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Memorandum

To **Greening Australia**

From Peter Seidel and Caitlin Edwards

File No. 011362471

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Subject **Constitutional refresh**



MELBOURNE

SYDNEY

Constitutional refresh project

- 1 Arnold Bloch Leibler was engaged by Greening Australia to prepare a revised Constitution for the consideration of Greening Australia Members.
- 2 We are instructed that the purpose of the constitutional refresh project is to ensure that Greening Australia has a contemporary governing document to support the organisation's mission, vision and strategy.
- 3 Before commencing the drafting exercise, we were provided with a list of threshold issues and opportunities in relation to the existing Constitution. These issues include complicated classes of Membership, inappropriate alternate Director provisions, unnecessarily complex administrative procedures and some legacy issues from Greening Australia's transition away from a federated structure.
- 4 We share the Board's view that the existing Greening Australia Constitution is in need of updating. Since its adoption there have also been significant changes to the regulatory environment for charities.
- 5 The ongoing role for the Australian Charities and Not-for-profits Commission is now secure and charities incorporated as companies must have a clear understanding of the interaction between the ACNC legislation and corporations law. The ACNC Governance Standards also provide an opportunity for charities to design a flexible governance structure that is appropriate for their size, purpose, existing structures and context.
- 6 In recent months Arnold Bloch Leibler has prepared a template constitution as a benchmark for best practice governance for registered charities. We have used this template as the basis for Greening Australia's proposed new Constitution and adapted it as required, with guidance from Arianne Rose and Brendan Foran.
- 7 Our overriding approach is to seek to preserve maximum flexibility for Greening Australia and ensure accountability to Members. In our view, the proposed new Constitution supports Greening Australia's mission and its commitment to remaining relevant, adaptive and independent.

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Key changes in proposed new Constitution

Objects

- 8 The proposed Constitution retains the same overarching statement of objects but removes additional vestigial objects relating to the previous “group” of companies.
- 9 Our understanding is that Greening Australia has not shifted in its fundamental objects, but the means by which it pursues those objects has necessarily evolved.
- 10 In our view, amending the objects to reflect changing priorities or activities is not advisable. The Constitution provides flexibility in this regard and contemporary mission statements and priorities can be contained in a separate policy document. In our view, amending the primary objects would only invite unnecessary reassessment of Greening Australia’s eligibility for charitable tax concessions and Deductible Gift Recipient status.
- 11 We also confirm that the proposed Constitution supports Greening Australia’s enterprises and commercial activities, in furtherance of its charitable objects (see clause 2.2(e)).

Membership

- 12 The proposed Constitution proposes only one class of Membership, with flexibility for the Board to create other classes of Members. This is in contrast to the existing classes of ordinary, regional, life and affiliate Members.
- 13 All Members have the right to vote (clauses 6.1 and 14.7) and must pay an annual Subscription (clauses 5.3(c) and 5.6).
- 14 We understand that the Board intends to exercise its power under clause 5.2 to establish a separate class of Membership for Life Members. The Board may also exercise its discretion to set the Subscription for such Members at \$0.
- 15 The quorum for General Meetings remains 15 Members (clause 13.1). This quorum is more than the 10% threshold provided in the ACNC template constitution for companies limited by guarantee and cannot be satisfied by attendance by only those Members who are appointed to the Board.

Board of Directors

- 16 References to ‘President’ have been replaced with Chairperson.
- 17 The proposed Constitution provides that Directors must be Members (clause 16.2) and other than in the situation of a casual vacancy or addition to the Board, Directors are to be appointed by Members (see clause 17).

- 18 The proposed Constitution does not allow for the appointment of Alternate Directors. In our view, Alternate Directors are not required for an organisation like Greening Australia where Directors are not appointed in a representative capacity.
- 19 Though the ACNC has released new guidance on the remuneration of charity Directors, the proposed Constitution continues to provide for these positions to be honorary. A Director may however be paid if engaged to work for the Company in a capacity other than Director(see clause 19).

Interaction between ACNC Act and Corporations Act

- 20 The proposed Constitution takes account of the interaction between the ACNC Act and the Corporations Act (see clause 1.3 and references to Applicable Act).
- 21 It also makes clear the requirement to comply with the specific duties in ACNC Governance Standard 5, which depart slightly from Directors' duties under the Corporations Act (see clause 20.3).
- 22 We note that Governance Standard 5 is being reviewed as part of the ongoing five year review of the ACNC legislation and may be amended to realign charity Directors' duties with the Corporations Act. We will keep the Board updated on any relevant amendments.

Register of Environmental Organisations

- 23 The proposed Constitution maintains the mandatory clauses for Greening Australia's entry on the Register of Environmental Organisations and Deductible Gift Recipient status.
- 24 The Commonwealth Government has announced changes to the Register of Environmental Organisations which would see the Register shifted from the Department of Environment and Energy to the ACNC. If this change goes ahead, we understand that public fund requirements will also be abolished.
- 25 In our view, merging the REO with the ACNC is likely to streamline Greening Australia's reporting requirements and lead to other efficiency improvements.
- 26 Greening Australia may want to seek our advice in late 2019 on whether this reform requires further amendments to the Constitution at that time. In the meantime, we have drafted the proposed Constitution to ensure maximum flexibility by using language such as "*if required under the Tax Act*" in clause 4.1 and "*if required by Tax Act or the Guidelines to the Register of Environmental Organisations*" in clause 4.5.

Advisory committees

- 27 Instead of mandating particular advisory committees and prescribing their responsibilities, the proposed Constitution authorises the Board to appoint advisory committees as required (see clause 21.5).

- 28 Clause 21.5(b) makes clear that an advisory committee will act in an advisory capacity only and conform to any direction of the Board. In our view, this clause is important to reduce the risk of advisory committee members being seen to act as shadow directors. In our view, this is a potential weakness in the existing Constitution.
- 29 Consistent with the preference for flexibility, we recommend that Greening Australia establishes a Board Charter that identifies the composition, roles and responsibilities of advisory committees. Any such Board Charter will be consistent with and build upon the governance framework provided in the Constitution.

Power to censure members and dispute resolution

- 30 Updated processes for discipline and dispute resolution have been included in clauses 9 and 11, drawing on ACNC recommendations regarding best practice.
- 31 While such provisions are seldom used, it is important the Members are provided with procedural fairness and an opportunity to be heard.

Technology

- 32 The proposed Constitution includes provisions to allow the Board to pass circular resolutions via email (clause 22.9)
- 33 Simplified execution provisions have also been included as a replacement for a company seal (clause 25).

Please let us know if the Board or Members have any questions in relation to the proposed Constitution.

Kind regards

Peter Seidel and Caitlin Edwards