

# LEGAL STRUCTURES TO CONDUCT BUSINESS BY THE UNIVERSITY

Purpose: This paper is an outline of the legal structures available to the University to conduct its core and non-core activities.

Further advice must be sought from Legal Services in order to ensure that the most appropriate legal entity has been adopted and to avoid the University facing unintended legal liabilities.

## 1. *La Trobe University - Internal Operating Units*

- LTU may conduct its core and non-core activities relying entirely on its own resources through (1) its departments and faculties; or (2) its commercial operating units (e.g. Union, SARA and the Children’s Centre).
- Part of LTU not a separate entity.
- Must comply with *La Trobe University Act*, Statutes, Regulations, Rules, Procedures and Policy.

### *Advantages*

- ▶ Total control by LTU
- ▶ All profits accrues to the University

### *Disadvantages*

- ▶ LTU may lack specific expertise.
- ▶ LTU exposed to all the risks.
- ▶ LTU bears all the losses.

<i>Key features:</i>	<b>Total control by the University. Bears all profits and losses</b>
<i>Establishing Body and Approval:</i>	<b>University Council</b>
<i>Reports to:</i>	<b>University Council</b>
<i>Managed by:</i>	<b>Head of area depending on activity</b>
<i>Charter Documents:</i>	<b>LTU Act, statutes, Regulations, Procedures and Politics</b>

## 2. *Internal Commercial Operating Unit and subcontracting services*

- LTU conducts the business but subcontracts aspects of the business where specific expertise is required.
- LTU must comply with *La Trobe University Act*, Statutes, Regulations, Rules, Procedures and Policy.

- Part of LTU not a separate entity.

***Advantages***

- ▶ High level of control exercised by LTU under sub contract.
- ▶ Expert services contracted and controlled in contract.
- ▶ Gain expert contribution.
- ▶ Subcontractors bears liability for its actions

***Disadvantages***

- ▶ LTU loses some control.
- ▶ LTU exposed to some risks.

<b><i>Key features:</i></b>	<b>University maintains full control with the benefit of expert input by independent contractors.</b>
<b><i>Establishing Body:</i></b>	<b>University</b>
<b><i>Reports to:</i></b>	<b>Head of area depending on activity</b>
<b><i>Managed by:</i></b>	<b>Head of area depending on activity</b>
<b><i>Charter Documents:</i></b>	<b>Sub-contract agreement</b>

### **3. Partnership**

- LTU enters into a partnership with 1 or more parties to conduct “a business in common with a view of profit” (definition under *Partnership Act*).
- Must comply with sections 37A(11A) and 37A(11B) of the *La Trobe University Act* which requires approval of Council and the relevant Minister being notified.
- Must comply with Partnership laws.

***Advantages***

- ▶ Inexpensive and no formalities are required to establish partnership except for partnership agreement
- ▶ Informal/flexible arrangements by agreement.
- ▶ Establishing costs are minimal.
- ▶ Partnership not liable to pay tax.
- ▶ Governed by partnership laws including *Partnership Act 1958 (Vic)*.
- ▶ Each partner responsible for its own tax.

***Disadvantages***

- ▶ Each partner faces an unlimited liability for the debts and obligations of the firm.
- ▶ Cannot transfer interest in partnership easily.
- ▶ Number of partners limited under legislation.
- ▶ May be construed to be partnership even if unintended.
- ▶ A partner can bind the other partners to a contract without their authority.

<i>Key features:</i>	<b>Not recommended because of unlimited Liability. Not a separate legal entity. No registration requirements. Easy to form and dissolve. Partner may be an agent to impose liability on the other partners.</b>
<i>Establishing Body:</i>	<b>University Council</b>
<i>Reports to:</i>	<b>Head of area depending on activity</b>
<i>Managed by:</i>	<b>Partners under Partnership agreement</b>
<i>Charter Documents:</i>	<b>Partnership agreement</b>

#### 4. *Joint Ventures*

- A contractual relationship which involves separate ventures for each participant in a particular undertaking and for the individual gain and NOT joint profit of each participant.
- Assets not jointly owned by participants.
- Parties receive their share of income separately and right to separately dispose of it.
- Must comply with sections 37A(11A) and 37A(11B) of *the La Trobe University Act* which requires Council's approval and the relevant Minister being notified.

