



BACKGROUND PAPER

TO

MODEL STATE CONSTITUTION DEVELOPMENT

TABLE OF CONTENTS

SUMMARY OF ISSUES	1
1. INTRODUCTION.....	2
1.1 Background	2
1.2 Purpose of the Project.....	3
1.3 Research.....	3
2. DOCUMENT REVIEW	4
2.1 Act requirements	4
2.2 OFT model rules.....	5
2.3 ASC Governance: Principles of Best Practice.....	5
2.4 SCORS Governance Review	6
2.5 SCORS Sports Insurance Review.....	11
2.6 Independent European Sport Review 2006 (EU Review)	11
3. NEW SOUTH WALES DEPARTMENT OF SPORT AND RECREATION “IT’S YOUR BUSINESS” RESOURCE 2002.....	12
4. OTHER ISSUES	12

SUMMARY OF ISSUES

The template documents should address the following issues:

- The documents must reflect the Act and any other OFT requirements. Financial and other reporting requirements should be set out in the documents.
- Common objects supporting a common policy framework. This should include branding and communications strategies.
- The NSO of the sport must be formally recognized by the SSO and the regional and local organisations.
- Clear rules establishing common membership categories. For example, individual members at club level should also be recognised as members of the regional and State (and ideally national) bodies.
- The effect of membership must also be clearly set out. This must also be reflected in membership or affiliation forms and declarations.
- The documents must clearly set out what is required in the document and what should go into by-laws. The distinction between these two sets of rules and also policies must be explained.
- The governance structure must reflect the level at which the organization is operating but must also provide for the ability for the board to co-opt members. A balance of representative and independent directors should be sought.
- The board (at whatever level) must have full governance powers including over the by-laws. Appropriate checks and balances will be placed in the AGM. Again the level to which the board is a strategic board or a management board must be addressed. The ASC Best Practice Principles will be observed as far as practicable in the context of the size and level of the organization.
- Appropriate corporate governance checks should be set out either in the constitution or in a governance policy and should address conflicts of interest and the procedures to be adopted by directors where conflicts of interest arise.
- The board should be entitled to hold an annual strategic forum. It need not be mandatory (again this reflects the context of the different size and levels of the organization).
- Disciplinary and grievance procedures must be addressed in the documents with detailed processes to go into by-laws.
- The committee delegation process must be clearly defined. Model terms of reference could be set out in by-laws.
- Obligations must be inserted in the documents setting out how SSOs and regional associations are to support the level below them.

1. INTRODUCTION

1.1 Background

The recreation and sport environment is constantly changing. Since the 1990s recreation and sport has been subjected to numerous pieces of legislation and other forms of regulation. It has also been subjected to external pressures from litigation and higher societal expectations of behavior. Sport organisations (“SOs”) have had to respond to these changes and adopt a more strategic risk management approach to their operation.

Despite this increasingly complex environment many SOs are still using and relying upon constitutions and rules that were written many years ago. These documents have either been amended in an ad hoc fashion over time or have not been amended at all. When amendments were made they were often not directed at particular issues which required attention or were driven by non strategic issues.

In New South Wales most SOs are incorporated associations under the *Associations Incorporation Act 1985 (NSW)*. This has been replaced by the *Associations Incorporation Act 2009 (NSW)* (“Act”). The Act is administered by the New South Wales Office of Fair Trading (“OFT”). The model rules prepared by OFT under the Act, generally do not address the particular issues which face New South Wales SOs: they are generic rules drafted to cater to a whole range of not-for-profit organisations all with different objects.

Recent work by the Australian Sports Commission (“ASC”), summarised in the document ‘Governance: Principles of Best Practice’ confirms the above operating environment and points out that sporting organisations are coming under increasing levels of performance scrutiny.

The ASC advocates that five major principles should be adopted by sport, including:

- Clear delineation of governance roles
- Effective governance processes
- Effective governance controls
- Governance improvement
- Member responsiveness.

These principles should be embedded in the constitution of each SO.

In some cases SOs do not have in place processes which allow the peak body (be it national (NSO) or state (SSO)) to define applicable legislative requirements and make them binding on their members and affiliates. This is often so, because of the constitutional framework does not link the constituent parts (affiliated regional associations and clubs and also individual members) of the SO together.

