

# **Medicare Locals: Template constitution guidance material**

Australian General Practice Network Limited

## Contents

<b>1</b>	<b>About these documents</b> .....	<b>5</b>
	What are these documents? .....	5
	What is the purpose of these documents? .....	5
	Why is AGPN making these documents available? .....	5
	Is the template constitution complete? .....	5
	Meaning of capitalised terms .....	6
<b>2</b>	<b>Using these documents</b> .....	<b>6</b>
	Important legal information .....	6
	How can I use these documents? .....	7
	How does this guidance material link with the template constitution?.....	7
	What are the key decisions to be made in preparing a draft constitution for the Medicare Local? .....	7
	Will I need legal or taxation advice in preparing a draft constitution for the Medicare Local?.....	7
<b>3</b>	<b>Background information</b> .....	<b>8</b>
	What is a constitution?.....	8
	Does a Medicare Local have to have a constitution? .....	8
	Is a constitution just like any other form of legal contract?.....	9
	Should all relevant rights and obligations be set out in a constitution? .....	9
	Should 'transitional provisions' be included in the Medicare Local's constitution?.....	10
	How can a constitution be implemented?.....	10
	What drafting assumptions have been made in preparing the template constitution? .....	11
<b>4</b>	<b>Guidance Notes to attached template constitution</b> .....	<b>12</b>
	<b>Guidance Note 1: Company Name</b> .....	<b>12</b>
	Does the company have to have a name? .....	12
	Must the word 'Limited' or 'Ltd' appear at the end of the company's name?.....	12
	What other factors may be relevant to the choice of company name? .....	12
	<b>Guidance Note 2: Australian Company Number</b> .....	<b>13</b>
	Will the ACN be known at the time the Medicare Local is established? .....	13
	<b>Guidance Note 3: Liability of members and guarantee on winding up</b> .....	<b>13</b>
	Do the members have to give a guarantee?.....	13
	Can the members reduce the guarantee amount at a later date? .....	13
	<b>Guidance Note 4: Objects</b> .....	<b>13</b>
	What are 'objects'? .....	13
	Is an 'objects clause' required for a Medicare Local? .....	13
	Will the objects limit the company's legal capacity?.....	14
	What objects should be specified for a Medicare Local? .....	14
	<b>Guidance Note 5: Membership</b> .....	<b>14</b>
	Does the company have to have members? .....	14
	What does 'membership' mean in the context of a not-for-profit company? .....	14
	Organisations as members .....	15

What are 'classes' of membership, and why might they be adopted by a Medicare Local?.....	15
What other methods of participation in a Medicare Local's governance could apply?.....	15
<b>Guidance Note 6: Admission to membership.....</b>	<b>16</b>
When are members admitted?.....	16
How might members be admitted in the future? .....	16
<b>Guidance Note 7: Register of Members.....</b>	<b>16</b>
Does the company have to keep a register of members?.....	16
What if the company wishes to collect and record other information about members? .....	17
Why else does the register of members matter? .....	17
<b>Guidance Note 8: Application fees and annual subscriptions .....</b>	<b>17</b>
Does the company have to charge an application fee for membership applications? .....	17
Does the Medicare Local have to charge its members an annual subscription?.....	18
<b>Guidance Note 9: Removal and cessation of membership.....</b>	<b>18</b>
Why should the constitution address removal and cessation of membership?.....	18
Who should have the right to expel a member? .....	18
How else might a member's membership cease other than through resignation?.....	19
<b>Guidance Note 10: No profits for members.....</b>	<b>19</b>
Does the constitution have to prohibit distributions to members? .....	19
Can a company limited by guarantee pay a dividend to its members? .....	20
<b>Guidance Note 11: General meetings .....</b>	<b>20</b>
Who should be entitled to convene a general meeting of the Medicare Local?.....	20
Can the members convene a general meeting, or require that one be convened? .....	21
What is a quorum and why is it important?.....	21
What quorum can be specified in the constitution? .....	21
What if a quorum cannot be achieved at a general meeting? .....	22
Who should preside at general meetings? .....	22
Control of the general meeting.....	22
Can the members pass resolutions in any other way? .....	23
<b>Guidance Note 12: Proxies and representatives.....</b>	<b>23</b>
What is a 'proxy'? .....	23
What rights does a proxy have?.....	23
What other requirements might apply regarding the appointment of a proxy? .....	24
What is a 'corporate representative'? .....	24
<b>Guidance Note 13: Appointment and retirement of directors.....</b>	<b>24</b>
What will need to be included in the constitution? .....	24
Who are the initial directors?.....	24
Can the Constitution include transitional provisions regarding directorships?.....	25
What minimum and maximum number of directors should be specified?.....	25
Does a director have to be a member of the company? .....	25
Is it necessary to include provisions regarding retirement of directors? .....	26
Can the directors appoint other directors? .....	26
How can a director be removed from office?.....	27
When will a director's office be vacated?.....	27

<b>Guidance Note 14: Directors' remuneration .....</b>	<b>28</b>
Should the constitution clarify whether or not directors are entitled to be paid fees? .....	28
What may impact on the decision whether or not to pay directors' fees?.....	28
What other payments could be made to directors? .....	28
On what basis has sample clause 11 been drafted? .....	28
<b>Guidance Note 15: Powers of directors.....</b>	<b>29</b>
Why is it important to clarify the powers of directors in the constitution? .....	29
Should other decisions be reserved to the members in general meeting? .....	29
<b>Guidance Note 16: Proceedings of directors .....</b>	<b>30</b>
Who should be entitled to convene a board meeting of the Medicare Local? .....	30
What quorum for board meetings can be specified in the constitution? .....	30
What if a quorum cannot be achieved at a board meeting?.....	31
How should the chairperson of the board be appointed and removed? .....	31
<b>Guidance Note 17: Participation where directors have conflicting interests .....</b>	<b>31</b>
Why might the constitution include provisions regarding directors' interests? .....	31
<b>Guidance Note 18: Committees.....</b>	<b>32</b>
What types of committee can a board establish? .....	32
Does the committee structure impact on the board's ability to delegate its powers?.....	33
Where else might a committee sit in the corporate structure? .....	33
<b>Guidance Note 19: Circular resolutions of directors .....</b>	<b>33</b>
Can the directors pass a resolution other than by holding a board meeting? .....	33
What issues need to be considered when drafting a provision of this kind?.....	34
<b>Guidance Note 20: Alternate directors.....</b>	<b>34</b>
What is an 'alternate director'?.....	34
Are these provisions optional?.....	34
<b>Guidance Note 21: Secretary.....</b>	<b>34</b>
Is the company required to have a secretary?.....	34
What does the secretary do? .....	35
Can a director also be appointed as the secretary? .....	35
<b>Guidance Note 22: Indemnity and insurance .....</b>	<b>35</b>
Why are these provisions important? .....	35
What sample provisions are included in the template constitution? .....	35
What type and level of protection should be offered by a Medicare Local to its officers?.....	36
What drafting decisions need to be made in the constitution? .....	36
What other issues need to be considered? .....	36
<b>Guidance Note 23: Seals and execution of documents .....</b>	<b>37</b>
Is the company required to have a common seal? .....	37
<b>Guidance Note 24: Gift fund requirements.....</b>	<b>37</b>
Are these provisions necessary? .....	37
Will any changes be required to these provisions?.....	37
Winding up requirements.....	37
<b>Guidance Note 25: Surplus assets on winding up or dissolution.....</b>	<b>38</b>
Are these provisions necessary? .....	38

<b>Guidance Note 26: Accounts, audit and records .....</b>	<b>38</b>
About these provisions .....	38
Amendments to reporting and audit obligations for companies limited by guarantee .....	38
Access to documents.....	39
<b>Guidance Note 27: Definitions and interpretation .....</b>	<b>39</b>
About these provisions .....	39
<b>Annexure 1: Glossary .....</b>	<b>41</b>

## 1 About these documents

### What are these documents?

This guidance material includes background information and high level guidance on a range of matters relevant to the establishment of Medicare Locals. It accompanies a template constitution that outlines (in broad terms) some of the key provisions that might be used in preparing a Medicare Local's constitution.

The template constitution and this guidance material have been prepared by DLA Phillips Fox on behalf of AGPN and for the reference of AGPN and GPNs. For ease of reference, information is presented in 'question and answer' format wherever feasible.

### What is the purpose of these documents?

These documents are intended to assist GPNs in:

- considering the matters that will need to be set out in a Medicare Local's constitution; and
- understanding some of the key legal and practical issues that will need to be considered in preparing that constitution.

If additional information is required, please refer to the material located at the AGPN Forum and the earlier DLA Phillips Fox Report as a starting point.

### Why is AGPN making these documents available?

AGPN has received feedback from various GPNs that, in designing the proposed governance structure for a Medicare Local, it would assist if they were able to view an up-to-date template constitution for a company limited by guarantee. Many GPNs have constituent documents that have not been updated for several years (and some still have Memorandum and Articles of Association rather than a standalone constitution).

Accordingly, AGPN has asked DLA Phillips Fox to:

- prepare a template constitution that includes provisions that commonly appear in the constitution of a company limited by guarantee; and
- where it is not possible to prepare a single set of provisions on a particular topic, provide additional guidance to assist GPNs in understanding what they must consider and what they need to do next.

### Is the template constitution complete?

No. AGPN has instructed DLA Phillips Fox not to include provisions in the template constitution which (in all likelihood) would not be common to all Medicare Locals. For example, every consortium involved in establishing a Medicare Local will need to give careful thought to a range of governance, structuring and operational issues including:

- The membership base and membership structure for the Medicare Local.

