

To: Christian Renford, CEO Swimming New Zealand (SNZ)
Brent Leyton, SNZ Board Chair

From: Board of Swimming Auckland (ASA) (prepared by an appointed ASA Working Group including representatives from ASA Clubs, ASA Board, other personnel selected for their skills, and Brian Palmer, Executive Officer)

Date: 12 June 2013

RE: REVIEW OF THE PROPOSED DRAFT REGIONAL CONSTITUTION (PRC)



Swimming
AUCKLAND

SECTION ONE - Introduction

The ASA made extensive submissions¹ relating to the Draft SNZ Constitution prior to its adoption at the 2012 SNZ SGM.

These concerns raised at that time were neither addressed nor responded to, and notwithstanding the commitment that a further Working Group would be recommended and appointed to review those legitimate concerns following the adoption of the Draft SNZ Constitution (SNZC), no such Working Group has been established under the direction of the new SNZ Board.

It is well known that the concerns which the ASA held were such that the ASA abstained from voting to endorse the adoption of a document which we felt, based on advice, was flawed.

We consider that it is obvious that with the presentation of this Proposed Draft Regional Constitution (PRC) that it is now not intended to undertake the review of the SNZC which was committed. As such this submission is based upon a presumption that the SNZC, as adopted, is now the foundation document to work from.

We do not seek to re-litigate the issues that existed (and to some extent still exist) relating to the SNZC, but must make reference to those issues which remain unaddressed and which still provide difficulty (real and/or anticipated) for ongoing governance at both a regional and club level of delivery. We do however feel obliged to re-emphasize the same level of concern with regard to the adoption of a new constitution as we did prior to last year's SGM and which caused Auckland to abstain from endorsing the motion laid at the SGM.

Specifically we wish to note that the adoption or otherwise of this PRC in whatever form it is finally presented is a decision for our clubs alone. This is notwithstanding the imposition of a constitutional obligation to *adopt the form of Regional Association constitution prescribed by SNZ* (SNZC 8.3.b). That cannot supersede the obligations which exist under our own constitution (ASA 2.02.1) which makes clear that our own rules *shall not be added to, rescinded or amended nor shall any new Rule be enacted save at the Annual General Meeting of the Association or at a Special Meeting called for that purpose.*

¹ Appended here for reference

For the avoidance of all doubt, we wish to make it very clear that no such meeting has yet been held by our association and that therefore our association remains as it was established as an independent and sovereign Incorporated Society, subject to the requirements of our own rules and subject to the requirements of the Incorporated Societies Act. Section 21 of that Act requires *that an incorporated society can only alter rules in the manner provided for in it's rules*. This piece of legislation and its requirements must be adhered to.

With a view to the above issues of lawfulness we would urge that all efforts are made to ensure that the document which is presented to our clubs for adoption, as and when that occurs, is a document that is acceptable and which addresses the legitimate concerns which are raised as a part of this submission process.

In this submission we have approached the process recognizing the need to have a document which is acceptable to our membership and with the following considerations in mind:

I. Identifying and establishing obvious conflicts between the SNZC and the PRC.

In addition to matters of form this also involves identification of obvious errata which have been carried forward in a draft. To this end there is a 'marked up' version of the PRC accompanying this submission.

II. Establishing areas of operational and functional difficulty for the governance and management of a region under the PRC.

While these issues are drawn from our own ASA experience we would extrapolate that in most cases they are likely to be common to other regions. We acknowledge that each region deals with its own set conditions. Our intent is not to identify simply areas that represent points of discomfort or differences to our present functions but to establish where genuine challenges will arise under the adoption of the PRC.

III. Establishing implications for the governance and management of the member clubs under the PRC.

It appears obvious to us that the changes intended under this document carry significant implications not just for the governance of a region, but also for the member clubs of a region. Arguably, the largest impact for each region has

already occurred with the adoption of the SNZC last year. While not all of those impacts have yet been crystallised, they are nonetheless real.

The real level of impact in terms of the day-to-day delivery of the sport are yet to be felt and will be realised for clubs when this PRC (or its variants) are adopted. We do not see how it will be possible to consider this work complete until a similar uniform document is imposed on each club. The requirements imposed under both the SNZC and the PRC are such that, given the sport's delivery through clubs, each club will need to adapt their own constitution in multiple areas to conform to the requirements of both documents.

We have therefore examined the likely impact areas which member clubs will face when the PRC is adopted and consider the reality of its impact as being greater for each member club than for a region.

A. FORM OF THE DOCUMENT

We are extremely concerned that the PRC is presented as a document strong in legal form. We have benefited from having some legal input available within our community, but must state that this cannot be considered to be normal, or necessarily desirable.

We believe it is regrettable that more effort has not been placed into ensuring that a governing document is created which is more suitable to the requirements of the volunteer workforce which leads the sport at a regional and club level.

One of the PRC's objects is to "*minimis[e] as much as practical the administrative complexity of competitive swimming*"², and yet we find a level of complexity within the PRC itself which will almost certainly necessitate future reference to legal advice (and consequent cost) to resolve conflicting interpretations.

We deliver the sport through incorporated societies, largely by volunteers with minimal *professional assistance*. The intention and nature of an incorporated society requires transparency and public scrutiny similar to that required of a public company, and yet our member clubs and regional organisations are not public companies and do not have access to the same resources. We do not have access to the breadth of governance and professional resource which public corporations have, therefore, it is vital that the structures which govern us are simplified to meet the capacity of those who volunteer their time and talents to deliver the sport. It is unreasonable to expect that regional and

² PRC 4.f.iii

club boards will be manned by the equivalent of what has been drawn into the current SNZ Board.

The governing documents must therefore be simplified to meet the capacity of those who serve. Our experience, especially at a club level, is where the societies' rules are too complex, the governing body will simply ignore the rules and will therefore frequently find themselves acting *ultra-vires*. This in our opinion reflects a failure of drafting rather than a failure of the volunteer.

We would therefore request very strongly that greater consideration should be given to *de-legalising* the PRC and any subsequent master club document which may result.

B. DEFINITIONS

We find a number of terms used within the PRC which are intended to have a unique meaning within the context of their use.

We consider it a flaw that these terms are not defined within the Definitions. We consider that to omit clear definitions with regard to these terms will lead to future capacity for ambiguous interpretation, in some cases on subjects fundamental to both the PRC and the SNZC.

Omissions include (but are not necessarily limited to) the following terms:

- Competitive Swimmer (perhaps this may be better considered as 'competing swimmer')
- Interested Members
- Key Role in the Sport
- Member Club * (we note that the definition used is not consistent with that used in the SNZC)
- Performance Culture
- Previous Governance Experience
- Region (we note there is no starting point to define existing regional boundaries)
- Regional Designate

- Swimming New Zealand's Standards
- Swimmer capacity

C. Regional Definition

We understand that there is some view that this does not need to be defined, as boundaries are to be set by agreement with the regions and approved by SNZ. (SNZC 8.2)

It is our view that the foundation boundary must be established as the definition within each regional constitution, and then changes (subsequent to the foundation and as agreed from time to time) should be recorded as an appendix or journal by the regional associations and SNZ.

We remain concerned now as we were last year when the SNZC was proposed that the definition provided in the SNZC³ determined that regional boundaries must be defined by territorial authority boundaries. We commented thus in an earlier submission:

1.1.1 Section 8.2. If in Auckland's case it were to agree a change of boundary with its neighbours it could not do so within this rule, given that under the Proposed Draft Constitution new boundaries must be defined by local territorial authorities.

1.1.1.1. The Auckland Territorial Authority is the entire area encompassing all 21 local board areas. Therefore Auckland (and presumably Counties Manukau) must retain their existing boundaries without change as there is no territorial authority which relates to either the current boundary or to any conceivable combination of how Auckland and Counties might adjust their boundaries in the future.

1.1.1.2. Even amalgamation would not succeed because the new boundaries created via amalgamation still would not align with the territorial authority boundary.

³ SNZC 8.2 (b)

Our concerns on this subject remain. In effect, both Auckland and Counties-Manukau, at the very least and probably other regions as well, are effectively functioning ultra-vires with boundaries that do not correspond with territorial authority boundaries.

We are further concerned that there is a lack of clarity in PRC with regard to the requirement that a region *work within its Region*⁴, and equally for a club under SNZC⁵ *operating within a region*, or under PRC⁶, *A member club may only be a member of one Regional Association at a time*.

We realize in writing this that it sounds obtuse, but sadly these documents, as prescribed are themselves obtuse.

We have an example which functions on our boundaries between two clubs, one Auckland and one Counties Manukau. Both have established a pattern (which incidentally we support) of sharing pool space and resource from time to time. That shared resource certainly under any lay definition would constitute not *working within* or not *operating within* a regional boundary.

We believe that where common sense dictates a better way to function, that our members should not be placed into a position where the common sense solution cannot be found because it would place the member in contravention of the rules. If the rules do not make sense then lay people will simply ignore the rules, which is not desirable.

D. COMPATIBILITY BETWEEN SNZC AND PRC

There are several examples where there are subtle (sometimes) but distinct differences between the two documents. We are unsure if this is intended which if so, carries some important considerations, or if these differences are simply differences which occur from drafting. Either way, it is important for clarity that they are resolved. Our document mark-up highlights some of those variances. However, by way of example we raise variances in the Objects as detailed between the two documents.

1. SNZC requires that a region must *support(ing) the development of member clubs and the relevant training, education and development of athletes* etc.⁷ The PRC does not contain an equivalent Object, so therefore does not meet the requirements prescribed by the SNZ document. We appreciate this is likely

⁴ PRC 5.1.o

⁵ SNZC 9.1

⁶ PRC 7.5

⁷ SNZC 8.4.e

an oversight, but it is not unique in being an isolated variation and we would expect in a final form document that all such variations will be remedied.

2. Other variations also give rise to differences in interpretation. For example, SNZC 4.2(a) which states for SNZ to *encourage people to choose to participate in the sport of competitive swimming*. Now, in PRC there is no such similar object for a region.

Logic would suggest that this is a simple oversight of drafting, however it may also be that it is specifically intended that this is a variation in the objects of the two respective organizations and that it is not intended for a region to *encourage people to choose...* as this may be a power to be jealously guarded by the national sporting organisation (NSO). While we would hope not, we concede that is possible, and so therefore must request that all such variations are identified and either be confirmed and corrected as errata, or be confirmed as being an intentional reflection of differing powers.

3. Under the PRC a region is required to include within its objects (PRC 4.2.e) *support [for] the development and running of inter-zonal competitions in accordance with Swimming NZ's standards*. We note with concern that neither document (PRC or SNZC) defines *Competition Zone*,– the term used in SNZC 8.4.c even though an entire section is dedicated to the concept (SNZC 10) nor the term *inter-zonal competition* – the term used in PRC 4.2.e which is, one might assume, intended as the equivalent of SNZC 8.4.c.

Unfortunately, while it may be intended that this term is the equivalent of that used in the SNZC, we must point out that at no stage in Section 10 (SNZC) does the term *inter-zonal competition* appear or, it would seem, have been contemplated. What seems apparent is that the entirety of SNZC 10 is referring to what might more correctly be referred to as an *intra-zonal* competition structure – specifically, competition *within* a zone.

We wonder then at the apparent contradiction of content between the two documents on this subject (or possibly subjects!) and would highlight this as another example of inconsistencies between the two documents. In this case this appears to be more than a simple oversight of drafting. It would seem to us that the intent of the PRC is to require the support of a region for a completely different form of competition to that which the SNZC requires under its provisions. Further, there is a complete absence in the PRC of an

object equivalent to that required by the SNZC for a region to support in its objects the competition which is contemplated in the SNZC. This would lead us to a view that the author of the PRC was clearly contemplating a competition of different form to that being discussed in the SNZC.

Once again, the subjects we have highlighted above do not form a comprehensive list of every contradiction between the two documents, but we hope serve to highlight the reality of the conflicts and the need for considerably more work to ensure that such examples of conflict are completely eliminated.

As the SNZC has been adopted through SGM vote and would now require a similar level of authority to change (SNZC 20) we would anticipate it is going to be easier to make corrections to the PRC to eliminate conflicts than to return to a re-draft of the SNZC, although once again we would highlight that such a re-draft/work of the SNZC was committed at the 2012 SNZ SGM.

E. WHOLE OF SPORT

We identify the Whole of Sport (**WOS**) process as being a fundamental cornerstone in the foundation relationship between the NSO, regional sporting organisation (**RSO**) and clubs as the grass roots delivery agents.

We are concerned that some references to the WOS infer a unilateral aspect to the relationship, but equally welcome a tone of suggested collegiality where it exists.⁸

We are also concerned that there are future obligations which will arise from WOS which are not presently clearly understood, but would highlight for the benefit of our member clubs that the WOS process will fundamentally determine the future of how the sport is both funded and delivered.

F. MEMBERSHIP

We probably carry more concerns under the area of membership than any other portion of the PRC.

There are critical variations which exist here which, unless clearly resolved, will provide opportunity for endless future conflict, debate and dispute. We ask that effort is placed

⁸ PRC 5.2.g

into resolving and ensuring that the Membership area of the PRC is clarified in plainness and simplicity.

We would note for the benefit of SNZ, but most especially our member clubs, that the membership requirements will require fundamental changes to the governing documents of almost every member club. That does mean that in signing up to the PRC our member clubs are in effect also signing up to a requirement that they will change their own constitution to comply.

We would urge our member clubs to understand their obligations and powers under their own constitutions in this regard, as most constitutions can only be changed with and under the express instruction of a General Meeting called for that purpose (in the case of incorporated societies) or by some other method for those clubs which are special character clubs.

SECTION TWO - ANALYSIS

In this section we will make constant reference to both the PRC and the SNZC, and will refer to various clauses either in the body of text or as footers. For a more complete analysis, the reader should refer to these documents. For additional reference we have attached our marked up version of the PRC, and also the ASA's 2012 submission to the Draft SNZC.

Let us start from the beginning:

1. **Regional Membership** – It is clear that a region can only have members who are clubs, who in turn are members of SNZ, and who also have individual members.
 - 1.1. In order for a club to be a member of SNZ then it must meet certain criteria under Clause 9.1 of SNZC and also under Section 6 of PRC.
 - 1.2. Some of our current member clubs do not currently comply with those requirements. As all clubs (including, it would seem, existing clubs) need to apply to become members (PRC 6.6) this raises some issues after adoption of the PRC.
 - 1.3. If a club currently a member, does not comply at the time the PRC is adopted, do they then not qualify for continuing affiliation?
 - 1.3.1. For example, PRC Clause 6.6.b. requires a member club *to have objects which include attracting, developing and retaining [Competitive?] members in the sport.*
 - 1.3.2. We would have several of our member clubs who do not currently have those objects, and would thus on adoption of the PRC not then qualify for membership.
 - 1.3.3. Recognising this, we believe that there must be suitable transition regulations applied relating to existing affiliated clubs.
 - 1.4. Certain (verbal) assurances were given by the former Governance Administrator of SNZ that the conditions for membership (SNZC 8.1) would be applied to new member clubs rather than existing clubs.

