

Which incorporated legal structure should we choose?

Legal information for ACT community organisations

This fact sheet covers:

- an overview of four common legal structures that can be used to incorporate a not-for-profit organisation
- some options for changing between legal structures, and
- international recognition of different legal structures.

This fact sheet provides general information about the incorporated legal structures available to Australian Capital Territory (ACT) community organisations.

What incorporated structures are available for not-for-profits in the ACT?

There are 4 common structures that can be used to incorporate a not-for-profit (NFP) organisation in the ACT:

- an incorporated association (the most common NFP legal structure – currently over 1,700 registered in the ACT)
- a company limited by guarantee (CLG) (the next most common NFP legal structure – approximately 11,000 in Australia)
- a non-trading co-operative (only about 1,800 in Australia), and
- an indigenous corporation (about 2,600 in Australia).

These are not the only structures available for NFPs, for example, there are also charitable trusts, trade unions and companies limited by shares (although these are usually used for for-profit businesses). This fact sheet does not cover these structures, but for more information on charitable trusts, go to Not-for-profit Law's overview, [Fundraising Foundations and Charitable Trusts](#).

For information on the meaning of not-for-profit, go to [What does not-for-profit mean?](#)

Key regulators referred to in this fact sheet are:

- [Access Canberra](#)
- [Australian Securities and Investment Commission \(ASIC\)](#)
- [Australian Charities and Not-for-profits Commission \(ACNC\)](#), and
- [Office of the Registrar of Indigenous Corporations \(ORIC\)](#).

Quick Comparison

Structure	Recommended for...	Not suitable for...
Incorporated Association	<ul style="list-style-type: none"> Locally focused not-for-profit community groups wanting to operate in the ACT. Groups with limited capacity to meet reporting obligations. Groups with limited funds and resources, as costs associated with setting up and running incorporated associations are sometimes (but not always) less than those involved in CLGs. 	<ul style="list-style-type: none"> Groups with less than 5 members (as this is the minimum number of members required to incorporate). In some cases, groups operating in many states and territories (although note there are options to allow an incorporated association to operate in other states and territories).
Company Limited by Guarantee	<ul style="list-style-type: none"> Organisations wanting to operate nationally or in more than one state or territory. Larger not-for-profits, including those that only operate in one state, often use this structure. Charities registered with the ACNC, as CLGs that are charities only report to the ACNC (not also ASIC). Housing and aged care providers (who must be CLGs). Wholly owned subsidiary organisations, as only one member is required (but note, three directors are required). 	<ul style="list-style-type: none"> Groups with limited resources, as CLGs reporting to ASIC must meet stricter requirements, and reporting deadlines are more strictly enforced (with higher penalties for non-compliance). Note that CLGs registered as charities will report to the ACNC, not ASIC, and the ACNC will take a more educative regulatory approach than ASIC.
Non-trading co-operative	<ul style="list-style-type: none"> Groups serving their members (eg. a member owned art co-op, ski lodge or a childcare group providing community services to its members). 	<ul style="list-style-type: none"> Co-operatives are run according to co-operative principles (in most cases members have equal voting rights) and may not be suitable for organisations wanting different voting rights to attach to different classes of members, including non-voting members.
Indigenous Corporation	<ul style="list-style-type: none"> Aboriginal and Torres Strait Islander groups. The structure takes into account indigenous customs and traditions. Corporations holding or managing 	<ul style="list-style-type: none"> Non-Aboriginal and Torres Strait Islander groups.

Which incorporated legal structure should we choose?

	native title under the <i>Native Title Act 1993 (Cth)</i> and the <i>Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)</i> must incorporate as an Indigenous Corporation.	
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Incorporated Associations

Feature	Brief description
Relevant laws	<ul style="list-style-type: none"> • <i>Associations Incorporation Act 1991</i> (ACT) • <i>Associations Incorporation Regulation 1991</i> (ACT)
Where an IA can operate?	<p>A group incorporated under the <i>Associations Incorporation Act</i> can operate in the ACT. Any ACT association that regularly operates ('carries on business') outside the ACT must register under the <i>Corporations Act 2001</i> (Cth) as a 'Registered Australian Body', or incorporate separately in each state and territory.</p>
Government regulator	<p>Access Canberra (which is part of the ACT Office of Regulatory Services), is responsible for the regulation of incorporated associations in the ACT.</p> <p>If you are a Registered Australian Body you must also report to ASIC.</p> <p>If you are registered as a charity, you will be registered with the ACNC, and must also report to the ACNC. This means incorporated associations will report to at least two regulators.</p>
Required abbreviation	<p>An incorporated association must use 'Incorporated' or 'Inc.' after its name.</p>
How common?	<p>In the ACT there were over 1,700 incorporated associations registered during the 2015 financial year.</p>
Description	<p>Incorporated associations were introduced as a legal structure to provide a simple and inexpensive means of incorporating not-for-profit groups. All States and Territories have their own, slightly different, laws to set up incorporated associations.</p>
Suitable for	<p>For most locally-focused not-for-profit groups wanting to operate in the ACT, an incorporated association is an appropriate structure. It is often less complex to set up than a CLG, and the regulator, Access Canberra, takes a more educative approach than the regulator of CLGs, ASIC (note that regulation of charity CLGs is managed by the ACNC rather than ASIC and the difference between incorporated association and CLG operational difficulty is not as high if a group intends to register as a charity. See the factsheet 'IA or CLG' for more detailed analysis at www.nfplaw.org.au/legalstructure). Access Canberra does not impose late fees when deadlines for reporting are not met.</p>
Not suitable for	<p>This structure is not suitable for groups with less than 5 members or for a parent organisation that wants to set up a wholly owned subsidiary (ie. with the parent organisation as the sole member). Groups wishing to operate outside of the ACT will need to register as a "Registered Australian Body" with ASIC or incorporate another association in that state or territory.</p>

