



COMMENTARY ON TEMPLATE CONSTITUTION FOR LOCAL NSW U3A'S

SOURCES: www.nfplaw.org.au ; <https://justiceconnect.org.au/how-we-help/not-for-profit-law/>
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State of New South Wales (NSW Fair Trading). For current information go to
fairtrading.nsw.gov.au;

The *Associations Incorporation Act 2009 (NSW) (AI Act)*, and the *Associations Incorporation Regulation 2016 (AI Regulation)*.

For proper conduct of AGM's and management committee meetings see:

https://www.nfplaw.org.au/sites/default/files/media/Calling_and_holding_meetings_NSW_0.pdf

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1. **Need for a Constitution.**

What is it: in relation to an association, means the constitution that is recorded in the NSW Register of Incorporated Associations in relation to the association.

What does it do: it governs the relationship between the association and the members of the association: *Associations Incorporation Act 2009 (Act)*, section 26. Both must abide by the terms of the Constitution. An individual may take action against a member or the association if a breach has occurred.

2. **Primary Legislation:** members of the Management Committee (**MC**) **must** be familiar with the provisions of the Act and its Regulations (**Regulations**)¹.

3. **Role of the MC:** the MC has two roles, being:

- a) The governance of the association; and
- b) The management of the association.

“**Governance**” refers to the direction, control and accountability of the association. It attracts particular legal obligations (see #5 below).

“**Management**” is concerned with the day to day management of the association.

4. **Members of the MC:** members of MC must understand:

- a) The role of the MC²: see #3;
- b) The legal obligations of committee members³: section 30A of the Act;
- c) The personal liability of committee members⁴: section 30B of the Act; and
- d) What they need to know about their association.

5. **The Legal Obligations**⁵: consist of:

- a) ensuring that the aims, objectives and rules of the organisation are observed;
- b) compliance with any laws, especially the Act and its Regulations. A breach of the Act may attract a pecuniary penalty (usually identified by reference to “penalty unit”). A penalty unit is a number used to equate one unit to a monetary amount. For example, if an offence attracts a penalty of 20 penalty units, in NSW this would equate to 20 x \$110 which = \$2,200.

Note: Section 91 Offences by committee members.

¹ www.legislation.nsw.gov.au/regulations/2016-538.pdf

² <https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/running-an-association/management-committee>

³ https://www.nfplaw.org.au/sites/default/files/media/Duties_Guide_CTH_0.pdf

⁴ https://www.nfplaw.org.au/sites/default/files/media/Duties_Guide_CTH_0.pdf

⁵ https://www.nfplaw.org.au/sites/default/files/media/Duties_Guide_CTH_0.pdf

(1) If an association contravenes, whether by act or omission, any provision of this Act or the regulations, each committee member of the association is taken to have contravened the same provision if he or she knowingly authorised or permitted the contravention.

(2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the association has been proceeded against or convicted under that provision.

(3) In the case of a contravention of section 40 (Association not to provide pecuniary gain for its members), each person who, pursuant to subsection (1), is taken to have contravened that section is, together with the association, jointly and severally liable for all debts incurred by the association as a consequence of that contravention.

(4) Nothing in this section affects any liability imposed on an association for an offence committed by the association under this Act.

(5) For the purposes of this section, an association's public officer (not otherwise being a committee member) is taken to be a committee member.

- c) meeting its contractual obligations; and
- d) keeping accurate financial records and ensuring that the association can pay its debts.

Note: Division 1A of the Act makes certain acts "offences.

If an association incurs a debt while insolvent (or that causes it to become insolvent), a committee member who had reasonable grounds to suspect that the association was insolvent (or would, by incurring the debt, become insolvent) commits an offence under section 68 (1).

If a committee member knowingly authorises or permits an association to contravene a provision of this Act or the regulations, the committee member is also taken to have contravened the provision: see section 91.

6. **Schedule 1 of the Act**⁶: mandates what a constitution **must** include. It must deal with:
- a) **Membership qualifications**: this is especially important for U3A associations. Failure to specify the criteria for membership may well mean that anyone who applies must be accepted for membership.