- 1.5. Clearly that cannot be so as PRC 6.7 requires the region to annually determine continuing compliance in addition to the requirements of PRC 6.6 as noted above.
- 1.6. We would therefore like a clear understanding of what transitional regulations will apply as it relates to existing clubs being able to place themselves in a position of compliance in order to apply for and be granted membership.
- 1.7. We note that there are clubs of various types within our community, including some we would describe as being special character clubs. This includes RNZAF (currently affiliated), Devonport (not currently affiliated but operational) and possibly others in our community which because of their special nature will never be able to meet all matters of compliance as detailed.
 - 1.7.1. Those military clubs are established under the Defence Act and are subject to individual service orders. This means there will be areas contained in the requirements of the SNZC and the PRC which they simply will never be able to adhere to.
 - 1.7.2. With that in mind as these are valued members of our community we seek clarification as to what formal exceptions will be granted to allow their continued participation and as to whether those exceptions will be established through specific amendment of the PRC or by way of special irrevocable undertakings by SNZ.
- 1.8. **Approval of New Clubs** – We note that under the SNZC that this is a regional function. We welcome that position.
 - 1.8.1. We also note that there is ambiguity surrounding approval of a new club, a matter which we do not welcome.
 - 1.8.2. SNZC 9.1.b requires a new applicant club (indeed any club, but in this case, we will consider firstly a new applicant club) to have 50 members. We are not satisfied that this criteria is sufficiently free from ambiguity to meet tests of robustness.

1.8.3. We would note for your consideration that the Incorporated Societies Act (ICA) requires a minimum of 15 members to incorporate a society.

1.8.3.1. While not all member clubs are Incorporated Societies this would be a number (15) if selected as a minimum that would have some inherent logic and reasoned basis for adoption.

1.8.4. Given that a club must have objects consistent with the development of swimming as a competitive sport (PRC 6.6.b) it is not unreasonable to extend that at some stage an interpretation of this rule will be that 50 members, means 50 *competing*, or 50 *vote eligible members*.

1.8.4.1. We appreciate some view that the capability of adding *other interested members* as being sufficient to support a position where to have 50 members from any class meets this requirement. We note also that as presently constituted neither the SNZC nor the PRC contains a definition for *interested members*. We would argue that in the absence of a definition no such class of member can therefore be created or counted.

1.8.4.2. Equally we have had others who have argued the other way. What we seek is clarity.

1.8.5. We are concerned as it relates to new applicant clubs, that if the membership criteria is related to *competing* (or other vote eligible) members that it will in effect become impossible for a new entity to ever become a member club.

1.8.5.1. This is because one cannot become a member until one *competes* – one cannot *compete* until one is a part of a club. That ‘chicken & egg’ position is covered and anticipated for intending members of existing clubs under provision SNZC 6.3.b, but no such provision exists as it relates to a new member club.

1.8.6. We would therefore ask how a society who has no *competing* members could become a club with 50 members, if the eligibility is directed toward *vote eligible* members.

1.8.6.1. Once again, we seek clarity and do not believe such a fundamental issue should become the subject of varying interpretation.

1.8.7. The number of 50 members is a given, and indeed, formed a part of the Moller Report. We note that there are aspects of the Moller Report where SNZ has now considered events have overtaken. We wonder if this maybe a further aspect which is about to become another.

1.8.7.1. In that same spirit we would ask that further consideration be given to clarification surrounding the 50 member requirement. This has the potential to, in our opinion, create needless anxiety and future *system fiddling* to meet a standard without really making any real difference to delivery capability.

1.8.8. If the number 50 is intended to apply to competing members and support groups as indicated by voting representation (as we believe is a sound interpretation), then we would question the relevance of a threshold having been set at 50, and will detail by example subsequently.

1.8.8.1. If the intention is to allow 50 members comprised of any number or ratio of *interested members* (however that maybe defined) then we would quite simply question the relevance of the threshold at all.

1.8.9. Of our 16 currently affiliated and operating clubs, at least 7 would either currently, or may regularly, fall short of the numeric threshold if measured in competing number terms. Each of these clubs are extremely valued members of our community, but of course, if so required could meet a general number of 50 when considering *interested members*.

1.8.9.1. An example of the value that these clubs provide is Kowhai Swim Club, which is based remotely in Warkworth. We assume this example will be repeated many times over throughout the country. Kowhai currently has approximately 100 actively participating swimmers, only 7 of whom are *competing members*. The reasons why others do not compete are sound and reflect circumstances of distance, cost etc. To rigidly enforce a numeric compliance in this circumstance will not result in another 43 competing members, but in the loss of 7 who currently participate, and also the effective loss of another valuable aquatic facility to our sport.

1.8.10. We already have several 'clubs' (non-affiliated) in Auckland who have previous historical affiliation, but who now do not because it is easier for them to ignore a competing element. These non-aligned clubs control waterspace in Massey, Helensville, Devonport, Youth Town and Northcote, to name a few.

1.8.11. It is our opinion that our community will be better served as we seek to find ways to encourage rather than restricting alignment.

2. **Swimming XYZ Designates** - The standing of designates is contradictory as presented.

2.1. PRC 5.1.f clearly grants to the region the power to determine who it will accept as a Regional Designate and yet SNZC 6.3.b grants (seemingly) the power to a putative designate to align with a region without the region itself having any particular power of acceptance or veto.

2.1.1. Is it intended that there should be an application process to a region for a designate or is the region required to accept all who would wish to become designates?

2.2. Once a designate has aligned with a region we would ask as to who is responsible for managing the designates application for SNZ membership and ongoing membership details including database participation etc, as it would appear that the PRC intends that this function generally is managed by clubs?

2.3. If the region is required to deal with the membership administration of designates then we fail to understand why the region is unable to charge a fee of each member designate as required in PRC 6.5? This, when presently a fee is intended to cover the costs of 'membership style' activities and recording.

3. **Life Membership** – We endorse the principle of a region having powers to recognise service and especially long-standing service of an outstanding nature which might result in the award of a traditional *Life Membership* award.

3.1. However, we do not believe the method proposed in the PRC is satisfactory. Clearly the intent of the SNZC was to restrict regional membership to clubs alone. To propose the granting of an effective *non-member* life membership as proposed does not disguise the fact that such *life memberships* do not constitute *membership* at all.

3.2. We would propose that such achievements for service be re-designated as *Lifetime Achievement Awards*, or such other designation, but without the ambiguous reference of *membership* when no such attachment is intended.

3.3. If the ability to name an award of this nature *life membership* is amended then we could support other aspects of the proposed handling of these candidates under the regional designate classification.

4. **Club Membership** – This will be an area with profound impact for each of our member clubs.

4.1. Each of our member clubs currently have their own established rules associated with membership which will not comply directly with those required under SNZC 6 generally, nor PRC 6.

4.2. This will create the inevitable position where each club will need to amend their existing constitution to comply with these requirements.

4.3. We would note that for many of our clubs it may be considered that to adopt a new constitution amounts to a costly impost. We are therefore not recommending that a new constitution is the way to go for each club, but equally we must recognize the implications inherent in the adoption of this PRC.

- 4.4. In order to comply and be consistent with the SNZC and PRC that the adoption of new Club Constitution maybe the only practical option available.

5. Competitive Members

- 5.1. We would note the requirement for a member to have competed in a recognized event *prior* to becoming a member.

5.1.1. We would also note that the authors of SNZC have recognized the difficulty this provision provides for an applicant to become a member when they have not yet competed. They have provided for this in SNZC 6.3.b.

- 5.2. We would also note the requirement for a competitive member to apply to become a member of SNZ in addition to being a member of their club. The direct responsibility for managing this process is a club, rather than a regional process.¹⁰

5.2.1. We wonder how this reconciles with the provisions of PRC 4.2.f.iii requiring a region to seek to minimize the administrative complexity of the sport?

5.2.2. Clubs, with their volunteer workforce, are the least well equipped to deal with this additional workload, in many cases well beyond what they are already managing.

6. **Interested Members** – We note this rather amorphous *hold all* classification and would express our concern at the lack of definition of what constitutes an *interested member*.¹¹

- 6.1. We believe that an effort needs to be made to define the parameters of *interested member* and as previously noted, we wish to know whether it is intended that an *interested member* is capable of being counted for meeting club membership criteria.

¹⁰ PRC 6.8 and others

¹¹ SNZC 9.1.b

6.1.1. We believe there are compelling arguments to suggest that they may not be counted, and that as such, their inclusion in membership numbers should only be seen as a point of temporary compliance.

6.2. When we submitted on the Draft SNZC in 2012 we raised the question relating to the contracted right of a region to charge a membership or affiliation fee of a club member, when under the then proposed SNZC there is no actual membership position or standing of that member with the region.

6.2.1. Once again we ask what the envisaged status of a member is, in the event that the regional portion of their fee or indeed any other amounts owing to a region may not be paid to the region, as those individuals and the region clearly do not have any commonality in their standing.

6.3. We also seek clarification of the rights of a region when issues such as the member (not of a region) holding regional property (i.e. a trophy) come into play. As the athlete is not a member of the region, what power or right of redress does the region hold to make claim or to secure regional property/assets?

6.3.1. May we suggest that this will need to be covered under the membership agreements with both clubs and SNZ with a provision that a member (of those two organizations) agrees as a condition of membership to become subject to all rules and conditions of the region to which their club belongs.

6.3.2. Failure to do this surely will mean that there is no primary relationship of claim which exists between member and region.

7. **Technical Officials** – Once again we find ourselves addressing the issue of a national timekeeper's qualification.

7.1. There is currently no such qualification, as there was not when the SNZC was approved.

7.2. Unless there is an intention to reintroduce that qualification we would respectfully suggest that item of redundancy be removed from both documents (SNZC and PRC) with immediate effect as to include an obviously redundant aspect clearly makes no continuing sense.

8. **Database** – We noted in our submission in 2012 relating to the SNZC as follows:

8.1. On the subject of the database requirements in the SNZC:

(a) The Database We accept a need for a database but the current membership database simply cannot deal with the membership issues as defined both in the Proposed Draft Constitution and the Proposed Transitional arrangements. The Transitional regulations will require amending to compensate for the inability of the current system to deal with membership as defined. In the current form we could not accept this document as we simply cannot comply with the requirements for reasons beyond our control.

8.2. We further noted:

5.5 The requirement under Section 6.8 for members to furnish personal details for the national database is considered unlawful and to fall outside the laws pertaining to privacy in this country.

5.5.1 Based on advice which we have received and the expectation of our members, no member should be required to forfeit their legal right to the provisions of the Privacy Act as a condition of membership.

5.5.2 We would expect that in accordance with best-practice, members are granted an assumption of privacy upon membership, with the right to 'opt-in' as opposed to the right to 'opt-out' of having their personal details made available to third parties.

5.5.3 Under the Proposed Draft Constitution there is neither a right to opt-in or opt-out granted. That is unacceptable.

8.3. Our position on this subject has not changed in the interim.

8.3.1. We are concerned especially as it relates to our special character clubs (RNZAF and Devonport) that the statutes under which they are established together, with the specific security requirements of Defence Force personnel mean that these clubs will simply never be able to meet the requirements imposed by both the SNZC and the PRC on the subject of the database and data collection.

8.3.2. We would consider it a tragedy if we were to lose the engagement of these valued and respected members of our swimming community over matters of administrative inflexibility.

8.3.3. While we have two examples of clubs who will simply be unable to comply, we equally expect that there are others who are members of our community as individuals and who for reasons of preference or security simply cannot comply with the data collection requirements.

8.4. Once again we ask that our legitimate concerns which reflect concerns expressed by many of our members on this subject be heard, considered and that the simple and rather obvious remedies be adopted.

9. **Club Administrative Requirements** – We endorse the sentiments contained in PRC 4.2.f relating to administrative simplicity.

9.1. We have already established practices of reducing club compliance where there is no practical benefit.

9.2. One area where we have done this is in the provisioning of various reports.

9.2.1. PRC 7.4.a & b. require clubs to provide Annual Reports and Financial Statements to the region. We see this as being unnecessary. We would note that most clubs (not all we acknowledge) are Incorporated Societies. They are therefore required to lodge annual returns with the Registrar of Incorporated Societies. Why would we wish to add another layer of requirement for no apparent purpose or advantage? If the return is required for whatever reason by a region then they can obtain it as a matter of public record, this saving club volunteers yet another task of required compliance.

9.2.2. We have our special interest clubs who simply cannot provide a financial statement to us as their structure and accounting is covered under military orders and cannot, we understand, be made available to third parties.

9.2.3. Other clubs (i.e. we have one that is a subsidiary of a Charitable Trust) do not keep independent accounts for the club activities alone.

9.3. We simply do not see the need for this information to be provided to a region at all, other than perhaps for matters of reporting against KPIs.

9.4. We do note that clubs are required to be financially independent and would anticipate that an Annual Statement from the clubs committee to the effect that they meet that threshold would be adequate.

10. **Governance** – We consider the proposed appointment process, terms of office of regional board members etc, as being satisfactory to meet Auckland's conditions. We cannot answer for other regions. However, we express concerns in the following areas and request reconsideration:

10.1. PRC 8.1 Board membership restricted to 6 members.

10.1.1. This is limiting especially when considering the practical requirement for a regional board (even in Auckland where we run a full professional office) to be a working Board.

10.2. PRC 8.3 Provision that the six regional board members be elected

10.2.1. This is contradictory to the requirements of SNZC which insists¹⁴ that the regional board must have *at least two persons appointed by, and to its governing board/committee because of their governance capability.*

10.2.2. We appreciate that appointment by election may be construed as *appointment*, but would not be contextual with the balance of the SNZC.

10.2.3. We draw attention to our recommendation below 10.3 relating to board size and our issues (already raised) surrounding the definition of *previous governance experience*, and would again note the inconsistency between the requirement of SNZC and the PRC on this subject.

¹⁴ SNZC 8.3.d

- 10.2.4. We interpret, perhaps incorrectly, that the intention of the PRC is that all board members are appointed by election, but could not be sure that this is so.
- 10.2.5. We therefore seek greater clarity in the wording and definitions together with consistency between the SNZC and the PRC.
- 10.3. We would propose for your alternate consideration a model which allows the elected board to second two additional members for limited period terms to full membership of the Board.
- 10.3.1. With a full Board of 8 persons and a quorum of 4, we consider that to be workable and would likely reflect most regional capabilities.
- 10.4. PRC 8.2.b *A person who holds a governance role in ... a member club*
- 10.4.1. We do not see this as being either necessary or desirable.
- 10.4.2. We genuinely believe that to place this restriction at a regional level would severely curtail our capacity to fill our Board with capable people.
- 10.4.3. We would infer that if we face that challenge in Auckland that other smaller regions would see that challenge magnified.
- 10.4.4. It is not just a case of having enough people. We believe that our governance is better because we retain a connection to the delivery of the sport. This allows our regional governance to remain connected to the pulse of what is happening and the issues our clubs generally are facing.
- 10.4.4.1. It is true that on (a very few) occasions that conflicts arise but these can be dealt with by a robust register of interests and suitable operational protocols.
- 10.4.4.2. On our current Auckland Board we have 4 current members whose service on the Regional Board has either presently, or does now, coincide with service on a Club Board.

