

Discussion Paper:

Review of Constitution

FOR:

**Australian & New Zealand Society of
Respiratory Science Inc**

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1 Background to this paper

1.1 Introduction

- 1.1.1 Jennifer Robertson, Consultant at Board Matters, has been engaged to facilitate a review of the Australian & New Zealand Society of Respiratory Science Inc (**ANZSRS**) constitution including the development of any constitutional changes which might assist in the continuous improvement of governance of ANZSRS. For the purposes of that discussion, Jennifer has prepared this paper (**discussion paper**) to raise for consideration some of the current pressures and trends in relation to governance both broadly and specifically for an organisation like ANZSRS.
- 1.1.2 The points raised in this discussion paper are not explored in detail, but are simply raised for further discussion or consideration, as relevant issues that must be taken into account in the governance review by the Board of ANZSRS.
- 1.1.3 Naturally as a membership organisation, the Board cannot make any final decision on major structural changes affecting the Constitution, which can only be approved by the membership at an AGM or other general meeting.

2 Governance pressures generally

2.1 Increased governance standards

- 2.1.1 There have been a number of moves over recent years to develop and promote 'standards' or 'frameworks' for good governance. Many of these standards or frameworks have emerged from corporate disasters over recent years, such as the collapse of HIH, OneTel, Harris Scarfe and others in Australia, as well as similar scenarios in other countries (eg. Enron and WorldCom in the US). The resulting standards applicable in Australia are predominantly:

- (a) The Australian Stock Exchange Corporate Governance Council's publication of *Corporate Governance Principles and Recommendations* (**ASX Recommendations**) published in August 2007; and
- (b) Australian standard AS 8000 – Australian standard on good corporate governance, and a number of associated standards relating to development of codes of conduct, protection of whistleblowers etc.

Copies of the above documents can be made available if required. Alternatively Board members can access a full copy of the ASX Recommendations from the ASX website (www.asx.com.au/about/pdf/ASXRecommendations.pdf).

2.1.2 In addition, there are similar pressures right across the world, as is evident from the large number of similar types of governance codes and standards applicable in countries throughout the world (e.g. see www.ecgi.org).

2.2 Legal pressures

2.2.1 There are an increasing number of high profile cases highlighting the responsibilities of directors to ensure good governance frameworks are in place. Whilst there is much unnecessary scare-mongering in this respect, the cases do serve to highlight the need for directors to be actively, and indeed proactively, involved in the governance oversight of their companies. Just some examples in recent years include:

- (a) ***CBA v Friedrich*** (National Safety Council of Victoria case) of the late 1980's/early 1990's, which established that directors of not-for-profit companies are as equally exposed to personal liability for their actions as directors of for-profit companies, with the Chairman in this case personally liable to the tune of \$97M upon the financial collapse of a not-for-profit company;
- (b) ***AWA case*** also from the 1980's, this case bears many resemblances to the recent National Australia Bank currency hedging crisis, but saw the financial collapse of a large public company, AWA, due to management exceeding financial hedging policy limits set by the board, confirming legally that directors must be directly involved in the development *and monitoring* of risk management systems in companies;
- (c) ***Sheahan v Verco & Hodge***, a decision from more recent years, reiterating that there is no such thing as a 'passive director' and that directors must be proactive in fulfilling their duty of care and diligence, actively asking questions and seeking information and not merely passively waiting for it to be provided to them;
- (d) ***Tru Floor Service Pty Ltd v Jenkins (No. 2)***, a decision from 2006 in which the insolvent trading provisions of a company were considered. The case lays down some guidelines about the financial knowledge a director must bring to bear in relation to a company's accounts so that "cash flow" rather than a "balance sheet" approach is key to determining insolvency.

