

**CONSTITUTION  
OF  
NEWCASTLE ART GALLERY  
FOUNDATION**

Adopted at EGM on 2 September 2019

**Australian Company Number (ACN) 001 547 968**

**A company limited by guarantee**

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## ***Preliminary***

### **1. Name of the company**

The name of the **company** is “Newcastle Art Gallery Foundation”.

### **2. Type of company**

The **company** is a not-for-profit public company limited by guarantee which is established to be, and to continue as, a charity.

### **3. Limited liability of members**

The liability of members is limited to the amount of the guarantee in Clause 4.

### **4. The guarantee**

Each member must contribute an amount not more than \$5 (the guarantee) to the property of the **company** if the **company** is wound up while the member is a member, or within 12 months after they stop being a member, and this contribution is required to pay for the:

- (a) debts and liabilities of the **company** incurred before the member stopped being a member, or
- (b) costs of winding up.

### **5. Definitions**

In this constitution, words and phrases have the meaning set out in Clauses 71 and 73.

## ***Charitable purposes and powers***

### **6. Objects**

The **company's** object is to act as the trustee of the Newcastle Art Gallery Foundation Trust and to facilitate the Newcastle Art Gallery Foundation Trust to raise, pay or apply funds solely for the purpose of providing money, property or benefits for the promotion, advancement and development of the **gallery** in all forms and in such manner that the **company** thinks fit, provided it is in accordance with the Public Ancillary Fund Guidelines and provided to an Eligible Entity as defined in the **trust deed**.

### **7. Powers**

Subject to clause 8 the **company** has the following powers, which may only be used to carry out its purpose(s) set out in Clause 6:

- (a) the powers of an individual, and
- (b) all the powers of a company limited by guarantee under the **Corporations Act**.

### **8. Not-For-Profit**

- 8.1 The **company** must not distribute any income or assets directly or indirectly to its members, except as provided in Clause 8.2 and Clause 70 Distribution of Assets.
- 8.2 Clause 8.1 does not stop the **company** from doing the following things, provided they are done in good faith and pursuant to the **trust deed**:
  - (a) paying a member for goods or services they have provided or expenses they have properly incurred at fair and reasonable rates or rates more favourable to the **company**, or
  - (b) making a payment to a member in carrying out the **company's** charitable purpose(s).

### **9. Amending the constitution**

- 9.1 Subject to Clause 9.2, the members may amend this constitution by passing a **special resolution**.
- 9.2 The members must not pass a **special resolution** that amends this constitution if passing it causes the **company** to no longer be a charity.

## **Members**

### **10. Membership and register of members**

- 10.1 The members of the **company** shall comprise the following classes:
- (a) Governor,
  - (b) Trustee,
  - (c) Fellow,
  - (d) General, and,
  - (e) Council.
- 10.2 Qualifications for classes of member shall be:
- (a) Governor – a person or entity who donates money, or makes a non-financial contribution to Newcastle Art Gallery Foundation and/or the **gallery** (including on a cumulative basis) not less than \$100,000.
  - (b) Trustee – a person or entity who donates money, or makes a non-financial contribution to Newcastle Art Gallery Foundation and/or the **gallery** (including on a cumulative basis) not less than \$15,000.
  - (c) Fellow – a person or entity who donates money, or makes a non-financial contribution to Newcastle Art Gallery Foundation and/or the **gallery** (including on a cumulative basis) not less than \$5,000.
  - (d) General – a person or entity who donates money, or makes a non-financial contribution to Newcastle Art Gallery Foundation and/or the **gallery** (including on a cumulative basis) not less than \$500.
  - (e) Council
- 10.3 The **company** must establish and maintain a register of members. The register of members must be kept by the secretary and must contain:
- (a) name,
  - (b) address and contact details,
  - (c) any alternative address or communication method nominated by the member for the service of notices,
  - (d) class of membership, and
  - (e) date the member was entered on to the register.
- 10.4 The **company** must give current members access to the register of members.
- 10.5 Information that is accessed from the register of members must only be used in a manner relevant to the interests or rights of members.

### **11. Who can be a member**

- 11.1 A person who supports the purposes of the **company** is eligible to apply to be a member of the **company** under Clause 12.
- 11.2 In this Clause, 'person' means an individual, a group of people such as a couple or family, or an entity or other incorporated body.

### **12. How to apply to become a member**

A person may apply to become a member by:

- (a) completing a membership application form, and

- (b) forwarding it, together with the amount required under clause 10.2 to become a member of the class of membership for which application is made, to the secretary of the **company**.

### **13. Directors decide whether to approve membership**

- 13.1 The directors must consider an application for membership within a reasonable time after the secretary receives the application
- 13.2 If the directors approve an application, the secretary must as soon as possible:
  - (a) enter the new member on the register of members, and
  - (b) write to the applicant to tell them that their application was approved, and the date that their membership started (refer Clause 14).
- 13.3 The Board may, at its discretion, determine to recognise a person as a member on the class of membership which the Board considers appropriate in recognition of a financial or non-financial contribution made by the person to the **company** and the **gallery**.
- 13.4 If the directors reject an application, the secretary must write to the applicant as soon as possible to tell them that their application has been rejected, but does not have to give reasons.

### **14. When a person becomes a member**

An applicant, for classes of member prescribed in Clauses 10.1 (a)-(d), will become a member when they have paid their membership fee appropriate to their nominated classification and are entered on the register of members.