Other recent issues that have arisen include:

- The capacity of SOs to deal with sport rage and sideline rage issues when the perpetrators are parents of children who are members but who are not themselves members of the association; or are perpetrated by volunteers

who are not to members. It is therefore important to clearly define, in the constitution, the members of the association. Is, or should, the guardian who signs the membership application on behalf of a junior member, also be defined as a member? If they are, how are the rules be enforced against them?

- The capacity of SOs to refer disputes, reports, appeals or complaints to an external dispute resolution process for resolution, conciliation or mediation, if the process for handling complaints and disputes is not clearly defined in the constitution.
- The capacity of SOs to handle effectively complaints by one member against another member for breaches of policies, for example complaints alleging harassment, as distinct from merely handling on-field reports made by umpires and officials.
- The capacity of sports to suspend members who are accused of offences against other members, for example child abuse complaints, pending the investigation of those complaints by police or other agencies, sometimes for extended periods of time, while still allowing the accused and accuser 'natural justice'.

1.2 Purpose of the Project

The purpose of the model constitution project therefore was to research and produce three 'template constitutions' which represent best practice constitutions for SOs. These template constitutions seek to address these issues and will be made available on the SAR website as a resource for New South Wales SOs.

1.3 Research

In preparing the model constitutions the following were reviewed and considered:

- *Associations Incorporation Act 1984 and 2009 (NSW)*
- OFT Model Rules for an Incorporated Association
- ASC Governance: Principles of Best Practice
- Standing Committee on Recreation and Sport ("SCORS") Governance Review (Stages 1 and 2) 2006
- SCORS Review into Australian Sports Insurance 2002
- Independent European Sport Review 2006
- New South Wales Department of Sport and Recreation "It's Your Business" Resource 2002

2. DOCUMENT REVIEW

2.1 Act requirements¹

It is useful for the purposes of this Project to set out the minimum legislative requirements for the rules of an incorporated association. Sections 23 and 23A in Division 3 of the Act regulate the rules of an incorporated association.

Section 26 (Nature of association) states:

“(1) *Subject to this Act, an association's constitution binds the association and its members to the same extent as if it were a contract between them under which they each agree to observe its provisions.*”

Section 6(5) (Application for registration) states:

“(5) *An association's proposed constitution must address each of the matters referred to in Schedule 1.*”

Schedule 1 (Matters to be addressed in association's constitution) states these matters to be:

"1 Membership qualifications

The qualifications (if any) for membership of the association.

2 Register of members

The register of the association's members.

3 Fees, subscriptions etc

The entrance fees, subscriptions and other amounts (if any) to be paid by the association's members.

4 Members' liabilities

The liability (if any) of the association's members to contribute towards the payment of the debts and liabilities of the association or the costs, charges and expenses of the winding up of the association.

5 Disciplining of members

The procedure (if any) for the disciplining of the association's members and the mechanism (if any) for appeals by members in respect of disciplinary action taken against them.

6 Internal disputes

The mechanism for the resolution of disputes between members (in their capacity as members) and between members and the association.

7 Committee

*The constitution and functions of the committee, including:
(a) the election or appointment of the committee members, and*

¹ The section references are to the 2009 Act.

- (b) *the terms of office of the committee members, and*
- (c) *the grounds on which, or reasons for which, the office of a committee member is to become vacant, and*
- (d) *the filling of casual vacancies occurring on the committee, and*
- (e) *the quorum and procedure at meetings of the committee.*

8 Calling of general meetings

The intervals between general meetings of the association's members and the manner of calling general meetings.

9 Notice of general meetings

The time within which, and the manner in which, notices of general meetings and notices of motion are to be given, published or circulated.

10 Procedure at general meetings

The quorum and procedure at general meetings of the association's members, and whether members are entitled to vote by proxy at general meetings.

11 Postal ballots

The kinds of resolution that may be voted on by means of a postal ballot.

12 Sources of funds

The sources from which the funds of the association are to be or may be derived.

13 Management of funds

The manner in which the funds of the association are to be managed and, in particular, the mode of drawing and signing cheques on behalf of the association.

14 Custody of books etc

The custody of books, documents and securities of the association.

15 Inspection of books etc

The inspection by the association's members of books and documents of the association.

16 Financial year

The association's financial year."

