



Law Council
OF AUSTRALIA

Legal Practice Section

23 May 2025

Sue Woodward AM
Commissioner
Australian Charities and Not-for-profits Commission
GPO Box 5108
Melbourne VIC 3001

By email: consultations@acnc.gov.au

Dear Commissioner Woodward

Template CLG constitutions consultation

1. This submission has been prepared by the Charities and Not-for-profits Committee of the Law Council of Australia's Legal Practice Section. The Committee welcomes the opportunity to make a submission to the ACNC in relation to the proposed template constitutions for companies limited by guarantee (**CLGs**).
2. In our respectful view the draft documents are not fit for purpose and will create more confusion for charities than the previous document. They require extensive revision. We will be happy to review further drafts at the appropriate time.
3. We have provided detailed comments in the annexed constitution for a Standard template CLG constitution. In addition to those comments, we submit:
 - (a) There is no need for the number of draft documents that have been prepared. We believe that only the following templates are required:
 - (i) one template for charities that will not seek deductible gift recipient (**DGR**) endorsement at all;
 - (ii) one template for all charities that will seek endorsement as a whole DGR, and that are not required to maintain a gift fund—principally public Benevolent Institutions (**PBIs**) and health promotion charities. There is no reason for PBIs and health promotion charities to have different templates; and
 - (iii) one constitution for all wholly endorsed DGRs that are still required to maintain a gift fund: i.e. environmental organisations, harm prevention charities, cultural organisations and overseas aid organisations.
 - (b) DGRs should only be required to distribute 'DGR assets' (i.e. deductible gifts and contributions, and fundraising amounts, and moneys received because of those amounts) to a DGR on winding up/revocation. It is not the case under the tax law that they are required to distribute all their assets to a DGR. Non 'DGR

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assets' (e.g. money from government grants or corporate sponsorships) can be distributed to non-DGR charities. Currently, the DGR as a whole and DGR for HPC require all assets to be distributed to a DGR. Both of these clauses should follow the same formulation as the PBI winding up / revocation provision.

- (c) Clause 95 must stipulate who/how the recipient DGR is decided (i.e. board decision).
 - (d) In relation to each DGR constitution where the term "gift fund" is used it is not explained or defined, and it is not a commonly understood term. This will be remedied in relation to the HPC and whole endorsement templates if they are removed and only the PBI formulation is retained and is used for all wholly endorsed DGRs that are not required to maintain a gift fund.
 - (e) The template for a DGR for a fund, authority or institution is not compliant with the ATO requirements. It does not include any of the requirements for establishing the fund or institution.
 - (f) There is also no need to refer to an 'authority' in the template for a DGR for a fund, authority or institution. A charity will not have an 'authority', so this is irrelevant.
 - (g) There is no template that is appropriate for a wholly endorsed DGR that is required to maintain a gift fund—i.e. for a charity that will seek endorsement as an environmental organisation, harm prevention charity, cultural organisation or overseas aid organisation. These are unique categories that have specific requirements for establishing and operating the fund, even though they are wholly endorsed. The templates do not account for these categories.
 - (h) It would be helpful to have examples of the common types of DGR that apply to 'as a whole' and 'a fund or institution' as this would be confusing for most users and many categories require other provisions to be included. We recommend you list the types of DGR that these templates will not be suitable for.
4. The Committee would welcome the opportunity to discuss this submission with the ACNC. In the first instance, please contact the Charities and Not-for-profits Committee Chair, Bridgid Cowling [REDACTED].

Yours sincerely



Greg McIntyre SC
Section Chair

Template constitution for a charitable company limited by guarantee

Commented [A1]: General comments:
We strongly recommend using subclauses. As this is a legal document, it should not depart too significantly from legal convention. In addition, subclauses are important so that particular parts can be clearly pinpointed.
We have noted where there are typos or grammatical errors as well as more substantive points.

Disclaimer

This template constitution is for general information purposes only and is intended to be used as a starting point for small charities preparing their own constitutions. This means that small charities should use this constitution as a guide only, and adopt a constitution that is suitable for their individual needs and circumstances.

You should seek professional advice before finalising a document based on this template.

The [ACNC's general disclaimer](#), which is set out on the ACNC's website, applies to this constitution.

This constitution reflects the law as at [date of publication].

Commented [A2]: This is a little unhelpful.
Consider instead - 'this constitution may not be suitable for every charity's requirements as there are a number of tailored options that may be not appropriate for your charity's circumstances. If you are not sure seek legal advice.'

Preparing to use the template constitution

This template constitution is intended for small charities preparing their own constitution, where that charity:

- is, or is incorporating as, a company limited by guarantee, and
- does not have, and is not applying for, deductible gift recipient endorsement.

Do not use this template if either of the above do not apply.

! Red boxes with an exclamation mark highlight items in the template you need to consider and make decisions about. Some boxes also include important information about what the ACNC Act and Corporations Act require. Once you've considered these things and customised the clause in the constitution, please delete the box.

? Green boxes with a question mark provide general guidance and aim to answer common questions. Please read these carefully, and then delete the box.

M Clauses in the template constitution that are marked with the 'M' icon are mandatory for registered ACNC charities. Do not delete or change these clauses if you want to be a registered ACNC charity.

Commented [A3]: It is incorrect say that the 'M' clauses can't be changed and are mandatory - while the substance of the requirement may be mandatory, they can be reworded.
In addition, leaving the 'M' in the constitution may be confusing. We recommend instead including a statement at the start about which matters must be dealt with - eg, name, NFP, purposes.

The ACNC website has [more information about companies limited by guarantee](#).

We recommend that:

- you read through the entire document to ensure it is appropriate for your company
- get legal advice if you are planning to adapt all or part of this template.

If your charity is going to be set up as – or is set up as – either an incorporated association or as a **propriety** company limited by shares (a 'Pty Ltd' company), do not use this template or parts of this template.

Commented [A4]: This should be 'proprietary'.

OFFICIAL

CONSTITUTION OF [Insert name of company]

Australian Business Number (ABN) [insert ABN]

Australian Company Number (ACN) [insert ACN]

Commented [A5]: We suggest you say that if you have an ABN it is preferable to include this on the cover. Don't include a requirement for the ACN as once they have an ABN this is the only number they need to use.

? You can find your existing company's ABN and ACN by searching the Australian Business Register's [ABN Lookup](#) website. If your company is a new one, it will be allocated an ACN on incorporation, after which it will then need to register for an ABN.

A company limited by guarantee

– 3 –

OFFICIAL

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Preliminary

1. Name of the company

The name of the **company** is _____ **Ltd.**

Commented [A6]: You should have a guidance note about companies that already exist and may not have Ltd as part of their name.

2. Type of company

The **company** is a not-for-profit public company limited by guarantee, established to operate as a charity.

Definitions and interpretations

3. Definitions

In this constitution:

ACNC Act means the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

business day means a day on which banks are open for business, excluding Saturdays, Sundays and public holidays in the location of the **company's** registered office.

company means the company referred to in clause 1.

Corporations Act means the *Corporations Act 2001* (Cth).

chairperson means an individual elected by the directors to be the **company's** chairperson under clause 52.

general meeting means a meeting of members, including an annual general meeting.

members present means, in connection with a **general meeting**, **members present** in person, present by use of audio or audio visual technology per clause 26, by **representative** or by proxy at the meeting.

members' resolution has the meaning given by clause 36(a).

members' statement has the meaning given by clause 36(b).

registered charity means a charity registered under the **ACNC Act**.

representative means a person appointed to represent an incorporated member in accordance with clause 32.

special resolution means a resolution:

- i. of which notice has been given under clause 28(d), and
- ii. that has been passed by at least 75% of the votes cast by **members present** and entitled to vote on the resolution.

Commented [A7]: A number of definitions are unnecessary:
Company
Chairperson
Members resolution and statement
Representative

surplus assets means any **company** assets that remain after paying all the **company's** debts and other liabilities, including the costs of winding up.

virtual meeting platform means any technology or combination of technologies that allows members to participate in a meeting, including by asking questions verbally and in writing, without being physically present at the meeting.

4. Reading this constitution with the Corporations Act

The replaceable rules set out in the **Corporations Act** do not apply to the **company**.

While the **company** is a **registered charity**, the **ACNC Act** and the **Corporations Act** override any clauses in this constitution that are inconsistent with those Acts, as they apply to a **registered charity**.

If the **company** is not a **registered charity** (even if it remains charitable), the **Corporations Act** overrides any clause in this constitution which is inconsistent with that Act.

A word or expression that is defined in the **Corporations Act** or used in that Act and covering the same subject has the same meaning as in this constitution.

5. Members signing documents

Where the constitution says that members must sign a document, the members may:

- (a) sign a physical form of the document by hand, or
- (b) sign an electronic form of the document in a way that identifies each person and indicates their intention.

Members may also sign separate copies of a physical or electronic document if each copy has the same wording.

6. Interpretation

In this constitution:

- (a) the words 'including', 'for example', or similar expressions mean that there may be more inclusions or examples than those mentioned after that expression, and
- (b) reference to an Act includes every amendment, re-enactment, or replacement of that Act and any subordinate legislation made under that Act (such as regulations).