### **15. When a person stops being a member**

A person immediately stops being a member if they:

- (a) die,
- (b) are wound up or otherwise dissolved or deregistered (for an incorporated member),
- (c) resign by writing to the secretary,
- (d) are expelled under Clause 17,
- (e) have not responded within three months to a written request from the secretary that they confirm in writing that they want to remain a member.

## ***Dispute resolution and disciplinary procedures***

### **16. Dispute resolution**

- 16.1 The dispute resolution procedure in this Clause applies to disputes (disagreements) under this constitution between a member or director and:
  - (a) one or more members
  - (b) one or more directors, or
  - (c) the **company**.
- 16.2 A member or a director must not start a dispute resolution procedure in relation to a matter which is the subject of a disciplinary procedure under Clause 17 until the disciplinary procedure is completed.
- 16.3 Those involved in the dispute must try to resolve it between themselves within 14 days of knowing about it.
- 16.4 If those involved in the dispute do not resolve it under Clause 16.3, they must within 10 days:
  - (a) tell the directors about the dispute in writing
  - (b) agree or request that a mediator be appointed, and
  - (c) attempt in good faith to settle the dispute by mediation.
- 16.5 The mediator must:

- (a) be chosen by agreement of those involved, or
  - (b) where those involved do not agree:
    - i. for disputes between members, be a person chosen by the directors, or
    - ii. for other disputes, be a person chosen by either the Commissioner of the Australian Charities and Not-for-profits Commission or the president of the law institute or society in the state or territory in which the **company** has its registered office.
- 16.6 A mediator chosen by the directors under Clause 16.5(b)(i):
- (a) may be a member or former member of the **company**
  - (b) must not have a personal interest in the dispute, and
  - (c) must not be biased towards or against anyone involved in the dispute.
- 16.7 When conducting the mediation, the mediator must:
- (a) allow those involved a reasonable chance to be heard
  - (b) allow those involved a reasonable chance to review any written statements
  - (c) ensure that those involved are given natural justice, and
  - (d) not make a decision on the dispute.

## 17. Disciplining members

- 17.1 In accordance with this Clause, the directors may resolve to warn, suspend or expel a member from the **company** if the directors consider that:
- (a) the member has breached this constitution, or
  - (b) the member's behaviour is causing, has caused, or is likely to cause harm to the **company**.
- 17.2 At least 14 days before the directors' meeting at which a resolution under Clause 17.1 will be considered, the secretary must notify the member in writing:
- (a) that the directors are considering a resolution to warn, suspend or expel the member
  - (b) that this resolution will be considered at a directors' meeting and the date of that meeting
  - (c) what the member is said to have done or not done
  - (d) the nature of the resolution that has been proposed, and
  - (e) that the member may provide an explanation to the directors, and details of how to do so.
- 17.3 Before the directors pass any resolution under Clause 17.1, the member must be given a chance to explain or defend themselves by:
- (a) sending the directors a written explanation before that directors' meeting, and/or
  - (b) speaking at the meeting.
- 17.4 After considering any explanation under Clause 17.3, the directors may:
- (a) take no further action
  - (b) warn the member
  - (c) suspend the member's rights as a member for a period of no more than 12 months
  - (d) expel the member
  - (e) refer the decision to an unbiased, independent person on conditions that the directors consider appropriate (however, the person can only make a decision that the directors could have made under this Clause), or
  - (f) require the matter to be determined at a **general meeting**.
- 17.5 The directors cannot fine a member.
- 17.6 The secretary must give written notice to the member of the decision under Clause 17.4 as soon as possible.

- 17.7 Disciplinary procedures must be completed as soon as reasonably practical.
- 17.8 There will be no liability for any loss or injury suffered by the member as a result of any decision made in good faith under this Clause.

### ***General meetings of members***

#### **18. General meetings called by directors**

- 18.1 The directors may call a **general meeting**.
- 18.2 If members with at least 5% of the votes that may be cast at a **general meeting** make a written request to the **company** for a **general meeting** to be held, the directors must:
  - (a) within 21 days of the members' request, give all members notice of a **general meeting**, and
  - (b) hold the **general meeting** within 2 months of the members' request.
- 18.3 The percentage of votes that members have (in Clause 18.2) is to be worked out as at midnight before the members request the meeting.
- 18.4 The members who make the request for a **general meeting** must:
  - (a) state in the request any resolution to be proposed at the meeting
  - (b) sign the request, and
  - (c) give the request to the **company**.
- 18.5 Separate copies of a document setting out the request may be signed by members if the wording of the request is the same in each copy.

#### **19. General meetings called by members**

- 19.1 If the directors do not call the meeting within 21 days of being requested under Clause 19.2, 50% or more of the members who made the request may call and arrange to hold a **general meeting**.
- 19.2 To call and hold a meeting under Clause 19.1 the members must:
  - (a) as far as possible, follow the procedures for **general meetings** set out in this constitution
  - (b) call the meeting using the list of members on the **company's** member register, which the **company** must provide to the members making the request at no cost, and
  - (c) hold the **general meeting** within three months after the request was given to the **company**.
- 19.3 The **company** must pay the members who request the **general meeting** any reasonable expenses they incur because the directors did not call and hold the meeting.

