

好好開社企

SE GOOD START

法律形式的選擇及運作建議
Choosing a Legal Form and Recommended Practices

2016

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01

背景及基本資料

Background and Basic Information

出版緣由

本指引為有志於香港成立社會企業(社企)的讀者而編撰，指引將列出社企常見的法律形式及組織架構，並提供例子及建議。**這並不是法律建議**。本指引只作參考用途。在尋求專業意見前，請勿只根據本指引內容而作出任何決定。

如需有關建立社企的常見問題或更多資料，請參閱〈常見問題〉及社聯-滙豐社會企業商務中心製作的《初創社企實用手冊》。

What is this Guide for?

This Guide is designed for the readers who are interested in setting up social enterprises in Hong Kong. The Guide sets out common legal forms and organisational models of social enterprises with examples and suggestions. **This is not a legal advice.** Please take this Guide as a reference only. Readers are NOT recommended to act upon solely the information contained in this Guide without seeking professional advice.

For commonly asked questions and more resources about social enterprise set up, please refer to the FAQs and “A Practical Guide of Setting Up a Social Enterprise” developed by HKCSS – HSBC Social Enterprise Business Centre (SEBC).

何謂「社企」

社企是懷着社會目的而營運的企業。與慈善事業不同，慈善事業雖然有其社會目的，但其運作並不涉及商業因素或商業經營。在香港，根據香港法例第112章《稅務條例》第88條獲得稅務豁免（以下稱為稅務豁免）的慈善組織，亦不時經營社企計劃。在此情況下，計劃本身就是社企，而慈善組織的其他活動及工作，則以慈善事業方式運作。社企亦不同於自願承擔企業社會責任的傳統企業。

一般企業的主要目的，是為股東從其商業營運中爭取最大的利潤及利益，不論其有否承擔企業社會責任。與一般企業相反，社企的主要目的是透過商業營運達致其特定的社會目標。例如，社企可提供產品及服務，以照顧特定的社會或福利需要（如長者護理產品）或為弱勢社群提供就業或培訓。

社企跟傳統企業的另一個不同之處，是社會會將其大部分利潤再投資，以發揮最大的社會影響力，而不是著重分配利潤予其股東。直至現在，香港還沒有社企的法定法律定義。

What is a 'Social Enterprise'?

Social Enterprise is an enterprise that contains social objectives in doing business. It should be distinguished from a charity, which contains social objectives but does not carry on business or adopt commercial elements in its activities. In Hong Kong, it is not uncommon for a charitable institution, which has been granted tax exemption pursuant to section 88 of the Inland Revenue Ordinance (Cap.112 of the Laws of Hong Kong) (hereinafter referred to as "Tax Exemption") to operate a social enterprise project. In that case, the project itself is a social enterprise whereas other activities and functions of the charitable institution are run as a charity. Social enterprise should also be distinguished from an ordinary enterprise which voluntarily undertakes corporate social responsibility (CSR).

An ordinary enterprise's main objective is to maximise the profits and interests generated from its business for its owners, whether or not it undertakes CSR. As opposed to an ordinary enterprise, the main objective of a social enterprise is to achieve specific social objectives through business approaches. For example, a social enterprise may provide goods and services that serve particular social or welfare needs (elderly care product) or create employment and training opportunities for the underprivileged.

Another characteristic of a social enterprise which distinguishes it from an ordinary enterprise is that a social enterprise reinvests most of its profit in maximising its social impact rather than distributing profits to its investors. As of today, there is no statutory legal definition of social enterprise in Hong Kong.

社企獨特之處

社企可以以不同的法律形式存在。社企的定義，並不取決於其法律形式，而是取決於其本質及最終目標。總括而言，雖然香港的社企以不同的法律形式運作，但都有其共同之處。

What are the unique characteristics of a Social Enterprise?

Social enterprise may exist in different legal forms. A social enterprise is not defined by its legal form but by its nature and ultimate objectives. Generally, social enterprises in Hong Kong share some common features despite their diverse legal forms.

	一般企業 Ordinary Enterprise	社企 Social Enterprise
主要目的 Main objective	為經營者爭取最大的財務回報 Maximise financial return for business owners	以可持續的經營模式達致其最終的社會目的 Achieve ultimate social objective by adopting a sustainable business model
在章程文件中中文述明經營本質及主要目的 Main objective or nature of business expressly stated in constitutional document	可選擇述明或不述明 Optional	並非強制要求述明，除非社企已獲得稅務豁免，但本中心仍鼓勵社企明文述明。請參考第三章〈在章程文件中訂立社會目的〉 Not mandatory unless the social enterprise has been granted Tax Exemption, but recommended. Please refer to Part III about "Setting out Social Objectives in Constitutional Document"
經營模式 Business model	以爭取最大財務回報 As a means to maximise financial return	以達到社會目的和自負盈虧 As a means to achieve social objective and self-sustainability
為弱勢社群創造就業 Job creation for underprivileged groups	不需要 Not necessary	可被視為其中一項社會目的，尤其是就業融合社企，particularly for the Work-Integrated Social Enterprise (WISE)
分配利潤予企業擁有者 Profit distribution to owners	容許 Allowed	容許，除非社企已取得稅務豁免 Allowed, unless the social enterprise has been granted Tax Exemption
利潤分享上限 (詳情參見第23頁) Maximum cap of profit sharing (ref to p. 23 for details)	非強制實行 Not compulsory	(只適用於未取得稅務豁免的社企) 建議實行，請參見第三章〈在章程文件中制定資產轉移限制及利潤分享上限〉 (Only applicable to a social enterprise that has not been granted Tax Exemption) Recommended, please refer to Part III about "Setting out Asset Lock and Cap of Profit Sharing in Constitutional Document"
資產轉移限制 (詳情參見第22-23頁) Asset Lock (ref to p. 22-23 for details)		同上 Same as above

02

組織結構及法律形式的選擇

Structuring and Choosing a Legal Form

1 組織結構 STRUCTURING

在社企成立之前，創辦人首先需要考慮一條基本問題—社企的組織結構。譬如說，組織結構的問題包括誰是社企的擁有人，誰負責管理，誰有權力去作出不同種類的決定等等。

個體創辦人

若創辦人是個體或一群個體，而他／她／他們希望擁有或直接管理社企，他們可以以他們認為適合他們個別情況的法律形式成立新實體，例如，成立股份有限公司，而創立人成為股東（擁有社企）及董事（管理社企）。

法團／組織單一創辦人

若只有一位創辦人，而創辦人為法團或組織，就有以下兩項選擇：

- 1 以創辦人機構內部部門或分支的方式成立社企。換句話說，社企並不以獨立法律實體存在。其不能獨立於創辦人的機構、擁有任何資產、享有任何法律權力、或負起任何法律責任。法律上，所有資產、法律權力及責任，均屬於創辦人，而不是社企自身。
- 2 選擇合適的法律形式並以該形式成立新實體，以擁有及營運社企。例如，若創辦人本身是擔保有限公司，就可以以股份有限公司成立附屬公司，以營運社企。如此，創辦人和社企將會分別為兩個法律實體，可獨立擁有其各自資產、享有法律權力及承擔法律責任。社企更可擁有一個自己與創辦人不同的管治機構（若是股份有限公司，則為董事局）。

Before a social enterprise is established, the founder(s) should first consider a fundamental question – how the social enterprise be structured. In this context, structuring concerns about who would be the owner(s) of the social enterprise, who would manage it, who would have the right to make major decisions of different natures etc.

