

Changing structure

Legal information for Australian Capital Territory incorporated associations

This fact sheet covers:

- why an incorporated association would want to change its structure
 - becoming a Registrable Australian Body or registering in multiple jurisdictions
 - whether transferring to a company is the best way to meet your organisation's needs
 - how a transfer can be achieved
 - what a transfer does
 - how membership changes when transferring
 - what documents must be lodged, and
 - other requirements.
-

Sometimes incorporated associations need to assess whether their legal structure is the most appropriate for achieving their aims. Incorporated associations may also, in some circumstances, be directed to change their structure by the relevant regulator.

This fact sheet can help you consider whether to change your structure and how to make the change. This fact sheet is general legal information only, and you should seek the advice of a lawyer about your particular circumstances.

Why an incorporated association would want to change its legal structure

There are many reasons why an incorporated association may consider changing its legal structure. Some reasons that may trigger an organisation to re-think its legal structure include:

- change in size, income or assets
- increasing membership numbers or diversity of membership
- change in geographic reach of operation
- desire to operate overseas
- it has been directed to do so by Access Canberra (**AC**)

- a government policy or the policies of other funders require potential grant recipients to be a particular entity type, or
- desire to enhance public perception of the organisation.

These are discussed in more detail below. For a more detailed comparison of the incorporated association structure and the company limited by guarantee (**CLG**) structure, read our fact sheet [“Incorporated association or company limited by guarantee?”](#).

Even if your organisation is undergoing significant changes, changing your structure may not always be the best option. The process can be time consuming, administratively complex and may require legal advice.

Size

When an incorporated association grows in size, it may consider whether its legal structure is still the most appropriate. An incorporated association can be any size, so there’s no need to change just because your organisation is growing. There are many large not-for-profit organisations operating as incorporated associations in the Australian Capital Territory.

However, if your membership base is growing, and there are reasons for a transfer other than size, you should start the transfer process as soon as possible because it can be very time consuming for incorporated associations with large numbers of members to transfer those members to a CLG structure (see further discussion of transfer of members below).

Operating interstate or overseas

In order to operate interstate an Australian Capital Territory incorporated association needs to meet requirements of other states if it is seeking to operate as an association outside the Territory. So if your organisation wants to operate in several jurisdictions, you might need to consider transferring to a CLG structure. However, there are ways of remaining an incorporated association and operating in other states or nationally. These are:

- become a Registered Australian Body, or
- incorporate separately in each jurisdiction that your association operates in.

The steps to take for these two options are outlined in more detail below.

For organisations wishing to operate overseas, there may be benefits to becoming a CLG (which is under federal law), as other nations may recognise and understand this structure more than the state-based incorporated association structure.

Public perception

Some groups consider their organisation will be taken more seriously if it is a CLG, rather than an incorporated association. However, in Australia, people rarely inquire about the structure of an organisation.

Direction from AC

Under the *Associations Incorporation Act 1991 (ACT)* (**the Act**), if the registrar-general is satisfied that the continued incorporation of an association would be inappropriate or inconvenient because of:

- the scale or nature of the activities of the incorporated association

- the value or nature of the property of the incorporated association, or
- the extent or nature of the dealings which the incorporated association has with the public,

The registrar-general may serve a notice (including written reasons) on the association stating that the association will be cancelled unless, within 2 months, the association:

- obtains the registrar-general’s permission to apply to transfer the registration of the incorporated association to a CLG, or
- by special resolution, resolves to implement an arrangement that, if approved by the registrar-general, will preserve the continued incorporation of the association.

Registered Charities

The Australian Charities and Not-for-profits Commission (**ACNC**) is the national regulator for charities. The ACNC uses tools such as the “Charities Passport” to reduce reporting burdens for charitable companies. Incorporated associations registered as charities need to report to both the AC and the ACNC. They also need to comply with the regulatory regime for incorporated associations as well as requirements for charities including the Governance Standards. In order to minimise the reporting burden, the ACNC is currently accepting financial reports prepared for state and territory regulators.