#### **20. Annual general meeting**

- 20.1 A **general meeting**, called the annual **general meeting**, must be held at least once in every calendar year.
- 20.2 Even if these items are not set out in the notice of meeting, the business of an annual **general meeting** may include:
  - (a) a review of the **company's** activities
  - (b) a review of the **company's** finances
  - (c) any auditor's report
  - (d) the election of directors, and

- (e) the appointment and payment of auditors, if any.
- 20.3 Before or at the annual **general meeting**, the directors must give information to the members on the **company's** activities and finances during the period since the last annual **general meeting**.
- 20.4 The chairperson of the annual **general meeting** must give members as a whole a reasonable opportunity at the meeting to ask questions or make comments about the management of the **company**.

## 21. Notice of general meetings

- 21.1 Notice of a **general meeting** must be given to:
  - (a) each member entitled to vote at the meeting,
  - (b) each director, and,
  - (c) the auditor (if any).
- 21.2 Notice of a **general meeting** must be provided in writing at least 21 days before the meeting.
- 21.3 Subject to Clause 21.4, notice of a meeting may be provided less than 21 days before the meeting if:
  - (a) for an annual **general meeting**, all the members entitled to attend and vote at the annual **general meeting** agree beforehand, or
  - (b) for any other **general meeting**, members with at least 95% of the votes that may be cast at the meeting agree beforehand.
- 21.4 Notice of a meeting cannot be provided less than 21 days before the meeting if a resolution will be moved to:
  - (a) remove a director,
  - (b) appoint a director in order to replace a director who was removed, or
  - (c) remove an auditor.
- 21.5 Notice of a **general meeting** must include:
  - (a) the place, date and time for the meeting (and if the meeting is to be held in two or more places, the technology that will be used to facilitate this),
  - (b) the general nature of the meeting's business,
  - (c) if applicable, that a **special resolution** is to be proposed and the words of the proposed resolution,
  - (d) a statement that members have the right to appoint proxies and that, if a member appoints a proxy:
    - i. the proxy does not need to be a member of the **company**
    - ii. the proxy form must be delivered to the **company** at its registered address or the address (including an electronic address) specified in the notice of the meeting, and
    - iii. the proxy form must be delivered to the **company** at least 48 hours before the meeting.
  - (e) a statement that members have the right to nominate for election to any available position, and
  - (f) a statement as to where and how proxy or nomination forms can be obtained.
- 21.6 If a **general meeting** is adjourned for one month or more, the members must be given new notice of the resumed meeting.

## 22. Quorum at general meetings

- 22.1 For a **general meeting** to be held, at least 8 members (if the meeting is called by directors) or at least 20 members (if the meeting is called by members) must be present (in person, by proxy or

by representative) for the whole meeting. When determining whether a quorum is present, a person may only be counted once (even if that person is a representative or proxy of more than one member).

- 22.2 No business may be conducted at a **general meeting** if a quorum is not present.
- 22.3 If there is no quorum present within 30 minutes after the starting time stated in the notice of **general meeting**, the **general meeting** is adjourned to the date, time and place that the chairperson specifies. If the chairperson does not specify one or more of those things, the meeting is adjourned to:
- (a) if the date is not specified – the same day in the next week
  - (b) if the time is not specified – the same time, and
  - (c) if the place is not specified – the same place.
- 22.4 If no quorum is present at the resumed meeting within 30 minutes after the starting time set for that meeting, the meeting is cancelled.

### **23. Auditor's right to attend meetings**

- 23.1 The auditor is entitled to attend any **general meeting** and to be heard by the members on any part of the business of the meeting that concerns the auditor in the capacity of auditor.
- 23.2 The **company** must give the auditor (if any) any communications relating to the **general meeting** that a member of the **company** is entitled to receive.

### **24. Representatives of members**

- 24.1 The Council member, an incorporated member or a joint member may appoint as a representative:
- (a) one individual to represent the member at meetings and to sign circular resolutions under Clause 31, and
  - (b) the same individual or another individual for the purpose of being appointed or elected as a director.
- 24.2 The appointment of a representative by a member must:
- (a) be in writing
  - (b) include the name of the representative
  - (c) be signed on behalf of the member, and
  - (d) be given to the **company** or, for representation at a meeting, be given to the chairperson before the meeting starts.
- 24.3 A representative has all the rights of a member relevant to the purposes of the appointment as a representative.
- 24.4 The appointment may be standing (ongoing).
- 24.5 When a member who is entitled to appoint a representative, makes an appointment under clause 24.2, that appointment automatically revokes any prior appointment by that member.

### **25. Using technology to hold meetings**

- 25.1 The **company** may hold a **general meeting** at two or more venues using any technology that gives the members as a whole a reasonable opportunity to participate, including to hear and be heard.
- 25.2 Anyone using this technology is taken to be present in person at the meeting.

### **26. Chairperson for general meetings**

- 26.1 The **elected chairperson** is entitled to chair **general meetings**.
- 26.2 The members present and entitled to vote at a **general meeting** may choose a director or member to be the chairperson for that meeting if:
- (a) there is no **elected chairperson**, or
  - (b) the **elected chairperson** is not present within 30 minutes after the starting time set for the meeting, or
  - (c) the **elected chairperson** is present but says they do not wish to act as chairperson of the meeting.

### **27. Role of the chairperson**

- 27.1 The chairperson is responsible for the conduct of the **general meeting**, and for this purpose must give members a reasonable opportunity to make comments and ask questions (including to the auditor (if any)).
- 27.2 The chairperson does not have a casting vote.

