

## Checklist: Issues to consider before signing an agreement with another organisation

### Overview

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This checklist sets out some of the important considerations a Victorian, not-for-profit community organisation should consider before entering into any agreement with another organisation. The 'agreement' may be an auspicing agreement, protocol document, memorandum of understanding, joint venture, partnering arrangement, alliance contract or other similar agreement.

**Note:** The information contained in this fact sheet is intended as a guide only, and is not legal advice. If you or your organisation has a legal problem you should talk to a lawyer before making a decision about what to do. The information in this fact sheet is written for people resident in, or affected by, the laws that apply in Victoria, Australia and is current at 1 October 2008.

**Is this agreement consistent with our organisation's objects or purposes?**

If your organisation is incorporated (and in some cases in unincorporated groups), you will have a constitution or a statement of purpose and rules. These set out the objects and powers as agreed by your organisation. You should check that any agreement being considered furthers the stated objects of your organisation and that entering into such an agreement is authorised by, or consistent with, your rules or constitution.

**Is entering this agreement going to affect our 'not-for-profit' or incorporated status, or our eligibility for tax concessions?**

Your organisation may need to seek legal advice on this issue. If you are an incorporated association, there are provisions in the *Association Incorporations Act 1981* (Vic) that prevent an organisation from 'trading' in certain circumstances and 'carrying on business' in certain locations. You should ensure that entering into the agreement will not bring your organisation in contravention of any legislation. For more information about the restrictions on incorporated organisation's trading or carrying on a business, see the Related Resources section at the end of this document.

It is also essential that your organisation checks whether entering into a particular agreement will affect your organisation's ongoing eligibility for tax concessions (e.g. endorsement as a Tax Concession Charity or Deductible Gift Recipient status). You may need to check the tax legislation and with Australian Taxation Office guidelines to determine this. For more information about tax issues, see the Related Resources section at the end of this document.

- Is the document setting out the agreement (whatever name it has been given) a legally binding contract?**

Your organisation needs to understand whether the agreement is going to create legal rights and obligations for the organisation. For example, can the terms of the agreement be enforced against your organisation or is it just a statement of intention (an 'agreement to agree')? Can your organisation enforce the terms of the agreement against another party? Would your organisation be liable to pay damages or penalties if it breaches the agreement (or similarly could your organisation seek damages?).

Your organisation may need to get legal advice to determine this question. The name given to the agreement will not, of itself, determine whether or not the agreement contains enforceable legal rights and obligations. If a court had to decide this issue it would look at the wording and nature of agreement, the intent of the parties when entering into the agreement, as well as the actions of the parties, among other factors.

- If it is a legally binding contract (so that the other party or parties to the contract could enforce it) what is our organisation agreeing to do if it enters into this contract? Is this feasible?**

In most cases, signing an agreement will be for the benefit of your organisation. It might be that you are agreeing to work with another organisation to start up a new service, or to apply for some funding together for a project. There may be many opportunities and benefits (including funding or resources) that flow to your organisation as a result of signing an agreement, which might not be possible without it. Even though this may be the case, it is advisable to check the terms of the agreement closely.

Make sure your organisation has a clear understanding of what it is required to do under all of the terms of the contract. In some parts of the contract this may be clear and obvious. (ie. 'Party A is required to provide Party B with XXXX on or before 30 June 2008'). However, sometimes a contract may have clauses that are less obvious but impose quite significant obligations on your organisation.

For example, there may be clauses that require your organisation to take out certain insurances (or have other organisations listed on your insurance). Sometimes these insurances may be very costly. Your organisation needs to understand all of its obligations under the agreement, so that you can ensure that entering the agreement is in the interests of your organisation.

For more information about insurance, see the Related Resources section at the end of this document.

**Tip:** If you are a board member or committee of management member who is being asked to approve a contract, you should be aware of any potential financial implications of entering into the contract, and be sure that the organisation is in a position to meet any liabilities that may arise out of the contract. All board members or committee of management members have a duty to ensure that an organisation can meet its debts and liabilities and does not trade while insolvent.