Charitable purposes and powers

7. Purpose M

The **company's** purposes are:

Commented [A8]: Remove clause 4.2 - this constitution should not be inconsistent with the legislation. If the legislation changes after adoption then the legislation will deal with this if it is applicable.

Commented [A9]: This is not the case for the meaning of 'officer', used later in the constitution.

Commented [A10]: This should be about signing documents generally, not just regarding members (eg, the constitution refers to representatives and directors signing).

Commented [A11]: 5.1(b) is confusing - does it require an electronic 'signature' or not.

! In the space above, enter details about what your company aims to do. For help, [refer to the ACNC's charitable purposes template and examples](#).

Your company's purpose is the reason that it exists.

To be a registered charity, you must demonstrate that your company pursues 'charitable purposes', which has a special legal meaning. [Read more about charitable purposes](#).

A charity must work towards its purposes in accordance with Governance Standard 1. [Read more about Governance Standard 1](#).

Commented [A12]: This implies activities. This wording should be consistent with ACNC guidance.

8. Powers **M**

Subject to clause 9, the **company** has all the powers of a company limited by guarantee under the **Corporations Act**.

The **company** may only use its powers to carry out the purpose(s) it has set out in clause 7.

Commented [A13]: This is unnecessarily complicated and confusing - we suggest 'Solely for carrying out the company's purposes, the company has all the powers of a company limited by guarantee under the **Corporations Act**.' And delete 8.2

9. Not-for-profit **M**

The income and assets of the **company** must be applied solely to carry out its purpose(s) as stated in clause 7.

The **company** must not distribute any income or assets directly or indirectly to its members, except as provided in clause 93 or the following, as long as these actions are done in good faith:

- (a) paying a member for goods or services they have provided, or expenses they have properly incurred at fair and reasonable rates or rates more favourable to the **company**, or
- (b) making a payment to a member in furtherance of the **company's** charitable purpose(s).

Commented [A14]: This is confusing. Directors must do everything in good faith. Including it here implies that it's a special duty with respect to this issue.

? Governance Standard 1 requires a registered charity to demonstrate its purposes and character as a not-for-profit. One way to demonstrate this is to include the above clause in your governing document. [Read more about Governance Standard 1](#).

A not-for-profit can still make certain payments to its members, for example:

- a) If a member is also an employee of the company, they can be paid wages for their work as an employee.

Commented [A15]: Why is 'payment' used as opposed to distributing income or assets? Also, the example should clarify other circumstances where this would apply. The relief of poverty is not a good example as there is a different public benefit requirement which may come into play.

- b) If it would further your company's charitable purpose (for example, the company is established to relieve poverty, and a member is experiencing poverty).

[Read more about being a not-for-profit.](#)

The company should ensure that these types of decisions are made carefully, and that the amounts paid are reasonable. These decisions should be recorded.

[Read more about recordkeeping obligations for registered charities.](#)

10. Amending the constitution

The members may amend this constitution by passing a **special resolution**. However, the members must not pass a **special resolution** that amends this constitution if doing so means the **company** would no longer be a charity.


The **company** must give notice of any amendment to its regulators as required.

Any amendment to this constitution will take effect from the date of the **special resolution**, or from any later date specified in the resolution.

Commented [A16]: And if they do? Better to say that a resolution to do this won't have any effect. You will also need to entrench that requirement.

Commented [A17]: Delete or say to give notice to the ACNC. If other regulators need to be notified that will apply in any event.

Members

 This constitution assumes that:

- The company will have multiple members.
- The company will only have one class of members, rather than multiple classes (for example, it will not have associate members and honorary members in addition to ordinary members).

If that is not the case, you should get professional advice about how to adapt the template constitution to suit your company's circumstances.

11. Membership

There shall be one class of members.

Commented [A18]: 11.1 - 'shall' is not plain English.

The members of the **company** are those:

- listed on the application for incorporation of the **company** with their consent, and
- any other person admitted as a member, in accordance with this constitution,

and have not since **ceased** to be a member.

Commented [A19]: Inconsistent use of 'cease' verses 'stop'.

! If your company is adopting this constitution to replace its previous constitution, you should change sub-clause (a) to say, 'who are members at the time of adopting this constitution'.

12. Register of members

The secretary must keep a register of members which includes the following information:

- (a) for each current member:
- (b) name
- (c) any address nominated by the member for the service of notices like a postal address or an email address, and
- (d) date the membership started, and
- (e) for each person who stopped being a member in the last seven years:
 - i. name
 - ii. any address nominated by the member for the service of notices like a postal address or an email address, and
 - iii. dates the membership started and ended.

! By law, the register must include the member's name and address, as well as the date that the member's name is entered into the register (which is the date their membership started).

Your company can amend the clause to say that the register must include other details that are necessary – for example, you may find that it is important to have the member's mobile phone number.

13. How to become a member

Any person over the age of 18 years who, or any incorporated body which, supports the purposes of the **company** can apply in writing to become a member of the **company**.

The directors must consider all applications for membership within a reasonable period after they are received.

The directors may accept an application to become a member by passing a resolution at a directors' meeting.

If the application is accepted, the secretary must add the applicant to the register of members. The date the applicant was added to the register of members is the day they became a member.

Commented [A20]: Plain English option - address nominated by member for receiving notices, such as..

Commented [A21]: The words 'address like a postal address or email address' may imply an 'address' which is broader than what the Corporations Act envisages, e.g. it could be interpreted as a phone number which would not meet the requirements of the concept of address under the Corporations Act. What else do you envisage other than a postal or email address? If nothing, just use those two. 'such as' is preferable to 'like'.

Commented [A22]: Indent.

Commented [A23]: See comment above.

Commented [A24]: 13.1 - If you want 18 and up, then 'at least 18 years old'
We suggest that at the start of the constitution, you define 'in writing' to include electronic.

As explained in comments below. we suggest you add at the end of 13.2 'and decide whether to accept or refuse the application'.

We suggest you add a new 13.3 - 'The company must let the applicant know if they have accepted or refused the application. They need not give any reasons.'

Commented [A25]: You should include the ability of the directors to set out how this may be done, or else it is potentially a very wide process.

Commented [A26]: Directors decide everything by resolution, so it's confusing to specify this here, or require the decision to be at a director meeting. This implies they can't delegate or decide by circular resolution.

Commented [A27]: Delete as this is already covered in 12.

The directors may refuse to accept a membership application. If they do so, the directors or secretary may write to the applicant about the decision and the reasons for it.

14. Members' rights

A member can:

- (a) attend, speak, and vote at **general meetings**
- (b) raise a dispute and have a dispute dealt with using clause 19
- (c) ask the directors to call a **general meeting** under clause 24
- (d) put forward resolutions at **general meetings**, under clause 36
- (e) be made a director (if the member is eligible to be a director) under clause 48
- (f) inspect the **company's** records under clause 81
- (g) **look** at the members' register free of charge under clause 81.

Commented [A28]: The applicant should be notified either way, not just on refusal. Also we strongly recommend that this clause instead say that reasons need not be given as you are opening the charity up to disputes.

Commented [A29]: It's confusing that you list some things that members 'can' do, but don't necessarily have 'a right' to do - eg, being nominated (which is subject to endorsement by 2 members). They certainly don't have a right to be made a director.

Commented [A30]: One member doesn't have the rights in c and d.

Commented [A31]: Delete - this is subject to chairpersons control of the meeting and the members 'as a whole' having a reasonable opportunity.

Commented [A32]: Just say raise - they may not have a right for it to be dealt with under the dispute clause.

Commented [A33]: Inspect rather than look at.

15. Members' responsibilities

A member must:

- (a) **follow** the **company's** constitution
- (b) **let the company know** if they change their details, and
- (c) treat other members, staff, volunteers and directors with respect.

Commented [A34]: Comply with.

Commented [A35]: Notify the company - this is otherwise too informal.

16. Transfer of membership

Members cannot transfer their membership **or its associated rights**.

Commented [A36]: Delete associated rights - proxies have the associated rights.

17. Membership fees

The directors may decide to set or change a joining fee and/or annual membership fee, and the **time within which a member must pay**.

Commented [A37]: Due date for payment.



If your company wants to establish membership fees, it will need to consider:

- when and how members will be notified of what the fee will be
- when members will be charged each year and how long members will have to pay the fee before it becomes overdue.
- what to do if a member doesn't pay a fee. Note that the next clause says that a member automatically stops being a member if they fail to pay the fee within one month after the date that the fee was due. Your company can change that clause if you want.

Your company can put these matters in a policy.

A member that has not paid the required membership fee in accordance with this clause may not exercise any of the rights associated with their membership, including the right to exercise any vote they may have at a meeting of members.

Commented [A38]: You can't say in accordance with this clause as there is no required payment mechanism under the clause.

We also note that suspending membership rights is hard to administer - consider removing that as a consequence.

