

Changes to an organisation's constitution or rules

Legal information for NSW community organisations

This fact sheet covers:

- what is a constitution?
 - why would we need to change our constitution?
 - our organisation has 'rules' - is this the same as a constitution?
 - what is the legal process for making changes to our constitution?
 - what issues should we look out for before we change our constitution?
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This fact sheet assists New South Wales not-for-profit community organisations to understand some of the issues that arise when making changes to their constitution or rules.

It includes information about changing the constitution or rules for an incorporated association, company limited by guarantee (CLG) and co-operative.

What is a constitution?

Every community organisation needs to have a constitution or rules. This is the governing document that contains the rules of the organisation, describes its basic structure and processes and will usually specify:

- the aims or purposes of the organisation
- how the members of the organisation are admitted
- the rights and obligations of its members
- how the office-bearers and other members of the governing body are elected, appointed or removed
- how general meetings of members and meetings of the governing body are convened and conducted, including voting rights and methods at these meetings
- how the organisation is managed (especially its finances), and
- what will happen to the organisation's assets if it is wound up.

Why would we need to change our constitution?

It is important that the constitution accurately reflects how your organisation operates in practice. It's no use having a constitution that no one looks at or follows, so you may need to change your constitution to bring it up-to-date with current practice in your organisation.

You may also need to change your constitution to implement a new structure, meet requirements of a new licence or funding arrangement, to alter the way in which the organisation operates or to reflect any changes in the law.

Incorporated associations

New laws for incorporated associations were introduced and took effect on 1 July 2010, and more recent amendments made to these laws took effect on 1 September 2016. These changes in the law were designed to make it easier for associations to operate more effectively and to manage their affairs.

For an association in existence prior to 1 July 2010, the "rules" of such an association (now referred to under the new laws as an association's constitution) are taken to comply with the new laws until the association chooses to make changes to its rules, in which case it will have to ensure that all aspects of its constitution comply with the new rules. A full review of an association's constitution, followed by further changes to, or a replacement of an association's constitution may need to be made in this instance, to update the constitution in line with the new laws.

Our organisation has 'rules' - is this the same as a constitution?

The terminology for governing documents of community organisations varies depending on whether your organisation is an incorporated association, a CLG or a co-operative (discussed further below). Nonetheless, the terms can generally be used interchangeably.

You can usually tell from an organisation's name whether it is an incorporated association, a CLG or a co-operative. All incorporated associations in NSW are required to have 'Incorporated' or 'Inc' at the end of their name (for example, ABC Org Inc.). Most CLGs are required to have 'Limited' or 'Ltd' at the end of their name (some CLGs have an exemption from this requirement). All co-operatives must have 'Co-operative', 'Cooperative', 'Coop' or 'Co-op' in their name, and 'Limited' or 'Ltd' at the end of their name.

TIP

To confirm what an organisation's legal structure is (for example, whether it is a CLG, incorporated association or co-operative) you can search the organisation's name on the Australian Business Register website, the Australian Securities and Investment Commission's website (for CLGs) or New South Wales Fair Trading's website (for incorporated associations or co-operatives). We have included the links to these websites in the Resources section at the end of this fact sheet. You can also contact New South Wales



Incorporated associations

An incorporated association registered under the *Associations Incorporation Act 2009* (NSW) (**AI Act**) is required by that Act to have a constitution, being a set of rules governing the affairs of an association, which must address matters referred to in Schedule 1 to the AI Act. This constitution can be either:

- the Model Constitution developed by New South Wales Fair Trading (**Fair Trading**) to cover all the matters outlined in Schedule 1 to the AI Act, or
- the association's own constitution (which can be a modified version of the Model Constitution).

If an association's constitution fails to address a matter outlined in Schedule 1 to the AI Act, the corresponding provision in the Model Constitution applies for that matter and will form part of the association's constitution. However, this does not apply to change the financial year end of an association registered prior to 1 July 2010, where the association's constitution does not address the financial year end.

Companies Limited by Guarantee

A CLG registered under the *Corporations Act 2001* (Cth) will have either a single constitution (for newer organisations) or two separate documents: a 'memorandum of association' and 'articles of association' (for older organisations that have not updated their constitution). The aims or purposes of a CLG are expressed through the 'objects' contained in its constitution or memorandum of association.

Co-operatives

A co-operative registered under the *Co-operatives (Adoption of National Law) Act 2012* (NSW) must have a set of 'rules' that make up its constitution. Usually the aims or purposes of a co-operative are expressed by specifying its 'primary activity' in its rules. The rules may also include objects.

What is the legal process for making changes to our constitution?

An incorporated association or a CLG can only change its constitution by passing a special resolution at a formal meeting of members.

A co-operative can change its rules by passing a special resolution at a formal meeting of members, and by a resolution passed by the governing body (committee) of the co-operative provided the change does no more than give effect to a requirement under the *Co-operatives (Adoption of National Law) Act 2012* (NSW). Prior written approval of the Registrar of Co-operatives (the Commissioner for Fair Trading, Department of Finance, Services and Innovation) is required for any proposed amendment to:

- rules relating to the active membership provision
- rules relating to the conversion of a non-distributing co-operative to a distributing co-operative, and

- rules of a co-operative that is a registered club which restrict the voting rights of different classes of members.

