of your association provides otherwise:

- the public officer may also hold another position in your association (including on the committee, such as being the secretary or president), and
- there is no upper limit to the public officer's age, subject to any other legislative requirements



Tip

Some associations accidentally appoint a public officer who is not allowed under law to hold the position. To avoid this, before someone is appointed as public officer, get them to sign a letter in which they:

- agree to act as the association's public officer
- confirm that they satisfy the AI Act requirements for being a public officer, and
- agree to notify the association if any of these matters, or their contact details, change

Who is a 'resident' of New South Wales?

The AI Act does not define who is a resident of New South Wales. However, generally, the public officer's primary residence (that is, the place where they usually live) must be located in New South Wales.



Even if the public officer is not an Australian citizen or if they frequently travel outside Australia, they can usually still be the public officer if they are based in New South Wales. Check your association's constitution for any additional requirements.

What does 'bankrupt' mean?

Bankruptcy is a legal process where a person is declared unable to pay their debts. It offers a person protection from further action against them by people they owe money to. A person is 'declared bankrupt' when an actual declaration of bankruptcy has officially been made about them. The usual period of bankruptcy is three years. For further information about bankruptcy, see the Australian Financial Security Authority website.

Bankruptcy records are publicly accessible on the National Personal Insolvency Index (**NPII**), so it's possible to check if a person has been declared bankrupt — you can search the bankruptcy register online (fees apply for searching the NPII).

Who is a 'mentally incapacitated' person?

Generally, a person may be mentally incapacitated if they are unable to make decisions for themselves, even after any necessary information, advice or support has been given to assist. A person's mental capacity may be in doubt if they can't:

- understand information given to them
- consider issues, options and consequences of making a decision
- remember information long enough in order to make a decision, or
- communicate their decision

Note that a finding of mental incapacity in one area does not automatically mean that a person loses capacity in another area. In most cases, a person's mental capacity will not be in doubt. If an association's committee has concerns about the mental capacity of their public officer, they should consider appointing a new public officer and seek legal advice.

Your association's constitution and policies

Your association's constitution may provide for the appointment and removal of your public officer. You must check the constitution and any relevant policies of your association for additional requirements (over and above those in the AI Act) about who can be appointed as the public officer and the term (or length) of their appointment. For example, your constitution may require certain qualifications or experience for the role or may state that the person elected secretary or president of your association is to be the public officer.

However, the constitution and any policies of your association can't override the AI Act requirements – for example your constitution can't permit your public officer to reside outside of New South Wales or to be under the age of 18. The constitution can only provide for additional requirements over and above the AI Act requirements.

If your association is large, your constitution may state that the public officer can be a paid manager. In some large associations the constitution may allow for certain work of the public officer to be carried out by a specialist firm for a fee. However, even if the public officer delegates their functions to another person or firm, the public officer remains legally responsible for those duties being properly carried out (for further information on the public officer's duties, see part 8: Reporting to NSW Fair Trading and part 3: Public Officer's Legal Role, Powers and Duties in this guide).



Note

Make sure you have the most up-to-date version of your constitution, including any changes that the association's members and NSW Fair Trading have approved.

If you are confused about which constitution applies to you and whether the copy you have is up-to-date, the best thing to do is to contact NSW Fair Trading and request a copy of your association's constitution and purposes.

Your constitution may not reflect all the requirements of any laws for incorporated associations. See our Constitution Checklist for more information.

Does the public officer have to be on the committee (or board)?

No, there is no requirement in the AI Act for the public officer to be on the committee (or board). But the constitution of your association may state that the public officer is a member of the committee or that a person appointed to a particular position on the committee (such as the secretary) is required to take on the role of public officer. This is optional – it's not required by the AI Act or by the AI Regulation.

Note that, under the Model Constitution, if there is no person holding the office of secretary of the association, the public officer will be deemed the secretary until a secretary is properly elected, and during this period automatically be on the committee. Refer to your association's constitution for further information.

If your association's constitution doesn't require the public officer to be a member of the committee, it will usually be the case (unless your constitution expressly states otherwise) that the public officer can't vote at committee meetings.

Where to find a new public officer

In many cases, a new public officer is found from within the association – for example, there may be an existing member of the committee or member of the association who has suitable skills and interests.

If your association needs someone with particular expertise to fulfil the position (for example, because of the size and complexity of your association), ask around. New public officers are often found by the existing committee members (or others within the association) who can use their networks to find people who may be suitable for the role.

