

## ORGANISATION

# Company constitutions

The constitution of a company sets out certain rights, roles and responsibilities of members or shareholders and directors and rules which govern various internal management activities such as meetings of members and directors. The constitution is a fundamental component of the governance framework.

The constitution has the effect of a contract between:

- the company and each member;
- the company and each director;
- the company and the company secretary;
- a member and each other member.

Constitutions cover a range of rules including:

- the appointment, removal and power of the directors;
- procedures for conducting director meetings;
- rules regarding transferring shares and paying dividends.

The *Corporations Act 2001* (Cth) does not specify the contents of a company's constitution. However, some not-for-profit companies must have specific clauses in their constitutions for tax concessions in accordance with the *Income Tax Assessment Act 1997* (Cth).

All new directors need to be aware of their duties in relation to the organisation's constitution.

Constitutions should be reviewed regularly to stay up to date with changes to the *Corporations Act 2001* (Cth) and other legislation, modern company practices and technologies. Signs to look for that the constitution may need updating include:

- the use of terms such as the 'Corporations Law';
- referring to the constitution as a 'memorandum and articles of association';
- requiring unnecessary formalities to be complied with to perform simple functions;
- not allowing for the use of circular or written resolutions by the board;
- not allowing for the organisation to use technology for meetings or to communicate with members.

### Corporations Act 2001 (Cth)

Companies may decide to operate either under the replaceable rules or under their own constitution. The replaceable rules are contained in Part 2B.4 of the *Corporations Act 2001* (Cth). These rules list the terms and conditions of the company's internal management, its governance system, and, as noted above, deal with such issues as the appointment, powers and remuneration of directors, frequency of directors' meetings and members' meetings, rules for share transfers, and rights of members to inspect the company's books.

The replaceable rules will usually apply automatically, unless a company displaces or modifies them in its own constitution. The exception is the proprietary company where the same person is both its sole director and sole shareholder. In this case, the replaceable rules do not apply because there are no other shareholders to consider. However, a constitution may be adopted, if the director/shareholder wishes.

Table 1 sets out the provisions of the *Corporations Act 2001* (Cth) that apply as replaceable rules.

**TABLE 1: Table of replaceable rules – *Corporations Act 2001* (Cth), s 141**

PROVISIONS THAT APPLY AS REPLACEABLE RULES		SECTION
<b><i>Officers and Employees</i></b>		
1	Voting and completion of transactions--directors of proprietary companies	194
2	Powers of directors	198A
3	Negotiable instruments	198B
4	Managing director	198C
5	Company may appoint a director	201G
6	Directors may appoint other directors	201H
7	Appointment of managing directors	201J
8	Alternate directors	201K
9	Remuneration of directors	202A
10	Director may resign by giving written notice to company	203A
11	Removal by members—proprietary company	203C
12	Termination of appointment of managing director	203F
13	Terms and conditions of office for secretaries	204F
<b><i>Inspection of books</i></b>		
14	Company or directors may allow member to inspect books	247D
<b><i>Director's Meetings</i></b>		
15	Circulating resolutions of companies with more than 1 director	248A
16	Calling directors' meetings	248C
17	Chairing directors' meetings	248E
18	Quorum at directors' meetings	248F
19	Passing of directors' resolutions	248G

PROVISIONS THAT APPLY AS REPLACEABLE RULES		SECTION
<b><i>Meetings of members</i></b>		
20	Calling of meetings of members by a director	249C
21	Notice to joint members	249J(2)
22	When notice by post or fax is given	249J(4)
22A	When notice under paragraph 249J(3) (cb) is given	249J(5)
23	Notice of adjourned meetings	249M
24	Quorum	249T
25	Chairing meetings of members	249U
26	Business at adjourned meetings	249W(2)
27	Who can appoint a proxy [replaceable rule for proprietary companies only]	249X
28	Proxy vote valid even if member dies, revokes appointment etc.	250C(2)
29	How many votes a member has	250E
30	Jointly held shares	250F
31	Objections to right to vote	250G
32	How voting is carried out	250J
33	When and how polls must be taken	250M
<b><i>Shares</i></b>		
33A	Pre-emption for existing shareholders on issue of shares in proprietary company	254D
33B	Other provisions about paying dividends	254U
34	Dividend rights for shares in proprietary companies	254W(2)
<b><i>Transfer of shares</i></b>		
35	Transmission of shares on death	1072A
36	Transmission of shares on bankruptcy	1072B
37	Transmission of shares on mental incapacity	1072D
38	Registration of transfers	1072F
39	Additional general discretion for directors of proprietary companies to refuse to register transfers	1072G

Companies can choose to adopt the provisions of the replaceable rules or to draft their own constitution to establish their own internal rules. For example, a company can include object clauses within its constitution which outline and restrict the activities in which the company may engage in (s 125(2)).

Under section 135 of the *Corporations Act 2001* (Cth), a company can choose:

- to establish a constitution that will specify all the rules (the equivalent of the old articles and memorandum (see s 141);
- not to adopt a constitution, and thereby be governed by the replaceable rules; or
- adopt a combination of the two (ss 135 and 136).

Under s 233 of the *Corporations Act 2001* (Cth), the court can also make an order requiring a company adopt a constitution (called the 'oppression remedy'). The intent of this section is to strengthen the minority shareholders of a company in resisting oppression by the majority.<sup>1</sup> This remedy been used most often in relation to small or closely held companies.<sup>2</sup>

There are certain types of companies that are required by law to be governed by a constitution. These are:

- public companies limited by guarantee that are applying to omit the word 'Limited' from their name (s 150);
- no-liability public companies (s 112);
- public companies listed on the stock exchange, which are required by the Listing Rules of the ASX to have their own constitution.

