

Comparison between the current and draft new Constitutions of TDHL and VT

Provision	Timaru District Holdings Ltd's current Constitution	Venture Timaru Ltd's current Constitution	Draft new Constitutions
<p>Issue of shares: The Companies Act 1993 provides that, unless a company's Constitution provides otherwise, its Board can issue shares at any time, to any person, and in any number it thinks fit. Section 45 of the Companies Act requires any new shares that are issued to be offered the company's existing shareholder(s) before they can be offered to third parties. This can be modified by the company's Constitution.</p>	<p>Under TDHL's current Constitution no shares may be issued unless the issue is approved by a Special Resolution of shareholders (clause 2.1.1). The existing shareholder(s) have pre-emptive rights to purchase any new shares that are issued (clause 2.1.3).</p>	<p>VT's current Constitution allows its Board to issue shares at any time, to any person, and in any number it thinks fit, but gives the existing shareholder(s) pre-emptive rights to purchase any new shares that are issued (clause 2.1.10).</p>	<p>We have simplified the draft new Constitutions to reflect that the Council is the sole shareholder of the 2 companies.¹ Each Constitution prohibits the Board from issuing shares to any person other than Timaru District Council (Council), without Council's approval (clause 2.1).</p>
<p>Transfer of shares: Section 39(1) of the Companies Act provides that shares are freely transferable subject to any limitation or restriction in the Constitution.</p>	<p>Clause 7.3 sets out a process to be followed before shares can be transferred. The Company has a period of time to find a shareholder or shareholders willing to purchase the shares being sold.</p>	<p>The Constitution gives the existing shareholder(s) pre-emptive rights to purchase shares (clause 8).</p>	<p>The new draft Constitutions reflect that Council is the sole shareholder of the 2 companies. They do not put any restrictions on the transfer of shares, but as Council is the sole shareholder, it goes without saying that any share transfer needs Council approval.</p>
<p>Appointment of Directors: Directors are appointed and removed by an Ordinary Resolution of Shareholders unless the Constitution provides otherwise (section 153(2) of the Companies Act).</p>	<p>The current Constitution provides for Directors to be appointed by a Special Resolution of Shareholders.</p>	<p>The current Constitution provides for Directors to be appointed by an Ordinary Resolution of Shareholders. The Board can also appoint any person to be an additional Director, either to fill a casual vacancy or as an additional Director, to hold office only until the next annual meeting (clause 17.9).</p>	<p>The new draft Constitution provides for Directors to be appointed and removed by Council as the sole Shareholder (clause 7.2).</p>

¹ We have not tried to cover off a situation where some or all of the Company's shares are sold by TDC to a third party. If this occurred, a new Constitution would invariably be prepared by at that time to reflect the change in shareholding structure.

<p>Minimum and maximum # of Directors: The Companies Act requires a company to have at least 1 Director but does not specify a maximum number of Directors.</p>	<p>The current Constitution provides for a minimum of 3 and a maximum of 6 Directors (clause 11.2).</p>	<p>The current Constitution does set a minimum or maximum number of Directors. VT currently has 7 Directors.</p>	<p>The draft new Constitution provides for the minimum and maximum number of Directors to be set by Council from time to time (ie without requiring a change to the Constitution), but records that as at the new Constitution is adopted the minimum was 3 and the maximum was 7.</p>
<p>Board composition: The Companies Act does not set any rules about Board composition. However section 57 of the Local Government Act 2002 requires CCOs to adopt a policy that sets out an objective and transparent process for the identification and consideration of the skills, knowledge, and experience required of Directors. When identifying those skills, knowledge, and experience, Council is required consider whether knowledge of tikanga Māori may be relevant to the governance of that CCO.</p>	<p>Council has an External Governance Appointments Policy. TDHL's current Constitution also contains prescriptive rules about the makeup of its Board:</p> <ul style="list-style-type: none"> • At least 2 Directors must be Elected Members of Council. • The Mayor is not to be appointed as a Director. • The number of Elected Member Directors shall not exceed the number of independent Directors. 	<p>Council has an External Governance Appointments Policy. VT's current Constitution does not set any additional rules about Board composition.</p>	<p>The draft new Constitution do not set any rules about Board composition. We suggest setting out all the rules regarding Board composition in the External Governance Appointments Policy. This would allow flexibility and minimise duplication. The updated External Governance Appointments Policy provides that for TDHL:</p> <ul style="list-style-type: none"> • At least 2 Directors must be Elected Members of Council. • The Mayor is not to be appointed as a Director. • The number of Elected Member Directors shall not exceed the number of independent Directors.
<p>Term of appointment: The Companies Act does not set a term of appointment or a maximum number of terms that may be served.</p> <p>(As a comparison, for listed companies the NZX listing rules require one-third (or the number nearest one-third) of all Directors to retire from office at each annual meeting with the Directors retiring being those who have been longest in office.)</p>	<p>TDHL's current Constitution requires 1/3 (or the number nearest to 1/3) of Independent Directors to retire each year. They are eligible for reappointment provided they have not served 3 or more terms. Elected Member Directors' terms automatically end on a date set by Council that is no more than 6 months after the triennial elections - even if they are re-elected. If they are re-elected, they are eligible for reappointment provided they have not served 3 or more terms.</p>	<p>The current Constitution does not set a term of appointment or a maximum number of terms that may be served.</p>	<p>The draft new Constitutions are silent regarding the term of appointment and maximum number of terms. We suggest setting out these rules in the External Governance Appointments Policy instead. This would allow flexibility and minimise duplication. The updated External Governance Appointments Policy provides for all COs 1/3 (or the number nearest 1/3) of Directors to retire each year. They are eligible for reappointment provided they have served less than 3 terms.</p>

