

Which incorporated legal structure should we choose?

Legal information for Western 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 Western Australian community organisations.

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

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

- an incorporated association (the most common NFP legal structure, with about 18,000 in Western Australia)
- a company limited by guarantee (CLG) (the next most common NFP legal structure, with about 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. NFPs can also be established as charitable trusts, unincorporated associations 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 read Not-for-profit Law's overview guide on [Fundraising Foundations and Charitable Trusts](#) on the Information Hub.

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

Key regulators referred to in this fact sheet are:

- [Consumer Protection division of the Department of Commerce WA](#) (Consumer Protection)
- [Australian Securities and Investment Commission](#) (ASIC)
- [Australian Charities and NFPs 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 NFP community groups wanting to operate in Western 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. 	<ul style="list-style-type: none"> Groups with less than 6 members. 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 NFPs, including those that only operate in one state, often use this structure. Charities registered with the ACNC, as CLGs that are charities will 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 that 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 generally takes 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’ as part of their organisation). Note, in general, only ‘non-distributing’ co-operatives will meet the definition of ‘not-for-profit’ 	<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 relation to ‘primary activities’ – 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

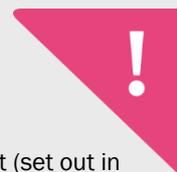
Which legal structure should we choose? (WA)

		<p>members with different voting rights</p> <ul style="list-style-type: none"> • 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. This structure takes into account indigenous customs and traditions. • Corporations holding or managing native title under the <i>Native Title Act 1993</i> (Cth) and the <i>Native Title (Prescribed Bodies Corporate) Regulations 1999</i> (Cth) 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 Incorporations Act 2015</i> (WA) • <i>Associations Incorporation Regulations 2016</i> (WA)
Where an incorporated association can operate?	<p>An association that has been incorporated under the <i>Associations Incorporation Act 2015</i> (WA) can only operate in Western Australia. If the incorporated association wants to operate outside Western Australia, it must apply to be registered as a 'Registrable Australian Body' under the <i>Corporations Act 2001</i>, or incorporate separately in each state that it operates in.</p>
Government regulator	<p>The Consumer Protection Division of the Department of Commerce is responsible for regulating incorporated associations in Western Australia. If the association is a Registrable Australian Body it must also report to ASIC.</p> <p>If the association is registered as a charity, it 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 Western Australia there are approximately 18,000 incorporated associations.</p>
Description	<p>Incorporated associations were introduced as a legal structure to provide a simple and inexpensive means of incorporating NFP groups. All States and Territories have their own, slightly different laws to establish associations.</p> <p>Incorporated associations are generally managed by a management committee that has the authority to exercise the powers and functions of the association and to manage its affairs. Members of the management committee of an incorporated association owe duties to the association.</p> <p>The members of an association, including the management committee, are generally not responsible for the debts or liabilities of the association once it has been incorporated.</p>
Suitable for	<p>This structure is designed specifically for locally-focused NFP organisations wanting to operate in Western Australia. 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 fact sheet 'IA or CLG' for a more detailed analysis at www.nfplaw.org.au/legalstructure.</p>
Not suitable for	<p>Groups with less than 6 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 Western Australia will need to register as a Registrable Australian Body with ASIC.</p>

NEW LAWS FOR INCORPORATED ASSOCIATIONS



The *Associations Incorporation Act 2015* (WA) (**new Act**) replaced the former *Associations Incorporation Act 1987* (WA) (**previous Act**) on 1 July 2016.

All associations need to update their rules to comply with the requirements under the new Act (set out in Schedule 1 of the new Act) and will have three years to do so, until 1 July 2019.

Other requirements under the new Act apply from 1 July 2016 to all associations, including changes in relation to:

- financial reporting
- governance
- privacy
- becoming incorporated, and
- membership of incorporated associations.

More information about the application of the new Act, including a [Transition Pack](#) for organisations, is available on the Consumer Protection website at: www.commerce.wa.gov.au/consumer-protection/associations-new-law.

