

Sharrock Pitman Legal

How to start a charity

A legal guide

Starting a charity can be confusing and daunting if you are unfamiliar with the process, particularly if you are unsure about the legal requirements. Our guide provides details of the various steps to consider when starting a charity, and what you need to know throughout this process.

JUNE 2021

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About this document

This guide is to help any person or group wanting to start a not-for-profit organisation or charity. Not every not-for-profit organisation is eligible to be registered as a charity. In this guide, we explain what requirements apply, and we provide a checklist of all the matters you'll need to think about when starting a charity, including available corporate structures, a full list of charitable sub-types and deductible gift recipient categories, together with information on establishing an ancillary fund (a charity giving fund or family foundation).

Disclaimer:

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Checklist for starting a charity

Setting up a not-for-profit or charity organisation can be a complex and rather daunting process.

We have compiled the following checklist of key matters that you will need to consider when setting up a charity.

✓ Purpose

It may sound basic, but one of the most important steps when establishing a charity is to clearly write down the purpose of the organisation. You will need to include the organisation's charitable purpose in its governing documents and in registration applications with government bodies.

✓ Members and management

Charities and not-for-profit organisations require both members and a management committee or board of directors. The management committee or board of directors are responsible for the governance of the organisation. The members are the group responsible for appointing and removing management committee members or directors, and are therefore the group that has ultimate control over the organisation.

You will need a membership base and must also decide who the founding committee members or directors of the organisation will be. Often the founding members and directors are the same people. Keep in mind that different legal structures require different numbers of founding members and directors.

✓ Legal Structure

As a charity, there are two main legal structures through which you could operate your organisation. Be aware that if you decide to incorporate your organisation, you will need to register with either [Consumer Affairs](#) (for an association that is incorporated in Victoria) or with [ASIC](#) (for a company limited by guarantee). Occasionally, and when required by legislation or the existing corporate structure, a charity will be established as a Charitable Trust or a separate Fund. We discuss these further in the following sections.

✓ ABN and GST registration

You will need to register for an Australian Business Number (**ABN**) and register GST for your organisation. You can register for each of these at the [Commonwealth Government's Business Registration Service](#).

✓ Constitution

Whether established as an incorporated association or a company limited by guarantee, your organisation will need a Constitution or Rules (depending on the type of organisation). This will need to specify the charitable purpose of the organisation.

To qualify as not-for-profit organisation, the Constitution or Rules must provide that the income and assets of the organisation cannot be distributed to the organisation's members. A charity's Constitution or Rules must also have all the required winding up and revocation clauses, and we recommend including a process for identifying conflicts of interest and, also, reference to the obligation to comply with the Australian Charities and Not-for-profits Commission (**ACNC**) Governance Standards.

✓ **ACNC registration & reporting**

If your not-for-profit organisation qualifies as a [charity](#), you will need to register it with the ACNC. Depending on its size, charities have ongoing reporting obligations to the ACNC, such as filing an annual financial statement or audited accounts and lodging the ACNC's Annual Information Statement.

✓ **Tax exemptions**

Not-for-profit organisations and charities are often exempt from paying taxes, including income tax. Many charities may also be fringe benefit tax exempt or eligible for a rebate. Different registrations are required for different tax concessions.

✓ **Fundraising**

You will need to consider how your organisation will raise funds. It may choose to raise funds by:

- > accepting donations
- > obtaining grants
- > charging membership fees, or
- > by conducting fundraising appeals.

There are currently different regulations in each State that govern fundraising activities such as [fundraising appeals](#), [raffles](#), and competitions, including under the *Fundraising Act 1998* (Vic) and the *Gambling Regulation Act 2003* (Vic). Fundraising may also be regulated by the Australian Consumer Code.

We recommend that you speak to Consumer Affairs Victoria, the Victorian Commission for Gambling and Liquor Regulation, or obtain legal advice prior to engaging in fundraising appeals, raffles or competitions.

✓ **Deductible gift recipient status for charities**

Some charities will be entitled to obtain [deductible gift recipient \(DGR\) status](#) for either some or all of their activities. This allows the organisation's donors to obtain a tax deduction for gifts of \$2 or more that they provide to the organisation. The eligibility criteria for DGR status are strict and not all charities will qualify to be DGR's. This will be discussed further in the next section, and we recommend obtaining legal advice prior to applying for DGR status.

✓ **Bank Accounts and Domain name registration**

Once your organisation has an ABN, you will be able to open a bank account and register an Australian .org.au domain name. You may also want to register other domain names, such as a .org domain name.

✓ **Employees and Employment agreements**

You will need to check whether your organisation's employees are covered by a Modern Award, and ensure that your organisation is complying with its obligations under the *Fair Work Act 2009* (Cth) including any relevant Modern Award and applicable state legislation.