10.4.4.3. We would unquestionably be poorer, as would the clubs from whom those members came, for not having had access to that joint service capability.

10.5. PR 8.2.c ...any other key role in the sport

10.5.1. This provision concerns us. First, we anticipate that a phrase such as this should require definition.

10.5.2. Further, we are concerned at its implication.

10.5.3. Dependant on the definition engaged, every member of our ASA Board currently (and for several years past) would be construed to hold, or have held, key roles within the sport. Whether this restriction is either necessary or appropriate will come down to how it is defined.

10.5.4. We do however express our concerns about the application of corporate governance principles, which while having merit in another corporate environment, become excessively restrictive and counter-productive in an environment such as a region. This because we are so heavily reliant on a small pool of contributors, many of whom give as they do, and in such a way, that they almost of necessity hold key roles within the sport at some level or another.

10.5.5. Once again, if we in Auckland would be diminished through this and other similar restrictions we can only wonder at the impact which may occur in smaller regions.

10.6. PRC 8.2 Additional Areas of Ineligibility to Stand for Office

10.6.1. We would also note that PRC 8.2 should have a further eligibility requirement relating to individuals who have either in the past been found guilty of Child Protection violations or are presently the subject of investigation relating to Child Protection violations.

10.6.2. One might also wonder about the eligibility of someone who may be the subject of a criminal conviction who still has an

unserved/unsent portion of their sentence outstanding. We would suggest that this is sufficient cause to disqualify a candidate from eligibility to stand.

10.7. PRC 8.6.d *Notification of candidates details*

10.7.1. This provision conflicts with PRC 11.3.

10.7.2. We believe that PRC 11.6 is the correct approach as clubs/delegates will require sufficient notification of candidates and business on the AGM in order that they may establish their instructions to their delegates in a timely manner.

10.8. Requirement to vacate through violation or complaint under the Child Protection provisions

10.8.1. We believe that another exclusion¹⁵ should be added to include Child Protection.

10.8.2. We acknowledge the risk that this may be used for political purposes at some stage, but consider our obligations as it relates to Child Protection to be such that any person who is under a cloud of allegation or question relating to Child Protection should be ineligible until such time as all process' of enquiry/natural justice have been served.

10.9. Requirement to vacate through conviction of a serious criminal offense

10.9.1. Once again we would suggest that, as obvious as it might seem to most, that this should be spelt out as it may not always be obvious to a person so convicted, especially if their sentencing involves a non-custodial sentence.

10.10. PRC 8.10.e

10.10.1. We consider that the restriction on unsuccessful candidates being ineligible for appointment to fill casual vacancies as being unnecessary.

¹⁵ In PRC 8.9

10.10.2. Equally, if our recommendation to allow appointed directors to fill board positions is accepted¹⁶ then this restriction should not apply either.

10.10.3. We have current membership of our board which has arisen from candidates who were unsuccessful in a contested election who then have been appointed and subsequently elected.

10.10.3.1. We would consider the proposed restriction appropriate where (as is the case of the SNZC) an appointment panel puts forward a single candidate for an effective coronation.

10.10.3.2. In that respect a rejection of the candidate amounts to a rejection of the appointment panel and hence there being logic to the restriction.

10.11. PRC 8.9.e Vacation through Dying

10.11.1. May we note that the more correct terminology would be *vacated the Board upon death*.

10.12. PRC 9.2.h Performance Culture

10.12.1. This term requires definition as it is ambiguous.

10.12.1.1. Does it refer to a corporate *performance culture* (logical), and if so, what does that mean?

10.12.1.2. If it is referring to a sporting performance culture (which may also be contextually logical) then that may be contradictory to the broader aims of delivering the sport at all levels of competition.

10.12.2. Tighter unambiguous definition is therefore required.

10.13. PRC 9.2.j and other references – Audit

¹⁶ PRC 5.b.1

10.13.1. Audit has dual meanings. When used with a small 'a' case law clarifies that *audit* means a set of accounts completed by a certified or public accountant acting independently of the organization.

10.13.2. When used with a large 'A' then audit means a set of accounts which have been subject to full Audit by a correctly certified Auditor.

10.13.3. We feel the intention of this provision is likely to be the latter, and if so, then we would request that it be amended.

10.13.4. The increased levels of professional liability associated with Audits is such that the cost imposition on relatively small NFP's such as a regional association are significant. Issues of probity and accuracy can be established without a full audit. Our experience is that a full audit now carries so many caveats to protect the professional that very little added protection is provided to the society.

10.13.5. We would recommend that a single level of accounting by way of a set of accounts prepared by a member of a professional accounting body would be suitable.

10.13.6. For the avoidance of doubt we would suggest removal of the term *audit*, leaving the choice to the current prevailing practice for organisations of a similar size and nature.

10.14. PRC 9.5 Member Protection Policy

10.14.1. The terminology here needs to be consistent with that used elsewhere (notably PRC 5.2.m).

10.15. PRC 10.2.c AGMs

10.15.1. See note above relating to Audit.¹⁷

10.16. PRC 10.2.d

¹⁷ PRC 5.b.xi

10.16.1. Surely this should read *election* (and maybe announcement) of *any new Board members*.

10.16.2. The PRC does contemplate *election* as opposed to *appointment*.¹⁸

10.17. PRC 10.2.f

10.17.1. See note above relating to Audit

10.17.2. If adopted, should therefore be *accountants* rather than *Auditors*.

10.18. PRC 10.3

10.18.1. We would consider that this should read as an either/or – being 1/3rd of voting capacity *or* 1/3rd of the number of clubs.

10.18.2. We would not consider it desirable to excessively limit the ability of member clubs to bring general items of business to an AGM.

10.18.3. As long as they are items requiring a normal majority for voting then the threshold should not be high as it relates to an AGM.

10.19. PRC 10.4.b SGMs

10.19.1. We believe that unlike an AGM there must be evidence when an SGM is called by the membership that there has been collaboration between member clubs.

10.19.2. We therefore believe that a collaboration between at least 1/3rd of member clubs is a more reasonable threshold than 1/3rd of voting capacity, which could quite conceivably be achieved in some cases without inter-club collaboration.

10.19.3. We link this thinking to PRC 10.4.e where all business of an SGM must be passed by special resolution.

10.20. PRC 10.5 Meeting Quorum

¹⁸ PRC 8.7

10.20.1. We note that an application of this provision may then bring the meeting into conflict with the requirement in PRC 10.2 for a meeting to be held within 4 months of the end of the financial year.

10.20.2. The requirement to repost the meeting with at least 30 days delay may well (most likely) then mean that rescheduled meeting does not meet the requirements of PRC 10.2.

10.20.3. This provision for delay must either stipulate an exception to PRC 10.2 or provide for a delayed meeting to be opened without a quorum and adjourned for 30 days.

10.20.4. We believe this is what is contemplated but believe that the matter should be clarified for the avoidance of doubt.

10.20.5. We have faced such a circumstance in the recent past and greater clarity on the subject could and should have avoided the need for legal advice to be sought.

10.21. PRC 11.3 Notice of Meeting

10.21.1. See reference above to PRC 5.b.vi – the two provisions PRC 11.3 and PRC 8.6.d require synchronisation.

10.22. PRC 12.1.a Elections and Voting

10.22.1. We can envisage issues arising surrounding this provision.

10.22.2. There are issues surrounding responsibility for payments, collection of payments etc which are not immediately clear within this PRC.

10.22.3. What is clear is that there is not presently a database system which allows for payment detail to be integrated with membership numbers. Current practice requires membership and payment detail to be routed through the region. It is not clear that this process is intended to continue under this PRC.

10.22.4. If payment is to be routed directly to SNZ via the clubs then there are definite issues where it would be difficult for a region to reconcile that all payments from members (who are not members of the region!) have actually been made in due time.

10.23. PRC 12.1

10.23.1. These are very wide powers indeed to be vested in a Board and are certainly wider than any board with which we have been associated has been granted.

10.23.2. We can envisage that the exercise of these powers in certain circumstances could occur for political purposes only and would therefore express strong caution in having such powers granted.

10.23.3. While we understand the sentiment we would be concerned that an elected Board has the power to prevent or stifle democratic participation for political purposes.

10.23.4. The powers granted should be limited to objective measures only.

10.24. PRC 12.2.c

10.24.1. With a single vote per delegate reflecting differing (and possibly very widely differing) vote capacities, how can a vote by voice correctly reflect the electoral college?

10.24.2. With widely differing vote capacities for each member club we would anticipate that, at a minimum, a show of hands is required.

10.24.3. We still hold to a view that where matters of personal election are involved that a secret ballot is appropriate.

11. **Finance - PRC 13.1**

11.1. We fail to understand the merits of a synchronized balance date between regions and NSO.

11.1.1. We would also note that to change a balance date will involve each region incurring added costs of compliance (as one off points of expenditure). As this requirement would be externally imposed we would ask if SNZ is proposing to meet the budgeted costs of the change of balance date for each region?

11.1.2. Indeed, in the context of various requirements to account for memberships we can see significant merits in the current process of staggered balance dates.

11.2. We believe that further discussion needs to ensue to ensure that this proposal does not create additional pressure point workloads for both volunteers and regional administrators who are always going to be working with limited resource.

11.3. Audit - PRC 13.2. & 13.4 - See previous notes on this subject.

12. **Alteration of Rules** - PRC 15.1 – we note that this provision needs to be read in conjunction with Rule PRC 5.1.h and also SNZC 8.3.b.

12.1. Ultimately when read in conjunction there is no effective power to make changes to a Regional Constitution unless these are agreed, or effectively imposed by SNZ.¹⁹

12.2. We anticipate that there should be greater clarity of purpose surrounding these three provisions to avoid wasted time and effort.

12.3. It is clear when read together that a region must adopt a Constitution provided for it by SNZ. To allow changes at a regional level not in accordance with SNZ's agreement will lead to each region having variations to their document which does not seem consistent with intent.

12.4. In our opinion therefore it would be better in all three clauses to be clear and consistent that no changes can be made to the constitution without the prior consent of SNZ.

13. **Disputes/Appeals** - In our opinion there is room for greater clarity on this subject.

¹⁹ SNZC 8.3.b

13.1. In normal conditions a club should be the primary point for any member dispute/disciplinary/appeal matters to be held.

13.1.1. We would see the region as being the primary point of appeal by a member to decisions made by a club, and then principally on issues of process rather than content.

13.1.2. We would anticipate in most circumstances matters dealt with this way can avoid being escalated to the national body or the sports tribunal who should be seen as points or *courts* of last resort.

13.1.3. We believe there would be merit in having greater clarity on this subject/process.

13.2. We note the provision for the engagement of the President on matters of dispute, and that this PRC does not contemplate a regional President.

13.2.1. The president to whom this refers is the national President. We have no value judgment as to the merit of this approach but it is a matter of some change which our clubs need to be aware of.

14. **Liability**

14.1. We believe that PRC 19.1 line 3 is not correct in referring to an AP.

14.2. This is a likely errata which simply requires correction.

SECTION THREE - CONCLUSION

While this submission is large it is not intended in any sense other than to ensure that a more workable set of solutions are obtained.

The nature of a region, its work and its relationship with its members and participants in the sport, have already been effectively changed through the adoption of the SNZC in 2012. It is our belief that those changes could have been more effective through a greater effort to ensure that the governing constitution was better refined.

We considered at the time, and still maintain, that to have adopted a governing document such as the SNZC without any effective review, and containing obvious errata, was unwise. We simply seek to avoid that same situation with regard to this document.

Equally, and as noted in the introduction to this document and based on the sound advice which we received at the time, the effective unilateral replacement of our own Constitution at the SNZ SGM with one which had not even been presented to our membership as required by our own rules and the Incorporated Societies Act was, and remains so now, ultra-vires.

We are further concerned that the same motion which effectively imposed a change of our own regional constitution on this unlawful basis has now also, in effect, been laid aside with one of the recommendations that the SGM bound SNZ to accept and adopt having now been publicly over-ruled. Regardless of the practical reasoning which may have existed behind this decision of the SNZ Board it leads us to question the regard which is paid to the due process', including any submission process, which are established.

We wish to emphasize once again that the decision relating to the replacement of our existing Constitution with one proposed by SNZ is one for our member clubs alone to make. As an association we have therefore sought in this process to emphasise areas of difficulty. We should anticipate these will be addressed in order for a final form document which is acceptable to our membership is created.

While we have sought to outline areas of concern we have not endeavoured to redraft the document. We would however reiterate that in our opinion the document is far too legalistic and should be simplified through the use of common language which will make it a considerably more effective document for use by those who are charged with running the sport in each region.

It is obvious to us that this document will carry a flow on impact requiring each club to make amendments to their own constitutions, and therefore we believe the sport will be better served through seeking to establish a pattern which is adapted to the capacity of the lay people who run the sport.

We do not believe that our community is well served, if in order to clarify matters, frequent reference needs to be made for interpretation to lawyers, or for us to be functioning in the *grey zone* of differing interpretations. Our sport can better spend its resource in other places the time of our volunteers being better spent in more productive activities.

We trust therefore that our submission will be received with the same good faith with which it has been offered.



CONSTITUTION OF SWIMMING
[XYZ]
INCORPORATED

May 2013

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CONSTITUTION OF SWIMMING [XYZ] NCORPORATED

Section One: Core Provisions

1. Name

- 1.1 The name of the organisation is Swimming [XYZ] Incorporated (Swimming XYZ).

2. Definitions and Interpretation – Please note – there are several definitions which are required. These are noted below.

- 2.1 In this constitution:

AGM means annual general meeting;

Amount means any fee, subscription, levy, fine or similar monetary imposition;

Board means the board of Swimming XYZ;

Chair means chairperson of the Board;

Competition Zone means a competition zone created by Swimming NZ; concern as should be developed in conjunction with the Regions

Competitive Swimmer – definition required.

Database means Swimming NZ's database of Members;

Elite HP Swimmer means a swimmer participating in an elite HP training programme run by

Swimming NZ; While this definition is consistent with the SNZ Constitution it does not accord with recent HP – draft strategy which allows for swimmers to train in non-SNZ training programmes.

Need to define HP training programme run by SNZ. It has always been considered by the ASA to be desirable for 'HP Swimmers to have a choice of training environment. The restrictive view that only a SNZ based HP swimmer maybe known as an Elite HP Swimmer stands in the face of both reality and desirability.

FINA means the Federation Internationale de Natation, the world governing body of swimming;

Financial Year means the financial year of Swimming XYZ; the Regional and Club financial year need not be the same as SNZ financial year. There is a good argument to have a staggered financial year for Clubs (eg 31 March) and Regions (eg 30 April).

