

LEGAL REVIEW OF THE COMMUNITY ENERGY PROGRAM

DECISIONS & FURTHER ACTIONS APPROVED BY WORKING PARTY 10 MAY 2019

The Foundation will pool the individual electricity demand of participating groups, businesses and individuals within the council areas, collectively invite tenders from and negotiate with electricity suppliers, enter into an electricity supply agreement with the preferred supplier, and participate in joint activities and decisions regarding the operation and administration of the electricity supply agreement. Pooling electricity demand will deliver the scale to access more competitive offers from electricity suppliers than we could from individual negotiations.

The likely public benefits from the Program include transaction cost savings, increased competition for the supply of electricity, increased incentives for investment in generating capacity, and the potential for electricity cost savings for RH&C councils to improve their competitiveness and benefit their residents and ratepayers.

LEGAL BARRIERS AND RISKS

Advice was sought from LGASA's preferred legal provider, HWL Ebsworth, on any potential legal barriers and risks to establishing the Foundation. Questions raised in the advice were resolved by the Community Energy Working Party on 10 May 2019, with key decisions and further actions in the following pages.

According to HWL Ebsworth advice, there are no fundamental legal barriers to establishing the Foundation in accordance with the CEP Report recommendations.

A number of commercial and legal risks will need to be considered and addressed in the final Foundation structure and activities, but these can be overseen and resolved. In particular:

- During the establishment period for the Foundation, and without an interim ACCC authorisation, RH&C councils should be cautious about sharing of sensitive pricing or energy procurement information relevant to their businesses or making decisions based on information received from other RH&C councils.
- Following establishment of the Foundation, consumer law issues in particular will remain an ongoing compliance consideration and should be a key focus for the Foundation management committee.
- Once the proposed arrangements with the selected energy retailer are clarified, the Foundation should ensure it has appropriate systems and processes in place to comply with statutory obligations for engaging in energy marketing activities.
- The Foundation should be structured as an incorporated association.
- The founding committee of the Foundation should be controlled by RH&C council representatives to ensure effective implementation of the Program. A supporting community working party should be considered as a means of establishing communication with the community from the outset, and to act as an incubator for transitioning to a community led committee.
- The Foundation could self-assess as tax exempt, on the basis that it is a community service organisation, and is likely to be successful in applying for DGR endorsement.
- RH&C councils should revisit the specific requirements of documents such as inter-council funding agreements and retailer arrangements once a clear strategy for the Foundation is determined.

RISK & BACKGROUND	MITIGATION	DECISIONS	FURTHER ACTIONS
ENERGY CONSUMERS			
<ul style="list-style-type: none"> Marketing of energy products is regulated, but no authorisations or licences are needed. ACCC actively polices energy businesses, with a 2018 case resulting in \$25K penalties for One Big Switch making false and misleading claims about the size of consumer savings. As an energy marketing agency, the Foundation’s marketing messages and activities (such as door-to-door and tele sales), as well as customer contracts, would be subject to regulatory obligations. 	<ul style="list-style-type: none"> Moreland Energy Foundation is developing a community engagement and marketing plan, funded under the LGR&D Scheme. Any plans for marketing energy products must include a legally robust compliance framework. 	<ul style="list-style-type: none"> A robust compliance framework should be developed prior to any activity that constitutes marketing of energy products (this may occur after an initial community interest/pledge campaign). 	<ul style="list-style-type: none"> Share initial advice with Moreland. Ensure Moreland contract includes compliance considerations.
COMPETITION			
<ul style="list-style-type: none"> Cartel conduct restrictions apply to collective bargaining and joint purchase arrangements. It is common practice for groups of local councils to collaborate to procure services (e.g. waste). Other organisations have successfully applied for ACCC authorisations to conduct similar activities, on the basis that public benefit outweighs private gain. 	<ul style="list-style-type: none"> Before the Foundation puts out an RFQ to partner with a retailer, it will likely need to secure an ACCC authorisation to secure legal protection. HWL Ebsworth has indicated we are likely to be successful if we apply. 	<ul style="list-style-type: none"> ACCC authorisation should be secured before the retailer RFQ is put out. 	<ul style="list-style-type: none"> Seek quote and timeframes (including processing and eligibility periods) for HWL Ebsworth to make the ACCC application.
<ul style="list-style-type: none"> Competitive neutrality principles ensure government-owned business activities do not have an unfair advantage over private sector businesses in a competitive market. 	<ul style="list-style-type: none"> Once the structure and other arrangements are clarified, we may need to consider if the Foundation complies with this principle. 	<ul style="list-style-type: none"> It is unlikely this principle applies. 	

