

Changes to an organisation's constitution or rules

Legal information for Victorian community organisations

This fact sheet covers:

- what is a constitution?
- why would we need to change our constitution?
- our organisation has 'rules' or 'articles'- is this the same as a constitution?
- what is the legal process for making changes to our constitution? and
- what issues should we look out for before we change our constitution?

This fact sheet assists Victorian 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 for an incorporated association, companies limited by guarantee (CLGs) and co-operatives.

NOTE FOR CO-OPERATIVES: CHANGES TO THE LAW

The Victorian *Co-operatives National Law Application Act 2013* has been in force since 13 March 2013. Any co-operative whose registration under the *Victorian Co-operatives Act 1996* was in force immediately prior to the commencement of the new laws on 13 March 2013 will still be taken to be registered under the new laws.



NOTE FOR REGISTERED CHARITIES: CHANGES TO THE LAW

Bodies registered as charities are regulated by the Australian Charities and Not-for-profits Commission (ACNC), established by the *Federal Australian Charities and Not-For Profits Commission Act 2012*. While the actual formation of these bodies as incorporated entities is still administered by ASIC (in the case of public companies limited by guarantee) and Consumer Affairs Victoria (CAV) (in the case of incorporated associations in Victoria), registered charities must now report to the ACNC and comply with the specific laws and requirements applying to registered charities.

Note: while charitable public companies limited by guarantee are now administered by, and report to, the ACNC almost exclusively, incorporated associations are required to report to both the ACNC and to CAV.



NOTE FOR INCORPORATED ASSOCIATIONS: CHANGES TO THE LAW



New laws for Victorian incorporated associations came into effect on 26 November 2012. This fact sheet reflects these new laws. The new laws include new model rules for incorporated associations.

All associations still using the old model rules were automatically transferred to the new model rules on 26 November 2013.

Associations with their own rules can continue to use their own rules, but where their rules do not address matters required by the new laws, the new model rule that deals with that matter will automatically apply to that association.

For more information on the new laws for Victorian incorporated associations and updating your organisation's rules to reflect the laws, see the [Constitution](#) page of the Information Hub.

What is a constitution?

Every not-for-profit organisation needs to have a constitution or rules. This is the 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 members
- how the office-bearers and members of the governing body are elected or appointed
- how general meetings of members and meetings of the governing body are convened and conducted
- how the organisation is, in broad terms, to be governed; 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 is governed. It's no use having a constitution that no one looks at or follows or that few can understand. An organisation's constitution should be reviewed at least once every three years, and if required, amended. As such, it may well be time for you to change your constitution to bring it up-to-date.

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.

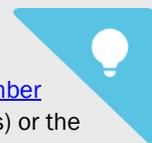
Our organisation has 'rules' or 'articles' - is this the same as a constitution?

The terminology for governing documents 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 are required to have 'Incorporated' or 'Inc' at the end of their names (for example, "ABC Org Inc."). Most CLGs have 'Limited' or 'Ltd' at the end of their names (although some have an exemption from this requirement). All co-operatives must have "Co-operative", "Cooperative" or "Co-op" in their names, and "Limited" or "Ltd" at the end.

TIP

To confirm the type of an organisation, you can search its name on the [Australian Business Number website](#) or the [Australian Securities and Investments Commission \(ASIC\) website](#) (for companies) or the [Consumer Affairs Victoria \(CAV\) website](#) (for incorporated associations and co-operatives).



Incorporated associations

An incorporated association registered under the *Victorian Associations Incorporation Reform Act 2012* is required by that Act to have rules that include a statement of purposes as well as a number of other matters. While organisations previously submitted their purposes separately to their rules, the rules and purposes now form one document (if your organisation was registered under the old system, your purposes are now considered part of your rules).

CLGs

A CLG registered under the federal *Corporations Act 2001* 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 of a CLG are expressed through the "objects" contained in its constitution or memorandum of association.

Co-operatives

A co-operative registered under the *Victorian Co-operatives National Law Application Act 2013* must have a set of "rules" that make up its constitution. A co-operative must have at least one "primary activity" which is the basic purpose or aim for which the co-operative exists. The rules of a co-operative may set out its objects, but an act will not be invalid simply because it is contrary or beyond any objects in the rules of the co-operative. There may be additional rule requirements depending on whether the co-operative is considered "distributing" or "non-distributing".

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

Whether your organisation is an incorporated association, a CLG or a co-operative, it can only change its constitution by passing a “special resolution” of members. 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 (discussed below).

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

Incorporated associations and companies

The following are the statutory requirements for a valid special resolution for both incorporated associations and companies:

- a special resolution can only be passed at a general meeting of members. This can either be the annual general meeting (AGM) or a special general meeting. A special resolution cannot be passed at a committee or board meeting, or by a resolution without meeting, unless the following rare exceptions apply:
 - for incorporated associations, if the Registrar is satisfied that it is impractical to pass special resolutions the usual way at a general meeting, he or she may approve another method of passing a special resolution (such as by written resolution)
 - for companies with only a sole shareholder, that sole shareholder may pass a resolution by recording it and signing a record; and
 - for proprietary companies with more than 1 member, members may pass a special resolution without a members’ meeting if all the members entitled to vote sign a document containing a statement that they are in favour of the resolution set out in the document;
- at least 21 days’ notice of the general meeting must be given to all members (and, for companies, to their auditor and to any directors who are not also members)
- the notice must state the text of the proposed special resolution
- the notice must specify the intention to propose the resolution as a special resolution. Preferably, use words along the following lines:
 - “It is intended that the following resolution be proposed as a special resolution”; or
 - “The following resolution will be proposed as a special resolution”.