Company limited by guarantees (CLG)

Feature	Brief description
Relevant laws	<i>Corporations Act 2001 (Cth), Corporations Regulations (various)</i>
Where can a CLG operate?	A CLG can operate (that is, carry on activities) anywhere in Australia.
Government regulator	ASIC is an independent Commonwealth government body that regulates CLGs and also for-profit companies. The ACNC is another independent Commonwealth government body that regulates CLGs that are registered charities. For these organisations although they incorporate as a CLG with ASIC, once they register as a charity, their regulation is handled by the ACNC, and a more flexible regulatory framework applies (see the Information Hub page on charities for more information www.nfplaw.org.au/charity).
Required abbreviation	Must use the word 'Limited' or 'Ltd' after its name (although CLGs that meet certain requirements can become a 'special purpose company' and can apply for an exemption from this requirement).
How common?	In Australia there are approximately 11,000 CLGs.
Description	Although we often think of a 'company' as being a business, a CLG is a special type of company structure for not-for-profit groups all across Australia. Just like a for-profit company, it has 'directors', but unlike a traditional company, it has 'members' instead of 'shareholders'. Some of the provisions of the Corporations Act (eg. directors' duties and penalties) that apply to 'for-profit' companies also apply to CLGs.
Most commonly used for	NFPs wanting to operate across Australia, or in multiple states and territories, often consider becoming a CLG. Larger NFPs, including those that only operate in one state, also often use this structure. Some legislation requires this structure for certain types of organisations (eg. registered housing and aged care providers). A CLG structure is also suitable for a wholly owned subsidiary organisation, as it can be set up with just one member (but does need to have three directors).
Comment	CLGs can be more costly to establish than incorporated associations. For more information on these requirements, go to Not-for-profit Law's page on Setting up the organisation . The penalties for non-compliance with reporting requirements and directors duties are higher than for incorporated associations, and tend to be more strictly enforced. However, for CLGs that are registered as charities, the ACNC takes a more educative approach to compliance and enforcement.

Co-operatives

Feature	Brief description
Relevant laws	<i>Co-operatives Act 2002 (ACT)</i> and <i>Co-operatives Regulation 2003 (ACT)</i> Note that reforms are currently being considered to nationalise the regulation of co-operatives.
Where can a co-operative operate?	A group incorporated under the <i>Co-operatives Act</i> can operate (that is, carry on its activities) in the ACT. However, there are also a number of ways that co-operatives can register to be (concurrently) recognised in other States and Territories.
Government regulator	Access Canberra (which is part of the ACT Office of Regulatory Services).
Required abbreviation	Must include the word 'Co-operative' in its name and the word 'Limited' or 'Ltd' at the end of its name.
How common?	There are currently only 5 co-operatives in the ACT and 1,800 in all of Australia.
Description	A co-operative is an organisation that is concerned with providing for the needs of its members. The co-operative structure is based on certain co-operative values, including self-help, self-responsibility, democracy, equality, equity and solidarity. There are both trading and non-trading co-operative structures. Only a co-operative which has rules to prevent surpluses or profits from being distributed to members is suitable as a not-for-profit structure.
Suitable for	Co-operatives are generally set up for the mutual benefit of members (for example, for a member-owned ski lodge or a community childcare co-operative). They can be a suitable not-for-profit structure for providing community services to members.
Not suitable for	Co-operatives are run according to co-operative principles - voting attaches to membership, rather than shareholding or class of membership (in most cases). The law allows for members to have up to five votes per member if provided for in the co-operative's rules. However, it is unclear whether co-operatives that are not clubs can have various classes of members with different voting rights attaching to these classes. There is strong argument, based on principles of statutory interpretation, that this cannot happen. This means, the general principle of one member, one vote applies in practice and cooperatives may not be a suitable structure for organisations that want to have different voting rights to attach to different classes of members, including non-voting members.

