

# Explanatory Memorandum

Confidential

**To** The Members

**From** The Board of Directors

**Date** 8 October 2024

**Subject** Proposed new constitution for Asthma Australia Limited

## 1 Introduction

- (a) Attached to this Explanatory Memorandum is a proposed new Constitution (**New Constitution**) for the consideration of the Members of Asthma Australia Limited (**Asthma Australia**) at the 2024 Annual General Meeting.
- (b) The Directors initiated a review of the existing Constitution of Asthma Australia (**Existing Constitution**) in respect of the following objectives:
  - (i) reflect that Asthma Australia is now a successfully merged and operational national body;
  - (ii) strengthen the governance structure to ensure that safeguards are in place to support Asthma Australia's pursuit of its charitable objects now and in the future;
  - (iii) enhance Asthma Australia's engagement with people in the Asthma Australia community and ensure this engagement best reflects this community's expectations; and
  - (iv) ensure it complies with current legal requirements, as:
    - (A) a not-for-profit company limited by guarantee under the *Corporations Act 2001* (Cth) (**Corporations Act**);
    - (B) a registered charity under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**); and
    - (C) a deductible gift recipient as a Health Promotion Charity.
- (c) The most efficient way to effect these changes is to adopt a new constitution that replaces the functional provisions while incorporating the essential features of the Existing Constitution.
- (d) References in this Explanatory Memorandum:
  - (i) to terms defined in the New Constitution take the meaning set out in the New Constitution; and
  - (ii) to clauses are references to clauses in the New Constitution unless otherwise indicated.

## **2 Succession and historical clauses**

### **2.1 Preamble**

The New Constitution includes a Preamble to both document the history of Asthma Australia and honour the legacy of the State and Territory asthma foundations that merged their operations into the national entity, but also to confirm that Asthma Australia is the proper successor to each of the entities listed in the Preamble. The Preamble will also assist executors of bequests to one of the State or Territory entities in identifying the proper recipient.

### **2.2 Historical clauses**

A number of the clauses in the Existing Constitution (for example, 2.1(h), 6.5(a)(ii) and 10.2) relate to or were to facilitate the merger that occurred in 2017 and are no longer needed in their current form. These clauses have been removed.

### **2.3 Succession**

The New Constitution simplifies clause 2.2 to reflect that succession is considered in the Preamble and provides greater flexibility.

## **3 Charitable status**

- (a) Asthma Australia is a charity registered with the Australian Charities and Not-for-profits Commission (**ACNC**) and is endorsed by the Australian Taxation Office to access charity tax concessions. The New Constitution, therefore, retains the following:
  - (i) a charitable Object (clause 2);
  - (ii) provisions for Asthma Australia's income and property to be applied solely for the furtherance of its Object (clause 4); and
  - (iii) provision for distribution on winding up to one or more funds or institutions with similar charitable purposes and as Asthma Australia is endorsed as a deductible gift recipient as a Health Promotion Charity, is similarly endorsed (clauses 5.2 and 5.3).
- (b) This means that any surplus made by Asthma Australia may only be used for the purposes set out in clause 2, and no income or property may be distributed to Members, except as permitted in clause 4.2.

## **4 Object of Asthma Australia**

The objects of Asthma Australia as set out in the Existing Constitution have been retained (except for clause 2.1(h) in the Existing Constitution) to reflect the current nature and charitable purposes of Asthma Australia and enable it to retain its registration as a Health Promotion Charity. However, for clarity, the word 'Object' in its singular form has been used to distinguish the Object of Asthma Australia from the activities it undertakes to pursue its Object. We note that the activities of Asthma Australia are not limited to the activities set out in this clause.

## **5 Corporations Act**

- (a) Since 3 December 2012, section 111L(1) of the Corporations Act has 'switched off' specific provisions of the Corporations Act for registered charities. These provisions previously applied to charities that are companies limited by guarantee, including the provisions relating to regulating members' meetings in Parts 2G.2

and 2G.3 of the Corporations Act and financial reporting in Parts 2M.1, 2M.2 and 2M.3.

- (b) Accordingly, the requirement to hold an Annual General Meeting is optional for Asthma Australia. However, to promote transparency and good governance, Asthma Australia has (in clause 1.4(a)) 'switched back on' the 'switched off' provisions of Parts 2G.2 and 2G.3 of the Corporations Act to enable these provisions to be practically applied to Asthma Australia. This means that Asthma Australia is required to have Annual General Meetings in accordance with the Corporations Act, which provides clarity and consistency for Asthma Australia in relation to how it regulates its members' meetings.