GM means a general meeting;

HP means high performance; We are struggling to ascertain under this definition exactly what is meant by 'High Performance'

KPIs means key performance indicators;

Swimming NZ Life Member means a person awarded life membership of Swimming NZ;

Member Club is a swimming club which is a member of Swimming XYZ **and** Swimming NZ; This definition is not consistent with the definition offered in the SNZ Constitution. We would consider it to be desirable for the two definitions to be the same.

Member Club Voting Representative means the individual notified to Swimming XYZ in writing by a Member Club as the person authorised to exercise the votes of that Member Club at a Swimming XYZ GM;

Objects means the objects of Swimming XYZ;

Ordinary Resolution means a resolution requiring a majority of the votes cast;

President means the president of Swimming NZ;

Region means a geographic area within New Zealand determined to be a Swimming NZ region by

Regional Associations; this needs clarification as it needs a starting point. SNZ regions often not Territorial boundaries as defined in the SNZ constitution (Section 8.2) – therefore we do not see this definition as being a workable definition.

Regional Association is a regional swimming association which is a member of Swimming NZ; See note above with regard to region. There needs to be a starting point and to be consistent with SNZ 8.2 this needs to be defined by a 'Territorial Boundary' – unfortunately in the case of Auckland and Counties Manukau at least, while those two regions exist it is not possible to define either in the terms required. We expect that the same will also apply to other regions.

Regional Designate – requires definition – it maybe that it is intended to be covered under the definition of Swimming XYZ Designate, yet the term Regional Designate is also used. See Reference.

SGM means a special general meeting;

Swimming NZ means Swimming New Zealand Incorporated (215320);

Swimming New Zealands Standards – see 4.2(d)

Special Resolution means a resolution requiring a two thirds majority of the votes cast;

Sport means the sport of competitive swimming;

Sports Tribunal means the Sports Tribunal of New Zealand;

Whole of Sport Plan means Swimming NZ's whole of Sport strategic plan for competitive swimming; We question how, as no Whole of Sport Plan presently exists this can currently be included as a definition in this form.

Swimming XYZ Designate is defined in rule 6.3; and See note above relating to Regional Designate. Also, we do not understand the importance of "...; and" – is the intention to link this definition to the definition below, or is it simply to suggest that this is the penultimate definition in a list. If the alter, then a list of definitions would not require the 'and' together with the possibility for future mis-interpretation.

Swimming XYZ Life Member means a person awarded life membership of Swimming XYZ. This just simply cannot be. How can a life member not be a member? A new term other than 'life member' will need to be found, because one cannot call a life member a member, when they quite explicitly under the SNZ Constitution Clause 6, specifically 6.1 cannot become a member.

Swimmer Capacity – as found in 4.2(f)(iv)

2.2 In this constitution:

- a. the singular includes the plural and vice versa;
- b. any reference to any Act, regulation, by-law, policy, deed, charter, procedure or document includes any amendment to it and any replacement passed in substitution for it;
- c. references to a person includes incorporated bodies and unincorporated groups;
- d. headings are for reference only and do not assist interpretation;
- e. derivatives of any term defined in this constitution have a corresponding meaning; and
- f. any approval, decision, requirement or action by Swimming XYZ or the Board may be undertaken by the Board or by such person to whom the Board has given authority.

3. Status

This is quite simply not possible. There must be foundation definition of the original geographic boundary at some point as the region is defined geographically.

3.1 Swimming XYZ is:

- a. an incorporated society established under the Incorporated Societies Act 1908;
- b. the Regional Association for competitive swimming and swimming related activities in its Region;
- c. bound by, and must observe the rules and decisions of FINA; and
- d. bound by, and must observe the rules and decisions of Swimming NZ.

4. Objects

4.1 The primary Object of Swimming XYZ is to support the growth and performance of the sport of competitive swimming in its Region, from entry level club competitive swimmers **The term 'Competitive Swimmer' requires a formal definition** to Elite HP swimmers.

4.2 To support its primary Object, Swimming XYZ has the further Objects to work with Swimming NZ, other Regional Associations, Member Clubs and others to:

- a. be a member of Swimming NZ;
- b. assist and support the development and operation of Member Clubs in its Region;
- c. assist and support the operation of Swimming NZ in its Region; - **we would like to know what this means – does it imply that SNZ will function within the regional area providing similar services to those provided by the regional association? If that is the case, then why is there a need for a regional association?**

We believe this is likely to add additional layers of administrative complexity which in turn is contrary to the f(iii)

- d. coordinate and run Regional competitive swimming in accordance with 'Swimming NZ's standards' – we do not believe it is obvious what SNZ Standards are, and consider that they will require a definition.

Include 8.4e from SNZ constitution "support the development of Member Clubs... ' Should align with SNZ 8.4 constitution. The fact that there is not alignment with the SNZ section 8.4 is either a. an oversight of drafting or an intended position of the objects of the region and SNZ being different. By way of example, SNZ 4.2 (a) contains an object to 'encourage people to choose to participate in the sport of competitive swimming." The fact that this is not included in the objects of the region is either an oversight or carries an explicit requirement that the region is not to so encourage participation, as it is the object of the NSO, but not the RSO. For ease of presentation and understanding the numbering of both the SNZ and XYZ bullet points should be compatible, unless as noted the intention is for the objects to be different.

- e. support the development and running of inter-Zonal swimming competitions in accordance with Swimming NZ's standards;

- f. work with Swimming NZ to support and deliver the Whole of Sport Plan in its Region including:

- i. working with Member Clubs to develop and implement Swimming NZ's facilities plan; Council input? Relationship with the Councils is with the Region. Very clumsy wording, double wording
- ii. facilitating the delivery of programmes to support Member Clubs to attract members and deliver competitive swimming;
- iii. minimising as much as practical the administrative complexity of competitive swimming; ASA does try and minimise admin, one of the key complexities is the parallel database. There are further requirements of this proposed Regional Constitution which succeed in creating greater levels of complexity than is presently the case.
- iv. enabling the Sport to build 'swimmer capacity'; this term requires definition as 'swimmer capacity' could mean several different things.
- v. complying with the policies and standards set by Swimming NZ; and
- vi. striving to achieve the KPIs for its Region set by Swimming NZ

Should be 'striving to achieve the mutually agreed Whole of Sport KPIs for

its region developed in conjunction with SNZ' – needs to align with 5.2 (g)

which says 'work with SNZ as it sets the regions KPI's -

- g. to raise awareness of and interest in competitive swimming within the wider community;
- h. have sound governance structures, processes and policies;
- i. adopt prudent risk and asset management policies;
- j. be financially viable and financially independent of Swimming NZ; and how can a Region be financially independent if SNZ can charge fees as they wish. What does 'financially independent' mean?
- k. fulfill its obligations to Drug Free Sport New Zealand in relation to doping controls and banned substances. What are these obligations and where do they arise from. As far as we know an NSO has direct obligations to Drug Free Sport, are there specific obligations from DFSNZ that directly apply to an RSO or are these delegated obligations from SNZ?,

5. Powers and Obligations

5.1 Swimming XYZ has full powers, jurisdiction and authority and (except as restricted by this constitution), may do all and any things to carry out its Objects, including:

- a. acquire or receive the benefit of any property and deal with property in any way (including borrow, invest, lend and give or obtain security);
- b. determine, raise, levy and receive money by any method and from any source;
- c. establish, acquire or have interests in incorporated entities, trusts or other entities and utilise the assets of Swimming XYZ in, through or with them;

Query the ability of a Inc Society to complete b. and c. Perhaps add the term "...consistent with its NFP and Sport status'

- d. produce, create, licence, use and protect intellectual property;
- e. determine who are its Member Clubs and Swimming XYZ **Designates** and their entitlements, and withdraw, suspend, terminate or restrict membership and other benefits; I am not sure this is possible as it relates to Swimming XYZ Designates as it appears the power to become a designate rests with the person seeking to become a designate, not with Swimming XYZ Therefore the only power to determine, is to try and find out who has designated the region. There should be a power of approval in order to ensure that a simple administrative paper trail is established.
- f. designate a Member Club Voting Representative to represent it at a Swimming NZ GM and to exercise Swimming XYZ's voting rights as provided in the Swimming NZ constitution;
- g. elect Swimming XYZ Life Members and award Regional service and honours awards As noted , this is not possible. Unless the definition of member is changed in the the SNZ Constituion a name other than life member will need to be established. You cannot have a member, who is not a member.
- h. make, alter, rescind and enforce rules, policies, plans, charters and procedures to effect the Objects, or for the governance and operation of Swimming XYZ;

What does this mean. If read in conjunction with 15.1 the only power to amend the constitution coems with the express approval of SNZ. Therefore Swimming XYZ does not have this power. If this power is granted and not read in accordance with 15.1, then it is only a matter of time before there are 16 (or some other number) different and unique Regional Constitutions. Rules etc, yes, but Objects – that must come originate from SNZ – SNZ 8.23(b)

- i. determine, implement and enforce disciplinary, disputes and appeal procedures including making decisions, conducting hearings and imposing sanctions and penalties; **There needs to be a clear protocol established for this. Should possibly read, "...in accordance with the protocol established by SNZ from time to time."**
 - j. engage and dismiss employees and contractors; **Check the ability to do so – this (dismiss) is a high risk for lay member boards. Should note, in accordance with current employment law obligations.**
 - k. delegate powers of Swimming XYZ to any person, committee or sub-committees (the composition of which is not limited to members of Member Clubs) and for that purpose to establish, fund and set the terms of reference and structure;
 - l. contract, engage or make any arrangements with any person to fulfil the Objects;
 - m. be a member of or affiliate to and/or be associated in any way with any person which has objects which are similar in whole or in part to the Objects in New Zealand and/or internationally; **what is the purpose of this? We believe that this may also conflict with FINA rules.**
 - n. produce, publish and distribute any communications, newsletters or publications;
 - o. work within its Region unless Swimming NZ approves otherwise; **suggest 'work only within its Region unless SNZ approves otherwise'**
 - p. do any other acts or things which it determines are incidental to or conducive to the attainment of the Objects; and
 - q. merge with, consolidate and/or transfer assets and liabilities to another Regional Association **in accordance with the Incorporated Societies Act.**
- 5.2 Swimming XYZ shall: **should align with SNZ 8.5**
- a. support and work with the Board and executive of Swimming NZ to build a culture of trust, collaboration and discipline for the Sport;
 - b. act consistently with the Whole of Sport Plan, policies, standards and KPIs set by Swimming NZ; **see 4.2f iv**
 - c. have, and provide to Swimming NZ, a strategic plan identifying its role in growing **what does this term mean?** the Sport and supporting the Whole of Sport Plan;
 - d. work with Swimming NZ and other Regional Associations for the benefit of the Sport;
 - e. work with other Regional Associations to set the geographic boundaries of the Regions; **Local Territorial boundaries? There must be a starting point. There is no base foundation to define a region's boundaries. As noted previously, Auckland and Counties at very least cannot comply with the definition for a foundation region as required by the SNZ Constitution 8.2(b) – that position is likely to apply to other regions in addition.**
 - f. play an active part in securing funding for the Sport and comply with the Sport funding strategy;
 - g. work with Swimming NZ as it **develops** the Region's KPIs by actively participating in consultation about them; **Reference back to 4.2 (vi)**
 - h. provide reports as required by Swimming NZ regarding the achievement of KPIs; **see 4.2f iv, These requirements raise, not reduce administrative complexity.**
 - i. organise and run competitive swimming in and for its Region, including Regional championships and maintaining a register of Regional records;

- j. cooperate with Swimming NZ and the other Regional Associations in respect of inter-Zonal competitions and the development of competition pathways to inter-Zonal competitions;
- k. work collectively with other Regional Associations in its Competition Zone, to support the development and running of inter-Zonal competitions; **Is this intended to be 'inter' or 'intra' zonal competitions. This entire area is not clear – are we working to support competitions between zones (inter-zonal) or within zones (intra-zonal)?**
- l. pay any Amount owed by it to Swimming NZ;
- m. abide by all rules, lawful requests or directions made by Swimming NZ including any Swimming NZ **Member child** protection policy or code of conduct;

General Note : There needs to be alignment between SZN 8.5 and PRC 4.2 as it relates to KPI's

- n. provide accurate data on a timely basis for it, its Member Clubs and its Swimming XYZ Designates as required by Swimming NZ for the Database or otherwise; **How is this possible for a region to do when it is the club who is responsible for the provisioning of the database? Under 6.8 it is the obligation of the region to provide club and designate details, not individual member details. It needs to be clear – who is responsible for provisioning the SNZ database of member details? It may also not be legally possible for the region to provision the SNZ database with member details as those 'members' are not members of the region and as such may not have approved the region supplying their data to a third party (ie SNZ)**
- o. have the same financial year as Swimming NZ. **The Regional and Club financial year need not be the same as SNZ financial year. There is a good argument to have a staggered financial year for Clubs (eg 31 March) and Regions (eg 30 April). This enables time for the clubs to prepare for the Regional AGM and the Region to prepare for the SNZ AGM. There are also cost implications associated with a change of financial year for each region. If this is to continue, then the constitution must (to begin with) define what the financial year should be. See note on 13.1**

Section Two: Member Clubs, Swimming XYZ Designates and Database

6. Member Clubs, Swimming XYZ Designates and Database

General Notes – need to reference back to the SNZ Constitution – section 9. What if a club operates across two regions? Indeed, what does 'operate' actually mean? 9.1 states a club 'operates within a region', what does 'Operating within' mean? Must be defined. Also, please note 9.1 (a), what does "...swimming by growing and helping its members ..." growing is an adverb, not a verb and in this context it is not possible to comprehend what is actually meant.