2.2.2 It is quite clear from these decisions, and the resulting pressure from insurance companies providing directors and officers insurance, that Boards of all companies, whether for-profit or not-for-profit, have significant legal duties and responsibilities to ensure that the members of the Board are sufficiently skilled, attentive to their role and provided with the necessary information to make decisions on

behalf of the company. ***This is equally true for the Board of ANZSRS.***

3 Governance for ANZSRS

3.1 Areas for Review

3.1.1 With the above pressures in mind, we must also be mindful that emerging research in Australia and elsewhere is clearly showing that merely following rigidly standards such as those set out in the ASX Recommendations or the Australian Standard on Good Governance does not necessarily deliver better accountability or governance generally.

3.1.2 Taking in to account each of these factors, the review should, it is suggested be focussed purely on answering this question:

What governance arrangements will enable the Board of ANZSRS to improve its functioning in order to better carry out its legal duties and responsibilities in the interests of ANZSRS?

3.1.3 In our view, ultimately the governing body's ability to carry out its leadership role effectively comes down to making strong judgement-based decisions. Hence we suggest that all governance arrangements should be structured to enhance this capacity of the governing body.

3.1.4 In other words, the Board ought only to focus on making changes to the governance arrangements of ANZSRS which will help to enhance the quality and rigour of decision-making at the Board of ANZSRS. Therefore in the following section 4 of this discussion paper identifying a number of issues for discussion, in each instance some explanation is given as to how the relevant issue can help or hinder good governance or decision-making at ANZSRS.

3.1.5 Naturally wherever options are presented in the following pages there remains the option of not accepting the proposed changes and retaining status quo. This has not be specified against each and every option proposed, for the sake of avoiding repetition.

4 Proposals for Discussion

Issue	Current	Options	Governance/decision-making impact of change?
4.1 Appropriate legal structure for international body	ANZSRS is an incorporated association under the <i>Associations Incorporation Act 1985 (SA)</i>	Given the national and international focus and membership of ANZSRS, the most appropriate legal structure for this organisation may not be an association incorporated under a State act. The options are: <ul style="list-style-type: none"> (a) Transition ANZSRS to a structure such as a company limited by guarantee which allows ANZSRS to trade outside of South Australia's borders without the need to register ANZSRS as an "Australian Registrable Body" with ASIC under the <i>Corporations Act</i>; or (b) If the legal structure is to remain an incorporated association, ANZSRS must ensure it complies with section 601AC of the <i>Corporations Act</i> and registers ANZSRS with ASIC as an Australian Registrable Body so that it may carry on business outside South Australia. 	The ability for ANZSRS to use a company limited by guarantee structure to engage more easily in interstate and international activities must be considered in light of the potential higher compliance costs associated with registration under the <i>Corporations Act</i> . If the legal structure of ANZSRS is to be changed, it would require the current association to be wound up and a company limited by guarantee to be incorporated.
4.2 Board and Executive	The constitution provides for a Board (rule 7.2) and an Executive Committee (rule 8). The Board	The options are: <ul style="list-style-type: none"> (a) remove the reference to the "Executive Committee" from the constitution and insert a general clause allowing the Board to appoint such committees it 	Executive committees often act as a de facto governing body between Board meetings. The ANZSRS constitution recognises and allows for potentially broad responsibilities,

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	<p>has the powers and duties set out in rule 7.1. The Executive has the powers set out in rule 8.1. Some of the powers (particularly in relation to the finances) have the potential to cut across one another and repose a great deal of power in the hands of an Executive, which has quorum of 2 people.</p>	<p>sees fit. The scope of the work provided to the Executive Committee by the Board, if required, could be encapsulated in a document such as terms of reference promulgated by the Board, rather than being entrenched in the ANZSRS constitution; or</p> <p>(b) create greater certainty regarding the roles of the Board and the Executive Committee by clearly expressing the powers, liabilities and obligations of the Board vis-à-vis the Executive in the constitution; and</p> <p>(c) expressly recognise and protect the Board’s leadership role in the constitution.</p>	<p>authorities and liabilities to vest in this ‘executive’ group. However how the liabilities of the Board may be affected by the Executive is not altogether clear, thus the dual Board/Executive structure set out in the constitution is confusing. Although the Executive powers appear to be limited to the “day to day management and running of the affairs of the Society”, its limitation on powers is not clear (eg. rule 8.1.6 allows the Executive to delegate powers delegated to it by the Board; rule 8.1.5 allows the Executive to carry out such duties as, inter alia, the <i>Executive</i> see fit.) Given the uncertainty as to how the powers of the Board and Executive interact, there is a potential conflict as to which internal governing body (ie the Board, Executive or both) is legally responsible for ANZSRS. This uncertainty is likely to have consequences of either the Executive binding the Board (with the Board liable for Executive actions/decisions) or the Executive becoming liable, as well as the Board for its</p>