A company can adopt a constitution either at the time of registration or at any stage afterwards. For a constitution to be formally binding at the time of the company's registration, it is necessary for each person specified in the application form (who consents to become a shareholder) to agree in writing to the terms of the constitution

before the application is lodged. Alternatively, a company can adopt, modify or repeal its constitution, or a provision of its constitution, by passing a 'special resolution'. A special resolution is a resolution passed at a meeting of the company's shareholders (the meeting requires at least 21 days' notice to be given to shareholders, or 28 days in the case of publicly listed companies), which requires the agreement of a 75 per cent majority of eligible voters.

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If the company is a public company, its constitution must be lodged with the Australian Securities and Investments Commission (ASIC) along with its application for registration. Alternatively, if a public company adopts a constitution by special resolution after registration, a copy of the constitution and the special resolution must be lodged with ASIC within 14 days after it is passed. A public company can also modify or repeal its constitution by a special resolution of its members but, again, ASIC should be advised (s 136).

A proprietary company is not required to lodge its constitution on application for registration, but a copy must be kept with the company's records and made available to authorities if required. However, proprietary companies do need to lodge a copy of the document if amendments to the constitution affect its name, share capital or type. All companies must provide an up-to-date copy of the constitution to any member who requests it within seven days (s 139).

1. R P Austin, I M Ramsay and H A J Ford, 2007, *Ford's Principles of Corporations Law*, 15th edition, LexisNexis Australia, pp 711-712.

2. *Ibid.*

### Specific requirements for other entities registered under the *Corporations Act 2001* (Cth)

Part 5B.1 of the *Corporations Act 2001* (Cth) allows for the registration of a body corporate that is not a company. The entity may be registered as one of the types of companies listed in s 601BA (1). To be registered under Part 5B.1, an entity must have a constitution lodged with its application (s 601BG).

A managed investment scheme registered under Part 5C.1 of the *Corporations Act 2001* (Cth) is also required to have a constitution. Under s 601GA, that constitution must make adequate provision for, or specify, certain prescribed matters including:

- the consideration to acquire and dispose of an interest in the scheme;
- the powers and rights of the responsible entity, including:
  - for making investments, borrowing or dealing with scheme property; and
  - to be paid fees or be indemnified out of scheme property;
- the method for dealing with complaints about the scheme;
- any rights of members to withdraw from the scheme; and
- winding up the scheme.

### Other types of organisation

Constitutions are not restricted to companies registered under the *Corporations Act 2001* (Cth). For example, an incorporated association or co-operative will have either rules or a constitution that is based on a model set of rules contained in legislation. These model rules can be adopted as the organisation's constitution or articles of association. Alternatively, if the organisation decides to change the constitution to suit its own needs, or totally replace it, there will still be a number of core rules that must be included in the constitution. For example, under the *NSW Associations Incorporation Act 2009*, an association may:

- adopt the Model constitution set out in Schedule 1 of the Act, or
- adopt its own constitution. If an association's constitution fails to address a matter outlined in Schedule 1, the Model constitution applies for that matter and forms part of the association's constitution.

The regulator in each state and territory will generally provide templates and/or guidance on the model rules or constitution for both incorporated associations and co-operatives.

While they may be established under the *Corporations Act 2001* (Cth), charities registered with the Australian Charities and Not-for-profits Commission<sup>3</sup> (ACNC) will require a constitution that meets the requirements of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) and the ACNC Governance Standards.

Indigenous corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) must have a written rule book or constitution (CATSI Act, s 66). The Office of the Registrar of Indigenous Corporations (ORIC) has developed a rule book that complies with the CATSI Act, but corporations change to suit their own circumstances and needs.<sup>4</sup>

### Benefits of a constitution

Unlike the replaceable rules in the *Corporations Act 2001* (Cth) or model rules under one of the state or territory association incorporation acts, for example, a constitution can be tailored to suit the company's individual circumstances and gives greater flexibility than the replaceable rules. For example, a company's constitution can be modified and amended in accordance with the wishes of its shareholders by the calling and passing of a special resolution when circumstances require such changes. Other benefits include:

- the company can have several classes of shares with different voting rights, dividend rights and rights to capital upon winding up;
- the constitution can:
  - specify how directors are appointed and removed;
  - set out the rules regarding the calling and holding of meetings, passing of resolutions;
  - provide guidelines on the day-to-day management of the company;
- using the constitution to communicate to key stakeholders how the company is governed and managed.

3. The ACNC provides a template constitution, which is available at <https://www.acnc.gov.au/tools/templates/constitution-charitable-company-limited-guarantee>.

4. See <http://www.oric.gov.au/start-corporation/rule-book> for further information and a draft rule book for a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

## Contents

Constitutions are specific to the organisation and the clauses to be included will vary depending on the structure of the company.

The list below shows the typical clauses that may be included in a constitution:

- definitions and interpretations
- objects
- powers
- income and property of company
- membership
- fees and subscription
- cessation of membership
- general meetings
- calling a general meeting
- proceedings at general meetings
- proxies
- directors
- powers and duties of directors
- proceedings of directors
- inspection of records
- accounts
- audit
- notices
- indemnity
- mediation
- chief executive officer
- company secretary
- by-laws and regulations
- dissolution and winding up
- adoption and amendments of Constitution

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