- The preferred number of directors, board skills mix and level of independence of directors.
- How the members influence or determine board membership (i.e. voting/appointment rights).
- The objects of the organisation and related tax concession considerations.
- Core design features that will facilitate broad stakeholder engagement (such as board committees, cross-membership of high level governance structures with other primary health care stakeholders, organisation-to-organisation relationships such as MOUs, and so on).
- Mechanisms to ensure governance systems can be adapted to accommodate evolving organisational roles.
- Various other constitutional and other governance elements that will shape the Medicare Local's performance and processes.

It is not possible for a template constitution to canvass all potential options in relation to the above matters. Accordingly, AGPN has instructed DLA Phillips Fox to leave those provisions blank and include appropriate commentary in this guidance material, rather than attempting to provide sample clauses that would have required heavy qualification and may have been confusing in all the circumstances.

### **Meaning of capitalised terms**

Capitalised terms and abbreviations used in this document are defined in the glossary at Annexure 1.

## **2 Using these documents**

### **Important legal information**

This document and the attached template constitution is provided for information only and is not intended as legal advice. You should seek your own legal advice about matters discussed in this Material in relation to your own particular circumstances before taking any action in response to those matters. None of AGPN, its funders (including the Commonwealth of Australia and its departments and agencies) or any person involved in the preparation or dissemination of this Material, including DLA Phillips Fox:

- warrants or represents that the information contained in this document and the attached template constitution I (including any comments or recommendations of third parties) is accurate, reliable, current or complete; or
- accepts any legal liability or responsibility howsoever arising for any loss, damage, claim, cost or expense suffered or incurred by the use or interpretation of, or reliance on, any information contained in this document and the attached template constitution.

If you use any of the information contained in this document and the attached template constitution, you also agree that to the fullest extent allowed by law all liability of the previously mentioned persons and entities is excluded.

### **How can I use these documents?**

These documents are for reference only. In particular, the template constitution is incomplete and is provided solely for review and consideration. It aims to provide general guidance as to the sorts of clauses that may be included in a Medicare Local's constitution, as well as identifying the other highly specific matters that each consortium will need to consider in designing the governance structure for the relevant Medicare Local.

The constitution is not in a form that could be used to establish an Australian public company limited by guarantee. This is because critical clauses regarding the company's objects, the identity of the members and their respective rights and obligations, and appointment and removal of directors, do not appear in the template constitution. They will need to be prepared on a case-by-case basis.

### **How does this guidance material link with the template constitution?**

The template constitution includes a number of drafting notes. Some of these drafting notes are self-explanatory and appear as bold, italicised text within square brackets.

Where a more general or lengthy commentary is required, reference is made to numbered 'Guidance Notes'. These Guidance Notes are set out in this document following this introductory material.

This guidance material should only be read in the context of Medicare Locals and the template constitution attached. It may not be applicable to existing GPNs or other companies limited by guarantee.

### **What are the key decisions to be made in preparing a draft constitution for the Medicare Local?**

In order to prepare a draft constitution for a Medicare Local, each consortium will need to consider a range of legal and practical issues. A high level summary of key issues is set out under the above heading 'Is the template constitution complete?'

For additional information, please refer to the material located at the AGPN Forum and other information available on the AGPN website in the Members' section, as well as the Report.

The decisions that each consortium will need to make in designing the governance structure for their Medicare Local are likely to be highly individual, and the final governance structure for each Medicare Local is likely to be unique. Although there may be points of commonality across various models, each consortium will consist of a different range of stakeholders, each having its own needs and objectives. In addition, local circumstances will need to be taken into account in designing a particular Medicare Local's governance structure.

### **Will I need legal or taxation advice in preparing a draft constitution for the Medicare Local?**

Yes. It is strongly recommended that each consortium obtain its own legal and taxation advice in preparing a draft constitution for the Medicare Local. That advice might be sought at an early

stage when the constitution is being prepared. Alternatively, the parties may prepare a draft constitution and have independent advisors review it and provide feedback as necessary.

Legal advice is recommended in light of both the complexity of Australian company law and the need to ensure that the proposed governance model is both coherent and workable.

Taxation advice may be required, not only with respect to the proposed 'tax concession' provisions in the draft constitution for the Medicare Local, but also to the extent that participating GPNs are proposing to transition any part of their existing operations into the Medicare Local.

### **3 Background information**

#### **What is a constitution?**

A constitution is the core governance document for a company. It provides the governance and internal management framework for the company, and includes key information regarding both the board and the members of the company and their respective roles, rights and obligations.

Under the Act, the constitution has effect as a contract:

- between the company and each member;
- between the company and each director and company secretary; and
- between a member and each other member,

under which each person agrees to observe and perform the constitution so far as it applies to that person.

#### **Does a Medicare Local have to have a constitution?**

In practice, yes. It is expected that the Australian Government would require each Medicare Local to have a constitution, which among other things would include an appropriately drafted objects clause that reflects the purposes for which the company is being established and funded.

Also, Medicare Locals are intended to obtain various tax concessions, and to do so each Medicare Local will need to have its own constitution which (among other provisions) includes standard provisions for Australian tax law purposes.

In addition, other stakeholders may also wish for the Medicare Local to have a single constituent document, namely a constitution.

Due to the nature of the replaceable rules set out in the Act (which are tailored towards companies limited by shares), it would be highly unusual for a company limited by guarantee to have no constitution and simply be governed by the replaceable rules. Technically, the company's internal rules could be a combination of a constitution and certain of the replaceable rules, but this is not a recommended approach. It is far more common for a company limited by guarantee's constitution to exclude all replaceable rules in the Act.

**Is a constitution just like any other form of legal contract?**

No. In many respects, the constitution is a 'special' form of contract. For example:

- Most contracts would require the approval of all signatories in order to vary the terms of the contract. In contrast, the Act provides that a company may modify or repeal its constitution, or a provision of its constitution, by special resolution (as opposed to unanimous approval of all members).
- Most contracts are a private matter between the parties. In contrast, the Act requires that an application to register a public company limited by guarantee must be accompanied by a copy of the constitution (if the company is to have a constitution on registration). The constitution would then be publicly available by searching ASIC's records.
- Importantly, the constitution can only bind someone in their capacity as a director, secretary or member of the company. If obligations are to be imposed on such persons in some other capacity then a separate contract would need to be used. For example, if a member was proposing to provide services to the Medicare Local on a fee-for-service basis, it would not be appropriate to include the terms of that arrangement in the Medicare Local's constitution. Instead, a separate services agreement would be required.

If in doubt, it is strongly recommended that legal advice be obtained regarding the drafting of the proposed constitution for a Medicare Local.

**Should all relevant rights and obligations be set out in a constitution?**

No. As the constitution is a 'special' form of contract, certain rights and obligations will need to be set out elsewhere, as discussed above.

Even if there is no legal impediment to including particular rights and obligations (or other material) in the Medicare Local's constitution, it will be important to consider:

- Whether those rights and obligations, or other material, are intended to apply indefinitely, or will they need to be varied or replaced from time to time?
- In the latter case, who should have the power to vary those rights and obligations, or other material?
- Are there any concerns about those matters being on the public record?

In relation to the first two bullet points, a special resolution of members is usually required to amend a provision of the Constitution. The cost and burden of convening and holding general meetings of a company should not be underestimated. Nor should the potential challenges in obtaining a special resolution at a general meeting (as many companies limited by guarantee struggle to obtain such approval in practice).

In contrast, it may be preferred for the relevant matter to be determined by the board or some other group from time to time (for example, terms of reference of a particular committee, or the skills matrix for the board). This is usually faster, cheaper and easier, and may also be the most appropriate forum for deciding that particular matter.

The actual drafting of such provisions is also relevant to this decision. If in doubt, it is recommended that legal advice be obtained before the constitution is finalised.

### **Should 'transitional provisions' be included in the Medicare Local's constitution?**

'Transitional provisions' are provisions which apply at a particular point in time, or for a particular period. For example, a company's constitution might be structured so that certain provisions only become operative in certain circumstances (for example, if a particular member ceases to be a member, or if new members are admitted to the company).

The most common transitional provisions that would ordinarily be seen in a company's constitution are those regarding board retirement and rotation mechanisms. For example, the constitution may provide that the board of the company at the time the constitution is adopted will remain in place for a specified period of time (such as the period up to and including the second annual general meeting after the date the constitution is adopted). On and from that date, a different set of provisions in the constitution regarding retirement from office would apply.

It is possible to include other forms of transitional provisions in a company's constitution, but care must be taken to ensure that the provisions are clearly drafted and are otherwise appropriate for inclusion in a constitution. It is highly unlikely that provisions regarding the transmission of a GPN's business into the Medicare Local would best be situated in the Medicare Local's constitution. Transmission arrangements would usually be documented separately.

If in doubt, it is recommended that legal advice be obtained about whether the relevant transitional arrangements are best documented in the constitution or in some other transaction document.

### **How can a constitution be implemented?**

The constitution of a company limited by guarantee can be adopted in different ways. In the case of Medicare Locals, the manner of adoption will depend on which 'Pathway' towards establishing the Medicare Local has been followed.

Pathway 1 involves GPNs (and other stakeholders) participating in the establishment of a newly-incorporated company. To incorporate a company, an application for registration must be lodged with ASIC. If the company is to have a constitution on registration, the Act requires that a copy of the constitution must be lodged with the application to register the company.

As this Pathway involves a new company being incorporated, there are no members or directors of the company until the company is registered. Therefore, the procedure for approving the registration forms and draft constitution is for the relevant stakeholders to decide upon. It is not necessary to hold a general meeting of the proposed company to do this, as the company does not yet exist and so does not have any members at that time.

Pathway 2 involves converting an existing company limited by guarantee into the Medicare Local. This is likely to involve the adoption of a new constitution by the company to replace its existing constituent documents.

As the company already exists, it may modify or repeal its constitution by special resolution. However, it will be important to review the existing constituent documents of that company to

ensure that no additional requirements or higher approval threshold applies. For example, the constituent documents might provide that a greater level of member approval is required, or that the approval of one or more specified members is required, before the constitution can be amended or repealed.

