

Constitution

Energy Assured Limited

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1. NAME OF THE COMPANY

The name of the Company is Energy Assured Limited.

2. TYPE OF COMPANY

2.1 Type of Company

The Company is a not-for-profit public company limited by guarantee.

2.2 Member's Liability

- (a) Subject to this Constitution, each person who is a Member and each person who was a Member during the year ending on the day of the commencement of the winding up of the Company, undertakes to contribute to the property of the Company for:
- (i) payment of debts and liabilities of the Company;
 - (ii) payment of the costs, charges and expenses of winding up; and
 - (iii) any adjustment of the rights of the contributories among Members.
- (b) The amount that each Member or past Member is liable to contribute is limited to one dollar (\$1.00).
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3. REPLACEABLE RULES

This Constitution displaces the Replaceable Rules to the extent that it is inconsistent with any Replaceable Rules.

4. DEFINITIONS AND INTERPRETATION

4.1 Definitions

In this Constitution, unless there is something in the subject or context which is inconsistent:

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

Alternate Director means any natural person appointed by a Director for the time being to hold the office of alternate director.

Annual General Meeting means the annual general meeting of the Members of the Company.

Annual Subscription means the subscription fees payable by Members pursuant to **clause 13**.

Board means the Board of Directors.

Chair means the person holding that office under this Constitution and includes any assistant or acting chair.

Code Manager has the meaning given to it in the Code of Practice.

Code of Practice means the document, as amended from time to time pursuant to **clause 16.1**, setting out the minimum competence standards in respect of the conduct and activities of door-to-door sales agents and includes the Procedures Guideline.

Code Panel means the panel appointed by the Board in accordance with **clause 16.3**.

Committee means a committee established in accordance with **clause 56**.

Company means Energy Assured Limited.

Constitution means this Constitution as amended or supplemented from time to time.

Consumer means a small business customer or residential customer who purchases electricity or gas at a rate below the maximum threshold amount as determined by the relevant State or Territory legislation for the purposes of defining a small business and/or residential customer within that State or Territory.

Deputy Chair means the deputy chair of the Board elected pursuant to **clause 53.2**.

Director means any person holding the position of a director of the Company (including the ERAA Director, Ordinary Directors and Energy Marketer Directors) and **Directors** means the directors for the time being of the Company or, as the context permits, such number of them as have authority to act for the Company.

Energy Marketer means an entity that employs or otherwise engages door-to-door sales agents and is retained, pursuant to a current contract, by a Licensed Energy Retailer to undertake door-to-door sales and marketing campaigns to sell electricity and gas to Consumers on behalf of the Licensed Energy Retailer.

Energy Marketer Member means a Member of the Company which satisfies the criteria set out in **clause 10.2(d)**.

ERAA means the Energy Retailers Association of Australia ABN 24 103 742 605.

ERAA Director means the person holding office pursuant to **clause 42.1**.

ERAA Member means ERAA in its role as a Member of the Company pursuant to **clause 10.2(a)**.

Financial Year means the period commencing on 1 July in any calendar year to 30 June in the following calendar year (both inclusive).

Individual Member means a Member of the Company who is a natural person.

Intellectual Property means:

- (a) any intellectual, industrial or commercial information or property (whether in material form or not), or rights of a proprietary nature, including without limitation:

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- (i) any copyright, patent, petty patent, design, trade mark, service mark, domain name, confidential information, trade secret, know-how, database; or
 - (ii) any rights protected or recognised under any laws related to the above or any similar laws; and
- (b) anything (whether in material form or not) copied or derived from the above property or rights.

Interest means the interest rate charged by the Company's financial institution on overdrafts of at least \$100,000.00 plus 2%.

Joining Fee means the fee payable by an applicant for Membership, which is determined by the Board from time to time.

Large Active Retailer Member means a Member of the Company which satisfies the criteria set out in **clause 10.2(b)**.

Licensed Energy Retailer means an entity that holds a valid retail supplier's licence (**Licence**), or similar authorisation, issued by the relevant government regulator to operate in the electricity and gas retail market in the State or Territory identified and pursuant to the terms and conditions contained in the Licence.

Member means a member of the Company pursuant to **clause 7** (and **Membership** has the corresponding meaning) and includes the:

- (a) ERAA Member;
- (b) Large Active Retailer Members;
- (c) Non-Active Retailer Members;
- (d) Energy Marketer Members; and
- (e) Small Active Retailer Members.

Member's Guarantee Amount means the amount referred to in **clause 2.2(b)**.

Non-Active Retailer Member means a Member of the Company which satisfies the criteria set out in **clause 10.2(c)**.

Objects mean the objects of the Company as set out in **clause 5.1**.

Office means the registered office for the time being of the Company.

Officer has the same meaning as given to that term in section 9 of the Act.

Ordinary Director means a Director referred to in **clause 41.1(b)**.

Organisational Member means a Member of the Company which is a body corporate.

Procedures Guideline means a guideline that sets out the procedures underlying the Code of Practice that forms part of the Code of Practice.

Quarter means the three (3) month period ending on 31 March, 30 June, 30 September and 31 December, and **Quarterly** has a corresponding meaning.

Regime means the regime created by the Code of Practice.

Register of Members means the register of Members to be kept pursuant to the Act and **clause 64**.

Registration Fee means the fee which is payable to record Members and door-to-door sales agents on the register of accredited door-to-door sales agents, as determined by the Board from time to time.

Replaceable Rules means the replaceable rules applicable to a public company limited by guarantee set out in the Act.

Representative has the meaning given to it in section 250D of the Act.

Sanction has the meaning given to it in the Code of Practice.

Secretary means the person appointed as the secretary of the Company under **clause 59**, and includes any assistant or acting secretary.

Small Active Retailer Member means a Member of the Company which satisfies the criteria set out in clause 10.2(e).

Special Resolution means, in relation to a resolution of Voting Members, a resolution which satisfied the criteria set out in **clause 28**.

Voting Members means:

- (a) the ERAA Member; and
- (b) Large Active Retailer Members.

Voting Members Present means, in connection with a meeting of Members, a Voting Member being present in person or by proxy or attorney or Representative.

4.2 Interpretation

- (a) In this Constitution, unless there is something in the subject or context which is inconsistent:
 - (i) the singular includes the plural and vice versa;
 - (ii) each gender includes the other two genders;
 - (iii) the word "person" means a natural person and any partnership, association, body or entity whether incorporated or not;
 - (iv) the words "writing" and "written" include any other mode of representing or reproducing words, figures, drawings or symbols in a visible form;

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- (v) where any word or phrase is defined, any other part of speech or other grammatical form of that word or phrase has a cognate meaning;
 - (vi) a reference to any clause or schedule is to a clause or schedule of this Constitution;
 - (vii) a reference to any statute, proclamation, rule, code, regulation or ordinance includes any amendment, consolidation, modification, re enactment or reprint of it or any statute, proclamation, rule, code, regulation or ordinance replacing it.
- (b) An expression used in a particular Part or Division of the Act that is given by that Part or Division a special meaning for the purposes of that Part or Division has, unless the contrary intention appears, in any clause that deals with a matter dealt with by that Part or Division the same meaning as in that Part or Division.
 - (c) Headings do not form part of or affect the construction or interpretation of this Constitution.

5. OBJECTS AND PURPOSES

5.1 Objects

- (a) The Company is a not-for-profit company. The Objects of the Company are:
 - (i) to establish, implement and manage an agreed standard for the door-to-door selling by Members of gas and electricity supply contracts to Consumers;
 - (ii) to develop and facilitate training programs to provide Members with the knowledge and capabilities to maintain the competence standards required by the Regime and to, in turn, deliver their own on-going training of door-to-door sales agents;
 - (iii) to administer a register of accredited door-to-door sales agents;
 - (iv) to develop and implement procedures and processes to monitor and assess the conduct and activities of door-to-door sales agents to ensure compliance with the Code of Practice;
 - (v) to manage a disciplinary process and to implement appropriate sanctions where a door-to-door sales agent is found to have breached the Code of Practice; and
 - (vi) anything ancillary to the Objects set out in **clauses 5.1(a)(i) to 5.1(a)(v)**.
- (b) The Company can only exercise the powers in section 124(1) of the Act to:
 - (i) carry out the Objects; and
 - (ii) do all things incidental or convenient in relation to the exercise of power under **clause 5.1(b)(i)**.

5.2 Income and Property

- (a) The income and property of the Company will be applied solely towards the promotion of the Objects and the exercise of the Company's powers as set out in this Constitution.
- (b) No income or property of the Company will be paid, transferred or distributed, directly or indirectly, by way of dividend, bonus or otherwise to any Member of the Company. However, nothing in this Constitution will prevent payment in good faith:
 - (i) to a Member in return for any services rendered or goods supplied or hired by the Company from a Member in the ordinary and usual course of business to the Company;
 - (ii) as remuneration to any employee of the Company;
 - (iii) of interest to a Member at a rate not exceeding current bank overdraft rates of interest for moneys lent to the Company;
 - (iv) of reasonable and proper rent to a Member for premises leased by any Member to the Company; and
 - (v) for moneys representing reimbursement to a Member of out-of-pocket expenses reasonably incurred by the Member and to which the Member would be entitled if they were not a Member.
- (c) No payment shall be made to any Director other than the payment:
 - (i) of out of pocket expenses incurred by the Director in the performance of any duty as a Director where the amount payable does not exceed an amount previously approved by the Board;
 - (ii) for any service rendered to the Company by the Director in a professional or technical capacity, other than in the capacity as Director, where the provision of the service has the prior approval of the Board and where the amount payable is approved by the Board and is not more than an amount which commercially would be reasonable for the service; and
 - (iii) any Directors' fees as determined by the Board from time to time.

MEMBERSHIP

6. ACCC AUTHORISATION

6.1 Compliance with the Code of Practice subject to Authorisation

Clauses 9.1(a), 16 and 17.3 do not come into effect and a Member is not required to comply with the Code of Practice unless and until the Company and its Members are granted authorisation to give effect to those clauses by the Australian Competition and Consumer Commission pursuant to section 88 of the *Trade Practices Act 1974* (Cth).