However, provided the notice makes it clear that the proposed resolution is a special resolution, this requirement will be met

- the special resolution will only be passed if at least 75% of those members eligible to vote and that in fact vote on the resolution, vote in favour. This includes members who are not actually present themselves but whose “proxies” (see below) cast votes on their behalf. 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) – though the abstaining members can still be counted for the purposes of assessing whether a quorum is present at a meeting; and

- the special resolution must also meet any requirements specified in the constitution of your incorporated association or company. For example, it may require a higher majority than the 75% proscribed by statute.

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. Organisations may have rules about when proxy forms need to be received (eg. at least 48 hours prior to the relevant meeting). Proxy voting cannot be excluded by CLGs, but may be excluded by the rules of an incorporated association.

Note: a “Representative” is different from a proxy. A Representative is the person who a company or organisational member nominates as its Representative to attend and exercise that company or organisation’s voting rights at a meeting of members.



Co-operatives

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

- the Registrar of Co-operatives requires that certain types of proposed amendments must be submitted to the Registrar before a special resolution is passed. These include, but are not limited to:
 - changes relating to active membership
 - changing status, the primary activity of the co-operative
 - winding up of the co-operative; and
 - the issue or sale of shares or co-operative capital units.

If the registrar has not contacted you with approval, refusal, amendment, or extension, then the proposed change is taken to be approved after 28 days. Once the Registrar has given approval, or the time period has elapsed, the co-operative can then vote on the special resolution. The notice form is available on the CAV website (see the Related Resources section below);

- for proposed rule changes that do not require pre-approval, the co-operative must hold a meeting for a special resolution according to the rules of your co-operative and legislative requirements
- members must be given at least 21 days’ notice of the intention to propose a special resolution. Co-operatives may apply to CAV to have this time extended or shortened. The notice must also specify the reasons for the proposed special resolution, and the effect of it being passed
- at a general meeting, the special resolution only requires a 66% majority of those present and voting (including by proxy), though a higher threshold may be imposed by your existing co-operative rules
- special resolutions may also be passed by a two-thirds majority of those members voting in a postal ballot in accordance with Schedule 3 of the *Co-operatives National Regulations* but only if this is permitted under the rules of the particular co-operative; and
- the rules of a co-operative may also be altered by a resolution passed by the co-operative's board, but only if the alteration does no more than give effect to a requirement of the *Co-operatives*

National Law Application Act 2013 (Vic). The board must then notify its members in writing as soon as practicable after such an amendment takes effect.

Providing proper notice and explanation of proposed changes

The law requires that members receive full and fair notice of matters that will be addressed at a meeting. The notice should be clear and provide adequate explanation, so that when a member scans the notice, they can understand clearly whether the matters to be addressed are ones that concern them. Accordingly, a member can decide whether or not to attend the meeting to which the notice relates.

Where changes to a constitution or rules are concerned, full and fair notice means:

- the proposed changes need to be clear
- an explanation of the effect of the changes should be provided; and
- an explanation of the reasons for the proposed changes should be provided.

An explanatory document or table can be a good way to explain the proposed changes and their effect to members.

It is not essential to provide members with a full copy of the proposed new constitution if the proposed changes have been made clear in the notice. However, it is good practice to provide members an opportunity to review the exact wording of proposed changes by providing an email address or contact number through which members can request a copy. If there aren't too many changes, it can be helpful to show the changes tracked against the current version of the rules.

TIP

If you are making lots of changes, it can be easier to put a “new” constitution to a vote rather than a suite of amendments - this only requires one resolution to be voted on. However, if some of the changes are controversial (and may not be passed) it can be better to separate out the controversial changes (into separate resolutions). However, be very careful as it is usual for rules of a constitution to interrelate. As such, having some rules changed and others not can result in a conflicting and sometimes unworkable constitution. If you are putting one resolution to your members to adopt a new constitution, you still need to set out what the changes are and the effect of the changes.

How do we lodge changes to the new or amended constitution?

Incorporated associations

For incorporated associations, the secretary or approved delegate must notify CAV of the changes to the new or amended constitution within 28 days of passing the special resolution, by lodging a copy of the special resolution stating the changes via [myCAV](#). Once lodged (and relevant fee paid), the changes will take effect.

If an incorporated association has a query about a particular change or rule, it can contact CAV for advice on this issue.

Co-operatives

For co-operatives, where pre-approval is required, CAV will review and approve changes prior to a vote. The changes will not take effect until CAV is notified of the successful vote.