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LEGAL STRUCTURE			
<ul style="list-style-type: none"> • During consultation on the CEP Report, there was a clear preference that the Foundation be structured 'at arms-length' from councils and that it become self-funding over time. • In HWL Ebsworth's view, a structure that, from the outset, does not involve the direct participation of councils in the governance of the Foundation presents certain commercial risks to partners which must be carefully considered. • In their view, during the critical establishment phase of the Foundation, RH&C councils may find their investment and the overall goals of the Foundation put at undue risk in circumstances where the governance and management of the Foundation is not controlled, or at least directly participated in, by RH&C council representatives. 	<ul style="list-style-type: none"> • WHL Ebsworth recommends that RH&C councils take a direct and active role in the governance of the Foundation for an initial 'transitional' period of, say, 2 years, reducing over time to make way for community control. • This would allow councils to monitor and control their investment, with regular visibility of, and participation in, the commercial and operational decisions. • This could be complemented by a community-led advisory board established from the outset, which advises the Foundation on community requirements and expectations. Members may then become the initial community reps on the Foundation board. 	<ul style="list-style-type: none"> • Partner councils should take a direct and active role in the initial management committee, to protect Council investment and ensure outcomes. • The preferred starting structure is a council-majority management committee assisted by a community working party. • Over a planned transition period, members of the community working party should replace S&HLGA reps on the management committee. 	<ul style="list-style-type: none"> • See 'Foundation Governance' for more details.
<ul style="list-style-type: none"> • If we take the path of council control, the Foundation structure must have regard to the statutory limitations imposed on councils in establishing separate incorporated structures. • Under s47 of the Corporations Act, a council must not form a company or acquire shares in a company. 	<ul style="list-style-type: none"> • An incorporated association, governed by a committee, is considered the most appropriate legal structure for the Foundation, noting that: <ul style="list-style-type: none"> ○ The proposed objects and activities of the Foundation are consistent with the legal purposes of an incorporated 	<ul style="list-style-type: none"> • The Foundation will not issue shares or operate outside SA in future. • Therefore, the Foundation should be established as an Incorporated Association. 	

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<ul style="list-style-type: none"> • Under s41 of the LG Act, councils may establish committees and subsidiaries. Benefits include council control and visibility and limited personal liability. However, they do not adequately support the collaborative nature of this project, and will not be appropriate longer-term (post-transition). • Under s36 of the LG Act, councils may enter into unincorporated structures such as joint ventures, trusts and partnerships, in connection with commercial projects. These structures require ongoing direct involvement and present potential legal liabilities, so do not meet our needs. • Under s36 of the LG Act, councils may also participate in incorporated associations or co-operatives. • Incorporated associations (IAs) are commonly employed in the not-for-profit sector. Under the <i>Associations Incorporation Act 1985</i>, IAs have the powers to acquire, hold and dispose of property and to sue and be sued in their corporate name. An IA cannot secure a profit for members, but may make a profit to further its purposes. As separate entities, IAs offer asset protection, risk separation through limited liability (making them an attractive vehicle for broad community participation), and perpetual succession (of both members and board). • Co-operatives are generally formed to meet the common economic, social or cultural 	<ul style="list-style-type: none"> ○ association and would justify registration. ○ We would be required (and intend) to re-invest any profits to further the Foundation’s aims (ie community benefit). ○ Council reps will not have statutory immunity inferred by the LG Act, and may be personally liable if they fail to comply with their duties under the AI Act. • Given the greater complexity of the co-op structure, it is not recommended unless RH&C requires the Foundation to be capable of one or both of the following: <ul style="list-style-type: none"> ○ Raising funds by issuing shares, on the basis that shareholders may receive a distribution of profit, rebate etc. This flexibility may be desirable if other sources of revenue are insufficient in the medium to long term in becoming self-funding; and ○ Operating outside of South Australia. 		

