

# Part 1

## The association – an overview



### Disclaimer

This guide provides general information about running an incorporated association in New South Wales. This information is a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this guide.

This part of the guide contains background information to help you understand your association, the roles of the members, public officer, office bearers and committee members, and how to use this guide.

### Summary of key points

<b>Who is this this guide for?</b>	This guide is primarily for public officers, office bearers, including secretaries and members of committees of incorporated associations. This part provides an overview of an association.
<b>How to use this guide</b>	This guide is in seven parts and includes a range of practical tools and other links.
<b>What is an incorporated association?</b>	An incorporated association is one of the most common (but not the only) legal structure used by not-for-profit organisations. There are laws that regulate incorporated associations in each state and territory. <b>This guide deals with New South Wales laws only.</b> A NSW association must operate in accordance with the requirements of the <a href="#">Associations Incorporation Act 2009 (NSW) (AI Act)</a> and the <a href="#">Associations Incorporation Regulation 2022 (NSW) (AI Regulation)</a> .
<b>What are the reporting obligations of an incorporated association?</b>	Certain information must be reported to NSW Fair Trading under the AI Act and the AI Regulation, including an annual summary of the association's financial situation, and when changes occur (for example, when a new public officer is appointed, or the association's details change).
<b>What are the rules and purposes of an incorporated association?</b>	Every incorporated association has its own constitution (or rules) which sets out the procedures for running the association and the purpose for which the association is established. Use <b>Tool 1</b> in this part of the guide to help you work out what your rules are – it's essential to be familiar with them.



<p><b>What is the role of members of an incorporated association?</b></p>	<p>Members of an incorporated association have the power to make certain decisions about the association. In particular, they usually appoint the members of the committee.</p>
<p><b>What is a committee?</b></p>	<p>The committee of an incorporated association (that is, its governing body or board) is responsible for overseeing how the association operates. There are special positions on the committee, known as 'office bearers'. Often the public officer is a member of the committee, but this is not required under the AI Act.</p>
<p><b>How does the committee differ from the 'managers' of an association?</b></p>	<p>The committee of an incorporated association sets the overall strategic direction of (or 'governs') the association and is generally not involved in the day-to-day running of the association.</p> <p>In larger associations, there may be senior staff (for example, the CEO, operations manager and finance manager) who are responsible for the day-to-day running of the association.</p>
<p><b>Who is the public officer?</b></p>	<p>Every association must appoint a public officer, who must be over 18 years of age and a resident of NSW.</p> <p>The AI Act and AI Regulation set out the specific tasks required of the public officer. These tasks include notifying NSW Fair Trading of any changes to key information about the association and lodging an annual summary of the association's financial situation, collecting all association documents from former committee members and returning all association documents to a committee member when the public officer vacates office. An association's constitution may set out additional requirements and responsibilities.</p> <p>The public officer is an authorised signatory of the association. <a href="#">Part 2 of this guide</a> sets out further information about the responsibilities of the public officer.</p>
<p><b>Who is the secretary?</b></p>	<p>Incorporated associations will usually elect a secretary. The secretary may be the same person as the public officer, or in addition to the public officer (either is permitted by the AI Act).</p> <p>The secretary's role and responsibilities will be governed by your association's constitution. If your association has adopted the model constitution (set out in Schedule 3 of the AI Regulation) and no separate secretary is elected, then the public officer will assume the role of secretary.</p> <p>This is not to be confused with the 'Secretary' who has replaced the 'Director-General' in the AI Act. References (in the AI Act and the AI Regulation) to the 'Director-General' have been replaced with the 'Secretary'.</p> <p>'Secretary', in the AI Act, is defined as:</p> <ul style="list-style-type: none"> <li>• the Commissioner for Fair Trading, Department of Finance, Services and Innovation, or</li> <li>• if there is no such position in the Department, the Secretary of the Department</li> </ul> <p>This is different from a committee member of an incorporated association who may bear the title of a 'secretary'.</p>
<p><b>Where can I go for information and assistance?</b></p>	<p>This guide sets out information about running an incorporated association. Not-for-profit Law has <a href="#">further resources for incorporated associations</a>.</p> <p>Information about other Not-for-profit Law services (such as training and legal advice) is also available on <a href="#">our website</a>.</p>



## Who is this guide for?

This guide is designed to help you (as the public officer, the office bearer, including the secretary), in your association, to comply with the duties associated with your roles by:

- alerting you to your legal obligations, and
- providing good governance tips and tools for running an incorporated association in NSW

It doesn't matter whether you are a volunteer in a small support group, or a paid officer of a large social club – any public officer or officer bearer of an incorporated association in NSW can benefit from this guide.

