

Explanation of changes proposed to FOG's Constitution

UPDATE

On 4 February 2024, members were invited by special bulletin to comment on changes that were proposed to FOG's Constitution *at that time*.

That consultation has resulted in further changes being now proposed to rule 2, to strengthen FOG's Objects. The explanation for this final proposed change is as follows:

- The reasoning in section 2 of Attachment A of this Explanation document remains sound, i.e., compared to FOG's current Constitution, the Committee's recommendation continues to be that FOG should remove the Preamble and the 'specific objectives' found in subrule 2(2).
- Comment received on the proposed removal of both the Preamble and the 'specific objectives' indicates that, from a legal perspective, too much of FOG's intent is lost. In the event FOG ever wanted to challenge a decision, the Objects in rule 2 need to demonstrate all the ways FOG's interests might be impacted by that decision.
- The revised Objects in rule 2 of the final draft Constitution presented now to members retains a broad capacity for FOG to establish standing, i.e., to be able demonstrate FOG is an affected party in a more appropriate (wider) range of circumstances.

The rest of this Explanation document is unchanged; it is as circulated to members on 4 February 2024.

Background

FOG's current Constitution, accepted at FOG's Annual General Meeting in 2015, needs to be amended. The primary reason is there have been significant changes to the *Associations Incorporation Act 1991* (ACT) and the *Income Tax Assessment Act 1997* (Cth) since then.

Following amendments to the Associations Incorporation Act, last year the ACT Government published new Model Rules in regulations that came into effect on 1 Feb 2024¹. FOG's current Constitution states its "rules are generally based on the model rules under ACT legislation". We are a small association struggling to keep up with legal requirements. In compliance terms, it is easier and safer for us to continue to adopt the newly revised Model Rules.

The changes to the Income Tax Assessment Act governing charities are also important. To explain:

- FOG was granted Deductible Gift Recipient (**DGR**) status by the Australian Charities and Not-for-profits Commission (**ACNC**) on 9 June 2022. To the Commissioner of Taxation (the **ATO**), this means FOG is eligible to receive tax deductible gifts and contributions from the public. It also means additional regulatory requirements must be addressed in the Constitution.
- In 2023, amendments passed to Australia's tax law included the abolition of the Register of Environmental Organisations and the transfer of administration of the 'environmental organisation' category of DGRs from the Environment Department to the ATO. Both changes came into effect on 1 Jan 2024². In the draft revised Constitution, FOG's response to these changes is at rules 72-73.

Amending the Constitution carefully now will address the new ACT and federal requirements simultaneously and to good effect.

The draft revised FOG Constitution – what are you looking at, how was it prepared

For scale, the number of model rules published in the Associations Incorporation Regulations has increased from 38 to 71. With that, there is *so much change and reordering* between the current and proposed Constitution it is not feasible to show the changes in track change text.

¹ *Associations Incorporation Regulation 2023* (ACT), Schedule 1. URL: legislation.act.gov.au/sl/2023-25/

² ParInfo (2023) *Explanatory Memorandum to a Treasury Laws Amendment Bill*, paras 3.10 to 3.11 on p. 68, URL: parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6996_ems_31fb9728-06c2-4fe2-aeac-086fe8fc69d0/upload_pdf/JC009151.pdf;fileType=application%2Fpdf#search=%22legislation/ems/r6996_ems_31fb9728-06c2-4fe2-aeac-086fe8fc69d0%22

Instead, the draft revised Constitution:

- starts with the new Model Rules, published by the ACT Government in the form of a template to be completed or varied to suit any association's requirements
- shows departures proposed from those new Model Rules, marked as track change text - each departure is needed to either comply with changes in tax law for charities (rules 72-73) or it suits how FOG operates
- has 'comments' on the right-hand side that explain why the Committee is proposing each part of the proposed Constitution be accepted in the form it is in.

Attachment A of this document explains in a little more detail the background for key changes.

Attachment A: Some detail about the draft revised FOG Constitution

1 Administration

FOG's current Constitution refers to 'the organisation'. These references are being replaced with references to 'the Association'.

The new Model Rules refer to sections and subsections. This is confusing because they also refer to sections of the Associations Incorporations Act and regulations. For clarity, references within FOG's Constitution have been amended to refer instead to rules.

2 How and where we explain who we are and what we do

The new Model Rules require that any association's objects are stated in their Constitution. In FOG's current Constitution, FOG's objectives are stated followed by a long string of 'specific objectives' plus statements of FOG's values, principles and functions.

In a contemporary Constitution, the inclusion of a Preamble containing these statements would be unusual. There is no provision for anything like it in the Model Rules. Including these statements creates levels of repetition both within the Constitution and with what is written on the FOG website (and there, there is different wording). While such statements are critical for members and other organisations to understand what FOG is about and for attracting new members, the Committee believes it is more appropriate these statements appear on the FOG website. The Committee's recommendation is to remove the Preamble and the 'specific objectives' in subrule 2(2) from FOG's Constitution. This is what is reflected in the draft revised Constitution presented for approval by FOG's membership.

3 Two key changes to how FoG operates

The new Model Rules suggest anyone applying for membership of any association should be required to sign their application form, including to declare they will support that association's values and objectives and comply with the Associations Incorporation Act and the rules of the association (subrule 4(2)(c)).

The Committee agrees this is a good idea. To make this work, the Committee has taken steps ensuring providing a signature on a declaration will be easy to do. This declaration has been included in a revised membership application form.

The current Constitution prevents proxy voting (rule 31(2)). The Committee proposes allowing proxy votes from the 2025 AGM onwards. This will minimise difference between FOG's Constitution and the model rules (rule 64(1)).

4 Rule changes related to the transfer of oversight of FOG's DGR status to the ATO

In 2023, Parliament passed the *Treasury Laws Amendment (Refining and Improving our Tax System) Act 2023* (Cth) which amended the Income Tax Assessment Act effective 1 Jan 2024:

- The Register of Environmental Organisations (the **Register**) was abolished.
- Administration of DGRs who are 'Environmental organisations' (such as FOG) was transferred to the ATO.
- When the Register was abolished, so was the endorsement of Public Funds as an entity separate to the Association. FOG can now operate a Gift Fund instead. Gift Funds have less stringent management and reporting requirements particularly in relation to qualifications for its management committee. Unlike FOG's current Constitution (subrule 34(1)), FOG's Gift Fund does not (it cannot) have its own objective because the Gift Fund is not an entity in itself.
- FOG's current Constitution contains rules relating to its Public Fund. Those rules have to be updated consistent with how FOG will operate its Gift Fund (rule 73).

For more information, look at this ATO page: www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/getting-started/in-detail/types-of-dgrs/dgr-table-deductible-gift-recipient-categories/environment#Environment