Individual Founder(s)

If the founder(s) is an individual or a group of individuals, and he/she/they intend to own and directly manage the social enterprise, they may form a new entity in a legal form that they think most suitable in their particular circumstances, e.g. forming a company limited by shares where founders would be the shareholders (i.e. own the social enterprise) and also the directors (i.e. manage the social enterprise).

Corporate/Organisation Sole Founder

If there is only one founder and the founder is a corporation or organisation, it may choose either one of the following options:

- 1 Establish the social enterprise as an internal department or a branch of the founder. In other words, the social enterprise is not established as a separate legal entity. It cannot, dependently from the founder, own any assets, enjoy any legal right or bear any legal liability. Legally speaking, all assets, legal rights and liabilities belong to the founder, not the social enterprise independently.
- 2 Choose an appropriate legal form and establish a new entity in that legal form as a vehicle to own and operate the social enterprise. For example, if the founder itself is a company limited by guarantee, it may establish a subsidiary in the legal form of a company limited by shares to operate the social enterprise. In this way, the founder and the social enterprise would be two separate legal entities, each of them may own its own assets, enjoy its legal rights and bear its legal liability independently from each other. The social enterprise may also have a governing body (e.g. in the case of a company limited by shares, the board of directors) composing of members different from the governing body of its founder.

考慮因素 FACTORS TO BE CONSIDERED

讀者在組織社企及為其選擇合適的法律形式時，應該考慮一些重要因素，例如：
Readers should take into account of some important factors when structuring and choosing a suitable legal form for the social enterprise, such as:

法律責任

若果社企的業務具有較高法律風險，例如經營餐廳的社企有可能須要承擔某些風險，例如因食物處理不當而引起食物中毒的法律責任，我們建議創辦人成立獨立法律實體營運社企，以分隔各自的法律責任。此外，不同的法律形式，皆會影響擁有人的法律責任，例如，當公司清盤時，擔保有限公司的成員只需承擔不多於章程細則所述的供款款額；而股份有限公司的股東則只需承擔不多於其認購股份時所付的代價。

資本來源

若社企希望將來吸納外部投資，對比擔保有限公司、社團或合作社，股份有限公司可能是最合適的法律形式。

稅務豁免

若社企合資格成為慈善機構，可根據《稅務條例》第88條申請稅務豁免。稅務局為申請稅務豁免的慈善機構訂下要求，例如，禁止機構分配其收入及物業予其成員，以及禁止管治機構（如董事局）成員收取酬金。若其創辦人希望自己管理社企，並需要從社企收取薪酬以支持其生活，受規定所限，稅務豁免顯然不是供他們的選擇。

Legal liability

If the underlying business of the social enterprise has a high legal risk exposure, for example, the underlying business is a restaurant and it is possible for social enterprise to bear certain legal liabilities (e.g. for food poisoning due to inappropriate handling of food), it would be advisable for the founder to set up a separate legal entity to operate the social enterprise, segregating their respective legal liabilities. Besides, different legal forms have legal liability implications to its owners, for example, member of a company limited by guarantee is liable up to the amount of contribution stated in the Articles of Association (AA) to be called upon winding up of the company, whereas the shareholders of limited by shares are liable up to the consideration they need to pay in subscribing for their shares in the company.

Source of capital

If a social enterprise wishes to draw external investment in future, a company limited by shares may be the most suitable legal form, compared to a company limited by guarantee, a society or a co-operative society.

Tax exemption

Social enterprises may apply for tax exemption under section 88 of the Inland Revenue Ordinance if they are qualified as charitable institutions. The Inland Revenue Department lays down requirements for charitable institutions applying for tax exemption, for example, prohibition of the institution from distributing its incomes and properties amongst its members and also prohibition of the members of its governing body (for example, the board of directors) from receiving remuneration. If the founders wish to manage the social enterprise by themselves and need to receive salary from the social enterprise to support their living costs, tax exemption is apparently not an option to them because of the required prohibition.

2 香港社企常見的法律形式

COMMON LEGAL FORMS OF SOCIAL ENTERPRISES IN HONG KONG

香港的社企可以以不同的法律形式成立及登記，以滿足其特定需要。以下將列出一些社企常見的法律形式，以供讀者參考。

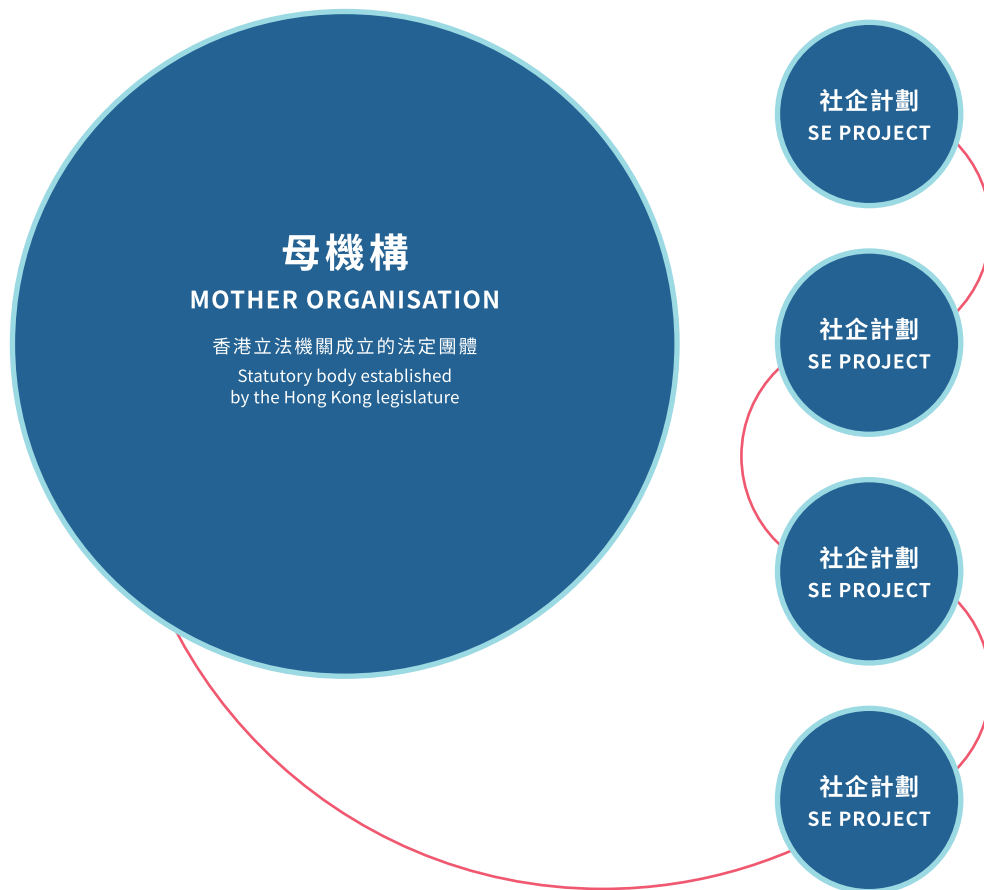
Social enterprises in Hong Kong may be established and registered in different legal forms in meeting their specific needs. Here are some common legal forms of social enterprises for the readers' consideration.