18. How to stop being a member

A member immediately stops being a member if they:

- (a) die
- (b) fail to pay any required membership fee in accordance with clause 17 within one month of the due date
- (c) are an incorporated member and are wound up or otherwise dissolved or deregistered
- (d) become mentally incapacitated or become a person or estate liable to be dealt with in any way under laws relating to mental health
- (e) become bankrupt
- (f) resign, by writing to the secretary
- (g) are expelled under clause 22, or
- (h) have not responded within three months to a written request from the secretary to confirm in writing that they want to remain a member.

Commented [A39]: This is strict, even unfair, without even a reminder notice. And should cl 17 doesn't have a process or due date. It would also be clearer to say 'fails to pay the membership fee, if any, ...'

! By-laws

By-laws are rules created by a company to govern its internal affairs and the behaviour of members. These by-laws should not be inconsistent with the company's constitution.

If your company intends to have by-laws, we suggest including the following clause:

Conduct of Members

The Board may regulate the conduct of the Members and in doing so may:

- (a) make by-laws and issue codes of conduct for the continuation of sound practice; and*
- (b) investigate the conduct of any Member and provide sanctions for those Members who do not comply with the rules of any such by-law or code of conduct.*

Commented [A40]: Unduly onerous to require a wait of three months for a response. It may be clear from other circumstances that they no longer wish to be a member such as 'no longer at this address' notifications. Consider instead a provision that the board can determine a member is untraceable.

Commented [A41]: This is confusing and outdated. We suggest you don't include it.

Dispute resolution and disciplinary procedures

19. Dispute resolution

This procedure applies to disputes or grievances under this constitution between a member or director and:

- (a) one or more members, or

- (b) one or more director, or
- (c) the **company** itself.

A member must not start a dispute resolution procedure in relation to a matter which is the subject of a disciplinary procedure under clause 22, until that disciplinary procedure is completed.

Commented [A42]: Needs to be cross-referenced.

Those involved in the grievance must try to resolve it between themselves either within 14 days of becoming aware of it, or within a timeframe agreed on by those involved. If it cannot be resolved within 14 days or within a timeframe agreed on by those involved, they must:

- (d) inform the **company's** directors in writing
- (e) agree or request that a mediator be appointed, and
- (f) attempt in good faith to settle the issue through mediation.

20. Choosing a mediator

Those involved in the grievance must either:

- (a) agree on the choice of mediator, or
- (b) where there is no agreement, consent to the following applying:
 - i. for grievances between members, the **chairperson** will choose the mediator, or
 - ii. for other grievances, the president of the law institute or society in the state or territory in which the **company** has its registered office will choose the mediator.

A mediator chosen by a director:

- (c) may not be a current or former member of the **company**
- (d) must not have a personal interest in the dispute, and
- (e) must be unbiased.

21. During mediation

When conducting the mediation, the mediator must:

- (a) allow those involved a reasonable chance to be heard
- (b) allow those involved a reasonable chance to review any written statements
- (c) ensure the mediation is conducted in a manner free from bias, and
- (d) not make a decision on the dispute.

Each party must:

- (e) do their best to resolve the grievance at the mediation conference, and

- (f) bear the costs of mediation as agreed between the parties.

The terms of any agreement reached between the parties must be provided to the **company**.

! Your company can amend these clauses to set out your preferred way to resolve disputes – for example, to ensure accessibility and efficiency. It can also develop a policy that sets out the process for resolving disputes.

It is important for companies to have a clear, agreed on ways to deal with disputes (disagreements or grievances) that occur within its ranks.

Fundraising authorities in certain states require companies that fundraise to have a procedure for dealing with disputes between members that are linked to fundraising activities. This procedure could be set out in the company's constitution.

Commented [A43]: Remove the 's' or the 'a' before clear to make it grammatically correct.

22. Disciplining members

In accordance with this clause, directors may resolve to warn, suspend, or expel a member from the **company** if they believe:

- (a) the member has breached this constitution, or
- (b) the member's behaviour is causing, has caused, or is likely to cause, harm to the **company**.

Commented [A44]: We find that this is complex to manage. Recommend deleting (as well as other references to this).

At least 14 days before the directors' meeting at which such a resolution will be considered, the secretary must notify the member in writing:

- (c) that the directors are considering a resolution to warn, suspend or expel the member
- (d) that this resolution will be considered at a directors' meeting, the date of which must also be provided
- (e) the claims made against the member
- (f) the nature of the resolution that is to be proposed at the meeting, and
- (g) that the member may provide an explanation to the directors, as well as how the member can do so.

Before the directors pass any resolution, the member must be given a chance to explain or defend themselves by:

- (h) sending the directors a written explanation prior to that directors' meeting, and/or
- (i) speaking at the meeting.

After considering any explanation provided, the directors may:

- (j) take no further action

Commented [A45]: Recommend this be 'must decide to'. Rather than 'may'.

- (k) warn the member
- (l) suspend the member's rights for a period of no more than 12 months
- (m) expel the member
- (n) require the matter to be determined at a **general meeting**, or
- (o) refer the decision to an unbiased, independent person on conditions that the directors consider appropriate. This independent person can only make a decision that the directors themselves can make under this clause.

The secretary must give written notice to the member of the directors' decision as soon as possible.

The directors cannot fine a member.

Disciplinary procedures must be completed confidentially and as soon as reasonably possible.

There will be no liability for any loss or injury the member suffers due to any decision made in good faith under this clause.



Your company can amend these clauses to set out its preferred way to discipline members. For example, you can change the clause to allow your company to impose fines.

Your company can also develop a policy that provides more detail about the process for disciplining members.

General meetings of members

23. Directors can call a general meeting

Unless required to do so by law, the **company** is not required to hold an annual **general meeting**. The directors may call a **general meeting**.



It is not mandatory for companies which are registered charities to hold an annual general meeting. However, it is a good way to comply with ACNC Governance Standard 2.

The ACNC website [has more information about Governance Standard 2](#).

If your company is not a registered charity and you do not intend to apply for registration, you must hold annual general meetings.

You can use the template clause in this alert box to make it compulsory for your company to hold annual general meetings.

Annual general meeting

*A **general meeting**, called the annual **general meeting**, must be held:*

Commented [A46]: This is confusing.

This constitution is expressly for a company that will register as a charity so you don't need to deal with it - plus the beginning deals with circumstances of not being a registered charity.

We suggest replace with an additional clause the company must be accountable to members, which may be done by AGM, not required to hold an AGM.

- (a) within 18 months after registration of the **company**, and
- (b) after the first annual **general meeting**, at least once in every calendar year.

Even if these items are not set out in the notice of meeting, the business of an annual **general meeting** may include:

- (c) a review of the **company's** activities
- (d) a review of the **company's** finances
- (e) any auditor's report
- (f) the election of directors, and
- (g) the appointment and payment of auditors, if any.

Before or at the annual **general meeting**, the directors must give information to the members on the **company's** activities and finances during the period since the last annual **general meeting**.

The **chairperson** of the annual **general meeting** must give members as a whole a reasonable opportunity at the meeting to ask questions or make comments about the management of the **company**.

Despite clause 27, for an annual **general meeting**, notice must be provided 21 days before the meeting unless all members entitled to attend and vote agree otherwise, but not if a resolution will be moved to:

- (h) remove a director
- (i) appoint a director to replace a director who has been removed, or
- (j) remove an auditor, if any.

Commented [A47]: Formatting error - the 'j' should be italicised.

24. How a member can call a meeting

Members, acting for a proper purpose, can request that the directors call a **general meeting**, by sending a written request to the **company** that:

- (a) states any resolution to be proposed at the meeting, and
- (b) is signed, in accordance with clause 5, by at least 5% of members who can cast votes at a **general meeting** (calculated as of midnight the day before the meeting is requested).

Commented [A48]: This is members requesting, not calling a meeting - the headings in both clauses 23 and 24 are confusing. Combine for how meetings can be called.

Commented [A49]: Unnecessary.



By law, if the company is not a registered charity, then its directors must call a general meeting on the request of members whose total percentage of votes equals or exceeds 5%.

If your company is a registered charity, this figure can be changed to one that is appropriate for its size.

Commented [A50]: Again, why do you need to say this - it's not relevant, and it's also confusing given you refer to 5% twice so there's no difference.

If your company's charity registration is revoked, this percentage should be changed back to the original 5% figure.

The directors must:

- (c) within 21 days of the members' request, give all members notice of a **general meeting**, and
- (d) hold the **general meeting** within two months of the members' request.

25. If the directors do not call a meeting

If the directors do not call the meeting within 21 days of being requested to under clause 24, 50% or more of the members who made the request may call a **general meeting**.

The members must:

- (a) as far as possible, follow the procedures for a **general meeting** as set out in this constitution,
- (b) call the meeting using the list of members on the **company's** member register, which the **company** must provide to members making the request at no cost, and
- (c) hold the **general meeting** within three months of the request being given to the **company**.

The **company** must reimburse the members who request the **general meeting** for any reasonable expenses they incur because the directors did not call and hold the meeting.