Under the AI Act and the AI Regulation, an association's public officer can also hold the positions of committee member and secretary. However, this will depend on the association's constitution.



### Note

It's important to understand which role a person is conducting at any time to determine what their duties are with respect to that role.



### Summary – who this guide is for

- The **public officer** is the incorporated association's official contact person and is responsible for reporting about the association to NSW Fair Trading and for keeping up-to-date records about the association.
- If your association has a **secretary**, the secretary will usually be responsible for organising meetings, keeping minutes, dealing with documents and updating records about the association.
- Under the model constitution, the secretary is a member of the association's committee, and this is usual practice.

This guide may also be useful for **other key people** in your organisation including the chief executive officer, chief financial officer, chief operations officer, or founder, as well as people and organisations who work with incorporated associations (such as peak bodies, advocacy groups and lawyers assisting incorporated associations).

## How to use this guide

The guide has seven parts and includes practical tools – such as sample documents, checklists, registers and flowcharts – to help you in your role. The tools are located at the end of each part of the guide.

<b>Part 1</b>	<b>The association – an overview</b>
<b>Part 2</b>	<b>The public officer’s legal role, powers and duties</b>
<b>Part 3</b>	<b>Registers, records and official documents</b>
<b>Part 4</b>	<b>Annual General meetings</b>
<b>Part 5</b>	<b>Special General meetings</b>
<b>Part 6</b>	<b>Committee meetings</b>
<b>Part 7</b>	<b>Reporting to NSW Fair Trading</b>

## Introductory information

### What is an incorporated association?

An incorporated association is one of the most common (but not the only) legal structure used by not-for-profit groups in NSW.

There are other legal forms used by not-for-profit groups, such as corporations (or companies) and cooperatives. Different laws and rules apply to them, which are not covered in this guide.

Every Australian state and territory has its own laws to regulate incorporated associations. This guide deals with incorporated associations in NSW.



For more information on what incorporation means, and different types of legal structures used by not-for-profit groups, see our free resources on [‘Getting Started’](#).



## How do you know if an organisation is an incorporated association?

Incorporated associations have the word 'Incorporated' or the letters 'Inc' at the end of their name. This can be contrasted with organisations that have, for example, 'Ltd' or 'Pty Ltd' at the end of their name.

In NSW, the AI Act is the main piece of legislation regulating incorporated associations. The AI Act covers the establishment, operation and ending (or dissolution) of an incorporated association.

If you are not sure whether your association is an incorporated association in NSW, you can search the [Register of Incorporated Associations](#).



## Tip

It's good practice to keep a copy of the current [AI Act](#) and [AI Regulation](#) with your association's official documents.



## More information

There are other laws which apply to incorporated associations – for example, laws dealing with work health and safety, workplace relations, volunteers, tax, advertising and fundraising. [Our website](#) has useful resources and information sheets on a range of topics and laws to help not-for-profit organisations.

## What does NSW Fair Trading do?

NSW Fair Trading is part of the New South Wales Government and has primary responsibility for dealing with incorporated associations.

Under the AI Act and the AI Regulation, the Director-General (Commissioner of Fair Trading) has certain legal functions relating to incorporated associations.

