

Key considerations on the constitution and governance matters

Sunshine Coast Arts Foundation Ltd

Rule	Issue	Key considerations
	Name	The proposed name of the company is 'Sunshine Coast Arts Foundation Ltd' (Company). There is no proprietary ownership in a legal entity name, so the company may wish to register a business name and trade mark in due course to help protect its brand.
2	Objects	<p>The Company's objects must reflect the proposed activities and purposes of the Company and be consistent with the requirements of a registered Cultural Organisation and Public Fund with the Register of Cultural Organisations.</p> <p>The objects must also empower the Company to conduct the actual activities proposed.</p> <p>The Company's objects should also reflect its charitable purposes because the objects will be reviewed by the Australian Charities and Not-for-profits Commission (ACNC) and the Australian Taxation Office (ATO) as a prerequisite to receiving endorsement as a charitable institution and for charitable tax concessions, including income tax exemption, fringe benefit rebates and GST concessions.</p> <p>Importantly, for the purposes of maintaining the Public Fund (for deductible gift recipient (DGR) status) the Company must only apply the donations received to the Public Fund to further its principal objects as defined in this section.</p>
	Activities	<p>The constitution provides that the Company may undertake various activities to further the objects, including (for example):</p> <ul style="list-style-type: none"> (a) establishing philanthropic programs; (b) attract and receive donations, gifts, bequests, endowments, trusts, etc.; (c) support the Caloundra Regional Gallery; (d) provide financial and other in-kind support to the Caloundra Regional Gallery; and (e) act as trustee of any trust the purpose of which relates to the objects in rule 2.1(a). <p>In order to receive and distribute funds to the Caloundra Regional Gallery, it is proposed that the company would act as a corporate trustee of a public ancillary fund.</p>
3	Not-for-profit	<p>The constitution includes reasonably standard 'non-profit' provisions in the constitution to:</p> <ul style="list-style-type: none"> (a) require the Company to apply its income and property toward the promotion of its objects; and (b) prohibit the distribution of income or property to members.

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4.1	Membership	<p>The constitution sets out the terms on which members engage with the Company.</p> <p>The constitution contemplates that Sunshine Coast Council will be the Company's 'Founding Member'. Council, as Founding Member will be entitled to appoint up to two directors, would be required to approve any proposal to wind up the company and any amendment to the constitution.</p> <p>In addition to the Founding Member, the Company will be structured so that the directors that were not appointed by the Founding Member will also be members.</p> <p>Generally, the rights of members of companies are set out in the <i>Corporations Act 2001</i> (Cth) (Corporations Act).</p>
	Public Sector Entity	<p>As currently structured (that is, where Council is a minority member with limited membership rights), the Company is unlikely to be deemed a 'public sector entity' by the Queensland Audit Office on the basis of being a 'controlled entity'. If it were, the Company would be required to:</p> <ul style="list-style-type: none"> (a) appoint the auditor-general as the auditor of the Company; and (b) ensure that that the auditor-general remains, at all times, the auditor of the Company. <p>Separately, by maintaining a minority role in the company at a membership and board level, the Company will help ensure that it is not deemed to be a 'Government Entity' for the purposes of the <i>Charities Act 2013</i> (Cth). It would be ineligible for charitable endorsement if found to be a 'Government Entity'.</p>
4.3	Application for membership	<p>The membership of the Company will be tightly controlled by the board of directors. Following the registration of the company, any new prospective directors must first apply to the company for membership.</p> <p>The application must include the nomination of another member and include the consent to be a member and a director of the company.</p>
4.5	Admission to membership	<p>The board may in its absolute discretion accept or reject an application for membership.</p> <p>Once accepted by the board, the individual will automatically be appointed as a director under rule 8.3 of the constitution.</p>
5	Winding up	<p>The liability of members on winding up of the Company will be a contribution of \$10 towards any debt. This is a standard guarantee amount for this type of Company.</p> <p>Upon winding up of the entity, any surplus assets or property must be applied to another authority, fund or institution with an equivalent tax endorsement and similar charitable objects.</p>
6	AGMs	<p>There are rules on AGMs to enable an opportunity for the company to formally report to the members (including Council as the Founding Member) and allow the member to raise queries on the annual report or financial accounts, etc.</p>
7	General meetings	<p>There are rules on general meetings. A quorum for general meetings will be met where more than half the members are present, which must include the Member Representative of the Founding Member.</p>