26. Using technology to hold meetings

The **company** may hold a hybrid or virtual-only **general meeting** using an appropriate **virtual meeting platform**.

Anyone using this platform is accepted as being present in person at the meeting.

If the **general meeting** is held using only a **virtual meeting platform**, then

- (a) the meeting location is taken to be the registered office of the **company**, and
- (b) the meeting time is taken to be the time at the **company's** registered office.

If the **general meeting** is held at more than one physical venue (whether or not it is also held using a **virtual meeting platform**), then:

- (c) the meeting location is taken to be the main physical venue of the meeting, as set out in the notice of the meeting, and
- (d) the meeting time is taken to be the time at the main physical venue of the meeting, as set out in the notice of the meeting.

Commented [A51]: We don't consider this necessary. The directors have to call a meeting if the request is valid. Including this provision potentially leads to members calling a meeting for an improper purpose. It potentially gives too much power to a small number of members and will result in unnecessary resource allocation by the charity to this.

Commented [A52]: This isn't necessary since you've earlier defined a member present. This clause is also inconsistent with that definition since it distinguishes between present in person and present by technology.

? Do not delete the above clause if you intend to hold hybrid or virtual-only meetings. The law requires that the constitution expressly permit hybrid or virtual-only meetings before it can do so.

Commented [A53]: Are you referring to 249R? This provision does not apply to charities.

27. When notice of a general meeting must be given

The notice of a **general meeting** must be given at least 21 days before the meeting to:

- (a) each member entitled to vote at the meeting
- (b) each director, and
- (c) the auditor (if any).

The notice of a **general meeting** may be provided less than 21 days before the meeting date if members with at least 95% of the votes that may be cast at the meeting agree beforehand but not if a resolution will be moved to:

- (d) remove a director
- (e) appoint a director to replace a director who has been removed, or
- (f) remove an auditor, if any.

28. What the notice must include

The notice of a **general meeting** must be in writing and include:

- (a) the place, date and time for the meeting (and if the meeting is to be held in two or more places, hybrid or virtually, the **virtual meeting platform** that will be used)
- (b) a statement regarding the member's right to request documents be sent to them in electronic or physical form or request to not be sent documents
- (c) the general nature of the meeting's business
- (d) if applicable, that a **special resolution** will be proposed, as well as the wording of the proposed resolution, and
- (e) a statement that members have the right to appoint proxies and that, if a member appoints a proxy:
 - i. the proxy does not need to be a member
 - ii. the proxy form must be delivered to the **company** at either its registered address, or the address (including an electronic address) specified in the notice of the meeting, and
 - iii. the proxy form must be delivered to the **company** at least 48 hours before the meeting.

29. Quorum at general meetings

For a **general meeting** to be held, at least 10% of the members (a quorum) must be present (in person, by proxy or by **representative**).

When determining if there is a quorum, a person may only be counted once (even if they are a **representative** or proxy of more than one member).



Your company can change how it calculates the quorum so it best suits its circumstances. If you want, you can specify a specific number of members who must be present instead of specifying a percentage as we've done in clause 29.

It is important to think about what an appropriate quorum is for your company, especially considering the number of members.

The quorum should not be so high that it makes it difficult to hold a valid meeting if members are absent. It is also important not to set the quorum too low, as it is important that members participate in meetings.

Commented [A54]: Query if this is fair - if they represent a number of members why should they not be counted more than once.

Commented [A55]: This needs to be cross-referenced.

Commented [A56]: It is not a requirement that members participate in meetings - merely that they have the opportunity to. If they have been given notice, and can appoint a proxy, what is the risk?

30. Quorum must be present

No business can be conducted at a **general meeting** if there is not a quorum present. A quorum must be present for the whole **general meeting**.



You can change this clause to say that a quorum does not need to be maintained for the whole general meeting.

If there is no quorum present within 30 minutes after the starting time stated in the notice of **general meeting**, the **general meeting** is adjourned to a date, time and place of the **chairperson's** choosing. If the **chairperson** does not specify one or more of those things, the meeting is adjourned to:

- (a) if no date is specified – the same day in the next week
- (b) if no time is specified – the same time, and
- (c) if no venue or **virtual meeting platform** is specified – the same venue and **virtual meeting platform**.

If no quorum is present at this resumed meeting within 30 minutes after the starting time set for that meeting, then the meeting is cancelled.

31. Right of non-members to attend meetings

The **chairperson** of a **general meeting** may invite any person to attend and address a **general meeting**.

If the **company** has an auditor, then the auditor must be given any communications relating to the **general meeting** that a member is entitled to receive. The auditor is also entitled to attend and address a **general meeting**, including by sending a written statement.

32. Representatives of members

An incorporated member may appoint as a **representative**:

- (a) one individual to represent the member at meetings and to sign resolutions under clause 39, and
- (b) the same individual or another individual for the purpose of being appointed or elected as a director.

Commented [A57]: Under 39, these resolutions can also be 'agreed to' - not only signed.

The appointment of a **representative** by a member must:

- (c) be in writing
- (d) include the name of the person
- (e) be signed on behalf of the member, and
- (f) be given to the **company** or, for representation at a meeting, be given to the **chairperson** before the meeting starts.

A **representative** has all the rights of a member relevant to the purposes of the appointment (during any relevant timeframe) as a **representative**, including to appoint a proxy.

The appointment may be for a set number of meetings, or for a duration of time or standing (ongoing).

33. Choosing a chairperson for a general meeting

The **chairperson** is entitled to chair **general meetings**.

The **members present** who are entitled to vote at a **general meeting** may choose a director or member to be the chair for that meeting if:

- (a) there is no **chairperson**, or
- (b) the **chairperson** is not present within 30 minutes after the starting time set for the meeting, or
- (c) the **chairperson** is present but does not wish to act as the meeting's chair.

34. Role of the chairperson in a general meeting

The **chairperson** is responsible for the conduct of the **general meeting**.

The **chairperson** must give members a reasonable opportunity to make comments and ask questions (including to the auditor if there is one).

The **chairperson** does not have a casting vote.

! Not allowing the chairperson to have a casting or deciding vote means that a contentious decision (one where the vote is evenly split), is not passed until a majority of members agree to it. You can change this clause to state that the chairperson has a casting vote.

35. Adjournment of meetings

If a quorum is present, a **general meeting** must be adjourned if the majority of members in attendance direct the **chairperson** to do so.

Only unfinished business may be dealt with at a meeting resumed after an adjournment.

If a **general meeting** is adjourned for one month or more, the members must be given new notice of the resumed meeting.

Members' resolutions and statements

36. Members may propose resolutions and give statements

Members with at least 5% of the votes that may be cast on a resolution may give:

- (a) written notice signed by the members to the **company** of a resolution they propose to move for a proper purpose at a **general meeting (members' resolution)**, with the wording of the resolution set out in full, and/or
- (b) a written request to the **company** that the **company** give all of its members a statement about a proposed resolution or any other matter that may properly be considered at a **general meeting (members' statement)**. The request must set out the statement to be distributed and be signed by the members.

The calculation for the percentage of votes that members have is to be based on the situation as of midnight before the request or notice is given to the **company**.

This clause does not limit any other right that a member has to propose a resolution at a **general meeting**.

Commented [A58]: What other rights does a member have to propose a resolution outside of this clause?

37. Members' resolutions and statements must be considered

If the **company** has been given notice of a **members' resolution** for a proper purpose under clause 36, the resolution must be considered at the next **general meeting** held no more than two months after the notice is given.

38. Company must give notice of proposed resolution and/or distribute statement

The **company** must give all its members notice of the **members' resolution** or a copy of the **members' statement** at the same time, or as soon as practicable afterwards, and in the same way, as it gives notice of a **general meeting**.

The **company** is responsible for the cost of giving members notice of the resolution or a copy of the **members' statement** if the **company** receives it in time to send it out to members with the notice of meeting.

If the **company** does not receive it in time to send it out with the notice of meeting, then the members requesting the meeting must meet the reasonable expenses that the **company** incurs when giving members notice of the **members' resolution** or a copy of the **members' statement**. At a **general meeting**, the members may pass a resolution that the **company** will pay these expenses.

The **company** does not need to send the notice of proposed **members' resolution** or a copy of the **members' statement** to members if:

- (a) it is more than 1,000 words long
- (b) the directors consider that it may be defamatory
- (c) if the members making the request are to bear the expenses of sending the notice out—unless the members give the **company** a sum that would meet all reasonable expenses that it would incur in giving the notice, or
- (d) in the case of a proposed **members' resolution**, the resolution does not relate to a matter that may be properly considered at a **general meeting** or is otherwise not a valid resolution able to be put to the members.

39. Resolutions without meetings

The members may pass a resolution without holding a **general meeting**, unless it is for the following:

- (a) a resolution to remove an auditor or remove a director
- (b) a special resolution, or
- (c) where the **Corporations Act** or this constitution requires a meeting to be held.

A resolution is passed if all the members entitled to vote on the resolution sign (in the way set out in clause 5) or agree to the resolution.