### **28. Adjournment of meetings**

- 28.1 If a quorum is present, a **general meeting** must be adjourned if a majority of **members present** direct the chairperson to adjourn it.
- 28.2 Only unfinished business may be dealt with at a meeting resumed after an adjournment.

## ***Members' resolutions and statements***

### **29. Members' resolutions and statements**

- 29.1 Members with at least 5% of the votes that may be cast on a resolution may give:
- (a) written notice to the **company** of a resolution they propose to move at a **general meeting** (members' resolution), and/or
  - (b) a written request to the **company** that the **company** give all of its members a statement about a proposed resolution or any other matter that may properly be considered at a **general meeting** (members' statement).
- 29.2 A notice of a members' resolution must set out the wording of the proposed resolution and be signed by the members proposing the resolution.
- 29.3 A request to distribute a members' statement must set out the statement to be distributed and be signed by the members making the request.
- 29.4 Separate copies of a document setting out the notice or request may be signed by members if the wording is the same in each copy.
- 29.5 The percentage of votes that members have (as described in Clause 29.1 is to be worked out as at midnight before the request or notice is given to the **company**).
- 29.6 If the **company** has been given notice of a members' resolution under Clause 29.1(a), the resolution must be considered at the next **general meeting** held more than two months after the notice is given.
- 29.7 This Clause does not limit any other right that a member has to propose a resolution at a **general meeting**.

### **30. Company must give notice of proposed resolution or distribute statement**

- 30.1 If the **company** has been given a notice or request under Clause 29:
- (a) in time to send the notice of proposed members' resolution or a copy of the members' statement to members with a notice of meeting, it must do so at the **company's** cost, or
  - (b) too late to send the notice of proposed members' resolution or a copy of the members' statement to members with a notice of meeting, then the members who proposed the resolution or made the request must pay the expenses reasonably incurred by the

**company** in giving members notice of the proposed members' resolution or a copy of the members' statement. However, at a **general meeting**, the members may pass a resolution that the **company** will pay these expenses.

- 30.2 The **company** does not need to send the notice of proposed members' resolution or a copy of the members' statement to members if:
- (a) it is more than 1,000 words long
  - (b) the directors consider it may be defamatory
  - (c) Clause 30.1(b) applies, and the members who proposed the resolution or made the request have not paid the **company** enough money to cover the cost of sending the notice of the proposed members' resolution or a copy of the members' statement to members, or
  - (d) in the case of a proposed members' resolution, the resolution does not relate to a matter that may be properly considered at a **general meeting** or is otherwise not a valid resolution able to be put to the members.

### **31. Circular resolutions of members**

- 31.1 Subject to Clause 31.3, the directors may put a resolution to the members to pass a resolution without a **general meeting** being held (a circular resolution).
- 31.2 The directors must notify the auditor (if any) as soon as possible that a circular resolution has or will be put to members, and set out the wording of the resolution.
- 31.3 Circular resolutions cannot be used:
- (a) for a resolution to remove an auditor, appoint a director or remove a director
  - (b) for passing a **special resolution**, or
  - (c) where the **Corporations Act** or this constitution requires a meeting to be held.
- 31.4 A circular resolution is passed if all the members entitled to vote on the resolution sign or agree to the circular resolution, in the manner set out in Clause 31.5 or Clause 31.6.
- 31.5 Members may sign:
- (a) a single document setting out the circular resolution and containing a statement that they agree to the resolution, or
  - (b) separate copies of that document, as long as the wording is the same in each copy.
- 31.6 The **company** may send a circular resolution by email to members and members may agree by sending a reply email to that effect, including the text of the resolution in their reply.

## ***Voting at general meetings***

### **32. How many votes a member has**

Each member has one vote, except in relation to a special resolution where the **Council member** is entitled to exercise votes equivalent to twenty six per centum of all votes cast on any special resolution at any general meeting of the Company.

### **33. Challenge to member's right to vote**

- 33.1 A member or the chairperson may only challenge a person's right to vote at a **general meeting** at that meeting.
- 33.2 If a challenge is made under Clause 33.1, the chairperson must decide whether or not the person may vote. The chairperson's decision is final.

### **34. How voting is carried out**

- 34.1 Voting must be conducted and decided by:
- (a) a show of hands, or

- (b) a vote in writing, or
  - (c) another method chosen by the chairperson that is fair and reasonable in the circumstances.
- 34.2 Before a vote is taken, the chairperson must state whether any proxy votes have been received and, if so, how the proxy votes will be cast.
- 34.3 On a show of hands, the chairperson's decision is conclusive evidence of the result of the vote.
- 34.4 The chairperson and the meeting minutes do not need to state the number or proportion of the votes recorded in favour or against on a show of hands.

### 35. When and how a vote in writing must be held

- 35.1 A vote in writing may be demanded on any resolution instead of or after a vote by a show of hands by:
- (a) at least five **members present**
  - (b) **members present** with at least 5% of the votes that may be passed on the resolution on the vote in writing (worked out as at the midnight before the vote in writing is demanded), or
  - (c) the chairperson.
- 35.2 A vote in writing must be taken when and how the chairperson directs, unless Clause 35.3 applies.
- 35.3 A vote in writing must be held immediately if it is demanded under Clause 35.1:
- (a) for the election of a chairperson under Clause 26.2, or
  - (b) to decide whether to adjourn the meeting.
- 35.4 A demand for a vote in writing may be withdrawn.

