

## Annexure B

**Australian Consumers' Association  
ACN 000 281 925**

**Explanatory Memorandum**

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### **A Introduction**

#### **1 Background**

- 1.1 It is proposed that the Australian Consumers' Association (the **Company**) adopt as a new constitution the draft constitution **attached** as Annexure "A" to the notice of meeting for the annual general meeting of the Company to be held on Thursday, 28 November 2013 (the **New Constitution**). This will completely replace the existing constitution of the Company (the **Current Constitution**).
- 1.2 This Explanatory Memorandum is intended to provide the members of the Company with information to help them to consider the New Constitution. It is intended to outline key aspects of the New Constitution and explain the rationale for some of the key new rules and concepts in the New Constitution.
- 1.3 Members of the Company should make their own independent assessment of the New Constitution and the information set out in this Explanatory Memorandum. The Explanatory Memorandum does not summarise or refer to all provisions of the New Constitution.
- 1.4 Capitalised terms in this Explanatory Memorandum have the same meaning as in the New Constitution, unless the context requires otherwise.

#### **2 Purpose of adoption of the New Constitution**

- 2.1 The Current Constitution was originally adopted in 1959. It has been amended incrementally over time, with the result that some provisions of the Current Constitution are ambiguous and inconsistent with each other. It also does not reflect contemporary good practice in governance or drafting.
- 2.2 Some of the issues that the Board identified in initiating a review of the Current Constitution included:
- (1) clarification of the distinction between CHOICE membership and membership of the Company;
  - (2) changes to the process for the nomination, election and appointment of directors; and
  - (3) clarification of the Board rotation process.
- 2.3 The drafting principles that the Board applied in the development of the New Constitution were:
- (1) plain English;
  - (2) simple, consistent and accessible rules;

- (3) technological neutrality, to accommodate the use of electronic communication as technology evolves; and
- (4) contemporary good practice in governance for companies with the role and functions of the Company.

2.4 Given that a large number of amendments to the Current Constitution would be required in order to address the issues and drafting principles outlined above, the Board recommends the adoption of the New Constitution, as a complete replacement for the Current Constitution.

### **3 Preparation of the New Constitution**

3.1 The drafting of the New Constitution was overseen by the Governance Committee of the Board, with pro bono legal advice from Norton Rose Fulbright Australia.

3.2 The Governance Committee invited members of the Company to be involved in the preparation of the New Constitution through a consultation process. The consultation process included:

- (1) inviting members to join a group that was consulted by email on specific issues;
- (2) consulting members who attended the Extraordinary General Meeting of the Company held in Brisbane on Wednesday, 29 May 2013; and
- (3) circulating, and requesting feedback on, a draft of the New Constitution via email in September 2013.

## **B Features of the New Constitution**

### **1 Key changes in the New Constitution**

1.1 A brief summary of some of the key changes introduced in the New Constitution, and the rationale for, and consequences of, those changes, are set out below.

### **2 Nature of the Company**

2.1 The nature of the Company is essentially unchanged in the New Constitution, but is now expressed more simply and in plain English:

- (1) rule 1 of the New Constitution states that the Company is a public company limited by guarantee, where the liability of each member is limited to \$1;
- (2) rule 1.2 sets out and clarifies the powers of the Company, which are all the powers of an individual and a body corporate, excluding the power to issue shares; and
- (3) rule 1.3 sets out that the Company is not for profit.

### **3 Purpose and objectives**

3.1 Rule 2 of the New Constitution sets out the purpose and objectives of the Company, and the manner in which the Company pursues the purpose and objectives of the Company. Under the New Constitution, the overall purpose of the Company is to work for fair, just and safe markets that meet the needs of Australian consumers.

3.2 The Current Constitution sets out a detailed and lengthy list of objects in rule 20.2. The revised purpose and objectives in the New Constitution are intended to remain relevant and flexible over time, and to satisfy requirements relating to the taxation status of the Company.

### **4 Membership**

4.1 The New Constitution distinguishes between “members of CHOICE” and “members of the Company”. Under the Current Constitution, a member of CHOICE was known as a “Subscriber”, and a member of the Company was known as a “Member”.

#### 4.2 *Members of CHOICE*

- (1) Under rule 3.1 of the New Constitution, members of CHOICE are individuals or bodies corporate who subscribe to one or more of the CHOICE membership options approved by the Board. This would include subscribers to any of the various CHOICE magazine or CHOICE online options.
- (2) While this generally reflects and maintains the status of Subscribers in the Current Constitution, the New Constitution has been drafted more broadly to incorporate current practice and future developments in CHOICE membership options. For example, the term “Annual Subscription” is no longer used in the New Constitution, reflecting the fact that many members of CHOICE subscribe on a quarterly basis.
- (3) The New Constitution makes it clear that a member of CHOICE is not a member of the Company for the purposes of the *Corporations Act 2001* (Cth) or the New Constitution. While this is the position under the Current Constitution, it is not clearly stated and should be clarified.