Note: In NSW persons under the age of 18 (minors) are not prevented from becoming members under the Act. Where the association has members who are minors, the constitution should clearly detail their rights and privileges. The Act does not permit members of the association under the age of 18 years to be members of the MC. A

⁶ <https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/starting-an-association/about-the-constitution>

member is not entitled to vote at any general meeting of the association if the member is under 18 years of age.

- b) **Register of Members:** an association must have a Register of Members⁷. It should include the name, contact details, the date the member joined the association and, when applicable, the date the member ceased to be a member of the association. This information is especially important for insurance purposes.
- c) **Fees, subscriptions etc.:** must include any entrance fees, subscriptions and other amounts, if any, to be paid by the members.
- d) **Members liabilities:** a member's liability, if any, towards the debts and liabilities of the association.
- e) **Disciplining of members:** the procedure, if any, for disciplining members, including an appeals process.
- f) **Internal disputes:** the procedure for the resolution of disputes between members and between members and the association.
- g) **Committee:** the composition, functions and processes of the committee, including:
 - the election or appointment of the committee members.
 - the terms of office of the committee members.
 - the maximum number of consecutive terms of office of any office-bearers on the committee.
 - the circumstances in which a committee member has to vacate office.
 - the filling of casual vacancies on the committee.
 - the quorum and procedures to be followed at committee meetings.
- h) **Calling of general meetings:** the procedure of holding and calling a general meeting and the intervals between meetings.
- i) **Notice of general meetings:** the process for notifying members of a general meeting and notices of motion.
- j) **Procedure at general meetings:** The quorum, procedure and requirements for conducting a general meeting, and whether members are entitled to vote by proxy.
- k) **Postal or electronic ballots:** the types of resolutions that may be voted on by a postal or electronic ballot.
- l) **Sources of funds:** the sources of the association's income.

⁷ <https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/running-an-association/membership>

- m) **Management of funds:** how the association's funds are to be managed and the procedure for drawing and signing cheques on behalf of the association.
- n) **Custody of books etc.:** who is responsible for the association's books, documents and securities.
- o) **Inspection of books etc.:** the procedures for the inspection of books and documents by members.
- p) **Financial year:** the association's financial year.
- q) **Winding up:** The winding up of the association.

Note: when lodged with NSW Fair Trading a representative of the association **must** certify that the new constitution complies with the requirements of the Act, that is that it deals with all of the above matters.

7. The Model Constitution

NSW Fair Trading developed the Model Constitution to cover all matters outlined in Schedule 1 of the Act, as well as a number of additional matters. It may be updated by NSW Fair Trading from time-to-time.

Note: If an association's constitution fails to address a matter outlined in Schedule 1, the Model Constitution applies for that matter and will form part of the association's constitution⁸.

Problem: members of the committee must identify what, if anything, is not addressed by their constitution. If there are matters not addressed as mandated by Schedule 1 they must be familiar with what the Model Constitution provides because they are bound by the Model Constitution's provisions on those matters. The remedy is to amend the existing constitution to ensure that all matters required by the Act are to be found in one document, that is the constitution.

8. How is a constitution changed?

The constitution may only be amended by the passing of a special resolution which is passed if at least three-quarters of the votes cast support it: section 39 of the Act. A special resolution requires the calling of a general meeting⁹. The association must apply for registration of the changes within 28 days of the special resolution being passed¹⁰. A change to the constitution is valid once it is registered with NSW Fair Trading. An association representative must certify that the constitution as amended complies with the Act.

⁸ <https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/starting-an-association/about-the-constitution>

⁹ www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/running-an-association/resolutions

¹⁰ www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/starting-an-association/about-the-constitution

9. Amendments to a Constitution.

The clauses and language used in the Model Constitution reflect the law, established usage and practice.

Changes should only be made in order to:

- a) reflect the current manner in which the association's business is conducted, for example the payment of fees, or
- b) reflect a preferred manner of conducting the association's business or procedures. For example, limiting the term for which a committee member may hold a position.