7. ADMISSION TO MEMBERSHIP

7.1 Entitlement to Membership

Subject to satisfying the relevant criteria set out in **clause 10**, an individual or body corporate is entitled to become a Member if that individual or body corporate:

- (a) agrees to assume the liability to pay the Member's Guarantee Amount; and
- (b) pays the Joining Fee, Annual Subscription and Registration Fee.

7.2 Entry in Register of Members

Subject to the Act, a person or body corporate becomes a Member on the registration of that person's or body corporate's name in the Register of Members.

8. APPLICATION FOR MEMBERSHIP

8.1 Application for Membership

- (a) The Board may prescribe the form of the application for Membership.
- (b) An application for Membership must be:
 - (i) in writing;
 - (ii) signed by the applicant;
 - (iii) lodged with the Secretary; and
 - (iv) accompanied by the Joining Fee.

8.2 Determination by Board

- (a) As soon as practicable after receiving an application for Membership, the Secretary must refer the application to the Board which is to determine whether to approve or reject the application.
- (b) An application under **clause 8.2(a)** may only be rejected if:
 - (i) the applicant does not meet the conditions for Membership set out in **clause 7.1**;
 - (ii) the applicant does not submit an application in accordance with **clause 8.1**; or
 - (iii) the applicant would have ceased to be a Member under **clause 15.1(d), 15.1(e) or 15.1(f)**.
- (c) As soon as practicable after the Board makes that determination the Secretary must notify the applicant, in writing, that the Board approved or rejected the application (whichever is applicable).

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- (d) If the Board approved the application, the Secretary must request payment of the Annual Subscription and Registration Fee within twenty-eight (28) days after the notification of the Board's determination is sent to the applicant.
 - (e) Upon receipt of payment of the Annual Subscription and Registration Fee, the Secretary must enter the applicant's name in the register of Members and the relevant class of Membership and, on the name being so entered, the applicant becomes a Member of the Company.
 - (f) If the Board rejected the application, the Secretary must refund the Joining Fee and deliver it to the applicant along with the notice required to be given in accordance with **clause 8.2(c)**.
 - (g) The Board shall not be required to provide its reasons for refusing an application for Membership under this **clause 8.2**.

9. CONDITION OF MEMBERSHIP

9.1 Compliance with Code of Practice and Constitution

- (a) Subject to **clause 9.1(b)**, it is a condition of every class of Membership that each Member must observe and abide by the Code of Practice and this Constitution.
- (b) The ERAA Member is not bound by the Code of Practice.

10. CLASSES OF MEMBERSHIP

10.1 Classes of Membership

- (a) There are five (5) classes of Membership in the Company, being the following:
 - (i) ERAA Member;
 - (ii) Large Active Retailer Members;
 - (iii) Non-Active Retailer Members;
 - (iv) Energy Marketer Members; and
 - (v) Small Active Retailer Members.
- (b) In addition to those benefits attached to different classes of Membership as set out in this **clause 10**, the Board will determine from time to time what additional benefits shall attach to each class of Membership.

10.2 Eligibility Criteria

The eligibility criteria and entitlements of the respective classes of Membership are as follows:

(a) ERAA Member

- (i) ERAA is entitled at all times to be a Member of the Company and will be referred to throughout this Constitution as the ERAA Member.
- (ii) The ERAA Member has one (1) vote.
- (iii) Notwithstanding anything else herein contained or in the Act, no resolution (including Special Resolutions) of Members will be effective or considered to be passed unless the ERAA Member has voted in favour of that resolution (or Special Resolution, as the case may be).

(b) Large Active Retailer Members

- (i) A body corporate will be entitled to be a Large Active Retailer Member if the body corporate:
 - (A) is a Licensed Energy Retailer; and
 - (B) uses door-to-door sales agents to sell electricity and/or gas to Consumers.
- (ii) A Large Active Retailer Member has one (1) vote.

(c) Non-Active Retailer Members

- (i) A body corporate will be entitled to be a Non-Active Retailer Member if the body corporate:
 - (A) is a Licensed Energy Retailer; and
 - (B) does not use door-to-door sales agents to sell electricity and/or gas to Consumers.
- (ii) A Non-Active Retailer Member is not entitled to vote.

(d) Energy Marketer Members

- (i) A body corporate will be entitled to be an Energy Marketer Member if the body corporate employs or otherwise engages door-to-door sales agents to sell electricity and gas to Consumers on behalf of a Licensed Energy Retailer.
- (ii) An Energy Marketer is not entitled to vote.

(e) Small Active Retailer Members

- (i) A body corporate will be entitled to be a Small Active Retailer Member if the body corporate:
 - (A) is a Licensed Energy Retailer; and

- (B) uses less than forty (40) door-to-door sales agents (based on a monthly average calculated Quarterly) to sell electricity and/or gas to Consumers.
- (ii) A Small Active Retailer Member is not entitled to vote.

11. REPRESENTATIVE

11.1 Organisational Members

- (a) This **clause** 11 only applies to Members which are Organisational Members.
- (b) An Organisational Member must appoint as its Representative a natural person.

11.2 Register of Members

The name and address of the Representative will be entered in the Register of Members as the representative of the Organisational Member.

11.3 Correspondence and Notices

All correspondence and notices from the Company will be served on that Representative and any notice served on a Representative will be deemed to be service on the Organisational Member which is represented by that particular Representative.

11.4 Appointment by reference to a Position

If the appointment of a Representative by the Organisational Member is made by reference to a position held, the appointment must identify the position.

11.5 Change of Representative

Despite **clause 12**, an Organisational Member may remove and replace a Representative where the Organisational Member gives written notice to the Board in a form approved by the Board.

11.6 Signature of Representative

A signature by a Representative of an Organisational Member on behalf of that Organisational Member is taken to be the signature of that Organisational Member for the purposes of this Constitution.

11.7 Powers and Rights of Representatives

- (a) Any power or right of an Organisational Member as granted by this Constitution can be exercised by the Representative of that particular Organisational Member.
- (b) Organisational Members are represented at meetings of Members by their Representatives, subject to the right of a Representative to appoint a proxy pursuant to **clause 36**.
- (c) The actions of a Representative bind the Organisational Member which is represented by that particular Representative.

11.8 Obligations of Representative

Each Representative will comply with the terms of this Constitution in all matters pertaining to the Company as if a Member himself or herself.

12. MEMBERSHIP ENTITLEMENTS NOT TRANSFERABLE

12.1 Entitlements not Transferable

A right, privilege or obligation which a person or body corporate has by reason of being a Member of the Company:

- (a) is not capable of being transferred or transmitted to another person or body corporate;
- (b) terminates on cessation of the person's or body corporate's Membership; and
- (c) in respect to a Member's rights, may not be exercised during any period that the Member's Annual Subscription has been due but unpaid for a period in excess of three (3) months.

13. ANNUAL SUBSCRIPTIONS

13.1 Annual Subscription

- (a) There shall be an Annual Subscription payable by each Member to the Company.
- (b) Subject to **clause 13.2**, the amount of any Annual Subscription shall be fixed by the Board and shall be payable by Members at such times and in such manner as determined by the Board from time to time. The Board can set different rates of Annual Subscriptions for different classes of Membership.

13.2 Powers of Board

The Board may in its discretion:

- (a) determine that:
 - (i) no Annual Subscription is payable; or
 - (ii) a discounted Annual Subscription is payable;by a Member or Members in a given year; and
- (b) extend the time for payment of Annual Subscriptions by any Member.

13.3 No Refund

No part of any Annual Subscription shall be refunded to a Member who varies their Membership class in accordance with **clause 14** or ceases to be a Member in accordance with **clause 15**.

14. VARIATION OF MEMBERSHIP

14.1 Variation of Membership

A Member may only vary its Membership in accordance with this **clause 14**.

14.2 Large Active Retailer Members

- (a) If a Large Active Retailer Member ceases using door-to-door sales agents to market and sell electricity and gas to Consumers, it must notify the Company within seven (7) days of the date upon which usage ceased.
- (b) Notification by the Large Active Retailer Member pursuant to **clause 14.2(a)** must be either:
 - (i) in writing;
 - (ii) in the form prescribed by the Board, if any;
 - (iii) signed by the Member; and
 - (iv) lodged with the Secretary.
- (c) As soon as practicable after receiving the notification of variation of Membership from the Large Active Retailer Member, the Secretary will notify the Board and update the Register of Members.
- (d) If the Large Active Retailer Member fails to notify the Company of a change to its Membership class as required by **clause 14.2(a)**, the Company may:
 - (i) update the Register of Members to reflect the change in Membership class; and
 - (ii) charge Interest on any unpaid Annual Subscriptions due in respect of the Large Active Retailer Membership class that are unpaid by the Large Active Retailer Member, up until the date on which the Large Active Retailer Member's Membership class is varied.
- (e) No part of the Annual Subscription paid by the Large Active Retailer Member shall be refunded following any variation in Membership class.

14.3 Non-Active Retailer Members

- (a) If a Non-Active Retailer Member commences using door-to-door sales agents to market and sell electricity and gas to Consumers, it must notify the Company within seven (7) days of such commencement.
- (b) Notification by the Non-Active Retailer Member pursuant to **clause 14.3(a)** must be either:
 - (i) in writing;
 - (ii) in the form prescribed by the Board, if any;
 - (iii) signed by the Member; and

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- (iv) lodged with the Secretary.
 - (c) As soon as practicable after receiving the notification of variation of Membership from the Non-Active Retailer Member, the Secretary will notify the Board and update the Register of Members.
 - (d) If the Non-Active Retailer Member fails to notify the Company of a change to its Membership class as required by **clause 14.3(a)**, the Company may:
 - (i) update the Register of Members to reflect the change in Membership class; and
 - (ii) charge Interest on any unpaid Annual Subscriptions due in respect of the Membership class that are unpaid by the Non-Active Retailer Member, from the date that the Non-Active Retailer Member commenced using door-to-door sales agents to market and sell electricity and gas to Consumers.