2.2 OFT model rules

As noted above OFT has produced a set of model rules for an incorporated association. These clearly reflect the requirements of section 6(5) and schedule 1 but again as noted above do not meet the requirements of a 21st century SO.

2.3 ASC Governance: Principles of Best Practice

An SO should incorporate the best practice principles from this ASC document in their constitutional, governance and administrative frameworks. The implementation and application of these principles will be effected by the particular context of an SO. For example, the application of best practice corporate

governance will differ between a large SSO and a local sporting club. The club will simply not be resourced to apply the principles as envisaged by the document.

As its name suggests the document deals with governance as opposed to the constitutional framework of an SO. Clause 1.3 of the ASC document states however that:

“The incorporated body will have a constitution, which may be changed from time to time by the members. Each sporting organization should give detailed consideration as to how people and/or organizations may become members of the incorporated national body. The members will elect the board of directors (board). The constitution of the incorporated body will state the voting power of each member in this regard. ...”

Such a statement accords with basic legal (Act) requirements. It is also important to ensure that the “sporting authority” (the power or recognition that an NSO receives from its international federation) is properly entrenched in the constitutional framework so it is recognized and applied from NSO to Club level.

2.4 SCORS Governance Review

In 2005-2006 SCORS reconvened a Commonwealth/State/Territory working group to oversee an investigation of the issues arising from the adoption of new and emerging governance models and the impacts these have on sport development and organisational sustainability at all levels (national and state/territory). This investigation aimed to satisfy industry needs for better intelligence and understanding of the impacts of existing and emerging governance models. The SCORS Report set out the findings, conclusions and recommendations of that investigation. The SCORS Report constituted Stage 2 of the investigation. Stage 1 of the investigation was a literature search, the findings of which formed the direction for Stage 2.

A number of NSOs and other not-for-profit (NFPs) organisations were asked to participate in the review. The constituent and other key documents of these organisations were reviewed and the organisations surveyed on a broad range of governance and structural issues. A number of workshops and/or interviews were conducted with these organisations or key individuals from them.

The SCORS Report is clearly useful for the purposes of this Project given it examined the constituent documents of a number of NSOs and examined the relationships within the constitutional structures of those organisations and the relationships between the NSOs and their SSOs. Many of the findings and recommendations of the SCORS Report apply equally to SSOs and NSOs despite the review being conducted in the context of NSOs.

The SCORS Report concluded: *“In the context of sports and their governing bodies, the issues of structure and accountability encompass:*

- *the definition of the goals and roles of the organisation, its constituent parts and its governing body;*
- *the demarcation and separation of responsibilities between the organisation, its constituent parts and its governing body;*

- *the implementation and communication of policy and responsibilities to and between the organisation, its constituent parts and its governing body;*
- *the wider structure and organisation of the governing body and the sport;*
- *the selection and appointment of representatives and other members of the governing body; and*
- *considering limits to the term of office for elected representatives and other members of the governing body.*

For a sport to survive and achieve its common object whilst dealing with the commercial, financial, legal, technological, social and sporting changes around it, it should:

- *be sensitive to the environment in which it operates and should be alert to these changes taking place around them;*
- *be cohesive with a strong sense of unity. Create a community for it and its stakeholders with a distinct persona and culture;*
- *build constructive relationships with entities around it; also those that it is comprised of. Management must listen and not be too directive; and*
- *be conservatively financed.”*

These conclusions apply to all SOs. Below are those recommendations from the SCORS Report which have ramifications for the constituent documents of SOs.

(a) Applicable recommendations from the SCORS Report

If SOs remain within a federal structure it is recommended that all constituent parts of the SO but primarily the NSO and the SSOs adopt (a) common objects and (b) a common constitution. This should be pursued at the expense of individual stakeholders' interests. SSOs and NSOs are all part of the one organisation with a singular common purpose: the particular sport.

SOs should seek to create, foster and maintain fiduciary relationships within their organisations. That is, the NSO itself, the SSOs and clubs and other members whom comprise the organisation should seek to become bound to exercise their rights and powers in good faith for the benefit of the others. No part of an SO operates in a vacuum or alone. Such relationships should be clearly defined and set out in the constitutional structure. NSOs and SSOs must demonstrate mutual reliance and interdependence in pursuing their common purpose. The structure should ensure all parties must work together in the common interest.

The assets (including intellectual property) and funds of the constituent parts of an SO should only be applied to the common purpose (the sport) and held either by the NSO directly or on trust for the stakeholders.

