

LEGAL STRUCTURES AND THEIR ROLE IN CHURCH LIFE.

The purpose of this paper is to comment briefly on alternative types of legal structures but with detailed comments about incorporated associations in WA; - as this is the most common form of incorporation in this State.

The options available for a not-for-profit organisation include: -

1. An unincorporated association;
2. An incorporated association under State legislation;
3. A co-operative company under State legislation;
4. A company limited by guarantee under the Corporations Act (national);
5. A special purpose non-profit company under the Corporations Act (national);
6. A Private Act of Parliament; and
7. A charitable trust.

1. An unincorporated association:-

This may also be described as a society, a club, or in some other way. Such a structure provides no legal protection to its leadership, or in extreme situations, to its members. The secretary of such an organisation is particularly at risk of incurring some personal liability in the event of an unpaid debt or an accident imposing loss on its members. Such risk can be insured against, but insurance may not cover all areas of risk. This type of structure is not recommended because of the lack of legal protection and often because it has inadequate formal rules.

Some Protestant denominations have many of their member churches operating under this loose structure. In such circumstances, if real estate is owned, it is most commonly held by the denomination in trust for the local unincorporated church.

To be recognised by ATO as an endorsed Tax Concession Charity (TCC) the unincorporated entity would need to have a formal constitution which meets the non-profit and charitable requirements. There are also difficulties in opening a new bank account under current banking obligations unless there is some formal set of rules of constitution in place.

2. Incorporated Association:

Many, but not all, Protestant denominations in WA are incorporated associations under the Associations Incorporations Act 1987 (WA). However some denominations have a different corporate structure. This may be due to their theological view of the Church, or because of ancient custom. The most common situation in those instances is that the denomination has the

corporate structure and the final position regarding property obligations and rights rests with the denomination.

The Associations Incorporations Act provides protection from personal liability for the leadership and membership except in circumstances where a person has acted negligently or deliberately, in which case the individual will have made themselves personally liable in respect to that specific matter. The current requirements under the WA legislation ensures that the organisation has an appropriate "not-for-profit" clause in its constitutional document. If it was incorporated under the earlier 1895 Act, which was much looser, there are known instances where such a provision does not exist. Without it, eligibility as an endorsed charity with ATO is not possible.

Operating as an incorporated association has the benefits of simplicity and economy. Normally the constitution is a relatively simple document that most people can follow. Also the current Act is a short Act with minimal obligations. Dept. of Commerce has advised that they expect substantial amendments to the 1987 Act to be introduced in this current Autumn session of Parliament. It is anticipated the amendments will become law late in 2011. The amendments will, we understand, impose a number of additional obligations; however the legislation will still be far simpler than the provisions of the Corporations Act (national).

It should be noted that in Western Australia the Associations Incorporations Act has been the accepted route for a wide range of non-profit entities ranging from a tiny charity or church with no paid personnel and a revenue base of lower than \$10,000 per annum to the very large organisations such as the Royal Automobile Club of WA Inc., St John Ambulance Australia (Western Australia) Inc., St John of God Hospital, Subiaco Inc., and other organisations employing many thousands of workers.

There is a legal restriction regarding operating across State boundaries. This is because it is difficult for entities in other States to identify details of the entity and who controls it. An Australian Registered Body number (ARBN) is needed to resolve this issue.

3. Co-operative Company:

Throughout Australia there are legislative provisions established under State laws for the operation of co-operative companies. The most common form utilised by the co-operatives is not for a not-for-profit purpose but to represent the best interest of its members in respect to a particular industry, while at the same time normally providing profits to its members. There are some isolated exceptions to these provisions. It is not a structure that would normally be beneficial to a charity or church.

4. Company Limited by Guarantee:

This structure established under the Corporations Act (national) is the most common structure used for not-for-profit entities where they operate across State boundaries. In most States other than Western Australia there are also legal requirements, or strong administrative pressure from Government for larger not-for-profit entities to be established as companies limited by guarantee. When the upgraded WA Associations Incorporations Act is introduced, it is our current understanding that such administrative or legislative pressure will not be introduced in this State.

The term “limited by guarantee” means that if the company is wound up, and it is in debt, the liability of members is guaranteed not to exceed a nominal amount – normally between \$20 and \$100.

Directors of a company limited by guarantee will be subject to all of the duties and obligations set out in the Corporations Act 2001 for directors. More information about the obligations of being a director is available on the Australian Securities and Investments Commission (ASIC) website. Key features are: -

- It can trade or operate throughout Australia;
- The liability of members is limited;
- There is a cost in establishing the company;
- There are substantial ongoing reporting and administrative requirements;
- Audit is obligatory for companies with revenue above \$1m. Revenue above \$250,000 and below \$1m may opt for a “review”, and may not need a Registered Company Auditor. For small companies with revenue below \$250,000 there is major relief. In each situation conditions apply and constitutional changes are needed.

5. Special Purpose Non-Profit Company:

This is a relatively new provision under the national Corporations Act to provide an alternative to a Company Limited by Guarantee. It has most of the Corporations Act obligations identically with a Company Limited by Guarantee but there is some easing of regulatory obligations: -

- Audit is optional – the members decide. This is similar to the WA Incorporated Associations situation;
- There is greater flexibility in the reporting obligations under Australian Accounting Standards;
- Its annual accounts do not have to be filed with ASIC.