A company would then be required to lodge with ASIC a copy of the special resolution within 14 days after it is passed, along with a copy of the new constitution.

Under Pathway 2, it will also be important to consider whether any third parties need to be notified of, or need to consent to, the adoption of a new constitution. For example, the company may have given a third party such rights under a funding agreement or other contract.

### **What drafting assumptions have been made in preparing the template constitution?**

Of necessity, a number of drafting assumptions and other drafting choices have been made in preparing this template constitution. These include:

- The template constitution does not include any provisions regarding the creation and amendment of 'regulations' or 'by-laws' by the board. Many constitutions would empower the board to create and amend such rules from time to time, provided they are consistent with the law and the constitution.
- The template constitution assumes that directors' fees can be paid by Medicare Locals, and will in fact be paid by each Medicare Local. Either or both of those assumptions may be incorrect. If so, those provisions will need to be removed and replaced with appropriate provisions regarding the non-payment of such fees.
- The template constitution does not include detailed provisions regarding election procedures, for example, with respect to the election of directors at general meetings of members. Some constitutions include detailed rules regarding these matters, but this is not strictly necessary and may in practice be unduly restrictive. Each individual consortium will need to consider this issue further when drafting the relevant Medicare Local's constitution.
- Although the template constitution includes general provisions regarding board committees and advisory committees, it does not include provisions regarding any specific committees (for example, a clinical governance committee, audit and risk committee or nominations committee). It is possible to include the terms of reference and other relevant provisions regarding such committees in a company's constitution, but as noted above this needs to be carefully considered.

In addition, critical governance material will often sit outside a company's constitution. This includes documents such as:

- Any regulations or by-laws of the company that may be implemented or updated by the board from time to time (if the constitution permits this).
- Terms of reference and other relevant rules for particular board committees or advisory committees.
- Codes of conduct, governance policies and other relevant corporate policies.

- The agreed terms on which directors (and, potentially other officers) will be indemnified by the company, have the benefit of directors' and officers' insurance that will be maintained by the company, and have access to corporate documents. Those matters would usually be documented in a separate contract (namely an 'Officers' Indemnity, Insurance and Access Deed').
- Business plans, budgets and other operational material.
- Vision statements, mission statements and other aspirational material regarding the company and its operations.
- MOUs and other non-binding agreements between the company and other organisations regarding their ongoing relationship and joint activities.

Each of these matters will need to be carefully considered by a consortium in designing the proposed constitution for a Medicare Local.

## 4 Guidance Notes to attached template constitution

### Guidance Note 1: Company Name

#### **Does the company have to have a name?**

Yes. A company must have a unique name. The name can be based upon the company's Australian Company Number (**ACN**) if preferred. However, the other requirements of the Act regarding company names need to be complied with.

In addition, the company may need to apply to register one or more business names if it intends to conduct its activities under a name that is not its full corporate name. If the company does so it will still need to include its full company name and ACN or ABN on all of its 'public documents' and negotiable instruments.

#### **Must the word 'Limited' or 'Ltd' appear at the end of the company's name?**

Yes, unless the company has been authorised by ASIC to dispense with this requirement.

However, one consequence of being permitted to omit the word 'Limited' from the company's name is that the company is prohibited from paying fees to its directors.

#### **What other factors may be relevant to the choice of company name?**

In particular, the requirements of the Australian Government are likely to be highly relevant to the choice of company name. This includes any branding or licensing arrangements (for example, regarding the phrase 'Medicare Local') that the Australian Government may put in place.

## Guidance Note 2: Australian Company Number

### **Will the ACN be known at the time the Medicare Local is established?**

This depends on which 'Pathway' has been followed towards establishing the Medicare Local.

If an existing GPN or other company limited by guarantee is being used to establish the Medicare Local, then the company will already have an ACN and this will not change. Accordingly, the ACN can be noted in the Medicare Local's constitution at the time the constitution is drafted.

If a new company limited by guarantee is being incorporated for the purposes of establishing the Medicare Local, the ACN will not be allocated by ASIC until the time the company is registered. Commonly, the ACN might then be recorded in the constitution at a later date.

## Guidance Note 3: Liability of members and guarantee on winding up

### **Do the members have to give a guarantee?**

Yes. A key distinguishing feature of a company limited by guarantee is that it does not have a share capital. Members do not contribute capital to the company while it is operating but are required to provide a guarantee in the event that the company is wound up and its assets are not sufficient to meet its liabilities.

Invariably, the guarantee amount is a very low number, usually between \$10 and \$20.

### **Can the members reduce the guarantee amount at a later date?**

No. So, for example, if an existing company limited by guarantee is being used to establish the Medicare Local, the guarantee amount that should be specified in the constitution should not be less than the existing guarantee amount under the company's current constituent documents.

In theory, the members could specify a greater guarantee amount, but this would be unusual.

## Guidance Note 4: Objects

### **What are 'objects'?**

The Act permits the company's constitution to specify the company's objects. An 'objects' clause sets out the fundamental objects and purposes for which the company is established.

### **Is an 'objects clause' required for a Medicare Local?**

In practice, yes. It is highly likely that the Australian Government would expect to see an appropriately drafted objects clause in the Medicare Local's constitution, to reflect the purposes for which the company is being established and funded. Equally, stakeholders other than GPNs may wish to see an objects clause to reflect the 'spirit' in which the relevant stakeholders are coming together to establish the Medicare Local.

In addition, a Medicare Local's eligibility for tax concessions will depend (among other matters) on whether appropriate 'objects' are included in the company's constitution.

An objects clause is required by the ATO to demonstrate the company's objects, and these must conform to the basis upon which income tax exemption is being sought. Accordingly, if an appropriate objects clause is not included, the desired tax concessions will not be available to the Medicare Local.

### **Will the objects limit the company's legal capacity?**

The Act confirms that an act of a company will not be invalid merely because it is contrary to or beyond any objects in the company's constitution.

However, if the company acts in a manner inconsistent with its objects there may be other adverse consequences. In particular, the company may no longer be entitled to enjoy any tax concessions, and the failure to comply with the company's objects may give support to a claim that the company's directors have breached their duties (which may give rise to liability on the directors' part), among other possible consequences.

The Act also permits the constitution to contain an express restriction on, or a prohibition of, the exercise by the company of any of its powers. Again, the exercise of a 'prohibited' power by a company is not invalid merely because it contravenes the constitution, although other consequences may apply as per the above discussion.

### **What objects should be specified for a Medicare Local?**

AGPN is currently undertaking work on this issue and will make available discussion draft objects in due course. These would be guided by the ITA, depending on when it is released in final form.

However, each Medicare Local will need to carefully consider how its own objects clause is drafted, and may require specialist legal advice on this topic.

For example, a GPN's constituent documents may require that its assets are to be transferred on a winding up to another body that has 'similar objects' to the GPN. The objects of the Medicare Local may need to be drafted in light of the GPN's objects to ensure that existing rules regarding distributions by the GPN can be complied with. Otherwise, the transition plan for the Medicare Local may not be effective.

## **Guidance Note 5: Membership**

### **Does the company have to have members?**

Yes. A company limited by guarantee must have at least one member. Unless the constitution imposes restrictions on membership (for example, by only permitting companies or other non-human persons to become members), any legal person can become a member of a company.

### **What does 'membership' mean in the context of a not-for-profit company?**

In the not-for-profit context, 'membership' is not the same as 'ownership'. This is principally because the members would not generally be entitled to make any pecuniary gain as a consequence of their membership, or receive any assets of the company when it is wound up.

For a Medicare Local, the members are best understood as being the primary stakeholders of the company, who have an interest in the company being operated in accordance with its objects and (generally speaking) exercise control through their rights to vote.

### **Organisations as members**

The ITA is expected to specify a strong preference for 'organisational membership'. This term does not have a precise legal meaning but in essence can be understood as signifying a preference for a smaller group of members who are not individual human beings.

If a company or other non-human person is a member of the Medicare Local, it would commonly appoint a 'corporate representative' to exercise its rights at general meetings. This is because the company obviously cannot turn up and exercise its rights other than through human agency. The appointment of the representative by a corporate member does not result in that human being 'becoming' the member or holding the membership 'on trust' in any way. It is simply a mechanism to permit a corporate member to exercise its membership rights efficiently.

### **What are 'classes' of membership, and why might they be adopted by a Medicare Local?**

The Act permits members of a company to be granted differing rights. This is usually achieved by allocating stakeholders different 'classes' of membership. As a consequence, the company's membership would be divided into several classes, with each class of members having distinct rights as compared with other classes.

A simple example would be two classes of members, only one of which has voting rights.

While the introduction of classes of membership may assist in structuring the membership and governance of the Medicare Local in the desired way, it is important to understand the additional complexity that can arise if different classes of membership are adopted.

In particular, a number of provisions under the Act will come into play, including those concerning 'class rights', which apply if there is any proposal to vary the rights applying to any particular class of membership. These requirements include separate class meetings to approve any changes to class rights. Additional reporting and notification obligations would generally apply as well.

If it is proposed to introduce multiple classes of membership it is strongly recommended that the constitution clearly define the rights and obligations of each class, the criteria for acceptance into any particular class of membership, and other relevant matters. Specialist legal advice is likely to be required to ensure that these provisions are drafted appropriately.

### **What other methods of participation in a Medicare Local's governance could apply?**

There are several ways in which a stakeholder can participate in the governance of the Medicare Local. Among other options, it may be considered appropriate to create a category of 'Non-Member Stakeholders'. Some not-for-profit entities are now favouring this approach. Sample provisions to that effect are set out for discussion purposes in clause 9 of the template constitution.