6.1 A Member Club is a swimming club in the Region for Swimming XYZ, which:

- a. is a member of Swimming NZ **in accordance with clause 9.1 of the SNZ Constitution. ; What does a club need to do to become a member of SNZ? Does it need to apply to become a member of SNZ? Or is it a simple act of it being approved as such by XYZ in accordance with SNZ 9.1?**
- b. is approved by Swimming XYZ as a member of Swimming XYZ;
- c. has club members who are:
 - i. swimmers who compete in a Swimming NZ Member Club or Region (or higher) event sanctioned by Swimming NZ or a Regional Association and which is on the annual national, inter-Zonal or Regional competitive calendar (this category includes Elite HP Swimmers and excludes "Learn to Swim" swimmers); and/or **How do you become a member of a Club in this category if you can't become a member until you have competed? Include the words 'and who are members of a Member Club' to align with the SNZ Constitution**

Definitions need to be the same

- ii. coaches of Member Clubs or coaches of Elite HP Swimmers; and/or include 'and who are members of a Member Club' as per the SNZ constitution
 - iii. Regionally or higher qualified inspectors of turns officials and nationally or higher qualified time keepers; and/or there is no national qualification for timekeepers.
 - iv. Swimming NZ Life Members; and/or
 - v. Swimming XYZ Life Members; and/or it has been stipulated that Regions cannot have individual Members therefore the Region cannot have a Life Member, may need a different term
 - vi. interested members being persons who do not come within any of rules 6.1c i, ii or iii. 'Interested members should be defined in the definitions'. Does this include parents who are standing in as proxy for their minor children?
- 6.2 Member Clubs must pay all Amounts due to Swimming XYZ and Swimming NZ before swimmers from that Member Club can participate in the events described in rule 6.1c.i. This is not practical, parents may have paid their \$\$ but clubs or regions may not pay in time, need a grace period.
- 6.3 Swimming XYZ Designates are any person described in rule 6.1c.ii, iii, iv or v or any Elite HP Swimmer who:
- a. is not a member of a Member Club; and
 - b. has designated Swimming XYZ as the Regional Association to which they are aligned;
 - and c. is a member of Swimming NZ.
- 6.4 If a Swimming XYZ Designate becomes a member of a Member Club or of a swimming club which is a member of a Regional Association other than Swimming XYZ, they are no longer a Swimming XYZ Designate.
- 6.5 Swimming XYZ Designates must pay Amounts levied by Swimming NZ but are exempt from paying any Amount levied by Swimming XYZ.
- 6.6 A swimming club seeking membership of Swimming XYZ must:
- a. complete and submit an application as required by Swimming XYZ;
 - b. have objects which include attracting, developing and retaining members in the Sport;
 - c. satisfy all criteria in the Swimming NZ constitution and in these rules to be a Member Club; and
 - d. will be subject to approval as a member by Swimming XYZ.
- 6.7 Swimming XYZ must determine actual membership at least annually including whether a swimming club or Swimming XYZ Designate continues to satisfy the requirements to be a Member Club or a Swimming XYZ Designate.
- 6.8 Swimming XYZ must collect and provide to Swimming NZ up to date details of its Member Clubs and Swimming XYZ Designates as required by the Swimming NZ constitution for the Database.
See back to 5.2(n)

7. Rights and Obligations of Member Clubs

- 7.1 A Member Club is bound by this constitution and:

- a. by all rules, policies, charters, procedures and decisions of Swimming XYZ and where applicable those of Swimming NZ and FINA;
 - b. must pay all Amounts imposed on it by Swimming XYZ and Swimming NZ;
 - c. must collect up to date details of its members for its own records, and provide them to Swimming XYZ and Swimming NZ as required for the Database.
- 7.2 A Member Club ceases to be a Member Club:
- a. by written agreement with, or written resignation delivered to, Swimming XYZ;
 - b. by liquidation or dissolution;
 - c. upon expulsion from membership;
 - d. if no longer eligible to be a Member Club under rule 6.
- 7.3 A Member Club disobeying any rule or failing to give effect to any decision of Swimming XYZ, Swimming NZ, FINA, or the Sports Tribunal, or having done anything else (for example, being convicted of a criminal offence which the Board considers is relevant to Swimming XYZ) which the Board considers brings or may bring the Sport or Swimming XYZ into disrepute and/or creates exposure to risk for Swimming XYZ or if a Member Club fails to enforce any sanction or give effect to any decision imposed by Swimming NZ or Swimming XYZ, is liable to:
- a. suspension for a period; and/or
 - b. expulsion;
- or such other sanction as the Board in its sole discretion imposes.
- 7.4 A Member Club must provide to Swimming XYZ at least two weeks prior to the AGM:
- a. a copy of its annual report; **ASA does not require this, and argue against its inclusion in the Constitution. It is already required under their own constitution. This would increase admin.**
 - b. a copy of its financial statements as approved by its members at a GM of that Member Club; **ASA does not require this, and argue against its inclusion in the Constitution. It is already required under their own constitution. This would increase admin.**
 - c. the names and addresses of its Member Club Voting Representative and its board members (if any);
 - d. the names and addresses of its officers.
- 7.5 A Member Club may only be a member of one Regional Association at a time.
- 7.6 Any transfer of membership of a Member Club between Regional Associations shall be effective once approved in writing by the two Regional Associations involved.
- 7.7 Any Member Club under suspension, or awaiting a hearing for an offence capable of having a period of suspension imposed, is ineligible for transfer.
- No requirement for Clubs to have the same financial year, but if it were so then would put huge pressure on Member Clubs.**

Section Three: Governance

8. Board Composition

- 8.1 The Board comprises **(a minimum of) six and a maximum of xx** persons (who are not required to be

members of a Member Club) at least two of whom should have previous governance experience.

A board of six with a quorum of four may be difficult to

Should have same terminology as the SNZ 8.3 d.

8.2 The following persons are not eligible to be a Board member:

- a. an employee of Swimming XYZ or Swimming NZ;
- b. a person who has any role in the governance of Swimming NZ or a Member Club; This would be an issue for some regions. Not desirable, need link with the decision making in clubs.
- c. a person who holds any other key role in the Sport. What does this mean??? Define

8.3 Board members are elected at the AGM. Is this all Board Members elected? Where is the ability to appoint Board Members?

8.4 Notwithstanding anything else in this constitution, each Member Club is entitled to only one vote of equal strength for the purposes of rule 8.3.

8.5 At least 21 days prior to the AGM, the Board shall give written notice to Member Clubs calling for nominations from Member Clubs for Board members.

8.6 Each Member Club:

- a. may nominate one person in writing to the Board as a candidate for election to the Board; and
- b. must provide to the Board its candidate's written consent to their nomination; and
- c. may provide to the Board such further information as it thinks fit in support of its candidate; and
- d. if choosing to nominate a candidate for election to the Board must comply with requirements 8.6? a-c above at least seven days prior to the AGM.

8.7 In relation to the term of office of a Board member:

- a. A term of office is for a maximum of three years;
- b. a Board member may not serve more than three consecutive terms of office on the Board;
- c. all terms of office served prior to the 2013 AGM count as one term of office;
- d. the two Board members with the longest service since they were last elected must retire at the end of each AGM. If there are two or more Board members with equal long service since last elected the two to retire may be decided by agreement among the Board members with equal long service since last elected, and, failing agreement, will be determined by lot among such members.
- e. a Board member may stand again for the Board but is subject to this rule 8.7;
- f. except where a term of office otherwise ends it expires at the conclusion of the next AGM.

8.8 At the first Board meeting after the AGM, the Board shall appoint a Chair and a deputy Chair of the Board. The Chair shall chair all Board meetings at which he or she is present and in the Chair's absence the deputy Chair shall take that role.

8.9 A Board member is deemed to have vacated the Board upon:

- a. being adjudicated bankrupt; check this requirement under Inc Society
- b. being declared of unsound mind or being the subject of a property order under the Protection of Personal and Property Rights Act 1988;

- c. resigning or retiring or their term of appointment expiring;
- d. being convicted of a criminal offence or being sentenced to imprisonment;
possibility of including a clause 'being found to have breached CPP' needs wording
- e. dying.

8.10 Casual vacancies are dealt with as follows:

- a. the Board may fill casual vacancies on the Board;
- b. the term of any appointments due to casual vacancies is until the conclusion of the next AGM;
- c. appointments due to casual vacancies will not count as a term served as a Board member for the purpose of 8.7 b;
- d. any person appointed to fill a casual vacancy may later stand for election to the Board;
- e. a person who unsuccessfully contested the most recent election to the Board cannot fill a casual vacancy. **Not desirable for Regions operating without the Appointment Panel process.**

9. Board Procedure

- 9.1 The governance of Swimming XYZ and the exercise of all powers of Swimming XYZ (except where restricted by this constitution) are delegated without further restriction, to be undertaken by the Board. Such powers may also be delegated by the Board to persons as it determines.
- 9.2 The role and responsibility of the Board is to act in the best interests of Swimming XYZ and to provide good governance to Swimming XYZ including through the following:
 - a. procuring the implementation of the Whole of Sport Plan in the Swimming XYZ Region.
 - b. monitoring and reviewing performance against the Whole of Sport Plan;
 - c. monitoring and reviewing performance against the annual business plan and budget;
 - d. addressing the ongoing viability and sustainability of Swimming XYZ;
 - e. monitoring regulatory compliance for Swimming XYZ;
 - f. establishing, reviewing, and monitoring policies to guide and govern Swimming XYZ;
 - g. fostering interaction and communication across and within Swimming XYZ, Regional Associations and Member Clubs and with Swimming XYZ Designates;
 - h. adopting and communicating a continual best practice performance culture;
 - i. receiving annual KPIs and being accountable to Swimming NZ for achievement of them;
and
see 4.2 f iv

- j. preparing an annual report and procuring an annual audited statement of accounts. **Query the need for fully audited accounts**
- 9.3 The quorum for a Board meeting is four Board members.
- 9.4 The Board determines its own rules for any matters not specified in this constitution, including for conduct, operation and meetings of the Board. Such rules should be recorded in a Board charter and **Board** code of conduct which shall include:
- a. there must be at least five Board meetings each year;
 - b. Board meetings may be held in person or by teleconference or by other means by which those participating may hear each other simultaneously;
 - c. a resolution signed by all Board members is as effective as if passed at a meeting;
 - d. a Board meeting may be called by the Chair or by written request of three Board members;
 - e. decisions are by Ordinary Resolution (unless otherwise required by this constitution) by voice, or if requested by the Chair by show of hands, and, if requested by any Board member, by secret ballot;
 - f. each Board member has one vote and in a tie the Chair has an additional casting vote;
 - g. the Board must ensure minutes are kept of all Board meetings;
 - h. any additional roles and expectations that Swimming XYZ has of a Board member;
 - i. the Board must at periods of not more than three years review all Swimming XYZ policies;
 - j. an annual performance review of the Board; and
 - k. a requirement that all new Board members sign the Board charter and code of conduct in front of their Board colleagues as a symbol of their commitment to act at all times in the best interests of Swimming XYZ.
- 9.5 The Board is required to establish and maintain a member protection policy in accordance with best practice and which is binding on all Member Clubs. **And implement**
- 9.6 The Board may establish an awards committee with functions, processes and protocols as determined by the Board.

Section Four: Meetings, Elections and Voting

10. General Meetings

- 10.1 A GM of Swimming XYZ is either an AGM or a SGM. Subject to rules 10.4 g and h all Member Clubs are eligible to be represented at a GM which shall be held at such location, date, and time, or in the case of rules 10.4 g and h by such process, as determined by the Board.
- 10.2 The AGM must be held once every year, no later than four months after the end of the Financial Year to consider:
- a. the Board's annual report;
 - b. the annual financial report;
 - c. the audited statement of accounts;
 - d. announcement **should this be election?** of any new Board members;

- e. whether to nominate any person for Life Membership of Swimming NZ;
 - f. appointment of the auditor;
 - g. any other business that is notified as an item of business under rule 10.3.
- 10.3 An item of business must be considered at an AGM if notified to Swimming XYZ by the Board or by not less than one third of Member Clubs within seven days of notice of an AGM being given.
- 10.4 A SGM:
- a. may be called by the Board at any time;
 - b. must be called by the Board within 21 days of Swimming XYZ receiving a written request setting out the reasons for the SGM from Member Clubs holding not less than one third of the total number of votes held by Member Clubs as determined in rule 12; **should this be one third of the votes, or one third of the clubs, better system**
 - c. can only be convened on a matter of major importance to justify a SGM. Whether a matter is of major importance is, for rule 10.4 1, determined by the Board, and is, for rule 10.4 b determined by those Member Clubs requesting the SGM after consulting with the Board;
 - d. can only consider the items of business for which the SGM has been called;
 - e. can only pass a resolution by Special Resolution;
 - f. Special Resolutions bind the Board to comply with such resolution;
 - g. if determined to be appropriate by the Board, may be held electronically or by teleconference with post, email or electronic voting; and
 - h. if the Board determines that a SGM is undesirable because of content, time and/or expense, the Board may conduct the business of the SGM entirely by post, email or electronic voting but this rule does not apply to a SGM requisitioned by not less than half of the number of Member Clubs.
- 10.5 A quorum for a GM is formed if the Member Clubs Voting Representatives present hold in total not less than 50% of the total votes as determined in rule 12.1 or, if post, email or electronic voting applies, at least 50% of the total votes are cast. If a quorum is not achieved within half an hour, or where post, email or electronic voting applies, less than 50% of the total votes are cast, the SGM fails for lack of quorum but the AGM is adjourned to another day, time and place to be notified to all persons who are to be given notice under rule 11. The Member Club Voting Representatives present at a re-convened AGM are deemed to constitute a valid quorum.
- 10.6 GMs are chaired by the Chair of the Board and in his or her absence by a Board Member elected by the Member Club Voting Representatives participating in the GM. Matters not provided for that occur at or in relation to a GM are decided by such chairperson.
- 10.7 All Member Club Voting Representatives at a GM must comply with any Board policy relating to speaking at a GM.
- 10.8 Members of Member Clubs may attend GMs as observers only.
- 10.9 Minutes must be kept of each GM.
- 10.10 Any irregularity, error or omission in notices, agendas and papers for the GM or omission to give notices within a timeframe or omission to give notice to all persons entitled to receive notice, and any other error in the organisation of the GM does not invalidate nor prevent the GM from proceeding provided that:

- a. the chairperson in his or her discretion determines that it is still appropriate for the GM to proceed despite the irregularity, error or omission; and
- b. a motion to proceed is put to the GM and such motion is passed by Special Resolution.

11. Notices for General Meetings

- 11.1 Notices and other documents referred to in this rule in relation to a GM must be given by Swimming XYZ to all Member Clubs and may be given to any other persons as determined by the Board.
- 11.2 Notice of the date, time and place (or process in the case of rules 10.4 g and h) of a GM must be given by Swimming XYZ not less than 30 days prior to the date of the GM.
- 11.3 Notice of the agenda and the documents relating to items of business for the GM must be given by Swimming XYZ not less than 14 days prior to the date of the GM.
- 11.4 Any notice to be given by Swimming XYZ in relation to a GM may be given by any method (for example but not limited to post, email, or notification on a website) as determined by the Board.

12. Elections and Voting

- 12.1 The number of votes held by a Member Club is equal to the number of members in rule 6.1c i, ii, iii, iv and v (for the avoidance of doubt excluding Swimming XYZ Designates) recorded on the Database for that Member Club on the last day of the Financial Year immediately preceding the date on which the vote is to be exercised, provided that:
 - a. a club member is not counted in the number of votes held by their Member Club if any Amount due by them to Swimming XYZ or Swimming NZ for the Financial Year referred to above is not paid fourteen or more days before the date on which the vote is to be exercised;
 - b. a Member Club who does not satisfy the requirement of rule 6.2 is not counted; and
 - c. voting rights are suspended if so determined by the Board under rule 7.3.
- 12.2 At GMs:
 - a. a Member Club's Voting Representative who is present is entitled to vote;
 - b. proxy votes are not permitted;
 - c. voting is by voices or by show of hands as determined by the chairperson of the GM, except in the case of rules 10.4 g and h where post, email or electronic voting applies. Any matter may be by a secret ballot if it is called for by a Member Club or by the chairperson of the GM;
 - d. motions are passed by Ordinary Resolution unless required by this constitution to be passed by Special Resolution.
- 12.3 All of the votes held by a Member Club must be voted together (i.e. the total number of votes cannot be split).
- 12.4 Life Members, Swimming XYZ Designates and Member Club members do not have individual voting rights at GMs.

