

An Endorsement as Building Fund or Library Fund

Endorsement of a Building or Library Fund means that tax deductible receipts may be issued for donations. The ATO has commenced their compliance program in this area. It is important to reflect on the principles underpinning endorsement. Both types of Funds must demonstrate compliance with the requirements of a 'public fund' for the purposes of the gift provisions of the Income Tax Assessment Act of 1997 which are set out fully in ***Taxation Ruling TR 95/27***.

Your Constitution

- The objects of the fund must be clearly set out and reflect the purpose of the fund
- The fund must have an acceptable dissolution clause which provides that, on winding-up, any surplus assets must be transferred to some other gift deductible fund.

Your Operation of the Fund

- The "Public" which means the general public population or a "significant part" of it (e.g. all members of Churches of Christ in Western Australia) must actually contribute to the fund and be invited to do so.
- The fund should be administered or controlled by "responsible" persons. This includes Church authorities, school principals, judges, clergy, solicitors, doctors and other professional people, mayors, councillors, town clerks and members of parliament
- Funds must not be paid to the trustees of the fund except as reimbursement for bona fide out-of-pocket expenses
- Funds must only be used for the acquisition, construction or maintenance of the Building or the Library.

Gifts received & Receipts issued

- Gifts to the fund must be kept separate through a separate bank account and clear accounting procedures
- Gifts must be voluntary and not associated with any material benefit to the donor.
- Receipts for gifts must state the name of the fund to which the gift has been made, the ABN of the fund (if the fund itself has been endorsed) or, if an entity is endorsed for the operation of a fund, the ABN of that entity, and the fact that the receipt is for a gift. The receipt should also identify that the gift is a tax deductible gift under the appropriate section of the Income Tax Assessment Act of 1997 - For a Building Fund section 30-25 item 2.1.10 of the ITAA 1997 - For a Library Fund section 30-25 item 12.1.2 of the ITAA 1997.

Look at ***Taxation ruling TR 2000/10 Income tax: public libraries, public museums and public art galleries*** to see whether or not your Library and its Fund are still covered.

Look at ***Taxation Ruling TR 96/8 Income tax: school and college building funds*** .

To examine these rulings go to www.ato.gov.au choose "Rulings & Law" then "Public Rulings", then "Taxation". Please contact our office for **assistance** to examine whether or not your Building or Library fund has been compliant with these rulings.



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NEWSLETTER

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INCORPORATED ASSOCIATION -V- COMPANY

What is the most appropriate structure?

Within Western Australia by far the majority of not-for-profit entities are incorporated under the Associations Incorporation Act of WA. This Act provides a simple, effective and economic form of incorporation.

Incorporation is necessary to allow an entity to enter into contracts and own property as a legal body separate from its members. Incorporation also allows the entity to continue to exist beyond the life span of individuals. Some entities are unincorporated. This means that individuals who act on behalf of the entity may become personally liable for its debts. Incorporation provides a measure of protection for members. Other entities may be a part of a larger incorporated organisation, for example the welfare agency of a Church may be unincorporated but the Church is incorporated. As such it would normally have the benefit of the 'parent' structure.

We are aware that there have been a number of religious and charitable not-for-profit entities that have responded to advice to become Companies Limited by Guarantee. The advice received was apparently suggesting that this was a more appropriate structure than an Incorporated Association. It seems relevant to provide some comments on the differences in the structures to broaden understanding.

A Company Limited by Guarantee is a company incorporated under the Commonwealth Corporations Act 2001. It is a structure specifically created in that Act for not-for-profit entities. It cannot be used for “for profit” entities. The original members/subscribers are required to guarantee to pay a sum of money (normally quite modest) in the event of the winding up/insolvency of the company.