It may also be helpful for your association to look for someone by contacting the various volunteer brokers and support organisations. You can also advertise online or in your local paper. Organisations who can help include:

- Volunteering Australia
- Go Volunteer
- State-based volunteering bodies, such as NSW Volunteering and NSW Volunteer Centre Network
- Community Builders NSW
- Goodcompany
- OurCommunity,
- Volunteer Match, and
- Pro Bono Australia

For further ideas, speak to any peak body to which your association may belong – they may be able to put a note in their next newsletter or e-bulletin. For example, NSW Council of Social Service can point groups working in social services in the right direction for assistance in finding a public officer.

How is the public officer appointed?

Your association's committee (or board) has responsibility for appointing the public officer (section 34(1) of the AI Act). Your association may have special requirements for how the association appoints a new public officer when there is a vacancy.

The first public officer of your association is the person nominated as public officer in the application for registration of the association (section 34(5) of the AI Act).

If the position of public officer becomes vacant, the association must fill the vacancy within 28 days (section 35(3) of the AI Act), and notify NSW Fair Trading of that appointment within 28 days (section 34(6) of the AI Act). The circumstances in which the position may become vacant are discussed below.



Note

The public officer may be a member of the committee – but doesn't have to be.



Example

A sample resolution of a committee to appoint a new public officer is set out below:

The management committee appoints Ms Katherine Smith to be the public officer of XYZ Inc, effective from 1 January 2016 until the end of the next annual general meeting of XYZ Inc (or earlier resignation or termination in accordance with the constitution).

To help make sure the public officer is eligible to hold the position, the association may also wish to state in the minutes something like this:

The management committee has received (and will keep for its records) a written statement by Ms Katherine Smith confirming that she:

- agrees to act as the public officer of XYZ Inc*
- satisfies the AI Act requirements for being a public officer, and*
- agrees to notify the management committee of XYZ Inc if any of these matters or her contact*

What happens after the public officer is appointed?

This section focuses on a public officer's reporting requirements to external authorities.

Report to NSW Fair Trading

Within 28 days after a new public officer is appointed, the public officer must notify NSW Fair Trading of (section 34 of the AI Act):

- the person's full name and date of birth
- the person's address for service of notices, being either the person's residential address or some other address at which the person can generally be found, and
- the fact that the person has taken office as public officer

If the existing public officer's details change (for example, their address) this information must also be provided to NSW Fair Trading.



Note

If you have just been appointed as the public officer (or you are the existing public officer and your details change), you need to notify NSW Fair Trading – even if your association or the previous people in this role have not done this in the past!

The public officer can advise NSW Fair Trading of these changes by lodging Form A9 - Notice of appointment of public officer and Notice of change of association address with NSW Fair Trading in person or by post. NSW Fair Trading also accepts completed and signed forms scanned (PDF format) and sent by email. There is no lodging fee to pay for submitting these forms.



Caution

If the public officer doesn't notify NSW Fair Trading within 28 days of their appointment, your association can be penalised.

Ongoing reporting responsibilities

The association has responsibilities for reporting to NSW Fair Trading about:

- the association's financial information in its annual statement (refer to Part 5 of the AI Act)
- certain decisions made by the association's members which must be approved by NSW Fair Trading before they can become official (such as changes to the association's name, objects or constitution)
- any change in the association's official address, and
- any change in the public officer

In practice, the public officer will generally be responsible for reporting the above issues to NSW Fair Trading on behalf of the association.

As mentioned previously, the public officer must also report to NSW Fair Trading any changes in the public officer's details.

See part 8: Reporting to NSW Fair Trading in this guide for more information about the reporting responsibilities of the public officer of an incorporated association.

Who else should be notified of the appointment of a new public officer?

If your association is registered for tax purposes (for example, if it has an ABN), the association must also notify the Australian Taxation Office (**ATO**) of certain changes, including the appointment of a new public officer. The ATO must be notified of a change in public officer within 28 days of the association becoming aware of the change, go to the ATO website for more information.



Tip

An outgoing public officer should notify the ATO and other authorities of the new office holder's details before they leave their role. This will ensure a smooth transition from one person to the next.

In addition to the public officer, an association may authorise another committee member to make enquiries to the ATO about tax affairs. A tax officer will only discuss your association's account with your authorised contact person. You will need to notify the ATO if your authorised contact person changes.