Section Five: Other

13. Finance

- 13.1 The financial year for Swimming XYZ is the same as for Swimming NZ. **Why?**
- 13.2 The Board must ensure that proper financial records are kept, the annual statements of account are audited and it has appropriate policies for management of Swimming XYZ finances.
- 13.3 Swimming XYZ's funds may be invested in such manner as determined by the Board.
- 13.4 At each AGM an independent and suitably qualified member of the New Zealand Institute of Chartered Accountants must be appointed as auditor by ordinary resolution.

14. Common Seal

- 14.1 Swimming XYZ must have a common seal. The Board determines when and by whom the common seal may be used and where it is to be kept.

15. Alteration to Rules

- 15.1 Subject to rule 15.2 and subject to the prior written consent of Swimming NZ, this constitution may be changed by Special Resolution at a GM for which such change has been notified in accordance with rule 10.
- 15.2 No change to the prohibition of personal benefit or the liquidation rules can be approved if it would have the effect of causing Swimming XYZ to cease to retain its preferential tax status as a society for the promotion of amateur sport or as a charity under the Charities Act (if applicable).

16. Disputes/Appeals

- 16.1 The Board must adopt a policy to require adherence by Member Clubs to processes that it considers will enable the fair, efficient and timely resolution of:
 - a. disputes that arise with or between Member Clubs and or involving Swimming XYZ Designates, involving an important activity or responsibility of Swimming XYZ and which the Board considers in its discretion is of such importance or is causing such a level of disruption to Member Clubs or to the activities of Swimming XYZ that it must be addressed; and
 - b. appeals by a club member against a decision of any Member Club involving suspension, expulsion, penalty or other material detriment to the club member or may decide (but is not required to) that such matters be referred to Swimming NZ or another body such as the Sports Tribunal (subject to the parties' consent if required).
- 16.2 The Board may request the President or any other person to act as a mediator in disputes involving Member Clubs. **What President?**
- 16.3 The Board may, in its discretion decide to allow a right to appeal disciplinary and selection decisions of the Board to Swimming NZ or another body such as the Sports Tribunal (subject to the parties' consent if required).
- 16.4 In relation to doping Swimming XYZ, and its Member Clubs shall abide by and be subject to the doping provisions set out in the constitution of Swimming NZ.

17. Liquidation and Merger

- 17.1 Swimming XYZ may be voluntarily liquidated if, at a GM a Special Resolution is passed requiring Swimming XYZ to be liquidated and the resolution is confirmed by a further Special Resolution passed at a subsequent GM called for that purpose and held not earlier than 30 days and not later than 60 days after the date on which the original resolution was passed.
- 17.2 If, upon the liquidation of Swimming XYZ, there remains after the satisfaction of all Swimming XYZ debts and liabilities any property whatsoever, the property shall be given to an organisation or organisations (selected by the Member Club Voting Representatives exercising the voting entitlement set out in rule 12.1) having objects similar to the Objects.
- 17.3 Subject to the written approval of Swimming NZ and satisfaction of all Swimming XYZ debts and liabilities, Swimming XYZ may in accordance with a Special Resolution at a GM called for that purpose merge with another Regional Association or Regional Associations having objects similar to the Objects.

18. Prohibition of Personal Benefit

- 18.1 All income, benefit or advantage must be applied to the Objects.
- 18.2 No Member Club or Board member or any person associated with a Member Club or Board member shall participate in or materially influence any decision made by Swimming XYZ in respect of the payment to or on behalf of that Member Club or Board member or associated person of any income, benefit or advantage whatsoever.
- 18.3 Any payments made must be for goods or services that advance the Objects and must be reasonable and relative to payments that would be made between unrelated parties.
- 18.4 The provision and effect of this rule must not be removed from this constitution and must be included and implied into any document replacing this constitution.

19. Limitation of Liability and Indemnity

- 19.1 No current or former member of the Board has any liability to Swimming XYZ or the Member Clubs or any Swimming XYZ Designate for any act or omission in their capacity as a member of the Board ~~or AP~~ except in the case of their own fraud, dishonesty, breach of fiduciary duty or the commission of any act known by them to be a breach of duties owed by them at law.
- 19.2 Each current or former member of the Board is indemnified by and out of the assets of Swimming XYZ against:
 - a. any liability arising out of any act or omission in their capacity as a member of the Board excluding criminal liability arising out of their fraud, dishonesty, breach of fiduciary duty or the commission of any act known by them to be a breach of duties owed by them at law; and
 - b. costs incurred by them in any proceeding relating to such liability.
- 19.3 This rule is intended to be enforceable by each current or former member of the Board.

20. Savings

- 20.1 If any matter arises in relation to Swimming XYZ that is not provided for in this constitution, the matter shall be dealt with as required by the Board.

21. Transition

- 21.1 This rule 21 enables transition of Swimming XYZ from the requirements of its previous constitution to this constitution. If any part of this rule 21 is inconsistent with any other rule then rule 21 applies and to the extent of the inconsistency the other rule in this constitution does not.
- 21.2 All Board members under the Previous Constitution shall hold office under this constitution until the end of the next AGM unless the Board member retires or vacates the Board earlier. At the next AGM the number of Board members to retire shall be the number necessary to reduce the size of the Board to six persons. The Board members retiring may be determined by agreement among all the Board members and, failing agreement, shall be determined by lot.
- 21.3 Swimming XYZ Life Members on the date of adoption of this constitution shall continue as Swimming XTZ Life Members under this constitution.
-

To: Chris Moller
Sue Suckling

From: Suzanne Speer, ASA Board Member, SNZ Board Member
Brian Palmer, ASA Executive Officer
and on behalf of the Auckland Swimming Board:
Jim Swanson, ASA Board Member, Steering Group for the SNZ Review
Willem Coetzee, ASA Board Member, Vice-Chair
Cameron Gibson, ASA Board Member
Gwen Ryan, ASA Board Member

Date: 17 July 2012

Re: **Review of the SNZ Proposed Draft Constitution and the Findings (including 21 Recommendations) of the Swimming New Zealand Review by the Independent Working Group**

INTRODUCTION

Firstly, we would like to state upfront that Auckland Swimming fully supports the findings of the Independent Working Group and sees them as being a foundation for the establishment of a constructive future for our sport. We thank you and the Working Group for the effort put into the Review. Accordingly, Auckland Swimming is seeking every opportunity to ensure that these recommendations are fully and successfully implemented, and this is the intent and purpose of this discussion paper.

Secondly, however, we wish to record our concerns about several key elements within the Proposed Draft Constitution that accompanies the recommendations. Our concerns are fundamentally one that the Constitution does not reflect the direction for governance of our sport as set out in the Review findings. Explanatory notes follow regarding the key areas of concern.

Thirdly, therefore, we are concerned that the SNZ Board has interpreted that the solution now rests around the 'bundling together' of the Review findings and recommendations, together with the Proposed Draft Constitution which, in our opinion, is clearly not yet in a final form and requires refinement which could best emanate through a robust process of consultation.

Fourthly, we believe that there are serious issues of constitutionality associated with the proposed business of the forthcoming SNZ SGM which may extend to rendering any decision taken under that remit as being ultra vires. Therefore, we would urge a cautious approach to ensure the orderly adoption and implementation of all 21 recommendations.

We have requested information from SNZ relating to the way and process in which the SGM has been called, but as yet have not received the documents we have requested. From what we understand, it is highly likely that the process used to call the SGM does not comply with the requirements of the current SNZ Constitution, which in turn would mean that any business conducted at the SGM would be flawed. While it is beyond the scope of this document, we are happy to detail the reasons why we have been able to conclude that the SGM as proposed is not in accordance with the requirements of the current SNZ Constitution, and remain confident that when that detail is received you too will come to the same conclusion as we have. In the context of the detail which follows, it would seem this could be a blessing in disguise as it will allow for an 'unlocking' of the Proposed Draft Constitution from the business of accepting the 21 Recommendations of the Moller Report, which we are confident most, if not all, members of the swimming community wish to see adopted.

And fifthly, following a significant (although at this stage incomplete) review of the Proposed Draft Constitution, and following consultation with our clubs in an ASA Special General Meeting (convened Thursday 12th July) for the purpose of seeking their mandate, we have been encouraged to seek suitable remedies surrounding a recognition that we have been presented with a Proposed Draft Constitution, and have as yet to be presented with the companion documents (Regional Constitution and others), and that all of these documents require further engagement in a process of consultation.

For the above reasons, we are now of the opinion that the best course of action is that the SGM scheduled for July 28th should be abandoned. We are of the opinion that a new SGM should be called (probably on a motion of the Board) under Rule 18.1 along the lines of the following:

A. Accept the recommendations of the Moller Report and to begin the process of implementation of the 21 Recommendations.

NB. It may be sensible to propose a time frame to make sure the matter moves and does not stagnate.

B. That the members are provided with the Proposed Draft Constitution and Transitional Regulations to consider with adequate time for consultation (28 days) and feedback.

NB. It is this consideration which is called for in the Moller Report under Recommendation 15.

We would also note that transitional regulations suitable to the current SNZ Constitution, but covering the same key issues as those proposed within the Proposed Draft Constitution should be made available to cover the governance functions until the subsequent adoption of a new agreed Constitution.

We have identified in our review of the Proposed Draft Constitution multiple errata which is, of course, understandable given the draft nature of what has been provided. Obviously at its most simple, an adopted Constitution must have errata corrected. However, we have been informally advised that to now make changes to the Proposed Draft Constitution (which is appended as an exhibit to the resolution of the SNZ SGM), even for the purposes of correcting errata, could under the relevant provisions relating to Incorporated Societies render the entire process ultra vires. We do not wish to see that position occur.

We have further identified several areas of form which affect the substance of governance, but which we would expect in a robust process of review to be smoothed through. We believe that an extended and robust process of review will ensure that these areas of form, once refined, will result in a more robust document which will survive the test of time. This discussion paper explains some (although not all) of those concerns. We have highlighted the key issues for summary purposes in the next section, Key Issues, but this is followed by much fuller explanatory comments.

Please note that this document is not intended as a comprehensive consultation paper covering a very complex governance document. It is intended to invite constructive engagement at the behest of our stakeholding clubs to seek suitable remedies in order that the 21 Working Group Recommendations can have their effect in an acceptable governance model.

We would really appreciate your careful attention to the matters we have raised, and would be more than pleased to have a discussion with you to help clarify details.

KEY ISSUES

1. COMPLETENESS OF DOCUMENTS

We are extremely concerned that we effectively require multiple documents to create the new governance platform for our sport, but we have been asked to make judgment based on sight of a single document only, and even then only in draft form. We do not consider it prudent to contract to the repealing of our own Regional Constitutions with impacts that impinge on the sovereign rights of clubs without having given due consideration to the replacement. We are confident that our clubs, who are our stakeholders, cannot and will not grant that mandate.

We are concerned that an imbalance is being created which is contrary to the principles of collaboration and federalism which we believe are clearly inferred from our reading of the Working Group Recommendations. We do not wish to be hasty in judgment, but we do not believe we can meet our proper governance and stewardship roles based solely on principles of good faith that the Regional Constitution “will turn out ok at some future date”. We would point out that the SNZ Draft Constitution specifically says Regional Constitutions will be adopted by SNZ – it says nothing about Regional consultation and acceptance. Obviously, this approach doesn’t work well for Regions.

2. MEMBERSHIP

We agree with the principles espoused relating to membership in the findings of the Working Group. There are aspects of the detail which concern us. These include:

(a) The Database We accept a need for a database but the current membership database simply cannot deal with the membership issues as defined both in the Proposed Draft Constitution and the Proposed Transitional arrangements. The Transitional regulations will require amending to compensate for the inability of the current system to deal with membership as defined. In the current form we could not accept this document as we simply cannot comply with the requirements for reasons beyond our control.

The requirement for members to furnish personal details for the data appears unlawful and appears to fall outside the laws pertaining to privacy in this country.

(b) Competitive Membership We consider the definition as proposed of '*competitive member*' with its linkage to participation in approved meets and the further linkage of approved meets to possible central control to be unsatisfactory. We consider that a simpler definition can be established and that such a definition needs to form a part of the Definitions. We consider the definition needs to be re-established and based on 'inter-club competition', a more meaningful definition with wider applicability.

(c) Technical Officials are defined as including National Timekeepers. This qualification does not exist and to include it in a foundation document is nonsensical. Either a commensurate qualification and standard needs to be established to precede incorporation or a new standard needs to be recognised and defined.

(d) Club membership We cannot concur with the exemption of any class of swimmer from club membership as clubs are the fundamental foundation for the delivery of the sport at all levels. We do not understand the drivers behind this recommendation, but in the absence of consultation would see this as being unacceptable.

(e) Transfers and other issues We understand that over many years issues of transferring, multiple club affiliations, eligibility for records etc have been refined, developed and adopted. It may be that these are better placed outside a Constitution and we remain open to that view. The issues are so fundamental to how the sport functions that previous generations have seen them as being of constitutional importance. We would expect to be convinced that suitable alternative provisions will be made before we could see these contentious areas, which took so long to resolve into a satisfactory working model, are repealed.

(f) Honours and Awards We note with concern the removal of an Honours and Awards function and would question the wisdom of having the award of Honours becoming an effective governance, and by extension, political function. There is more for us to understand in this area. We also note with concern that the removal of members from a region carries with it an implication that a region can no longer recognise outstanding service through the grant of Life Membership. We do not believe that we can

consent to the effective removal of Regional Life Membership from those who have been granted this honour in the past and we do not believe it would be prudent to lose the ability to grant such honours in the future. There may be more for us to learn when we see other documents which are related.

(g) Powers to cancel membership We are concerned about the breadth of powers granted to SNZ to cancel membership and its flow-on effects. We are concerned that these powers will lead to the stifling of legitimate democratic debate which will ultimately lead to the diminishment of accountability.

3. SPORT FUNDING STRATEGY

We, and all other regions, currently operate on a self-sufficient basis. We are autonomous and self-governing. The Proposed Draft Constitution, as presented, commits every region and club to an as yet unknown funding strategy with an unlimited power granted to SNZ to levy regions for undefined sums with no reciprocal rights. This is contrary to what we understand are the doctrines associated with Sport New Zealand's Whole of Sport approval process which envisages multi-directional funding flows and full collaboration. With no insight into what the 'Sports Funding Strategy' may be, we cannot agree to this position and still be true to the fiduciary obligations we hold to our members and stakeholding clubs. There is enough disclosed to leave us with legitimate concerns that, as proposed, the sports funding strategy may draw into question at some point the continuing viability of our business model. To meet our obligations we will need to be assured that the sports funding strategy will function within boundaries which allow our region to continue as a viable entity.