14.4 Small Active Retailer Members

- (a) Within two (2) weeks after the end of each Quarter, a Small Active Retailer Member must notify the Company of the number of door-to-door sales agents used during each month of the Quarter just ended (**Reconciliation Quarter**).
- (b) Notification by the Small Active Retailer Member pursuant to **clause 14.4(a)** must be:
 - (i) in writing;
 - (ii) in the form prescribed by the Board, if any;
 - (iii) signed by the Member; and
 - (iv) lodged with the Secretary.
- (c) If the average monthly number of door-to-door sales agents used by a Small Active Retailer Member during a Quarter exceeds forty-six (46), the Secretary will notify the Board and update the Register of Members to record the Small Active Retailer Member as a Large Active Retailer Member.
- (d) Subject to **clause 14.4(a)**, at the commencement of the Quarter following the Reconciliation Quarter, the Small Active Retailer Member must pay the Annual Subscription for the Large Active Retailer Membership class.
- (e) If:
 - (i) the Small Active Retailer Member fails to notify the Company as required by **clause 14.4(a)**; and
 - (ii) **clause 14.4(c)** applies,then the Company may:
 - (iii) update the Register of Members to reflect the change in Membership class; and

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- (iv) charge Interest on any unpaid Annual Subscriptions due in respect of the Large Active Retailer Membership class that are unpaid by the Small Active Retailer Member, from the beginning of the Quarter following the Reconciliation Quarter during which the Small Active Retailer Member used more than a monthly average of forty-six (46) door-to-door sales agents to market and sell electricity and gas to Consumers.
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15. CESSATION OF MEMBERSHIP

15.1 Cessation of Membership

A Member's Membership will cease:

- (a) if, being an Individual Member, the Member dies;
- (b) subject to **clause 15.3**, on the date that the Secretary receives written notice of resignation from that Member;
- (c) subject to **clause 13.2**, if that Member has failed to pay the Member's Annual Subscription for the current Financial Year or any preceding Financial Years;
- (d) if that Member has been found to be in breach of the Code of Practice and the Code Manager or the Code Panel has decided that the Member's Membership should cease as a consequence thereof;
- (e) if the Member is expelled pursuant to **clause 17**;
- (f) if, being an Organisational Member:
 - (i) that Member is dissolved or otherwise ceases to exist;
 - (ii) that Member has:
 - (A) a receiver;
 - (B) a receiver and manager;
 - (C) a liquidator;
 - (D) an administrator;
 - (E) an administrator of a deed of company arrangement; or
 - (F) a trustee of other person administering a compromise or arrangement between the Member and someone else;
 appointed to it;
- (g) if, being an Energy Marketer, the Member ceases to employ or otherwise engage door-to-door sales agents to sell electricity and gas to Consumers on behalf of a Licensed Energy Retailer;
- (h) if a Member no longer satisfies the criteria of any class of Membership; or

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- (i) if the Company in general meeting resolves by a Special Resolution, to terminate the membership of a Member whose conduct or circumstances in the opinion of the Company renders it undesirable that that Member continue to be a Member of the Company. The Member must be given at least twenty one (21) days' notice of the proposed resolution and must be given the opportunity to be heard at the meeting at which the resolution is proposed.

15.2 Unpaid Amounts

If a Member's Membership ceases pursuant to **clause 15.1**, all monies due to the Company and unpaid at the date of cessation of the Member's Membership remain owing by the Member to the Company and shall be recoverable by the Company as against the Member. This **clause 15.2** shall continue to apply following the cessation of the Member's Membership.

15.3 Resignation from Membership

- (a) A Member is not entitled to resign as a Member except in accordance with this **clause 15**.
- (b) All Annual Subscriptions, all arrears due and unpaid and all other monies due to the Company or for which the Member is liable as a Member of the Company under **clause 2.2**, including where applicable the Member's Guarantee Amount, must be paid prior to the date on which a written notice of resignation (**Resignation Notice**) is served by the Member on the Company.
- (c) A Resignation Notice must be delivered to the Secretary giving one (1) month's notice of the Member's intention to resign as a Member, or such period as the Board may determine from time to time in its absolute discretion (**Resignation Period**).
- (d) Upon the expiry of the Resignation Period the Member ceases to be a Member.

15.4 Updating Register of Members

Where a Member ceases to be a Member pursuant to this **clause 15**, and in every other case where a Member ceases to be a Member, the Secretary will make an appropriate entry in the Register of Members recording the date on which the Member ceased to be a Member.

15.5 ERAA Member

This **clause 15** does not apply to the ERAA Member.

16. CODE OF PRACTICE

16.1 Amendment of Code of Practice and Procedures Guideline

The Code of Practice may from time to time be amended by the Board and, as amended, be promulgated by the Board and published to Members.

16.2 Compliance with Code of Practice & Procedures Guideline

- (a) Subject to **clause 16.2(b)**, every Member shall be bound to accept and, in the execution of its door-to-door sales and marketing activities, abide by the

standards of practice and conduct expressed in the Code of Practice and Procedures Guideline, as amended from time to time.

- (b) In the event of any inconsistency between a provision of the Code of Practice, the Procedures Guideline and the law, the law prevails.

16.3 Code Manager & Code Panel

- (a) The Board shall:
- (i) determine the powers of the Code Manager;
 - (ii) determine the terms of reference of the Code Panel;
 - (iii) create and adopt policies to supplement the Code of Practice; and
 - (iv) appoint a Code Manager and Code Panel to decide on matters related to the Code of Practice and Procedures Guideline.
- (b) Each Member who is the subject of a proposed Sanction brought before the Code Manager or Code Panel:
- (i) agrees to abide by the decisions of the Code Manager or Code Panel; and
 - (ii) acknowledges that it will not be entitled to bring any action or suit against the Company, the Directors, the members of the Code Panel or the Code Manager as a consequence of or arising out of any decision or action of the Code Panel or Code Manager.
- (c) If a complaint is made in writing (and is supported by evidence and documentation) to the Code Manager or the Code Panel by a:
- (i) Member or Members; or
 - (ii) person who is not a Member;
- that a Member:
- (iii) has violated or refused or neglected to observe or otherwise breached the Code of Practice and Procedures Guideline; or
 - (iv) has been guilty of or party to any conduct which may be contrary to this Constitution; or
 - (v) may be likely to injure or discredit or hinder the work or Objects of the Company;

then the Code Manager and the Code Panel will deal with that charge in accordance with the Code of Practice.

16.4 Publishing Details of Matters

Each Member acknowledges that the Code Manager and the Code Panel is, subject to the Code of Practice, at liberty to publicly publish details of any Sanctions determined by the Code Manager or the Code Panel, including the:

- (a) name of the Member who is the subject of the matter being heard;
- (b) the decision of the Code Manager or the Code Panel;
- (c) reasons for any decisions made by the Code Manager or the Code Panel;
and
- (d) any Sanctions or other action taken in respect of the Member.

16.5 Costs of Appeal

The Members acknowledge that the Company has the right to demand that a Member, who is appealing a decision in accordance with the Code of Practice, pay for the costs of the Company conducting the appeal.

16.6 Release

- (a) Each Member acknowledges that no matter or thing done or omitted by the Code Manager or the Code Panel (including the exercise of its powers as referred to in **clause 16.4**) subjects the Code of Practice Panel, the Code Manager, Directors or Company to any liability. Each Member hereby releases the Company, Directors, the Code Manager and members of the Code Panel from any such liability, including liability for negligence.
- (b) No statements or comments, whether written or oral, made or used by the:
 - (i) Code Panel (including the exercise of its powers as referred to in **clause 16.4**);
 - (ii) Code Manager (including the exercise of its powers as referred to in **clause 16.4**);
 - (iii) Directors; or
 - (iv) Company;

or any of their representatives as part of the Code of Practice may be relied upon to found or maintain any action by the Member for defamation, libel, slander or any related complaint, and this Constitution may be pleaded as a bar to any such action.

16.7 Audit

- (a) All Members acknowledge that the Company has the right to enter, or cause an auditor to enter, a Member's premises for the purposes of:
 - (i) auditing the Member's books, records, and complaints procedure documentation; and
 - (ii) interviewing any of the Member's employees or consultants;

to ensure compliance by that Member with the Code of Practice and the Procedures Guideline.

- (b) The Company further has a right to use any information collected pursuant to **clause 16.7(a)** for the purposes of administering Sanctions.
- (c) **Clause 16.7(a)** does not apply to the ERAA Member.

17. DISCIPLINING OF MEMBERS

17.1 Expulsion by the Board

- (a) The Board may resolve to expel any Member or to suspend any Member from Membership of the Company where the Board holds the opinion that the Member:
 - (i) has persistently refused or neglected to comply with a provision or provisions of this Constitution; or
 - (ii) has persistently or wilfully acted in a manner prejudicial to the interests and Objects of the Company.
- (b) A resolution of the Board pursuant to **clause 17.1(a)** will be of no effect unless the Board confirms the resolution in accordance with this clause at a meeting held not earlier than fourteen (14) days and not later than twenty eight (28) days after the service on the Member of notice under **clause 17.1(c)**.
- (c) If the Board resolves under **clause 17.1(a)** to expel or suspend any Member, the Secretary must serve the Member with a notice in writing:
 - (i) setting out the resolution of the Board and the grounds upon which it is based;
 - (ii) stating that the Member may address the Board at a meeting to be held not earlier than fourteen (14) days and not later than twenty eight (28) days after service of the notice;
 - (iii) stating the date, place and time of that meeting; and
 - (iv) informing the Member that the Member may do either or both of the following:
 - (A) attend and speak at that meeting;
 - (B) submit to the Board at or prior to the date of that meeting written representations relating to the resolution.
- (d) At a meeting of the Board held in accordance with **clause 17.1(c)(ii)**, the Board must:
 - (i) give the Member an opportunity to make oral representations;

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- (ii) give due consideration to any written representations submitted to the Board by the Member at or prior to the meeting; and
 - (iii) resolve whether to confirm or to revoke the decision to expel or suspend the Member.
- (e) The Member must be notified in writing of the decision of the Board within seven (7) days. If the Board resolves to confirm the expulsion or suspension, the Member must also be notified of the right of appeal.
- (f) A resolution confirmed by the Board under **clause 17.1(d)** does not take effect:
- (i) until the expiration of the period within which the Member is entitled to appeal against the resolution; or
 - (ii) if the Member exercises the right of appeal, until the Company confirms the resolution pursuant to **clause 17.2(d)**.