Note: Drafting a contract is a skill. Ambiguity and uncertainty in the terminology used are two defects that have lost many a plaintiff (the aggrieved person) their case. Amending the wording of any part of the constitution should be undertaken with great care and with a full understanding why it is being done and its consequences.

10. THE TEMPLATE CONSTITUTION FOR LOCAL U3AS

The template constitution is based primarily on the Model Constitution. It has been drafted to reflect the objects of U3A and the manner in which most U3A's in Australia are managed.

What follows is a summary of most of its clauses.

11. **The Object:** The Model Constitution does not contain a clause headed "Object" as the Object Clause is unique to each type of not-for-profit association (NPF). It identifies the reason for the NPF's existence and sets the parameters within which the clauses that follow must be applied.

The object clause in the draft constitution reflects the fundamental principles of U3A: www.u3a.org.uk/about/vision.

12. **Definitions:** The Definitions clause must clearly define the more important terms in the constitution especially the criteria for membership.

"**Eligible Person**" is defined to reflect one of the fundamental principles of U3A in that it was established to provide education for people no longer in full-time employment. An age-criteria has been added because of the fluidity of the employment market that has and continues to see persons retiring at an earlier age. See definition of "**Full-Time Employment**" below which is the definition used by Fair Work Australia¹¹.

Note: the definition must be read in conjunction with clause 1 (Membership) which gives the committee a discretion to admit someone to membership even though they do not meet the

¹¹ <https://www.fairwork.gov.au/employee-entitlements/types-of-employees/casual-part-time-and-full-time/full-time-employees>

criteria of “Eligible Person”. The discretion would arguably cover a person with a disability who is unable to be in permanent employment.

A failure to address the issue of who may become a member constitutes a breach of the Act and also a failure to respect a fundamental principle of U3A. It may well create a situation where anyone who applies in accordance with the constitution must be admitted to membership: see 6 a) above.

The definition of “**Financial Member**” has been added to ensure that the rights and obligations attached to membership only accrue to persons who have paid all necessary fees. The definition of **Membership Fee** recognises 2 versions: the calendar year version and the 1 July – 30 June version of the financial year. Alternatives are given throughout this document where necessary.

Clause 4 under the heading “**Definitions**” ensures that the constitution leaves no doubt about the fact that such parts of the Model Constitution as are required by Schedule 1 of the Act to form part of the association’s constitution in fact do so even though they may have inadvertently been omitted from it or the constitution has failed to keep up with what Schedule 1 requires over time.

TERMS

13. **Clause 1:** defines who is a member by reference to a number of criteria: he/she is an Eligible Person, the application for membership has been accepted and all fees have been paid.
14. **Clauses 2, 3 & 4:** set out the procedure for the acceptance or non-acceptance of a membership application (the primary criteria to be applied is that of “*Eligible Person*”).
Note: The acceptance of an application should be the subject of a motion put at a meeting of the MC. If passed it should be dealt with in the minutes as a resolution. If rejected the minutes should set out the reasons for the rejection. The rejection must be based on failure to comply with any of the matters set out in Clauses 1 and 2.
Clauses 5 & 6 deal with when a member ceases to be a member and the inability of a member to transfer their rights as members of the association.
15. **Clauses 7 & 8** deals with the right of a member to resign their membership. The date on which the resignation takes effect must be noted in the Register of Members. This is especially important for insurance purposes.
16. **Clauses 9 – 22:** These clauses deal with 2 necessary registers, the Register of Members and the Register of members of the MC. They reflect what is required by NSW Fair Trading¹². The

¹² www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/running-an-association/membership

proper maintenance of the registers is of vital importance especially in terms of the association's insurance. Noting the date when a person became a Financial Member and when that person ceased to be a Financial Member is crucial.

Note: members have a right to view both Registers and to obtain a copy of entries in the Registers upon payment of the nominated amount: Clauses 11,12, 21 and 151.

Note: the right to privacy contained in Clause 13 and the restrictions upon the use of the information in the Register of Members.

