



FOUNDATIONS

The Governing Document Hierarchy: Constitution, By-laws, Policies

Why the tier a rule sits in matters more than the rule itself

Ask most boards where a particular governance rule lives, the constitution, a by-law, or a policy, and you will get a confident answer that is often wrong. Not because the board is careless, but because the three documents do different legal jobs, and the differences matter far more than most organisations realise until a rule is challenged.

Getting this hierarchy right is not a filing exercise. It determines how easily your organisation can adapt, how exposed a rule is to legal challenge, and whether your members are protected on the matters that should require their approval to change.

Which rules apply to your association?

The law depends on how your association is set up. A **company limited by guarantee** follows the Corporations Act 2001 (Cth) and its constitution. An **incorporated association** follows its state or territory associations Act and its rules. A **registered charity** also follows the ACNC Act and the ACNC Governance Standards, and some Corporations Act rules are replaced for charities that are companies. Check your own governing documents, and get advice before decisions with legal consequences.

In this resource

1. [The Constitution: The Top Of The Hierarchy](#)
2. [By-Laws: The Practical Layer, With A Hard Limit](#)
3. [What The Courts Have Actually Said](#)
4. [Policies: The Operational Layer](#)
5. [A Practical Test For Your Own Document Stack](#)

The Constitution: The Top Of The Hierarchy

As covered in the previous article in this series, a company's constitution has effect as a statutory contract under section 140 of the Corporations Act 2001 (Cth), binding the company, its members, and its directors and secretary. It sits at the top of the organisation's own governance hierarchy for a straightforward reason: for a CLG, it can generally only be modified by special resolution (at least 75 per cent of the votes cast by members entitled to vote) under section 136 of the Act. For an incorporated association, follow the special resolution and lodgement requirements in your state or territory Act and your rules. Legislation, including any mandatory rules, sits above the constitution and overrides it. Within the organisation, nothing below the constitution can override it, and anything inconsistent with it is, in principle, invalid to the extent of that inconsistency.

This is why the constitution should be reserved for matters that warrant that level of protection: objects, membership classes and voting rights, board composition, and the core mechanics of general meetings. Anything else clutters a document that is deliberately hard to change, and hard to change is a feature, not a flaw, for the right content.

By-Laws: The Practical Layer, With A Hard Limit

By-laws sit beneath the constitution and typically give effect to it: if the constitution establishes that members elect directors, the by-laws set out how that election actually runs, nomination timelines, ballot procedures, how disputes are resolved. Most constitutions explicitly empower the board to make by-laws, and by-laws can usually be amended by board resolution alone, without the higher threshold a constitutional change requires. That flexibility is the entire point of having them.

But that flexibility comes with a hard legal limit, and it is a limit some boards have discovered the expensive way. A by-law that conflicts with the constitution is not a grey area requiring interpretation. It is invalid to the extent of the inconsistency, because the constitution sits above it in the hierarchy and by-laws only ever operate within the authority the constitution grants them.

What The Courts Have Actually Said

Two Australian cases from 2023 and 2024 illustrate both sides of this line clearly, and it is worth boards understanding both, because they show the hierarchy is tested by courts, not just theorised by governance advisers.

In *Carabetta & Anor v Carlingford Bowling, Sports & Recreation Club* [2023] NSWSC 1442, the club's board adopted new by-laws ahead of a board election that restricted the voting rights of Social Members. The club's own constitution empowered the board to make by-laws, but specifically only by-laws that were not inconsistent with the constitution. The New South Wales Supreme Court found that the new by-laws did exactly that, restricting voting rights the constitution itself protected, and held them invalid. The case confirms, in a real Australian dispute, that an explicit constitutional limit on the board's by-law-making power will be enforced by the courts, not treated as a formality.

By contrast, in *Lawrence v Melbourne Football Club Ltd* [2024] FCA 945, a director candidate challenged the club's election rules as oppressive, including restrictions on media interviews and public social media campaigning. The Federal Court dismissed the claim, finding the rules were not so unfair that reasonable directors would not have adopted them. Read together, the two cases show that by-laws are not inherently vulnerable, a properly authorised by-law that operates within its constitutional mandate will generally hold up. What fails is a by-law that steps outside that mandate, particularly one that touches rights the constitution has specifically protected.

A by-law's flexibility is not a licence. It is authority on loan from the constitution, and it can be tested, and withdrawn by a court, the moment it steps outside the terms of that loan.

Policies: The Operational Layer

Policies sit below by-laws again, and the distinction here is not just about ease of amendment, it is about legal character entirely. Unlike the constitution and by-laws, policies are not contractual and do not form part of the statutory contract binding members and the company. They are operational and governance guidance, usually approved by the board, with supporting procedures maintained by staff under delegated authority, covering matters like privacy practice, expense reimbursement, or day-to-day administrative procedure. This is why policies should never be used to smuggle in something that needs contractual force. A voting rule, a membership eligibility criterion, or a director removal process does not belong in a policy no matter how convenient that would be to amend. If it needs to bind members with

contractual force, it needs to sit in the constitution or, properly authorised, in a by-law. A policy is not a shortcut around the hierarchy. It is a different tier entirely, built for a different kind of content.

A Practical Test For Your Own Document Stack

- For every by-law your organisation currently has, confirm the constitution actually authorises the board to make it, and check the specific scope of that authorisation, not just its general existence.
- Audit whether any current by-law touches a matter the constitution protects more specifically elsewhere, particularly member voting rights, the pattern in both cases above.
- Check whether any policy is quietly doing constitutional or by-law work, governing something that needs contractual force rather than operational flexibility.
- When drafting anything new, ask which tier it belongs in before asking how to word it. The tier question should always come first.

None of this requires treating every by-law review as a legal emergency. It requires treating the hierarchy as real, because the courts plainly do. A governance document stack where each tier stays within its proper authority is not just tidier. It is measurably more defensible the day a member decides to test it.

This is one of the practical governance topics built into our Board Director course, alongside the papers, tools and frameworks that turn the principle into your board's actual practice. [Explore the course](#)

Annie Gibbins

Founder and CEO, Nexus Leadership

BOARDROOM ACTION WORKSHEET

The Governing Document Hierarchy: Constitution, By-laws, Policies

Turn the resource into evidence, a decision and an accountable next step. Keep the completed record in your association's approved board records system.

1 What is the issue or decision?

State the governance question in one clear sentence.

2 What evidence do we already have?

Record the facts, source documents and stakeholder evidence available now.

3 What evidence is still needed?

Identify the legal, regulatory, financial, member or operational information still required.

4 What is the agreed next action?

Capture the owner, timeframe and how the matter will return to the board.

Action owner	Review date	Board decision or resolution

General education, not legal, financial, tax, clinical or governance advice. Confirm specifics at the relevant primary source or with your own qualified adviser. Nexus Leadership is operated by Lipstick Consulting Pty Ltd · ABN 15 619 120 482.

CONTINUE YOUR LEARNING

Turn governance principles into practical board action.

Self-paced courses, editable resources and practical support for association boards and CEOs at nexusleadership.com.au.