Alternatively, the **company** may send a resolution by email to members, and members may agree to it by sending a reply email to that effect and including the text of the resolution in their reply.

The directors must notify the auditor (if any) as soon as possible that a resolution **has or will** be put to members, and set out the wording of the resolution.

Voting at general meetings

40. Number of votes for each member

Each member has one vote.

Commented [A59]: Why have you changed this from 'directors may put a resolution to members without a meeting'? This implies that the members can get together and pass anything without director input - strongly recommend this is changed. The power to propose resolution should remain with the directors (subject to the clause above dealing with members notifying directors about proposing resolutions).

Commented [A60]: Further to the comment above, this would only apply to the resolution sent to members by email (not the one signed, which, under the current drafting, doesn't need to come from the directors).

Commented [A61]: This part hasn't specified that a resolution is passed by over 50% (other than special resolutions).

41. Challenge to member's right to vote

A member or the **chairperson** may only challenge a person's right to vote at the time of the **general meeting**. The **chairperson** must then decide whether the person may vote. The **chairperson's** decision is final.

42. How voting is conducted

Voting must be conducted and decided by:

- (a) a show of hands
- (b) a vote in writing, or
- (c) another method chosen by the **chairperson** that is fair and reasonable in the circumstances.

Before a vote is taken, the **chairperson** must note whether any proxy votes have been received and, if so, how the proxy votes will be cast.

If there is a show of hands, the **chairperson's** decision is conclusive evidence of the result of the vote.

The **chairperson** and the meeting minutes do not need to state the number or proportion of the votes recorded in favour or against on a show of hands.

43. When and how a vote in writing must be held

A vote in writing may be demanded on any resolution instead of, or after, a vote by a show of hands by:

- (a) at least five **members present** who are entitled to vote on the relevant resolution,
- (b) **members present** with at least 5% of the votes that may be passed on the relevant resolution (worked out as at the midnight before the vote in writing is demanded), or
- (c) the **chairperson** of the meeting.

A **written vote** must be conducted at the **chairperson's** direction, but must be held immediately if it is demanded for the following:

- (d) for the election of a **chairperson** under clause 33, or
- (e) to decide whether to adjourn the meeting.

A demand for a vote in writing may be withdrawn.

44. What is a proxy

A member may appoint a proxy to attend and vote at a **general meeting** on their behalf. The member can decide how long the appointment is for. For example, it can be for a set number of meetings, or for a duration of time or standing (ongoing).

Commented [A62]: It's unclear what the chairperson must do. Sometimes the proxy won't have a voting direction.

Commented [A63]: Replace with - 'if there is a 'vote conducted by' a show of hands...'. Also, this is inconsistent/confusing with saying that a vote in writing can be demanded after a vote by show of hands. This implies that the vote has already been passed at this point.

Commented [A64]: Is a written vote the same as a vote in writing?

Commented [A65]: Query whether this heading is correct.

A proxy does not need to be a member.

45. What a proxy can and can't do

A proxy appointed to attend and vote for a member has the same rights as the member to:

- (a) speak at the meeting
- (b) vote in writing (but only to the extent allowed by the appointment), and
- (c) demand a vote in writing under clause 43.

Commented [A66]: Change 'to the extent' to 'in the manner'

A proxy is not entitled to vote on a show of hands (but this does not prevent a member appointed as a proxy from voting as a member on a show of hands).

A proxy does not have the authority to speak and vote for a member at a meeting while the member is at the meeting.

Commented [A67]: This needs clarification - eg, at the meeting in person or by technology

When a vote in writing is held, a proxy:

- (d) does not need to vote, unless the proxy appointment specifies the way they must vote
- (e) must vote in the way specified on the proxy form, if applicable, and
- (f) may cast votes in different ways (if the proxy is also a member or holds more than one proxy).

46. How to appoint a proxy

An appointment of proxy (via proxy form) must be signed by the member appointing the proxy and must contain:

- (a) the member's name and address
- (b) the **company's** name
- (c) the proxy's name or the name of the office held by the proxy, and
- (d) the length of the appointment, measured as a set number of meetings, or for a duration of time or standing (ongoing).

Proxy forms must be delivered by post, electronically, or in person to the **company** at the addresses stated in the notice under clause 28(e), or at the **company's** registered address, at least 48 hours before a meeting.

Commented [A68]: Isn't this dealt with in the notice provision?
Alternatively, the notice of meeting can say how proxy forms are to be delivered, and this clause can be simplified to 'proxy forms must be delivered as specified in the notice'.

Unless the **company** receives written notice before the start or resumption of a **general meeting** at which a proxy votes, a vote cast by the proxy is valid even if, before the proxy votes, the appointing member:

Commented [A69]: Can the company accept late proxy forms?

- (e) dies
- (f) is mentally incapacitated
- (g) revokes the proxy's appointment, or

- (h) revokes the authority of a **representative** or agent who appointed the proxy.

A proxy appointment may specify the way the proxy must vote on a particular resolution.

Commented [A70]: This is unnecessary, and implied above in any event.

Directors

Commented [A71]: As a general comment, we don't think these clauses work.

47. Number of directors

The **company** must have at least three and **no more than nine directors**.

Commented [A72]: Later clauses should say that appointment/election is ineffective if it exceeds the maximum.



Your company must have at least three directors. You can decide to have:

- a set number of directors (for example, 'your company must always have five directors')
- a range, as in the clause above, to provide for flexibility over the life of the company. You can also change the maximum number of directors that your company can have. We recommend that you include a cap on the maximum number of directors so your board can work effectively.

If your company increases its members, revenue or activities, you may wish to amend the constitution later to have more than a minimum of three directors.

The Corporations Act requires that at least two of the directors must reside in Australia.

48. Who can be a director

An individual **can be a company director** if they:

- are a member, or a **representative** of a member appointed under clause 32
- are 18 years of age or older
- are nominated by two members or **representatives** of members entitled to vote (unless the person was previously elected as a director at a **general meeting** and has been a director since that meeting)
- have a director identification number
- give the **company** their signed consent to act as a **company** director, and
- are not ineligible to be a director under the **Corporations Act** or the **ACNC Act**.

Commented [A73]: This is imprecise - is it a requirement or not - recommend using 'is eligible to be'.

Commented [A74]: A better solution for the issue you note in the compendium would be to include in clause 11 that the directors are members while they are directors.

Commented [A75]: Query whether this is necessary.



By law, directors must be at least 18 years old, have a director identification number before being appointed, and not be ineligible to be a director under the Corporations Act or the ACNC Act.


Your company can change the other requirements to best suit it. You can also develop a policy that sets out the ideal mix of skills and experience your company will seek to have represented by board members to help achieve good governance.

For example, a board skills matrix could be developed. This is a tool used to provide an overview of the ideal skills, expertise, and characteristics of your company's board members. The matrix could also be used to ensure your board is diverse and inclusive.

The Australian Institute of Company Directors has a [board skills matrix available for download from its website](#).

49. How to become a director

The initial directors are the individuals who have agreed to act as directors and who are named as proposed directors in the application for **company** registration.


 If your company is replacing an existing constitution with this template constitution, you should delete the above sentence and replace it with:

'The initial directors are the individuals who were directors at the time of adopting this constitution'.

The members may elect a director either by passing a resolution without a meeting, or by a resolution passed at a **general meeting**. Each appointment must be by separate resolution.

50. What happens if there is a casual vacancy

The directors may appoint an individual as a director to fill a casual vacancy, or as an additional director, if that individual meets the eligibility requirements set out in clause 48.

 If your company does not want directors to appoint directors, delete this sub-clause.

However, if you delete this sub-clause, the only way your company can appoint directors is by members passing a resolution.

Commented [A76]: It would be clearer to say 'by resolution' without further specification because the clauses above on member resolutions outline how resolutions are passed - eg, at meeting or without a meeting. Also, this clause confuses election by members and appointment by the board. Also, it should be subject to the imposed maximum number of directors.

Commented [A77]: This clause deals with additional directors as well as casual vacancy.

Commented [A78]: Highly unusual to require member nomination for director appointed director - also, should be subject to maximum number of directors.

51. What happens if there are too few directors

If the number of directors is reduced to fewer than three, or is less than the number required for a quorum, the continuing directors may act but only:

- (a) in an emergency
- (b) for the purpose of increasing the number of directors to three or the number required to form a quorum, or
- (c) to call a general meeting.

52. Election of chairperson

The directors must elect a director as the **company's chairperson** and may decide the period for which that person is to be **chairperson**.

The **chairperson's** responsibilities include:

- (a) managing board meetings, including setting the agenda
- (b) ensuring directors receive accurate, timely, and clear information
- (c) ensuring effective communication with members, and
- (d) managing disputes to ensure the **company** is run effectively.

! Your company can change the way it elects a chairperson. For example, members may elect a director to the role of chairperson. Your company can also impose a term limit for the chairperson role.

53. Term of office

If appointed during a meeting, a director's term of office starts at the end of the meeting.

If retiring during a meeting, a director's term of office ends at the conclusion of the meeting at which they retire.