## **6 Membership**

### **6.1 New Constitution**

- (a) One of the fundamental changes made in the New Constitution is the composition of membership. We have sought and listened to feedback on how current Members engage with Asthma Australia. We understand that many Members enjoy being engaged with and receiving information from Asthma Australia, and we value and wish to honour this engagement. However, many Members want to continue this engagement without exercising a formal 'corporate governance' role (for example, casting a vote at Annual General Meetings).
- (b) Asthma Australia seeks to address this issue while retaining a Member base to discharge the governance role and provide an external reference point to keep the Directors accountable.
- (c) To achieve both objectives, the New Constitution introduces the following changes:
  - (i) The maximum number of Members is 100, or such other number determined by the Members (clause 6.1).
  - (ii) The Members of Asthma Australia on adoption of the New Constitution are:
    - (A) Directors;
    - (B) members of the Consumer Advisory Council (**CAC**);
    - (C) members of the Professional Advisory Council (**PAC**) who are also Members;
    - (D) members of the Research Advisory Council (**RAC**) who are also Members; and
    - (E) Life Members.(clause 6.1(b))
  - (iii) Ordinary Members under the Existing Constitution become Subscribers with the benefits set out by the Directors in Policies (clause 6.2). This means that Ordinary Members under the Existing Constitution will no longer be Members with a corporate governance role. However, as paragraph 6.1(c)(v) below notes, the Directors may admit any eligible person to membership. *If you are an Ordinary Member under the Existing Constitution and want to exercise a corporate governance role, please get in touch with Asthma Australia using the details provided in paragraph 10(c) below.*
  - (iv) After the adoption of the New Constitution, the following individuals are required to be Members:

- (A) Directors (clause 10.3(a)); and
  - (B) members of the CAC, PAC and RAC (clauses 23.4, 24.4 and 32.4).
- (v) Under clauses 6.4 and 6.5(iv), the Directors may admit *any other person of at least 18 years of age to membership* if the person satisfies any further qualification requirements of membership set out in Policies. This means that Directors have the discretion to admit any qualified person to membership of Asthma Australia. If membership and the corporate governance roles this entails is something that is desired, please do not hesitate to contact Asthma Australia using the contact details provided in paragraph 10(c).
- (d) The provisions relating to membership terms, membership fees and the Register remain unaltered in the New Constitution, except that current Directors and current members of the CAC, PAC and RAC and Life Members are not required to renew their membership (clause 6.9(b)).

## **6.2 Rights of Members**

- (a) The rights of Members under the New Constitution include the right to:
- (i) call a General Meeting in conjunction with other Members (clause 8.2 and the Corporations Act);
  - (ii) receive notice of a General Meeting (clause 8.3);
  - (iii) attend, speak at and vote at a General Meeting of the Members (see clauses 8 and 9);
  - (iv) appoint another Member as a proxy for the Member (clause 9.15);
  - (v) remove the Directors (clause 13(b));
  - (vi) inspect the Members' Register or other records of Asthma Australia as authorised by the Directors or as otherwise provided by law (clause 40); and
  - (vii) amend the constitution by Special Resolution (clause 43(a)).

## **6.3 Termination of Membership**

- (a) A Member ceases to be a Member in several situations as stated in clause 7.1, including when a person ceases to be a Director or a member of the CAC, PAC or RAC.
- (b) In addition, either the Directors or the Members in General Meeting may terminate the membership of a Member for several reasons, including:
- (i) a failure to comply with the Constitution or any applicable Policies made by the Directors;
  - (ii) engagement in conduct that is unbecoming of a Member or prejudicial to the interests of Asthma Australia; or
  - (iii) a failure to pay any debt (other than a membership fee) due to Asthma Australia for a period of three months after the date for payment (clause 7.2).

- (c) However, it is a legal requirement that natural justice be afforded. Therefore, before terminating membership, Asthma Australia must follow the notification process outlined in clause 36, requiring them to give the Member notice of the general allegation against them in writing and allow the Member to respond.

## **7 General meetings**

- (a) Clauses 8 and 9 of the New Constitution refer to general meetings. These clauses are substantially the same as the applicable clauses in the Existing Constitution. As noted in paragraph 5(b), Asthma Australia has opted to continue holding annual general meetings in accordance with the Corporations Act to ensure accountability and transparency.
- (b) References in the New Constitution to meetings include meetings held by technology where all attendees have a reasonable opportunity to participate in the meeting (clause 1.2(f)). A person is present at a meeting for the purposes of calculating the quorum if they are present by technology and may vote on a 'show of hands' in some agreed electronic form.
- (c) Similarly, where a document is required to be in writing and signed, this may include electronic forms (clauses 1.2(k) and 1.3).

## **8 Directors**

### **8.1 Appointment**

- (a) The Existing Constitution provides that the number of directors must be 9 or a lesser number of persons as the Voting Members in General Meeting may determine from time to time (clause 10.1 of the Existing Constitution).
- (b) In the New Constitution, clauses 10 to 15 of the New Constitution regulate the office, powers, and duties of Directors. Clause 10.1 provides that the number of Directors shall be between 3 and 9 as the Members may determine from time to time, and, in the absence of such determination, the number will be 9. A Director must be a Member, have a Director Identification Number, and consent in writing to act as a Director (clause 10.3).
- (c) The appointment of the Directors is made by the Appointments Committee (clause 10.2). Under the Existing Constitution (clause 30.2 of the Existing Constitution), the Appointments Committee comprises 2 Directors, 2 members of the CAC and 2 members of the PAC. However, to ensure the Appointments Committee better represents the interests of Members, under the New Constitution, the Appointments Committee comprises 2 Members, 2 Directors and 1 member of each of the CAC and the PAC (clause 31).