### The Director-General's legal functions include:

- maintaining the Register of Incorporated Associations (a list of all incorporated associations in NSW)
- approving applications for incorporation
- approving Constitutions drafted by incorporated associations
- receiving annual summaries from incorporated associations (see [part 7](#) of this guide: [Reporting to NSW Fair Trading](#))
- approving important changes to an incorporated association (such as changes to an association's Constitution, statement of purposes or name)
- cancelling an association's incorporation status
- monitoring and investigating an association's compliance with the AI Act and AI Regulation (and taking other action if necessary), and
- imposing fines (or taking other action if necessary) where there has been a failure to comply with the AI Act



In practice, the office of NSW Fair Trading deals with these matters on behalf of the Director-General (Commissioner of Fair Trading).

### You can contact NSW Fair Trading if you need help with:

- forms to be lodged with NSW Fair Trading, and requests for extension of time to lodge forms
- information and assistance to ensure your association's Constitution complies with the AI Act
- requests for documents (for example, your association's Constitution or other documents lodged with NSW Fair Trading), and
- general advice about your obligations under the AI Act

NSW Fair Trading is **not** able to:

- give legal advice or pre-approve changes to your Constitution
- provide advice about how to interpret your association's Constitution, or
- resolve internal disputes within your association

## What are the reporting requirements of an incorporated association?

### An incorporated association is required to report to NSW Fair Trading:

- every year by lodging an annual summary of the association's financial situation (see [part 7 of this guide: Reporting to NSW Fair Trading](#))
- whenever a new public officer is appointed, or if the existing public officer's details change (see [part 2 of this guide: The public officer's legal role, powers and duties](#))
- if the address or name of the association change, and
- when certain key decisions are made by the association – for example, if the association passes a special resolution to change its name or its Constitution (see [part 4 of this guide: Annual General Meetings](#) and [part 5 of this guide: Special General Meetings](#))

## The constitution and purpose of an incorporated association

Every incorporated association must have its own constitution. The constitution sets out in detail the procedures for running the association. Your association must follow its own constitution.



### Why follow the constitution?

Your association's constitution informs the association's members how the association is to be run and managed, and how decisions will be made. Members can also contribute to (or raise concerns about) the association's decision-making where appropriate.

The constitution is legally enforceable by members of your association.

Certain matters must be covered by your association's constitution (these are listed in Schedule 1 of the AI Act). The constitution must also be consistent with laws, including the AI Act.

Apart from these matters, your association has a fair degree of flexibility in establishing its constitution.

The constitution should also cover the same matters dealt with in the model constitution, and may adopt those to suit its own requirements, so it complies with the AI Act and the AI Regulation.



### Tip

The association's constitution of the association is a key source of information for public officers and office bearers, including secretaries.

You should read your association's constitution, have an up-to-date copy handy and make sure it's consistent with the requirements of the AI Act.



### Caution – disputes

You can be challenged by a member of the association if you don't follow your association's constitution.

If there is a dispute between members of the association as a result of a failure of someone to follow the constitution, the constitution will set out the procedure for the resolution of internal disputes between members, as well as between members and the association.

The model constitution sets out a procedure to resolve disputes via mediation between the members and the association. NSW Fair Trading doesn't get involved in the resolution of these types of disputes.

An association's constitution must cover all the mandatory items listed in Schedule 1 of the AI Act.

An association can either:

- adopt the 'model constitution', or
- write its own constitution by:
  - drafting a new constitution from scratch, or
  - making changes to the model constitution



### What is the 'model constitution'?

The model constitution is an example constitution that complies with the minimum requirements of the AI Act. The model constitution is set out in Schedule 3 of the AI Regulation and is published on the NSW Fair Trading website.

Many associations choose to adopt the model constitution when they become incorporated. An association can also convert to the model constitution after it incorporates (although this is less common).

The model constitution can change over time if there are changes to the IA Regulation.



### Note

If your organisation has adopted the whole model constitution, any changes to the model constitution in the AI Regulation over time will apply to your organisation automatically. This means you should check to see what the most up-to-date model constitution is – as this is the constitution your association should be following.



### Tip

The model constitution can seem like a good option if you don't want to draft your own constitution. But the model constitution is not 'model' in the sense of being the 'best' for every association – for example, if your association wants to access certain tax concessions it may need to consider whether the model constitution meets the necessary tax law requirements.