Subject to clauses 54 and 55, a director holds office for a maximum of 5 years from the date of appointment, unless members resolve to extend the maximum term for a particular director.

! Your company can change the maximum term limit.

It is good practice, but not a legal requirement, to cap a director's term. Doing so allows the company to benefit from having a range of people with different skills, experiences and methods serve on the board.

Your company's members can establish further rules about how it appoints directors, provided those rules are not inconsistent with its constitution, or with either the ACNC Act or the Corporations Act.

Commented [A79]: This doesn't work with appointments and elections. It is confusing what the actual term is. Eg, can a director be re-elected or re-appointed for a further 5 years?

There is confusion in this clause between appointment and election.

Given that you have referred to casual vacancies, when does their term start?

? We suggest your company maintains a register of directors which includes their contact details, the date they started as a director and the date they ended their term as a director. [We have a template register on our website.](#)

When a director is appointed, your company can also provide them with a letter of appointment with information about their obligations. [We have a template letter of appointment for Responsible People](#) on our website.

Commented [A80]: What does this mean?

54. How to stop being a director

A director stops being a director if they:

- (a) resign in writing

- (b) die
- (c) stop being a member
- (d) are a **representative** of a member, and that member stops being a member
- (e) are a **representative** of a member, and the member notifies the **company** that the **representative** is no longer a **representative**
- (f) are appointed for a term of office and are not reappointed,
- (g) are removed from office under clause 55,
- (h) are disqualified from being a director under the **Corporations Act** or the **ACNC Act**.

Commented [A81]: These won't be necessary if the change is made so that directors automatically become members.

Commented [A82]: This is confusing in the context of how clause 53 is drafted.

55. How to remove a director

The members may remove a director by passing a resolution in a **general meeting**. The process is as follows:

- (a) The members must provide notice of intention to move a resolution to remove a director at least 2 months before the meeting is to be held.
- (b) The **company** must provide a copy of the notice to the director as soon as practicable after it is received.
- (c) The director can give the **company** a written statement to circulate to the members and speak to the motion at the meeting.
- (d) The members must pass a resolution with a simple majority to remove the director.

Commented [A83]: Presumably you should cross reference to clause 36 but compare timing requirement with clause 37 as it appears inconsistent, i.e. the members have to provide notice of the intention to move the resolution **at least 2 months** before the general meeting, but the company has to hold the meeting **no more than 2 months** after the notice is given, meaning everything has to all be decided and done on one day?

Commented [A84]: A resolution is necessarily passed by simple majority unless it is a special resolution, so why is this said?
The wording could also be read as requiring members to pass this resolution.

56. How to appoint and remove an auditor

The members may appoint an auditor by passing a resolution at a **general meeting**. The members may remove an auditor by passing a resolution in a **general meeting**.

? If your company is a small charity (those with annual revenue less than \$500,000), it is not required to prepare financial reports. Some small charities choose to do so, and have the financial report audited.

If your company is a medium or large charity, it must prepare a financial report and submit it with their Annual Information Statement.

Medium charities (annual revenue of \$500,000 or more, but less than \$3 million) may have their report either reviewed or audited. Large charities (annual revenue of \$3 million or more) must have their reports audited.

We recommend retaining this clause so your company will not need to change its constitution because, for example, its size changes and results in its reporting requirements to the ACNC changing.

[The ACNC website has more information on reviews and audits.](#) It also has more information about [charity size and financial reporting obligations](#).

Commented [A85]: This will be confusing and we recommend deleting it. If an auditor needs to be appointed the auditor should know how it is to be done and it does not need to be in the constitution.

Powers of directors

57. Powers of directors

Directors, on behalf of the members, oversee the running of the **company** to carry out the purpose(s) set out in clause 7. The directors make decisions about the affairs of the **company** and manage, or set the direction for managing the business of the **company**.

Directors should act with reasonable care and diligence in their role.

Commented [A86]: We don't consider that this is correct. The words in the current ACNC model is correct.

Commented [A87]: The language is imprecise. It should be clear that the directors 'are responsible' for making decisions, must act with reasonable care and diligence, and both manage and set the direction.

Directors may use all the powers of the **company** except for powers that, under the **Corporations Act** or this constitution, may only be used by members.

The directors must decide on the responsible financial management of the **company** including:

- (a) any suitable written delegations of power under clause 58, and
- (b) how money will be managed – including how electronic transfers must be authorised, signed off or otherwise approved.

Directors may borrow or raise money, charge any property or business of the **company** or give any other security for a debt, liability or obligation of the **company**.

Directors cannot remove a director or auditor. Directors and auditors may only be removed by a resolution passed at a **general meeting**.

58. Delegation of directors' powers

The directors can pass a resolution to delegate any of their powers and functions to:

- (a) a committee of directors
- (b) a particular director
- (c) a **company** employee (such as a chief executive officer) or
- (d) any other individual, as they consider it appropriate to do so.

Commented [A88]: It is problematic and confusing to sometimes refer to passing a resolution - all director decisions must be by resolution. Instead, just say that the director may delegate.

Commented [A89]: Delete 'of directors'

Commented [A90]: For what reason have you changed 'person' to 'individual' (person includes a company)?

The **company** must keep appropriate records of any delegations of powers by recording the directors' resolution in the meeting minutes.

Commented [A91]: Delete - Directors should keep records of appropriate delegations. Delegations may not be decided at a meeting.

The delegate must:

- (e) follow the directors' directions when using the delegated powers
- (f) report to directors on their exercising of their delegated power.

Commented [A92]: Delete - this should be covered by the terms of delegation. The delegate may not be bound by the constitution, so it is ineffective here.

59. Payments to directors

The **company** must not pay directors' fees (also called sitting fees). However, this does not stop the **company** from making the following types of payments:

- (a) paying a director for work they do for the **company** other than as a director, as long as the payment amount is no more than a reasonable fee for the work completed, or
- (b) reimbursing a director for expenses they've properly incurred for work in connection with the **company's** affairs.

Any payment made under this clause must be fair and reasonable to the **company** and approved by the directors in accordance with clause 64.

! The clause above would not allow your company to remunerate directors for being directors.

Your company may wish to pay directors for their role. The ACNC does not prohibit charities from paying fees to directors. However, there are some other laws that do. The ACNC website [has more information about remunerating Responsible People](#).

If you have carefully considered this topic and decided that your company will pay directors fees, you can amend the clause to permit it. For example:

'The members may, by resolution at a general meeting, fix the remuneration of directors for their services.'

Commented [A93]: As a general comment, this clause requires redrafting. Fair and reasonable is repeated, and every decision must comply with clause 64, so it causes interpretation issues if you single it out here.

Commented [A94]: Must not pay fees for acting as a director.

Commented [A95]: It's not a however given that the listed payments are not director fees.

Commented [A96]: Should be no more than is fair and reasonable. Because it may be more favourable to the company.

Commented [A97]: If you make this statement, you need to provide information on which laws prohibit payments. Or just delete this sentence and let people go to the guidance. Also, it is not necessary and is onerous to require members to fix the remuneration.

60. Execution of documents

The **company** may execute a document without using a common seal if the document is signed by:

- (a) two directors of the **company**
- (b) a director and the secretary, or
- (c) some other combination of individuals appointed by the board for that purpose.

Documents can be signed in a physical form by hand or by signing an electronic form of the document using an electronic means that identifies the individual, and indicates the individual's intention and consent to the terms of signing.

Only authorised people can execute documents for the **company**.

? Some documents may require your company to execute them in a different way. Your company will need to ensure it complies with the requirements for the specific document.

Commented [A98]: Don't refer to common seal, it is confusing and unnecessary.

Commented [A99]: Authorised is a better word.

Commented [A100]: Unhelpful - particularly in the context of what the green box says.

A company may use a common seal to execute documents, but it is no longer compulsory to have one.

61. Validity

An act carried out by a director, or by a meeting of directors, or by a committee attended by a director, is not invalid just because:

- (a) of a defect in the appointment of the director
- (b) the individual is disqualified from being a director or has vacated office, or
- (c) the individual is not entitled to vote,

if that circumstance was not known by the individual or the directors or committee, when the act was carried out.

Duties of directors

62. Governance Standards

If the **company** is a **registered charity**, its directors must take reasonable steps to ensure that the **company** complies with the ACNC's Governance Standards and, if applicable, ACNC External Conduct Standards.



You can read more about both the [Governance Standards](#) and the [External Conduct Standards](#) on the ACNC website.

Commented [A101]: This appears to go beyond the ACNC requirements, which place the onus of compliance on the company.

63. Duties of directors

The directors must comply with their duties:

- (a) to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable individual would exercise if they were a director of the **company**
- (b) to act in good faith in the best interests of the **company**, and to further the charitable purpose(s) of the **company** set out in clause 7
- (c) to not misuse their position as a director
- (d) to not misuse information they gain in their role as a director
- (e) to disclose any perceived or actual conflicts of interest in the manner set out in clause 64
- (f) to ensure that the financial affairs of the **company** are managed responsibly, and
- (g) to not allow the **company** to operate while it is insolvent.