The ATO can be notified of a change of public officer or other authorised contact person by:

- telephone – phone 1300 130 248 (the dedicated ATO number for not-for-profits) between 8am and 6pm Monday to Friday
- sending the form ‘Change of Registration Details’ (NAT 2943) which can be requested by phone or via the ATO website, or
- online, if your association is registered for ATO online services

The ATO has a useful checklist ‘Handover checklist: not-for-profit administrators’ on its website.

You may need to consider whether there are other people, organisations or agencies that should be notified of a change of public officer. Check your association’s policies and important documents such as funding agreements and leases.

When will the position of public officer become vacant?

Under the AI Act (section 35(1)), the position of public officer becomes vacant:

- if the public officer:
 - dies
 - resigns the office in writing addressed to the association’s committee
 - is removed from office by resolution of a general meeting of the association (see below)
 - becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with their creditors or makes an assignment of their remuneration for their benefit
 - becomes a mentally incapacitated person, or
 - no longer ordinarily resides in New South Wales, or
- in such other circumstances as the association’s constitution may provide

If any of these circumstances apply, the association doesn’t have to pass a resolution removing the person as public officer. Their position is automatically terminated (vacated) under the AI Act. Where an automatic vacancy occurs, an association must appoint a new public officer within 28 days of the vacancy (section 35(3) of the AI Act).

The positions of public officer and all committee members also become vacant if an external administrator is appointed to run the association (section 56(1)(a) of the AI Act).

Public officers can also retire or be removed from office. Members of an association can remove a public officer by resolution of a general meeting (section 35(1)(c) of the AI Act). For more information about passing resolutions at general meetings, see part 6: Special General Meetings in this guide. The constitution of an association can provide other ways to remove a public officer (for example by resolution of the committee).



Note

If the position of public officer becomes vacant, the association must fill the vacancy within 28 days, and NSW Fair Trading must be notified within 28 days of the vacancy being filled.

The public officer will have access to documents and information about the association because of their role. After they have left their position, these documents must be returned to the committee within 14 days (section 35(2) of the AI Act). A penalty applies under the AI Act for failing to comply with this requirement.

It’s good practice for the outgoing public officer to sign a statement confirming they have returned all relevant documents after they have finished in the position.



Tip

To assist the transfer of information from one public officer to the next, it's a good practice to:

- arrange a handover from the outgoing to the incoming public officer
- arrange for the new public officer to seek information from the outgoing public officer (for example, logins and passwords, financial records, copies of documents lodged with NSW Fair Trading) as soon as they are appointed or elected
- ensure that public officers store all information securely in a central place (such as the association's office or computer), including back-ups of electronic data, and
- provide a copy and explain the association's policies and procedures to the next public officer

Removing a public officer

Sometimes an association may have to remove a public officer from office (for example, because the person is not carrying out their duties properly). Under section 35(1)(c) of the AI Act, a public officer may be removed from office by resolution of a general meeting of the association.

What if the removed public officer is a member of the committee?

If the removed public officer is also a member of the committee, depending on your association's constitution, the person may be automatically removed as a committee member. However, check what your constitution says.

What if the public officer is an employee of your association?

If the public officer is also an employee of your association, their employment arrangements should be carefully considered. If the person's main role is as the public officer, the association may no longer want to employ them.

If your association wants to remove a public officer who is also an employee, **and** this would mean that the person no longer has a paid position within the association, you should seek legal advice before taking any action to remove the public officer. The association needs to ensure that it complies with relevant contractual and statutory requirements about terminating (ending) a person's employment. Under the national *Fair Work Act 2009* (Cth), it's illegal to dismiss an employee on a range of grounds. You can find more information on fair and lawful termination on the Fair Work Ombudsman's website.

Further information



Related Not-for-Profit Law resources

- For information about taking a role in an incorporated association in New South Wales, see our webpages on ‘the people involved’.



Related resources

Legislation

- The *Associations Incorporation Act 2009* (NSW) is the legislation that regulates incorporated associations in New South Wales
- The *Associations Incorporation Regulation 2016* (NSW) contains additional requirements for incorporated associations in New South Wales and also includes the Model Constitution
- The *Fair Work Act 2009* (Cth) is the legislation that regulates the termination of employees in Australia

Government

- NSW Fair Trading's website contains a variety of online resources, including online access for incorporated associations
- The Fair Work Ombudsman website contains information about employers' obligations and the Small Business Fair Dismissal Code

Other links

- See part 1: The Association in a Nutshell in this guide for links to other organisations and online resources to assist you and your association.