We recommend preparing written [employment agreements](#) for use with your organisation's employees. A written employment agreement will document the terms on which your organisation engages its employees and protect your organisation's interests as the employer.

✓ **Superannuation & WorkCover insurance**

Your organisation will be required to pay superannuation and provide WorkCover insurance for its employees.

✓ **Protection of Intellectual Property**

If your organisation has a distinctive name, logo or brand, you may consider registering that name, logo or brand as a trademark in order to obtain exclusive property rights to that name, logo or brand.

✓ **Insurance**

Your organisation should obtain appropriate insurance to protect your organisation and its directors or management committee, members and volunteers. Insurance products you should consider include:

- > public liability,
- > product liability,
- > Directors and Office bearer's insurance (DOI),
- > management insurance, and
- > volunteers insurance.



Charity structure & charity sub-types

Corporate Structure

A charity should be structured in a particular way as a not-for-profit entity (**NFP**). We recommend that a NFP entity be established as either:

1. an **incorporated association** (usually operates only in the State of its incorporation; requires at least 5 members), or
2. a **public company limited by guarantee**, registered with the Australian Securities and Investments Commission (**ASIC**) (operates throughout Australia; requires at least 3 directors); or
3. occasionally, a charity may be established as a Trust or Fund. We would only recommend this structure when it is required by legislation or your existing corporate structure (e.g. a School, established as a company limited by guarantee, setting up a separate Scholarship Foundation as a charitable trust).

ACNC Charity Registration Requirements

There are a number of requirements to meet before an entity can be registered as a charity:

- > The entity is required to have an Australian Business Number (**ABN**).

- > In order to be registered as a charity, the entity must have a 'charitable purpose'.
- > Your charitable purpose must be reflected in both your governing documents (i.e. Constitution) and actual activities of the entity.
- > There are currently 12 charity sub-types that can reflect a charity's charitable purposes, as follows:
 1. advancing health
 2. advancing education
 3. advancing social or public welfare
 4. advancing religion
 5. advancing culture
 6. promoting reconciliation
 7. promoting and protecting human rights
 8. advancing the security or safety of Australia
 9. preventing or relieving the suffering of animals
 10. advancing the natural environment
 11. any other purpose beneficial to the general public, and
 12. advancing public debate.

- > In addition to these 12 specific charitable sub-types, a charity may also be:
 1. a health promotion charity, or
 2. a public benevolent institution (**PBI**).
- > Whether the entity would be registered as a charity is ultimately a decision for the ACNC.
- > The Constitution or Rules must meet all the legal and ACNC governance requirements in order to be registered as a NFP/charity, including having a NFP clause and appropriate winding up and revocation clauses.
- > A charity must also meet the ACNC's Governance Standards, including managing and disclosing conflicts of interest.
- > If your entity is also planning to operate overseas, it must seek to meet the ACNC's External Conduct Standards. This must be documented in writing.
- > We also recommend that you have a business/strategic plan and website created for the start-up entity prior to lodging the application for charity registration with the ACNC.

DGR Registration

A deductible gift recipient (**DGR**) is a type of charity that is able to receive tax deductible gifts and donations from donors. With DGR status, donors to your charity can receive a tax deduction for gifts of \$2 or more to the charity.

A charity (without DGR status) can be endorsed by the Australian Taxation Office (**ATO**) as income tax exempt, but will not be a tax deductible entity. Only a DGR can provide tax deductible receipts for donations it receives, and receive distributions from foundations that are registered as ancillary funds.

If you are seeking DGR status, then the entity must have a charitable purpose and activities that will qualify for this. Please note, only certain charitable sub-types provide 'gateways' to DGR status, and not all charities can qualify to be DGRs.

Public Benevolent Institution

A PBI can obtain DGR status (which allows for tax deductions for gifts to the entity), however a PBI must have **a main purpose** of providing benevolent relief.

The **basic** requirements of a DGR registered as a PBI are as follows:

- > a PBI is required to have a main purpose of providing benevolent relief to people in need,
- > according to the ACNC's Commissioner's Interpretation Statement 2016/03 at 5.1.1 and 5.1.2, a PBI is an institution organised for the relief of poverty or distress (sickness, disability, destitution, suffering, misfortune or helplessness), and
- > to be considered 'public' and an 'institution' the entity will normally have a majority of independent directors and members.

Other DGR Options

There are other options for obtaining DGR status. While not an exhaustive list, the most common types are as follows:

1. a public library, museum or gallery
2. an environmental organisation
3. a harm prevention charity
4. a health promotion charity
5. a research foundation

6. a public or private ancillary fund (giving foundation)
7. a necessitous circumstances fund (welfare fund)
8. a school building fund
9. a scholarship fund
10. a disaster relief fund
11. an overseas aid fund
12. a marriage education or family counselling fund
13. registered training organisations, and
14. an animal welfare charity.

