

## Response to latest queries regarding the draft Constitution

Recently, Justin Warren raised three specific issues regarding the draft Constitution. These are summarised below, along with the Board's response in each case.

### 1. Indemnity and Insurance (clause 14)

#### Issue

"This creates a huge potential liability for EFA, and I don't see how the organisation benefits from it. I see no reason why EFA should cover losses incurred before the adoption of this Constitution, and I'd love to hear the argument for how this benefits members rather than the individual board members and executive officers who have incurred losses already."

#### Response

The Board has received the following advice on this clause:

This is a standard provision in most constitutions of not for profit (as well as for profit) companies. It may be difficult to find experienced people willing to serve as an officer (including as a director) if they will not be indemnified by the company for Losses and claims incurred by them in the course of carrying on their duties for the company.

However, members can be reassured that Part 2D.2 of the Corporations Act 2001 provides for strict limits on when a company may indemnify an officer (including for legal costs), which is also embedded in clause 14.1.4.

These limits include that the company cannot exempt or indemnify an officer from a liability to the company itself (for example, arising from the officer's own fraud or breach of duty), for a criminal or civil penalty under certain provisions of the Corporations Act 2001 or for any liability owed to a third party arising out of conduct by the officer which was not done in good faith.

Based on this advice, the Board does not propose any changes to this clause.

### 2. Resolutions by a show of hands (clause 11.4.3)

#### Issue

"Clause 11.4.3 says "A resolution proposed at a general meeting must be decided on a show of hands." There doesn't appear to be any mechanism for conducting a poll, or calling for a poll to be held.

"Clause 11.6.2 says that if you want to appoint a proxy or attorney "A proxy or attorney must be a Member for the appointment to be effective." so you can't appoint a non-member as your proxy or attorney, and membership is subject to board discretion, under clause 7.3. The board can just reject an application for membership, and doesn't have to give a reason (clause 7.3.3).

"Clause 11.6.7 says that if a person holds a proxy for more than one member, they only get one vote on a show of hands which is the only method of voting allowed. This effectively means that if 3 members—say Alice, Bob, and Mary—give their proxy to Jane (who must also be a member, remember) then instead of having 4 votes available at the meeting, there's only one: Jane.

"Proxies are basically useless, and members who can't attend the meeting for whatever reason effectively cannot vote."

“This effectively means you have to have everyone turn up to the meeting to vote, which looks like an attempt to counter block voting by a group of people who get organised to vote together, but can’t all make the meeting for whatever reason.”

## **Response**

The Board has received the following advice on this issue:

This provision does not apply to special resolutions (for example, which are required to amend the constitution or change the company’s name) but only to ordinary resolutions or to the election of directors (to which clause 12.3 applies).

Other matters (such as to approve the minutes of the previous meeting etc) are often best dealt with by consensus at the meeting and this provision avoids the need to prove the outcome of a vote on a routine resolution once it has been declared by the Chair.

However, sections 250K and 250L do provide that members may demand a poll in certain circumstances.

If specific provision for a poll is still preferred, the clause could be replaced as follows:

11.4.3. A resolution proposed at a general meeting must be decided on a show of hands unless a poll is required by the chairperson or effectively demanded by at least 5 members entitled to vote on the resolution (in person or by proxy), in which case the resolution must be decided by a poll conducted in a manner determined by the chairperson.

Based on this advice, the Board has amended this clause in the draft constitution using the language above.

## **3. Payments to Directors**

### **Issue**

“the proposed constitution says EFA will be able to pay directors for being a director. The Australian Charities and Not-For-Profit Commission has a template constitution and a guide to the template constitution that bans paying directors fees in clause 45.”

### **Response**

While the standard template constitution provided by the ACNC does include a clause that prohibits the payment of Directors fees, the accompanying Guide explains that this clause is “only mandatory for companies that do not want to use ‘Limited’ in their name (under the Corporations Act).”<sup>i</sup>

It should also be noted that clause 15.1.2 in our draft constitution provides that,

*No part of the income or property may be paid or transferred directly or indirectly by way of dividend, bonus or other profit distribution to any of the Members (in their capacity as Members) or Directors.*

Also, clause 15.2.1 provides that,

*The Company must not make any payment to a Director for services rendered by that Director to the Company, including services as a Director, unless:*

- (a) the provision of those services has the prior consent of the Board;*
- (b) the amount payable is on reasonable commercial terms; and*
- (c) the payment has the prior approval of the Board.*

And, clause 15.2.3 provides that,

*The total of payments made to Directors under this clause 15.2 must be disclosed to the Members at the annual general meeting.*

While there is no suggestion that Directors fees be introduced at any time soon, the Board wishes to leave the option open for future Boards that may wish to appoint suitably-qualified Independent Directors, for example to serve as the Company Secretary. The Board is aware that introducing Directors fees would have implications in relation to fundraising laws in some states, and those issues will of course need to be considered by any future Board that was considering introducing Directors fees.

The Board is satisfied that the current draft constitution includes sufficient safeguards, particularly the requirement for reporting of payments made to Directors at the AGM, that no changes are required in this context at this time.

## **Other minor amendments**

The following minor amendments have been made since the last published draft of the Constitution (dated 28<sup>th</sup> May 2017).

- Clause 4.1.6 – the words “for Australians” have been deleted from this Purpose clause as it was felt this was unnecessarily restrictive. While there is no suggestion that EFA will actively pursue international issues that do not also affect Australians, there have in the past and will likely be in the future, certain international issues that may warrant the organisation’s attention.
- Clause 7.5.4 – the words “or appointment” have been added here, simply to ensure coverage of the full range of situations in which a member may join the Board.
- Clause 9.6.1 (a) – the deadline for the initial Annual General Meeting of the new Company has been shortened from 18 to 12 months from registration.
- Clause 10.3.4 (b) – the deadline for receipt of proxy forms has been shortened from 48 hours prior to a general meeting, to 24 hours prior.
- Clause 11.6.4 – ditto.
- Clause 12.3.1 – this clause has been reworded for clarity.
- Clause 12.3.4 – per clause 7.5.4 above, the words “or appointment’ have been added.
- Clause 12.3.5 (b) – ditto.

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<sup>i</sup> See pages 32 & 33 in the Guide, available (as a PDF) from:  
<https://acnc.gov.au/CMDownload.aspx?ContentKey=2efea0fa-af4f-4231-88af-5cffc11df8b7&ContentItemKey=6046cbc5-d7fd-4b6b-93ba-c8e3114b07ba>