A draft of the proposed amendment together with a statement advising of the reasons for the amendment must be submitted to the Registrar before the resolution amending the rules is passed by a co-operative. An amendment of the rules of a co-operative does not take effect unless and until it is then passed by the co-operative and registered by the Registrar.

It is important that the statutory (legal) requirements for a special resolution are complied with, otherwise the resolution will not be valid and the changes will not take effect.

A special resolution typically means the resolution needs to be supported by at least 75% of members' votes at a general meeting to pass (which is a higher number of votes than a resolution passed by a simple majority). However this is not always the case. For example to pass a special resolution for co-operatives, the resolution must be passed by at least two thirds of member's votes (see the section below for more details). There are extra statutory requirements for passing a special resolution (discussed below).

As well as complying with statutory requirements, you also need to comply with any extra requirements in your own constitution or rules. For example, the constitution or rules of a locally-based organisation may require the approval of the national body before changes to the local organisation's constitution or rules are effective.

Incorporated associations and CLGs

The following are the statutory requirements for a valid special resolution for both incorporated associations and CLGs.

- A special resolution can only be passed by members at an annual general meeting or special general meeting. In addition, some associations may be able to pass special resolutions by postal ballot if the association's constitution permits. A special resolution cannot be passed by the organisation's governing body at a committee or board meeting.
- At least 21 days' notice of the general meeting must be given to all members (and for CLGs, to their auditor (if applicable) and to any directors who are not also members), unless a longer period is specified in the organisation's constitution.
- The notice of meeting must include the terms of the proposed special resolution and must specify the intention to propose the resolution as a special resolution. Preferably, the notice would use words to the following effect:
 - "It is intended that the following resolution be proposed as a special resolution", or
 - "The following resolution will be proposed as a special resolution".
- The special resolution will only be passed at the general meeting if at least 75% of those members who vote (and are entitled to vote) on the resolution, vote in favour.
 - Members who are not actually present themselves may be able to appoint another person to act as their 'proxy' to cast votes on their behalf (see below for an explanation of proxy voting).
 - It excludes those members who abstain from voting (for example, members who do not attend the meeting, or who attend but abstain from voting at the meeting).

NOTE - PROXIES



A proxy is a person you authorise to vote on your behalf if you cannot attend a meeting yourself. The appointment of a proxy is usually required to be in writing using a specified form which the organisation's constitution may provide for. Organisations may have rules about the time frame in which proxy forms need to be received prior to a general meeting (eg. at least 48 hours prior to the relevant meeting).

Proxy voting is permitted for all CLGs, but may be excluded by the constitution of an incorporated association.

A change to a CLG's constitution takes place on the date the special resolution was passed, or a later date if a later date was specified in the notice of meeting.

For a CLG which is registered as a charity with the Australian Charities & Not-for-profits Commission (**ACNC**), changes to its constitution are required to be notified to the ACNC through the online Charity Portal available on their website. Changes to the constitution are not required to be notified to the Australian Securities and Investment Commission (**ASIC**) where the CLG is a registered charity.

For a CLG which is not registered as a charity with the ACNC, a copy of the special resolution and the changes to the constitution must be lodged with ASIC within 14 days of the special resolution being passed.

A change to an incorporated association's constitution takes place only once it is registered with Fair Trading and the application for registration must be submitted to Fair Trading using the approved form within 28 days of the special resolution being passed.

Co-operatives

For co-operatives, the statutory requirements are similar to those set out above, except that:

- an alteration to the rules does not take effect unless and until the alteration is registered with the Registrar of Co-operatives in a form approved by the Registrar, within 28 days after the alteration is made
- at a general meeting, the special resolution only requires a two thirds majority of those present and voting (including by proxy, if the rules of the co-operative provide for voting by proxy)
- special resolutions may also be passed by a two-thirds majority of those members voting in a postal ballot, or a three-quarters majority in a special postal ballot, but in each case only if this is expressly permitted under the rules of the co-operative (and if so, must be done in accordance with the *Co-operatives National Regulations* (NSW)), and
- as noted above, the rules of a co-operative may also be altered by a resolution passed by special resolution (two thirds majority) of the co-operative's board, but only if the alteration does no more than give effect to a requirement under the *Co-operatives (Adoption of National Law) Act 2012* (NSW) .

How do we lodge changes to our constitution or rules?

Incorporated associations and co-operatives

For incorporated associations and co-operatives, a special resolution to change the constitution will only take effect once it has been approved by the Registrar of Incorporated Associations or the Registrar of Co-operatives. For both types of organisations, a form must be lodged with Fair Trading within 28 days of the special resolution being passed.

The approved notice forms are available on Fair Trading's website (see the Resources section at the end of this fact sheet) and must be accompanied by a copy of the constitution or rules, including the alteration.

CLG

A change to CLG's constitution takes place on the date the special resolution was passed, or a later date if a later date was specified in the notice of meeting.

