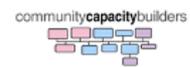


Social Enterprise Legal Structures

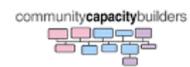


In this lecture we are going to look at social enterprise legal structures.
In Australia there are diverse legal forms for starting a social enterprise – they can be for-profit, not-for-profit, or even a hybrid of both.

Organisational Theory

- “structure follows strategy”

Chandler, 1962

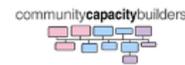


When considering how to structure a social enterprise, it is useful to remember the business principle “structure follows strategy” as the structure you choose should help you achieve the strategy you have developed in your business model canvas and your business plan.

Do you need to set up an organisation

- Options not requiring setting up an organisation
 - Run the enterprise out of your existing organisation
 - Continue unincorporated
 - Join another organisation
 - Auspicing

Justice Connect, 2017



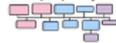
Before considering the diversity of legal forms for setting up a social enterprise to achieve your strategy, it is worthwhile to firstly consider ways you can operate that do not require setting up an organisation.

- You might be able to run the enterprise out of your existing organisation: if you are an existing organisation that is seeking to set up a new social enterprise as part of your organisation, you could operate a business from within that existing structure.
- You could continue unincorporated: If you are a start-up, it may be possible to undertake your activities without incorporating. But incorporation gives you benefits such as limited liability and the ability for the organisation to enter into agreements in its own name.
- You could join another organisation: Is there an existing organisation whose purposes and aims are consistent with yours? It might be worthwhile seeing if you can join them rather than having to start an organisation from scratch.
- Finally there is auspicing: you could approach a not-for-profit organisation to see if they are willing to auspice your initiative. This usually involves setting up an auspicing agreement between your group and the auspicing body.

Choosing between Not-for-profit & For-profit

Question	Relevance
Where will your funding come from?	Donations and philanthropic funding can generally only be directed to not-for-profits. For-profit entities can seek investors to raise funds. Similarly, not-for-profits can also seek investors to raise funds through impact investment but this can be more complex, and often results in debt.
Where do you want profits to go?	A fundamental characteristic of not-for-profit organisations is that profits are not distributed outside of the organisation - which means no dividends or distributions can be made, and <i>all</i> profits are directed to achieving the organisation's mission. In a for-profit organisation, profits are often distributed to shareholders/investors. In a for-profit social enterprise, profits are normally partially distributed to investors and partially reinvested into the organisation.
Is it important for your enterprise to be perceived as not-for-profit?	Public perception may inform your choice of structure.
Do you want investors/owners or members?	Some structures have investors and/or owners, some have members; these are not the same.
Does your organisation hope to access charitable and other tax concessions?	Only not-for-profits can access the majority of the tax concessions available, and only not-for-profits can be charities.

Justice Connect, 2017

communitycapacitybuilders


There are a number of factors that influence whether social enterprises set up as a not-for-profit or for-profit.

One factor is where will your funding come from? Generally it is only not-for-profits that can access donations and philanthropic funding. For-profits generally find it easier to seek investors to raise funds.

Another factor is where do you want your profits to go? Not-for-profit organisations cannot distribute profits outside of the organisation and all profits need to be directed to achieving the organisation's mission. For-profit organisations can distribute profits to shareholders/investors.

You should consider if it is important for your enterprise to be perceived as not-for-profit? Some people only like dealing with not-for-profit social enterprises.

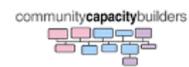
Another factor is if you want your social enterprise to have investors/owners or members? For profit is better suited to investors and owners, and not-for-profit is better suited to members.

Finally, does your organisation hope to access charitable and other tax concessions? Only not-for-profits can access the majority of the tax concessions available, and only not-for-profits can be charities.

Hybrid Structures

- Where two or more entities are used to form the one social enterprise
- Used to harness the benefits of both for-profit and not-for-profit structures

Justice Connect, 2017



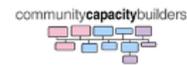
A hybrid structure is where two or more entities are used to form the one social enterprise. Hybrid structures are used to harness the benefits of both for-profit and not-for-profit structures.

For example, a social enterprise might want to have equity funding from investors so chooses a private company, but would like to access income tax exemptions for its charitable activities that it will be undertaking. Another need for a hybrid structure is if you want a not-for-profit structure, but have a project that you would like to attract investors for.

Not-for-profit Legal Structures

Structure	Benefits	Downsides
Incorporated associations	<ul style="list-style-type: none"> Less onerous reporting obligations Regulator takes 'educative' approach to enforcement Sometimes cheaper to set up 	<ul style="list-style-type: none"> Groups with less than 5 members cannot use this structure State-based structure makes it difficult to operate across different states
Companies limited by guarantee	<ul style="list-style-type: none"> National regulator In the case of charities, simpler reporting requirements as reporting is to the ACNC not ASIC 	<ul style="list-style-type: none"> Can be expensive to set up If not a charity, complex reporting requirements to a strict regulator (ASIC)
Non-distributing co-operatives	<ul style="list-style-type: none"> For organisations passionate about co-operative principles, the structure enshrines co-operative principles. 	<ul style="list-style-type: none"> Fewer co-operatives in Australia and fewer professionals with co-operatives expertise Co-operative principles and associated obligations will not suit all social enterprises
Indigenous corporations	<ul style="list-style-type: none"> Takes into account Aboriginal and Torres Strait Islander customs and traditions 	<ul style="list-style-type: none"> Excludes non-Indigenous groups

Justice Connect, 2017



Common legal structures that are used by not-for-profit social enterprises in Australia include:

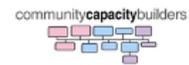
- Incorporated associations
- Companies limited by guarantee
- Non-distributing cooperatives, and
- Indigenous corporations

As shown in this table, there are benefits and limitations to each of those structures.

Model	Dominant legal structure(s)	Dominant economic activity
Meeting unmet consumer needs of excluded groups or locales	Cooperative Company limited by guarantee Company limited by shares Proprietary limited (Pty Ltd) company Incorporated association	Goods and services retail
Advancing charitable or community purpose	Legislation, royal charter or patents letter (charity) Company limited by guarantee Partnership Sole proprietorship	Goods and services retail
Creating opportunities for community participation	Incorporated association Unincorporated association	Goods and services trade between citizens
Providing work integration opportunities for disadvantaged groups	Company limited by guarantee Cooperative Pty Ltd company	Primary production Manufacturing Goods and services retail
Promoting ethical consumption through ethical production and supply	Cooperative Company limited by guarantee Company limited by shares Pty Ltd company	Primary production Secondary production Goods and services retail
Strengthening the social economy	Incorporated association Partnership Sole proprietorship Company limited by guarantee	Services retail
Social and environmental innovation	Incorporated association Company limited by guarantee Company limited by shares Pty Ltd company Incorporated association Cooperative Partnership Sole proprietorship	Primar

Table 1.
Social enterprise models, legal forms and economic activity

Barraket et al., 2017



As shown in this slide, common For-Profit legal structures for social enterprises include:
Sole proprietorship
Partnership, and
Proprietary Limited company.

References:

- Barraket, J., Douglas, H., Eversole, R., Mason, C., McNeill, J., & Morgan, B. (2017). Classifying social enterprise models in Australia. *Social Enterprise Journal*.
- Chandler, A. D. (1962). *Structure follows Strategy*. Chapters in the History of the industrial Enterprise, Cambridge Mass.
- Justice Connect (2017), *Social Enterprise Guide: Legal issues to consider when setting up a social enterprise*, Australia Not-for-profit Law Guide.