a. 香港立法機關成立的法定團體

只有在非常特殊情況下，或因為某些歷史因素，立法機關才會成立法人團體（特定條例）。例如，東華三院乃憑藉《東華三院條例》（香港法例第1051章）而成立，救世軍大將則憑藉《救世軍條例》（香港法例第1062章）當作為法團而成立。

現在仍需要以這形式成立的法人團體非常罕有。大部分慈善機構可以透過擔保有限公司或社團形式成立。而且，社企自身亦難以透過這種法律形式成立。

另外，由立法機關成立的法定團體，若決定成立社企，可能透過建立內部部門或分支而為之（即是無須成立獨立法律實體）。例如，「iBakery」是東華三院轄下成立的社企計劃，而「家品店」則是救世軍成立的社企計劃，這兩間社企並不是獨立於其母機構的法律實體。



a. Statutory body established by the Hong Kong legislature

Only under very special circumstances or because of historical reasons, an entity would be established by legislature (special ordinance). For example, Tung Wah Group of Hospitals was established by virtue of the Tung Wah Group of Hospitals Ordinance (Cap. 1051 of the Laws of Hong Kong) and The General of The Salvation Army is deemed a corporation and was established by virtue of the Salvation Army Ordinance (Cap.1062 of the Laws of Hong Kong).

Nowadays, it is rare to see an entity actually needs to be established in this legal form. Most charitable institutions may be established in the form of a company limited by guarantee or a society instead. And a social enterprise could hardly be established in this legal form by itself.

Besides, if a statutory body established by legislature, decides to establish a social enterprise, it may prefer to set up the social enterprise as an internal department or a branch of the statutory body (i.e. without forming a separate legal entity). For example, “iBakery” is set up as a social enterprise project under Tung Wah Group of Hospitals, and “Family Stores” is also set up as a social enterprise project of The Salvation Army, both of these social enterprises are not separate legal entities independent from their mother organisations.

若社企以個別「計劃」形式，於母機構的架構下成立，社企將直接地受母機構的董事局管治，並由母機構的人員管理。為促進不同社企計劃之間的協調，一些組織更選擇成立專責部門，以監督不同種類的社企計劃的整體發展及管理。

In the case a social enterprise is set up as an individual ‘project’ within the mother organisational structure, the social enterprise project is directly governed by the board of directors of the mother organisation and managed by the organisation’s staff. To facilitate better co-ordination among different social enterprise projects, some organisations might choose to set up a dedicated department to oversee the overall development and management of various social enterprise initiatives.

b. 社團

「社團」指根據《社團條例》(香港法例第151章)登記的社團。負責處理登記的政府部門是警務處處長 – 香港警務處社團事務處的牌照課。

社團是不屬法團的團體。有別於屬法團的團體(如公司)，不屬法團團體的成員及幹事可能為社團引起的責任負上無限個人責任。

社團的章程文件，一般稱為章程，總括地規定社團的內部事務及管理，例如董事會議程序，權利的分配，成員之間或成員與社團之間的權利及補救。譬如說，章程可包括社團的宗旨及推進該宗旨的准許方法。《社團條例》並無訂定社團章程的必要內容。為確保章程能夠涵蓋社團的目的及其有效管治，草擬章程時請尋求專家協助。

總括而言，以社團形式營運社企，並不常見。社團反而更常見於具更廣大的使命的組織(例如傳教組織)，該等組織然後再成立社企以達致其社會目標。

在成立社企時，一些社團傾向透過建立內部部門或分支的形式為之，而非建立獨立法人實體。這點與立法機關成立的法定團體相似。若是如此，社團宜先檢測其法律風險，就如上文所述，社團不是法人團體。以社團形式營運的社企亦應該確保其社會目標與母機構的宗旨吻合。再者，母機構需要為旗下社企負上法律責任。

例如，「理安心」為香港單親協會的社企計劃，而「環保精彩大道」則是屯門青年協會的社企計劃，兩者皆不是獨立於其母機構的法律實體。

b. Society

“Society” refers to a society registered under the Societies Ordinance (Cap.151 of the Laws of Hong Kong). The government department responsible for handling the registration is the Commissioner of Police (CP) – Licensing Office of the Hong Kong Police’s Societies Office.

A Society is an unincorporated body. Unlike an incorporated body (e.g. a company), an unincorporated body’s members and office bearers may be held personally liable for the liabilities incurred by the Society without limit.

The constitutional document of a Society is commonly called the Constitution. It generally regulates the Society’s internal affairs and management, such as procedures for board meetings, distribution of entitlements, and the rights and remedies of the members as between themselves or over the Society. For example, the constitution may contain the objects of the Society and the permitted means for fostering such objects. The Societies Ordinance does not stipulate the required contents of the constitution of a Society. To ensure the constitution is comprehensive enough for the purpose of the Society and for its effective administration, it is advisable to engage professional adviser to draft the Constitution.

Generally, it is uncommon for a Society established primarily for operating a social enterprise. More often, a Society is initially formed for a broader mission (e.g. for promoting a religion) and it subsequently establishes a social enterprise to foster its social objectives.

Like statutory bodies established by legislature, in establishing a social enterprise, some Societies may prefer to set up the social enterprise as an internal department or a branch of the Society, rather than setting up a separate legal entity. If so, the Society is recommended to review its legal risk exposure since, as mentioned above, a Society is an unincorporated body. The Society should also ensure that the social objective of its social enterprises is in line with the organisation’s mission. Besides, the mother organisations shall be responsible for the legal liabilities of the social enterprises.

For example, “理安心” is a social enterprise project run by Hong Kong Single Parents Association, and “環保精彩大道” is a social enterprise project run by Tuen Mun Youths Association, both of them are not separate legal entities from their mother organisations.