? The ACNC website [has more information on the duties of directors](#).

A registered charity must take reasonable steps to ensure its Responsible People meet their duties, in accordance with Governance Standard 5. [You can read more about Governance Standard 5](#) on our website.

The ACNC uses the term 'Responsible People' to refer to directors. The term describes those people responsible for governing a charity.

64. Conflicts of interest

A director who has or thinks that they may have a conflict of interest in a **company** matter must let the other directors know.

The conflict of interest, including the nature and extent of the interest and the relationship of the interest to the **company**, must also be recorded in the register of interests.

Each director who has a conflict of interest must not:

- (a) be present at the meeting while the matter is being discussed, or
 - (b) vote on the matter,
- unless
- (c) their interest arises because they are a member of the **company**, and the other members have the same interest
 - (d) their interest relates to an insurance contract that insures, or would insure, the director against liabilities that the director incurs as a director of the **company** (see clause 89)
 - (e) their interest relates to a payment by the **company** under clause 88 (indemnity), or any contract relating to an indemnity that is allowed under the **Corporations Act**
 - (f) the Australian Securities and Investments Commission (ASIC) makes an order allowing the director to vote on the matter, or
 - (g) the directors who do not have a material personal interest in the matter pass a resolution that:
 - i. identifies the director, the nature and extent of the director's interest in the matter and how it relates to the affairs of the **company**, and
 - ii. says that those directors are satisfied that the interest should not stop the director from voting or being present.

? The ACNC website [has more information on conflicts of interest](#).

Commented [A102]: This wording seems inappropriate for the constitution which should only include the legal requirement - disclose a perceived or actual COI. The part 'thinks that they may have' should be dealt with in a policy.

Commented [A103]: Not all disclosures need to be recorded in the register, because the directors may decide it's not a COI or is immaterial. It may be recorded in the minutes, but not significant enough to be on the register.

Your company should consider developing a conflicts of interest policy if you don't already have one. There is a [template conflicts of interest policy](#) and a [template register of interests](#) available at the ACNC website.

Directors' meetings

65. When the directors meet

The directors may decide how, where, when and how often they meet.

66. Calling directors' meetings

A director may call a directors' meeting by giving reasonable notice to all other directors, or by the secretary giving **notice of the meeting to all directors**. The notice can be in writing or by any other means of communication **that has previously been agreed to by all directors**.

Commented [A104]: Should this be reasonable notice?

Commented [A105]: Suggest this be removed - onerous to make sure directors have previously agreed. Eg, for new directors it will be common that charities forget to get express permission prior to giving notice.

67. Chairperson for directors' meetings

The **chairperson** must chair directors' meetings.

The directors at a directors' meeting may choose another director to chair that meeting if the **chairperson**:

- (a) is not present within 30 minutes after the starting time set for the meeting, or
- (b) is present but does not want to act as **chairperson** of the meeting.

Where the votes on a proposed resolution are equal, the chair of the meeting does not have a second or casting vote, and the vote is taken as lost.

! In the clause above, we have stated that the chair does not have a casting vote. However, if your company prefers, this clause can be changed to state that the chairperson can have a casting vote.

68. Quorum at directors' meetings

The quorum for a directors' meeting constitutes the majority of directors.

A quorum must always be present during a directors' meeting.

If a directors' meeting cannot maintain a quorum due to one or more directors **having a conflict of interest that prevents them from being present when a matter is discussed**, directors must put the matter to the members at the next **general meeting**, or at an earlier time if it is reasonable to do so.

Commented [A106]: Remove the apostrophe.

The members can pass an ordinary resolution to deal with the matter.

Commented [A107]: There may be other ways the board can deal with this. As such the wording should be changed to the directors 'may' put the matter to the members to decide. Also, the wording is currently not clear that members could decide outside of a general meeting.

! Your company can change the number of directors required for a quorum **at** a directors' meeting. However, the quorum number must be at least two directors.

Your company could, for example, specify its quorum as five directors, or specify a percentage of directors that would make up a quorum (as long as that percentage constitutes at least two directors).

Some other laws – for example, some state or territory laws about fundraising – may require your company to have a different or more specific quorum.

Commented [A108]: This should be 'for' not 'at'.

Commented [A109]: Only NSW that requires 3, so why not set this out.

69. Using technology to hold directors' meetings

The directors may hold their meetings – including hybrid meetings – by using any **virtual meeting platform**, as long as all directors agree to its use.

The directors' agreement on the platform to use can be an ongoing one.

A director may only withdraw their consent to use the agreed-to platform within a reasonable period before the meeting.

Commented [A110]: Why is agreement necessary. It is extremely common and convenient to use technology. People won't remember to expressly seek agreement, and it leaves open the possibility that one director could prevent a meeting from going ahead.

70. Passing directors' resolutions at a meeting

A directors' resolution must be passed by a majority of the votes cast by directors present and entitled to vote on the resolution.

71. Resolutions of directors without a meeting

A resolution can be passed without a meeting if all the directors entitled to vote on the resolution sign or otherwise agree to the resolution by:

- (a) signing a single document setting out the resolution and containing a statement that they agree to the resolution,
- (b) signing separate copies of that document, as long as the wording of the resolution is the same in each copy, or
- (c) replying to an email from the **company** setting out the resolution.

The resolution is passed when the last director signs or otherwise agrees to the resolution.

Commented [A111]: Confirming their agreement by reply email (otherwise it implies that merely replying is the agreement).

Commented [A112]: Suggest you include a time frame otherwise there can be indefinite periods where the resolution is neither passed nor rejected.

Secretary

72. Appointment of secretary

The **company** must have at least one secretary, who may also be a director.

The secretary must be at least 18 years old.

The secretary must give the **company** their signed consent to become a secretary before being appointed by directors.

The directors must decide the terms and conditions under which the secretary is appointed, including any remuneration.

? Under the Corporations Act, the secretary must be 18 years old, live in Australia, and must provide their written consent to act as the secretary.

The initial secretary is the individual who has agreed to act as a secretary and who is named as a proposed secretary in the application for **company** registration.

! If your company already has a constitution and you are adopting this constitution to replace it, you should delete the sentence above and replace it with:

'The initial secretary is the individual who was secretary at the time this constitution was adopted.'

73. Role of secretary

The secretary is responsible for the following:

- (a) maintaining a register of the **company's** members (see clause 12)
- (b) maintaining the minutes and other records of **general meetings** (including notices of meetings), directors' meetings and resolutions, and
- (c) notifying the relevant regulator of applicable changes, such as the resignation or appointment of a director, change of address, or change to the constitution.

! Other clauses in this template constitution set out additional obligations on the secretary, such as giving some notices on behalf of the company and executing documents on behalf of the company.

Your company can amend the clause to add extra obligations for the secretary.

Commented [A113]: Are these responsibilities of the company, or the secretary under the Corporations Act, in which case you should cross refer? Directors are usually responsible for compliance and this could be read as indicating that they aren't.

Commented [A114]: These aren't obligations because these are actions that a secretary is authorised by the board to do, rather than being obligations.

74. How to stop being a secretary

The secretary stops being secretary if they:

- (a) resign in writing to the **company**,
- (b) are removed by resolution of the directors
- (c) are disqualified from managing corporations under the **Corporations Act** or the **ACNC Act**, or
- (d) die.

Financial matters

75. Funds

The **company**'s money must be deposited into a **company** bank account. The directors may decide to maintain a 'petty cash' fund for minor and incidental expenses. Withdrawals or deposits from this fund must be recorded.

The **company** may derive or generate funds from joining and annual subscription fees, donations, grants, fundraising, interest, and any other sources approved by the directors under clause 57.

76. Company's financial year

The **company**'s financial year is from 1 July to 30 June, unless the directors pass a resolution to change the financial year.



If your company uses a different financial year (for example, the calendar year), it can change this clause.

If your company is a registered charity, it must have an approved substituted accounting period. You can read more about substituted accounting periods on the ACNC website.

Commented [A115]: This is unnecessary and outdated. You have already said that the board is responsible for financial management. This appears to come from IA requirements to include these provisions - if the IA legislation did not require inclusion, we would never include it. So this is taking a backward step.

Commented [A116]: Delete. It is not necessary and will be covered in the application to become a charity. If directors did pass a resolution to change it, and the constitution wasn't changed, this sets up the potential for future confusion.

Minutes and records

77. Records of members' meetings

The **company** must, within one month, make and keep the following records:

- (a) minutes of proceedings and resolutions of **general meetings**
- (b) minutes of any other resolutions of members
- (c) a copy of a notice of each **general meeting**, and
- (d) a copy of any **members' statement** distributed to members under clause 38.

78. Records of directors' meetings

The **company** must, within one month, make and keep the following records:

- (a) minutes of proceedings and resolutions of directors' meetings (including meetings of any committees), and
- (b) minutes of any other resolutions of directors.

Commented [A117]: Committees may not include directors so you should not say 'including', but you could list it separately.