An association can change its constitution by following certain procedures. An association's current constitution must be lodged with, and accepted by, NSW Fair Trading to be valid.

The different options available to an association when drafting and changing its constitution can make it difficult for members and committee members, and the public officer to work out what the current official constitution is. Some specific guidance is provided below.

### Writing your own constitution

If your association has written its own constitution, make sure the constitution covers all the matters required to be addressed by Schedule 1 of the AI Act. You should also consider the matters covered in the model constitution and decide whether they need to be addressed in your constitution. For example, what officer-bearers or committee members you will have and what titles they will be given?



### Note – 'reading in' parts of the model constitution

If your association's constitution doesn't cover an item in Schedule 1 of the AI Act, the relevant model constitution provision that covers the particular item will be automatically included in your constitution.

For example, if your association's constitution doesn't specify the number of days' notice is required for a general meeting, then clause 30 of the model constitution will apply so that at least:

- 14 days' notice is required, or
- 21 days' notice if a special resolution has been proposed

The process of 'reading in' model constitution provisions can become very confusing, so it's better to make sure your own constitution covers all the required items listed in Schedule 1 of the AI Act.



### Caution

Your association's constitution can't override the AI Act or any other laws.

If there is an inconsistency between the AI Act and a clause in your association's constitution, the clause in your constitution has no effect to the extent of the inconsistency (section 25(6) of the AI Act).

If the AI Act says something must be covered in your constitution, but your constitution doesn't cover it, then the relevant part of the model constitution will fill the 'gap' automatically (section 25(2) of the AI Act).

When reviewing your constitution, make sure you are reviewing the correct version. You can request a copy of your constitution from NSW Fair Trading to make sure you have the most up-to-date version.





If your association has written its own constitution, or made changes to the model constitution, you must submit a copy of your constitution to NSW Fair Trading. NSW Fair Trading will reject it (if there are problems with it), or register it.

Your association's constitution, including any changes to it, is not official (legally binding) until it is approved by and registered with NSW Fair Trading.



### Tip

To check what your association's constitution is, follow the steps in the [flowchart tool](#) at the end of this part of the guide.

## What is the role of members of an incorporated association?

The members of an incorporated association have certain rights and responsibilities under the AI Act, the association's constitution, and the law developed by the courts (judge-made law or common law).

Importantly, members of the association can attend general meetings and vote on particular matters such as:

- electing the committee
- changing the association's name, purposes, or its constitution
- amalgamating the association with one or more other associations, or
- winding up (ending) the association voluntarily

An association's constitution must set out the procedures for formal meetings where the members can make official decisions - an 'annual general meeting' and 'special general meetings'. Both annual and special general meetings are 'general meetings' in the model constitution.



### The term 'general meeting'

In this guide, we use the term 'general meeting' to mean any meeting of the members of the incorporated association (whether the annual one or a 'special general meeting') which has been convened using the procedures for formal meetings of members in the association's constitution.

These procedures include giving notice of the meeting to members.

Under Schedule 1 of the AI Act an association's constitution must also set out the rights, obligations and liabilities of members, including:

- the qualifications (if any) for membership of the association
- any fees, subscriptions or other amounts to be paid by members
- the procedure for disciplining members and handling internal disputes
- the process by which members may inspect the books and records of the association, and
- the liability (if any) of the association's members to contribute towards the payment of the debts and liabilities of the association or the costs, charges and expenses of the winding up of the association

The members of an incorporated association are not responsible for making decisions about the overall running of the association – that is the job of the committee (see below, 'What is a committee?').

However, if you have drafted your own constitution, you can require the committee to get member approval of certain decisions (for example, investment plans, or entering into contracts over a certain dollar value).

The members may be (and often are) involved in carrying out the association's activities (for example, helping teams with coaching), but this is different to having the **legal** responsibility for management of the association. Sometimes the line between these two can seem unclear or artificial. If the constitution doesn't specifically state that a decision must be made by the members, then it's likely to come under the overall responsibility of the committee. The committee may then choose to delegate 'the doing' to others (for example, involve members, volunteers or paid staff to actually do what is needed).

