

Guide to Establishing Non-Profit Organisations in Australia

David Ford and Matthew van Arkel

Emil Ford Lawyers

February 2017

GUIDE TO ESTABLISHING NON-PROFIT ORGANISATIONS IN AUSTRALIA

In Australia, non-profit organisations (whether charities or not) are normally established in one of three ways: companies, trusts and incorporated associations. However, incorporated associations are specifically for organisations that are going to operate just within one of the Australian states. Therefore, in practice, non-profit organisations seeking to establish in Australia should think of starting as a company or as a trust.

COMPANIES

- ◆ Nature of the organisation: A company is a relatively complex form of organisation bound by many rules. Non-profit organisations have to be companies limited by guarantee. A company has an existence independent of its members and so can sue and be sued and enter into contracts.
- ◆ Governing law: Companies and their activities are directly regulated by the Australian *Corporations Act* and by the Australian Securities and Investments Commission (ASIC) (www.asic.gov.au). The Act controls most aspects of a company's formation, business and winding up. Charities that have incorporated as companies are also regulated by the Australian Charities and Not-for-profits Commission (ACNC) (www.acnc.gov.au) and its namesake Act.
- ◆ Establishment procedure: The act of establishing a company is called incorporation. The incorporation procedure involves preparing a Constitution and lodging an application with ASIC. Charities that have incorporated as companies may also register their status with the ACNC.
- ◆ Continuity of existence: Companies are legal entities in their own right and do not depend on the continuing existence of members. Therefore, the death or retirement of a member will not terminate the company and may not even require any reorganisation of the company's operations.
- ◆ Limitation of liability: For a company limited by guarantee, a member's liability is limited to a set amount and is payable if the company is wound up and the assets are insufficient to pay out the liabilities.
- ◆ Control: Control of a company generally lies with its board of directors. Membership does not give the member any ownership interest in the company's assets or any say in the direction of the company. The precise nature of the control is limited by the *Corporations Act*, the company's constitution, and, for those companies registered as charities, the *ACNC Act*.
- ◆ Formalities: There are a number of formalities involved in setting up, running and winding up a company. Australian companies must have at least two directors resident in Australia. They must also have a secretary resident in Australia. Companies must also comply with requirements as to meetings, filing of returns and keeping company registers.
- ◆ Admitting participants: A new participant may be admitted quite simply by becoming a member of the company.
- ◆ Tax implications: The company is a separate legal entity from its members. Generally, a charitable non-profit organisation is exempt from tax on its income. In some cases, gifts to the organisation may be deductible to the donor. For example, overseas aid funds can attract tax deductible gifts. More information can be found at <https://www.ato.gov.au/Non-profit/Getting-started/In-detail/Types-of-DGRs/Overseas-aid-funds/>. The organisation may also be entitled to other exemptions under Australian and State tax laws.

Some advantages of a company are:

- ◆ Companies have perpetual succession (until wound up or dissolved) – that is, their continued existence is not affected by the death or withdrawal of members.
- ◆ Members generally have limited liability and are not liable for the debts of the company beyond the amount of their guarantee.
- ◆ The corporate structure affords considerable flexibility in the organisation, management and financing of the company.
- ◆ Membership and management of companies can be separated with control given to directors.
- ◆ The directors may be the only members or may be elected by a large group of members.
- ◆ As the company is a separate legal entity, there is no need to have trustees to hold property.

However, there are some disadvantages of using the corporate structure, particularly when the organisation is relatively small and unsophisticated:

- ◆ The corporate structure is a little more complex to form and to maintain in existence in terms of legal and accountancy work and administration.
- ◆ As some of the company's financial information must be filed in publicly available registers, there is less privacy regarding its financial affairs than for trusts.
- ◆ Members may not have very effective involvement or control over decision-making or management.

TRUSTS

- ◆ Nature of the organisation: the trust is a complex form of organisation. There are a number of forms a trust may take.
- ◆ Governing law: each Australian State has a *Trustee Act*, but much of the law relating to trusts is the law developed by the courts over many years.
- ◆ Establishment procedure: establishment is not necessarily complex but is technical: a trust deed must be drawn up and a trustee (preferably, a company) appointed.
- ◆ Continuity of existence: the trust has an independent existence, so the death of an individual trustee is not a serious problem (although there is some paper work to be done to appoint a new trustee).
- ◆ Limitation of liability: a trustee is usually liable for actions taken and debts incurred as trustee. A creditor's right to recover his or her debt from the trust property itself is limited.
- ◆ Control of the organisation: the trustee has control over the trust but must fulfil its obligations under the trust deed to carry out the purposes of the trust.
- ◆ Formalities: a trust generally involves fewer formalities than running a company.
- ◆ Ending the trust: it is a relatively simple matter to wind up a trust. The trust deed must specify that the assets of the trust are to go to a similar organisation on winding up.
- ◆ Tax implications: the comments on taxation made in relation to Companies are also applicable to trusts. However, tax deductibility is normally only given to companies.

Some advantages of a trust are:

- ◆ Privacy, as there are no statutory requirements for accounts to be prepared or published. However, if the trustee intends to approach the public for donations, there are statutory requirements such as registration and preparation, auditing and filing of accounts.
- ◆ Control is concentrated in the hands of the trustee.

However, there are disadvantages of having a trust, particularly when there is a corporate trustee. These disadvantages are basically the same as those for a company as having a corporate trustee involves the same costs and complexities.

Emil Ford Lawyers
February 2017