Under the Corporations Act a Company Limited by Guarantee is classified as a public company. (This is not the same as a public listed company which refers to a company listed on the Stock Exchange). Where a company is a “public” company the full weight of the Corporations Act and Australian Accounting Standards apply. As a consequence the reporting, accounting and auditing obligations are substantial – there are no exemptions available for small entities. Also the Australian Securities and Investments Commission (ASIC) require filing with them, normally within 28 days, notices regarding changes in office bearers including their private residential address changes and a range of other matters. Failure to comply with ASIC rules imposes late lodgement penalties. As a consequence the compliance obligations are significant. The officers of the entity are often unfamiliar with these rules and as a consequence late lodgement penalties often occur. For these practical reasons smaller not-for-profit entities would be well advised to obtain careful advice relating to their own special circumstances before selecting such a structure.

Having said that the Company Limited by Guarantee is in many circumstances the most appropriate structure. This is particularly the case where there are branches in more than one State of Australia or where there is significant “trading” activity across State boundaries. This is because it is a Commonwealth law. State incorporated associations have some complications in such circumstances. Also there are instances where a very large not-for-profit entity may find this is the most appropriate structure for other reasons related to the individual entity.

The establishment cost of the Company Limited by Guarantee, including Government Charges and professional advice would normally be in excess of \$2,000. There are also ongoing annual charges that do not apply to an association.

An association incorporated under the WA Act is by contrast a very simple structure. The 1987 Act imposes very few obligations in relation to compliance. There is no current requirement regarding notification of office bearers, registered office, etc. For some not-for-profit charities there are obligations under the Charitable Collections Act, which is a different matter. The Charitable Collections Act requires charities raising money from the public via direct appeal (other than approaches to its own members) to be registered. The registration under that Act requires also the filing of annual accounts and details of office bearers annually. The Incorporated Association in WA is therefore very much in contrast with the Company Limited by Guarantee. Subject to its Constitution for small incorporated associations there would be available exemptions from many of the Australian Accounting Standards on the grounds that they are Non-Reporting Entities. The issue becomes one of judgement by its Board and the extent to which there are external creditors needing financial information regarding the Association.

It is significant to note that many of the largest not-for-profit charitable and benevolent entities in Western Australia are incorporated under the Associations Incorporations Act.

While a Proprietary Limited Company can, in theory, be identified as a not-for-profit entity it is a very unusual procedure to follow. It would be our strong recommendation that either the Incorporated Association or Company Limited by Guarantee structure be utilised in preference to such a structure. While technically it is possible for such an entity to obtain ITEC endorsement in practice this is highly unlikely.

A choice to incorporate as a Company Limited by Guarantee is a choice to embrace the full obligations of the Corporations Act and all of the Australian Accounting Standards. This is a greater level of accountability to the public and bears a significant increase in compliance costs.

In NSW, if the income of an entity is likely to exceed \$500,000, the Department of Fair Trading may refuse an application to incorporate as an Association. In WA the Associations Incorporations Act does not have a limit on size of an entity.

We can provide advice in relation to any of these matters in the event of need.

ITEC ENDORSEMENT

We are becoming increasingly concerned about the ATO approach to ITEC endorsement. It is very evident now that Associations with very small memberships are being carefully scrutinised by ATO now. Where the small membership entity also has a committee/board with multiple family members on it the ITEC status of the organisation will, we believe, be in significant question.

The recent advice by ATO of new rules regarding ITEC endorsement relates to this issue. We have sought to give it some publicity in the seminars we ran in May/June and we re-emphasise the matter now. Add-Ministry have arranged, in conjunction with WA Council of Social Services, for some further seminars on this subject to be conducted. The first of these will be held on Friday, 1 October 2004. Full information is available on the WACOSS website at www.wacoss.org.au or by contacting WACOSS by email on info@wacoss.org.au or by phone on 9420 7222. Non members of WACOSS are eligible to attend.

GST CHANGES

The forthcoming Federal election means that Bills currently before Parliament lapse. As a consequence the proposed changes for annual BAS for small ITEC's and some other matters will not proceed.

SCHOOL BUILDING FUNDS

In August the ATO advised they will be reviewing School Building Funds and Public Library Funds as a part of their compliance reviews. Selected schools can expect to receive a letter from ATO shortly. The review will focus on Deductible Gift Recipient compliance and the tax deductibility of donations.