#### 4.3 *Members of the Company*

- (1) The New Constitution states that the Company has one category of membership, being voting members (which includes life members). Only individuals who are members of CHOICE may apply to become a member of the Company, that is, a voting member. While this reflects the Company’s current practice, it is not stated clearly in the Current Constitution. Consultation with members indicated support for this change.
- (2) Rule 4.2.2 of the New Constitution sets out the right of the Board to decide, in its absolute discretion, to accept or reject an application by a member of CHOICE to become a member of the Company, and the factors that the Board may consider in making this decision. This is consistent with rule 3.3 of the Current Constitution, although the factors that the Board may consider have been redrafted in plain English.
- (3) The rules referring to life members, membership fees and cessation of membership remain broadly the same in the New Constitution.

#### 4.4 *Disciplining and removing members*

- (1) Rule 4.6 of the New Constitution formalises a procedure for disciplining and removing members. This seeks to ensure that members are dealt with fairly, afforded the opportunity to defend themselves, and made aware of their rights.

### 5 **Directors**

#### 5.1 *Number of directors*

- (1) The New Constitution provides that the Company will have nine directors elected by the members of the Company, and up to three directors appointed by the Board under the “co-option” process. The co-option process allows the Board to appoint additional directors to provide additional skills required by the Board.
- (2) Rule 8.1 of the Current Constitution allows for a maximum of 20 directors, but the Board has adopted a practice of having nine elected directors and appointing further directors as required. The New Constitution reflects this practice.

## 5.2 *Qualification to be a director*

- (1) Under the New Constitution, the following mandatory and non-mandatory qualification requirements apply to persons to be elected or appointed as a director of the Company:
  - (a) *Mandatory requirements in rule 6.2:* Only members of the Company are eligible to be a director of the Company. Further, persons who are employees of the Company, were employees of the Company at any time in the three years before the Nomination Date, or provide consulting or independent contractor services at the Nomination Date, cannot be a director of the Company. This clarifies the position in the Current Constitution.
  - (b) *Non-mandatory requirements in rule 6.3:* Candidates will also be assessed on the basis of other skills and qualities, including their governance experience, the membership factors set out in rule 4.2.2, and any other competencies, skills and experiences set by the Board.
- (2) The intent of these rules under the New Constitution is both to supplement and clarify the rules in the Current Constitution. For example, there are no equivalent provisions to rule 6.3 in the Current Constitution, but broadly speaking, rule 6.3 of the New Constitution reflects the Board's current practice. The Board identifies and publishes a list of skills required by the Board as a guide to members when calling for nominations. The factors in rule 6.3 will not prevent a candidate from standing for election. They will, however, provide a framework against which candidates will be assessed.
- (3) The New Constitution does not contain the requirement in rule 8.5 of the Current Constitution that a director must be a current member of at least one month's standing at the time of their appointment or election. This requirement has little or no practical effect under the Current Constitution because:
  - (a) a person seeking election must be a member at the Nomination Date, which under the Current Constitution (and New Constitution) is at least 90 days before the annual general meeting; and
  - (b) for a director who is co-opted or appointed to a casual vacancy, the effect of the rule has been to simply delay the appointment by one month.

## 5.3 *Nominations Committee*

- (1) The New Constitution establishes a Nominations Committee. Many companies and other organisations use a Nominations Committee to assist in identifying candidates with suitable skills to hold the office of director.
- (2) As rule 6.7.1 of the New Constitution sets out, the role of the Nominations Committee is to assist the Company to identify directors having appropriate competencies, skills and experience, including qualities consistent with rule 6.3, to help achieve the purpose and objectives of the Company set out in rule 2.
- (3) Although the Current Constitution does not provide for a Nominations Committee, the New Constitution broadly reflects the current practice of the Board. Further, the rules regarding the Nominations Committee in the New Constitution incorporate feedback received from members.

## 5.4 *Nomination of directors*

The New Constitution requires that the nomination of a candidate for election as a director include a signed declaration from two other members of the Company

indicating their support for the candidate's nomination. This reflects the established practice of the Company.

#### 5.5 *Ballot*

- (1) There are two key changes to the ballot process for the election of directors introduced by the New Constitution:
  - (a) Rule 6.8.6 of the New Constitution provides that members are permitted to vote in favour of any number of candidates equal to or less than the number of vacancies to be filled. Under rule 9.5(c) of the Current Constitution, a ballot is only valid if the member votes in favour of a number of candidates equal to the number of vacancies. This change is proposed as the result of consultation with members.
  - (b) Rule 6.8.10 of the New Constitution states that where two or more candidates receive an equal number of votes, but there are not enough vacancies for all of these candidates to be elected, the candidate(s) to be elected must be decided by lot. Under the Current Constitution, the process in this situation is not clear. This change has been drafted after consultation with members.