17.2 Appeal to Company

- (a) A Member may appeal to the Company in general meeting against a resolution of the Board, which is confirmed under **clause 17.2(d)**. Written notice of such an appeal must be lodged with the Secretary within seven (7) days of service of the notice required under **clause 17.1(e)**.
- (b) Upon receipt of a notice of appeal under **clause 17.2(a)**, the Secretary will notify the Board and the notice of appeal must be considered at the next general meeting.
- (c) At a general meeting of the Company which has the notice of appeal on its agenda, pursuant to **clause 17.2(b)**:
 - (i) the Board and the Member must be given the opportunity to state their respective cases orally or in the writing, or both; and
 - (ii) the Voting Members Present must vote by secret ballot on the question of whether the resolution will be confirmed.
- (d) Confirmation of the resolution may be by a simple majority of those Voting Members present.

17.3 Expulsion by Code Panel

The Members acknowledge that the Code of Practice Panel has the power to expel a Member pursuant to the Code of Practice.

17.4 Non Merger

In the event that a Member:

- (a) is expelled or suspended from Membership of the Company for any reason; or
- (b) does not renew its Membership at any time;

the Member acknowledges that it will nevertheless remain subject to and bound by the provisions of:

- (c) **clause 16**;
- (d) this Constitution; and
- (e) the Code of Practice and Procedures Guideline;

to the extent that a Sanction against a Member is being considered by the Code Manager or the Code Panel. The Member will remain subject to and bound by the provisions of this Constitution, the Code of Practice and Procedures Guideline until the:

- (f) Sanction process is resolved or dismissed; or
- (g) Member's involvement in the alleged breach of the Code of Practice is otherwise dismissed by the Code Panel or the Code Manager.

18. RESOLUTION OF DISPUTES BETWEEN MEMBERS

18.1 Referral to Board

Disputes between Members (in their capacity as Members) shall be referred to the Board which must take steps to resolve the dispute.

18.2 Referral to Mediator

If a dispute so referred is not resolved to the satisfaction of any party to the dispute within thirty (30) days of its being referred, then that party may refer the dispute to mediation before a mediator appointed by mutual agreement of the parties.

18.3 Referral to President of NSW Law Society

Failing agreement by the parties to the appointment of a mediator within fourteen (14) days of a party notifying the other party of its intention to refer the dispute to mediation, the appointment of the mediator shall be made by the President of the New South Wales Law Society.

18.4 Costs

The costs of the mediator appointed pursuant to **clause 18.2** or **clause 18.3** (as the case may be) shall be shared equally between the Members party to the dispute.

18.5 Exchange of Statements

At least seven (7) days before a mediation session established by a mediator appointed pursuant to **clause 18.2** or **clause 18.3** (as the case may be) is to commence, the parties to the dispute are to exchange statements of the issues that are in dispute between them and supply copies to the mediator.

GENERAL MEETINGS

19. ANNUAL GENERAL MEETINGS

19.1 Annual General Meetings

- (a) With the exception of the first Annual General Meeting of the Company, an Annual General Meeting of the Members must be convened at least once in each Financial Year and within a period of five (5) months after the expiration of each Financial Year.
- (b) The Annual General Meeting is, subject to the Act, to be convened on such date and at such place and time as the Board thinks fit.

20. BUSINESS AT ANNUAL GENERAL MEETINGS

20.1 Business at Annual General Meetings

In addition to any other business which may be transacted at an Annual General Meeting, the business of an Annual General Meeting must include the following:

- (a) to confirm the minutes of the last preceding Annual General Meeting and of any general meetings held since that Annual General Meeting;
- (b) to receive from the Board reports on the activities of the Company during the last preceding Financial Year;
- (c) to appoint an auditor;
- (d) to transact such business as may be transacted at an Annual General Meeting pursuant to this Constitution;
- (e) to transact special business of which not less than twenty-one (21) days notice shall have been given to the Secretary; and
- (f) to transact any other business which the meeting may think fit to be transacted as ordinary business.

21. CONVENING OF GENERAL MEETINGS

21.1 Convening by Board

The Board may, whenever it thinks fit, convene a general meeting of the Company.

21.2 Requisition by Members

- (a) The Board must, on the requisition in writing of at least five (5) Voting Members convene a general meeting.
- (b) A requisition of Voting Members for a general meeting under **clause 21.2(a)**:
 - (i) must state the purpose or purposes of the general meeting;
 - (ii) must be signed by the Voting Members making the requisition;

- (iii) must be lodged with the Secretary; and
- (iv) may consist of several documents in a similar form, each signed by one or more of the Voting Members making the requisition.

21.3 Use of Technology

A general meeting of the Company may be convened at two (2) or more venues using any technology that gives the Members a reasonable opportunity to participate in the general meeting.

22. NOTICE OF GENERAL MEETINGS

22.1 Notice of General Meetings

- (a) Subject to consent to shorter notice being given in accordance with the Act, at least twenty one (21) days notice of any general meeting must be given to each Member and each Director specifying:
 - (i) the place, day and hour of the meeting;
 - (ii) the general nature of any business to be transacted at the meeting;
 - (iii) if a Special Resolution is to be proposed, the details of and intention to propose it;
 - (iv) if the meeting is to be held in two or more places, the technology that will be used to facilitate this; and
 - (v) any other information required by the Act.
- (b) The accidental omission to give notice of any general meeting to or the non-receipt of notice of a meeting by any person entitled to receive notice will not invalidate the proceedings at or any resolution passed at the meeting.

22.2 Matters upon which Voting Members vote

The matters upon which Voting Members can vote are limited to those matters expressly provided for in the Act and this Constitution. Typically, Voting Members have a right to vote on certain decisions relating to the structure and Constitution of the Company, including:

- (a) the adoption of an amendment to the Constitution;
- (b) changes to the name and type of the Company;
- (c) variations to the rights attached to a particular class of Membership;
- (d) the removal of Directors pursuant to section 203D of the Act;
- (e) the appointment and removal of the Company's auditors;
- (f) the initiation of a Member's voluntary winding up of the Company; and

-
- (g) any Special Resolution to be decided upon by the Members as notified in accordance with **clause 22.1(a)(iii)**.

22.3 Other Matters

- (a) No matter other than that specified in the notice under **clause 22.1** will be transacted at the meeting.
- (b) A Member intending to bring a matter before a meeting must give notice in writing to the Secretary at least one (1) month before the meeting specifying the nature of the matter and the Secretary must include the matter in the next notice given under **clause 22.1**.

23. CANCELLATION OR POSTPONEMENT OF GENERAL MEETING

23.1 Cancellation of General Meeting

Subject to the provisions of the Act and this Constitution, the Board may cancel a general meeting of the Company:

- (a) convened by the Board; or
- (b) which has been convened by a Voting Member or Voting Members pursuant to the Act upon receipt by the Company of a written notice withdrawing the requisition signed by that Voting Member or those Voting Members.

23.2 Postponement of Meeting

The Board may postpone a general meeting or change the venue at which it is to be held. No business shall be transacted at any postponed meeting other than the business stated in the notice to the Members relating to the original meeting.

23.3 Notification of Cancellation or Postponement

Where any general meeting is cancelled or postponed or the venue for the same is changed:

- (a) the Board must endeavour to notify in writing each person entitled to receive notice of the meeting of the cancellation, the change of venue or the postponement of the meeting by any means permitted by this Constitution and in the case of the postponement of a meeting, the new place, date and time for the meeting; and
- (b) any failure to notify in writing any person entitled to receive notice of the meeting (except the ERAA Member) or failure of a person to receive a written notice (except the ERAA Member) shall not affect the validity of the cancellation, the change of venue or the postponement of the meeting.

PROCEEDINGS AT GENERAL MEETINGS

24. QUORUM

24.1 Need for Quorum

No business may be transacted at any general meeting unless a quorum of Voting Members is present at all times during the meeting.

24.2 Definition of Quorum

Fifty-one per cent (51%) of Large Active Members present in person or by proxy or by Representative plus the ERAA Member constitute a quorum for all general meetings.

24.3 Absence of Quorum

- (a) If within thirty (30) minutes after the time appointed for holding a general meeting a quorum is not present:
 - (i) the meeting, if convened upon the requisition of Voting Members, shall be dissolved;
 - (ii) in any other case:
 - (A) it will stand adjourned to the same day in the next week at the same time and place or to such other day time and place as the Board may by notice to the Members appoint; and
 - (B) if at such adjourned meeting a quorum is not present within thirty (30) minutes after the time appointed for the holding of the meeting, five (5) Voting Members will constitute a quorum.
- (b) If within thirty (30) minutes after the time appointed for holding an adjourned meeting the quorum required pursuant to **clause 24.3(a)(ii)(B)** is not present the meeting shall be dissolved.

25. CHAIR

25.1 Chair of General Meetings

The Chair of the Board or, in the Chair's absence, the Deputy Chair, will preside as Chair at every general meeting.

25.2 No Chair

Where a general meeting is held and:

- (a) there is no Chair and no Deputy Chair; or
- (b) both the Chair and the Deputy Chair are not present within thirty (30) minutes after the time appointed for the holding of the meeting or, if present, are both unwilling to act as Chair of the meeting,

the other Directors present may choose another Director as Chair of the meeting by two-thirds majority, or if their number is not three or a multiple of three, then the nearest number to one-third. If no Director is so chosen, or if all the Directors present decline to take the chair, the Voting Members Present may choose one of their number to be Chair of the meeting.

25.3 Rulings of Chair

The rulings of the Chair of a general meeting on all matters relating to the order of business, procedure and conduct of the meeting shall be final and no motion of dissent from such rulings shall be accepted.