There should be common, uniform branding under a centralised uniform intellectual property policy.

NSOs and their SSAs should consider entering into a charter agreement or deed of commitment under which they would set out their respective roles and responsibilities in administering the sport. Any such deed must recognise the

position of the NSO as pre-eminent. It must be recognised that it is the NSO that has been granted the “sporting power” by the relevant IF and that the SSOs can only rely upon and exercise that sporting power by agreeing to the jurisdiction of the NSO.

SOs may not need to enter into a deed of commitment if the appropriate constitutional structure and other governance and policy mechanisms are put in place.

An SO should adopt a single set of policies for their sport. It is only the delivery or implementation of those policies that may be affected by “local” conditions.

Regardless of the structure or the position of the organisation, SOs’ legal and administrative structures should be regularly reviewed and updated if necessary. Structures should be developed which enable flexible and adaptive practice to operate and promote and maintain the sound governance and administration of the sport over the relevant geographical area.

An SO’s administration must be mindful of key stakeholders who are essential to the successful operation of a sport and its events. Regular communication channels and forums must be established and conducted which address and receive the concerns, interests and rights of members and other key stakeholders regardless of level within the SO.

As with all governing or administering organisations, a number of principles should be applied to enable the SO to regulate the sport in an effective manner. The primary function of a board at all levels of an SO whether state or club is to manage the business of the organisation at that level.

The role of a board and its members is to give direction to the organisation and to accept initial responsibility for its management. It is not a director’s role to take part in the day to day management of the organisation. Most NSOs that participated in the review did not appear to have systemic interference by board members in management matters. It is considered that confusion of these roles and interference in day-to-day management is more prevalent at SSA level.² Ongoing governance education including about the risks of confusing these roles is recommended to address this issue.

The board of an SO should have full governance powers under its constitution. “Full” meaning free from unnecessary interference from the members (but subject always to the law).

SOs should adopt a governance framework (as far as its operating context permits) that includes:

- the board should have a majority of independent and appropriately skilled directors who have no formal affiliation (this does not mean membership) with a stakeholder. This may or may not be achievable in many SOs, in which case the independent directors should at least comprise a majority of the “interested” directors. The simple aim here it to avoid if possible and certainly minimise conflicts of interests;³

² As noted above this is a context issue where the application of corporate governance in a true sense becomes more difficult for smaller RSOs than for larger RSOs.

³ It is recognised that this is simply unachievable in a whole range of SOs.

- implementing longer, rotational terms so directors are ratified by members for three year terms, with an election of a certain number of directors each year;
- the board being the body within the sporting organisation that appoints the management and committees and other key officials on advice of management;
- directors not being allocated permanent “portfolios”, but may be required to chair a special taskforce for a set period;
- develop and publish a charter of professional conduct for the governance and management of the sport;
- have all directors, management, staff and regular consultants disclose interests in and memberships of other organisations that may be perceived by an external party to be a conflict of interest;
- develop a key performance indicator framework and monitoring process for the sport, incorporating changes to processes to ensure data integrity, transparency and timeliness (for example, regular reporting);
- adopt an “open” financial disclosure policy on income and expenditure for the sport. The NSO and all its SSOs should adopt this policy;
- adopt a national strategic plan to which all SSOs and the NSO contribute, and agree to accept;
- adopt and implement a communications plan setting out the roles and responsibilities of each of the stakeholders from a communications perspective. Organise regular meetings and information and other resource sharing forums;
- all directors (at NSO and SSO level) should continue to undertake regular governance education (at least annually and whenever there is a change in the composition of the board);
- adopt a uniform committee structure across the SO; and
- ensure the board, all committees and other key positions (voluntary and paid) have clear position descriptions. This is particularly important for volunteers to attract the maximum benefit from volunteer protection legislation.

It is incumbent upon governments to assist SOs achieve “better” structures including governance. This is particularly so where government invests in, and/or otherwise funds, an SO.

(b) Constitutional Issues

The paragraphs set out below are excerpted from the SCORS Report and deal with constitutions. The authors consider them relevant and useful in the context of this Project. Where the paragraphs for example talk of the federal structure of an NSO the same can apply in respect of an SSO structure. That is, the constitutional framework of an SO (at whatever level) can be more tightly drafted so that the various constituent parts are interlinked and interdependent.