If this approach is considered desirable, it will be vital to ensure that all relevant stakeholders understand the difference between members and non-member stakeholders, in particular their

respective rights and obligations and their legal relationship with the Medicare Local. It will also be critical that those distinctions are not blurred in practice.

There is no need to include these provisions in the constitution, and if in doubt they should not be included.

## Guidance Note 6: Admission to membership

### When are members admitted?

At least one member must be identified at the time a company is incorporated. If an existing company limited by guarantee is being used to establish the Medicare Local, and it is proposed to change the membership base of that company as part of the transitioning process, it will be important to ensure that the company has one member at all times during that transition.

Under Australian law, a person does not become a member of a company until their name is entered in the register of members (refer Guidance Note 7 below).

### How might members be admitted in the future?

Most constitutions will include rules regarding how future members may be admitted. Commonly, a person wishing to apply for membership would submit their application to the secretary, and the board would have absolute discretion as to whether or not the application for membership was accepted. Reasons for rejecting an application would not usually have to be provided to the unsuccessful applicant.

Other approaches can be adopted. For example, the members might be given the power to approve applicants for membership, whether by majority or unanimously. Whichever model is preferred, it will be important to carefully consider the rules that apply and the potential consequences, including from the perspective of 'outsiders' who may be concerned that they are being unfairly excluded.

## Guidance Note 7: Register of Members

### Does the company have to keep a register of members?

Yes. The Act requires the company to set up and maintain a register of members.

The register of members must contain the following information about each member:

- The member's name and address.
- The date on which the entry of the member's name in the register is made.

The register must also show the following information, which may be kept separately from the rest of the register:

- The name and details of each person who stopped being a member within the last 7 years.
- The date on which each such person stopped being a member.

If the company has more than 50 members, it must include in the register an up-to-date indeed of members' names (depending on the form in which the register is kept). Additional requirements apply.

### **What if the company wishes to collect and record other information about members?**

Companies commonly collect other information about their members, for example telephone numbers and email addresses. Other relevant membership information (for example, the class of membership to which a particular member belongs) would also commonly be recorded.

In some cases, all such information is maintained as a single register that includes the information that is legally required to be maintained in the register of members. A consequence of this approach is that if a third party exercises its legal right to view the register, information not strictly required to be kept by law such as telephone numbers and email addresses will also be made available to them. Privacy law considerations have generally not prevailed over the perceived value in allowing third parties to review a company's register of members.

For this reason, sample clauses 3.11 to 3.14 of the template constitution make clear that the company will maintain a register of members that strictly accords with the requirements of the Act, but may also maintain other registers which include information that is not required to be kept under the Act.

The purpose of this approach would be to support an argument that a third party's right to view the register of members would not give them a right to view the other information which is stored separately. However, whether or not this approach would succeed in keeping the other information private will depend on many factors, including whether the relevant registers have been created and maintained in an appropriate way. Clauses 3.13 and 3.14 can be deleted if this approach is not favoured.

### **Why else does the register of members matter?**

The register plays a critical role in determining who is a Member of the company. In particular, a person does not become a member of a company until their name is entered in the register of members. Also, a register kept under the Act is proof of the matters shown in the register (subject to evidence to the contrary). These are further reasons why it is essential to maintain an up to date register of members at all times.

## **Guidance Note 8: Application fees and annual subscriptions**

### **Does the company have to charge an application fee for membership applications?**

No. Often, the constitution will simply permit the board to charge an application fee as it sees fit from time to time. This should not be misunderstood as allowing the board to act capriciously or unfairly (for example, by unfairly discriminating between different applicants for membership).

If it is decided that the Medicare Local will never charge application fees in this way, the relevant provisions do not need to be included in the constitution.

**Does the Medicare Local have to charge its members an annual subscription?**

No. There is no legal requirement for a company limited by guarantee to charge its members an annual fee. Many do not do so, for a variety of reasons.

However, depending on the identity of the members and their respective financial means, the ability to charge some form of annual subscription can be a useful way of:

- raising funds for the company; and
- ensuring that members who have no particular interest in continuing to participate in the company's affairs as members are required to actively turn their minds to whether or not to continue as members.

In other words, the imposition of a membership fee of this kind is sometimes viewed as a useful mechanism of confirming each member's continued interest in participating as a member.

Again, care needs to be taken as to how any annual subscription is calculated and imposed (for example, it should not be imposed on an unfair or discriminatory basis). The financial position and means of the Medicare Local's proposed members is also a relevant factor.

**Guidance Note 9: Removal and cessation of membership****Why should the constitution address removal and cessation of membership?**

The constitution will invariably include rules about when a person can cease to become a member, whether on a voluntary or involuntary basis. This provides all parties with certainty.

It is important to note that one of the most common scenarios in which a not-for-profit entity is involved in litigation is where an attempt is made to terminate a member's membership and this is challenged by the member. It is therefore advisable to include clear and enforceable rules regarding these matters in the constitution. General law requirements (such as 'natural justice') may also have a role to play in this process.

**Who should have the right to expel a member?**

Commonly, a two-stage process will apply if it is proposed to expel a member from membership of a company. The first step would usually involve the board passing a resolution to the effect that the person is no longer considered suitable for membership by a majority of directors. The directors would then convene a general meeting of members to consider the removal of the member from the register of members.

The directors would be required to provide an appropriate period of written notice to such a member, to enable them to provide written representations to the company in their defence.

The second step would then involve the general meeting considering the proposed removal from membership and voting upon the proposed resolution. The member in question would often be given rights to present their defence at the general meeting, subject to rules about appropriate conduct and so on.

Other models are possible. For example, the board may have no power to initiate such a process, or some other committee or group may be given the power to assess both applications for membership and also continuing eligibility for membership.

Whichever approach is preferred, it will be important to carefully consider the intended process and to document the rules clearly. It is recommended that legal advice be obtained on the proposed wording before the constitution is adopted. In addition, if it is ever proposed to exercise rights of expulsion under the constitution, it may be prudent to obtain legal advice on the proposed process, including any applicable 'natural justice' requirements.

### **How else might a member's membership cease other than through resignation?**

A company's constitution will often include other (non-voluntary) mechanisms by which a member's membership will cease. For example:

- If a 'Termination Event' occurs in respect of the member. This would typically refer to a critical development and would often be defined to include bankruptcy, insanity and/or death (if the member is a human being) or winding up and/or insolvency (if the member is a corporation).
  - The definition of 'Termination Event' in sample clause 22.1 of the template constitution is merely one approach among many. It is possible for the scope of this concept to be expanded.
  - For example, it may be decided that a member's membership should cease if they fail to attend a specified number of consecutive general meetings of members without the prior consent or approval of a particular party or body, such as the board. This would be comparatively unusual but is an option if such engagement/enforcement mechanisms are considered necessary.
- If members are required to pay an annual subscription or equivalent (refer Guidance Note 8 above), a failure to pay any arrears might also result in the member's name being removed from the register of members, in accordance with that company's constitution. Sample clause 5.3 of the template constitution is an example of this approach. Again, this is optional.

Other mechanisms for cessation of membership may also be appropriate in the context of a particular Medicare Local. If in doubt, it is recommended that legal advice be sought before the constitution is finalised.

## **Guidance Note 10: No profits for members**

### **Does the constitution have to prohibit distributions to members?**

In practice, yes. If the Medicare Local wishes to be eligible for the relevant tax concessions, under the Tax Act and ATO requirements it will be necessary to include a clause prohibiting the distribution of any income or property of the Medicare Local to any of its members or officers while the Medicare Local is a going concern, or upon the winding up of the Medicare Local, except in specified circumstances.

The provisions set out in sample clause 6 of the template constitution are fairly standard. Importantly, there is a range of carve outs set out in clauses 6.3 and 6.4. It will be important to consider whether any other carve outs are considered appropriate, in which case specialist legal advice may be required to determine whether or not the change would be acceptable from a taxation perspective.

A key decision is whether or not directors' fees will be payable by the Medicare Local. This is discussed further in Guidance Note 14 below. See also the discussion in Guidance Note 1 above regarding a company's ability to delete the word 'Limited' from its name, and the impact of this upon its ability to pay directors' fees.

### **Can a company limited by guarantee pay a dividend to its members?**

Generally, no. The vast majority of tax-exempt companies limited by guarantee would be prohibited under the Tax Act from paying dividends to members. A company limited by guarantee that receives funding from a government department or agency may also be subject to additional restrictions regarding use of funds and dealings with members.

In addition, the Act prohibits a company limited by guarantee that is incorporated on or after 28 June 2010 from paying dividends to its members.

Sample clause 6.2 of the template constitution is optional. If a new company limited by guarantee is being established, this clause simply restates the requirements of the Act. It may nonetheless be useful to retain the clause so as to clarify the position for future members and directors of the Medicare Local.

If an existing company limited by guarantee is being used to establish the Medicare Local, and that company was incorporated prior to 28 June 2010, the prohibition on payment of dividends to members will not apply. However, Tax Act requirements would preclude the payment of a dividend to the company's members in any event. Whether or not sample clause 6.2 of the template constitution is retained for such a Medicare Local will require individual consideration.

## **Guidance Note 11: General meetings**

### **Who should be entitled to convene a general meeting of the Medicare Local?**

As a public company limited by guarantee, it will be important to include appropriate provisions in the Medicare Local's constitution regarding the power to convene general meetings.

Ordinarily, the constitution of a company limited by guarantee would provide that any director may convene a meeting of the company's members. This reflects the 'replaceable rule' set out in the Act.

It is sometimes proposed that a higher threshold should apply (for example, a majority of directors) to address the perceived risk that a single director might inappropriately convene a general meeting. On balance, we recommend that any single director be given the power to convene a general meeting. Directors are subject to strict duties under both statute and the general law and there would be consequences if a director exercised this power inappropriately.