26. ADJOURNMENTS

26.1 When adjournment may occur

The Chair of a general meeting at which a quorum is present:

- (a) may adjourn a meeting with the consent of the majority of the Voting Members Present and the ERAA Member; and
- (b) must adjourn the meeting if the majority of the Voting Members Present and the ERAA Member so direct,

to a time and place as determined.

26.2 Business and Resolutions at Adjourned Meeting

- (a) No business may be transacted at any adjourned general meeting other than the business left unfinished at the meeting from which the adjournment took place.
- (b) A resolution passed at a meeting resumed after an adjournment is passed on the day it was passed.

26.3 Notice of Adjournment

It is not necessary to give any notice of an adjournment of a general meeting or of the business to be transacted at the adjourned meeting except if the meeting is adjourned for fourteen (14) days or more, in which case notice of the adjourned meeting must be given as in the case of an original meeting.

27. DETERMINATION OF QUESTIONS

27.1 Determination of Questions

- (a) At any general meeting a resolution to be considered at the meeting shall be decided on a show of hands unless a poll is demanded by:
 - (i) the Chair of the meeting; or
 - (ii) at least three (3) Voting Members Present and entitled to vote on the resolution along with the ERAA Member.

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- (b) Before a vote on a resolution is taken, the Chair must inform the meeting whether any proxy votes have been received and how the proxy votes are to be cast.

27.2 Declaration by Chair

A declaration by the Chair of the result of a vote on a resolution by a show of hands and an entry to that effect contained in the minutes of the proceedings of the Company, which has been signed by the Chair of the meeting or the next succeeding meeting, shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

28. SPECIAL RESOLUTIONS

28.1 Necessary Notice

- (a) A Special Resolution of Members shall only be carried if at least twenty one (21) days' written notice has been given to Voting Members on the subject of the resolution and that notice:
 - (i) provides reasonable details of the proposed resolution; and
 - (ii) specifies the intention to propose the resolution as a Special Resolution.
- (b) Subject to the Act, the requirements of **clause 28.1(a)** shall not apply to the extent that all the Voting Members agree to waive the requirements of **clause 28.1(a)**.

28.2 Definition of Special Resolution

A Special Resolution is passed if it is passed by a majority which comprises:

- (a) no less than seventy-five per cent (75%) of Voting Members Present; and
- (b) the ERAA Member.

29. POLLS

29.1 When Poll can be demanded

- (a) A poll may be demanded:
 - (i) before a vote on a resolution is taken;
 - (ii) before the voting results on a show of hands are declared; or
 - (iii) immediately after the voting results on a show of hands are declared.
- (b) If a poll is demanded it must be taken in such manner and at such time before the close of the meeting and at such place as the Chair of the meeting directs, subject to **clause 29.4**.

29.2 Result of Poll

The result of the poll shall be taken to be the resolution of the meeting at which the poll was demanded.

29.3 Continuance of Meeting

The demand for a poll shall not prevent the continuance of a meeting for the transaction of any business other than the question on which a poll has been demanded.

29.4 Immediate Poll

A poll demanded on the election of a Chair or any question of adjournment of the meeting must be taken immediately.

29.5 Withdrawal of Demand for Poll

The demand for a poll may be withdrawn.

30. VOTING RIGHTS

30.1 Voting Rights

- (a) On any question arising at a general meeting a Voting Member has one (1) vote only.
- (b) All votes must be given personally or by proxy or by Representative.

31. VOTING DISQUALIFICATION

31.1 Persons who cannot vote

No person or body corporate other than a Voting Member shall be entitled to a vote at a general meeting.

31.2 Unpaid Annual Subscriptions

A Voting Member or proxy holder or Representative who's Annual Subscription for the current Financial Year has been due but not paid for a period in excess of three (3) months is not entitled to vote at any general meeting or Annual General Meeting.

32. OBJECTION TO QUALIFICATION TO VOTE

Any challenge as to the qualification of a person to vote at a general meeting or the validity of any vote tendered may only be raised at the meeting and must be determined by the Chair, whose decision shall be final and conclusive and a vote allowed by the Chair shall be valid for all purposes.

33. PERSONS OF UNSOUND MIND AND MINORS

33.1 Voting Members of Unsound Mind and Minors

A Voting Member:

- (a) of unsound mind; or

-
- (b) whose person or estate is liable to be dealt with in any way under the law relating to mental health; or
 - (c) who is a minor;

may vote whether on a show of hands or on a poll by that Voting Member's committee or by such other person as properly has the management or guardianship of that Voting Member's estate or by the public trustee (as the case may be) and the committee or other person or trustee may vote by proxy or representative.

33.2 Evidence of Appointment

Any person having the right of management or guardianship of the person or estate in respect of a Voting Member as referred to in **clause 33.1** must not exercise any of the rights conferred under that clause unless and until the person has provided to the Board satisfactory evidence of the appointment of the person accordingly.

34. CHAIR'S CASTING VOTE

In the case of an equality of votes whether on a show of hands or on a poll, the Chair of the meeting at which the show of hands is taken or at which the poll is demanded is not entitled to a casting vote.

35. RIGHT OF NON-MEMBERS TO ATTEND GENERAL MEETING

35.1 Attendance by Non-Members

The Chair of a general meeting may invite any person who is not a Member to attend and address a meeting.

35.2 Attendance by Auditor

Any auditor of the Company shall be entitled to attend and address a general meeting.

PROXIES

36. RIGHT TO APPOINT PROXIES

36.1 Appointment of Proxies

- (a) A Voting Member, including the Representative of a Voting Member, may appoint another person as the appointing Voting Member's proxy to attend and vote for the appointing Voting Member or the Representative at the meeting and such person need not be a Member.
- (b) If a Voting Member or Representative appoints a proxy, the proxy is entitled to vote on a show of hands and on a poll.

37. APPOINTING A PROXY

37.1 Instrument of Appointment

The instrument appointing a proxy must be in the form set out in **Annexure 1** and signed by the appointor or the appointor's attorney duly authorised in writing.

37.2 Valid Instrument of Proxy

- (a) The instrument of proxy is valid if it contains the information required by the Act which at the date of this Constitution is the following information:
 - (i) the name and address of the Voting Member (and the Representative, if applicable);
 - (ii) the name of the Company;
 - (iii) the proxy's name or the name of the office of the proxy; and
 - (iv) the meetings at which the instrument of proxy may be used.
- (b) An instrument of proxy shall not be treated as invalid merely because it does not specify all of the information required by **clause 37.2(a)**.

37.3 Standing Appointment

An instrument of proxy may be expressed to be a standing appointment. An instrument of proxy for a specified meeting is only valid for that meeting and any postponement or adjournment of that meeting.

37.4 Revocation of Appointment

An instrument of proxy may be revoked at any time by notice in writing to the Company.

38. LODGEMENT OF PROXIES

38.1 Lodgement of Proxies

An instrument appointing:

- (a) a proxy and the power of attorney or other authority (if any) under which it is signed or executed or a certified copy of that power or authority; or
- (b) an attorney to exercise a Voting Member's voting rights at a general meeting or a certified copy of that power of attorney,

must be deposited at whatever location is specified for that purpose in the notice convening the general meeting not less than one (1) hour (or such shorter period as the Board may allow) before the time appointed for the holding of the meeting or adjourned meeting as the case may be at which the person named in the instrument proposes to vote and in default the instrument of proxy or the power of attorney will not be treated as valid.

38.2 Lodgement by Facsimile

For the purposes of this clause it will be sufficient that any document required to be lodged by a Voting Member be received in legible form by facsimile at the place at which the document is required to be delivered by the Voting Member and the document shall be regarded as received at the time the facsimile was received at that place.

38.3 Lodgement by Electronic Transmission

For the purposes of this clause it will be sufficient that any document required to be lodged by a Voting Member be received in legible form by email if the notice of meeting so permits at the address and in the form specified in the notice and the proxy shall be regarded as received at the time of the receipt of the email transmission by the Company.

39. VALIDITY OF PROXIES

39.1 Effective Votes

A vote exercised pursuant to an instrument of proxy, a power of attorney or other instrument of appointment is valid notwithstanding:

- (a) the death or unsoundness of mind of the Voting Member;
- (b) the bankruptcy or liquidation of the Voting Member;
- (c) the revocation of the instrument of proxy or the power of attorney or any instrument under which the instrument or the power was granted,

if the Company has not received at the location referred to in **clause 38.1** written notice of the death, unsoundness of mind, bankruptcy, liquidation or revocation at least one (1) hour (or such shorter period as the Board may allow) prior to the time appointed for the holding of the general meeting or adjourned meeting, as the case may be, at which the instrument of proxy or the power of attorney is exercised.

39.2 Proxy voting for another Voting Member

A proxy who is not entitled to vote on a resolution as a Voting Member may vote as a proxy for another Voting Member who can vote if the appointment specifies the way the proxy is to vote on the resolution and the proxy votes that way.

40. RIGHTS OF PROXIES AND ATTORNEYS

40.1 Rights of Proxies and Attorneys

- (a) The instrument appointing a proxy will be taken to confer authority to demand or join in demanding a poll.
- (b) Unless a Voting Member by the instrument of proxy directs the proxy to vote in a certain manner, the proxy may vote as the proxy thinks fit on any motion or resolution. Otherwise the proxy shall follow the voting instructions contained in the instrument of proxy.

40.2 No Revocation

A proxy will not be revoked by the appointor attending and taking part in any general meeting, but if the appointor votes on a resolution either on a show of hands or on a poll, the person acting as proxy for the appointor shall not be entitled to vote in that capacity in respect of the resolution.

40.3 Evidence of Identity

The Chair of a general meeting may require any person acting as a proxy to establish to the satisfaction of the Chair that he is the person nominated as proxy in the form of proxy lodged under this Constitution. If the person is unable to establish his identity, he may be excluded from voting either upon a show of hands or upon a poll.