For a CLG which is registered with the ACNC, changes to its constitution are required to be notified to the ACNC through the online Charity Portal available on their website. Changes to the constitution are not required to be notified to ASIC where the CLG is a registered charity.

For a CLG which is not registered with the ACNC, a copy of the special resolution and the changes to the constitution must be lodged with ASIC within 14 days of the special resolution being passed.

Updated copies

All types of organisations should make sure copies of their consolidated constitution or rules (that is, the constitution or rules with all amendments incorporated) are provided to committee members or directors so that they can familiarise themselves with the current version of the document. Copies of the constitution or rules must also be provided to any member who requests a copy. Any member is legally entitled to a copy of the constitution (and for CLGs and co-operatives, there may be a small fee payable to the organisation for such a request).

What issues should we look out for before we change our constitution?

Schedule requirements

For incorporated associations, check that the constitution as amended provides for each of the 17 matters specified in the Schedule 1 to the AI Act, being matters that must be addressed in the association's constitution.

For co-operatives, check that the rules address all of the matters specified in Schedule 1 to the Co-operatives National Law, found in the Appendix to the *Co-operatives (Adoption of National Law) Act 2012* (NSW).

TIP

It's a good idea to prepare a list or table, cross-referencing each of the items in the Schedule with the rules as they will be once the amendments are approved. Write the applicable rule numbers against each of the matters required to be included. This way, you can see if anything has accidentally been left out.



Rights and liabilities of members

Any changes to the constitution that affect the existing rights of members or that may increase their potential financial liability need to be approached with particular care. In such cases, unless the changes are completely uncontroversial, it will be prudent to seek legal advice before going ahead with the changes.

Transitional arrangements

Be careful when changing your constitution (especially if you replace the whole constitution) that the members under the old constitution remain members under the new constitution. Problems can arise when changes are made to categories of membership or eligibility for membership.

Similarly, you may need to make it clear that, despite the changes to the constitution, the office holders of the governing body (eg. management committee or board) under the old constitution continue to hold their office under the new constitution. Alternatively, there may need to be an election for the new governing body, or the officer holders may need to be specified in the new constitution, with effect from a given date. If unsure, seek legal advice.

Tax status

If your organisation has been endorsed by the Australian Taxation Office as a Deductible Gift Recipient or is exempt from income tax, whether as a Tax Concession Charity or otherwise, you also need to make sure that any changes to the constitution will not jeopardise your tax status. In particular, any changes to the purposes of an incorporated association, the objects of a CLG or the activities of a co-operative, and to the winding up provisions of these organisations, should be approached with care. If unsure, seek legal advice.

Funding agreements

If you receive funding from an outside body (eg. a government department or philanthropic trust), check that the proposed changes do not conflict with anything in the relevant funding agreement or terms and conditions of the grant. Also, once any changes have been made, you may be required by the funding documents to send a copy of the new constitution to the funding body.

Resources

Related Not-for-profit Law Resources

The Not-for-profit Law Information Hub (www.nfplaw.org.au) has information on the following topics:

- ▶ Getting Started – www.nfplaw.org.au/gettingstarted

Not-for-profit Law's Getting Started page on the Information Hub has information on incorporating and choosing a legal structure.

- ▶ Running the Organisation – www.nfplaw.org.au/runningtheorg

Not-for-profit Law's Running the Organisation page has information on governance, meetings and record keeping.

- ▶ People Involved – www.nfplaw.org.au/people

Not-for-profit Law's People Involved page has information on members, clients, employees and volunteers.

Legislation

- ▶ [Associations Incorporation Act 2009 \(NSW\)](#)
- ▶ [Co-operatives \(Adoption of National Law\) Act 2012 \(NSW\)](#)
- ▶ [Corporations Act 2001 \(Cth\)](#)

New South Wales Fair Trading

- ▶ [Information on incorporated associations](#)

This section of Fair Trading's website has information about incorporated associations. Click on the Associations forms quick link for forms in relation to changing your association's constitution.

- ▶ [Register of New South Wales Incorporated Associations](#)

This section of Fair Trading's website is where you can search to find an association registered in New South Wales.

- ▶ [Information on co-operatives](#)

This section of Fair Trading's website has information on co-operatives. Click on the Co-operatives forms quick link for forms in relation to changing your co-operative's rules.

- ▶ [Register of New South Wales Co-operatives](#)

This is a database where you can find co-operatives registered in New South Wales.

Australian Securities & Investments Commission (ASIC)

- ▶ [Information of special resolutions for CLGs](#)

This link provides information about special resolutions for CLGs, and includes a link to the form (205) which needs to be submitted to ASIC to notify ASIC of changes to your constitution

- ▶ [ASIC database for companies](#)

This is the ASIC database where you can search to find companies (including CLGs) registered in Australia by organisation name.

Australian Charities & Not-for-profits Commission (ACNC)

Information on ACNC regulation and reporting

This ACNC webpage explains the ACNC's role as a regulator and transitional arrangements from the ATO to the ACNC.

ACNC Charity Portal

This is the online portal through which changes to the organisation's constitution of a CLG registered with ACNC can be notified to the ACNC.

A Not-for-profit Law Information Hub resource. Access more resources at www.nfplaw.org.au

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