### 36. Appointment of proxy

- 36.1 A member may appoint a proxy to attend and vote at a **general meeting** on their behalf.
- 36.2 A proxy does not need to be a member.
- 36.3 A proxy appointed to attend and vote for a member has the same rights as the member to:
- (a) speak at the meeting
  - (b) vote in a vote in writing only to the extent allowed by the appointment, and
  - (c) join in to demand a vote in writing under Clause 35.1.
- 36.4 An appointment of proxy (proxy form) must be signed by the member appointing the proxy and must contain:
- (a) the member's name and address
  - (b) the **company's** name
  - (c) the proxy's name or the name of the office held by the proxy, and
  - (d) the meeting(s) at which the appointment may be used.
- 36.5 A proxy appointment may be standing (ongoing).
- 36.6 Proxy forms must be received by the **company** at the address stated in the notice under Clause 21.5(d) or at the **company's** registered address at least 48 hours before a meeting.
- 36.7 A proxy does not have the authority to speak and vote for a member at a meeting while the member is at the meeting.
- 36.8 Unless the **company** receives written notice before the start or resumption of a **general meeting** at which a proxy votes, a vote cast by the proxy is valid even if, before the proxy votes, the appointing member:
- (a) dies
  - (b) is mentally incapacitated
  - (c) revokes the proxy's appointment, or
  - (d) revokes the authority of a representative or agent who appointed the proxy.

36.9 A proxy appointment may specify the way the proxy must vote on a particular resolution.

### **37. Voting by proxy**

37.1 A proxy is not entitled to vote on a show of hands (but this does not prevent a member appointed as a proxy from voting as a member on a show of hands).

37.2 When a vote in writing is held, a proxy:

- (a) does not need to vote, unless the proxy appointment specifies the way they must vote
- (b) if the way they must vote is specified on the proxy form, must vote that way, and
- (c) if the proxy is also a member or holds more than one proxy, may cast the votes held in different ways.

## **Directors**

### **38. Number of directors**

The **company** must have a Board of at least five and no more than twelve directors. The Board shall consist of:

- (a) one director who is a Governor or Trustee member,
- (b) one director who is a Fellow member,
- (c) one director who is a General member,
- (d) up to five further directors from any class of membership,
- (e) up to three invited directors, and,
- (f) one **Council nominated Director** who is nominated by the Council member under clause 24.

### **39. Election and appointment of directors**

39.1 Directors elected under Clause 38 (a) and (b) and (c) and (d) must be nominated by two members and elected by resolution passed in an annual **general meeting**. (Clause 20.1)

39.2 Directors under Clause 38 (e) are automatically appointed to the Board and do not require a resolution to be passed in an annual **general meeting**.

39.3 Each of the directors elected under Clause 38 (a) and (b) and (c) and (d) must be appointed by a separate resolution, unless:

- (a) the members present have first passed a resolution that the appointments may be voted on together, and
- (b) no votes were cast against that resolution.

39.4 A person may be elected as a director of the **company** provided they give the **company** their signed consent to act as a director of the **company** within 7 days of election.

39.5 A person is not able to be appointed as a director if they are ineligible to be a director under the **Corporations Act** or the **ACNC Act**.

39.6 If the number of directors is reduced to fewer than five or is less than the number required for a quorum, the continuing directors may act for the purpose of increasing the number of directors to five (or higher if required for a quorum or calling a **general meeting**), but for no other purpose.

39.7 The Board has the power to make director appointments to fill any casual vacancy.

39.8 The Board has the power to invite up to three (3) persons at any given point in time, to be directors

### **40. Election of chairperson and office bearers**

The directors must elect a director as the **company's elected chairperson** and elect other directors as **office bearers** at a meeting to be held within two weeks of the annual general meeting.

#### **41. Term of office**

- 41.1 All directors except the **Council nominated director** must retire at the annual **general meeting**.
- 41.2 A director who retires under Clause 41.1 may nominate for election or re-election.
- 41.3 A director's term of office, where the director is elected at the annual **general meeting**, starts at the end of the annual **general meeting** at which they are elected and ends at the end of the annual **general meeting** at which they retire.
- 41.4 Any director appointed to fill a casual vacancy holds office only until the next annual general meeting.
- 41.5 An invited director must retire at the annual **general meeting** as per Clause 41.1 however the Board may also resolve at any time to end their appointment as a director prior to the annual **general meeting**.
- 41.6 Except for the **Council nominated director** any director who has been a director for a continuous period of nine years or more, requires a **special resolution** to be passed in order to be elected.

#### **42. When a director stops being a director**

A director stops being a director if they:

- (a) give written notice of resignation as a director to the **company**
- (b) die
- (c) are removed as a director by a resolution of the members, except in the case of the Council nominated Director to whom the provisions of clause 24 apply.
- (d) stop being a member of the **company**
- (e) are absent for three consecutive directors' meetings without approval from the directors,
- (f) become ineligible to be a director of the **company** under the **Corporations Act** or the **ACNC Act**, or,
- (g) being an invited director, are removed as a director by resolution of the board.