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			actions/decisions.
<p>4.3 Board structure (size, composition etc)</p>	<p>The Board comprises 6 elected members.</p> <p>The Chair of the Board is elected yearly and his/her tenure is limited to 3 years. The tenure of a Director other than the Chair is limited to 6 years.</p>	<p>Any or all of the following:</p> <p>(a) Retain a smaller Board as governing body, without need for a separate Executive, comprising say <u>6-9</u> including:</p> <p>(i) Chair/President of ANZSRS;</p> <p>(ii) 4-5 other ANZSRS members elected to the Board by the membership (see section 4.5 below)</p> <p>(iii) 1-2 appointed (or 'independent') directors either elected by the membership or appointed by the Board itself to meet skills, competencies or experience gaps.</p> <p>(b) Chair of the Board is:</p> <p>(i) The President elected at the AGM (therefore holding office for 2/3 year blocks but eligible for re-election subject to (c) below); OR</p> <p>(ii) elected by the Board itself from amongst its own number every year.</p> <p>(c) 8-year limit on Chair's role and</p>	<ul style="list-style-type: none"> • Present size of the Board is small however is still of sufficient number to expect formation of flexible and cohesive decision-making body which can meet as necessary and build the required culture for the making of good robust decisions. • Looking for the skills of a good chair enhanced by Board ability to elect its own chair. • Even number of Board members may require Chair "casting" vote (per rule 7.2.3) more often than if there were an odd number of Board members (although see comments in section 4.7 below in this regard)

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		<p>maximum Board tenure of between 9-12 years.</p>	
<p>4.4 Executive Committee structure (size, composition etc)</p>	<p>The Executive comprises the immediate past-President, 3 elected members (it appears that the Executive Committee must comprise persons other than Board members) and up to 2 nominees (who are non-voting).</p>	<p>If the Executive is not removed from the constitution per option 4.2(a) above, any of the following:</p> <ul style="list-style-type: none"> (a) an “executive” is appointed as a smaller subset of the Board with limited powers/delegations to act as the Board, when the Board is not in session; or (b) create a written decision-making protocol to ensure that decisions which must be made between Board meetings can be made in a timely manner and communicated to all Board members; and (c) give non-voting members of the executive the right to vote. 	<ul style="list-style-type: none"> • Executive Committees are often comprised of a smaller subset of the Board, however at present, the Executive Committee could be the same size and completely different people to those elected to the Board. • The Executive Committee in the constitution appears to comprise another layer of governance for ANZSRS. • As set out in section 4.3 above, there are risks associated with the current drafting of the constitution especially in relation to the legal roles/responsibilities/liabilities of the Executive Committee vs. the Board. In this circumstance, a quorum of 2 voting members could be considered too low for important decisions which bind ANZSRS Directors. • Depending on where the potential obligations/liabilities of the Executive Committee fall, a