Many NSO structures are a less than tightly knitted federation of SSOs. Some constitutions do not formally recognise the SSOs as members or parts of the NSO. This produces an organisation which has no recognition or control over its constituent parts. Even where SSOs are members of the NSO and are recognised as such under the national constitution, many SSOs do not recognise the NSO in their constitutions. That is, there is no reciprocal recognition. In short the constitutional framework for an NSO does not clearly set out the relationship nor the roles and responsibilities of each member or constituent part of the federation.

This produces a weak structure both legally and from a policy perspective with each SSO potentially being largely free to conduct itself and the sport in its State as it sees fit. That is, without reference to any other SSO, the NSO or any national policy framework.

A lack of uniformity in objects also contributes to a weaker legal structure and does not facilitate uniformity in policies or operation. Nor does this lend itself to the promotion and development of uniform commercial or sporting objectives. Uniformity of objects is often lacking in the constituent parts of an SO.

SSO constitutions often do not recognise the NSO or its constitutional requirements. As a result SSOs may fail to comply with their obligations as members or affiliates. SSO constitutions can often be very outdated and thus SSOs (but also NSOs) do not have the power to conduct a wide range of commercial activities or indeed even address the wide range of policy issues that currently impact upon sport, for example insurance, member protection, doping and equity.

A number of SOs have a poor division of power in that the management powers of the organisation; that is the governance is often retained by the general meeting or another body (for example, a Council) other than the board.

In many SOs, the above division of power within the organisation is not clear. This is often made worse by the existence of a third organ with responsibilities and powers usually named "the council" or the "general assembly". This body is often comprised of representatives or delegates from SSOs or regions or even clubs. In many organisations the council and the general meeting are one and the same. This causes duplication.

Many SO constitutions require the organisation to be governed by the board or management committee subject to the constitution. This would be satisfactory if this was all the constitution stated. However many constitutions go on to vest all powers (management and governance) either in the general meeting or more usually the council. Further confusion is created in that directors are often members of the general meeting as well the council.

The issue for consideration here is the blurring between ownership and control. The traditional response in sport is that the members (however described or categorised) are effectively the owners of the sporting organisation. As noted above this ownership is transient and may only last as long as the member continues to pay their membership fees. Notwithstanding this transience, members, considering themselves as owners, have traditionally also demanded control over the management of the organisation. This too was a consequence or indeed a requirement of past times when the size and demands of the sport meant that it could be managed by a volunteer member or members. As noted above sport has become commercial and with that commercialism, obligations and duties have increased. Many sporting organisations can no longer be managed by volunteer members. This is not to say there are no organisations that can not be run this way and run this way very well. Also membership numbers have grown or activities and events have grown so the responsibilities in managing the organisation have been divested to a management committee or board. The difficulty arises in that the management committee or board, does not have the governance control or power to manage the organisation. The control is still with the members. This is poor practice governance and as stated above potentially exposes the members.

2.5 SCORS Sports Insurance Review

This review considered issues associated with insurance for Australian sport and recreation organisations. The review considered (from an insurance context) certain constitutional issues for Australian recreation and sport bodies. The only recommendation that arises in this regard from this Report is as follows: *"It is recommended that a national uniform approach be taken in response to the issues of governance, ... sport structures, member protection, ... and insurance;"*

2.6 Independent European Sport Review 2006 (EU Review)

The EU Review was commissioned by the European Union. It contains a number of recommendations and proposals that are aimed at addressing a number of structural and legal problems in the European football market. It also considers European sport more broadly. The EU Review considers governance issues in some detail but also looks at the European Sports Model which the authors consider is very similar to the traditional Australian federation model. Below are some relevant paragraphs from the EU Review:

"As noted, the constitutional model of European sport is based on the so called pyramid structure. At the top of the period are the European federations, themselves formed by national associations. These national associations are, in turn, formed by regional associations and/or leagues, with the clubs at the base of the structure. This is the essence of the European sports model and a legacy of European sports history. The model applies for all sports in Europe, in particular team sports. It is also accurate to say that the pyramid is formed with elite professional football at the top and an infinitely greater number of amateur clubs and volunteers at the base.

This European sports pyramid functions on the basis of two key principles: the principle of national organisation of sport and the principle of a single federation governing the whole structure. The authors of the Report consider that the single federation structure is the best means to deliver clarity and efficient administration in European sport."