To seek prior approval, co-operatives must complete and lodge a form with CAV - [Application for prior approval of rule amendment/s](#) (and list the rule amendments, deletions and/or additions that require pre-approval).

If the co-operative's proposed rule changes do not require prior approval, the process outlined above must be followed and once the special resolution is passed, the co-operative must complete and lodge a form with CAV - [Application for registration/approval of rule amendment/s](#). CAV will notify the organisation of whether or not the proposed rule amendment/s has been approved.

Companies limited by guarantee

For companies, a special resolution to change the constitution takes immediate effect, unless otherwise set out in the resolution (eg. from "x date" the constitution will change to...). However, a copy of the special resolution and the changes to the constitution must be lodged with ASIC within 14 days of the vote.

However, companies limited by guarantee that are registered charities need only notify the ACNC of changes to its Constitution. They do not need to lodge the new constitution with either ASIC or ACNC.

Bodies also registered as charities

If your organisation is also registered as a charity with the ACNC, you must notify the ACNC of any changes made to your constitution. This obligation is in addition to the obligations your charity may have to other regulators. Small charities (annual revenue of less than \$250,000) have 60 days to notify the ACNC and supply them with a copy of the new governing documents. Medium charities (annual revenue of \$250 000 or more, but less than \$1 million) and large charities (annual revenue of \$1 million or more) have 28 days to meet this obligation.

Updated copies

All types of organisations should make sure copies of the consolidated constitution (that is, the constitution with all amendments made) are provided to committee members/directors so that they can familiarise themselves with it. Copies of the constitution must also be provided to any member who requests one. Any member is legally entitled to a copy of the constitution (although for companies and co-operatives there may be a small fee).

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

Schedule requirements

For incorporated associations, check that the rules as amended provide for each of the 23 matters specified in the Schedule to the *Associations Incorporation Reform Act 2012* (Vic).

It's a good idea to prepare a list or table, cross-referencing each of the items in the Schedule with the rules of the constitution as they will be once the amendments are lodged. Write the applicable rule numbers against each of the matters required to be included. That 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.

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 the categories of membership or the eligibility for membership change.

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 in office under the new constitution. Alternatively, there may need to be an extraordinary election for the new governing body, or the office 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 (**DGR**) or is exempt from income tax, whether as a Tax Concession Charity (**TCC**) 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.

RELATED RESOURCES

For more information on DGR and TCC, please see the [Tax page](#) on the Information Hub.

Funding agreements

If you receive funding from an outside body (for example, 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

✔ [Getting Started](#)

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

✔ [Running the Organisation](#)

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

✔ [People Involved](#)

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

Legislation

✔ [Associations Incorporation Reform Act 2012 \(Vic\)](#)

This legislation regulates incorporated associations in Victoria.

✔ [Co-operatives National Law Application Act 2013 \(Vic\)](#)

This legislation regulates co-operatives in Victoria.

✔ [Corporations Act 2001 \(Cth\)](#)

This legislation regulates companies in Australia. Not-for-profit's usually incorporate as companies limited by guarantee.

Consumer Affairs Victoria (CAV) resources

Incorporated associations

✔ [Database of Victorian incorporated associations](#)

This is a CAV database where you can search to find Victorian incorporated associations and co-operatives.

✔ [CAV's incorporated associations information](#)

This section of CAV's website has information about incorporated associations. Click on the update details link for more information about updating your organisation's rules.

✔ [myCAV](#)

The online system for incorporated associations system that lets incorporated associations manage their obligations, such as updating contact details and their constitution and lodging annual statements, all in one place.

Co-operatives

✔ [CAV's co-operatives information](#)

This section of CAV's website has information about co-operatives. Click on the forms and publications link for the forms for informing CAV about proposed changes to your co-operative's constitution.

✔ [Database of Victorian co-operatives](#)

This is a CAV database where you can search to find Victorian incorporated associations and co-operatives.

Australian Securities and Investments Commission (ASIC) resources

✔ [ASIC database for companies](#)

This is the ASIC database where you can search to find all types of companies in Australia.

✔ [ASIC special resolutions information](#)

This link provides information about special resolutions for companies limited by guarantee, and includes a link to the form (205) which needs to be submitted to ASIC to notify of changes to constitution.

Australian Charities and Not-for-profits Commission

✔ [Information on changing from ASIC to ACNC regulation and reporting](#)

This ACNC webpage explains who will automatically transfer so be registered with the ACNC and transitional arrangement for moving from ASIC to the ACNC as a regulator.

Commonwealth Government Resources

✔ [Business.gov.au - ABN Lookup](#)

ABN Lookup provides access to publicly available information provided by businesses when they register for an Australian Business Number.

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

© 2015 Justice Connect. You may download, display, print and reproduce this material for your personal use, or non-commercial use within your not-for-profit organisation, so long as you attribute Justice Connect as author and retain this and other copyright notices. You may not modify this resource. Apart from any use permitted under the *Copyright Act 1968* (Cth), all other rights are reserved.

To request permission from Justice Connect to use this material, contact Justice Connect at PO Box 16013, Collins Street West, Melbourne 8007, or email nfplaw@justiceconnect.org.au