



MILLS OAKLEY

# Constitution/Rules

Mills Oakley Not-for-Profit and Social Enterprise

## Introduction

Your constituent document, which you would know as either your constitution or rules (which we will refer to in this checklist as the **constitution**), is the document that governs how your organisation operates. It is a legal document and its terms must be complied with at all times. Regardless of whether your organisation is a company or an incorporated association, there will be provisions in your constitution that are statutorily required under the relevant legislation (ie the *Corporations Act 2001* (Cth) or the *Associations Incorporation Act* of your state).

With the effluxion of time it is common for organisations to depart from their originally determined path, and this often results in the objects, activities and operations practised by the organisation being out of sync with those stated in its constitution. We have set out below those areas that are most susceptible to variation, and to which particular attention should be paid during any review.

## How often should you review your constitution/rules?

Like any long-term set of rules, your constitution should be reviewed from time to time (we suggest every two to three years) to ensure that:

- it reflects your current objects, activities and operations;
- it does not risk any tax endorsements or concessions that you may currently enjoy;
- you have incorporated any changes to the legislation since the last review;
- your processes continue to be workable and flexible enough to meet your practical needs; and
- your organisation is compliant with the new law.

Review required?

### A. OBJECTS

1. Ensure the objects – as drafted in the constitution – still reflect the objects and activities of the organisation.

*It is vital that this clause accurately reflects at all times:*

- (a) what the organisation is doing; and
- (b) the purpose of the organisation.

*Special care must be given to ensure that the organisation satisfies the ATO criteria to enable the organisation to be eligible for appropriate tax endorsements and concessions.*

### B. BOARD/COMMITTEE

2. Appointment/election of directors/committee members

- How are directors/committee members appointed/elected? Is the procedure stated in the constitution still being applied? Do you require any changes to the procedure? Is the procedure consistent with your relevant Act?
- Consider whether independent directors/committee members can be appointed/elected. You may wish to alter how the board/committee is constituted eg the appointment of specially qualified directors/committee members.
- Are you satisfied with the size of the board/committee?
- Are directors/committee members required to be members of the organisation? If so, will those members be able to bring the range of perspectives necessary to ensure robust decision making?

3. Office bearers

- Which office bearers do you wish to have on your board/committee? For example, president, chair, vice president, treasurer etc.
- How are office bearers elected/appointed?
- What is the length of their term of office?
- Do you have office bearers required by your relevant Act?
- Do you need all of the office bearers?
- Is the statutory role of secretary/public officer appointed in accordance with the relevant Act?

4. Term

- What is the term of the directors/committee members and is this still appropriate?
- How many maximum number of consecutive terms can a director/committee member hold office for? Do you want to change this?
- Do all directors/committee members come up for election in the same year? If so, has consideration been given to the implications of all being changed at once?

5. Board/committee meetings

- The procedural aspects of convening board/committee meetings should be reviewed eg what is the required notice period, and whether this would allow directors/committee members to meet their care and diligence obligations in all circumstances?
- How is the chair appointed and does the chair have a casting vote?
- Can the directors/committee members change the chair if the chair proves to be ineffective?
- Is the chair the President (or effective head irrespective of the title)? If not, do the different roles cause inappropriate pressures that should be corrected?

**6. Expulsion of directors/committee members**

- Check the circumstances for expulsion of a director/committee member. Does it:
  - comply with the law; and
  - allow for natural justice and due process?
- Does the wording of any particular circumstance inadvertently result in the directors effectively removing a director in contravention of the Act?

**7. Vacancies**

How are vacancies dealt with in the constitution? Does the procedure work in practice?

**8. Alternate directors/committee members**

- Can alternate directors/committee members be appointed and is board/committee approval required?
- Do you want alternates with the complications they bring?
- If you need alternates, is an agreed pool a better option than individual alternates?

**9. Delegated authority**

*Over time it may have become convenient for the board/committee to establish subcommittees to assist with certain aspects of the organisation's governance. This is an important clause and you should ensure that it is included in the constitution. You need to consider:*

- the procedure for their establishment;
- how they are to be constituted;
- a process for their routine/regular review to ensure they remain relevant; and
- how they are to operate.

**10. Remuneration**

- Are directors/committee members remunerated for their roles as directors/committee members of the organisation and, if so, does this comply with the law?
- Does the constitution provide for directors/committee members to receive payment for services provided to the organisation by that director/committee member? If so, are there checks to ensure the facility is not exploited?

Review required?

**C. INDEMNITIES**

11. Ensure that indemnity and insurance clauses are contained in the constitution and that they provide adequate protection for the officers of the organisation. How broadly/narrowly do you want to extend this coverage?

*It is important to seek legal advice in respect of these provisions, particularly if they have not been reviewed or updated for some time.*

**D. MEMBERS**

12. Does the organisation have different classes of membership?

If so, has there been any variation to the organisation's membership classes?

If not, consider whether the introduction of different classes of membership would be beneficial to the organisation's structure and finances.

If so, are they different classes or just categories of the same class?

If so, are class rights effectively addressed?

13. Check the eligibility criteria for admission as a member.

*If the organisation has deviated from its initial objects, it is worth considering whether the membership criteria require amendment. For example, would the requirement for particular qualifications be beneficial?*

14. Do the eligibility criteria for membership contravene the *Competition and Consumer Act 2010* (Cth), and do any of the Objects risk contravening the same Act? Does the power to set fees reside with the directors/committee members who have a fiduciary duty or with the members who have no fiduciary duty?

15. If you have corporate members, is there a "Representative" clause in the constitution?

16. Does the organisation follow the dispute resolution procedure as set out in the constitution? The dispute resolution procedure should also be reviewed to ensure that it complies with the relevant legislation.

*This applies to disputes between members and disputes between members and the organisation.*

**E. MEMBERS' MEETINGS**

17. The legal requirements and procedures at members' meetings may have changed and it is important that your constitution accurately records what is legally required of such meetings.

18. If your constitution has not been reviewed for some time, it may not include a clause allowing the latest technology to be used to conduct members' meetings. For convenience, this should be included.

19. Does the chair have a casting vote at members' meetings?

20. For companies still with inappropriate restrictions, have you yet changed to allow the appropriate appointment of proxies?

21. Does the quorum requirement remain practicable?

22. Have you considered allowing for direct voting?

**F. WINDING UP**

23. Ensure that the winding up provisions comply with the legislation and with ATO requirements for eligibility for tax endorsements and concessions. Otherwise, your organisation may risk losing its tax endorsements/concessions.

24. Are the winding up processes practicable? Do you have a fall back if a meeting of members cannot be held?



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