Indigenous corporations

Feature	Brief description
Relevant laws	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth) (began on 1 July 2007, replacing the <i>Aboriginal Councils and Associations Act 1976</i>).
Where can an indigenous corporation operate?	Can operate (carry on activities) anywhere in Australia.
Government regulator	Office of the Registrar of Indigenous Corporations (ORIC) - a national body.
Required abbreviation	Must have the words 'Aboriginal Corporation', 'Torres Strait Islander Corporation' (or a number of allowable combinations) in its name.
Number	Approximately 2,600 across Australia.
Description	<p>The structure of an indigenous corporation is somewhat similar to a company limited by guarantee, although ORIC has some additional powers to those of ASIC, including the power to call meetings of members and appoint special administrators.</p> <p>Indigenous corporations can, but do not have to be, 'not-for-profit'. Indigenous corporations that want to be not-for-profit must have a 'rule book' which prevents surpluses or profits from being distributed to members.</p> <p>Only Aboriginal and Torres Strait Islander organisations can incorporate using this structure.</p>
Most suitable (or required) for	The indigenous corporation structure is designed to meet the needs of Aboriginal and Torres Strait Islander groups, and attempts to take into account indigenous customs and traditions. Corporations holding or managing native title under the <i>Native Title Act 1993</i> and the <i>Native Title (Prescribed Bodies Corporate) Regulations 1999</i> must incorporate as this structure.
Not suitable for	Non-Aboriginal and Torres Strait Islander groups, or Aboriginal or Torres Strait Islander groups that would prefer to be regulated by a State regulator, ACNC or ASIC.

Incorporated Association or CLG

The tables above outline the key features of the four structures covered in this fact sheet. Most groups in the ACT choose between incorporating as an incorporated association or a CLG. For a more detailed comparison of these two structures, go to the Not-for-profit Law Guide, 'Incorporated association or company limited by guarantee?' on the [Legal Structure page](#).

Changing between legal structures

It is usually possible for your group to change its legal structure, but there can be legal and administrative costs involved, and making the change can be time consuming. It is a good idea to think about your group's future needs when deciding which legal structure to incorporate under to avoid having to change your structure down the track.

Where organisations do need to change structure, some common transitions are:

- 'converting' or 'migrating' from an incorporated association into a company limited by guarantee. This is possible with member approval if other requirements for a CLG are met. For more information, go to Not-for-profit Law's [Changing structure page](#).
- transferring a CLG or a co-operative to an incorporated association, or
- if the group is an indigenous one, transferring its registration as an Incorporated Association or a CLG to being under the *Corporations (Aboriginal and Torres Strait Islander) Act*.

International recognition

If your group wants to operate overseas it will need to seek legal advice about what the laws of the other relevant country/ies require. Using Australia as an example, any overseas (foreign) company that wants to 'carry on business' (conduct activities) in any part of Australia must register with ASIC under the Commonwealth *Corporations Act*. Many other countries will have similar requirements, even if your group is operating as a not-for-profit.

In general, a CLG structure (that is, incorporation under the *Corporations Act*) will be a more recognised structure in other countries, compared with other structures such as an incorporated association or co-operative.

OK, so what next?

Having read the brief profiles, you might already have an idea of which structure would work well for your group.

Most ACT not-for-profit groups wanting to incorporate choose between becoming an incorporated association and a CLG. What is best for your group will depend on the particular circumstances and future plans of your group. See the fact sheet IA or CLG for a more detailed comparison at www.nfplaw.org.au/legalstructure.

Co-operatives and indigenous companies are quite specialised. If your group would like to set up as one of these legal structures we have provided links to websites with further information about these in the Resources section below.

Resources

Not-for-profit Law Resources

- ✔ Getting started - www.nfplaw.org.au/gettingstarted

This page of the NFP Law website contains links to resources and information produced to assist groups in their initial stages.

- ✔ The incorporation decision - www.nfplaw.org.au/incorporationdecision

Resources on deciding which is the best legal structure for your organisation

- ✔ Setting up the organisation - www.nfplaw.org.au/settingup

Legislation

- ✔ [Associations Incorporation Act 1991 \(ACT\)](#)

This is the legislation that governs the setting up and running of an incorporated association in the ACT.

- ✔ [Associations Incorporation Regulation 1991 \(ACT\)](#)

This is a link to the regulations which govern the setting up and running of an incorporated association in the ACT.

- ✔ [Corporations Act 2001 \(Cth\)](#)

This is a link to the legislation which govern the setting up and running of a CLG.

- ✔ [Co-operatives Act 2002 \(ACT\)](#)

This is a link to the regulations which govern the setting up and running of a co-operative in the ACT.

- ✔ [Co-operatives Regulation 2003 \(ACT\)](#)

This is a link to the legislation which govern the setting up and running of an Indigenous Corporation.

Access Canberra

- ✔ [Incorporated Associations](#)

This page of the Access Canberra website contains information on ACT incorporated associations.

- ✔ [Co-operatives registration](#)

This page of the Access Canberra website contains information on co-operatives.

Australian Securities and Investment Commission

- ✔ [For companies – an overview](#)

This page contains an overview of starting, running and closing a company and contains information relevant to CLGs.

- ✔ [Registrable Australian Bodies](#)

This information sheet sets out the steps involved in registering an Australian body.

Australian Charities and Not-for-profit Commission

▀ [Obligations for registered charities](#)

Office of the Registrar of Indigenous Corporations

▀ [Start a corporation](#)

A Not-for-profit Law Information Hub resource. Access more resources at www.nfplaw.org.au

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