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<p>goals of members. Under the <i>Co-operatives National Law (SA) Act 2013</i>, co-ops are democratically owned – each member has one vote – and members are required to be active or risk cancellation. A co-op can be ‘distributing’ or ‘non-distributing’ – that is, it can distribute surpluses to members or reinvest them. A board of directors, made up of a majority of active members, must meet at least every three months. Directors duties and other obligations are akin to those of the Corporations Act. Obligations include providing robust disclosure statements and lodging them with the registrar.</p>			
TAX			
<ul style="list-style-type: none"> • There are a number of ways the Foundation can be set up as income tax exempt. • This will depend on its legal structure, its principal purpose, whether it will be set up as a charity, and whether the Foundation wants to receive tax deductible donations. • Choosing between IA and co-op structures will not impact tax exempt or DGR eligibility. 	<ul style="list-style-type: none"> • In WHL Ebsworth’s view, it is likely the Foundation could achieve tax exempt status on the basis of being a ‘community service organisation’, provided that: <ul style="list-style-type: none"> ○ Its activities and main objectives are to benefit the community by identifying, developing and procuring a lower cost and cleaner energy supply, ○ It complies with all the substantive requirements in its governing rules, and ○ It applies its income and assets solely for the 		<ul style="list-style-type: none"> • Ensure the Foundation’s constituent documents explicitly integrate the project’s three phases, emphasising activities which assist the community to transition to low carbon energy. • When the Foundation’s purpose, objectives and constituent documents are available: <ul style="list-style-type: none"> ○ Complete self-assessment of tax-exempt status, and submit to committee for approval; and/or

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	<p>purpose for which it was established.</p> <ul style="list-style-type: none"> • The Foundation may also be eligible for DGR endorsement (deductible gift recipient / charity status) on the basis it: <ul style="list-style-type: none"> ○ Is not-for-profit, ○ Acts for the public benefit, and ○ Has the principal purpose of 'protecting or advancing the natural environment'. 		<p>seek a private ruling from the Commissioner of Taxation requesting the ATO to confirm this position.</p> <ul style="list-style-type: none"> ○ Request preliminary view from the Australian Charities and NFP Commission (ACNC) on likelihood of DGR endorsement (optional). ○ Seek registration and endorsement of DGR status from the ACNC and the Commissioner of Taxation.
FOUNDATION MEMBERSHIP			
<ul style="list-style-type: none"> • Under the AI Act, we can choose to have members or not. • If so, they make key decisions like changes to the rules of the Foundation. If not, all decisions are made by the committee. • If so, their role in Foundation governance is outlined in constituent documents, including: <ul style="list-style-type: none"> ○ Any annual subscription or membership fees ○ Any classes of membership (eg. restricted voting rights) 	<ul style="list-style-type: none"> • Pros of membership may include: <ul style="list-style-type: none"> ○ fees, which could provide a reliable funding stream ○ commitment, with people prepared to pay fees being more likely to use services and ensure ongoing success. • Cons of membership may include: <ul style="list-style-type: none"> ○ more convoluted administration and decision-making 	<ul style="list-style-type: none"> • The Foundation should not have members initially. • The Foundation could change its constitution at a future AGM to include members if desired. 	

