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Our Ref: PWB:JK:110628

3 November 2011

OPBERON COUNCIL

04 NOV 2011

RECEIVED

The General Manager
Oberon Council
PO Box 84
OPBERON NSW 2787

Attention: Leanne Mash

Dear Leanne,

RE: ADVICE - SENIORS WELFARE TRUST

We refer to your previous instructions in relation to the above matter and set out below are further details of two proposed entities as requested.

Company Limited By Guarantee

A company limited by guarantee is an entity that is incorporated with the Australian and Securities and Investments Commission (ASIC).

A company limited by guarantee limits the liability of the members to a fixed amount, that being the amount of the guarantee. Unlike a company limited by shares, the members do not contribute money while the company is a going concern.

The guarantee will only be called in a winding up situation. If the company is wound up and the company does not have sufficient assets to meet its liabilities, each member will have an obligation to contribute an amount fixed by the company's constitution. The members who will be liable on a winding up will be the current members and past members if they were members within one year of the commencement of the winding up.

Ordinarily, the members of the company would be entitled to elect the directors of the company who would then be responsible for running the company in accordance with its constitution and the Corporations Act.

The company's constitution would need to be carefully drafted to address issues such as:

- the objects of the company;
- powers of the board of directors;
- the application of income or capital of the company including the criteria required to be met to be eligible to receive donations;
- ability or prohibition on distribution of funds to members;
- the amount of the guarantee and the extent of liability of the members upon winding up;
- categories of membership, including voting rights etc;
- annual subscriptions of members;
- appointment / election of directors and office bearers;
- removal of directors and office bearers;
- remuneration of directors and members (or non-remuneration); and
- meetings of members and meetings of directors.

As previously advised, the Local Government Act does not prevent Council from being a member of a company limited by guarantee "and licensed not to use the word "Limited" in its name.

ASIC may register a company limited by guarantee without the word "Limited" in its name if its constitution requires the company to pursue charitable purposes only and to apply its income in promoting those purposes; prohibits the company making distributions to its members and paying fees to its directors and requires the directors to approve all other payments the company makes to directors.

We note that the Morse Group has provided advice to Council regarding the reporting requirements of companies limited by guarantee.

Charitable Trust

A charitable trust would be established by way of a trust deed. The trust would be controlled by the trustee who is responsible for funds of the trust. The trustee is known as a "fiduciary" of the beneficiaries of the trust and owes them a duty to properly manage the trust funds. The trustee's actions would be governed by the terms of the trust deed and also the Trustee Act.

Often, a company is incorporated to act as the trustee of a trust.

The trust deed would (amongst other things) address the following issues:

- the process of appointment of the trustee;

- the settlor of the fund (this is the person who provides the original financial contribution into the fund);
- clearly defined charitable purposes and objects;
- powers of trustee;
- approved investment types; and
- beneficiaries / categories of beneficiaries / eligibility criteria for receipt of money

We confirm our prior advice to you that s358 of the Local Government Act requires Council to obtain the consent of the Minister to form or participate in a trust.

We note that the Morse Group has provided advice to Council regarding the reporting requirements of charitable trusts.

It is our view that regardless of which entity may be utilised by Council, the issue of control will need to be properly considered and addressed. Whether as directors of a company limited by guarantee, or as trustees of a charitable trust, either entity will require a group of people willing to take the risks and responsibilities associated with the management of the donated funds.

In relation to the letter from Mark Ireland Lawyers dated 9 August 2010, we would take an initial view that either of the proposed entities would satisfy the requirements set out in [REDACTED] will *if* the entity's funds were able to be used for the **construction** of a new nursing home in Oberon. The controller's of the entity would have to be comfortable to resolve to donate money to a private investor to assist with the construction of a nursing home in Oberon, and such donation would have to fall with the defined charitable purpose of the entity.

Please note that in order to formalise our advice, we would require to review the will in it's entirety.

Please contact us should you require further advice in this regard, or any further explanation of the above.

Yours faithfully,
BIRD LEGAL

fu:

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