母機構 (社團) MOTHER ORGANISATION (SOCIETY)

社企計劃
SE PROJECT

社企計劃
SE PROJECT

從以上兩個個案，讀者應清楚了解社企的社會目的與母機構的使命一致。另外，母機構須承擔社企的法律責任。

From above cases, readers should get better understanding that social objectives of a social enterprise should align with its mother organisation. Mother organisation has legal obligation to the social enterprise.

c. 公司

「公司」是現今最常見的社企法律形式。根據《公司條例》(香港法例第622章)，公司共有五種類型(根據前身條例，香港法例第32章，共有八種類型)，分別是：

- 私人股份有限公司
- 公眾股份有限公司
- 擔保有限公司
- 私人無限公司
- 公眾無限公司

c. Company

‘Company’ is currently the most common legal form of social enterprises in Hong Kong. Under the Companies Ordinance (Cap.622 of the Laws of Hong Kong), there are 5 types of companies (formerly 8 types under the preceding ordinance, Cap.32 of the Laws of Hong Kong), namely:

- private company limited by shares
- public company limited by shares
- company limited by guarantee
- private unlimited company
- public unlimited company

有關成立社企方面，其中兩種較為相關 – 私人股份有限公司(本指引將其省略為「股份有限公司」)及擔保有限公司

i. 註冊法團

根據《公司條例》(第622章)，所有個人(年滿18歲)及群體均可為合法的目的成立公司。公司註冊處負責實施和執行《公司條例》的大部分條文。

ii. 章程文件

根據現時《公司條例》，公司可採用與其相關的公司類型的章程細則範本中的任何或全部條文為自己的組織章程細則。換句話說，在公司註冊時，創辦成員可免卻草擬公司組織章程細則的麻煩及節省成本。章程細則範本可從《公司(章程細則範本)公告》(香港法例第622H章)找到。

iii. 成員及表決權

每一間公司最少須有一位成員，在股份有限公司中，其成員一般稱為「股東」。

公司可有不同類別的成員，例如，有表決權成員及無表決權成員。一般來說，在擔保有限公司內，同一類別的各成員皆有同等的表決權，即是一人一票。在股份有限公司內，股東的表決權按照其擁有的股票數目分配，一般是一股一票。

iv. 董事及公司秘書

在擔保有限公司內，最少須有兩名董事，而董事須為年滿十八歲的自然人。在股份有限公司內，最少須有一名董事，而股份有限公司的董事可以是自然人或法人團體，前提是須有一名董事是自然人。

每間公司須有一名公司秘書，公司秘書必須為居於香港的自然人、或其註冊地或業務地點在香港的法人團體。

In the context of forming a social enterprise, two types are more relevant – private company limited by shares (simply referred to as “company limited by shares” in this Guide) and company limited by guarantee.

i. Incorporation

In accordance with the Companies Ordinance (Cap.622), all individuals (aged 18 or above) and groups may set up companies for lawful purposes. The Companies Registry administers and enforces most parts of the Companies Ordinance.

ii. Constitutional Document

The constitutional document that a company must have upon its incorporation is the AA. Companies formed before the current Companies Ordinance (Cap.622) in force on 3 March 2014 would also have the Memorandum of Association, which was abolished by the current Ordinance. All information such as the object clause (if any) contained immediately before the Memorandum of Association was abolished shall automatically form part of the AA.

iii. Members and Voting Power

Every company must have at least one member, in the case of a company limited by shares, its members are commonly called “shareholders”.

Companies may have different classes of members, for example, voting members and non-voting members. In general, for a company limited by guarantee, each member of the same class would have the same voting power, i.e. one vote per member. For a company limited by shares, a shareholder’s voting power is in proportion to the number of shares that he holds, normally one vote per share.

iv. Directors and Company Secretary

For a company limited by guarantee, it must have at least 2 directors who must be natural persons aged 18 or above. For a company limited by shares, it must have at least 1 director; directors of a company limited by shares may be natural persons or body corporates provided that it must have one director who is a natural person.

Every company must also have a company secretary, who must be either a natural person ordinarily resides in Hong Kong or a body corporate that has its registered office or place of business in Hong Kong.

v. 有限公司

有限公司與無限公司的不同在於有限公司成員對公司債項所承擔的責任受其股份或擔保所限。換句話說，只要成員履行其承諾支付其股份(如果是股份有限公司)或分擔組織章程細則所示的數額，成員將不須承擔有限公司的債務。

v. Limited Company

A limited company, as opposed to an unlimited company, means the liability of the members of the limited company for the debts of the company is limited either by shares or by guarantee. In other words, the members will not be held liable for the limited company's debts as long as those members have fulfilled their commitment to pay for their shares (in case of a company limited by shares) or to contribute the amount stated in the AA.

+ 擔保有限公司

公司清盤時，成員的責任受公司的組織章程細則所限，成員僅須承擔其在章程細則中承諾分擔公司資產的固定數額。

在香港，社企選擇以擔保有限公司方式營運，主要因為這種法律形式合資格申請稅務豁免。

一些社企以擔保有限公司形式成立，並作為母機構的附屬公司營運。在此情況下，社企受獨立的董事局管治。

+ Company limited by guarantee

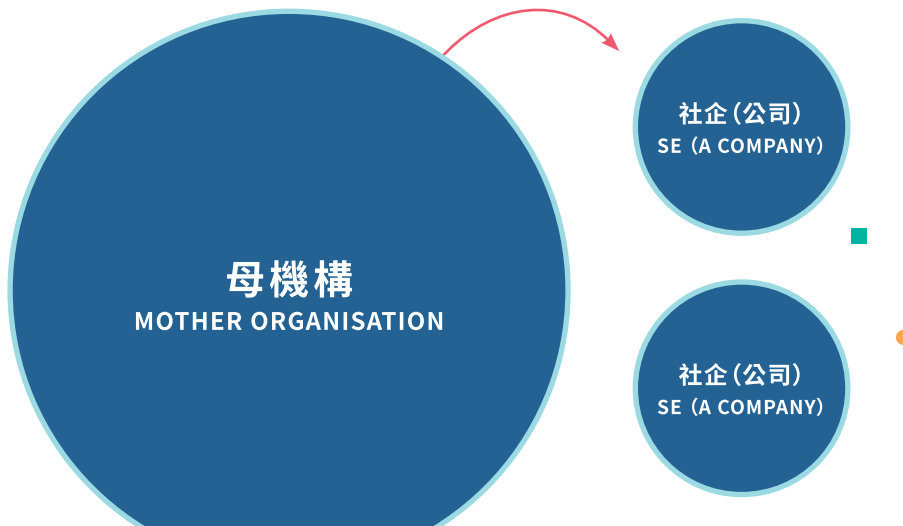
The liability of its members is limited by the company's AA to the fixed amount that the members undertake, and members must contribute to the assets of the company in the event of the winding up of the company.

In Hong Kong, social enterprises choose to be formed as a company limited by guarantee mainly because this is a legal form that is eligible to apply for Tax Exemption.