Company limited by guarantee (CLG)

Feature	Brief description
Relevant laws	<ul style="list-style-type: none"> • <i>Corporations Act 2001</i> (Cth) • <i>Corporations Regulations</i> (various) • <i>Australian Charities and Not-for-Profits Commission Act 2012</i> (Cth) and <i>Australian Charities and Not-for-Profits Commission Regulation 2013</i> (if the CLG is a charity)
Where can a CLG operate?	A CLG can operate (that is, carry on activities) anywhere in Australia.
Government regulator	<p>ASIC is an independent Commonwealth government body that regulates CLGs and also for-profit companies.</p> <p>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.</p>
Required abbreviation	A CLG must use the word 'Limited' or 'Ltd' after its name (although charities 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	<p>A CLG is a company that is formed under the <i>Corporations Act 2001</i> on the principle of having the potential liability of members limited to the amount that that member has 'guaranteed' to pay under the company's constitution.</p> <p>When a CLG is wound up without adequate funds to discharge its liabilities, each person who is a member when the CLG commences the winding up process is liable to pay the amount that the member has undertaken to contribute if the company is wound up.</p> <p>A CLG is managed by a board of directors, but unlike a business, it has 'members' instead of 'shareholders'. Directors of CLGs have strict duties imposed upon them by the Corporations Act, under the general law and in equity.</p> <p>If the CLG is a charity registered with the ACNC then certain provisions of the Corporations Act do not apply. The CLG will instead need to comply with the provisions of the <i>Australian Charities and Not-for-Profits Commission Act 2012</i> (Cth) and the five governance standards set out in the <i>Australian Charities and Not-for-Profits Commission Regulation 2013</i>.</p>

Feature	Brief description
<p>Most commonly used for</p>	<p>NFPs wanting to operate across Australia, or in multiple states, 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).</p> <p>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).</p>
<p>Comment</p>	<p>CLGs can be more costly to establish than incorporated associations. For more information on these requirements, go to NFP Law's page on Setting up the Organisation at www.nfplaw.org.au/settingup</p> <p>The penalties for non-compliance with reporting requirements and directors' duties are higher than for incorporated associations, and tend to be more strictly enforced.</p>

Co-operatives

Feature	Brief description
Relevant laws	Co-operatives are administered under the Co-operatives National Law, applied in Western Australia by the <i>Co-operatives Amendment Act 2016</i> (WA) and the <i>Co-operatives Amendment Regulations 2016</i> (WA).
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 Consumer Protection.</p>
Government regulator	The Consumer Protection division of the Department of Commerce.
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 approximately 52 co-operatives in Western 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>

NOTE

Western Australia's *Co-operatives Amendment Act 2016* and *Co-operatives Amendment Regulations 2016* commenced on 1 January 2017. As a result of these reforms, WA's co-operatives laws are now consistent with the Co-operatives National Law.



Indigenous corporations

Feature	Brief description
Relevant laws	Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)
Where can an indigenous corporation operate?	An indigenous corporation can operate (carry on activities) anywhere in Australia.
Government regulator	Office of the Registrar of Indigenous Corporations (ORIC) which is 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 CLG, 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, NFPs. Indigenous corporations that want to be NFPs 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 Native Title Act 1993 and the Native Title (Prescribed Bodies Corporate) Regulations 1999 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 Western Australia choose between incorporating as an incorporated association or a CLG. For a more detailed comparison of these two structures, go to the NFP Law Guide, 'Incorporated association or company limited by guarantee?' on the Legal Structure page at www.nfplaw.org.au/legalstructure.

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 public company limited by guarantee. This is possible with member approval if other requirements for a CLG are met. For more information, go to NFP Law's Changing structure page at <http://www.nfplaw.org.au/changingstructure>.
- 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 an Aboriginal or Torres Strait Island corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act*.

Overseas 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 NFP organisation.

In general, a CLG structure 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 Western Australian NFP 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 Incorporated Association 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

Related 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 2015 \(WA\)](#)

This is a link to the new legislation that governs the setting up and running of an incorporated association in Western Australia as of 1 July 2016.

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

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

- ✔ [Co-operatives Amendment Act 2016 \(WA\)](#)

The Amendment Act amends *Co-operatives Act 2009 (WA)* and governs the setting up and running of a co-operative in Western 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.

Department of Commerce Western Australia

- ✔ [Inc: A guide for incorporated associations in Western Australia](#)

This page of the Department of Commerce website contains information on Western Australian incorporated associations.

- ✔ [Co-operative](#)

This page of the Department of Commerce 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 NFP Commission

▀ [Obligations for registered charities](#)

Office of the Registrar of Indigenous Corporations

▀ [Start a corporation](#)

A NFP Law Information Hub resource. Access more resources at www.nfplaw.org.au

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