### ***Powers of directors***

#### **43. Powers of directors**

- 43.1 The directors are responsible for managing and directing the activities of the **company** to achieve the purposes set out in Clause 6.
- 43.2 The directors may use all the powers of the **company** except for powers that, under the **Corporations Act** or this constitution, may only be used by members.
- 43.3 The directors must decide on the responsible financial management of the **company** including:
  - (a) any suitable written delegations of power under Clause 44, and
  - (b) how money will be managed, such as how electronic transfers, negotiable instruments or cheques must be authorised and signed or otherwise approved.
- 43.4 The directors cannot remove a director or auditor, except for invited directors who may be removed as per Clause 41.5 and 42 (g). Unless otherwise specifically provided, directors and auditors may only be removed by a members' resolution at a **general meeting**.

#### **44. Delegation of directors' powers**

- 44.1 The directors may delegate any of their powers and functions to a committee or a director as the Board consider appropriate.
- 44.2 The delegation must be recorded in the **company's** minute book.

44.3 Notwithstanding Clause 44.1 the Board remains responsible for the actions of the delegate.

#### **45. Payments to directors**

45.1 The **company** must not pay fees to a director for acting as a director.

45.2 The **company** may:

- (a) pay a director for work they do for the **company**, other than as a director, if the amount is no more than a reasonable fee for the work done, or
- (b) reimburse a director for expenses properly incurred by the director in connection with the affairs of the **company**.

45.3 Any payment made under Clause 45.2 must be approved by the directors.

45.4 The **company** may pay premiums for insurance indemnifying directors, as allowed for by law (including the **Corporations Act**) and this constitution.

#### **46. Execution of documents**

The **company** may execute a document without using a common seal if the document is signed by any two directors (or a director and the company secretary); but wherever practicable the Chair (or the Acting Chair) should be one of such signatories.

### ***Duties of directors***

#### **47. Duties of directors**

The directors must comply with their duties as directors under legislation and common law (judge-made law), and with the duties described in governance standard 5 of the regulations made under the **ACNC Act** which are:

- (a) to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable individual would exercise if they were a director of the **company**
- (b) to act in good faith in the best interests of the **company** and to further the charitable purpose(s) of the **company** set out in Clause 6
- (c) not to misuse their position as a director
- (d) not to misuse information they gain in their role as a director
- (e) to disclose any perceived or actual material conflicts of interest in the manner set out in Clause 48.
- (f) to ensure that the financial affairs of the **company** are managed responsibly, and
- (g) not to allow the **company** to operate while it is insolvent.

#### **48. Conflicts of interest**

48.1 A director must disclose the nature and extent of any actual or perceived material conflict of interest in a matter that is being considered at a meeting of directors (or that is proposed in a circular resolution):

- (a) to the other directors, or
- (b) if all of the directors have the same conflict of interest, to the members at the next **general meeting**, or at an earlier time if reasonable to do so.

48.2 The disclosure of a conflict of interest by a director must be recorded in the minutes of the meeting.

48.3 Each director who has a material personal interest in a matter that is being considered at a meeting of directors (or that is proposed in a circular resolution) must not, except as provided under Clauses 48.4:

- (a) be present at the meeting while the matter is being discussed, or
- (b) vote on the matter.

- 48.4 A director may still be present and vote if:
- (a) their interest arises because they are a member of the **company**, and the other members have the same interest
  - (b) their interest relates to an insurance contract that insures, or would insure, the director against liabilities that the director incurs as a director of the **company** (see Clause 67)
  - (c) their interest relates to a payment by the **company** under Clause 67 (indemnity), or any contract relating to an indemnity that is allowed under the **Corporations Act**
  - (d) in relation to the **Council nominated Director**
    - (i) their interest relates to them being a councillor of or employee of Newcastle City Council, and,
    - (ii) their interest does not otherwise offend Clause 47.
  - (e) the Australian Securities and Investments Commission (ASIC) makes an order allowing the director to vote on the matter, or
  - (f) the directors who do not have a material personal interest in the matter pass a resolution that:
    - (i) identifies the director, the nature and extent of the director's interest in the matter and how it relates to the affairs of the **company**, and
    - (ii) says that those directors are satisfied that the interest should not stop the director from voting or being present.

### ***Directors' meetings***

#### **49. When the directors meet**

The directors may decide how often, where and when they meet.

#### **50. Calling directors' meetings**

- 50.1 A director may call a directors' meeting by giving reasonable notice to all of the other directors.
- 50.2 A director may give notice in writing or by any other means of communication that has previously been agreed to by all of the directors.

#### **51. Chairperson for directors' meetings**

- 51.1 The **elected chairperson** is entitled to chair directors' meetings.
- 51.2 The directors at a directors' meeting may choose a director to be the chairperson for that meeting if the **elected chairperson** is:
- (a) not present within 30 minutes after the starting time set for the meeting, or
  - (b) present but does not want to act as chairperson of the meeting.

#### **52. Quorum at directors' meetings**

- 52.1 Unless the directors determine otherwise, the quorum for a directors' meeting is a majority (more than 50%) of directors.
- 52.2 A quorum must be present for the whole directors' meeting.

#### **53. Attendance of invited guests at directors' meetings**

- 53.1 The directors may invite any person to attend a directors meeting on such terms and for such period as the directors see fit; and the directors may withdraw or qualify that invitation at any time
- 53.2 The directors are not required to give any reason for any term or limitation imposed on the attendance of an invited guest.