Correspondingly, given the critical role played by each director in the company's governance, and given each director's potential exposure to personal liability through holding office, it is

generally considered appropriate that any director could convene a general meeting to put a particular matter before the members. The concern is that if a board resolution to that effect was required and the board as a majority was behaving inappropriately, the ability to put the matter to the members may be stymied.

### **Can the members convene a general meeting, or require that one be convened?**

Yes, in accordance with the Act.

First, the Act requires the directors of the company to call and arrange to hold a general meeting on the request of:

- members with at least 5% of the votes that may be cast at the general meeting; or
- at least 100 members who are entitled to vote at the general meeting.

Additional requirements apply under the Act.

Secondly, members with more than 50% of the votes of all of the members who make a request under the above mechanism may call and arrange to hold a general meeting if the directors do not do so within 21 days after the request is given to the company. Again, other procedural requirements set out in the Act must be complied with in that scenario.

Thirdly, the Act permits members with at least 5% of the votes that may be cast at a general meeting of the company may call, and arrange to hold, a general meeting. However, the members calling the meeting must pay the expenses of calling and holding the meeting. Other requirements set out in the Act must also be complied with.

Finally, the Court may order a meeting of the company's members to be called if it is impracticable to call the meeting in any other way.

Clause 7.2 of the template constitution is a standard provision and simply refers back to the requirements of the Act.

### **What is a quorum and why is it important?**

A 'quorum' is a protective requirement which specifies the minimum number of members required to be present at a general meeting in order that business can be validly transacted.

This is an important protection as it ensures that corporate decisions reserved to the members in general meeting cannot validly be made unless a specified number of members is present at the time the meeting proceeds to business.

### **What quorum can be specified in the constitution?**

There is considerable flexibility as to the quorum that can be specified for general meetings. Key considerations include the following:

- The total number of members, including the number of 'inactive' members (i.e. those who technically remain members but show no interest in participating in company activities, including general meetings, and therefore cannot be relied upon to turn up at general meetings).

- If there are different classes of members, whether the quorum should require a certain number of members from one or more classes to be present? The same model might apply for one or more specified members, rather than classes.
- Whether the quorum should be specified as a fixed number of members, or a percentage of the existing number of members. The danger of the former approach is that a quorum may be unattainable if the number of members drops for any reason. It is possible to include a 'hybrid' requirement which says that the quorum will be the lower or the higher of a fixed number and a percentage of members. If this approach is preferred it will be important to ensure that the quorum requirements are drafted with clarity. Clause 7.7 of the template constitution canvasses both approaches.
- Whichever way the quorum is specified, if it is too high there is a risk that the company may be 'paralysed' through being unable to consider company business and pass resolutions.

### **What if a quorum cannot be achieved at a general meeting?**

Commonly, a company's constitution will provide that if a quorum cannot be achieved at a general meeting within a specified time, the meeting must either be dissolved or stand adjourned to a specified date (depending on who called the meeting). If the general meeting is adjourned, the constitution may also specify a lower quorum to be achieved for business to be conducted at the adjourned meeting.

This would override the replaceable rule set out in the Act.

### **Who should preside at general meetings?**

Commonly, the chairperson of the board will be entitled also chair every general meeting.

If that individual is unavailable or unwilling to act, or if it is thought appropriate for them to temporarily relinquish the chair during a general meeting (for example, because the members are being asked to vote on their re-election to the board), the constitution would usually specify that the deputy chairperson of the board (if there is one) is entitled to preside.

If the deputy chairperson is not present or is unwilling or unable to act, the directors present at the general meeting may then be required to elect one of their number to chair the meeting. Failing that, the members present at the general meeting may be required to elect one of their number to chair the meeting.

This is a standard procedure but other options are possible. In deciding how to draft the constitution, it will be important to consider the rights and responsibilities of the person presiding at general meetings. In particular, will that person be given a second or casting vote in addition to any deliberative vote they have and any votes they hold as attorney or proxy for any members? It will be important to clarify this in the constitution one way or the other.

### **Control of the general meeting**

The person chairing the general meeting will commonly be given broad powers to make rulings on all matters relating to the order of business, procedure and conduct of the general meeting.

In addition, the chairing the meeting will usually be given broad discretionary power to refuse a person entry to the general meeting, or to expel them from the general meeting, if their conduct is inappropriate. Many constitutions will seek to elaborate on what may constitute 'inappropriate conduct' for these purposes. Sample clause 7.14 of the template constitution is one method of addressing these issues.

### **Can the members pass resolutions in any other way?**

For a public company limited by guarantee, the Act does not provide for the passing of resolutions without meetings. Accordingly, if this is considered desirable it will be necessary to include appropriate provisions in the company's constitution.

This mechanism is considered useful because it permits the members to pass a resolution (usually by signing a copy of the resolution) without the need to convene and hold a general meeting. In other words, where there is agreement between members on a particular matter, the delay and expense of convening and holding a general meeting can be avoided.

However, the utility of such provisions diminishes in proportion to the size of the company's membership. If the company has a very large number of members it is highly unlikely that the requirements of a provision of this kind would be satisfied. As a consequence, if the company has a large number of members, it is likely that members will only pass resolutions at general meetings.

If provisions of this kind are considered appropriate, it will be important to consider the level of member approval required. If the statutory procedure for proprietary companies set out in the Act is used as a model, all members entitled to vote on the relevant resolution would be required to sign the document. Sample clause 7.30 of the template constitution follows this approach.

If a lower threshold is specified there may be concerns that the process could be abused, in contrast with the requirement to give proper notice of a general meeting and the opportunity for robust debate at that meeting. These issues will need to be considered further if this provision is retained.

## **Guidance Note 12: Proxies and representatives**

### **What is a 'proxy'?**

If a member is unable to attend a general meeting to exercise their voting rights, they can appoint a person as their 'proxy' to attend and vote on their behalf at the meeting. The proxy is therefore an agent of the member, who is authorised to vote on the member's behalf.

The Act includes a number of additional provisions regarding the appointment of a proxy, including permitting a member's proxy to be an individual or a body corporate. These are mandatory rules for public companies, including companies limited by guarantee.

### **What rights does a proxy have?**

The Act provides that a proxy appointed to attend and vote for a member at a general meeting has the same rights as the member:

- to speak at the meeting;
- to vote (but only to the extent allowed by the appointment); and
- join in a demand for a poll.

The Act also confirms that the constitution may provide that a proxy is not entitled to vote on a show of hands. Sample clause 7.23 of the template constitution does not permit a proxy to vote on a show of hands. However, a proxy is always entitled to make or join in the demand for a poll (as reflected in sample clause 8.2)

### **What other requirements might apply regarding the appointment of a proxy?**

Some constitutions will require that the person appointed as a member's proxy must themselves be a member of the company, or even a member of the relevant class of members. This is not obligatory and may be unduly limiting in practice, depending on the company's membership structure and the number of members.

### **What is a 'corporate representative'?**

As discussed in Guidance Note 5 above, if a corporation is a member of the Medicare Local, it may appoint an individual as its 'corporate representative' to exercise the member's powers at general meetings and in other circumstances.

The Act provides that such an appointment may be a standing one, and that the appointment may set out restrictions on the representative's powers. If the appointment is to be by reference to a position held (for example, the Chief Executive Officer from time to time), the appointment must identify the position.

Importantly, the Act also clarifies that a body corporate may appoint more than one representative, but only one representative may exercise the body's powers at any one time.

## **Guidance Note 13: Appointment and retirement of directors**

### **What will need to be included in the constitution?**

As a company limited by guarantee, a Medicare Local must have a board of directors as well as at least one company secretary.

In particular, the Act requires a public company to have at least three directors (not counting alternate directors, if any are permitted: see Guidance Note 20 below). At least two of the directors must ordinarily reside in Australia.

Further, the Act provides that only adults may be appointed as directors of a company. The Act further requires that a person give the company a signed consent to act as a director of the company before being appointed. The company must keep that consent form.

### **Who are the initial directors?**

If a new company is being incorporated, the initial directors will be those individuals named in the application to register the company, each of whom must previously have given their signed

consent to act as a director. This is reflected to in sample clause 10.1 of the template constitution, which assumes that a new company is being incorporated.

In contrast, if an existing company limited by guarantee is being used to establish the Medicare Local, the board of directors in office at the time the constitution is adopted would remain as directors following the adoption of the constitution unless some other procedure is specified.

For example, as part of the transition process, there may be a spill of some or all of the board seats. The constitution might also include rules about how long the relevant directors will hold office before needing to stand for re-election or re-appointment (as applicable).

### **Can the Constitution include transitional provisions regarding directorships?**

Yes, and often does where a new company is being incorporated. The Constitution may include transitional provisions giving rise to a 'two-stage' process, such that the initial board will hold office until the relevant period of time has passed, after which the standard board composition rules set out in the constitution would come into play.

For example, the initial board may be exempt from any obligation to retire from office (by rotation, or otherwise) for the first 18 months or two years, to permit the board to 'bed down' the company's operations and governance arrangements.

Whether such a two-stage process is required will require an individual assessment of the needs and objectives of the relevant Medicare Local, and the desirability or otherwise of board retirement mechanisms coming into play immediately.

### **What minimum and maximum number of directors should be specified?**

Under the Act, the minimum number of directors is three. It is possible to include a higher minimum number, but care should be taken that this requirement could not inadvertently 'paralyse' the company if at any time the number of directors actually holding office could fall below that number.

There are various possible ways of addressing this risk, including giving the directors the power to appoint other directors. In addition, it may be sufficient simply to choose an appropriate board quorum to ensure that a specified number of directors must be present for company business to be transacted, as opposed to setting the minimum number of directors too high.

There is no maximum number of directors. However, generally accepted principles of good governance would support the maximum number of directors being set somewhere between seven and nine. Often, a board consisting of five to nine directors is seen as optimal, although numerous individual factors are relevant to this decision.