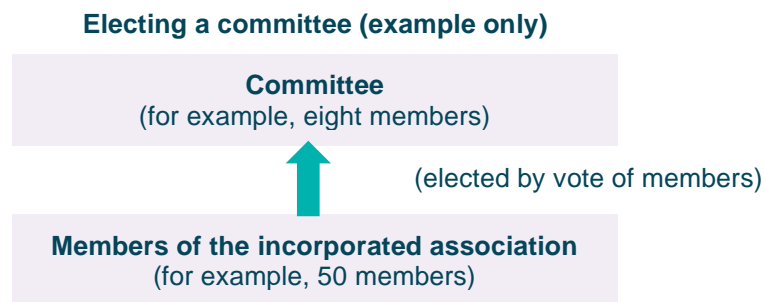
## What is a committee in an incorporated association?

Managing an incorporated association is the responsibility of an elected committee. Sometimes other names are used for this governing body, such as the 'board', 'council', 'management committee' or 'committee of management'.

In many cases, the members of the association elect a small group of people.

Under the AI Act, the committee must be made up of at least three (or more) members of the association who are 18 years or over, and at least three of the committee members must reside in Australia.

If the association's constitution contains other qualifications or requirements for a committee member, these provisions must also be complied with, in addition to the requirements under the AI Act.



In some associations, all the members of the incorporated association are also members of the committee. This often happens in small associations or when the association first begins.

When all the members of an association are also on the committee, it can seem strange to separate the governance of the association from the actual doing of the work. However, it's important to understand the separate (legal) role of the committee.

### Governance – how the committee differs from 'managers' of an association

Good governance practices are crucial to an association's ability to function, to achieve its objects, and to comply with all the legal, ethical and operational requirements of an incorporated association.

Incorporated associations, especially small associations, often struggle to distinguish between:

- the role and responsibility of an association's committee (to govern the association), and
- the role and responsibility of the staff, 'organisers' or key volunteers that are not on the committee (to manage the association)

While these two functions may be performed by the same group of people, distinguishing between issues of strategic governance and day-to-day management is important, as particular legal duties apply to the governance, but not management, of associations.

The 'governance' of an association is the responsibility of the committee, and generally refers to the direction and control of an association. This includes overseeing the affairs of the incorporated association and making sure its legal obligations are met.

Members of the committee have particular legal duties under the AI Act, under judge-made law and under the Constitution, such as:

- the duty of reasonable care, skill and diligence
- the duty to disclose interests
- the duty not to misuse information or position, and
- the duty to act in good faith



NSW Fair Trading is responsible for enforcing these requirements and members also have the right to take action to enforce them.

In larger associations, different people may be ‘managers’ (such as a CEO, finance manager or operations manager), and in smaller associations, ‘key volunteers’ are responsible for making decisions about the day-to-day running of the association, based on the strategy decided by the committee.

Normally these people don’t need to comply with the legal duties that the committee must comply with, but occasionally, ‘managers’ or ‘key volunteers’ also need to comply with legal duties. This occurs where they are deeply involved in making key decisions that affect the operations of an association or who are influential in the affairs (financial or otherwise) of the association.

### Are there special positions on the committee?

There are often special positions on a committee.

The people who take positions on the committee are called ‘officers’ or ‘office bearers’ or ‘the executive’ of the association. The titles of positions on a committee will vary between associations and will be set out in the constitution.

### Some common positions and their traditional roles:

- **the chairperson** (or president) runs meetings and usually represents the association at public events
- **the deputy chairperson** (or vice-president) takes on the role of the chairperson when that person is not available
- **the treasurer** (or financial officer) deals with the financial affairs of the association
- **the public officer** reports to NSW Fair Trading and will conduct the role of secretary if no secretary is elected or if the public officer is separately elected as secretary (for further information about the role of the public officer, see [part 2 of this guide: Public officer's legal role, powers and duties](#)), and
- **the secretary** organises meetings, deals with documents and keeps minutes and other records of the association

The committee may have other members who are not office bearers. These are sometimes called ‘ordinary committee members’. These members must also meet the duties that apply to members of the committee.