17. **Clauses 22 – 28:** deal with the payment of fees. In summary these clauses provide as follows:

a) The MC has the power to set fees. The clause should simply recognise that fact and it should not refer to a specific amount!

b) **Note:** MC members have a legal duty to exercise reasonable care and skill in managing the affairs of the association (including the financial affairs), and a duty to prevent insolvent trading by the association. Accordingly, the MC must have flexibility in the setting of fees. It sets out what must be considered when setting fees.

Note: an association may set aside a cash reserve to provide a cushion for planned or unplanned future needs. A commonly used reserve goal is three to six months' expenses. Retaining large amounts as a reserve may attract the attention of NSW Fair Trading as it is inconsistent with being a not-for-profit.

c) The annual fee must be paid with the application, and that membership last only for the calendar year in which the fee was paid.

d) Renewal of membership is only effective upon receipt of the annual fee.

e) Provides for a 50% discount for person joining after 30 June.

f) Provides for when course fees, if any, must be paid.

g) Provides that failure to renew membership deprives a person of the right to attend courses.

18. **Clause 29:** provides that members must wear their membership badges if attending courses. This is important as it allows tutors to ensure that persons attending classes are in fact Financial Members. Again important for insurance purposes.

19. **Clause 30:** deals with members' liability which is limited to the amount of annual fee owed by a member.

20. **Clause 31 & 33:** these clauses seek to create a reasonably simple mechanism for the resolution of disputes. Clause 33 deals with the avenue available if the mandated process fails to satisfy the disputants. It is important to remember that arbitration is a very expensive process and should be the last possible resort.

Note: NSW Fair Trading cannot intervene in matters relating to the internal administration of an association that do not involve a breach of the AI Act, which is often the situation for internal disputes.

NSW incorporated associations must have procedures for dealing with 'grievances' under their rules¹³. Typically, a 'grievance' arises where there is conflict between:

- a) member(s) of the organisation and the rest of the organisation
- b) member(s) of the organisation and the committee of management, or
- c) members of the committee of management.

When a grievance arises, go to the constitution to see what it says about dispute resolution. These rules should be followed very closely.

If your constitution doesn't say anything about grievance or dispute resolution procedure then the law says that clause 10 of the Model Constitution will automatically apply to your association.

See comments re procedural fairness below!

21. **Clauses 34 – 43:** deal with the disciplining of members and their rights of appeal.

Note: associations are allowed, under law, to discipline members. Disciplinary action is taken when a member has breached the rules or engaged in other improper behaviour (such as harassing other members or acting in a way that harms the association), and could include a sanction, a fine, or suspension or cancellation of membership, depending on your constitution. If there is a procedure in the constitution, it should be followed. If your organisation uses the model constitution, clauses 11 and 12 contain the disciplinary procedure.

Importance of Procedural Fairness: In most cases, the alleged offender will be entitled at common law to natural justice also called 'procedural fairness'. It means that the processes used by a decision maker must be fair and proper (for example, following appropriate timeframes, giving appropriate notice, allowing allegations to be responded to and avoiding bias in the process. If you are uncertain about processes to follow you may need to seek specific legal advice.

Failure to strictly adhere to the constitution and the principle of procedural fairness may result in the members of the MC finding themselves embroiled in expensive litigation, an expense they will need to meet out of their personal finances. **Example:** treating a member in a way that suggest to the membership/public that he/she lacks probity, or has personality traits that may bring the association into disrepute, has a tendency to harass or bully or embarrass other

¹³ www.nfplaw.org.au/sites/default/files/media/Dealing_with_disputes_and_grievances_with_members_NSW.pdf

members etc. In this situation the alleged offender, if not afforded procedural fairness, may well seek damages for defamation from the members of the MC.