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<ul style="list-style-type: none"> ○ Extent of entitlement to representation on the management committee and/or community advisory committee ○ Any fundamental matters reserved to a decision of members. 	<ul style="list-style-type: none"> ○ raising the participation threshold, which may go against our principles of inclusivity and affordability. 		
FOUNDATION GOVERNANCE			
<ul style="list-style-type: none"> ● The rules of the Foundation (Rules) need to be drafted to clearly contemplate the proposed governance arrangements. ● HWL Ebsworth recommends a two-part approach to the management committee – the founding committee structure (including RH&C council representatives) and the final committee structure (community-led), which should be implemented after a suitable transitional period. ● There are no strict legal requirements regarding the membership of the committee. A number of questions will need to be resolved to draft the Rules. ● As previously discussed, a community-led advisory board can also be established to support founding committee. We are free to structure the advisory board as appropriate to meet the requirements of the Foundation in its preliminary stages. ● Securing endorsement for tax-exempt and DGR status require the Rules to clearly stipulate that the Foundation is established for ‘community service purposes’ and ‘to protect and enhance the natural environment’. A clause also needs to state 	<ul style="list-style-type: none"> ● RH&C councils should consider the following factors when designing the initial committee and the ultimate committee structure: <ul style="list-style-type: none"> ○ Skills: Desired skills mix for the committee (e.g. financial, legal, energy sector expertise). This will drive the number of committee members as well as the recruitment process. ○ Size: Depending on required skills mix and representation, 5 to 9 members is usually an optimal size. Fewer may be appropriate in the early stages. ○ Representation: Which stakeholders are represented and to what degree (ie. number per Council/stakeholder). 	<ul style="list-style-type: none"> ● Committee skill mix must include marketing, community engagement, energy, law and finance. ● The initial committee should comprise 7 members – 4 S&HLGA reps and 3 skilled. The ultimate committee of 7 should comprise 4 community reps and 3 skilled. ● Council reps should be drawn from S&HLGA Board membership or their nominated proxies, with 2 EMs and 2 Execs. Selection criteria to include distribution across the region and across skillsets. ● The CEO should be an ex officio member. 	<ul style="list-style-type: none"> ● HWL Ebsworth to draft Foundation Rules reflecting these decisions, as well as objects of the Foundation that clearly guide its activities and provide for tax-exempt and DGR status endorsement. ● HWL Ebsworth to draft community working party charter, defining its mandate, its nature and capacity, and its relationship with the committee.

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<p>that “in case of the winding-up of the Foundation, any surplus assets are to be transferred to another fund with similar objectives that is on the Register of Environmental Organisations.”</p>	<ul style="list-style-type: none"> ○ Council Control: Desired degree of representation/control by RH&C councils in the transition period (i.e. total control, majority representation or non-majority representation). ○ CEO: It is common to make the CEO an ex officio committee member, ensuring a clear and direct line of communication from management to the board. ● A charter outlining the mandate of the separate community committee / working party will be critical to ensure it adds value to the Foundation, and that there is a clear distinction between the nature and capacity of that group, as compared with the legally founded governance role of the Foundation committee. ● The Rules of the Foundation will need to clearly identify the objects of the Foundation. These objects will guide the activities of the Foundation and must be framed to incorporate both current intent and longer-term strategic objectives. 	<ul style="list-style-type: none"> ● The transition period would be on an aspirational timeline, with actual transition based on readiness, at the board’s discretion. 	

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RETAILER RFQ			
<ul style="list-style-type: none"> In due course, an Inter-Council Funding Agreement will be required as well as an RFQ and resultant agreement with the selected energy retailer. HWL Ebsworth has advised they are not able to provide any detailed advice on these documents at this stage. The appropriate structure and content of these documents will be influenced by the ultimate agreed structure for the Foundation and concrete business plans adopted by the Foundation. 	<ul style="list-style-type: none"> This has implications for the staging of our project. The LGR&D Scheme funded project includes drafting white-labelled Inter-Council Funding Agreement, Retailer RFQ and Retailer Agreement. HWL Ebsworth has advised these can't be delivered until the Foundation is established and a more concrete business plan drafted. Establishment of the Foundation is dependent on RH&C Council endorsement. 		<ul style="list-style-type: none"> Request HWL Ebsworth to requote to deliver draft generic templates now, then review at a later date.