4. ACCOUNTABILITY

We are where we are today because of issues of accountability of the governance body to its membership. Our early examination leads us to a view that faced with similar circumstances of systemic failure the 'stakeholders' (however that term may be defined, but for discussion, let's consider them to be federal regions) will have less powers for sanction and accountability than those which existed previously. It was the inadequacy of those powers which led to the Ineson Review, followed by a failure to accept accountability for systemic failure and the inability of the organisation to correct, that led ultimately to the work of this Working Group.

This sport could conceivably face similar systemic collapse in the future. If the core of that failure rests at a governance level, this Proposed Draft Constitution provides less capacity to remedy it than the current SNZ Constitution. Given everything the sport has been through in recent years, we are not prepared to leave the sport with fewer protections than those which have already proved inadequate. We have identified possible solutions.

REVIEW OF THE SNZ PROPOSED DRAFT CONSTITUTION

1. BACKGROUND

- 1.1. On 18 May 2012, the Board of Auckland Swimming, along with others, were invited to the presentation of the draft findings and recommendations of the Working Group of the Independent Review of Swimming New Zealand.

Subsequently, the final report of the Group was released in June and with its 21 recommendations are to form the basis for drafting the replacement constitution for Swimming New Zealand and replacement standard constitution for all 16 Regional Associations.

- 1.2. Swimming New Zealand has called a Special General Meeting of the Regional Associations to consider the Working Group's findings in conjunction with a proposed new SNZ Constitution.

- 1.3. The resolution given to Regional Associations to be considered at this meeting is as follows:

That Swimming New Zealand Incorporated accepts and adopts in full the report of the Independent Working Group for the Review of Swimming New Zealand dated June 2012, including the recommendations in it numbered 1-21 inclusive, and, to help give effect to those recommendations, Swimming New Zealand Incorporated repeals its existing constitution and adopts the attached new constitution dated July 2012.

- 1.4. The proposed replacement Constitution for Regional Associations is not available at this time and will not be considered at this SGM; nor will any new Regulations for Swimming New Zealand.

2. THE BOARD OF SWIMMING AUCKLAND'S POSITION RELATING TO THE RECOMMENDATIONS OF THE INDEPENDENT WORKING GROUP FOR THE REVIEW OF SWIMMING IN NEW ZEALAND, DATED JUNE 2012.

- 2.1. The Board of Swimming Auckland supports the findings and recommendations of the Independent Working Group.

2.2. The Board of Swimming Auckland has sought input from its clubs by way of a Special General Meeting (12th July 2012) and has received unanimous support from those clubs who participated in the SGM to support the adoption of the 21 recommendations of the Independent Working Group.

3. THE BOARD OF SWIMMING AUCKLAND'S POSITION AS IT RELATES TO THE NEW PROPOSED DRAFT CONSTITUTION FOR SWIMMING NEW ZEALAND.

3.1. Swimming Auckland is unable to support the Proposed Draft Constitution for Swimming New Zealand in its entirety for the reasons listed below. However, the Board of Swimming Auckland considers that the Proposed Draft Constitution can be revised to incorporate and address its concerns as listed below in Section 5.

3.2. At the ASA SGM (referenced above) the Board of ASA has been mandated by those clubs to seek suitable engagement to ensure that the Proposed Draft Constitution is subject to both a process and period of consultation with the intention of a more acceptable and refined document being developed.

4. REASONS FOR SWIMMING AUCKLAND'S POSITION.

4.1. Incomplete documents for consideration.

4.1.1. The publication of the Proposed Draft Constitution alone is insufficient to permit a comprehensive assessment of potential likely effects on Regional Associations and Clubs.

4.1.1.1. To achieve a holistic evaluation of the likely impact of these changes, any SNZ Proposed Regulations and the Proposed Constitution for Regional Associations must accompany the SNZ Constitution.

4.1.1.2. As the Proposed Draft Constitution contains reference to the responsibilities of clubs, there will be merit in also viewing any guidelines being developed which may have direct affect for clubs under the responsibilities that a new constitution might impose on clubs.

4.1.1.3. These three, and possibly four, documents are interrelated. An example of this interrelationship is seen by proposed provision Section 8.3 of the Proposed Draft Constitution which states that:

A Regional Association is an entity governing a Region which.....adopts the form of Regional Associations constitution prescribed by SNZ.

AND

... conducts its activities in compliance with its regional constitution and the SNZ constitution.

4.1.2. Therefore without a replacement Regional Constitution to consider, affected parties have little idea how the existing Regional Associations' Constitutions will be altered; yet the Associations will be bound to comply with all new provisions without necessarily any ability to be consulted on the matter, as Section 8.3(b) states that the Regional Constitution will be prescribed by SNZ for all Regions.

4.2. Constitutional federalism needs to be strengthened along with necessary checks and balances.

4.2.1. Issue

The current federal structure of governance for a swimming organisation in New Zealand is encompassed clearly in the existing SNZ Constitution, although in the past decade there has been a high degree of central control, especially in the management of international competitive swimming.

4.2.2. The concept of an identified federal constitution has been retained in the findings of the Working Group, albeit with the thought that there are currently too many Regions and ultimately they will need to be reduced in number through self-determination.

4.2.2.1. It is our opinion that this principle of federalism is not reflected in the drafting of the Proposed Draft Constitution for SNZ. Indeed, the level of central control

by the national body of swimming will be significantly increased through the provisions of the Proposed Draft Constitution.

4.2.2.2. Within the Proposed Draft Constitution, powers of the National Sports Organisation (NSO) of SNZ have substantially increased when compared with the existing Constitution. This has been achieved in the Proposed Draft Constitution by the omission of necessary checks and balances to the power of the NSO.

4.2.2.3. This lack of checks and balances relates not only to the creation of new Policies, Strategies, Rules and Regulations by the NSO, but also in its exercise and implementation of these.

5. ISSUES AND POSSIBLE SOLUTIONS

5.1. Examples of unacceptable expanded powers of the NSO are shown in the following sections of the Proposed Draft Constitution and these need to be amended:

5.1.1. Section 8.3(h) requires SNZ to approve a Regional Association as a member of SNZ. In addition, SNZ may remove a Regional Association as a member or any other member of the organisation, as given in Section 7.3.

5.1.1.1. The Board of SNZ has sole discretion to do this and there is no independent arbitrator to appeal any such decision of the NSO.

5.1.1.2. Criteria used for assessing if a member should be expelled or suspended by the NSO are open-ended and very subjective.

AND

5.1.2. Section 8.5(b) requires a Region to *act consistently with the Whole of Sport Plan, policies, standards and KPIs determined by SNZ* while not allowing for any input from Associations before determining these.

5.1.2.1. To implement 'Whole of Sport' and other SNZ requirements, Regions must self-fund these without assistance from its NSO.

5.1.2.2. The NSO can at the same time limit a region's ability to fundraise by the stipulation that it must comply with a national fundraising plan, written and enforced by the NSO without consultation, as stated in Section 8.5(e).

AND

5.1.3. Regions must pay any money, levies, and amount determined by SNZ to the NSO as per the all encompassing provisions of Section 5.1(b).

5.2. Accountability of the SNZ Board

5.2.1. Issue

There is no formal process under the Proposed Draft Constitution to hold the Board of SNZ responsible for its actions. If it fails to fulfill its duties as a Board it cannot be removed.

5.2.1.1. This lack of accountability has been of grave concern to Regions and members and was a very recent concern as encapsulated in the Regions' proposed remits (later withdrawn) at the 2011 SNZ AGM.

5.2.1.2. Even a vote of 'no confidence' in the Board at a Special General Meeting or Annual General Meeting does not legally remove the Board under the new Proposed Draft Constitution.

5.2.1.3. If such a vote were supported by delegates, then it would be up to the Board to take steps, by way of resignation, if it chooses to do so. If the Board did resign *en masse* then SNZ would be left without a Board so there needs to be a process in place to appoint an interim Board.

5.2.2. Solution

Below is a suggested clause to remove the Board, as a whole or individual Directors, by delegates which will complement the proposed provisions contained within Section 12.10 which will enable the SNZ Board to remove its own Directors:

12.10(e) *The delegates at a SGM called for the purpose of removing the Board as a whole or individual directors may, by a majority of 60% of the votes cast, remove any Director, or the Board as a whole , before the expiration of their terms or its term in office as follows:*

- (a) *Upon the Chief Executive receiving a request for a SGM (under rule ...) for the purpose or removing a Director or the Board as a whole, the Chief Executive shall send the notice of the SGM to the Director concerned or the Board as a whole (as the case may be), in addition to the persons specified in rule ... (Notice of SGM). Any such request for a SGM to remove a Director or the Board as a whole shall specify the reasons for the proposed removal.*
- (b) *Following notification under rule ... (Notice of SGM), and before voting on the proposal to remove a Director or the Board as a whole, the Director or the Board (as the case may be) affected by the proposal to remove them, shall be given the opportunity prior to , and at, the SGM to make submissions in writing and/or verbally to the persons entitled to be present at the SGM about the resolution.*
- (c) *If a Director is removed under this rule, the Board shall leave the position vacant until the AGM in the following year, at which time it shall be filled in accordance with this Constitution. If the Board as a whole is removed or more than one Director is removed so that a quorum cannot be met, the delegates at the meeting shall elect such number of Directors as*

are necessary to ensure the board comprises of at least 4 Directors. Nominations for Directors in these circumstances may be made by the delegates at the meeting from the floor and the usual time period for nominations shall not apply. The Directors elected under this rule, shall constitute the Board until the AGM in the following year, at which time the positions will become vacant and such vacancies will be filled in accordance with the constitution. No appointed Directors may be appointed during this period.

5.2.3. The above has not been drafted specifically to be integrated into this Proposed Draft Constitution, but is an example of the types of powers for checks and balances which one might expect to find.

5.2.4. We would also express a concern that the powers to call a SGM have been reduced (or perhaps better, the barriers have been raised) ensuring that a SGM represents an extremely high threshold.

5.2.5. We are very concerned that issues which precipitated the current review process were deep-seated and became more serious because there was no constructive process by which sanctions could be applied, when in the case past, a Board as a collective refused to accept accountability for systemic failure. We are concerned that faced with similar circumstance of systemic failure that the Proposed Draft Constitution provides arguably even less capacity to deal with systemic failure than existed previously.

5.2.6. We see this as being an issue of significance.

5.3. Lack of consultation, provisions, rights and regard to input from Regional Associations.

5.3.1. Issue

Consultation with members is commonplace in organisations as it relates to proposed Plans, Policy, Regulation, or similar matters.

5.3.1.1. In recent times, Regional Associations have had significant problems in dealing with new proposed regulations from the NSO as they have often been formulated without regard to regional input or proper evaluation of such input by the NSO.

5.3.1.2. The Proposed Draft Constitution under Section 4.1 does stipulate that the NSO ... *in supporting its primary Object, SNZ has the further Objects to work with Regional Associations and Member Clubs and others ...* but there is no process put in place within the Proposed Draft Constitution to achieve this and ensure that this occurs.

5.3.2. Solution

Rules should therefore be introduced into the Constitution to ensure that there is proper consultation with all members and any proposed Plan, Policy, Regulation or similar matter should be effectively and properly evaluated with input summarised for public notification to all members.

5.3.2.1. Also, while it would be ineffective to require Regions' approval to all such changes, this should be required when there are any Policies, Plans, Regulations or similar matters which will directly affect Regional Associations.

5.3.2.2. Section 13.6 in the Proposed Draft Constitution will need to be amended because the SNZ Board assumes all the powers of SNZ (set out in Rule 4.1) which includes the powers for the Board to *determine its own rules for any matters not specified in the constitution ...*

5.3.3. There may in effect be other ways to accomplish this position which we accept and could welcome. We do recognise that conditions vary around the country and what works in one region may not work in another.

5.3.4. We have a sport where delivery occurs for the most part locally and it is vital that when Policy and Regulations are being established that there is a robust and transparent process of consultation and evaluation which is available.

5.4. The 'Whole of Sport' Plan is not an interactive process under the Proposed Draft Constitution.

5.4.1. Issue

The Proposed Draft Constitution defines the term 'Whole of Sport' as being:

"...SNZ's whole (sic) of Sport strategic plan for competitive swimming."

5.4.2. However, the Sport NZ doctrine associated with 'Whole of Sport' envisages that it will be just as the term suggests, a process involving the entire sport, with multi-directional flows of both input and funding.

5.4.2.1. We do not see this doctrine encapsulated in either the adopted definition nor the practical incorporation and use of the term 'Whole of Sport' throughout the document.

5.4.2.2. As presented, the Proposed Draft Constitution does not capture the collaborative nature of 'Whole of Sport' which we know has been successful with other sports who have completed WOS Plans.

5.4.2.3. We would welcome formal inclusion within the document the recognition of the collaborative nature of WOS as we understand it.

5.4.3. The new Whole of Sport concept within the Proposed Draft Constitution is not drafted to be an interactive approach from all levels of the sport between the NSO, Regions and Clubs; instead a hierarchical model is utilised being one way, from the top downwards.

5.4.3.1. In this regard, Section 13.2 is unacceptable as it clearly excludes Regions from involvement in the creation of the 'Whole of Sport' Plan but instead imposes upon them the implementation of that Plan within their areas of jurisdiction.

5.4.3.2. Regions and Clubs may be required to fund the Whole of Sport Plan themselves as the Proposed Draft Constitution requires them to be financially independent of SNZ and be self-sufficient financially.

5.4.4. Solution

Formulation of the 'Whole of Sport' Plan should incorporate wide consultation of all members and evaluation of submissions received. It should ensure sufficient and effective support by SNZ to Regions and Clubs for its implementation, and in so doing, the Whole of Sport Plan should not detrimentally affect the financial sustainability of any Region or Club required to be part of the Plan.

5.4.4.1. Suitable rules should be drafted in the Proposed Draft Constitution to reflect the above.

5.5. The requirement under Section 6.8 for members to furnish personal details for the national database is considered unlawful and to fall outside the laws pertaining to privacy in this country.

5.5.1. Based on advice which we have received and the expectation of our members, no member should be required to forfeit their legal right to the provisions of the Privacy Act as a condition of membership.

5.5.2. We would expect that in accordance with best-practice, members are granted an assumption of privacy upon membership, with the right to 'opt-in' as opposed to the right to 'opt-out' of having their personal details made available to third parties.

5.5.3. Under the Proposed Draft Constitution there is neither a right to opt-in or opt-out granted. That is unacceptable.

5.6. The lack of clarity in Section 9.1(e) as to where a Member Club is located may further diminish a Regional Association's sovereignty/powers as Member Clubs may locate outside their established primary geographical location.

5.6.1. We believe there needs to be definition established of what is meant by *location* (Section 9.1(e)) as it relates to clubs which are not exclusively geographic entities.