Joint Ventures may be unincorporated or incorporated.

#### *Unincorporated Joint Venture*

- An unincorporated joint venture is a contractual relationship usually confined to a particular undertaking for individual gain of the parties.
- Parties receive their share of income separately and right to separately dispose of it as members of joint venture think fit.
- Part of LTU not a separate entity.

##### *Advantages*

Provided the joint venture is properly constituted:

- ▶ Each party is only liable separately and **not** jointly for the debts of the joint venture whilst partners are jointly and severally (ie. separately) liable for partnership debts.
- ▶ No authority to bind as agents.
- ▶ No change in the ownership of the assets used in the joint venture either at the beginning of the joint venture or when it is terminated.
- ▶ Acts are governed by the joint venture agreement.
- ▶ Directors= liability (under Corporations Law) is not applicable.
- ▶ Right to dispose income and share control over

expenditure of money.

***Disadvantages***

- ▶ Unlimited liability although restricted to a certain extent by joint venture agreement.
- ▶ Courts have been more disposed to construe the relationship to be one of a partnership rather than a joint venture which places the parties in a worse position.
- ▶ Appropriate detailed contractual documentation is required as the relationship is governed solely by contract.

<b><i>Key features:</i></b>	<b>Individual gain but no joint profit. Unlimited liability. Joint venturer not an agent to impose liability on other joint venturers. Taxation advantage.</b>
<b><i>Establishing Body:</i></b>	<b>University Council</b>
<b><i>Reports to:</i></b>	<b>University Council</b>
<b><i>Managed by:</i></b>	<b>Head of area depending on activity</b>
<b><i>Charter Documents:</i></b>	<b>Joint venture agreement</b>

***Incorporated Joint Venture***

- Parties to the joint venture may decide to set up a company to conduct the venture which may have significant liability and tax implications.
- Separate legal entity - ***SEE SECTION ON COMPANIES BELOW***

<b><i>Key features:</i></b>	<b>Limited liability. Compliance with LTU Act, Corporations Law and Memorandum and Articles of Association.</b>
<b><i>Establishing Body:</i></b>	<b>University Council</b>
<b><i>Reports to:</i></b>	<b>University Council</b>
<b><i>Managed by:</i></b>	<b>Board of Directors</b>
<b><i>Charter Documents:</i></b>	<b>Memorandum and Articles of Association. Corporations law</b>

**5. *Associations***

- Must comply with sections 37A(11A) and 37A(11B) of the *La Trobe University Act* which requires Council’s approval and the relevant Minister being notified if forming or participating in the formation of an association whether incorporated or not.
- An association may be unincorporated or incorporated under the *Associations*

*Incorporation Act 1981.*

### ***Unincorporated Association.***

- A body of two or more persons organised usually social or sporting; and
- Normally does **not** include the carrying on of business with a view to making profit (as in the case of a partnership).
- Whether it is part of LTU will depend on circumstances.

#### ***Advantages***

- ▶ Easy to set up with no formalities.
- ▶ Formation costs are minimal.
- ▶ Administration not regulated by any government agencies.
- ▶ Objects, minutes and accounts are not available to public scrutiny.

#### ***Disadvantages***

- ▶ No legal identity distinct from its members.
- ▶ Cannot sue or be sued in its own name.
- ▶ Members may be liable for debts of the association.
- ▶ Cannot enter into contracts in its own name.
- ▶ Not certain whether or not part of LTU.
- ▶ Cannot own property or goods in its own name.
- ▶ Potential for liability of committee members for breach of contract or tort in some cases eg. Where debt is greater than the assets of the association.