APPOINTMENT AND REMOVAL OF DIRECTORS

41. NUMBER AND APPOINTMENT OF DIRECTORS

41.1 Composition of Board

The Board shall at all times consist of the following:

- (a) the executive director (or similar position if there is no executive director) of ERAA (hereinafter referred to as the **ERAA Director**);
- (b) one (1) Director appointed by each Large Active Retailer Member (hereinafter referred to as **Ordinary Directors**) in accordance with **clause 44.1**; and
- (c) five (5) Directors elected by the Board from amongst nominees put forward by the Energy Marketer Members in accordance with **clause 44.2** (hereinafter referred to as **Energy Marketer Directors**).

41.2 Eligibility for Ordinary Director or Energy Marketer Director

To be eligible for appointment to the Board as an Ordinary Director or an Energy Marketer Director:

- (a) the Large Active Retailer Member or Energy Marketer Member, as the case may be, must be a Member; and
- (b) the person appointed or nominated for election must:
 - (i) hold a position of seniority within the Member organisation; and
 - (ii) have experience in sales and marketing; and
 - (iii) have one of the following three areas of experience:
 - (A) regulatory experience; or
 - (B) finance experience; or
 - (C) public affairs experience.

42. TERM

42.1 Term of ERAA Director

The ERAA Director shall hold office as the ERAA Director for so long as that person is the executive director (or similar position if there is no executive director) of ERAA.

42.2 Term of Ordinary Director and Energy Marketer Director

- (a) From 1 January 2011 (or earlier date if an Ordinary Director or Energy Marketer Director was appointed or elected pursuant to **clause 42.3(d)**):
- (i) each Ordinary Director shall hold office for a term of three (3) years; and
 - (ii) each Energy Marketer Director shall hold office for a term of two (2) years,
- and will be eligible for re-appointment or re-election, as the case may be, for one (1) further term of two (2) years.
- (b) Subject to **clause 42.2(a)**, each Ordinary Director and Energy Marketer Director appointed or elected to the Board shall hold office for a term of two (2) years and will be eligible for re-appointment or re-election, as the case may be, for one (1) further term of two (2) years.
- (c) Subject to **clause 42.2(a)(i)**, a person shall not hold office as an Ordinary Director or Energy Marketer Director for more than four (4) consecutive years.

42.3 First Board

Notwithstanding anything else herein contained, the first Board that will hold office from the date of registration of the Company until 31 December 2010 shall be comprised of:

- (a) Cameron Myles O'Reilly;
- (b) James Watson Myatt; and
- (c) Mark Troy Brownfield; and
- (d) any Ordinary Directors or Energy Marketer Directors who have been appointed or elected pursuant to **clause 41.1** (who will continue to remain in office beyond 31 December 2010 in accordance with their terms as set out in **clause 42.2**).

43. GENERAL RIGHT TO APPOINT AND REMOVE DIRECTORS

43.1 Vacancy of Director appointed by Large Active Retailer Member

A Large Active Retailer Member may appoint a new Director to fill a casual vacancy created by that Large Active Retailer Member's originally appointed Ordinary Director vacating or being removed from office. Any Ordinary Director so appointed shall hold office for a full term.

43.2 Other Vacancies

The Board may act despite any vacancy in their body, but if the number falls below the minimum required by the Act, the Board may act:

- (a) for the purpose of increasing the number of Directors to the minimum; or
 - (b) for the purpose of convening a general meeting; or
 - (c) in emergencies;
- but for no other purpose.

44. ELECTION OF DIRECTORS

44.1 Ordinary Directors

- (a) Subject to **clause 41.2**, each Large Active Retailer Member shall be entitled to appoint an employee of its organisation to be an Ordinary Director for the purposes of **clause 41.1(b)**. Each appointee shall take office upon the retirement of the previous Ordinary Director who was appointed by that Large Active Retailer Member (if any) and shall hold office in accordance with **clause 42**.
- (b) If a Non-Active Retailer Member becomes a Large Active Retailer Member (**New Large Active Member**), the New Large Active Member shall be entitled to appoint an employee of that New Large Active Member's organisation to be an Ordinary Director pursuant to **clause 41.1(b)**.
- (c) Despite anything else contained in this Constitution, if a Large Active Retailer Member which has appointed an Ordinary Member to the Board ceases to be a Large Active Retailer Member, the Ordinary Director appointed by that Large Active Retailer Member is entitled to serve out the rest of that calendar year only.

44.2 Energy Marketer Directors

- (a) Subject to **clause 41.2**, not less than three (3) months prior to:
 - (i) 31 December 2010 in relation to the first Energy Marketer Directors to be appointed; and
 - (ii) the Annual General Meeting at which the term of an Energy Marketer Director elected pursuant to **clause 41.1(c)** shall expire;

the Secretary shall write to all of the Energy Marketer Members inviting them to nominate a candidate for Energy Marketer Director to fill the position referred to in **clause 41.1(c)**. Each Energy Marketer Member shall only be entitled to nominate one (1) person.

- (b) For the purposes of **clause 44.2(a)**, the Secretary shall send each Energy Marketer Member a form to complete whereby the Energy Marketer Members write in:
 - (i) the name of the person they wish to nominate;

-
- (ii) a brief resume of the candidate; and
 - (iii) a brief explanation as to why they hold the opinion that the candidate they have nominated is suitable for the office of the Energy Marketer Director and satisfies the criteria set out in **clause 41.2**.
- (c) For the purposes of **clause 44.2(b)**, the form must:
- (i) be signed by two (2) directors of the Energy Marketer Member and accompanied by the written consent of the candidate (which may be endorsed on the form of the nomination); and
 - (ii) must be delivered to the Secretary at least forty-nine (49) days before:
 - (A) 31 December 2010; or
 - (B) the date fixed for the holding of the Annual General Meeting at which the election is to take place;as the case may be.
- (d) The nominations of the Energy Marketer Members shall be collated by the Secretary and presented to the Board at least seven (7) days immediately preceding the Board meeting at which the election is to occur. The Board will elect the Energy Marketer Director from the list of nominees as prepared by the Secretary in accordance with the process set out in **clause 44.2(e)**.
- (e) Election shall proceed by ballot, conducted in the following manner:
- (i) each Director voting shall mark his or her ballot paper by marking a cross opposite the name of each candidate for whom he or she wishes to vote and deliver the same to the Secretary. Each Director voting shall vote for one (1) candidate for each vacancy and no more and no less;
 - (ii) the result of the ballot shall be determined by the Secretary; and
 - (iii) after the closing of the ballot the Secretary shall proceed to the examination of the voting papers and shall report the result of the ballot to the Chair. Those candidates receiving the greatest number of votes shall be deemed elected and a declaration as to such election shall be made at the Board meeting by the Chair.
- (f) In the case of an equality of votes in favour of two (2) or more nominees for the one (1) position, the successful candidate shall be chosen by draw to be conducted by the Secretary in the presence of a Director.
- (g) The Board may direct the Secretary to destroy the ballot papers at any time after the expiration of one (1) month after the date of the declaration of the election.

45. VACATION OF OFFICE

45.1 Retirement by Director

- (a) Any Director may retire from office on giving written notice to the Company at the Office of his intention to retire and the resignation shall take effect at the time expressed in the notice (provided the time is not earlier than the date of delivery of the written notice to the Company).
- (b) If, pursuant to **clause 45.1(a)**, the ERAA Director resigns for any reason, ERAA shall appoint another person to hold the office of the ERAA Director in accordance with **clause 42.1**.

45.2 Casual Vacancy

The office of a Director shall become a casual vacancy if the Director:

- (a) dies;
- (b) becomes bankrupt or makes any arrangement or composition with creditors generally;
- (c) becomes prohibited from being a director of a company by reason of any order made under the Act;
- (d) becomes of unsound mind or a person whose personal estate is liable to be dealt with in any way under the law relating to mental health;
- (e) resigns by notice in writing to the Company;
- (f) is an Ordinary Director and the Large Active Retailer Member who appointed that Ordinary Director has any Annual Subscription or fees or any other monies due to the Company which have been due but are unpaid for a period in excess of three (3) months;
- (g) except where such Director has appointed an Alternate Director, is absent without the permission of the Board from two (2) consecutive meetings of the Board;
- (h) being an Ordinary Director, is removed from office by the Large Active Retailer Member which nominated the Ordinary Director by notice in writing, which may be given without any reason being ascribed to it; or
- (i) is a Energy Marketer Director and the Energy Marketer Member who nominated the Energy Marketer Director, ceases to be a Member pursuant to **clause 15.1(g)**.

45.3 Change in Ordinary Director by Large Active Retailer Member

A Large Active Retailer Member who nominated an Ordinary Director may change its Ordinary Director at any time.

46. ALTERNATE DIRECTORS

46.1 Appointment of Alternate Director

Each Director, with the prior approval of the Board, may appoint an Alternate Director to exercise some or all of the Director's powers for a specified period.

46.2 Rights of Alternate Director

- (a) The Alternate Director is entitled to receive notices of all Board meetings and may also attend and vote at those meetings if the Director who appointed the Alternate Director is not present at any such meeting.
- (b) The Alternate Director may exercise any powers that the Director making the appointment may exercise, and if the Alternate Director does so exercise a power, it will be taken to be an exercise of power by the Director who appointed the Alternate Director.

46.3 Termination of Alternate Director

- (a) The Alternate Director may be terminated from the office of Director at any time, even if the period of initial appointment has not yet expired by either:
 - (i) the Director who initially appointed that Alternate Director; or
 - (ii) the Board having passed a resolution terminating the appointment.
- (b) If the Director who appointed the Alternate Director vacates his or her office for any reason, the office of the Alternate Director is automatically terminated.

46.4 Effective Appointment and Termination

Any appointment or termination of an Alternate Director must:

- (a) be effected by a notice signed by the Director making the appointment or termination (or by the Secretary on behalf of the Board where the Board has terminated the appointment); and
- (b) be served on the Company; and
- (c) set out the terms (if any) of the appointment or termination.