In addition, there are specific DGR organisations listed in the taxation legislation. There are very specific requirements for each DGR type, and these can be discussed with our NFP team. Whether the entity would be registered as a DGR is ultimately a decision for the ACNC and the ATO.





How do I set up a charity giving fund?

A charity giving fund, also known as an ancillary fund, is a vehicle for public and private philanthropy. It is a type of charitable trust designed to provide an investment structure for philanthropic giving purposes. Simple and quick to set up, ancillary funds offer tax deductions to donors and tax exemptions for income earned by the fund.

What is an ancillary fund?

Ancillary funds are philanthropic 'giving' funds that provide a link between people who want to give ('donors') and organisations [other than ancillary funds] that can receive tax deductible donations as DGRs.

An ancillary fund does not undertake charitable work itself, but can be used as a collection point or funnel to pool donations to then be distributed to other DGR charities, as decided by the trustees.

An ancillary fund is itself registered as a DGR and so donors can receive a tax deduction for donations made to the fund. Ancillary funds will usually be registered with the ACNC as a charity so

the fund can be endorsed as income tax exempt with the ATO.

There are two types of ancillary funds:

- > private ancillary funds (**PAF**), and
- > public ancillary funds (**PuAF**).

What is the difference between a public and a private ancillary fund?

In a basic sense, a PAF is used by family groups to undertake private philanthropy by pooling resources and distributing donations to chosen DGRs. Donors don't necessarily all need to be from the same family, but usually share some form of common interest or close relationship. PAFs cannot solicit donations from the general public.

In contrast, a PuAF is used for fundraising purposes to collect donations from the public.

There are other differences in establishment, administration and the required minimum annual distributions, which we will set out below.

Why would you establish an ancillary fund?

A PAF may be suitable for you if you:

- > Wish to establish a charity foundation that will keep on giving after your death
- > Want a structured way to involve your children or family in giving
- > Have recently disposed of an asset and wish to obtain a tax deduction in the year of sale (however, once a gift is made to the trust it cannot be revoked)
- > Wish to devote a considerable amount of time and money to charity and philanthropy into the future
- > See yourself in a philanthropic, financial, supportive role rather than wanting to establish an organisation that provides charitable services or activities itself, or
- > Want to establish a tax deductible vehicle for investing and accumulating assets for philanthropic and charitable purposes.

In addition, a PuAF may be suitable if you are an organisation that wants to establish a public foundation for more efficient fundraising and to give to DGR entities connected to your organisation or pursuing the same cause.

A PAF isn't necessary where you are happy to give to charity on an *ad hoc* basis in response to requests or needs. There are costs in establishing and maintaining an ancillary fund (e.g. costs of audit or review of financial statements and the lodgement

of an income tax return) so whether or not it's worthwhile establishing a fund usually depends on the amount being invested. We usually recommend PAFs start with around \$500,000-\$1,000,000.

What are the main features of an ancillary fund?

Ancillary funds have the following additional features and requirements:

- > The fund must have an Australian Business Number (ABN) and be established and operated from Australia.
- > The fund must comply with various rules and guidelines, have the required clauses in its trust deed, and operate as a 'not-for-profit' entity.
- > A PuAF must invite the public to make donations and the public must in fact contribute to the fund.
- > The fund must meet the 'minimum annual distribution' requirements.
- > The fund must have its financial statements audited or reviewed each year (an audit is not required if revenue and assets are less than \$1 million).
- > The fund must have a formal investment strategy.
- > Generally, PuAF cannot borrow money, must maintain investments on an arm's-length basis, and must not provide assistance to related parties or acquire assets from them (other than by way of gift).

- > A PAF must have a corporate trustee, with at least one director meeting the ATO's 'responsible person' test. This person cannot also be the founder or a major donor to the PAF. For a PuAF, a majority of directors of the corporate trustee must meet the 'responsible person' test.

How we can help

The first step is an initial consultation to discuss your vision, mission, purpose and plan and provide advice at the meeting and confirmation in writing on legal structures, charitable sub-types, options, requirements of DGR status and setting out a strategy and way forward to achieving charity and DGR status.



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About Sharrock Pitman Legal

Sharrock Pitman Legal is a boutique commercial law practice based in the eastern suburbs of Melbourne, having served businesses, not-for-profit organisations and the wider community for over 50 years.

For over 30 years, we have assisted charities and other not-for-profit organisations on a range of legal issues, and provide expert advice to charities, PBI's, churches and other religious organisations, independent schools and tertiary institutions and aged care providers.

Winner of the Law Institute of Victoria's 2018 Boutique Law Firm of the Year award, we have Accredited Specialists in Commercial Law, Property Law, Commercial Litigation, Wills and Estates Law and Family Law and are experts in Charity Law.

Contact our not-for-profit law team today or visit www.sharrockpitman.com.au/legal-services/charities-not-for-profits for more details.

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