

How to Read and Understand NFP Constitutions

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Dr Joanne Redburn

Importance of your constitution

- * Your constitution must comply with the laws that are relevant to your NFP organisation
 - * Corporations Act 2001 (Cth)
 - * Associations Incorporation Act of your State or Territory.

Importance of your constitution

- * If your organisation is a charity, your constitution will also need to also comply with:
 - * Australian Charities and Not-for-Profit Commission (ACNC) Act 2012; and
 - * Governance Standards

Objects/Charitable Purpose

The objects should accurately reflect:

- * What is the purpose of the organisation
- * What the organisation is actually doing (activities/ programs/ projects)
- * Must satisfy the criteria to maintain eligibility for appropriate tax endorsements and concessions
- * Allow the organisation to develop and do the activities it wishes to do in the future.

Powers

- * The organisation has all the powers of an individual
- * Constitution – ensures that these powers can only be used to achieve the objects/ charitable purpose.

Not for profit

- * a not-for-profit is an organisation that does not operate for the profit, personal gain or other benefit of particular people (for example, its members, the people who run it or their friends or relatives).
- * The definition of not-for-profit applies both while the organisation is operating and if it 'winds up' (closes down).

Not for profit clause

- * The assets and income of the organisation shall be applied solely to further its objects; and
- * no portion shall be distributed directly or indirectly to the members of the organisation except as genuine compensation for services rendered or expenses incurred on behalf of the organisation.'

Membership

- * Generally membership is unlimited
- * You may set eligibility criteria for membership and/ or classes of membership
- * Do you have a need for corporate members – “representative” clause

Membership Application

- * Generally, a person would make an application and the Board would consider that application at its next meeting
- * Placing restriction on application, eg nominated and seconded by another member may give greater control to the members
- * The Board may reject/accept an application
- * Some constitution have an appeal process where an application is rejected

Membership Fees

- * Some constitutions have provisions for charging a membership fee:
 - * Application fee
 - * Annual fee
- * The power to set the fees may be by the Board (fiduciary duty) or the members (no fiduciary duty).
- * There is no requirement to have a membership fee.

Rights of membership

- * Some constitutions set out what rights it members have, eg
 - * Attend annual and special general meetings
 - * Vote at meetings
 - * Other benefits?

Limited liability of members

- * Company – guarantee
- * Association – no liability

Members – general meetings

Two types:

- * Annual general meetings
- * Special general meetings

Annual General Meetings

- * ACNC Governance Standard 2 – accountability to members
- * Holding your AGM is one of the ways that a charity can demonstrate that it is accountable to its members.

Annual General Meetings

Your organisation may have obligations to other Commonwealth, state or territory government agencies in relation to holding an AGM. These requirements may cover areas such as:

- * holding your AGM within a certain time period
- * the matters that you must discuss at the meeting
- * whether you have to provide notice to your members of the meeting and, if so, how much
- * where the meeting must be
- * who is eligible to attend and vote at the meeting.

When must AGM is held?

- * NFP companies – within 18 months after its registration then a least once in each calendar year and within 5 months after the end of its financial year
- * NFP Charitable companies – at least one in each calendar year
- * Incorporated associations (Qld) - within 6 months after the end of its financial year

What matters must be discussed?

- * a review of the Company's activities;
- * a review of the Company's finances;
- * any auditor's report; and
- * the appointment and payment of auditors, if any.

Notice of general meetings

- * May be 14/21 days
- * If a special resolution then 21 days (usually)
- * Notice must provide details of date, time, location and, if a special resolution is to be vote on then the wording of the special resolution.

Quorum

May be:

- * A set number
- * A percentage
- * Particular category of members
- * Majority of board members (plus one)

How a member may attend

- * Member may attend:
 - * in person,
 - * proxy (if in constitution) or
 - * telecommunication

Voting

- * Voting members usually have one vote
- * Members must be eligible to vote
- * A resolution put to a vote is usually decided by a show of hands
- * But a member or the chair may decide a poll more appropriate

Motion/Resolutions

- * Motion put to the members
- * Usually if a majority in favour the resolution is passed
- * If a special resolution is required:
 - * 75% of members present at meeting and eligible to vote must vote in favour.