<b><i>Key features:</i></b>	<b>Informal as no constitution required although desirable to have one. Not appropriate for conducting business and direct acquisition of profit by members. Not separate legal entity. Risk of unlimited liability of members and committee members.</b>
<b><i>Establishing Body:</i></b>	<b>University Council</b>
<b><i>Reports to:</i></b>	<b>University Council</b>
<b><i>Managed by:</i></b>	<b>Committee members</b>
<b><i>Charter Documents:</i></b>	<b>Rules, if exist</b>

## ***Incorporated Association***

- Associations often incorporate if they intend to employ people, hire or lease premises or do anything that may expose the members to financial liabilities.
- Separate legal entity.
- Suitable for non profit activity.

### ***Advantages***

- ▶ Limited liability.
- ▶ Formality and expenses less than forming a company.
- ▶ Can be sued and sue in its corporate name.
- ▶ Can hold property in its corporate name.
- ▶ Can enter into contracts in its corporate name.
- ▶ No liability for members of the incorporated association unless provided in the rules of the association.
- ▶ Can invest, raise or borrow money.

### ***Disadvantages***

- ▶ An association cannot be incorporated if its object is to provide financial gains for the members.
- ▶ Other restrictions on trading under the *Associations Incorporation Act*.
- ▶ Cannot trade outside Victoria.
- ▶ Profit of the association cannot be divided amongst its members.

<b><i>Key features:</i></b>	<b>Non profit associations. Limited liability. Less formal to set up than a company. Compliance with Incorporation Associations Act. Cannot trade outside Victoria.</b>
<b><i>Establishing Body:</i></b>	<b>University Council</b>
<b><i>Reports to:</i></b>	<b>University Council</b>
<b><i>Managed by:</i></b>	<b>Committee members under the rules</b>
<b><i>Charter Documents:</i></b>	<b>Rules</b>

## **6. Companies**

- Separate legal entity.
- Limited liability.
- Must comply with section 37A *La Trobe University Act* which requires Council's approval and the relevant Minister being notified and Corporations Law.
- Companies may be limited by shares or limited by guarantee.

### ***Company limited by shares***

- Share capital divided into shares allotted to shareholders and payment is upfront.
- Liability limited to amount unpaid on the shares by shareholders.
- Shares are personal property and freely transferable subject to Constitution.

- Can be proprietary or public.

***Company limited by guarantee***

- Members guarantee to contribute up to specified amount to company upon winding up to meet any excess of liabilities over assets.
- Must be public company.
- No capital.
- Cannot increase or reduce guarantee by amending Constitution or by agreement therefore difficult to raise loan finance.
- Unsuitable for trading purposes but to acquire or confer membership.
- Cannot be incorporated as a proprietary company as it has no share capital .

***Advantages***

- ▶ Limited liability.
- ▶ Law governing companies is fairly clear.
- ▶ Participants and third parties more familiar with corporate structure.
- ▶ Shares can be easily transferred as opposed to interest of joint venturers/partners.
- ▶ Companies may be perceived to be more stable and attract more grants.
- ▶ 100% owned University companies may have taxation exemption.
- ▶ Marketing advantage

***Disadvantages***

- ▶ Compliance with requirements under section 37A of the *La Trobe University Act* for the formation and participation in a limited company is essential requiring Council’s approval and the relevant Minister being notified.
- ▶ Profit of the company is taxed (except in relation to 100% owned University companies).
- ▶ Compliance with the Corporations law as opposed to partnerships and joint ventures.
- ▶ Potential liability of directors.
- ▶ Loss of control by LTU if LTU does not own more than 50%.
- ▶ May affect research quantum issue.