For more information about legal duties of committee members in your association, see our [Duties Guide](#).

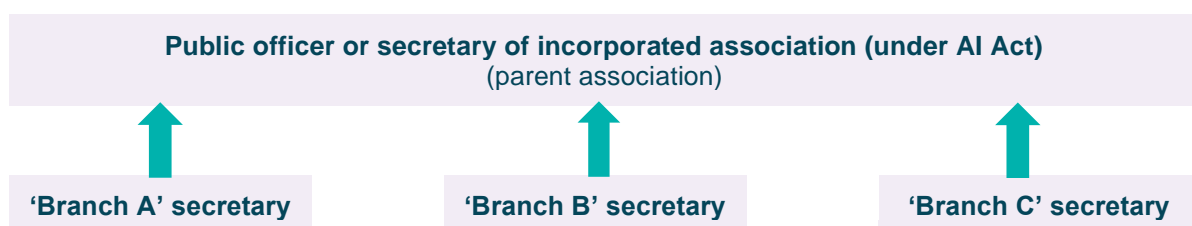
### Branches and branch secretaries

A large association may have branches if its constitution provides for this.

Each branch will usually have its own branch secretary (and possibly its own committee), reporting to the secretary, public officer or committee of the parent association (see the diagram below).

In most cases, branches are not separately incorporated under the AI Act – the rules of the parent association control the branch, and a member of the branch is a member of the parent association. As a result, a branch secretary is not the ‘secretary’ or ‘public officer’ for the purposes of the AI Act. Only the secretary or public officer of the parent association performs these statutory roles.

#### Example of branch secretaries reporting to secretary of parent association



If an association chooses to establish branches, it's good practice for the governance arrangements for the branches to be explained in the association's constitution.

An association with branches should draft its own, tailored constitution rather than adopt the model constitution.



### Who is the public officer?

The public officer of an incorporated association has responsibilities under the AI Act for submitting forms and documents to NSW Fair Trading and is the primary public contact person for the association.

The public officer may, but does not need to, be part of the committee. For example, the public officer could be an employee of an association (for instance, the general manager), who is neither a member of the committee nor a member of the association. Under the model constitution, the public officer is not a member of the committee.



### Note

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

See [part 2 of this guide: The public officer's legal role, powers and duties](#).



### Who is the secretary?

An association will usually have a secretary (although this isn't a requirement under the AI Act).

The model constitution provides for a secretary and says the secretary of the association means:

- the person holding office under this constitution as secretary, or
- if no person holds that office – the public officer of the association

Depending on your association's circumstances, the public officer and secretary roles may be held by the same person or by two different people.

If you act as both the public officer and secretary of an association, it's important to understand in which capacity you are acting (that is, which 'hat' you are wearing) when acting on behalf of the association. This will ensure you comply with all your relevant duties for your particular roles.

There is no restriction at law or in the model constitution on a public officer standing for election as an association's secretary (or any other committee position). However, if your association hasn't adopted the model constitution, you should check your constitution to see if this is permitted or prohibited.

Consequently, unless your constitution states otherwise, a public officer can assume the role of secretary by:

- election (a person must be elected to both the role of public officer and the role of secretary), or
- automatic effective appointment (where a public officer's appointment as a secretary is automatically effective when they are elected as a public officer)



This distinction may be relevant if a new candidate stands for election, or the members wish to remove the secretary from office.