Some social enterprises are formed as a company limited by guarantee and operate as the subsidiary of its mother organisation. In these cases, the social enterprises are governed by an independent board of directors.

例子：香港善導會的明朗服務有限公司；社聯的互聯網學習資源中心(有機上網)

E.g., Bright Services Company Limited of the Society of Rehabilitation and Crime Prevention, Hong Kong; Internet Learning Resource Centre Limited (Weborganic) under the Hong Kong Council of Social Service



+ 股份有限公司

其成員的責任限制在其擁有的股票中仍未清付的部分。例如，陳先生以HK\$100代價認購某公司一股，他收到股票時支付HK\$70，公司可接着聯絡陳先生要求其支付HK\$30。當陳先生再支付HK\$30，他對公司的債務就再無責任，即使公司不能完全負擔自身債務。

這種法律形式，對一些希望註冊後仍可彈性吸納新投資者的自由的社企，相當合適，因為股份有限公司可以根據組織章程細則隨時發行新股吸納新投資者以增加資本。

例子：黑暗對話(香港)、鑽的

E.g. DID HK Limited; Diamond Cab

+ Company limited by shares

The liability of its members is limited to any amount unpaid on the shares held by the members. For example, Mr. Chan subscribes for one share of the company at a consideration of HK\$100. He has paid for HK\$70 when the share is issued to him. The company can subsequently call on Mr. Chan to pay the balance of HK\$30. Once Mr. Chan has paid the said HK\$30, he has no liability towards the company in paying its debts even if the company is unable to pay its debts in full.

This legal form is suitable for social enterprises which are desirous to have the flexibility to attract new investors after incorporation because a company limited by shares may, subject to its AA, raise fund by issuing new shares at any time to incoming investors.

d. 獨資經營

「獨資經營」指一個人擁有的業務。嚴格來說，這並不是法律實體，雖然經營者可以聘請僱員。經營者有權享有全部利潤及承擔獨資經營中所引致的任何債務。實質上，獨資擁有人須承擔獨資經營中所招致的無限債務責任。故此，這法律形式對社企經營者並不吸引，亦不常見於社企經營。

d. Sole Proprietorship

“Sole Proprietorship” refers to a business that is owned by one individual. Strictly speaking, it is not a legal entity, though the proprietor may engage employees. The proprietor is entitled to all of the profits and is responsible for any debts that the sole proprietorship incurs. In substance, the sole owner has unlimited liability for the debts of his sole proprietorship business, making this legal form an uncommon and unattractive one for social enterprises.

e. 合夥

根據《合夥條例》(香港法例第38章)，合夥指為牟利共同經營業務的人之間所存在的關係。共同締結合夥的人，合稱商號。商號的每一合夥人，對商號在他作為合夥人期間所招致的一切債項及義務，須與其他合夥人共同負上法律責任。因為合夥人須承擔無限法律責任，這種法律形式並不常見於社企經營。

e. Partnership

According to Partnership Ordinance (Cap.38 of the Laws of Hong Kong), partnership is the relation which subsists between persons carrying on a business in common with a view of profit. Persons who have entered partnership with one another are called collectively a firm. Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner. Since the extent of liability borne by the partners is unlimited, this legal form is uncommon for setting up a social enterprise.

3 三種法律形式的基本比較 A BRIEF COMPARISON OF THREE LEGAL FORMS

「社團」(作為母機構)、「擔保有限公司」及「股份有限公司」是社企最常見的法律形式，讀者可考慮不同因素，以決定最合適他們個別情況的法律形式。

‘Society’ (as a mother organisation), ‘Company Limited by Guarantee’ and ‘Company Limited by Shares’ are the most popular forms of social enterprises. Readers may take into account various factors in deciding the most suitable form for their own circumstances.

此表僅是三種法律形式的概括比較，讀者應尋求法律意見以獲取更詳細資料。

This table is a general comparison of three legal forms. Readers are recommended to seek legal advice for more details.

	社團 Society	擔保有限公司 Company Limited by Guarantee	股份有限公司 Company Limited by Share
法人身份 Legal identity	並無獨立於其擁有人的法律地位以擁有權利及義務 No separate legal status in rights and obligations from its owners	獨立於其擁有人的法律地位 Separate legal entity from its owners	
法例 Legislation	《社團條例》(第151章) Societies Ordinance (Cap.151)	《公司條例》(第622章) Companies Ordinance (Cap.622)	
負責註冊的 政府部門 Government Department for Registration	警務處處長 – 香港警務處社團事務處的牌照課 Commissioner of Police (CP) – Licensing Office of the Hong Kong Police’s Societies Office	公司註冊處 Companies Registry	
營運社企所需的 商業登記證 Business Registration Certificate required for operating the social enterprise	需要，除非社團已獲得稅務豁免 Yes, unless the Society has been granted Tax Exemption	需要，除非公司已獲得稅務豁免 Yes, unless the company has been granted Tax Exemption	需要 Yes
法律責任 Legal liability	若果資不抵債，所有社團中的成員及幹事須負上個人無限責任 All members and office bearers of the Society may be personally liable unlimitedly if assets are not sufficient to meet the liabilities	所有成員須承擔其在章程細則中承諾供獻的公司資本 Every member is liable up to his contribution stated in the AA	股東僅須承擔他們認購的股本 The shareholders are liable up to the shares they contributed



申請稅務豁免的資格(《稅務條例》第88條)
Eligibility to apply for tax exemption (section 88 of the Inland Revenue Ordinance)

合資格
Eligible

實際執行上，一般情況並不合乎資格，除非該公司符合所有稅務豁免的規定，例如禁止分配收入及董事酬金
In practice, normally not eligible unless the company fulfills all requirements for tax exemption, e.g. prohibits distribution of income and directors’ remuneration

吸納外部
投資者資格
Eligibility to draw
external investment

實際執行上，一般情況並不合乎資格
In practice, normally not eligible
(詳情參見第12-13頁)
(ref to p. 12-13 for details)

可以
Yes

分配利潤予擁有人
Profit distribution
to owners

若獲得稅務豁免，不允許
Not allowed if Tax Exemption is granted

允許，除非獲得稅務豁免，股份有限公司獲得稅務豁免並不常見
Yes, unless in the unlikely case that it has been granted Tax Exemption

申請政府社企
資助計劃資格
Eligibility to apply
for government’s
social enterprise
funding schemes

合資格申請所有現有社企資助計劃，包括但並不限於：
Eligible to apply for all existing funding schemes for social enterprises including but not limited to

- 「伙伴倡自強」社區協作計劃(ESR)
Enhancing Self-Reliance through District Partnership Programme (ESR)
- 「創業展才能」計劃(3E計劃)
Enhancing Employment of People with Disabilities through Small Enterprises Project (3E project)
- 社會創新及創業發展基金(社創基金)
Social Innovation and Entrepreneurship Development Fund (SIE Fund)