<b><i>Key features:</i></b>	<b>Limited liability. Onerous compliance requirements (Corporations Law, Memorandum and Articles of Association, <i>LTU Act</i>). Directors=liability</b>
<b><i>Establishing Body:</i></b>	<b>University Council</b>
<b><i>Reports to:</i></b>	<b>University Council, ASC</b>
<b><i>Managed by:</i></b>	<b>Board of Directors</b>

## 6. *Trust*

- A trust is an obligation whereby the trustee holds property for the benefit of another (the beneficiary) or for the advancement of specific purposes.
- Must comply with *La Trobe University Act*, Statutes, Regulations, Rules, Procedures and Policy and *Trustee Act*.
- A trustee can be a company (corporate trustee) which acts as the vehicle for trading. (*see comments under Company*)

### **Types of Trust**

- ***Unit Trust***

A unit trust derives income, usually in the course of conducting a business, under a deed, where its “capital” is represented by units usually of equal amounts. The number of units owned by a unit holder determines his/her entitlement to the income distributed annually and the interests held in the assets of the trust..

- ***Discretionary Trust***

A discretionary trust is one whereby the identity for the interests of the beneficiary is not determined at the creation of the trust. The trust is able to exercise a discretion in relation to the selection of beneficiary or object and/or proportion of trust fund or trust interest which each beneficiary is to take.

***Unit trusts has following advantages over discretionary trust:***

- You can transfer units.
  - You have fixed annual entitlements to income; and
  - You have fixed entitlements to “capital” ie the value of the units
- ***Trading Trust***

A trading trust is where the good will and assets of the business have been transferred to the trustee who conducts the business and distributes the income amongst a range of beneficiaries. The trustee often incorporates to limit its liability.

***Advantages***

- ▶ Income is usually taxed in the hands of the beneficiaries not the trustee of the unit trust which is an advantage where the beneficiary is a tax exempt body such as the University.
- ▶ Liability may be limited from the trustee similar to that of a company.
- ▶ Losses of a trust do not follow through to the

beneficiaries.

***Disadvantages***

- ▶ Administration and accounting requirement.
- ▶ Trustee may be personally liable in the performance of the trust.
- ▶ Unit holders (the beneficiaries) in a unit trust may be jointly and personally liable under trust law to indemnify the trust via its liquidator for any shortfall of assets on liquidation where there is no limitation of indemnity clause in the trust deed.
- ▶ Compliance with *Trustee Act*.

<b><i>Key features:</i></b>	<b>Taxation advantages;</b>
<b><i>Establishing Body:</i></b>	<b>University Council</b>
<b><i>Reports to:</i></b>	<b>University Council</b>
<b><i>Managed by:</i></b>	<b>Trustee</b>
<b><i>Charter Documents:</i></b>	<b>Trust deed, Trustee Act</b>

## **8. Agency**

- Business may be conducted by the appointment of an agent by an express agreement.
- The agreement should set out the actual authority of the agent to act on behalf of the University (the principal).

***Advantages***

- ▶ Economical to appoint an agent especially overseas.
- ▶ Agent has expertise and contacts.
- ▶ Low cost if agent's remuneration is based on a commission.

***Disadvantages***

- ▶ Implied, apparent or ostensible authority of the Agent may put LTU at significant risk.
- ▶ Degree of control lessened.

<b>Key features:</b>	<b>Easy to appoint; LTU may be responsible for agent=s acts.</b>
<b>Establishing Body:</b>	<b>Depends on nature of activity</b>
<b>Reports to:</b>	<b>Principal (LTU)</b>
<b>Managed by:</b>	<b>Depends on agency agreement.</b>
<b>Charter Documents:</b>	<b>Agency agreement</b>

## 9. *University Research Centres and Institutes*

- The basic function of a University Research Centre or Institute is to pursue specific research interest falling outside the University=s parameters of the traditional departments or disciplines.
- Compliance with the Research and Graduates Office=s *AGuidelines for the Establishment and Operation of University Centres and Institutes@* and LTU=s Statute 38 - *Affiliation Research Centres and Institutes* and Regulations is required.

### *Advantages*

- ▶ Provide focal point for research strengths in schools and with links with external users of that research.
- ▶ Stimulating research activities and involvement in special projects of other departments, other Universities and industry bringing own expertise and knowledge.
- ▶ Sharing of costs.
- ▶ Constitution and heads of agreement required to define the parties= powers and obligations.
- ▶ A properly set up Centre/Institute raises the public profile of the area of discipline which may have a perceived advantage when applying for funding.
- ▶ Not costly to establish.
- ▶ Control by the University.