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			<p>non-voting member of the Executive could be ultimately be liable for Executive decisions despite not being able to vote on motions etc.</p>
<p>4.5 Election mechanisms</p>	<p>Currently there appears to be three different types of election held every 2 for the Regional Representatives and the Executive Committee or 3 years for the Board. The Board and Executive are elected by a “simple majority voting of voting members of the Society” (see rule 7.2.1 and 8.2.1.2)</p>	<p>Any or all of the following:</p> <ul style="list-style-type: none"> (a) Postal-vote for election of: <ul style="list-style-type: none"> (i) Chair/President; and/or (ii) Board; or (b) 4-6 ANZSRS members elected to the Board by members at the AGM; (c) Provide 2 year rotational terms for ANZSRS members elected to the Board with ½ the elected Board members retiring each year. (d) 1-2 independent (or appointed) Board members: <ul style="list-style-type: none"> (i) appointed by the Board itself; OR (ii) elected by ANZSRS members at AGM (as per paragraph (b) above). (e) Independent Board members’ terms depend whether appointed by Board itself (in which case they could be up for reappointment every year) or 	<ul style="list-style-type: none"> • There are different tenures for the Board, Executive and Regional Representatives, which may cause administrative issues when calling AGMs. • The current election mechanisms are unclear given that clauses 7.2.1 and 8.2.12 could be interpreted as a requirement for a simple majority of ALL ANZSRS members to elect the Board and Executive, not just those present at the AGM. • There is inconsistency in the election provisions for the Executive. The voting for the Executive is to be done before the AGM according to rule 8.2.1.2, although the order of business for the AGM includes the election of the Executive (see rule 11.1.2.3). • Seek a mechanism which has

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		<p>elected by Board/members (in which case 2/3 year terms.</p>	<p>more clarity and allows flexibility to elect or appoint the people with the interest, skills, capabilities, time etc to dedicate to the Board role.</p> <ul style="list-style-type: none"> • A rotational term for Directors is more likely to retain a working level of corporate knowledge within ANZSRS.
<p>4.6 Region Regulations</p>	<p>Regions are formed under rule 9.2.1 but there is minimal specified about what legal relationship a “region” has to the Board/ANZSRS and what liabilities/obligations, if any, are associated with regions or Regional Representatives. Regional Representatives are appointed via voting mechanisms set out in the constitution and can be delegated</p>	<p>The options are:</p> <p>(a) Change Regional Representative system into an advisory committee to the Board, with the committee created by Board by-law and with reporting obligations to the Board, conforming with Board requirements.</p> <p>OR if regions are more like a “branch” of ANZSRS:</p> <p>(b) Provide expressly in rule 9.2 that “Regions” must conform to all Rules and Regulations from time to time approved by ANZSRS Members at General Meeting (on recommendation from Board) including with respect to:</p> <ul style="list-style-type: none"> • The allowance of and requirements for formation and/or 	<ul style="list-style-type: none"> • There are potential legal exposures for ANZSRS if separate regions or branch like structures (or similar) form without incorporating and then incur liabilities on behalf of ANZSRS. • Without understanding the legal relationships between Regions and ANZSRS, those members operating within a region may be considered an unincorporated association with the commensurate liability attaching. • Further discussion on this point will likely clarify what drafting changes are required.

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	<p>duties by the Executive, however disqualification to act as a Regional Representative is treated the same as disqualification of a Board or Executive member (see rule 10.1 particularly 10.1.3).</p>	<p>incorporation of Regions (or not);</p> <ul style="list-style-type: none"> • The conduct of the meetings and other affairs within Regions; • Strict adherence to financial management of ANZSRS in accordance with budgets approved by the Board (if in control of their own finances); • Compliance with all directions of the Board of ANZSRS in order to comply with the requirements of ANZSRS' quality control and insurances in respect of the conduct of national and other ANZSRS meetings and conferences; • Use of the name, logo or image of ANZSRS. 	
<p>4.7 Chair vote during Board meetings</p>	<p>The Chair is stated to be entitled to only cast a vote in the event that a vote is hung (rule 7.2.3)</p>	<p>Either of the following:</p> <p>(a) The Chair has a deliberative and casting vote at Board meetings; or</p> <p>(b) The Chair has a deliberative vote and if the vote is hung, the motion shall be decided in the negative.</p>	<p>Much like the non-voting member of the Executive Committee referred to in section 4.4 above, the Chair ought be able to vote on any matter before the Board given that he/she will be responsible for and ultimately potentially liable for Board decisions.</p>

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			A Chair not being able to vote on motions etc except in the case of a hung decision is not consistent with good governance practice.