22. **Clause 44:** deals with the rights of Non- Member Course Leaders.
23. **Clause 45:** deals with the powers of the MC. These are the powers it needs to ensure that it fulfils its role which according to the NSW Fair Trading website¹⁴ includes managing the association's financial affairs and maintaining its financial viability, ensuring the association acts in accordance with its objects or purposes and ensuring it meets all legal requirements.
24. **Clause 46:** deals with the limitation on the power of the MC. The MC has no power to provide for the payment of remuneration to any member of the association in any capacity. Clause 47 mitigates clause 46 as it allows for payment of out-of-pocket expenses (Disbursements) to tutors and a gratuity of \$50 as a token of appreciation. Payments for Disbursements should be supported by a receipt for the amount claimed. As a matter of good business practice a receipt should be issued in respect of all monies received by the association.
Note: this clause refers to section 5 of the Act which is set out at #50 below.
25. **Clauses 48 & 50:** identify the composition of the MC and who is an officer bearer. Office bearer or officer means a person who is appointed to a special position on the committee. The office bearers of most associations are the chairperson (or president), deputy chairperson (or vice president), secretary and treasurer.
26. **Clause 49:** states the minimum number of MC members. The Act requires that the MC have at least 3 members¹⁵.
Note: keeping the number of committee members small is advisable as larger committees are difficult to manage and may make the reaching of consensus difficult.
27. **Clause 52:** is very important. It deals with what, if any, limitation there is on the number of consecutive terms for which any member of the MC may hold office. 2 options are provided: firstly, where there is no limit, and secondly, where the limit is 3 consecutive terms unless a further term is approved by the members in general meeting by a vote of 75% of Financial Members present. The second option does not prevent any past member of the MC standing again after a break of 12 months.
28. **Clause 53:** provides that each MC member holds office until the conclusion of the AGM immediately following the person's election. This ensures that the MC continues to function between the end of the financial year and the conclusion of the immediately following AGM.

¹⁴ <https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/running-an-association/management-committee>

¹⁵ <https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/running-an-association/management-committee>

29. **Clauses 54 – 60:** deal with how a nomination for office is made and how the appointment of committee members must be dealt with at the AGM. The identity of the nominees should be made known to the members at least 3 days prior to the AGM. If there is more than one nominee for a position each nominee should be given a opportunity at the AGM to inform the members present of their experience and vision etc for the coming year.
30. **Clauses 61 & 64:** deal with the duties of the secretary. Although not set out in the constitution but of particular importance is the duty of the secretary to draft, for approval of the MC, an agenda for the AGM and the agendas for the meetings of the MC.
31. **Clauses 65 – 72:** deal with the position and obligations of the treasurer. These are more detailed than those in the Model Constitution for the reason that it is considered sensible to ensure that the treasurer is left in no doubt as to the scope and ambit of the treasurer's duties¹⁶.
- Clauses 73 & 74:** deal with the position of public officer. A public officer is both the official point of contact for an incorporated association and one of the authorised signatories. However, the public officer is not automatically a signatory to the association's bank account. Who can be a public officer? A committee member, an ordinary member or a person outside the association may hold the position of public officer.
- Note:** for purposes of section 91 of the Act, the public officer is deemed a member of the MC.
32. **Clauses 75 & 76:** deals with casual vacancies which are concerned with the instances when the position of a committee member falls vacant. The MC has the power to fill the vacancy with a Financial Member.
33. **Clauses 77 & 78:** deal with the circumstances in which a committee member may be removed.
34. **Clauses 79 – 86:** detail how often the committee must meet, the calling of committee meetings, the necessary quorum (clause 83) and what happens if no quorum is present.
35. **Clauses 87 – 89:** deal with the appointment of Financial Members as members of the MC for the purpose of having a quorum.
36. **Clauses 90 & 91:** deal with the use of technology at committee meetings.
37. **Clauses 92 – 98:** deal with the delegation of matters to a sub-committee.
- Note:** the members of the management committee **cannot** delegate the duties they owe under the Act or the general law.
38. **Clauses 99 – 102:** deal with the issue of voting at the MC level.