It might also be considered appropriate to have a slightly larger board during the initial phase of the Medicare Local's operations, with the number of directors to be gradually reduced over time. Again, this is a matter of individual preference.

### **Does a director have to be a member of the company?**

No, unless this requirement is set out in the constitution. Careful thought should be given to whether such a requirement is appropriate in the context of each Medicare Local, particularly

where individual membership may not be favoured by the Australian Government under the ITA.

Importantly, if such a requirement is included in the constitution, a director's office would cease upon his or her ceasing to become a member - including if the director was removed from the membership in a non-voluntary manner, as may be provided for in the constitution.

### **Is it necessary to include provisions regarding retirement of directors?**

It is generally prudent to include clear rules about how long a director may hold that office before needing to stand for re-election or re-appointment (as the case may be).

As the Act does not specify how long the directors of a public company are entitled to hold office, a director will remain in office until such time as he or she retires, dies or is removed by the members in general meeting unless the constitution provides otherwise.

The reason for including such provisions in the constitution is to avoid the situation where, through inertia, a company's board remains static for several years, without the members reviewing its performance and giving active consideration to whether each director should remain in office for a further term.

Two standard approaches are:

- Directors are appointed for a fixed term, ending at the close of a specified annual general meeting of the Medicare Local (for example, the close of the second annual general meeting after the date of the director's appointment).
- Directors are appointed for a maximum term of office (for example, three years) but are also required to 'retire by rotation', such that a director might have to stand for re-election prior to the expiry of that maximum term, depending on other changes at board level in the interim.

The constitution may also include a cap on the total number of consecutive years or terms that a director can hold office. This is a matter of individual preference.

### **Can the directors appoint other directors?**

A company's constitution will usually include provisions permitting the directors (or if there is only one director, that director) to appoint a person to be a director of the company.

This may be either to fill a casual vacancy (namely, where an existing board seat has become vacant for some reason, such as resignation) or in addition to the existing number of directors. This would, of course, be subject to the maximum number of directors permitted under the constitution.

If it is considered appropriate for the board of the Medicare Local to be partly elected, and partly appointed, then the constitution would need to make clear precisely how many board positions are to be voted on by the members, and any other relevant rules.

Commonly, where a director is appointed by the board, that person would only hold office as a director until the next general meeting after the appointment. The usual mechanism would be

that the person's continuation as a director of the company would be decided upon by the members at that meeting.

### **How can a director be removed from office?**

The Act provides that a director cannot be removed from office by any or all of the other directors. Nor can any or all of the other directors require a particular director to vacate his or her office.

Further, the Act states that a public company may, by resolution, remove a director from office despite anything in:

- the company's constitution; or
- an agreement between the company and the director; or
- an agreement between any or all members of the company and the director.

However, if the director in question is a nominee director, the resolution to remove him or her does not take effect until a replacement to represent the relevant appointor's interests has been appointed.

A public company's constitution will usually clarify whether or not the members also have the power by ordinary resolution to appoint another person as a replacement when they remove a director from office. This is not always the case but sample clause 10.8 of the template constitution follows this approach.

### **When will a director's office be vacated?**

The Act provides that a person becomes disqualified from managing corporations if the person is convicted of various offences.

In addition, a company's Constitution will usually specify other circumstances in which the director's office will become vacant. The examples set out in sample clause 10.10 of the template constitution are fairly standard. However, careful thought should be given to the inclusion of any provision relating to a director's failure to attend a specified number of board meetings (whether or not consecutive), as this may have adverse governance consequences for the company.

Provisions of this kind are sometimes favoured as they will result in directors who are not fulfilling their responsibilities by participating at board level ceasing to hold office, without the other directors or the members having to take any further action. However, this requirement may be too onerous and would often be 'softened' to permit non-attendance with the board's (or chairperson's) consent.

If the latter approach is preferred, careful thought should be given as to how the requirement is drafted. For example:

- Must the consent be given prior to the absence from the board meeting, or can it be retrospective?

- Can the consent be informal, or must it be in writing or documented by board resolution?
- Is the consent of the chairperson sufficient, or must the board formally resolve to permit the person to be absent?

## Guidance Note 14: Directors' remuneration

### **Should the constitution clarify whether or not directors are entitled to be paid fees?**

Yes. Because directors are in a fiduciary relationship with the company, they will not be allowed to profit from that office without the members' fully informed consent. One means of recording that consent is by including appropriate provisions in the Constitution confirming the basis on which fees and other payments can be made to the directors.

Similarly, if it was determined that directors' fees will not be paid, it would be prudent to include provisions to that effect in the Constitution to avoid doubt or dispute in the future.

### **What may impact on the decision whether or not to pay directors' fees?**

Many categories of tax concession do not preclude the payment of fees to a company's directors in their capacity as directors (provided the fees are not excessive or otherwise paid improperly).

However, if a company is permitted under the Act to omit the word 'Limited' from its corporate name, one consequence would be that it would **not** be permitted to pay fees to its directors. For further discussion see Guidance Note 1 above.

### **What other payments could be made to directors?**

A company's constitution will commonly provide that directors may be reimbursed for relevant travelling, accommodation and other expenses properly incurred in attending and returning from board meetings, or otherwise incurred in their execution of duties as directors. That mechanism might permit not only reimbursement but the initial payment of the relevant amount by the company.

In addition, if the director has any special skills or involvement in some other business and is asked to perform extra services or undertake additional work for the company that is outside their ordinary duties, then the director is entitled to be paid a fee for those services or that work. The Constitution would often provide that such amounts must be no greater than the arm length's-length failure of such services.

Other payments, including a pension or allowance, may also be payable to the extent permitted by the Act. It was not necessary to include such provisions in the Constitution if this arrangement would never be contemplated.

### **On what basis has sample clause 11 been drafted?**

Sample clause 11 of the template constitution has been drafted on the basis that directors:

- Must be paid fees, as determined by the company in general meeting.

- May be paid fees for additional services rendered.
- May be reimbursed for relevant out-of-pocket expenses.
- May be paid a pension or allowance after leaving office, to the extent permitted by the Act. (However, we expect that this would not be appropriate for Medical Locals, and it is included for reference only).

These assumptions may not be appropriate for every Medicare Local, or at all (depending on the requirements of the ITA).

## Guidance Note 15: Powers of directors

### Why is it important to clarify the powers of directors in the constitution?

A company has two primary 'organs' of decision-making: the members in general meeting and the directors acting as a board.

Typically, almost all corporate decisions are reserved to the board, with only a small number of critical corporate decisions reserved to the members. The general power of management that is usually vested in the board will be limited by any powers that the company's constitution or the Act require to be exercised by the members in general meeting.

Sample clause 12.1 does not reserve any additional decisions to members over and above those that are reserved to members under the Act. Those decisions include matters such as:

- approval of a modification or repeal of the company's constitution (including the adoption of an entirely new constitution); and
- approval of a change of the company's name,

among other decisions.

### Should other decisions be reserved to the members in general meeting?

This is a key decision that the stakeholders involved in establishing the Medicare Local will need to consider. If it is considered necessary to impose additional checks and balances on the power of the board, one method of doing so is to observe certain key decisions to the members in general meeting.

For example, if it is considered essential to preserve the terms of reference of a particular committee, or entrench some other governance mechanism that may ordinarily be documented outside the constitution, one method of doing so would be to reserve any decision to change that document (such as the terms of reference) to the members in general meeting, rather than permitting the board or some other party to do so.

However, the practical implications of reserving decisions to members should be carefully considered. Usually, for the members to pass a resolution, a general meeting will need to be convened and held: refer Guidance Note 11 above for a discussion of other forms of resolution by the members. This involves a time delay as well as an administrative burden and expense to the company.

In addition, if the members cannot reach a decision, there is no other group of stakeholders to whom the decision can be referred under the standard corporate model. The time delay involved in convening and holding a general meeting may also, in and of itself, be sufficient to 'paralyse' the company. All of these matters should be considered further before additional decisions are reserved to the members.

From a director's perspective, it is often seen as undesirable for too many decisions to be reserved to members. In particular, directors are subject to strict general law and statutory duties, while in comparison, members are generally free to exercise their powers as they see fit, provided that as a majority they do not behave in an oppressive manner.

A board usually does not wish to be put in a position where it has responsibility without appropriate power. Most potential directors would decline the office under those circumstances. Accordingly, if the preferred constitution for the Medical Local diverges too greatly from the standard model, it may be difficult to attract and retain appropriately qualified directors.

## Guidance Note 16: Proceedings of directors

### **Who should be entitled to convene a board meeting of the Medicare Local?**

Further to the discussion of general meetings in Guidance Note 11, it will be important to include appropriate provisions in the Medicare Local's constitution regarding the power to convene board meetings.

Ordinarily, the constitution of a company limited by guarantee would provide that any director may convene a board meeting. This reflects the relevant 'replaceable rule' set out in the Act.

It is sometimes proposed that a higher threshold should apply, for example a majority of directors, to address the perceived risk that a single director might inappropriately convene a board meeting. As per the discussion above, on balance we recommend that any director be given the power to convene a board meeting. This is reflected in sample clause 13.1 of the template constitution.

### **What quorum for board meetings can be specified in the constitution?**

As discussed in Guidance Note 11 above, a 'quorum' is a protective requirement which specifies the minimum number of directors required to be present at a board meeting in order that business can be validly transacted.

As with general meetings, there is considerable flexibility as to the quorum that can be specified for board meetings. Key considerations include the following:

- The total number of directors, taking into account the minimum and maximum number of directors specified in the constitution.
- Whether the quorum should be specified as a fixed number of directors, or a percentage of the existing number of directors. However the quorum is specified, if it is too high there is a risk that the board (and hence the company) may be 'paralysed'.