### **8.2 Retirement or vacation**

- (a) The Existing Constitution provides that Directors' appointments take effect at the close of an Annual General Meeting where their appointments are announced. Under the Existing Constitution, the Directors are rotated a third at a time, such that at least a third of the Directors will be up for re-appointment at every Annual General Meeting, when they must retire but may be re-appointed. The Existing Constitution limits the number of consecutive years a Director can serve to 3 consecutive terms or 9 years, whichever is longer.
- (b) In the New Constitution, this term remains three years (clause 10.4(a)). At each Annual General Meeting, any Director who has held office for three years or more since last being elected must retire but is eligible for reappointment (clause 10.5(a)). A Director may be reappointed on 2 occasions provided their period of

service to Asthma Australia does not exceed 9 years (unless the Members, by resolution in General Meeting, elect to waive this requirement for a particular Director).

- (c) The New Constitution no longer provides for the rotation of Directors as this process is quite burdensome. Instead, the terms of Directors provide for a natural rotation.
- (d) The office of Director may be vacated for several reasons, including resignation, removal by ordinary resolution of the Members, absence from 3 successive meetings of the Directors without leave, or prohibition, disqualification, or removal from being a Director because of any order of the court or regulator (clause 13).
- (e) If the office of a Director is vacated, the Appointments Committee may appoint another person to fill this position as a casual vacancy (clause 10.6). A person appointed to fill a casual vacancy holds that position only until the conclusion of the next Annual General Meeting (but is eligible for appointment under clause 10.2).

### **8.3 Role of Directors**

- (a) The Directors are to manage Asthma Australia. They may exercise all the powers of Asthma Australia that are not, by the Corporations Act or by the New Constitution, required to be exercised by Asthma Australia Limited in General Meeting (clause 14.1).
- (b) The Directors may, from time to time, by resolution, make or alter or rescind Policies which are binding on the Directors and Members for the management and conduct of the business of Asthma Australia (clause 15).
- (c) The New Constitution includes a new clause expressly providing that the Directors may appoint a Chief Executive Officer on such terms and conditions (including as to remuneration) as they think fit (clause 16.1).
- (d) The Directors are responsible for appointing the officers of Asthma Australia Limited (clause 10.7) and shall, among other things, appoint a Secretary in accordance with clause 16.2.

### **8.4 Remuneration of Directors**

The New Constitution retains a provision allowing Directors to receive remuneration for their services as Directors, subject to the approval of Members (clause 11).

## **9 Committees and Councils**

### **9.1 General**

Clause 22 of the New Constitution allows for the establishment of Directors' committees, where the Directors may delegate any of their powers other than powers required by law to be dealt with by Directors as a board. A Committee to which any powers have been delegated under clause 22 must exercise those powers in accordance with any directions of the Directors and may be comprised of Directors and such other persons as the Directors think fit (clause 22.1).

### **9.2 Consumer Advisory Council**

The provisions relating to the CAC have remained essentially unchanged in the New Constitution. However, under clause 26 of the New Constitution, members of the CAC may be remunerated for their services as Councillors.

### **9.3 Professional Advisory Council**

- (a) The provisions relating to the PAC have been amended to provide that members of the PAC are appointed by the Directors (clause 24.3), which documents the current practice as there are no Professional Members of Asthma Australia to appoint members to the PAC.
- (b) Further, members of the PAC are now required to be Members of Asthma Australia and may be remunerated for their services as Councillors.

### **9.4 Research Advisory Committee**

- (a) Under the Existing Constitution, the RAC was a committee constituted under clause 21 of the Existing Constitution. The New Constitution prescribes that there shall be a Research Advisory Committee whose principal function is to provide the Directors with advice, information and guidance around the design, implementation, and evaluation of the research program and to facilitate collaboration with individuals and organisations locally and internationally (clause 32.1).
- (b) In the New Constitution, members of the RAC must be Members of Asthma Australia (clause 32.4).

## **10 Conclusion**

- (a) We trust that this is sufficient to enable the Members to approve the Constitution at a General Meeting for which 21 days' notice has/will be provided.
- (b) In accordance with the Corporations Act, the adoption of the New Constitution requires a special resolution of the Members to be passed, being a resolution of which at least 75% of those present and voting at the general meeting vote in favour.
- (c) If you have any questions about the New Constitution, please visit [www.asthma.org.au/constitution](http://www.asthma.org.au/constitution) or call 1800 278 462.