**If we enter into this agreement, what will our relationship be with the other parties to the agreement?**

Depending on the nature of the agreement, sometimes you will not only have to comply with the terms of the contract, but you will also owe the other parties additional, special duties which have been developed and recognised by the law over time (sometimes known as ‘fiduciary duties’).

In some cases your organisation may be held liable for the actions (or debts) of other parties to the agreement. Make sure you understand, or get legal advice about, your rights and obligations towards the other parties to the agreement.

**If we enter into this agreement, does it adequately protect or benefit our organisation? (including our organisation’s staff, volunteers, property, finances etc).**

The terms of the agreement are crucial - a well written agreement can limit your organisation’s exposure to liability, and protect your organisation’s assets.

In many cases, your organisation will be presented with a standard agreement, and the terms of the agreement will favour the party who has presented you with the agreement.

For example, an agreement may contain a clause which requires your organisation to completely indemnify (that is, agree to pay for any costs or liabilities incurred by) another party in relation to the agreement. This is a considerable undertaking and, if relied upon, could financially ruin a small community organisation. However, the terms of an agreement are often negotiable and the only time to negotiate is before the agreement is signed.

If the agreement is going to generate revenue for your organisation, then it is worth spending some money to get legal advice about the agreement, to ensure your organisation is protected.

**What are the ways in which the agreement can be terminated (by us or others) and what happens if the agreement is terminated?**

It is important that your organisation understands how the agreement may be ended, either by your organisation or other parties (or even possibly by external events). Sometimes there are very limited circumstances in which an agreement can be terminated, in others, it is simply by one party giving notice to the other.

Your organisation should think about whether the ease or difficulty of terminating the contract suits your organisation's circumstances, and what the consequences of this action may be. The agreement should also deal with what happens to property, shared resources, funding (etc.) if the agreement is terminated.

**Does the agreement have a dispute resolution clause and does it involve alternative dispute resolution mechanisms?**

While relations between parties to an agreement may be good at the beginning, and will hopefully continue that way, it is naive to think that this initial goodwill will always last for the duration of the agreement. Make sure any agreement includes a clause where the parties document a process to resolve disputes.

A dispute resolution clause may include:

- ▶ a statement about both parties using their 'best efforts' to resolve a dispute;
- ▶ the nomination of a person from each party who will be responsible for attempting to resolve a dispute;
- ▶ the timeframes for resolution;
- ▶ how a dispute will be escalated and may be referred to an external body for dispute resolution, if necessary.

It is expensive to take a contractual dispute to court for resolution, so think carefully about the constructive ways a dispute may be resolved outside the courts. Make sure you understand whether any dispute resolution process (such as external mediation) is binding on the parties, or whether court action may still be taken.

## Related Resources

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### Related PilchConnect Resources

Checklist: Issues to cover in an Auspice Agreement

### Related links

For online legal information resources for Victorian community organisations about:

- ▶ working with other organisations see [www.pilch.org.au/workingwithothers](http://www.pilch.org.au/workingwithothers)
- ▶ tax see [www.pilch.org.au/tax](http://www.pilch.org.au/tax)
- ▶ insurance see [www.pilch.org.au/insurance](http://www.pilch.org.au/insurance)
- ▶ incorporated associations see [www.pilch.org.au/legalstructure](http://www.pilch.org.au/legalstructure) and [www.pilch.org.au/incorporatedassociation](http://www.pilch.org.au/incorporatedassociation)
- ▶ the legal duties of members of a committee of management in an incorporated association see [www.pilch.org.au/positionsia](http://www.pilch.org.au/positionsia)
- ▶ companies limited by guarantee see associations see [www.pilch.org.au/legalstructure](http://www.pilch.org.au/legalstructure) and [www.pilch.org.au/companylg](http://www.pilch.org.au/companylg)
- ▶ the legal duties of directors of a company limited by guarantee see [www.pilch.org.au/positionsclg/](http://www.pilch.org.au/positionsclg/)