不合乎資格申請「創業展才能」計劃，但合資格申請「伙伴倡自強」社區協作計劃、以及社會創新及創業發展基金(社創基金)
Not eligible to apply for 3E scheme. Eligible to apply for funding of ESR and SIE Fund

列載於社聯-
滙豐社會企業
商務中心出版的
《社企指南》
Eligibility to be
listed at the
Social Enterprise
Directory published
by SEBC

可以
Yes

●www.police.gov.hk

●www.cr.gov.hk

03

確保社企的社會目的：
運作方式的建議及例子Safeguarding Social Objectives:
Recommended Practices and Examples

公眾對社企及其社會價值日漸認識。由於香港對社企並無法定定義，及並無強制社企必須以特定法律形式營運，一般大眾未必容易辨別社企及了解其社會理念。

社企可運用一些方法令公眾更了解其理念及營運。這一章將會介紹數種建議方法，以社團形式或以公司形式成立的社企均可採用這些方法。

There is a rising public awareness of social enterprise and its social value. Since there is no statutory definition or mandatory legal form for the setting-up of social enterprises in Hong Kong, the general public may not be able to identify a social enterprise and understand its social purpose easily.

Social enterprises may adopt some practices to enable the general public better understand their values and operation. This section introduces a few recommended practices which could be adopted by social enterprises established in the legal forms of societies or companies.

1 在章程文件中訂立社會目的
SETTING OUT SOCIAL OBJECTIVES IN CONSTITUTIONAL DOCUMENT

社會目的可謂社企的靈魂，因為社會目的的存在，使社企不同於一般企業。因此，不論社企採用何種法律形式，社會目的都應該記錄在章程文件上，雖然這並非法律要求（但這是獲得稅務豁免的條件）。

若純粹為特定的社企計劃成立全新的社團或公司，事情就簡單直接 – 社企的社會目的就可明文述明於社團的章程或公司的組織章程細則。

但是，在很多個案中，社團或公司（或甚至是立法機關成立的法定團體，透過建立內部部門或分支成立社企）是為更廣大的社會目的成立，又或其已建立多於一間社企，而其下每間社企的社會目的又不盡相同。舉例來說，一間以社團形式成立的慈善機構的主要社會目的是幫助解決貧窮問題，而其轄下社企的社會目的較狹窄，是為失業青年提供就業機會。在以上情況，社團或公司應確定：

- 1 轄下社企的社會目的與其母機構的社會目的保持一致；若有疑問，社團或公司應修改及擴展其自身的社會目的，以使其明確包括轄下社企的社會目的；及
- 2 轄下社企的社會目的應明文述明於社團或公司的章程文件（例如「公司的社會目的是……成立社企，以[社企的特定社會目的]」）或最少明文述明於特定社企的商業計劃、計劃書、或類似文件，而公司實體管治機構（例如董事局）應妥為採用，及使公眾能容易查閱以上文件。

Social objectives are said to be the soul of a social enterprise since their existence distinguishes the social enterprise from an ordinary enterprise. Therefore, regardless the legal form that is chosen for setting up a social enterprise, it is always recommended that the social objectives be incorporated in the constitutional document though this is not mandatory by law (but is a requirement for Tax Exemption).

If a society or a company is formed afresh solely for a specific social enterprise project, this would be straight forward – the social objectives of the social enterprise can be expressly stated in the society's constitution or the company's AA.

However, in many cases, a society or a company (or even a statutory body established by legislature setting up a social enterprise in the form of an internal department or a branch) is established for broader social objectives than those of its social enterprise, or it has established more than one social enterprise with social objectives not identical with each other. For example, the key social objective of a charitable institution in the form of a society is to help relieve poverty, and its social enterprise's social objective is narrower which is to create job opportunity for the unemployed youth. In those cases, it is advisable for the society or the company to ensure that:

- 1 the social objectives of its social enterprise are in line with its own social objectives; in case of doubt, the society or the company is recommended to amend and broaden its own social objectives so as to clearly cover the social objectives of its social enterprise; and
- 2 the social objectives of its social enterprise are expressly set out in the society's or the company's constitutional document (e.g. "the social objectives of the company is ... to form a social enterprise for [specific social objectives of the social enterprise]...") or at least expressly set out in the specific social enterprise's business plan, proposal or similar document, which should be duly adopted by the entity's governing body (e.g. board of directors) and made easily accessible to the public.

章程文件中述明社會目的條文一般稱為「宗旨條文」，在前身《公司條例》(第32章)於1997年修改之前，所有公司都必須有宗旨條文。現在，根據現行《公司條例》(第622章)，宗旨條文乃可有可無，但就如上述，為回應公眾對其社會目的的疑問(及為申請稅務豁免，如有的話)，所有以不同法律形式成立的社企，皆應將其宗旨條文寫在組織章程細則。

草擬宗旨條文時，有人認為先查考相關基本社會目的的本質，會比較容易為之。這裏有兩種常見的社企，以其社會目的的本質進行分類：

a. 就業融合社企

就業融合社企是集中於提升弱勢社群就業能力的社企。就業融合社企為較難獲得主流勞工市場聘用的人士提供培訓及工作機會，例如傷健人士及更生人士。工作融合社企在社企界佔有一大席位，尤其是在開展初期。大部分香港非牟利機構運作的社企皆是就業融合社企。

一些政府資助計劃，以幫助弱勢社群創造就業作為申請的先決條件，亦訂立具體要求。例如，受「創業展才能」計劃資助的社企，其聘請的人員中不少於50%須為傷健人士。

就業融合社企應明文述明其社會目的於章程文件及其他官方文件，並使公眾能容易查閱以上文件。

The provision setting out the social objectives in a constitutional document is generally called the “object clause”. Before the preceding Companies Ordinance (Cap.32) was amended in 1997, all companies must have an object clause. Now, under the Companies Ordinance (Cap.622), object clause is optional but as explained above, in order to address public’s concern about its social objectives (and for applying for Tax Exemption, as the case may be), any social enterprise regardless the legal form it has chosen, is recommended to include an object clause in its AA.

In drafting an object clause, some people may find it easier to first examine the nature of the underlying social objectives concerned. Here are two common types of social enterprises categorized by their different nature of social objectives:

a. Work Integrated Social Enterprise (WISE)

WISE is a type of social enterprise that focuses on improving employability of the deprived groups. WISE offers training and job opportunities for those people who are difficult to be engaged in the mainstream labour market, such as people with disabilities and the ex-offenders. WISE plays an important role in the Hong Kong’s social enterprise sector, especially during the initial stage. Majority of social enterprises operated by non-profit making organisations in Hong Kong are WISE.

Some government funding schemes make the creation of jobs for the deprived groups a prerequisite and set out concrete requirements. For the social enterprises funded under 3E Project, for example, are required to employ not less than 50% of people with disabilities of the total number of persons on the payroll of the Business.