POWERS AND DUTIES OF DIRECTORS

47. POWERS OF DIRECTORS

47.1 Powers of Directors

- (a) The control, ultimate management and conduct of the Company shall be vested in the Board who shall exercise all such powers of the Company as are not by the Act or by this Constitution required to be exercised in any other manner.
- (b) The Board will specifically:

-
- (i) control and manage the affairs of the Company;
 - (ii) exercise all functions as may be exercised by the Company other than those functions that are required by this Constitution to be exercised by a general meeting of Members; and
 - (iii) perform all acts and do all things as appear to the Board to be necessary or desirable for the proper management of the affairs of the Company.

48. NEGOTIABLE INSTRUMENTS

48.1 Negotiable Instruments

All cheques, promissory notes, drafts, bills of exchange and other negotiable instruments and all receipts for money paid to the Company must be signed, drawn, accepted, endorsed or otherwise executed as the case may be by:

- (a) any two (2) Directors; or
- (b) the chief executive officer of the Company and one (1) other employee who has received the appropriate delegated authority to do so by the Board.

49. CONFERMENT OF POWERS

49.1 Conferment of Powers by Board

- (a) The Board may from time to time confer upon any Director for the time being, or any other person as they may select, such of the powers exercisable under this Constitution by the Board as it may think fit for such time and to be exercised for such purposes and on such terms and conditions and with such restrictions as it may think expedient.
- (b) Powers conferred under this **clause 49.1** may be exercised concurrently with the powers of the Board in that regard and the Board may from time to time withdraw, revoke or vary all or any of such powers.

DIRECTORS' DISCLOSURE OF INTEREST

50. CONTRACTS

50.1 Power to enter into Contracts with Interested Director

The Company may enter into contracts or arrangements with other companies or bodies in which a Director has an interest, provided it does so according to the usual commercial terms and conditions that applies to such contracts or arrangements.

50.2 Disclosure of Interest

A Director must disclose an interest in accordance with the Act and the Secretary must record all declarations in the minutes of the relevant meeting.

50.3 Rights of Interested Director

- (a) A Director who has an interest in a contract or arrangement made by the Company and has disclosed this interest to the Board subject to compliance with section 195 and related provisions of the Act still may:
- (i) vote on the matter;
 - (ii) be counted in determining whether or not a quorum is present at any meeting of Directors considering that contract or arrangement or proposed contract or arrangement;
 - (iii) sign or countersign any document relating to that contract or arrangement or proposed contract or arrangement; and
 - (iv) vote in respect of, or in respect of any matter arising out of, the contract or arrangement or proposed contract or arrangement.
- (b) A Director's failure to make disclosure under this **clause 50** does not render void or voidable a contract or arrangement in which the Director has a direct or indirect interest.

50.4 Sufficient Disclosure

A general notice given to the Board by a Director that the Director is an officer, a member of or otherwise interested in any specified corporation or firm stating the nature and the extent of the Director's interest in the corporation or firm shall, in relation to any matter involving the Company and that corporation or firm after the giving of the notice, be a sufficient disclosure of the Director's interest, provided that the extent of the interest is no greater at the time of first consideration of the relevant matter by the Board than was stated in the notice.

PROCEEDINGS OF DIRECTORS

51. MEETINGS OF DIRECTORS

51.1 Regularity of Board Meetings

The Board may meet together for the despatch of business, adjourn and otherwise regulate their meetings and proceedings as it thinks fit, provided that they shall meet together at regular intervals not less than four (4) times in each twelve (12) month period.

51.2 Convening of Board Meetings

A Director may at any time and the Secretary upon the request of a Director shall convene a meeting of the Board by giving at least forty eight (48) hours (or such other period as may be unanimously agreed upon by the Directors) notice of the meeting to all Directors, except a Director who the person convening the meeting reasonably believes to be outside Australia.

51.3 Notice of Board Meetings

Notice of a meeting of the Board need not be in writing.

51.4 Use of technology

A Board meeting may be convened or held using any technology consented to by all Directors. The consent may be a standing one.

52. QUORUM

52.1 Definition of Quorum

- (a) Fifty-one per cent (51%) of Directors entitled to attend a meeting of the Board who are personally present plus the Chair or Deputy Chair form a quorum and a quorum must be present at all times during the meeting.
- (b) A Director who is disqualified from voting on a matter shall be counted in the quorum despite that disqualification.

52.2 Absence of Quorum

- (a) If within thirty (30) minutes of the time appointed for a meeting of the Board a quorum is not present, the meeting stands adjourned to the same place and at the same time on the same day in the following week.
 - (b) If, at the adjourned meeting, a quorum is not present within thirty (30) minutes of the time appointed for the meeting, the meeting will be dissolved.
-

53. CHAIR

53.1 Chair

The ERAA Director shall preside as Chair.

53.2 Deputy Chair

- (a) The Board shall elect from amongst the Directors the Deputy Chair.
- (b) In the Chair's absence the Deputy Chair shall preside as Chair.
- (c) The Deputy Chair shall hold office as such for a term of one (1) year, or until such time as he is no longer a Director, whichever occurs first. The Deputy Chair shall be eligible for re-election only for a further term of one (1) year.

53.3 Absence of both Chair and Deputy Chair

- (a) If a meeting of the Board is held and neither the Chair nor the Deputy Chair is present within thirty (30) minutes after the time appointed for the holding of the meeting then **clause 52.2** shall apply.
- (b) If the Chair or the Deputy Chair is present, but does not wish to chair the meeting, then the other Directors present must elect one of their numbers to be Chair of the meeting.

54. VOTING

54.1 Resolution

A resolution of the Board or at a meeting of a Panel constituted in accordance with **clause 56** must be passed by a majority of votes of the Directors or Panel members present at the meeting who vote on the resolution. A resolution passed by a majority of the votes cast by the Directors will for all purposes be taken to be a determination of the Board.

54.2 Voting

- (a) Each Director or Panel member shall have one (1) vote.
- (b) In case of an equality of votes at a meeting of the Board or of a Panel, the Chair shall have a casting or deliberative vote.

54.3 Defect

Any act or thing done or suffered, or purporting to have been done or suffered, by the Board or the Panel, is valid and effectual notwithstanding any defect that may afterwards be discovered in the appointment or qualification of any member of the Board or Panel.

55. RESOLUTIONS BY DIRECTORS

55.1 Circular Resolutions

- (a) The Board may pass a resolution without a Board meeting being held if all the Directors entitled to vote on the resolution sign a document containing a statement that they are in favour of the resolution set out in the document. For this purpose, signatures can be contained in more than one document.
- (b) A facsimile transmission which is received by the Company and which purports to have been signed by a Director shall, for the purposes of this **clause 55.1**, be taken to be in writing and signed by that Director at the time of the receipt of the facsimile transmission by the Company in legible form.
- (c) An email transmission which is received by the Company and which purports to have been sent by a Director shall, for the purposes of this **clause 55.1**, be taken to be in writing and signed by that Director at the time of the receipt of the email transmission by the Company.

55.2 Use of Technology

In addition, a Board meeting may be called or held and resolutions may be passed using any technology consented to by all the Directors. The consent may be a standing one. A Director may only withdraw consent within a reasonable period before the meeting or the putting of the resolution.

55.3 Validity of Resolutions

- (a) All resolutions of the Directors passed at a meeting of the Board where a quorum is present but where notice of the meeting has not been given as required to each Director, or any act carried out pursuant to such resolution, shall, provided each Director to whom notice was not given subsequently

agrees to waive the same, be as valid as if notice of the meeting had been duly given to all Directors.

- (b) Resolutions passed at a meeting of the Board at which there is no quorum present are not valid.

56. COMMITTEES OF DIRECTORS

56.1 Delegation to Committees

- (a) The Board may form, and by instrument in writing delegate any of its powers to, one or more Committees consisting of such Directors and other persons as are specified in the instrument except for:
- (i) this power of delegation; and
 - (ii) a function which is a duty imposed on the Board by the Act or by any other law,

and may from time to time revoke such delegation by instrument in writing.

- (b) The Board may continue to exercise any function delegated.

56.2 Obligations of Committee

A Committee must, in exercise of the powers delegated to it, conform to any directions and restrictions that may be imposed on it by the Board. A power so exercised shall be taken to be exercised by the Board.

56.3 Committees Meetings

- (a) The meetings and proceedings of any Committee consisting of more than one person will be governed by the provisions for regulating the meetings and proceedings of the Board contained in this Constitution.
- (b) A minute of all the proceedings and decisions of every Committee shall be made, entered and signed in the same manner in all respects as minutes of proceedings of the Board are required by the Act and this Constitution to be made entered and signed. A copy of these minutes shall be tabled at the next Board Meeting.

57. VALIDATION OF ACTS OF DIRECTORS

57.1 Validity of Actions of Directors

All acts done:

- (a) at any meeting of the Board; or
- (b) by any person acting as a Director,

shall, even if it is discovered afterwards that there was a defect in the appointment or continuance in office of any such Director or person or that they or any of them were disqualified or were not entitled to vote, be as valid as if every such person had been

duly appointed or had continued in office and was duly qualified to be a Director and had been entitled to vote.

MINUTES

58. MINUTES

58.1 Requirement to keep Minutes

The Board must cause minutes to be kept in accordance with the Act for the purposes of recording:

- (a) the names of the Directors present at each Board meeting and of Directors present at each meeting of any Committee;
- (b) all orders, resolutions and proceedings of general meetings and Board meetings and meetings of Committees;
- (c) such matters as are required by the Act to be recorded in the record books of the Company including without limitation all declarations made or notices given by any Director of his interest in any contract or proposed contract or the holding of any office or property whereby any conflict of duty or interest may arise.

58.2 Accuracy of Minutes

Such minutes shall be signed by the Chair of the meeting, or the Chair of the next succeeding meeting and minutes which purport to be signed accordingly shall be received in evidence without any further proof as sufficient evidence that the matters and things recorded by such minutes actually took place or happened as recorded and of the regularity of such matters and things and that the same took place at a meeting duly convened and held.

SECRETARY

59. APPOINTMENT AND TENURE

59.1 Appointment of Secretary

- (a) There must be at least one Secretary (who is the Company Secretary for the purposes of the Act) appointed by the Board for a term and on conditions determined by the Board.
- (b) The Board will appoint the chief executive officer of the Company as the Secretary.
- (c) The Board may remove any Secretary so appointed and appoint a person who is not the chief executive officer to be the Secretary in their stead.