### *Disadvantages*

- ▶ Not a separate legal entity.
- ▶ May be classified as unincorporated association (members of the University and/or external bodies).
- ▶ University prima facie liable for activities of the Centre/Institute.
- ▶ External bodies cannot participate in management.
- ▶ May be incorrectly perceived to be a separate legal entity to the University.

- **See also comments under unincorporated joint ventures and associations**

<b>Key features:</b>	<b>Easy to establish facility for low risk research.</b>
<b>Establishing Body:</b>	<b>University Council by Regulation</b>
<b>Reports to:</b>	<b>Academic Board via the Dean</b>
<b>Managed by:</b>	<b>Committee of Management in accordance with Constitution</b>
<b>Charter Documents:</b>	<b>Constitution &amp; agreement, if any</b>

## 10. Affiliations

- The affiliation with the University of any educational, commercial, cultural, sporting or other institution, organisation or body is governed by Section 30(i)(k) of *La Trobe University Act* requiring Council's consent and that the affiliation will assist in attaining any of the objects of the University.
- Must comply with LTU's Statute 38 - *Affiliation Research Centres and Institutes* and Regulations.
- Not usually used for conducting business.

### *Advantages*

- ▶ Easy to establish.
- ▶ Good public relations.

### *Disadvantages*

- ▶ Not a separate legal entity.
- ▶ LTU's level of control is decreased.

- **See comments under unincorporated associations.**

<b>Key features:</b>	<b>Informal not usually used for conducting business. Not separate legal entity.</b>
<b>Establishing Body:</b>	<b>University Council</b>
<b>Reports to:</b>	<b>University Council.</b>
<b>Managed by:</b>	<b>Depends on affiliation agreement</b>
<b>Charter Documents:</b>	<b>Affiliation agreement</b>

## 11. Co-operatives

- A co-operative is an incorporated body registered under the Co-operatives legislation of each State.
- A co-operative is a user owned business run by an association of persons.
- It is a separate legal entity with limited liability.

- There are **trading co-operatives** (ones which give returns or distributions to their members on share capital) and **non-trading co-operatives** ( ones which give no returns or distributions on share capital other than the nominal value of shares, if any, at winding up).
- In contrast with an unincorporated association, the members of a co-operative may derive a profit from the business of the cooperative.

***Advantages***

- ▶ Members’ liability, as in the case of a company, is limited to the unpaid amount owing on the shares.
- ▶ Members may derive a profit from the business of the co-operative.
- ▶ Separate legal entity.
- ▶ Formality and expenses less than forming a company.
- ▶ Can be sued and sue in its corporate name.
- ▶ Can hold property in its corporate name.
- ▶ Can enter into contracts in its corporate name.

***Disadvantages***

- ▶ Must comply with the *Co-operatives Act 1996 (Vic)* and some provisions of the *Corporations Law* including approval of rules, disclosure statement, annual reporting and appointment of registered company auditor.
- ▶ Cannot trade outside Victoria.
- ▶ Powers of a cooperative are to be exercised within traditional cooperative principles as set out in the *Co-operatives Act*.
- ▶ Registrars vested with strong powers of investigations and enforcement.
- ▶ Untested law as the *Co-operatives Act 1996* is relatively new.

<b><i>Key features:</i></b>	<b>Limited liability. Onerous compliance requirements (Co-operatives Act, Corporations Law, Co-operatives Rules).</b>
<b><i>Establishing Body:</i></b>	<b>University Council</b>
<b><i>Reports to:</i></b>	<b>University Council</b>
<b><i>Managed by:</i></b>	<b>Board of Directors</b>
<b><i>Charter Documents:</i></b>	<b>Rules of the Co-operative</b>

Please contact Legal Services on 9479-2495 should you require further information in relation to this issue.

*This article provides general information only. It is not a complete or definitive statement of the law on the subject matter. Formal legal advice should be sought in relation to particular matters.*

*31 July, 2001*