WISEs are recommended to state their social objective clearly in their constitutional document and other official documents which are easily accessible by the public.

宗旨條文例子 Examples of Object Clause

集中為更生人士創造就業的回收公司

‘公司宗旨：

- 提供就業機會予更生人士，為香港社會的利益而經營；
- 經營回收業務，提高公眾對香港環境保護的意識；及
- 提供培訓時段及能力發展課程，以提升更生人士技能。’

A recycling company targets to create jobs for ex-offenders

‘The objects of the Company are:

- to operate for the benefit of the HK society by providing job opportunities for the ex-offenders;
- to operate the business of recycling with a mission to arouse public awareness of environmental protection in HK; and
- to empower the ex-offenders by offering training sessions and capacity building programmes.’

集中為視障人士創造就業的社企餐廳

‘公司宗旨：

- 經營餐飲事業；
- 提供培訓及工作機會，以提高視障人士的工作能力及自我形象；及
- 成為職業跳板，以助視障人士受聘於公開勞工市場。保證不少於50%的全日制員工為視障人士。’

A social enterprise restaurant targets to create jobs for visually impaired persons

‘The objects of the Company are:

- to operate the business as a restaurant and catering center;
- to enhance the work ability and raise the self-esteem of visually impaired persons by providing training and job opportunities; and
- to serve as a springboard for the visually impaired persons to engage in the open job market. It is guaranteed that no less than 50% of total number of full time staff is visually impaired.’

個案 Case 黑暗中對話(香港)基金會 Dialogue in the Dark (HK) Foundation Limited

此社企以擔保有限公司形式於2009年註冊。基金會宗旨已於其組織章程大綱及細則的一章〈宗旨及能力〉中明文述明。現將部分宗旨節錄如下作為例子。

The social enterprise was incorporated as a Company Limited by Guarantee in 2009. Objects of the Foundation were clearly stated under the section ‘Objects and Power’ of the Memorandum and Association. Part of the objects are quoted as below as an example.

‘基金會的目的如下：

- 為公眾利益，以非牟利的方式，提倡、支援及提高教育，使人正確認識及認同視障。
- 以非牟利的方式，組織及協助組織教育座談會、講座、會議及參觀，以提高公眾對視障人士及其他傷健人士的認知及包容。
- 教導香港大眾，特別是學生，有關對視障人士的包容、尊重，及同理心。
- 提供適當的職業培訓及工作機會，以提高香港視障人士的自我認同。’

‘The Objects of the Foundation are:

- to promote, support and enhance advancement of education for correct understanding and acceptance of the visually impaired in Hong Kong on a non-profit making basis and for public benefit;
- to raise public awareness and tolerance of the visually impaired or people with other disabilities in Hong Kong by organising or assisting in organising educational talks, lectures, seminars and visits on a non-profit making basis;
- to educate the public in Hong Kong, in particular the students, about diversity, respect and empathy for the visually impaired; and
- to raise the self-esteem of the visually impaired in Hong Kong by offering proper occupation training and job opportunities.’

資料來源Source: 黑暗中對話(香港)基金會組織章程大綱及細則 M&A of Dialogue in the Dark (HK) Foundation Limited

b. 非就業融合社企

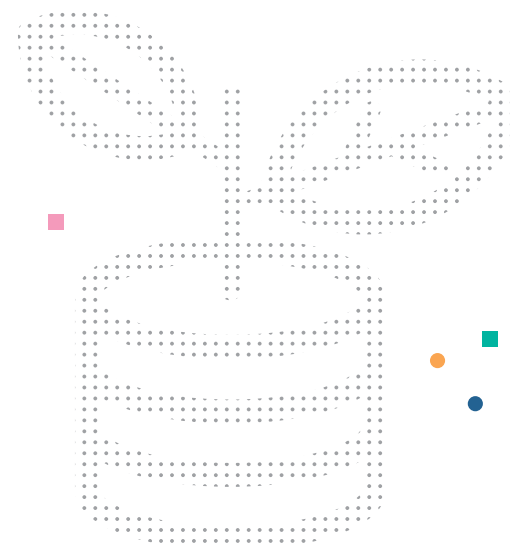
非就業融合社企並非集中於改善弱勢社群就業機會，而是為了其他社會目的而存在的社企。香港近年非工作融合社企愈來愈多，例如：

- **公平點**
售賣社企產品，提倡公平貿易意識
- **歷耆者**
透過提供年老體驗課程，提高公眾對老年人士需要的了解
- **要有光**
以可負擔的租金為單親家庭提供得體住房
- **好好社企**
為個人及公司客戶進行社企產品買賣，提倡負責任的消費

b. Non-Work Integrated Social Enterprise (Non-WISE)

Non-WISE is a type of social enterprise that does not focus on improving employability of the deprived groups but for other social purposes. In Hong Kong, there is a growing number of non-WISEs in recent years, such as:

- **Fair Circle**
promote the idea of fair-trading by selling social enterprise products
- **Eldpathy**
raise public understanding about the need of the elderly through the delivery of aging experiential programmes
- **Light Be**
provide single-parent families with a decent home at affordable rent
- **GoodGoods**
advocate responsible consumption by trading social enterprise products for individual and corporate customers



宗旨條文例子 Examples of Object Clause

為低收入家庭提供高質素日常用品的零售商店

‘公司宗旨：

- 經營銷售日常用品的零售商店；
- 尋找及提供低廉及可負擔的日常用品，以造福低收入家庭；及
- 提供免費興趣班及活動，為低收入家庭提供聯誼機會。’

A retail shop aims to provide quality daily goods to low income families

‘The objects of the Company are:

- to operate the business as a retail shop selling daily products;
- to operate for the benefit of the low income families by sourcing and offering daily goods at low and affordable price; and
- to provide networking opportunities for the low income families by providing free interest classes and activities.’

為提高環保意識及提倡香港設計的升級再造公司

‘公司宗旨：

- 經營升級再造業務，將廢棄物料升級成高質手袋及配件飾物；
- 為公眾舉辦升級再造工作坊，以提高公眾對香港環境保護的意識；及
- 舉辦教育及推廣活動，以鼓勵公眾欣賞香港設計的產品。’

An upcycling company aims to raise eco-awareness and promote Hong Kong design

‘The objects of the Company are:

- to operate the business of upcycling with a mission to upgrade wasted materials to high quality bags and accessories;
- to arouse public awareness of environmental protection in HK by conducting upcycling workshops to the general public; and
- to encourage public appreciation of the design products of HK by organising education and promotion events.’

個案 Case 全城街馬基金會 RunOurCity Foundation Limited

此社企以擔保有限公司形式於2013年註冊。基金會宗旨已於其組織章程大綱及細則的一章(宗旨及能力)中明文述明。現將部分宗旨節錄如下作為例子。

The social enterprise was incorporated as a Company Limited by Guarantee in 2013. Objects of the Foundation were clearly stated under the section ‘Objects and Power’ of the Memorandum and Association. Part of the objects are quoted as below as an example.

