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## Setting Up A Company Limited By Guarantee For A Non-Profit Organisation

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In setting up a non-profit organisation, there are a variety of legal structures such as a society, trust and company limited by guarantee (CLBG) that may be adopted. As each legal structure has different distinguishing features, it is important that a legal structure that best suits the aims, activities and culture of the organisation is chosen.

Due to its unique nature, a CLBG is a popular choice among social enterprises, charitable organisations, non-profit societies and religious bodies who wish to establish a corporate body to conduct their operations. As at 1.6.2021, there are 2,158 CLBGs registered in Malaysia, of which 808 are registered with the word “Berhad” and the rest without.

This alert provides an overview of a CLBG and highlights the features of a CLBG as compared to a society and a trust.

### What Is A CLBG?

Section 10(3) of the Companies Act 2016 defines a CLBG as a public company where the liability of its members is limited to such amount as the members undertake to contribute in the event the company is wound up. The amount of liability shall be stated in the CLBG’s Constitution and is commonly at a nominal amount.

As it is a public company with no share capital, a CLBG generally has the word “Berhad” in its name. However, this is not always the case as a CLBG may apply for an approval of the Minister to remove the word “Berhad” or its abbreviation “Bhd” as well as apply for the utilisation of the word “Yayasan” or “Foundation” in its name.

In Malaysia, a CLBG can only be formed for the following specific purposes:

- (a) Providing recreation or amusement

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- (b) Promoting commerce and industry
- (c) Promoting art
- (d) Promoting science
- (e) Promotion religion
- (f) Promoting charity
- (g) Promotion pension or superannuation schemes
- (h) Promoting any other objects useful for the community or country, such as:
  - Environment
  - Health
  - Education
  - Research
  - Social
  - Sports

## Attractive Features

CLBGs are primarily used by non-profit organisations that require corporate status to separate the identity of the organisation and protect its members who are involved in the running of the organisation from any personal liability for debts, losses or risks incurred by the CLBG.

As compared to other legal structures such as a society or a trust, setting up a CLBG has these few features that are attractive to a non-profit organisation:

### 1. Separate Legal Entity and Limited Liability

Like any company, a CLBG is a separate legal entity. The ownership of assets and liabilities of the CLBG belongs to the CLBG and not its members. A CLBG is capable to sue and be sued in its own name and enter into contracts. Only upon the winding up of the CLBG, the members of the CLBG can be held liable in their personal capacity up to the amount agreed upon in the CLBG's Constitution.

In contrast, societies and trusts are not separate legal entities from its members and trustees respectively. Members and trustees are held liable in their personal capacity for any liabilities incurred by the society or trust. This could pose as an issue when the society or trust grows and operates at a

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larger scale, assuming more risks and incurring greater liability.

## 2. No Share Capital

A CLBG does not have share capital (Section 12 of the Companies Act 2016). Therefore, no person can acquire a controlling interest in a CLBG nor make profit from a share sale in a CLBG.

## 3. No Profit-Making, No Participation in Profits

Despite a CLBG being a company, which is typically associated as a profit-making entity, under the Companies Act 2016, a CLBG is prohibited from making payment of any dividend to its members and is required to apply all its profits or income of the CLBG in achieving or promoting its objects. A CLBG must also ensure that none of its members or directors uses the company or its financial resources to conduct any form of political or unlawful activities.

Therefore, comfort is given to the financier, contributor and donor of a CLBG that their money will be used for the non-profit purpose.

## 4. Continuity of the Objects and Purpose of a CLBG

Even after a CLBG is wound-up, Section 45(2)(c) of the Companies Act 2016 states that the available assets of the CLBG are required to be transferred to another body with objects that are similar, incidental or conducive to its original objects. This ensures that there is a continuity in the efforts put in by the former members of the CLBG even though it has been wound-up.

## 5. Reliability

Another reason why incorporating a CLBG is the preferred legal structure for a non-profit organisation is the public's perception that a CLBG is more reliable, trustworthy and legitimate compared to an unincorporated business.

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Due to the stringent regulatory and reporting requirements imposed upon a CLBG, a CLBG is regarded as a more reliable and credible organisation than a voluntary association thereby making it easier for CLBGs to obtain funding, donation or contribution from the public and/or the government.

### Disadvantages Of A CLBG

On the flip side, CLBGs have some features that could discourage non-profit organisations from selecting a CLBG as their preferred legal structure.

#### 1. Specific Purposes Only

CLBGs may only be incorporated for the limited purposes specified in the Companies Act 2016 and any funding received by the CLBG are strictly to be used for its purposes only.

#### 2. Stringent Regulatory Requirements

Another main reason why a CLBG may not be the preferred legal structure is due to the stringent regulatory requirements which could be costly and time consuming.

Setting up a CLBG entails the submission of, *inter alia*, an application letter spelling out the reasons for incorporating a CLBG, an explanation and justification for the use of the proposed name for the CLBG, a detailed list of activities to be carried out by the CLBG and submission of a draft copy of the Constitution, which can only be amended with the approval of the Minister.

In addition to the above documentary requirements, the potential founder or director of a CLBG must be a fit and proper person who is not disqualified under the Companies Act 2016. He shall have to undergo security vetting as required by the Ministry, which shall be conducted by the Royal Malaysia Police and/or other agencies. A founder or director may not be appointed by the CLBG without first obtaining the approval of the Minister.

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These requirements are not needed in a society or a charitable trust.

### 3. Inability to Set Up a Branch

Unlike a company or a society, a CLBG is unable to set up branches of its operations. This could pose problems to an organisation that wishes to operate in different locations and segregate their operational costs.

### 4. Licence Requirement

Unlike a society, trust or a company, who can freely deal with land or property, a CLBG is required to obtain a licence from the Minister in order to hold, acquire, charge, mortgage, lease, sell or dispose a land or property. This could be a cumbersome procedure to be faced by the CLBG every time it wishes to transact in land or property which may potentially delay operations of the CLBG's purposes.

### 5. Minimum Capital Injection of RM1 million

If a CLBG wishes to omit the word "Berhad" or "Bhd" or use the word "Foundation" or "Yayasan" in its name, the Minister requires that a capital injection of RM1 million be made into the CLBG within the first 6 months of its incorporation. This could potentially be an issue for an organisation that does not have the requisite funding for this purpose.

## Comments

A CLBG is a more suitable legal structure for an organisation that operates at a larger scale, wishes to obtain funding, contribution or donation from the public, has the necessary resources required to meet the regulatory and reporting requirements of a CLBG and more importantly, falls under one of the specific purposes allowed to form a CLBG.

Deciding upon the right legal structure of a non-profit organisation is important as it affects various aspects of the operations of the organisation as well as the legal obligations attached with the legal structure. It is important that an in-

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depth understanding of each legal structure and timely legal advice is sought prior to making a decision.

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