Board/ committee

- * Number/ Size of the Board/committee
 - * Minimum set by legislation
 - * Company – 3 directors
 - * Incorporation Association – president, treasurer, secretary
- * Composition

Election and appointment of directors

- * Election usually by the members at an AGM
- * May be appointed by the directors or a third party
- * Nominated/ representative directors
- * Chairperson and deputy chairperson
- * Term may be set by members or board or prescribed by constitution

Eligibility

- * 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);
- * give the Company their signed consent to act as a Director of the Company; and
- * are not ineligible to be a Director under the Corporations Act or the ACNC Act.

Casual Directors

- * Board usually appoints where a vacancy
- * Appointment may be until next AGM or the original term of the director

Removal from office

- * Usually by members at a general meeting
- * But a process should be followed beforehand.
- * Recommend incorporating a suspension by Board then removal by members.

Powers of the Board/committee

- * has power to manage the business of the Company; and
- * may exercise every right, power or capacity of the Company except those which must be exercised by the Company in general meeting and/or by the members.
- * May make by laws and policies

Delegation of powers

- * a committee or committees;
- * a Director;
- * an employee of the Company; or
- * any other person.

Directors meetings

- * Some constitution set the number of meetings, others say as the directors think fit (discharge duties)
- * Quorum – usually a majority
- * Attendance – may be via telecommunication
- * Voting – usually consensus then majority in favour
- * Circulating resolutions

Directors duties and interest

- * Each Director must comply with his or her duties described in governance standard 5 of the regulations made under the ACNC Act and under the general law.
- * Interests
 - * May hold other offices
 - * Must disclose interest
 - * If material personal interest in a matter then procedure to avoid actual or perceived interest

Director remuneration

- * Usually prohibited from pay fees as a Director
- * May, with Board approval:
 - * Reasonable expenses
 - * Remuneration for services in good faith
 - * Interest on money lent

Director indemnity and insurance

- * Company indemnifies director for any liabilities incurred (permitted by law)
- * May make payment in respect of legal costs
- * Does not operate if liability is covered by insurance
- * May require company to take out insurance

Secretary/ Treasurer

- * Must have a secretary
- * May be a director or only secretary
- * Incorporated association must have a treasurer

Minutes

- * proceedings and resolutions of members meetings
- * the names of Directors present at each Board meeting or committee meeting;
- * proceedings and resolutions of Board meetings
- * Circulating resolutions
- * disclosures and notices of Directors' interests.

Financial reports

- * Incorporated association – prescribed wording as to what must be kept
- * Company, financial records must:
 - * correctly record and explain its transactions (including transactions undertaken as trustee) and financial position and performance; and
 - * would enable true and fair financial statements to be prepared and audited,

Winding Up

- * 'In the event of the organisation being dissolved, all assets that remain after such dissolution and the satisfaction of all debts and liabilities shall be transferred to another organisation with similar purposes, which is charitable at law and which has rules prohibiting the distribution of its assets and income to its members.'

DGR Revocation clause

‘If the organisation is wound up or its endorsement as a deductible gift recipient is revoked (whichever occurs first), any surplus of the following assets shall be transferred to another organisation with similar objects, which is charitable at law, to which income tax deductible gifts can be made:

- a. gifts of money or property for the principal purpose of the organisation
- b. contributions made in relation to an eligible fundraising event held for the principal purpose of the organisation
- c. money received by the organisation because of such gifts and contributions.’

Questions

Thank you

Contact Details:

Joanne Redburn

Director, NFP Lawyers

Phone: 07 3160 0010

Email: joanne.redburn@nfplawyers.com.au

Website: www.nfplawyers.com.au



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