#### 5.6 *Terms of office and rotation of the Board*

- (1) The New Constitution provides for a regular rotational system for the retirement and election of directors:
  - (a) Rule 6.11 states that elected directors hold office from the end of the annual general meeting at which they are elected, until the end of the third annual general meeting after they are elected. This means that the term of office of an elected director is approximately three years.
  - (b) Rule 6.12 states that co-opted directors hold office from the time they are co-opted, until the end of the third annual general meeting after they are co-opted, or a shorter period as determined by the Board. In effect, this means that the term of office of a co-opted director is up to or around three years.
  - (c) Rule 6.15.2 sets out the length of time a director appointed to fill a casual vacancy will hold office. Briefly, the term of office of a director appointed to fill a casual vacancy under rule 6.5.3 is approximately three years. A director appointed to fill a casual vacancy arising other than under rule 6.5.3 will hold office for the remainder of the term of office of the person whose position he or she is filling.
- (2) The above rules of the New Constitution have been drafted to establish a regular system of Board rotation, and to ensure greater consistency in the lengths of the terms of office of elected and appointed directors. The combined effect of these rules (and the transitional arrangements discussed below) is to seek to ensure that three of the nine elected directors' positions become available at every annual general meeting.
- (3) Although the Current Constitution also purports to provide a regular system of Board rotation, the number of elected directors' positions that become available can vary from year to year, and the lengths of terms of office of elected and appointed directors can vary significantly.

#### 5.7 *Limit on consecutive terms of office*

- (1) The New Constitution introduces a limit on the number of consecutive terms for which a director may hold office. Rule 6.13 of the New Constitution states that no director may serve for more than three consecutive terms of office (with certain exceptions for

casual vacancies and where a director is exempted by the Board in exceptional circumstances).

- (2) Although there is no equivalent rule in the Current Constitution, the Board has had a policy for some time of seeking to limit the maximum length of time a person may be a director to three terms, unless there are exceptional circumstances.

#### 5.8 *Transitional arrangements for the Board*

- (1) Schedule 2 of the New Constitution sets out the transitional arrangements applicable to the "Existing Directors", being the elected directors holding office following the annual general meeting at which the New Constitution is adopted. In particular:
  - (a) Three Existing Directors shall retire at each subsequent annual general meeting. The three Existing Directors selected to retire will be those Existing Directors with the earliest "Election Date", being the date of their most recent election or appointment to office.
  - (b) Where two or more Existing Directors share the same Election Date, the Existing Director(s) selected to retire at the annual general meeting must be selected by lot.
  - (c) The New Constitution provides for the situation where a casual vacancy arises because an Existing Director ceases to be a director under rule 6.14.
- (2) The transitional arrangements in the New Constitution have been drafted to introduce a regular rotational system for the retirement and election of directors.

#### 5.9 *Directors' interests in contracts*

- (1) The Current Constitution provides that a person ceases to be a director if he or she is directly or indirectly interested in a contract or proposed contract with the Company.
- (2) This rule has not been replicated in the New Constitution, which introduces the new rule 6.25.2. It is the view of the Board that interests in contracts and any conflicts they create can be managed under rules 6.21 (which, broadly speaking, restricts directors from being present at meetings or voting in relation to matters in which the director has a material personal interest) and 6.22 of the New Constitution, which requires directors to comply with the requirements of the Act in relation to disclosure of interests.

#### 5.10 *Decisions of directors without meetings (circulating resolutions)*

- (1) Rule 7.6 of the New Constitution introduces the ability for the Board to pass a resolution without holding a Board meeting, if 75% of the directors entitled to vote on the resolution either sign a document containing the resolution and a statement that they are in favour of the resolution, or otherwise provide their agreement to the resolution by any other method approved by the Board.
- (2) Under the Current Constitution, the directors may only pass a written resolution without holding a Board meeting if it is signed by all the directors entitled to do so. In the experience of the Board, it can be impractical to obtain the signatures of all the directors, for example if a director is travelling or does not have access to the relevant technology to transmit his or her signature. Rule 7.6 of the New Constitution addresses these practical difficulties.

**C Questions**

If you have queries regarding the New Constitution, please email [constitution@choice.com.au](mailto:constitution@choice.com.au), or contact Linda Magee, Company Secretary, on (02) 9577 3378.

**DATED**

**2013**

BY ORDER OF THE BOARD

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Director