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Church Constitutions and Governing Documents

Are they relevant for current times?

Kathleen Watt (Senior Associate) and Jessica Lipsett (Associate)

ACC Webinar series – 16th May 2018, Brisbane

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Introduction

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About your speakers



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Associate



Are your governing documents relevant for current times?

1. What are governing documents
2. The importance of governing documents
3. What governing documents should contain
4. Governing documents – key issues
5. Case Studies



1. What are governing documents

- For Unincorporated Associations – usually Rules, a Constitution or Constituting legislation, Church or Canon law
- For Incorporated Associations – usually a Statement of Purpose and Rules or Articles of Association
- For Company limited by guarantee – usually a Constitution
- For Trusts – usually a Trust Deed (including any variations to the Trust Deed)



2. The importance of governing documents

The Australian Charities and Not-for-profits Commission is the national regulator for charities in Australia.

ACNC registration is required for a charity to be entitled to ATO charity tax concessions.

Charities must keep the ACNC updated with its current governing documents – *“the formal document that sets out the way the charity's operates, its rules and purposes”*

- By-laws and regulations generally not required



2. The importance of governing documents

- Charitable purpose
- Not-for-profit nature
- Use of income and assets
- Governance powers, duties and processes
- Decision-making, consultation and control
- Records
- Dispute resolution
- Alterations



2. The importance of governing documents

The Charity Compliance Report 2017

- In 2017, almost 1,700 concerns raised about charities
- 202 charities investigated, 82 investigations finalised
- 26 charities deregistered, 16 charities entered into ACNC Compliance Agreements
- Subject charities controlled over \$5.9 billion of charitable assets in total
- A common theme was poor governance

ACNC, Australian Government, *Media Release No. 233 Charity concerns increasing: national regulator* (6 March 2018) <http://acnc.gov.au/ACNC/Comms/Med_R/MR_233.aspx>.



2. The importance of governing documents

“The most common issues we identified related to poor financial controls, inadequate due-diligence, and a failure by charities’ responsible persons to act in the best interests of the charity.”

“These issues, in addition to fraud, terrorism, harm to beneficiaries and disqualifying purposes, will be areas of focus for the ACNC in 2018.”

ACNC, Australian Government, *Media Release No. 233 Charity concerns increasing: national regulator* (6 March 2018) <http://acnc.gov.au/ACNC/Comms/Med_R/MR_233.aspx>.



2. The importance of governing documents

Section 50-50(2) of the *Income Tax Assessment Act 1997* (Cth)

To be exempt from income tax, a registered charity must:

- (a) comply with all the substantive requirements in its governing rules; and
- (b) apply its income and assets solely for the purpose for which it is established.



3. What governing documents should contain

- Charitable purpose
- Not-for-profit nature
- Use of income and assets
- **Governance powers, duties and processes**
- **Decision-making, consultation and control**
- **Records**
- **Dispute resolution process**
- **Alterations**



4. Governing documents – key issues

• Governance duties, powers and processes

- Who are the governors (responsible persons)?
- ACNC Governance standards – do they apply?
 1. Not-for-profit and charitable purpose
 2. Accountability to members
 3. Compliance with Australian laws
 4. Suitability of Responsible Persons (governors – Board/Church Council/Elders)
 5. Duties of Responsible Persons
- Accountability mechanisms – are they switched off?
- Delegations and Limitations – regulations or rules?
- Governor appointment, discipline and removal – adequate provisions?



4. Governing documents – key issues

- **Decision-making, consultation and control**
 - Two controlling minds – who plays these roles?
 - Members' standing – removing officeholders; convening meetings
 - Financial controls – in whose hands?
 - Due diligence – sufficient checks?
 - Member discipline, cessation and removal – just and fair?



4. Governing documents – key issues

- **Records**

- Board resolutions
- Members resolutions
- Membership Register – is it up-to-date?



4. Governing documents – key issues

- **Dispute resolution**

- Impartiality – who are the decision makers?
- Confidentiality – who is informed?
- Communication
- Enforcement



4. Governing documents – key issues

- **Alterations**

- Check mechanisms work – sole member companies
- Preserve imperative clauses – NFP; purpose; use of income and assets; winding up
- Remove redundant clauses – notification to the ATO



5. Case Studies

- Charities with outdated membership registers – wanting to remove inactive members without notice (in cases of conflict)
- Balancing natural justice and procedural fairness with the best interests of the company
- What about when clauses just don't work?

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Next Webinar

TUESDAY

24th July 2018 @ 1:00pm

**Understanding vilification and
discrimination – what can and can't
be said from the pulpit**

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