59.2 Notice of Secretary's Details

The Secretary must, as soon as practicable after being appointed as Secretary, lodge a notice of his or her address details with the Company.

59.3 Keeping of Minutes

The Secretary must keep minutes of:

- (a) all appointments of Directors;
- (b) the names of the Directors present at a Board meeting or a general meeting;
and
- (c) all proceedings at Board meetings and general meetings.

EXECUTION OF DOCUMENTS

60. EXECUTION OF DOCUMENTS

60.1 Execution of Documents

Without limiting the manner in which the Company may execute any contract, including as permitted under section 126 of the Act or as otherwise delegated by the Board, the Company may execute any agreement, deed or other document by:

- (a) two Directors signing the same; or
- (b) one Director and one Secretary signing the same.

60.2 Common Seal

Nothing in this Constitution requires the Company to execute any agreement, deed or other document under common seal for the same to be effectively executed by the Company.

ACCOUNTS AND INSPECTION OF RECORDS

61. ACCOUNTS AND INSPECTION

61.1 Financial Records

The Board shall cause proper financial records to be kept and must distribute copies of the financial reports of the Company and a Director's report in accordance with the requirements of the Act.

61.2 Access of Records by Members

The Board must also from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounting and other records of the Company or any of them will be open to the inspection of Members.

62. CUSTODY OF BOOKS

Except as otherwise provided by this Constitution, the Secretary must keep in his or her custody or under his or her control all records, books and other documents relating to the Company.

63. INSPECTION OF BOOKS

The records, books and other documents of the Company must be open to inspection, free of charge, by a Member at any reasonable hour.

64. REGISTER OF MEMBERS

64.1 Register of Members

- (a) The Secretary must establish and maintain a Register of Members specifying the name and address of each person or body corporate who is a Member together with the date on which the person became a Member and the class of Membership.
- (b) The Register of Members will be kept at the principal place of administration of the Company and will be open for inspection, free of charge, by any Member at any reasonable hour.

INTELLECTUAL PROPERTY

65. USE OF INTELLECTUAL PROPERTY

65.1 Obligation of Members

- (b) All right, title and interest in any Intellectual Property (of whatever nature) developed, produced or created by the Company is and becomes vested in the sole, exclusive, absolute and entire beneficial ownership of the Company.
- (a) Nothing in this Constitution or any other agreement, appointment or arrangement between the Company and a Member (or any other party) confers on the Member any right, interest or title to the Intellectual Property.

65.2 Restrictions on use of Intellectual Property

A Member must not use any Intellectual Property owned by, or licensed to, the Company other than for a purpose to which the prior written consent of the Board has been obtained and in accordance with the Board's written directions from time to time.

65.3 Infringement Claims and Litigation

- (a) Members must inform the Company of any act of unfair competition or of any infringement of the Intellectual Property owned by, or licensed to, the Company of which they become aware.
- (b) The Company will have the right, but not the obligation, to prosecute and defend, as the case may be, all claims of infringement against or by an Energy Marketer arising from or in connection with a Member's use of the Intellectual Property owned by, or licensed to, the Company.
- (c) Members must provide all reasonable assistance that the Board requests for the purpose of protecting the Company's Intellectual Property and prosecuting any infringement of the Company's Intellectual Property.

NOTICES

66. SERVICE OF NOTICES

66.1 Service of notice to Member

- (a) A notice may be given by the Company to any Member by:
- (i) serving it on the Member personally;
 - (ii) sending it by post to the Member or leaving it at the Member's address shown in the Register of Members or otherwise the address supplied by the Member to the Company for the giving of notices;
 - (iii) facsimile to the facsimile number supplied by the Member to the Company for the giving of notices; or
 - (iv) sending it to the electronic address supplied by the Member to the Company for the giving of notices.
- (b) Any Member who has not left at or sent to the Office his place of address for inclusion in the Register as the place at which notices may be given to the Member shall not be entitled to receive any notice.
- (c) Where a notice is sent by post, service of the notice shall be taken to be effected by properly addressing, prepaying and posting a letter containing the notice and shall be deemed to have been effected on the day after the date of posting. Service of a notice to a Member outside Australia shall be deemed to have been made in the ordinary course of the post.
- (d) Where a notice is sent by facsimile or other electronic means, service of the notice shall be taken to be effected by properly addressing and sending the notice and in such case shall be taken to have been effected on the business day after it is sent.

66.2 Notice to Dead, Lunatic of Bankrupt Member

A notice may be given by the Company to the persons entitled to a share in consequence of the death, lunacy or bankruptcy of a Member by:

- (a) service on the Member personally;
- (b) sending it by post addressed to the person by name or by the title of the representative of the deceased or lunatic or the assignee of the bankrupt or by any like description at the address, if any, within Australia supplied for the purpose by the person claiming to be entitled;
- (c) by giving the notice in any manner in which the same might have been given if the death, lunacy or bankruptcy had not occurred.

66.3 Evidence of Service of Notice

Evidence of service of a notice may be established by proving that the envelope containing the notice and stamped appropriately was properly posted and a

certificate given by any Officer of the Company to that effect shall be conclusive evidence of service.

67. NOTICES OF GENERAL MEETING

67.1 Notice of General Meeting

Subject to **clause 66.1(b)**, notice of every general meeting must be given in any manner authorised by this Constitution to:

- (a) every Member; and
- (b) the auditor for the time being of the Company.

WINDING UP

68. WINDING UP

68.1 Surplus to ERAA

If any surplus remains following the winding up of the Company, the surplus will not be paid to or distributed amongst Members, but will be given or transferred to ERAA so long as ERAA has:

- (a) a constitution which requires its income and property to be applied in promoting its objects; and
- (b) a constitution which prohibits it from paying or distributing its income and property amongst its Members to an extent at least as great as imposed on the Company by **clause 5.2(b)**.

68.2 Surplus to Other Organisations

- (a) If at the time of the winding up of the Company:
 - (i) ERAA does not satisfy the criteria in **clauses 68.1(a)** and **68.1(b)**; or
 - (ii) it is not legally permissible for the surplus to be transferred to ERAA;then the surplus of the Company shall be given or transferred to an organisation or institution that has:
 - (iii) objects which are similar to the Objects;
 - (iv) a constitution which requires its income and property to be applied in promoting its objects; and
 - (v) a constitution which prohibits it from paying or distributing its income and property amongst its Members to an extent at least as great as imposed on the Company by **clause 5.2(b)**.
- (b) The identity of the corporation or institution referred to in **clause 68.2(a)** is to be determined by the Members in writing at or before the time of dissolution

and failing such determination being made, by application to the Supreme Court for determination.

INDEMNITY

69. INDEMNITY

69.1 Indemnity of Officers

To the extent permitted by law every Officer (and former Officer) of the Company shall be indemnified out of the funds of the Company against all costs, expenses and liabilities incurred as such an Officer or employee (or former Officer or employee). However, no such Officer (or former Officer) shall be indemnified out of the funds of the Company under this **clause 69** unless:

- (a) it is in respect of a liability to another person (other than the Company or a related body corporate to the Company) where the liability to the other person does not arise out of conduct involving a lack of good faith; or
- (b) it is in respect of a liability for costs and expenses incurred:
 - (i) in defending proceedings, whether civil or criminal, in which judgment is given in favour of the Officer (or former Officer) or in which the Officer (or former Officer) is acquitted; or
 - (ii) in connection with an application, in relation to such proceedings, in which the court grants relief to the Officer (or former Officer) under the Act.

70. PAYMENT OF INDEMNITY POLICY PREMIUM

70.1 Payment of Insurance Premiums

- (a) To the extent permitted by law the Company must enter into and/or pay a premium in respect of a policy of insurance insuring an Officer (or former Officer) of the Company against any liability incurred by such person in that capacity (whether in respect of acts or omissions prior to or after the date of the issue of the policy or both) except for:
 - (i) a liability arising out of conduct involving a wilful breach of duty in relation to the Company; or
 - (ii) a contravention of sections 182 or 183 of the Act.
- (b) The Board shall have the discretion to approve the terms and conditions of any such policy of insurance.

70.2 No Indemnity

Where an Officer (or former Officer) has the benefit of an indemnity pursuant to an insurance policy in respect of his actions or omissions, then the Company shall not be required to indemnify the Officer under **clause 69** except to the extent that the indemnity affected by the insurance policy does not fully cover the person's liability.

71. INDEMNITY TO CONTINUE

The indemnity granted by the Company contained in **clauses 69** and **70** shall continue in full force and effect notwithstanding the deletion or modification of that clause, in respect of acts and omissions occurring prior to the date of the deletion or modification.

We the several persons whose signatures appear hereunder hereby agree to the foregoing Constitution:

Name and address of Members	Signature of Members
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Australian Power & Gas Pty Ltd

of Level 9, 341 George Street,
Sydney NSW 2000

Authorised Signatory:

.....

Name:
Director/Company Secretary

Date:

Authorised Signatory:

.....

Name:
Director/Company Secretary

Date:.....

APPENDIX 1

Energy Assured Limited Form of Appointment of Proxy

PROXY FORM

(1) Your details

(Please print your name and address)

Name: _____

Address: _____

City: _____

State: _____

Postcode: _____

Telephone: _____

(2) Appoints

Name: _____

(Please print name of proxy)

as my proxy to vote for me on my behalf at the Annual/Special General Meeting of **Energy Assured Limited** be held on [insert date] commencing at [insert time] and at any adjournment thereof.

(3) Directions

I direct and authorise my proxy to vote as follows:

In favour of / against motion 1 *(strike out as appropriate)*

In favour of / against motion 2 *(strike out as appropriate)*

In favour of / against motion 3 *(strike out as appropriate)*

In favour of / against motion 4 *(strike out as appropriate)*

In favour of / against motion 5 *(strike out as appropriate)*

In favour of / against motion 6 *(strike out as appropriate)*

(4) Signature

(5) Date

This form may be returned by fax to (02) ##### or email to ###@#####.###.au.