53.3 A person invited to attend a directors meeting may not participate in the deliberations of the directors unless specifically called upon to do so.

53.4 Without restricting the generality of this clause, the Gallery Director may attend Board meetings and observe proceedings at them.

#### **54. Using technology to hold directors' meetings**

54.1 The directors may hold their meetings by using any technology (such as video or teleconferencing) that is agreed to by all of the directors.

54.2 The directors' agreement may be a standing (ongoing) one.

54.3 A director may only withdraw their consent within a reasonable period before the meeting.

#### **55. Passing directors' resolutions**

A directors' resolution must be passed by a majority of the votes cast by directors present and entitled to vote on the resolution.

#### **56. Circular resolutions of directors**

56.1 The directors may pass a circular resolution without a directors' meeting being held.

56.2 A circular resolution may only be initiated by the Chair or the Secretary.

56.3 A circular resolution is passed if:

- (a) 75% of the directors entitled to vote on the resolution, sign or otherwise agree to the resolution in the manner set out in Clause 56.4;
- (b) The signature by or agreement to the resolution, as required by clause 56.4, occurs within 7 days of the circulation of the resolution (that period lasting to midnight on the 7<sup>th</sup> day after, and including, the day on which the resolution was circulated); and,
- (c) No director, by notice in writing to all other directors sent within the period provided in clause 56.3 (b), opposes the Motion.

56.4 The **company** may send a circular resolution by email to the directors and the directors may agree to the resolution by signing either:

- (a) a single document setting out the content of the resolution and containing a statement that they agree to the resolution, or
- (b) separate copies of that document, as long as the wording of the resolution is the same in each copy,

and sending the signed document or documents by email to the **company** using the addresses for the Chair or the Secretary or both.

56.5 A circular resolution is passed, but subject to the provisos in clause 56.3, when the last director signs or otherwise agrees to the resolution in the manner set out in Clause 0.

56.6 All circular resolutions should be noted at the next board meeting and recorded in the minutes.

### **Secretary**

#### **57. Appointment and role of secretary**

57.1 The **company** must have at least one secretary, who may also be a director.

57.2 A secretary must be appointed by the directors after giving the **company** their signed consent to act as secretary of the **company** and may be removed by the directors.

57.3 The directors must decide the terms and conditions under which the secretary is appointed.

57.4 The role of the secretary includes:

- (a) maintaining a register of the **company's** members, and
- (b) maintaining the minutes and other records of **general meetings** (including notices of meetings), directors' meetings and circular resolutions.

## ***Minutes and records***

### **58. Minutes and records**

- 58.1 The **company** must, within one month, make and keep the following records:
- (a) minutes of proceedings and resolutions of **general meetings**
  - (b) minutes of circular resolutions of members
  - (c) a copy of a notice of each **general meeting**, and
  - (d) a copy of a members' statement distributed to members under Clause 30.
- 58.2 The **company** must, within one month, make and keep the following records:
- (a) minutes of proceedings and resolutions of directors' meetings (including meetings of any committees), and
  - (b) minutes of circular resolutions of directors.
- 58.3 To allow members to inspect the **company's** records:
- (a) the **company** must give a member access to the records set out in Clause 58.1, and
  - (b) the directors may authorise a member to inspect other records of the **company**, including records referred to in Clause 58.2 and Clause 60.1.
- 58.4 The directors must ensure that minutes of a **general meeting** or a directors' meeting are signed within a reasonable time after the meeting by:
- (a) the chairperson of the meeting, or
  - (b) the chairperson of the next meeting.
- 58.5 The directors must ensure that minutes of the passing of a circular resolution (of members or directors) are signed by a director within a reasonable time after the resolution is passed.

## ***Treasurer***

### **59. Appointment and role of treasurer**

- 59.1 The **company** may have a treasurer who may also be a director.
- 59.2 A treasurer may be appointed by the directors after giving the **company** their signed consent to act as treasurer of the **company** and may be removed by the directors.
- 59.3 The directors must decide the terms and conditions under which the treasurer is appointed.

### **60. Financial and related records**

- 60.1 The **company** must make and keep written financial records that:
- (a) correctly record and explain its transactions and financial position and performance, and
  - (b) enable true and fair financial statements to be prepared and to be audited.
- 60.2 The **company** must also keep written records that correctly record its operations.
- 60.3 The **company** must retain its records for at least 7 years.
- 60.4 The directors must take reasonable steps to ensure that the **company's** records are kept safe.

## ***By-laws***

### **61. By-laws**

- 61.1 The directors may pass a resolution to make by-laws to give effect to this constitution.
- 61.2 Members and directors must comply with by-laws as if they were part of this constitution.

## ***Notice***

### **62. What is notice**

- 62.1 Anything written to or from the **company** under any Clause in this constitution is written notice and is subject to Clauses 63 to 65 unless specified otherwise.
- 62.2 Clauses 63 to 65 do not apply to a notice of proxy under Clause 36.6.

### **63. Notice to the company**

Written notice or any communication under this constitution may be given to the **company**, the directors or the secretary by:

- (a) delivering it to the **company's** registered office.
- (b) posting it to the **company's** registered office or to another address chosen by the **company** for notice to be provided, or
- (c) sending it to an email address or other electronic address notified by the **company** to the members as the **company's** email address or other electronic address.