79. Signing minutes

The directors must ensure that minutes of a **general meeting** or a directors' meeting are signed. This can be done by sign a physical form of the minutes by hand, or by signing an

Commented [A118]: 'Signing' - also see comment about a general interpretation clause about this.

electronic form of the minutes within a reasonable time after the meeting. The minutes can be signed by:

- (a) the chair of the meeting, or
- (b) the chair of the next meeting.

The directors must ensure that minutes of the passing of a resolution passed without a meeting (of members or directors) are signed by a director within a reasonable time after the resolution is passed.

Commented [A119]: There are no minutes of a resolution without a meeting. It is simply a record of a resolution passed without a meeting. See 251A Corporations Act.

80. Financial and related records

The **company** must make and keep written financial records that:

- (a) correctly record and explain its transactions and financial position and performance, and
- (b) enable true and fair financial statements to be prepared and to be audited.

The **company** must also keep written records that correctly record its operations.

Records may be kept in physical or electronic format.

? If your company is a registered charity, it must adhere to the record-keeping obligations set in place by the ACNC. These include keeping written financial records and records which correctly record and explain its operations. [The ACNC website has guidance on record-keeping.](#)

The ACNC website also has templates for meeting agendas, meeting minutes and annual reports.

81. Inspecting the register of members

The **company** must allow members (and non-members upon payment of a fee) to inspect the register of members. To inspect the register, the person must submit their request in writing with their name, address and the purpose of their request.

Information that is accessed from the register of members must only be used in a manner relevant to the interests or rights of members.

Commented [A120]: It is important this is consistent with the requirements in the Corporations Act. Also, should this say 'rights of members as members'.

82. Inspection of records

To allow members to inspect the **company's** records where the request is made in good faith and for a proper purpose:

- (a) the **company** must give a member access to the records set out in clause 77, and

Commented [A121]: It is important that this is consistent with the requirements in the Corporations Act.

- (b) the directors may authorise a member to inspect other records of the **company**, including records referred to in clause 78 and clause 80, which may be in redacted form only.

Commented [A122]: This is confusing - should be stronger as to the board having full discretion about whether to allow this.

83. How long records must be kept for

The **company** must retain its records for at least seven years.

The directors must take reasonable steps to ensure that the **company's** records are kept safe.

Notice

84. What is notice

Anything written to or from the **company** under any clause in this constitution is written notice and is subject to clauses 85 to 87 unless specified otherwise.

Clauses 85 to 87 do not apply to a notice of proxy under clause 46.

85. Notice to the company

Written notice or any communication under this constitution may be given to the **company**, the directors or the secretary by:

- (a) delivering it to the **company's** registered office
- (b) posting it to the **company's** registered office or to another address the **company** chooses for notice to be provided to, or
- (c) sending it to an email address the **company** has notified members as being the **company's** email address.


Commented [A123]: This is confusing. Suggest removing the reference to 'written notice' so it covers 'any communication under this constitution'.

In the constitution, you do refer to different types of communication and so it is confusing to specify written notice in this clause.

86. Notice to members

Written notice or any communication under this constitution may be given to a member:

- (a) in person
- (b) by sending it to the email address of the member (if any) nominated by the member for service of notices, or
- (c) by posting it to, or leaving it at, the postal address of the member (if any) nominated by the member for service of notices, or
- (d) by notifying the member via an email address they nominate that the notice is available for access via a website, in electronic form or at a specified place or address, if the member agrees to this method.

 Your company can change this to add other ways that notice can be given to a member. For example, a member could agree that notice be given at a mailbox in a members' clubhouse.

Commented [A124]: This appears to be taken from the IA legislation, most charities would not have a 'members' clubhouse'.

If a member elects to receive documents in physical form or electronic form, the **company** must take reasonable steps to send documents in the preferred manner.

87. When notice is taken to be given

If a notice is:

- (a) delivered in person, or left at the recipient's physical address, then it is taken to be given on the day it is delivered
- (b) sent by post, then it is taken to be given on the seventh **business day** after it is posted to the recipient's address, and postage costs are paid for
- (c) sent by email, or other electronic method, then it is taken to be given when it is sent, unless the sender receives an automated message that the notice has not been delivered, and
- (d) given under clause 86(d), then it is taken to be given on the **business day** after notification of the notice being available is sent.

Commented [A125]: This is problematic in relation to working out 21 days notice - it is too long.

Commented [A126]: What if they get an automated message that it wasn't delivered (see previous clause).

If the delivery or receipt of a notice is not on a **business day**, or is after 5pm on a **business day**, it is deemed to be received at 9am the following **business day**.

Indemnity, insurance and directors' access

88. Indemnity

The **company** indemnifies each officer out of the **company's** assets – to the extent permitted by law (including the **Corporations Act**) – against all losses and liabilities (including costs, expenses and charges) that individual incurs as an officer.

In this clause and clause 89, 'officer' means a director or secretary, and includes a director or secretary after they have ceased to hold that office.

Commented [A127]: Do you intend to define this more restrictively than the Corporations Act? If so, why?

The indemnity is a continuing obligation and is enforceable by an officer:

- (a) even if that individual is no longer an officer, and
- (b) is enforceable without that individual first having to incur any expense or make any payment.

89. Insurance

To the extent permitted by law (including the **Corporations Act**), and if the directors consider it appropriate, the **company** may pay or agree to pay a premium for a contract that insures a current or former **company** officer against any liability they incur in that role.



It is common for a company to provide an 'indemnity' to its officers (directors and secretaries). An indemnity ensures that the people who manage the company are protected from any losses or liability (legal responsibility) they incur in performing their role.

In other words, where an officer suffers a relevant loss in their role as an officer of the company, the company may need to pay for that loss, rather than the officer paying.

If your company is replacing an existing constitution with this template constitution, you must make clear the period the company will indemnify its officers for. If your existing constitution did not indemnify the company's officers, you must take care not to indemnify former officers unless you have clearly decided to do so.

Insurance for directors and officers for liability or legal costs that they incur in performing their role is called directors and officers liability insurance (commonly referred to as D&O insurance). Your company may wish to obtain appropriate professional advice about taking out this type of insurance.

Commented [A128]: The wording 'pay or agree to pay' doesn't work - it's meant to indicate that the company can itself take out the policy or pay for the director to.

90. Directors' access to documents

A director has a right to access the **company's** financial records at all reasonable times.

The directors may resolve to give a director or former director access to other records, including documents provided for, or available to, the directors.

Commented [A129]: Make sure this is consistent with the Corporations Act.

Winding up

91. Winding up voluntarily

If permitted by law, the members may pass a **special resolution** at a **general meeting** to wind up the **company** voluntarily.

Commented [A130]: Is this necessary in the constitution - why not just rely on the Corps Act. Since you have drafted the clause to say 'if permitted by law', the Corps Act requirements will have to be addressed in any event.

92. Surplus assets not to be distributed to members


If the **company** is wound up, any **surplus assets** must not be distributed to a member or a former member of the **company**, unless that member or former member is a charity which meets the requirements in clause 93.

93. Distribution of surplus assets

Subject to the **Corporations Act** and any other applicable Act, and any court order, any **surplus assets** that remain after the **company** is wound up must be distributed to one or more charities:

- (a) with charitable purpose(s) similar to, or inclusive of, the purpose(s) in clause 7, and
- (b) which also prohibit the distribution of any **surplus assets** to its members to at least the same extent as the **company**.

The decision as to the charity or charities to be given the **surplus assets** must be made by a **special resolution** of members at or before the time of winding up. If the members do not make this decision, the **company** may apply to the Supreme Court to make this decision.

 You can change this clause to state that the directors, rather than the members, can decide which charity or charities will receive the company's surplus assets when it winds up.

If you want to seek endorsement as a deductible gift recipient (**DGR**), you will need to add a clause about it. You can look at the different templates we have for different types of DGR endorsement on our website.

[Read more about DGR endorsement on the ACNC website.](#)

Commented [A131]: What is this reference for - it is not helpful. If there is a court order they will know it takes precedence. Other Acts require statements in the constitution and do not apply otherwise. What are you referring to in the Corporations Act?

Commented [A132]: This should read 'on a winding up' as there is nothing after the company is wound up!


Commented [A133]: Very onerous and impractical - why can't the directors decide and why by special resolution?

94. Liability of members limited to the guarantee

Each member must contribute an amount not more than \$10 (the guarantee) to the property of the **company** if the **company** is wound up:

- (a) while they are a member, or within 12 months after they cease being a member, and
- (b) if at the time of winding up, the debts and liabilities the **company** incurred before they stopped being a member, exceed the **company's** assets. These debts and liabilities also include any costs incurred in winding up the **company**.

The liability of each member is limited to the amount of the guarantee.

 If your company is new, it can change the amount of the guarantee. Normally, the guarantee is set as a small amount – for example, like the \$10 we have suggested in clause 96.

Commented [A134]: Very risky that an existing company will simply adopt this amount which may be in breach of their legal obligations.

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If your charity already has a constitution and you are replacing it, then you should use the same amount for the guarantee that was used in the old constitution. If you would like to change that amount, you should get independent legal advice.

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