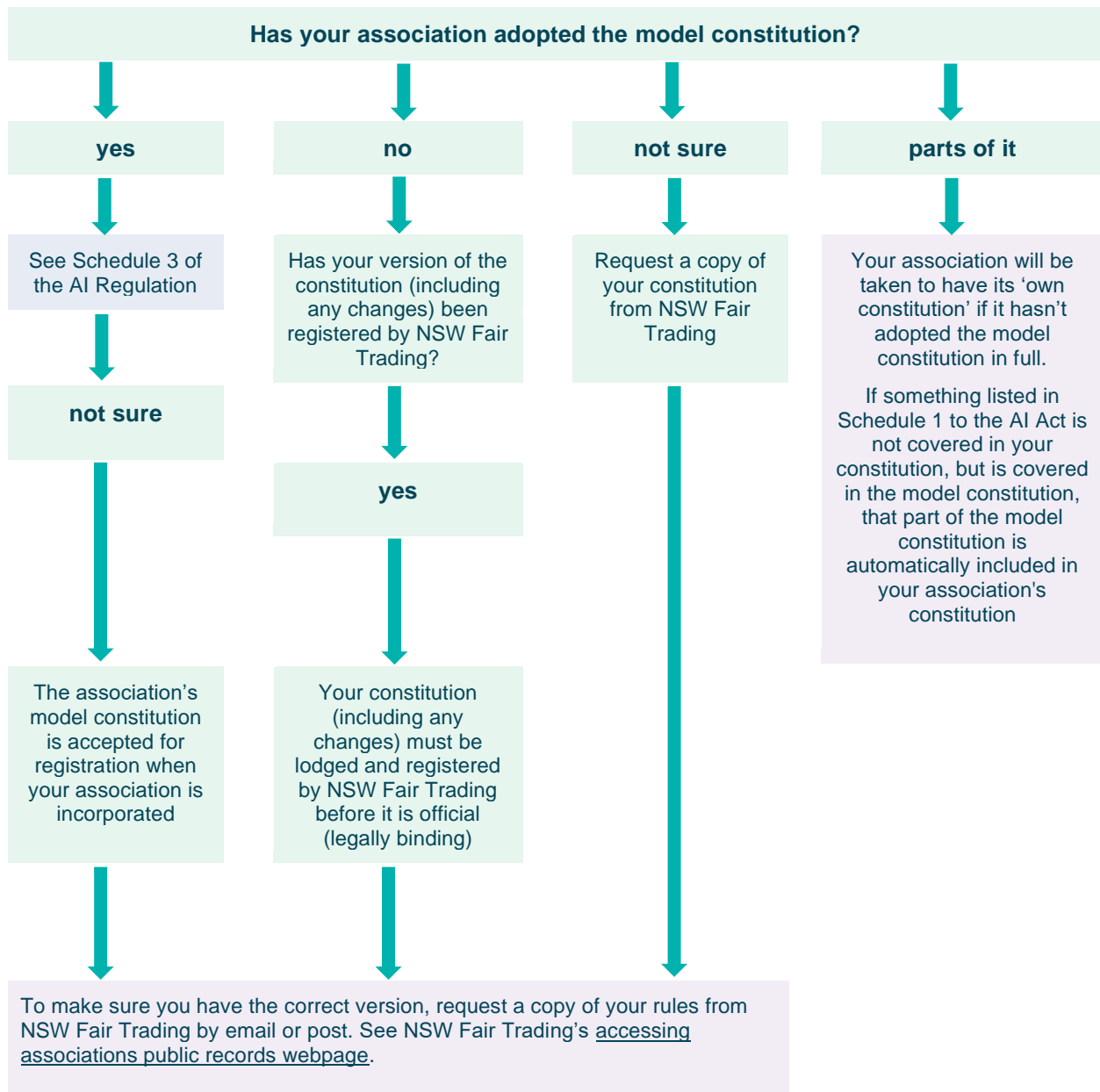
### **Note – this is not the ‘Secretary’ referred to in the AI Act and AI Regulation**

The ‘Secretary’ referred to in the AI Act and AI Regulation is NSW Fair Trading (part of the NSW Department of Finance, Services and Innovation).

The AI Act gives the ‘Secretary’ powers and responsibilities to administer incorporated associations. In practice, the functions of the ‘Secretary’ are carried out by NSW Fair Trading.

In this guide, we use ‘NSW Fair Trading’ in place of ‘Secretary’.

## Tool 1 – Working out what your association's current constitution is



### Beware

If your constitution doesn't cover all the items listed in Schedule 1 of the AI Act, certain clauses of the model constitution may automatically apply to your association.

If a clause in your constitution is inconsistent with the AI Act, the clause is invalid.