### **64. Notice to members**

64.1 Written notice or any communication under this constitution may be given to a member:

- (a) in person
- (b) by posting it to, or leaving it at the address of the member in the register of members or an alternative address (if any) nominated by the member for service of notices
- (c) sending it to the email or other electronic address nominated by the member as an alternative address for service of notices (if any)
- (d) sending it to the fax number nominated by the member as an alternative address for service of notices (if any), or
- (e) if agreed to by the member, by notifying the member at an email or other electronic address nominated by the member, that the notice is available at a specified place or address (including an electronic address).

64.2 If the **company** does not have an address for the member, the **company** is not required to give notice in person.

### **65. When notice is taken to be given**

A notice:

- (a) delivered in person, or left at the recipient's address, is taken to be given on the day it is delivered
- (b) sent by post, is taken to be given on the third business day after it is posted with the correct payment of postage costs
- (c) sent by email, fax or other electronic method, is taken to be given on the business day after it is sent, and
- (d) given under Clause 64.1(e) is taken to be given on the business day after the notification that the notice is available is sent.

## ***Financial year***

### **66. Company's financial year**

The **company's** financial year is from 1 July to 30 June, unless the directors pass a resolution to change the financial year.

## ***Indemnity, insurance and access***

### **67. Indemnity**

- 67.1 The **company** indemnifies each officer of the **company** out of the assets of the **company**, to the relevant extent, against all losses and liabilities (including costs, expenses and charges) incurred by that person as an officer of the **company**.
- 67.2 In this Clause, 'officer' means a director or secretary and includes a director or secretary after they have ceased to hold that office.
- 67.3 In this Clause, 'to the relevant extent' means:
- (a) to the extent that the **company** is not precluded by law (including the **Corporations Act**) from doing so, and
  - (b) for the amount that the officer is not otherwise entitled to be indemnified and is not actually indemnified by another person (including an insurer under an insurance policy).
- 67.4 The indemnity is a continuing obligation and is enforceable by an officer even though that person is no longer an officer of the **company**.

### **68. Insurance**

To the extent permitted by law (including the **Corporations Act**), and if the directors consider it appropriate, the **company** may pay or agree to pay a premium for a contract insuring a person who is or has been an officer of the **company** against any liability incurred by the person as an officer of the **company**.

### **69. Directors' access to documents**

- 69.1 A director, but not a former director, has a right of access to the financial records of the **company** at all reasonable times.
- 69.2 If a majority of directors agree, the **company** must give a director or former director access to:
- (a) documents provided for or available to the directors, and
  - (b) any other documents referred to in those documents.

## ***Winding up***

### **70. Distribution of surplus assets**

- 70.1 Subject to the **Corporations Act** and any other applicable Act, and any court order, any **surplus assets** that remain after the **company** is wound up must not be distributed to members and must be distributed as per the **trust deed**.
- 70.2 If the **trust deed** requires the **surplus assets** to be distributed to an approved entity as defined in the **trust deed**, then the decision as to the approved entity to be given the **surplus assets** must be made by a **special resolution** of members at or before the time of winding up. If the members do not make this decision, the **company** may apply to the Supreme Court to make this decision.

## ***Definitions and interpretation***

### **71. Definitions**

In this constitution:

**ACNC Act** means the *Australian Charities and Not-for-profits Commission Act 2012* (Cth).

**Company** means the company referred to in Clause 1.

**Council nominated Director** means the person nominated from time to time under clause 24.

**Council, or Council Member** means Newcastle City Council.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**elected chairperson** means a person elected by the directors to be the **company's** chairperson under Clause 40.

**gallery** means the Newcastle Art Gallery.

**Gallery Director** means the person appointed by Newcastle City Council as the Director of the Newcastle Art Gallery.

**general meeting** means a meeting of members and includes the annual **general meeting**, under Clause 20.1.

**member present** means, in connection with a **general meeting**, a member present in person, by representative or by proxy at the venue or venues for the meeting.

**office bearers** means Chairperson, Treasurer and Secretary.

**registered charity** means a charity that is registered under the **ACNC Act**.

**special resolution** means a resolution:

- i. of which notice has been given under Clause 21.5(c), and
- ii. that has been passed by at least 75% of the votes cast by **members present** and entitled to vote on the resolution, and

**surplus assets** means any assets of the **company** that remain after paying all debts and other liabilities of the **company**, including the costs of winding up.

**trust deed** means the Supplemental Deed of Trust for the Newcastle Art Gallery Foundation Trust dated 17 June 2015 and any later variation or replacement of that Deed.

## **72. Reading this constitution with the Corporations Act**

72.1 The replaceable rules set out in the **Corporations Act** do not apply to the **company**.

72.2 While the **company** is a **registered charity**, the **ACNC Act** and the **Corporations Act** override any Clauses in this constitution which are inconsistent with those Acts.

72.3 If the **company** is not a **registered charity** (even if it remains a charity), the **Corporations Act** overrides any Clause in this constitution which is inconsistent with that Act.

72.4 A word or expression that is defined in the **Corporations Act**, or used in that Act and covering the same subject, has the same meaning as in this constitution.

## **73. Interpretation**

In this constitution:

- (a) the words 'including', 'for example', or similar expressions mean that there may be more inclusions or examples than those mentioned after that expression, and
- (b) reference to an Act includes every amendment, re-enactment, or replacement of that Act and any subordinate legislation made under that Act (such as regulations).