‘公司成立的宗旨如下：

- 透過街跑及馬拉松活動，提高及提升公眾意識及提倡正能量；
- 透過跑步訓練鍛鍊公眾人士的身心，以及透過跑步活動及訓練幫助個人增加自信及忍耐力；
- 透過街跑鼓勵公眾與社區連繫；及
- 透過街跑向所有年紀的群眾提倡健康跑步。’

‘The Objects for which the company is established are:

- to raise and enhance the public’s awareness and promote positive spirits through street running and marathon event;
- to sharpen the public’s mind and body through running training and to help individuals regain self-confidence and endurance through running activities and training;
- encourage the public to connect with the community through street running; and
- to promote healthy running among all age group through street running.’

資料來源Source: 全城街馬基金會組織章程大綱及細則 M&A of RunOurCity Foundation Limited

2 在章程文件中制定資產轉移限制及利潤分享上限 SETTING OUT ASSET LOCK AND CAP OF PROFIT SHARING IN CONSTITUTIONAL DOCUMENT

另一個常見的公眾問題是社企如何使用其資產及分配其利潤以保護其社會目的。「資產轉移限制」及「利潤分享上限」概念正為解答以上問題而出現。

在香港，這些概念僅與無稅務豁免的社企有關(大部分均是股份有限公司)。為確保社企可獲得稅務豁免，在其章程文件中必須包括以下條文：(a) 禁止分配其收入及資產予其成員的條文；(b) 禁止其董事收取酬金的條文；及(c) 當公司解散時如何處理資產的規定條文，一般來說資產都會捐予其他慈善機構。因此，獲稅務豁免的社企的資產必須受限，而利潤嚴禁分予其成員，利潤分享上限根本並不相關。

未有獲得稅務豁免的社企，可自願在其章程文件中採用「資產轉移限制」及「利潤分享上限」條文。資產轉移限制及利潤分享上限如何執行，及執行至何等程度，因個別情況而異。一些香港社企參考英國的社區利益公司作為指標。

一般來說，作為其主要特點，社區利益公司在其組織章程細則中包括以下條文：

In general, being its key characteristics, a CIC includes the following provisions in its AA:

資產轉移限制

社區利益公司的資產必須保存在公司，以用於其社區目的，或若果資產轉移出社區利益公司，其轉移必須：

- + 以市價全數進行，以確保社區利益公司所轉移的資產的價值得以保留在公司內；
- + 轉移至其他實施資產轉移限制的團體(例如另一間社區利益公司或慈善機構)；或
- + 為社區利益。

Another increasing common question is how a social enterprise uses its assets and distributes its profits to safeguard its social objectives. To address such questions, the concepts of “asset lock” and “cap of profit sharing” emerge.

It should be noted that in Hong Kong these concepts are only relevant to social enterprises that are not granted with Tax Exemption (i.e. mostly companies limited by shares). To enable a social enterprise be granted Tax Exemption, it must have been included in its constitutional document the following provisions: (a) clause prohibiting distributions of its incomes and properties among its members; (b) clause prohibiting its directors from receiving remuneration; and (c) clause specifying how its assets should be dealt with upon its dissolution, normally be donated to other charities. As such, the assets of social enterprises granted Tax Exemption must be locked and profit sharing among its members is totally prohibited, not even at a cap.

For social enterprises that are not granted Tax Exemption, they may on a voluntary basis adopt “asset lock” and “cap of profit sharing” provisions in its constitutional document. The way and to the extent that the assets are locked and the profits can be shared may vary. Some social enterprises in Hong Kong make reference to Community Interest Companies (CICs) introduced by UK as a benchmark.

Asset Lock

The CIC’s assets must either be retained within the company to be used for the community purposes for which it was formed, or if the assets are transferred out of the CIC, the transfer must be made:

- + for full market value so that the CIC retains the value of the assets transferred;
- + to another asset-locked body (e.g. another CIC or a charity); or
- + for the benefit of the community.

利潤分享上限

社區利益公司透過股息分配利潤予其擁有人，而公司對該利潤預設上限百分比(現時設定為35%)。

例如在香港，綿德社利有限公司(L plus H)在其組織章程細則的條文包括「資產轉移限制」及「利潤分享上限」。

在《釋義》章節中第2(a)條文規定：

At Clause 2. (a) under the section ‘Interpretation, it provides that,

「資產轉移限制」

解作公司的資產(包括其經營活動產生的任何利潤或其他盈餘)，在符合其細則條文及義務的前提下，將永久保留在公司實體內，及用於社區目的，公司資產的轉移受限於其轉移價格不少於市價，除非為社區目的，或轉移至其他實施類似資產轉移限制的團體或慈善機構；(第7頁)

在《資產轉移限制及股息分享上限》章節中第97至99條文規定：

At Clause 97 to 99, under the section ‘Dividend Capping and Assets Lock’, it provides that,

97. 公司的收入及資產，源自公司，將用於推動章程大綱中的公司目標。每年向成員繳交的股息受限於除稅後淨利潤最多35%，而成員的每個財務年度最高回報不多於其投資數額的10%。

The income and property of the Company, whence ever derived, shall be applied towards the promotion of the objectives of the Company as set forth in the Memorandum of Association. Dividend payable to the members per financial year is capped at the maximum of 35% of net profit after tax of the Company subject to a maximum return to members of not more than 10% on their investment amounts per financial year.

98. 此公司受資產轉移限制。禁止以低於市價由公司轉移出資產，除非其轉移至其他實施資產轉移限制的團體、或其轉移有利於社區。

The Company is an asset locked company. Transfer of asset from the Company at less than market value is prohibited unless to another asset locked body or otherwise for the benefit of the community.

99. 在此有關於公司股息給付及資產轉移的細則將受限於第97及98細則。

The Articles therein in respect of dividend payment and transfer of assets of the Company shall be subject to Article 97 and 98.

上述例子僅供參考，讀者應尋求法律意見獲取更詳細資料。

The above information available is for reference only. You should seek legal advice before proceeding.

04

有用資料及免責聲明

Useful Information and Disclaimer

有用連結 Useful links

公司註冊處

Companies Registry

www.cr.gov.hk/

警務處處長 – 香港警務處社團事務處的牌照課

Commissioner of Police (CP) – Licensing Office of the Hong Kong Police's Societies Office

www.police.gov.hk/ppp_en/11_useful_info/licences/societies.html

稅務局 – 屬公共性質的慈善機構及信託團體的稅務指南

Inland Revenue Department – A Tax Guide for Charitable Institutions and Trusts of a Public Character

www.ird.gov.hk/eng/tax/ach_tgc.htm

香港廉政公署 – 社會企業的內部監控

ICAC's Internal Control in Social Enterprise

www.icac.org.hk/filemanager/en/Content_1031/internalcontrol.pdf

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