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Types of Legal Entities

There are numerous types of legal entities which are capable of entering into legal transactions and running a business.

The most appropriate entity to adopt will depend on each set of circumstances. Relevant considerations include whether the entity's purpose is commercial or "not for profit", the number of stakeholders, the type of business the entity is engaged in, the entity's goals and purpose, registration and set-up fees and ongoing costs, compliance obligations, as well as tax and asset protection considerations.

Different types of legal entities are capable of signing contracts, entering into leases, buying and selling property and other assets and engaging employees. They can also sue and be sued.

Basic outlines of some types of legal entities are outlined below. Before entering into any new business or community venture or acquiring any major asset, we recommend that you obtain qualified advice regarding the most appropriate legal entity to use for the transaction. It is important to have the right structure from the outset to avoid unnecessary costs and complications.

Sole Trader

A Sole Trader is a person who owns and operates a business. A Sole Trader is solely entitled to the profits and responsible for the liabilities of a business. Set-up and compliance costs are typically lowest for a Sole Trader, however many of the asset protection and taxation benefits available to other legal entities are not available to Sole Traders.

Private Company Limited by Shares (Pty Ltd)

A Private Company Limited by Shares is the most common form of Company in Australia. It has the words "Pty Limited" or "Pty Ltd" at the end of its name. A Private Company Limited by Shares is governed by the Corporations Act 2001 (Cth) and the Company's Constitution. A Pty Ltd Company can have up to 50 shareholders. The Company must have at least one director, who makes decisions on behalf of the Company. The shareholders in the Company elect the directors. The Company's profits are paid to shareholders in proportion to the value of their shares in the Company. The liability of a shareholder in a Pty Ltd Company is limited to the value of the shares in the Company owned by that shareholder. Shares can be bought and sold privately. The Company must be registered with ASIC (the Australian Securities and Investments Commission). Annual fees are payable to ASIC to maintain registration. This type of entity is commonly used for small businesses which are run on a "for profit" basis.

Public Company Limited by Guarantee

A Public Company Limited by Guarantee has the word "Limited" or "Ltd" at the end of its name. A Public Company Limited by Guarantee is governed by the Corporations Act and the Company's Constitution. A Public Company Limited by Guarantee must have at least three directors and a secretary, and at least one member. A Public Company Limited by Guarantee is commonly used for charitable or "not for profit" organisations.

The members of the company guarantee the debts of the Company up to a stated amount (which is normally a nominal sum). Public Companies Limited by Guarantee and are registered with ASIC. Public Companies Limited by Guarantee can operate nationwide, unlike Incorporated Associations, which must be registered in the state or territory in which they operate.

Public Company Limited by Shares

A Public Company Limited by Shares has the word "Limited" or "Ltd" at the end of its name. A Public Company Limited by Shares is publicly listed and shares may be bought and sold in the public domain on the Australian Stock Exchange (ASX). A board of at least three directors is elected by the Company's shareholders. The number of shareholders permitted in a Public Company is unlimited. The Company's profits are paid to shareholders in proportion to the value of their shares in the Company. The liability of shareholders in a Public Company Limited by Shares is limited to the value of that shareholder's shares in the Company. Public Companies are registered with ASIC and have extensive audit and public reporting obligations. This type of Company is used for large trading corporations.

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Business Law
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Incorporated Association

In Queensland, Incorporated Associations are registered with the Office of Fair Trading under the Associations Incorporation Act 1981 (Qld). An Incorporated Association has the word "Incorporated" or "Inc" at the end of its name. An Incorporated Association must have a president, secretary and treasurer, who are elected by the company's members. An Incorporated Association may also have an elected management committee. Generally, Incorporated Associations have lower registration fees and fewer compliance obligations than companies registered with ASIC. Incorporated Associations are commonly used by community groups and not-for-profit organisations.

Aboriginal and Torres Strait Islander Corporation (ATSI Corporation)

Each ATSI Corporation must have a majority of members who are Indigenous. An ATSI Corporation is registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) and has a Rule Book. ATSI Corporations are administered by ORIC (the Office of the Registrar of Indigenous Corporations). Each ATSI Corporation has a board of directors who are elected by the Corporation's members. The members of the Corporation can choose not to be liable for the debts of the Corporation. Registration is free for ATSI Corporations registered with ORIC, unlike companies registered with ASIC. ORIC takes a more facilitative role than ASIC and can give assistance to ATSI Corporations with corporate governance issues. ATSI Corporations may operate nationwide. Profits can be paid to members if allowed in the Corporation's Rule Book.

Partnership

A Partnership is an association of two or more individuals or entities owning and controlling a business together. Members in a partnership share in the Partnership's profits and liabilities in proportion to their share in the partnership. As with a Sole Trader, each Partner is personally liable for the Partnership's debts. Each partner pays tax on their share in the net partnership income received whereas the Partnership does not pay tax on income of the Partnership. A partnership is not a separate legal entity.

Discretionary Trust

The trustee/s of a Discretionary Trust (which may be a company or individual/s) owns assets on trust for the beneficiaries of the Trust. The trustee has the power to make decisions regarding the Trust. The principal or appointor of a Discretionary Trust has the power to remove and appoint the trustee.The beneficiaries of a Discretionary Trust are usually members of the same family, and related corporate entities.The trustee has the discretion as to which beneficiary to whom the profits and capital of the Discretionary Trust are to be paid. Discretionary Trusts are useful for asset protection purposes, as no beneficiary "owns" the assets or income of the Trust.

Each beneficiary is merely a member of a class of beneficiaries who may or may not receive a benefit from the Trust, depending on the Trustee's discretion. Discretionary Trusts can also be useful for taxation purposes, as the trustee may elect to pay the profits of the Trust to beneficiaries who are in lower tax brackets. A Discretionary Trust (commonly known as a family trust) gives flexibility in the distribution of profits and property, and is common in small business ownership and for family investments where the stakeholders are related to each other.

Unit Trust

As with a Discretionary Trust, the trustee of a Unit Trust (which may be a company or individual) owns assets on trust for the beneficiaries of the Trust and has the power to make decisions regarding the Trust. The beneficiaries of a Unit Trust own "units" in the Trust. The beneficiaries are entitled to the profits and capital of the Trust in proportion to the number of units that they own. The trustee of a Unit Trust has no discretion as to the amount to be paid to each beneficiary. A Discretionary Trust is common in joint ventures and property ownership, where the financial affairs of the stakeholders are separate from each other. There is certainty as to the entitlement of each beneficiary from a Unit Trust, unlike a Discretionary Trust.

Superannuation Trusts

All Superannuation Funds are operated as trusts. The trustee typically has some discretion as to how the funds are invested and the selection of beneficiaries upon the death of members, however Superannuation Trusts are tightly controlled by legislation. Superannuation Trusts may provide taxation and pension benefits and can be useful in retirement and estate planning.

Please contact us for expert advice on business structuring and legal entities.

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