¹⁶ https://www.ourcommunity.com.au/management/view_help_sheet.do?articleid=70

39. **Clauses 103 – 106:** deals with matters relating to the AGM.
40. **Clauses 107 – 112:** deal with the calling of a special general meeting. These are called when the MC seeks the urgent approval of the members for a specified act such as changing the association's name, changing the association's objects, changing the association's constitution, amalgamating with another registered association, an existing registered association applying to transfer incorporation, voluntarily winding up or cancelling the registered association and distributing property. **These are proposals that require a special resolution.** Members must be given at least 21 days' notice of the proposed special resolution. The notice must state the: time, date and place where the meeting to vote on the special resolution will be held, intention to propose the resolution as a special resolution, proposed resolution in full. A special resolution will be passed if the conditions imposed by Fair Trading, if any, are met, a quorum of members required by the constitution is present at the meeting, and it is supported by at least three-quarters of the valid votes cast in person or by proxy, if proxy votes are allowed by the constitution.
41. **Clauses 113 & 114, 154 & 155:** deal with the notices that must be given prior to a general meeting, and the manner of service of notices, including notices calling a special general meeting.
42. **Clause 115:** identifies the business that may be dealt with at a general meeting. A general meeting can only deal with the business set out in the notice calling the meeting.
43. **Clause 116:** deals with a member wishing to bring a matter before the AGM or a special general meeting.
44. **Clauses 117 – 120:** deals with the quorum requirement at a general meeting.
45. **Clauses 121 & 122:** deals with who presides at a general meeting.
46. **Clause 123 – 125:** deal with adjournments.
47. **Clauses 126 – 129:** deal with how decisions are to be made at a general meeting.
48. **Clause 130:** deals with special general resolutions.
49. **Clauses 131- 135:** deal with voting including proxy voting.
50. **Clauses 136 – 139:** deal with postal/electronic voting and use of technology.
51. **Clauses 140:** deals with the need for insurance.
52. **Clause 141 – 145:** deal with the source of funds and the need to bank all monies received without deduction into the association's bank account.
53. **Clause 146:** deals with the fact that the association is a NFP and mandates that all funds received must be applied in pursuance of the Objects and that it must not provide a pecuniary

gain to a member. Section 5 of the Act provides that an association provides a pecuniary gain to a member if:

(1) (a) *it carries on any activity for the purpose of securing pecuniary gain for its members, or*

(b) it has capital that is divided into shares or stock held by the organisation's members, or

(c) it holds property in which the organisation's members have a disposable interest (whether directly, or in the form of shares or stock in the capital of the organisation or otherwise), or

(d) it is an organisation that is, or is included in a class of organisations that is, prescribed by the regulations for the purposes of this subsection.

(2) *For the purposes of subsection (1) (a), an organisation does not provide pecuniary gain for its members merely because of any of the following:*

(a) the organisation itself makes a pecuniary gain, unless that gain or any part of it is divided among or received by the organisation's members or any of them,

(b) the organisation is established for the protection of a trade, business, industry or calling in which the organisation's members are engaged or interested, but the organisation itself does not engage or take part in, or in any part or branch of, any such trade, business, industry or calling,

(c) members of the organisation derive pecuniary gain through the enjoyment of facilities or services provided by the organisation for social, recreational, educational or other like purposes,

(d) members of the organisation derive pecuniary gain from the organisation by way of bona fide payment of remuneration,

(e) members of the organisation derive pecuniary gain from the organisation of a kind which they could also derive if they were not members of the organisation,

(f) members of the organisation compete for trophies or prizes in contests directly related to the objects of the organisation,

(g) the organisation provides pecuniary gain of a class prescribed by the regulations for the purposes of this section.

- 54. **Clauses 147 & 148:** deal with distribution of assets on winding up.
- 55. **Clause 149:** deals with a change of objects, name and constitution.
- 56. **Clause 150** deals with custody of books etc.
- 57. **Clauses 151-153** deal with the inspection of books by members.
- 58. **Clause 154 – 155:** deal with the services of notices.
- 59. **Clause 156** identifies the financial year. The Act defines the financial term as follows:

"financial year", in relation to an association, means:

(a) a period of 12 months, or such other period (whether longer or shorter than 12 months) not exceeding 18 months as the association resolves, commencing on the date of incorporation of the association, and

(b) each period of 12 months, or such other period (whether longer or shorter than 12 months) not exceeding 18 months as the association resolves, commencing at the expiration of the previous financial year of the association.