When the members of this type of corporate structure choose the accounts to be audited annually, this type of structure offers only minor benefits as against the Company Limited by Guarantee.

6. Private Act of Parliament:

A Private Act of Parliament has been used for the corporate structure of some of the older charitable and religious institutions in our country. Prior to the introduction of Companies Acts or Associations Incorporations legislation in the various States, it was the only reliable option to provide for perpetual succession and the holding or having title to property. It has also been a facility for providing the entity thus created with the legal authority to create its own internal Acts or regulations. An example of this is the Anglican Church of Australia (Diocesan Trustees) Act of 1888 and the Anglican Church of Australia Diocesan Trustees and Land Act of 1980. The Universities in WA such as University of WA and Murdoch University are also established under such a structure. I understand the Senates of the universities can pass laws in relation to their internal matters which have similar legal standing to an Act of Parliament of WA.

7. Charitable Trusts:

The original and ancient method of divesting property for family protection or for charity was through a trust. In ancient times the trustee would be a natural person or group of persons. Today the trustee is most commonly a corporate structure.

A trust that has a charitable Object or Purpose is a structure that is often used where one of the corporate structures is seen to be unsuitable. This is sometimes because of a requirement in Income Tax Law. A trust provides wider flexibility in respect to the application of the income and assets of the trust. This is because an association or a company are bound under their Objects to apply their financial resources solely or predominantly in accordance with its Objects. The decision by such an organisation to transfer a substantial part of its annual income to another organisation, even an organisation with somewhat similar Objects, would be ultra vires – “beyond its power”.

A charitable trust is often used as a fund-raising foundation to provide for the financial needs of organisations outside of the charitable trust itself. You would find if you were to explore the Australian Business Register industriously, that a number of well-known charities have a related foundation bearing a very similar name with the word “Foundation” added. In most instances you would find the foundation is structured as a charitable trust. However a charitable trust has many possible purposes beyond fund-raising support for a specific charity. Many are established as discretionary trusts so that they can distribute their income, at the discretion of its Board, to a selected group of charities that have Tax Concession Charity endorsement with ATO.

An example of this is a special type of trust established under Tax Law known as an Ancillary Fund. An Ancillary Fund has Deductible Gift Recipient status.

It can only distribute its income to other DGRs. It is a very useful planning tool for larger churches and charities. A large church, with a number of DGR funds, can encourage its members to support the ancillary fund with their donations when seeking a tax deduction. The church leadership can then determine the proportion of income to be allocated to the individual DGR funds in accordance with their priorities.

Where a trust is established it needs a trustee to administer it. The trustee could be a small group of experienced and trusted persons. However the most common structure for the trustee is an association because of the perpetual succession issue – there is no need to change title deeds, bank accounts, or shareholdings into new names whenever there is a change of trustee in such a situation.

Australian Registered Body Number: - The Australian Registered Body Number (ARBN) is a provision under the National Corporations Act that has some similar characteristics to the Business Names Act in this State. Its purpose is to enable an organisation that is incorporated under State law to operate across State boundaries, without needing to become a company under the Corporations Act. This is because it is illegal for an association to carry on activities in more than one State on a continuing basis without registering with ASIC under the Corporations Act. The purpose is identification. If you operate in this State as an incorporated association, or under the Business Names Act provisions, the names of the parties in control of the association or the business name can be located on a public record. If, however, you are operating in another State without an ARBN, your identity is hidden from people wishing to do business with you.

Charitable Collections Licence: - In Western Australia, if a charitable organisation wishes to raise money from the public, as opposed to from its own immediate circle of members, it is required to have a Licence from Dept. of Commerce, known as a Charitable Collections Licence. In other States, this is commonly called a Fund-Raising Licence. The provisions in law vary between States. In WA the Licence imposes on the holders the obligation to have an annual audit. The audit normally needs to be carried out by a member of a recognised accountancy body. In most other States, a fund-raising licence itself does not impose an audit obligation, but the Associations Incorporations laws in those States will, except with the smallest organisations, impose audit as an obligation.

National fund-raising laws will soon replace State obligations, but details are not yet available.

Australian Accounting Standards: - In Australia the national Government have established an Accounting Standards Board (AASB) and an Auditing and Assurance Standards Board (AUASB) to regulate the preparation and auditing of the accounts of all entities. The Financial Reporting Council appointed by the Federal Treasurer oversees the work of these two organisations and guides the development of policy. The Auditing Standards

Board develops auditing standards in conjunction with international bodies. These organisations would have little interest to most church treasurers. However the Standards produced by the two Australian bodies are obligatory Standards on members of a recognised accounting body. More and more the regulations from these Boards are creating a legislative minefield for small charities and churches.

Currently there are concessions available in the preparation of financial reports under what are called "Special Purpose Financial Reports". These Special Purpose Reports give smaller entities the option of reduced disclosures in their accounts. As a result, the onerous obligations of public companies can be avoided. However there is currently serious debate with the AASB, which is likely to remove this concession and replace it with an alternative which is not as user friendly.

Noel Harding

Add-Ministry Inc.

March 2011