

Which incorporated legal structure should we choose?

Legal information for South Australian 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 South Australian community organisations.

What incorporated structures are available for not-for-profits in South Australia?

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

- an incorporated association (the most common NFP legal structure – currently over 20,000 in South Australia)
- a company limited by guarantee (CLG) (the next most common NFP legal structure – approximately 11,000 in Australia)
- a non-distributing 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:

- [Consumer and Business Services, South Australia \(CBS\)](#),
- [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 South Australia. 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. Groups of any size or wholly owned subsidiary organisations as there is no minimum number of members required. 	<ul style="list-style-type: none"> In some cases, groups operating in many states and territories (although incorporated associations can register as a Registered Australian Body with ASIC and operative in other states).
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 / non-distributing co-operative legal structure	<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). Groups that wish to follow the ‘co-operative principles’ (although groups that do not adopt the co-operative legal structure may still adopt the ‘co-operative principles’ 	<ul style="list-style-type: none"> May not be suitable for organisations that: <ul style="list-style-type: none"> do not want to function under the ‘co-operative principles’ do not have resources to manage ‘active membership’ requirements (the CNL requires that members of co-operatives are ‘active’ in

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	<p>as part of their organisation).</p> <ul style="list-style-type: none"> Note, in general, only 'non-distributing' co-operatives will meet the definition of 'not-for-profit' 	<p>relation to 'primary activities'</p> <ul style="list-style-type: none"> NFPs can deem that a member paying a subscription fee that is applied to a 'primary activity' is an 'active member') want different classes of members with different voting rights Groups with limited resources, as offences (similar to CLGs) apply where cooperatives do not meet certain obligations such as holding AGMs in time, and other offences unique to co-operatives apply such as for a failure to cancel membership of non-active 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 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. 	<ul style="list-style-type: none"> Non-Aboriginal and Torres Strait Islander groups.

Incorporated Associations

Feature	Brief description
Relevant laws	<ul style="list-style-type: none"> • <i>Associations Incorporation Act 1985</i> (SA) • <i>Associations Incorporation Regulations 2008</i> (SA)
Where an IA can operate?	<p>A group incorporated under the <i>Associations Incorporation Act</i> can operate in South Australia. Any South Australian association that regularly undertakes activities ('carries on business') outside South Australia will need to register under the <i>Corporations Act 2001</i> (Cth) as a 'Registered Australian Body', or incorporate separately in each state.</p>
Government regulator	<p>CBS Licensing and Registration is responsible for the regulation of incorporated associations in South Australia.</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' after its name.</p>
How common?	<p>In South Australia there are currently over 20,000 incorporated associations.</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 South Australia, an incorporated association is an appropriate structure. It is often less complex to set up than a CLG, and the regulator, CBS Licensing and Registration, 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 a more detailed analysis at www.nfplaw.org.au/legalstructure).</p>
Not suitable for	<p>Groups wishing to operate outside of South Australia 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</i> (Cth), <i>Corporations Regulations</i> (various)
Where can a CLG operate?	A CLG can operate (that is, carry on activities) anywhere in Australia.
Government regulator	ASIC. ASIC is an independent Commonwealth government body that regulates CLGs and also for-profit companies. All CLGs must initially register with ASIC. CLGs that are charities can apply to register as a charity with the ACNC, which then handles ongoing regulation (so that charity CLGs only reports to one regulator). Many Corporations Act requirements for CLGs 'switch off' when a CLG registers with the ACNC.
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 National Law (South Australia) Act 2013 (SA)</i> (which replaced the <i>Co-operatives Act 1997 (SA)</i>).
Where can a co-operative operate?	<p>A group incorporated under the relevant state or territory co-operatives act can operate (that is, carry on its activities) in its home state or territory.</p> <p>Co-operatives can also operate in other states and territories (and how this occurs will depend on whether the other state or territory has adopted the CNL). Co-operatives may need to register with ASIC as a Registrable Australian Body if they will undertake regular activities outside of their 'home' state or territory. Registered Australian Bodies need to undertake limited annual reporting to ASIC as well as to CBS Licensing and Registration.</p>
Government regulator	CBS Licensing and Registration.
Required abbreviation	Must include the word 'Co-operative', 'Cooperative' or an abbreviation in its name and the word 'Limited' or 'Ltd' at the end of its name.
How common?	There are approximately 56 co-operatives in South Australia and 1,800 in all of Australia.
Description	A co-operative is an organisation that follows the co-operative principles set out in section 10 of the CNL. Co-operative principles include voluntary and open membership, democratic member control (members actively participate in setting policies and making decisions, equal voting rights among members – 'one member, one vote'), member economy participation, autonomy and independence, education training and information, cooperation among co-operatives, and concern for the community. There are both distributing and non-distributing 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	Organisations that want to apply the co-operative principles to their organisation. The Co-operatives Registrar under the CNL can only register groups that are "designed to function under the co-operative principles". Co-operatives are often set up for the mutual benefit of members (for example, for a member-owned art co-op, ski lodge or a community childcare co-operative). They can also be a suitable not-for-profit structure for providing community services, such as employee-member or client-member health services co-operatives.

Feature	Brief description
Not suitable for	<p>Co-operatives are not suitable for groups that do not want to function under the co-operative principles, or do not have resources to manage active membership requirements, or organisations that want different classes of members (as, in general, it is difficult for a co-operative to have different classes of members with different voting rights). Due to strict liability offences, like those that apply to non-charitable CLGs, groups should consider whether they have resources to comply with CNL requirements in a timely way to avoid penalties (such as holding AGMs within required timeframes).</p> <p>Co-operatives that are charities will need to report to the state-based regulator of co-operatives as well as the ACNC.</p>

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> (Cth)).
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 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 South Australia 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 South Australian 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 1985 \(SA\)](#)

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

- ✔ [Associations Incorporation Regulations 2008 \(SA\)](#)

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

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

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

- ✔ [Co-Operatives National Law \(South Australia\) Act 2013](#)

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

- ✔ [Corporations \(Aboriginal and Torres Strait Islander\) Act 2006 \(Cth\)](#)

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

Consumer and Business Services, SA

- ✔ [Incorporated Associations](#)

This page of the CBS website contains information on South Australian incorporated associations.

- ✔ [Co-operatives](#)

This page of the CBS 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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