<p>Appointment of Chairperson and Deputy Chairperson:</p>	<p>TDHL's current Constitution provides for Council to appoint a Chairperson and Deputy Chairperson, and states they each must be Independent Directors.</p>	<p>The current Constitution provides for the Board to elect one of their number as Chairperson and Deputy Chairperson.</p>	<p>The draft new Constitutions provide for Council to appoint the Chairperson and Deputy Chairperson.</p>
<p>Directors' duties: Section 131 of the Companies Act requires Directors to act in the best interests of the Company. However a company's Constitution can permit Directors to instead act in the best interests of the Company's shareholder, even though it may not be in the best interests of the Company.</p>	<p>The current Constitution permits Directors to act in the best interests of Council.</p>	<p>The current Constitution permits Directors to act in the best interests of Council.</p>	<p>No change. The draft new Constitution permits the Directors to act in the best interests of the Council.</p>
<p>Powers of the Board: Section 128 of the Companies Act provides that the business and affairs of a company must be managed by, or under the direction or supervision of, the Board and the Board has all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the Company. Those provisions may be modified or limited by the Constitution.</p>	<p>The current Constitution requires the Board obtain a Special Resolution of Shareholders before undertaking any of the actions in clause 17.1.2 (a)-(e).</p>	<p>The current Constitution places no restrictions on the powers of the Board (clauses 18.1-18.2).</p>	<p>The draft new Constitutions require the Boards to obtain Council approval before undertaking certain actions (see clause 7.3). These actions are the ones listed in clause 17.1.2 (a)-(e) of TDHL's current Constitution.</p>
<p>Interested directors: The Companies Act requires Directors to disclose conflicts of interest and provides that an interested Director may attend meetings, count towards quorum and vote on the matter, unless the company's Constitution provides otherwise.</p>	<p>TDHL's current Constitution prohibits an interested Director from voting on the matter in which they are interested, but permits them to attend meetings and count towards quorum (clause 13.2).</p> <p>It states that a Director will not be considered "interested" in a transaction by virtue only of the fact that they are a ratepayer in the Timaru District.</p>	<p>VT's current Constitution prohibits an interested Director from voting on the matter in which they are interested, but permits them to attend meetings and count towards quorum (clause 22.7).</p>	<p>No change (clause 12).</p> <p>The draft new Constitutions both state that a Director will not be considered "interested" in a transaction by virtue only of the fact that they are a ratepayer in the Timaru District.</p>

<p>Insurance / indemnities: Under section 162 of the Companies Act a company can insure and indemnify its Directors and employees if expressly authorised to do so by its Constitution.</p>	<p>TDHL's current Constitution authorises it to indemnify and effect insurance for its Directors and employees in accordance with section 162 of the Act (clauses 19.1 and 19.2).</p>	<p>VT's current Constitution authorises it to indemnify and effect insurance for its Directors and employees in accordance with section 162 of the Act (clauses 27 and 28).</p>	<p>No change. The draft new Constitutions each also authorise the company to indemnify and effect insurance for its Directors and employees in accordance with section 162 of the Act.</p>
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