A company limited by guarantee's constitution will often permit the board to change the quorum. Of course, to do so there would need to be a quorum of directors to pass such a resolution. Sample clause 13.5 of the template constitution reflects this model.

### **What if a quorum cannot be achieved at a board meeting?**

Further to the discussion in Guidance Note 11, if the board cannot achieve a quorum it is not able to conduct company business. This could risk paralysing the company, so the company's constitution will typically include rules to address this risk. For example:

- If the number of directors holding office has been reduced below the number of directors required to form a quorum, the directors or, if there is only one director, that director, will often have the power to appoint additional directors. (Refer sample clause 13.5 of the template constitution).
- If the directors cannot form a quorum because one or more of them is excluded from voting due to a material personal interest, the usual response is for the directors to convene a general meeting and permit the members to decide the matter. (Refer sample clause 13.11 of the template constitution).
- In an 'emergency', the directors or surviving director might also be permitted to act, even if a quorum cannot be formed.

### **How should the chairperson of the board be appointed and removed?**

Commonly, the directors of a company will be entitled to appoint and remove the chairperson. Sample clause 13.7 of the template constitution reflects this model.

Other options are possible. For example, the power to appoint and remove the chairperson might be reserved to the members in general meeting.

In deciding how to draft the constitution, it will be important to consider the rights and responsibilities of the person presiding at general meetings and board meetings. In particular, will that person be given a second or casting vote in addition to any deliberative vote they have (and any votes they hold as attorney or proxy for any members, in the case of general meetings)?

## **Guidance Note 17: Participation where directors have conflicting interests**

### **Why might the constitution include provisions regarding directors' interests?**

Further to the discussion in Guidance Note 14 above, due to each director's fiduciary relationship with the company they will not be allowed to profit from that office without the members' fully informed consent. In the absence of consent, the director may be forced to account to the company for certain profits he or she has made.

In addition, due to the strict rules that apply to fiduciary relationships, if a director has an interest in a contract or arrangement to which the company or a related entity is a party, the contract or arrangement may be invalid or voidable as a consequence. Accordingly, the company's constitution will often include provisions addressing these matters.

One means of providing advance consent is by including appropriate provisions in the constitution. Sample clauses 13.13 and 13.14 of the template constitution are one method of doing so. They do not have to be included in the Medicare Local's constitution, but if there are any queries or concerns regarding directors' interests it is recommended that advice be sought before the constitution is finalised.

Sample clause 13.10 of the template constitution is commonly included in a constitution to acknowledge the requirements of the Act regarding 'material personal interests' of directors. The Act prevents a director of a public company who has a 'material personal interest' in a matter that is being considered at a directors' meeting from:

- being present while the matter is considered at the meeting; or
- voting on the matter,

other than in limited circumstances. Appropriate disclosure of interests by the directors of a Medicare Local will be an important issue from the outset, and legal advice may be required regarding the scope of these obligations and the best means of fulfilling them.

## Guidance Note 18: Committees

### What types of committee can a board establish?

Boards often establish committees of their members for various reasons, including to:

- Consider particular issues and provide advice to the full board.
- Share the board's workload and free up the full board's time for the most critical items of business.
- Delegate particular powers to the committee, usually to be exercised in accordance with the directions of the full board.

In some cases, non-board members might be appointed to such a committee. In certain contexts, particularly the public sector context, it may be considered inappropriate for a committee that does not consist entirely of board members to have decision-making power delegated to it by the board.

Although these are not strict terms of art, committees established by the board that consist only of directors are sometimes referred to as 'board committees', while other committees established by the board with purely advisory functions and (potentially) mixed membership may be referred to as 'advisory committees'. Other forms of categorisation could be chosen if preferred. The most critical issues to be determined are:

- Who is entitled to sit on the relevant committee (for example, only current directors of the company)?
- Who decides upon the appointment and removal of committee members?
- What is the function of the committee? In particular, will or might it be delegated any powers by the board? Or would that be expressly prohibited?

- Who determines the committee's terms of reference, and whether to terminate the committee?

### **Does the committee structure impact on the board's ability to delegate its powers?**

No, unless the company's constitution says otherwise.

The Act gives the directors a broad power of delegation, unless the company's constitution provides otherwise. For instance, sample clauses 13.19 to 13.21 of the template constitution concern the establishment and functions of 'Advisory Committees'. Sample clause 13.21 seeks to limit the board's power of delegation such that no powers can be delegated to an Advisory Committee. The board's power of delegation in sample clause 13.16 is expressly subject to this requirement.

These sample provisions are optional and can be deleted or amended as required. They simply reflect one way of approaching the twin issues of board committees and delegation of board powers. Many constitutions may not include this level of detail, or may provide for some other regime.

### **Where else might a committee sit in the corporate structure?**

The term 'committee' can be used in several ways. Potentially, the management team of the Medicare Local might be permitted to establish a 'committee' (presumably consisting of Medicare Local employees and, potentially, third parties) to consider particular issues, or as a means of liaising with and seeking input from those people or organisations.

Ordinarily, such a 'committee' would not be able to exercise any of the Medicare Local's powers. However, it might play an important governance role by permitting those parties to participate in the governance of the Medicare Local through participation in that committee.

In designing the governance structure for a Medicare Local, it will be important to consider where a particular 'committee' is intended to sit in the corporate structure, along with the other key issues identified above. In particular, there will need to be clarity about which person or collective will have the power to change the committee's terms of reference (or equivalent), determine the membership of the committee and terminate the committee.

## **Guidance Note 19: Circular resolutions of directors**

### **Can the directors pass a resolution other than by holding a board meeting?**

Yes. Just as the members may be given the power to pass a circular resolution (refer Guidance Note 11 above), the board may also be empowered to do so. This can be a useful means of permitting the board to act when it is unable to meet in person, or where the matter is urgent.

The Act contains a 'replaceable rule' concerning circular board resolutions, but it will not apply under the template constitution (as all replaceable rules are excluded under sample clause 22.4). Accordingly, it will be necessary to include specific provisions in the Medicare Local's constitution concerning circular board resolutions if the replaceable rules are excluded, and this form of decision-making is to be permitted. Sample clause 13.26 is a common approach.

### **What issues need to be considered when drafting a provision of this kind?**

'Fast-track' decision-making mechanisms of this kind could potentially be abused. For this reason, it is common to require all directors (or more precisely, all directors entitled to vote on the resolution in question) to approve a circular resolution for it to be a valid resolution of the board. If any director who is entitled to vote on the matter does not support the proposed resolution, it is considered appropriate for the matter to be instead discussed and voted upon at a board meeting.

Some constitutions permit a simple majority of directors to pass a circular resolution. This is not considered best practice for the reasons outlined above.

Other constitutions also exclude directors who have been given a 'leave of absence' from needing to approve the proposed circular resolution, for fear that their absence could potentially stymie any ability to pass a circular resolution. Whether this carve-out is appropriate will need to be decided by each Medical Local in light of its own requirements and circumstances.

### **Guidance Note 20: Alternate directors**

#### **What is an 'alternate director'?**

An 'alternate director' is an individual appointed by a director to act in the director's place and exercise some or all of their powers in the director's absence (for example, if the director is ill, overseas or cannot attend a board meeting for some other reason).

If both the alternate director and the director who appointed him or her are present at a board meeting, the alternate will have no power or legal status as a director.

There is no automatic right to appoint an alternate. Whether or not a director can do so, and the terms on which an alternate can be appointed, will depend upon the company's constitution.

#### **Are these provisions optional?**

Yes. Many companies will not permit directors to appoint alternates, for example because the company wishes to benefit from the particular skills and experience of that individual, which it cannot do if the director is replaced by an alternate. There may also be concerns about the choice of individual who is proposed as the director's alternate.

Alternate directors are subject to the same strict duties (and potential liabilities) as company directors generally. For this reason, there is a growing reluctance to accept appointment as an alternate due to the potential exposure to liability in acting in that capacity.

### **Guidance Note 21: Secretary**

#### **Is the company required to have a secretary?**

Yes. The Act requires a public company to have at least one secretary, at least one of whom ordinarily resides in Australia. The Act further provides that only an adult may be appointed as a secretary of a company. Tax law also requires that there be a public officer and in a not for profit entity this role is often filled by the company secretary.

The board can appoint more than one secretary at any time. Sample clause 15.1 of the template constitution reflects this.

### **What does the secretary do?**

The company secretary is in effect the 'chief administrative officer' of the company. Historically, the role was considered equivalent to that of a 'mere clerk', but law and practice places greater importance on the secretary's role as the primary governance advisor to the board and the corporate officer most closely involved in preparing notices of meeting, agendas, draft minutes and other critical governance documentation. The term 'chief governance officer' is increasingly being used to describe the secretary's role.

The secretary is given specific functions under the template constitution, which reflect requirements of the Act and/or contemporary corporate practice.

### **Can a director also be appointed as the secretary?**

Yes, although there is no requirement for one individual to act in both roles. If it is decided to allocate responsibilities in this way, it will be important for the relevant individual to understand the responsibilities of each office and ensure that the capacity in which he or she is acting at a particular time is always clear.

## **Guidance Note 22: Indemnity and insurance**

### **Why are these provisions important?**

Due to the various forms of liability to which directors and other corporate officers (including secretaries and senior executives) can be exposed, it is now common practice for companies to indemnify those officers and extend other protections to them, subject always to the law.

This was originally a private-sector approach but is now increasingly common in the not-for-profit and public sectors contexts as well, with necessary variations.

There are typically three elements to a comprehensive director and officer protection regime (over and above appropriate risk management and governance practices). These are:

- Including appropriate provisions in the entity's constitution regarding indemnity and insurance.
- Entering into a 'Officers' indemnity, insurance and access deed' (or equivalent) with the directors and, potentially, other officers of the company, to offer them additional protection.
- Obtaining and maintaining appropriate D&O insurance to protect those individuals against liability while they hold office and for an agreed period thereafter.