Other key principles which the EU Review considered underpinned the European sport model were:

- *Solidarity: the principle of **financial solidarity** is equally a key aspect of European sport. At one and the same time, this principle operates to keep sporting competition varied and exciting and also finances the development of the grassroots.*
- *.... another important matter that requires consideration is the **combination of regulatory and commercial functions** that may, in certain circumstances, be vested in the same sports governing body.*
- *All stakeholders must be properly involved and consulted to give legitimacy to the decisions that the governing body takes. It is the task of the [governing peak] authorities to balance their interests, which are sometimes consistent and sometimes conflicting. At national level for example, professional leagues and clubs are often involved in the decision making process. Indeed, the situation needs to be vigilantly monitored, to ensure that the balance does not move too far in favour of any single interest group.”*

3. NEW SOUTH WALES DEPARTMENT OF SPORT AND RECREATION “IT’S YOUR BUSINESS” RESOURCE 2002

This resource describes the difficulties faced by the different levels of SOs in terms of meeting risk management and corporate governance responsibilities due to resource constraints (human, temporal and financial).

4. OTHER ISSUES

Other issues for SOs are as follows.

- SO board representation should seek to strike a balance between representative and independent directors. This will vary depending upon the level of the organization (club to region to SSO).
- A board at whatever level should have the ability to co-opt additional directors.
- Common statewide branding should be a uniform object and supported by a uniform statewide policy.
- No club or region should be disaffiliated without approval by the SSO.
- SSOs should seek adopt a more strategic corporate governance approach whilst regions and clubs will have to find the right balance that sits within their resources.
- SSOs should hold an annual strategic forum (in addition to the AGM) for key stakeholders in the sport.
- The strategic plan of SSOs (and other SOs if applicable) should also be reported against at the AGM.

- Committee structures of SOs should clearly be set out including types and name of committees, their composition and their roles in clear terms of reference and delegation. The actual terms of reference should not be in the constitution of an SO but what must be in the terms of reference and delegation should be set out. Consideration must be given as to whether Committees should have the power to co-opt members.
- Constitutions should state that the SOs by-laws are the province of the board. A grandfather or sunset clause by which time members can provide comments on proposed by-laws should be considered.
- Matters such as discipline and grievance should be in by-laws not the Constitution.
- All levels in an SO should have common objects. These should capture both sport and active recreation where possible.
- A constitutional obligation on SOs to support its regions and clubs should be considered. Such an obligation could be considered along the lines of the duty to act in the best interests of all the members of the SSO as well as promoting the growth of the sport. Such an obligation would have to recognise particular circumstances of both the SSOs and the stakeholders it must support.
- All statutory obligations of SOs and their officers should be recognised in their constitution.
- The ASC Best Practice Corporate Governance Principles should be applied (as best as possible) in SOs' constitutions.
- There should be a clear division of power between the board and the general meeting. The board should have full governance powers.
- SSOs should recognise the sporting authority of their NSOs and their membership of their NSOs in their constitutions.
- SOs should consider whether a charter or memorandum of understanding would facilitate the operation and governance of the SO and its constituent members.
- SOs need to be mindful of compliance with their statutory obligations. Consideration should be given as to how this can be built into the constitutions of SOs.
- SO directors should possess a passion for and knowledge of the sport and the organisation.
- Portfolios should not be entrenched in the constitution.
- Leadership is the key governance issue for SOs.
- The ASC guidelines do not work at local and regional level. However SSO boards should address more strategic issues whilst regional and local levels must find the balance between strategic and hands on governance.

- Dispute handling and grievance procedures must be clearly referenced in the constitution. The actual processes for these procedures belong more properly in by-laws.
- SOs should adopt a uniform policy framework across the State at all levels. At the very least common principles must be adopted.
- Education is required to demonstrate the distinction between the constitution itself and by-laws made under it and also policies. The documents themselves must be clearly drafted to express this distinction.
- As far as practicable within the corporate governance context applicable to each level of an SO, management and governance must be separate with the responsibilities clearly defined.
- Financial and other reporting obligations of SOs and their boards should be clearly set out in either the constitution or by-laws.
- An annual strategic forum would provide a platform for a good communications strategy. It would however have no legal authority for example, like an AGM.

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