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8.2	Directors	The constitution provides there would be a minimum of 3 directors (being the statutory minimum) and up to 7 directors where: (a) up to two would be appointed by the Founding Member (using any process it deems appropriate); and (b) up to 5 who would be automatically appointed to the board upon being accepted as members to the Company.
8.3	Qualification for membership of the board	This rule provides that to be eligible for election or appointment as a director under rule 8.2, the director (a) must be supportive of the objects of the company; and (b) not be an employee or councillor of the Founding member. Additionally, rule 15 requires that if the Company is registered with the Register of Cultural Organisations, then the board or a committee of the board that administers the Public Fund must comprise a majority of 'Responsible Persons' as that term is described under the tax legislation and reflected in the constitution. This qualification is relevant for the requirements to manage the Public Fund (discussed further at rule 15 below).
9.3	Reserve Powers	In addition to the members' usual membership rights, the Founding Member has certain rights in respect of key decisions, which have been reserved to it, namely rule 9.3 on approving any proposal to wind up the Company. Among the other special rules under the constitution include rule 18.3, which provides that any proposed amendments to the constitution would need to be approved by the Founding Member – and rule 7.6(b) requires that a quorum for any meetings of members may only be satisfied where half of the members are present, which must include the Member Representative of the Founding Member.
10.8	Committees	The Board may establish a committee and delegate decision making powers to it. As detailed above, for the purposes of the Public Fund (discussed further at rule 15), the Board may need to appoint a committee comprised by a majority of members who are Responsible Persons. The Board may consider establishing a committee that has non-directors as well. However, any committees with delegated power should have at least one director. The Board should create terms of reference to outline the roles and responsibilities of any committees.
10.9	Advisory group	The Board may establish an advisory group to advise it on specified issues relevant to its activities. Advisory groups do not usually have any decision making power. The Board should create terms of reference to outline the roles and responsibilities of any advisory board.
11	Company secretary	The company must have a secretary who may also be a director. The secretary will be appointed and removed by the board from time to time.
12	Indemnity and insurance	The Company must have adequate insurance for officers. Directors may request the Company to sign a deed of indemnity for any liability they personally incur as a director under the Corporations Act.

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15	Public Fund	<p>In order for the Company to become a 'Cultural Organisation' DGR on the 'Register of Cultural Organisations', it must establish and maintain a Public Fund, which is established under rule 15.</p> <p>The Public Fund will need an official name - we have named it the 'Sunshine Coast Arts Foundation Public Fund'.</p> <p>The Public Fund must be managed and administered by a committee, appointed under rule 10.8, which is comprised by a majority of members who meet the criteria of a Responsible Person.</p> <p>All gifts to the Public Fund must be used only to further the principal objects of the Company and must be made in accordance with the guidelines for public funds as outlined by the ATO.</p> <p>The Company must notify the relevant Department of any proposed amendments or alterations to rule 15.</p>
18.3	Amendment to constitution	<p>Any amendment to the constitution must be approved by:</p> <ul style="list-style-type: none"> (a) A Special Resolution at a meeting of the members; or (b) a circular resolution signed by all the members, which must include the support of the Founding Member. <p>In other words, the Founding Member has a veto right on amendments to the constitution.</p>
	Public Reporting	<p>On registration with ASIC, a public company limited by guarantee registered under the Corporations Act may be required to prepare and lodge a financial report, directors' report and auditors report with ASIC annually.</p> <p>In general, annual reporting to ASIC is 'switched off' and replaced with ACNC reporting to the extent that the Company will be registered as a charity with the ACNC under the <i>Australian Charities and Not-for-profits Commission Act 2012</i> (Cth). A registered charity is instead required to lodge Annual Information Statements and, depending on the size of the organisation, financial reports.</p> <p>The Company must also provide reports to the Department that administers the Register of Cultural Organisations after it receives endorsement as a DGR.</p>