### **What sample provisions are included in the template constitution?**

Sample clause 16 of the template constitution permits (but does not oblige) the company both to indemnify its officers and pay D&O insurance premiums for their protection, in each case to the fullest extent permitted by law.

Such provisions do not need to be included in the constitution, as there is no legal obligation to provide these forms of protection. However, the usual rationale for a company offering such protection is that it is necessary to do so for the company to attract and retain appropriately skilled and experienced officers.

Alternatively, some constitutions would replace the word 'may' with 'must' (that is, the provisions are 'mandatory' rather than 'permissive'). The consequences of this drafting approach are discussed further below.

### **What type and level of protection should be offered by a Medicare Local to its officers?**

This is a decision that will need to be made by each Medicare Local, taking into account its own financial position and likely financial position going forward, the identity of its first corporate officers (and their requirements), and various other factors.

It is strongly recommended that these matters are considered as part of the establishment phase, rather than deferring them for consideration post-implementation. In particular, it is often simplest to implement these protection arrangements at the time the constitution is being prepared.

If it is decided to offer some form of protection to corporate officers, this will impact on the drafting of the Medicare Local's constitution.

### **What drafting decisions need to be made in the constitution?**

The threshold decision is whether or not the Medicare Local must, or alternatively might, indemnify some or all of its officers (which may include former officers), and obtain insurance for their protection. It would be unusual for a company's constitution to prohibit the company from doing either of those things, as it would be difficult to recruit officers on those terms.

If these protections must, or may, be offered by the company, the next decision is whether or not a separate indemnity, insurance and access deed will be entered into with some or all of the company's current officers. If a deed will be entered into, it is generally preferable to include permissive rather than mandatory provisions in the constitution. This avoids the risk of there being two inconsistent sets of rules in place (namely, under the constitution and also under a separate deed).

From the officers' perspective, the main advantage of entering into a separate contract regarding indemnity, insurance and access rights is the certainty offered by direct contractual rights against the company. Such a contract cannot (generally speaking) be amended without the directors' consent. In addition, an officer may not be able to enforce rights that are set out in the constitution after the person ceases to be an officer of the company (due to the nature of the statutory contract under the Act).

### **What other issues need to be considered?**

Officer protection arrangements are regulated under the Act and other statutes. They raise a number of complex legal issues, including:

- The nature of the benefits to be provided.

- Which organ of decision making should authorise a company's entry into such an arrangement (namely, the board or the members in general meeting)?
- How should future directors and officers be offered this protection?

The financial implications of a company giving an uncapped and potentially unqualified indemnity also need to be understood and evaluated.

It is likely that each Medicare Local will need to obtain independent advice before designing and implementing such protections.

### Guidance Note 23: Seals and execution of documents

#### **Is the company required to have a common seal?**

No. A common seal is now optional and most newly-incorporated companies do not have a seal.

If the company elects to have a common seal, further requirements set out in the Act must be complied with.

### Guidance Note 24: Gift fund requirements

#### **Are these provisions necessary?**

In practice, yes. This is because eligibility for deductible gift recipient (**DGR**) status is contingent upon gifts received by the company being accounted for and dealt with in particular ways. The ATO's preferred position is that appropriate clauses be included in the company's constitution.

The provisions set out in clause 18 are standard provisions that have previously been accepted by the ATO as satisfying these requirements.

#### **Will any changes be required to these provisions?**

Potentially, depending on the particular category of DGR that is sought by the Medicare Local. AGPN is commissioning further advice on this topic.

For certain categories of DGR, more onerous 'public fund' provisions would need to be included in the constitution. However, if the Medicare Local qualifies as a 'Health Promotion Charity' the gift fund provisions set out in sample clause 18 of the template constitution should be sufficient.

These matters should be confirmed with the ATO or tax advisors before the draft constitution is adopted and the relevant gift fund established.

#### **Winding up requirements**

The gift fund will also need to be dealt with in a specified way if the fund is wound up or if the company ceases to be a DGR for any reason. These rules are stricter than the standard not-for-profit 'winding up' provisions (refer Guidance Note 25 below for more information).

## Guidance Note 25: Surplus assets on winding up or dissolution

### Are these provisions necessary?

Yes, if the Medicare Local wishes to enjoy any tax concessions. This is because eligibility for tax concessions will depend (among other matters) on whether provisions of this kind are included in the company's constitution.

It is also highly likely that the Australian Government would expect to see such provisions in the Medicare Local's constitution to ensure that members do not make profit or gain from their membership of the Medicare Local.

If changes are proposed to these provisions, it is strongly recommended that legal advice be obtained as to the consequences of those changes before the constitution is finalised.

## Guidance Note 26: Accounts, audit and records

### About these provisions

These provisions are 'standard provisions' for a company limited by guarantee. To a large extent they simply refer to applicable requirements set out in the Act.

### Amendments to reporting and audit obligations for companies limited by guarantee

Recent changes implemented a tiered audit and reporting structure for companies limited by guarantee, with the aim of lessening the burden imposed on such companies (which are generally used for not-for-profit purposes). In particular, reporting obligations are now based on the company's annual revenue and whether or not the company had DGR status during the relevant financial year.

If the company is part of a consolidated group for tax purposes, the revenue thresholds apply to the annual consolidated revenue of the entity. A summary of the revised financial reporting and audit obligations follows:

Tier	Applies to a company limited by guarantee that:	Financial reporting and audit obligations
1	Has an annual revenue less than \$250,000 in the relevant financial year and was not a DGR at any time during that year.  (Excludes Commonwealth government entities and certain other entities including building societies and credit unions).	A 'small company limited by guarantee' has no obligation to do any of the following unless directed to do so by ASIC or 5% of members: <ul style="list-style-type: none"> <li>• Prepare a financial report.</li> <li>• Prepare a director's report.</li> <li>• Have financial reports audited.</li> <li>• Notify members of reports.</li> </ul>
2	Has an annual revenue of less than \$250,000 in the relevant financial year and was a DGR at any time during that year.	The company limited by guarantee must: <ul style="list-style-type: none"> <li>• Prepare a financial report, which it may elect to have reviewed rather than audited (unless the company is a Commonwealth government entity).</li> <li>• Prepare a streamlined rather than a full director's</li> </ul>

Tier	Applies to a company limited by guarantee that:	Financial reporting and audit obligations
	Has an annual revenue of more than \$250,000 but less than \$1 million in the relevant financial year, irrespective of its DGR status during that year.	<p>report.</p> <p>A streamlined process for distributing the company's annual report to members also applies.</p>
3	Have an annual revenue of more than \$1 million in the relevant financial year, irrespective of its DGR status during that year.	<p>The company limited by guarantee:</p> <ul style="list-style-type: none"> <li>• Must continue to prepare a financial report, which must be audited.</li> <li>• May prepare a streamlined rather than a full director's report.</li> </ul> <p>A streamlined process for distributing the company's annual report to members also applies.</p>

Importantly, a company limited by guarantee's audit and reporting obligations could vary from financial year to financial year, depending on its annual revenue and other factors.

A Medicare Local will need to assess whether it must comply with more onerous audit and reporting obligations that have been imposed in other ways, eg. under a funding agreement that the company has entered into with a government department or agency or other funding body.

### Access to documents

Members do not usually have access to the company's financial records and other documents unless the information is required to be disclosed under the Act (for example, annual financial reporting requirements, or by order of the Court) or the constitution otherwise permits the members to access the information.

The approach set out in sample clause 20.4 of the template constitution is standard but should be assessed by each individual consortium. If significant changes are proposed to this model, legal advice may be required.

Directors will have general law rights of access to the company's documents while they hold office. In addition, the Act gives each director statutory access rights to company books for the period of their directorship and for 7 years thereafter.



It is common for directors to enter into an agreement with their company further clarifying the director's rights and obligations regarding access to company documents: see Guidance Note 22 above for more information.

## Guidance Note 27: Definitions and interpretation

### About these provisions

These provisions are 'standard provisions' for a company limited by guarantee. They are included to assist in interpreting the constitution.

The defined terms set out in clause 22.1 will need to be reviewed to ensure that all capitalised terms used in the final version of a Medicare Local's constitution are defined appropriately, and that no definitions are retained that are not used in the final constitution.



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## Annexure 1: Glossary

Capitalised terms used in this document have the following meaning unless the context requires otherwise:

**Act** means *Corporations Act 2001* (Cth) and any related regulations.

**AGPN** means Australian General Practice Limited ACN 082 812 146.

**AGPN Forum** means the online forum located at <http://medicarelocaltransition.com.au/index.php>.

**ASIC** means Australian Securities & Investments Commission.

**ATO** means the Australian Taxation Office.

**DGR** means deductible gift recipient for the purposes of the Tax Act.

**Discussion Paper** means the document issued by the Australian Government (through the Commonwealth Department of Health and Ageing) in October 2010 titled *Medicare Locals: Discussion Paper On Governance And Functions*.

**GPN** means a division of general practice, otherwise known as a general practice network.

**ITA** means the proposed *Invitation to Apply: Medicare Locals* to be issued by the Australian Government. It is expected that the ITA will set out guidelines for the establishment and initial operation of Medicare Locals as well as other information for applications seeking funding to establish a Medicare Local.

**Medicare Local** means an independent company limited by guarantee with strong links to local communities, health professionals, service providers and consumer and patient groups and forming part of the NHHN, as described more fully in the Discussion Paper and the eventual ITA.

**Report** means the report prepared by DLA Phillips Fox for Australian General Practice Network Limited in April 2010 titled *Report to the AGPN: Advice and recommendations for structure, membership and governance of Primary Health Care Organisations*.

**Tax Act** means *Income Tax Assessment Act 1936* (Cth) and *Income Tax Assessment Act 1997* (Cth).