5.6.1.1. Past interpretation on this subject related to a club's principle place of operation, but equally was open to ambiguities relating to whether, for example, that was where the Post Office box was located, the pool (or pools) was located, where swimmers trained, etc. As clubs are members of Regions there must be some alignment between regional boundaries and club boundaries for good governance. As this is not defined it will lead to disputes which could and should be avoided.

5.7. The Proposed Draft Constitution is a relatively complex document with the need for much cross-referencing between sections and provisions and thereby making it unduly difficult to use.

5.7.1. It needs to be simplified and erratum need to be corrected (as for example Section 8.6(e) and the inclusion of National Timekeepers as members of SNZ).

5.8. Commenting on the subject of National Timekeepers, we are respectful of what we suspect was the intent in this inclusion. Sadly, the intent is not matched with fact.

5.8.1. The SNZ Technical Advisory Committee has introduced a policy (effective now for many years) whereby Timekeepers are not qualified nationally. Indeed most regions, as far as we can tell, require a higher standard of qualification for Timekeepers than SNZ expects. We do not see resolution to this as being difficult, but further work is required.

5.9. Section 9.1(c)(v) is unacceptable and unenforceable, as organisations which donate money or equipment to clubs will often require them to be returned if they are not to be used for the specific purpose that they were donated.

5.9.1. Further to this, Section 9 places specific responsibilities on clubs, some of which impinge on the club's own sovereignty as established in their own Constitutions.

5.9.2. We would consider it as being questionable as to whether a Regional Association is empowered to create through the acceptance of this Proposed Draft Constitution an impost of conditions relating to

sovereignty on its member clubs without the express consent of those clubs prior to doing so.

5.9.3. Further, if clubs are to be required to change their Constitutions to comply with the requirements of the adoption of this Proposed Draft Constitution, there are very real cost issues involved. Most clubs are small and frequently marginal operations. To impose the cost of a Constitutional review on each club, where they may not have the internal legal resource, would be a heavy burden in most cases.

5.9.4. We would therefore welcome, in a similar way, what we are anticipating with a template for the Regional Constitution, a commitment to work being done on a best-practice Club Constitution which can be considered for adoption with relatively minor local input, and which would result in alignment with the national and regional documents, together with the Whole of Sport process.

5.10. The Proposed Draft Constitution is not a collaborative approach between Regions and the NSO.

5.10.1. This is shown by the unacceptable provision of Section 8.5(m) which states that Regional Associations *must provide accurate data on a timely basis as required by SNZ and if it has not done so the Board of SNZ may suspend its voting rights.*

5.10.2. Section 5.1 also gives *full powers, jurisdiction and authority ...* to the NSO with very few limitations to these powers as it relates to its members.

5.10.3. Further, Regional Associations are required under Section 8.5(a) *to support and work with the Board and executive of SNZ to build a culture of trust, collaboration and discipline.* Yet the NSO and its Board are not similarly required to work in this manner with the Regions and Clubs.

5.10.4. Similarly, the SNZ Board has the right under Section 13.6 *to determine its own rules for any matter not specified in the constitution* without consultation and consideration of members' views on any matter.

5.10.5. Once again, we had expected that doctrines of collaboration and collegiality would be reflected not just as obligations for the regional

and club bodies but to be strongly reflected as obligations for the national body.

5.11. Elite HP Swimmer. We are concerned at this definition and the encapsulation within the Proposed Draft Constitution that in some way there is a class of athlete who is different to the norm. We believe that 'elite' and 'high performance' should be matters of fact, not association.

5.11.1. We do not believe it is appropriate for any athlete to be removed from the requirement to be a member of a club.

5.11.1.1. Clubs are the base vehicle for the delivery of the sport and to remove athletes from a requirement to associate as members of a club would establish an unacceptable precedent.

5.11.2. We believe further (as recommended in the Ineson Report) that provision must be made for athletes who are, by performance standard, both elite and high performance, or who are aspiring to be, or may become either by definition, who choose for whatever reason to operate outside of a High Performance programme run by SNZ. To create a position of distinction and separation between those who are in the 'fold' and those who are 'outside' is not an approach which we can endorse or support.

5.11.3. There must be pathways provided which allow athletes who achieve elite and high performance standing through their ability, rather than through appointment or association, and to be granted both equality of status and opportunity.

5.12. Under 'Definitions' we believe that there is a requirement for the term 'Stakeholder' (as used in Section 13.2(x)) to be defined.

5.12.1. The use of this term has created significant conflict in the past and must either be defined or removed.

5.13. The Appointments Process.

5.13.1. We have reviewed the appointments process as described and presented in the Proposed Draft Constitution with a number of

people with the qualities which ordinarily would lead one to the view that they might have the capacity, whether through professional or sport-specific skills, to contribute as potential SNZ Board candidates. None would have any particular aspiration to put themselves forward for 'national office'.

5.13.2. The question was asked of these potential candidates: Consider the criteria and process for selection. Would you consider that you might be a suitable candidate under that criteria, and would you apply?

5.13.2.1. From a sample of 10 people asked, without weighting one way or the other, those with a sport-specific background universally replied that they did not believe they would be considered to be either qualified or appropriate.

5.13.2.2. Those approached who had professional or commercial backgrounds, again the response universally was that they would not apply as they considered that the process, as defined, was too intrusive.

5.13.3. We hold concerns that unless presented in a gentler manner that this process will attract a very narrow range of applicant who in turn will hold a similarly narrow range of connection with the community. We are concerned that this could lead to a situation of disconnection from the zeitgeist, similar to what we have already experienced under our existing structure.

5.14. Board Procedure.

5.14.1. We note that over time a flavour of the organisation will be established through the development of Board Policy, especially as it relates to the establishment of a 'Whole of Sport' Plan. The nature of that Policy and Plan will reflect the new DNA of the organisation and that cannot be legislated in advance.

5.14.1.1. We are concerned that the Region has clearly been downgraded in this process from being what we might consider key stakeholders.

5.14.1.2. Requirements exist (Sections 13.2(vii), (viii) etc) for the SNZ Board to engage with the 'Sport'. That is rather ineffective as under the definition of 'the Sport', the Sport is amorphous and has no defined personality. There is no requirement for engagement with Regional bodies or Clubs specifically, which are surely key stakeholders, in the delivery of the sport of competitive swimming.

5.14.1.3. We would wish to see more specific requirements being mandated based on engagement with those who deliver the sport at all levels.

5.15. The President. While we like the concept as presented of a President, we believe there are flaws which require remedy.

5.15.1. We note the use of the term '*mediation*' or '*mediate*'. We would infer that this does not refer to the formal and legal process of mediation for which the President may not be qualified. We infer that it implies some lesser form of dispute resolution capability, but which would not enjoy the effective provisions attached to formal mediation. Nor is it intended to be arbitration. We believe the meaning of *mediation* as used requires definition.

5.15.2. We would note the terms of Section 14.3. To not approve the Board's nomination amounts to an effective vote of no-confidence. Similar action relating to Elected Directors results in the disqualification of the AP from future appointment, yet no similar recognition results from an obvious consideration by members that the Board is not connecting with the zeitgeist.

5.15.3. This should lead to a reality check occurring, and yet the follow through provisions allows the Board to leave the position vacant right at a time when it is likely that trouble is brewing. This is exactly the time when the services of the President in a dispute resolution role could be vital to avoid a crisis and yet it could be the very time where the Board exercises a prerogative to not have a President in Office. This does not seem to be consistent with the thinking which attaches to the decisions (or rejection thereof) of the AP.

5.16. Disputes/Appeals

- 5.16.1. There are many disputes which arise in sport. Some are competition based, others relate to issues arising from a complex environment and may include, for example, matters relating to child protection, disputes within clubs etc.
- 5.16.2. It is not reasonable to consider that all those disputes should end on the desk of SNZ.
 - 5.16.2.1. The regional body is an effective buffer for dealing with most disputes when they cannot be resolved within a club. Section 21 of the Proposed Draft Constitution seems to envisage that the responsibility for dealing with disputes is largely a SNZ responsibility. That would be consistent with the notion that a region has no members other than clubs.
 - 5.16.2.2. We do not believe this would be effective, practical or desirable. Experience leads us to a view that the best place for dispute resolution to commence is both quickly and close to the source.
- 5.16.3. We are concerned that Section 21.1 (extending through to (a)) could be used as a charter to stifle legitimate democratic debate and disagreement. At no stage should the Board be granted a right to adopt a policy which is neither fair, efficient, nor timely.
 - 5.16.3.1. While the intention here is likely to be non-prescriptive it is our view that it would be better to be prescriptive in this instance and require the Board to both adopt and practise policies for dispute resolution which are fair, efficient and timely.
- 5.16.4. Section 21.1(b) implies that a region will have power to discipline. However, how can this be the case when a region has no members other than a club? Further and better particulars of the Proposed Regional Constitution will be required to cast a further opinion on that subject.

5.17. Transition Regulations. We broadly support the thrust of the transitional regulations. We are however concerned that the provisions of Section 27.8(a) are simply not functional.

5.17.1. SNZ's current database does not have the capacity to categorise present membership in the manner as defined, and nor was data entered in the Zeus database in a manner which was ever intended to be consistent with this regulation.

5.17.2. It is simply not possible to make a transfer from the data entered in the Zeus database and relate it in any meaningful way to the categorisations established under these provisions.

5.18. Membership. We believe we understand and equally support the broad thrust of the membership provisions. However, we feel there are several major omissions and areas of concern.

5.18.1. Section 6.1(a). We reject the notion that competitive membership should be defined by a meet which is effectively capable of being licensed by SNZ. This gives rise to the capacity for SNZ to charge royalties (as is done in some countries) and for the business model of operation for both clubs and regions to be fundamentally compromised.

5.18.1.1. We see no reason to redefine the current accepted requirement for a competitive swimmer as being any swimmer who swims in an inter-club meet during the period. We believe the definitions should define a competitive swimmer in these terms.

5.18.1.2. Our ASA Rule 6.01.1 defines *competitive swimmers* in these terms and we believe that is a consistent interpretation around the country.

5.18.1.3. While it may not be the intention, this definition (Section 6.1.a) could unwittingly result in a reduction of the pool of competitive swimmers rather than increase.

- 5.18.2. Section 6.1(c). There is no such thing as a nationally qualified TK. Either that qualification needs to be established or this proposed rule must be changed.
- 5.18.3. Section 6.1(e). Who defines what and who are members under this category? Is that a club responsibility, or a national responsibility?
- 5.18.4. Section 6.2. If an official chooses not to 'pay' does that mean that they will not be permitted to participate? This will be counter-productive and ultimately if enforceable will run counter to the spirit of volunteerism within the community.
- 5.18.5. Section 6.6. Who will police this and under what method will it be done? The current SNZ database has no capacity to accomplish this as it does not link between membership and competition.
- 5.18.6. Section 6.8(b). Simply unacceptable as it conflicts with the requirements of the Privacy Act.
- 5.18.7. Section 6.8(c). This is simply neither practical nor enforceable and the use of the term *must* is a very heavy handed way to deal with members.
- 5.18.7.1. Section 7.3 lists obligations of members, if for example, a member fails to notify SNZ of their updated details they are in default and possibly liable for expulsion, but so also is their club and their region.
- 5.18.7.2. This is simply not enforceable nor is it desirable in its implementation in a volunteer organisation of amateur association.
- 5.18.8. Section 7.3. This clause can, and is likely to, be used to stifle democratic debate and is a catch-all to remove any individual, club or region who may have a differing political view to the NSO.
- 5.18.9. Section 8.3. We note that a region can only have as its members its affiliated clubs.

5.18.9.1. This would imply that a region cannot honour its longstanding members with Life membership? Does that mean the region may be restricted from extended service and honours awards as it has no members?

5.18.9.2. Surely this was not the intent?

5.19. Sections 8 & 9 Regions and Clubs. In the absence of the Proposed Regional Constitution, meaningful comment cannot be made with regard to these provisions.

5.19.1. However, we do note concerns that as proposed these sections may impinge on both a region and a club's capacity to operate a self-sustaining business model.

5.19.1.1. The capacity of SNZ to make unlimited financial (Section 8.5.k) and resource (meet and report on KPI's, etc) imposts on members, clubs, and regions does mean that in some cases (and Auckland will be no exception) our entire business model will be subject to review for sustainability. That review will not be possible until various SNZ planning process' (including funding, competition and others) are understood.

5.19.1.2. Many regions operate on an amateur basis and this may prove to be the only way all regions can function in the future. We are concerned about the demands on volunteer resource expected under provisions such as Section 8.5(m) and Section 9.5(a) - (e).

5.19.2. Section 8.6(d). How, if a region, under the Proposed Draft Constitution, has no members other than clubs, can it impose regional amounts on the members in its region?

5.19.2.1. It would have no primary or contractual relationship with members and so the only way collection would be enforceable would be if the amounts were imposed on the member clubs.

5.19.2.2. Further and better particulars are required.

5.19.3. Section 8.2. If in Auckland's case it were to agree a change of boundary with its neighbours it could not do so within this rule, given that under the Proposed Draft Constitution new boundaries must be defined by local territorial authorities.

5.19.3.1. The Auckland Territorial Authority is the entire area encompassing all 21 local board areas. Therefore Auckland (and presumably Counties Manukau) must retain their existing boundaries without change as there is no territorial authority which relates to either the current boundary or to any conceivable combination of how Auckland and Counties might adjust their boundaries in the future.

5.19.3.2. Even amalgamation would not succeed because the new boundaries created via amalgamation still would not align with the territorial authority boundary.

The logo for Swimming AUCKLAND features a stylized blue wave graphic above the word "Swimming" in a large, bold, blue sans-serif font. Below "Swimming" is the word "AUCKLAND" in a smaller, blue, all-caps sans-serif font.

Swimming
AUCKLAND

CONCLUSION

We appreciate as well as you that the preparation of a robust Constitution which meets the needs of a complex sport is a challenging task. Because the Constitution is so fundamental, it is our opinion that it is very important to 'get it right' even if it takes a bit more time to go through a good consultation process.

Given that the new Constitution will be the core document, as opposed to the '21 recommendations', that will govern the relationships of the sport for generations to come, it is vital that the time is taken to ensure that the document is refined to properly reflect the intentions of the Review findings and the key positions of all key parties to the sport. When disputes arise in the future, they will be resolved by reference to the adopted Constitution – not by reference to what the recommendations of the Working Group were, nor what the intentions may have been at the time.

In our opinion, it is unfortunate that a document clearly intended as a draft has now been placed before us as a final form document for adoption. It is also unfortunate that other complementary documents (like the Regional Constitutions) are not available for consideration because they have to be evaluated side-by-side. We wish to re-emphasise that, in our opinion, it would be imprudent for those with stewardship responsibilities to repeal existing multi-level structures without a clear understanding of all elements of their replacement.

We would really appreciate your careful attention to the matters we have raised, and would be more than pleased to have a discussion with you to help clarify details.

On behalf of

Board of Swimming Auckland