CLGs that are registered charities only need to report to the ACNC. Most obligations under the *Corporations Act 2001* (Cth) (**Corporations Act**) for CLGs ‘switch off’ when a CLG registers as a charity. Therefore the legal structure is increasingly attractive to incorporated associations that are registered charities, as CLGs only need to comply with and report under one, rather than two, regulatory regimes.

Becoming a Registered Australian Body or incorporating in multiple states

If your incorporated association is thinking of transferring to a CLG structure because it wants to operate interstate or nationally, then you can also consider the following two alternatives to changing structure:

1. Registering as an Australian Body

An incorporated association can register with the Australian Securities and Investments Commission (**ASIC**) as a “Registered Australian Body” (**RAB**). This means your incorporated association will be recognised by the Commonwealth government and authorised to operate in any state or territory in Australia. The first step is to ensure that the name of your incorporated association is available for the body and to reserve it by lodging ASIC Form 410 “Application for reservation of a name”. The name is reserved for two months, in which time you must complete ASIC Form 401 “Application for registration as a registrable Australian body”, which will ask for general details about the body. A certified copy of the body’s certificate of incorporation and constitution will need to be lodged with the application form.

Once registered, your organisation must provide information about your registered office and office holders to ASIC and AC.

FURTHER READING

More information on ASIC Form 410 “Application for reservation of a name” can be found [here](#).

More information on ASIC Form 401 “Application for registration as a registrable Australian Body” can be found [here](#).

Your organisation will be given an Australian Registered Body Number (**ARBN**) which must be displayed after its name and other details on its public documents.

More information on the process of registering and all of the obligations of being an RAB is on the [ASIC website](#).

If your group is an incorporated association and is registered as a charity, once it becomes an RAB, it will not need to report to ASIC on an ongoing basis, and rather will report to the ACNC (as well as its state-based regulator). In summary, organisations that register as an RAB have the following obligations in addition to those under the incorporated associations laws and laws for charities:

- using the ARBN on all public documents
- notifying ASIC or, if registered as a charity, the ACNC, of certain changes to the organisation
- for groups that are not registered charities: complying with the directors' duties in the Corporations Act, and
- for groups that are registered as charities: complying with Governance Standards for charities that are administered by the ACNC rather than ASIC (this applies to registered charities regardless of whether they become an RAB).

CAUTION

Office holders (including committee members) will need to understand and comply with the provisions of the Corporations Act in respect of directors' duties (including the insolvent trading provisions). While Corporations Act duties will not apply to RABs that are also registered charities (these groups will need to comply with ACNC Governance Standards rather than the duties in the Corporations Act), insolvent trading provisions from the Corporations Act still apply to RABs that are also registered as charities. There are significant penalties for breaches of Corporations Act provisions.

For information, go to the [Running the Organisation page](#) of the Information Hub.



2. Incorporating separately as an association in other states or territories

Your association can set up other incorporated associations in the other states or territories that you wish to operate in. This is called a “federated structure”.

If you have distinct groups involved in each state and territory, or if you want to limit the liability of the group from state to state, this can be an option worth considering.

However, if you don't intend to operate distinct groups in each state, setting up other incorporated associations can be difficult to administer, because your local administration staff or volunteers will need to look after all the requirements (like reporting) for the other states, especially if you operate in more than one other state.

Each (state-based) incorporated association will be a separate legal entity and will need to comply with the requirements of that state or territory's legislation (including requiring a separate committee, finances, reporting, etc., as well as with federal laws such as tax laws and charitable reporting requirements). These ongoing obligations can become very time and labour intensive.

! CAUTION

You may have to comply with as many as 8 different state and territory laws and report to 8 different regulators if you choose this option.

Please note: just because the main entity may be registered as a charity and may have been granted deductible gift recipient endorsement (**DGR**), it does not necessarily follow that the associations

incorporated in other states will receive the same endorsement. Other incorporated entities are not permitted to use or share the DGR endorsement of brother/sister organisations.

Transferring from an incorporated association to a company limited by guarantee

If your group decides to transfer to a CLG structure, the Act allows an incorporated association to “transfer” its registration to become a CLG under the Corporations Act. The steps to convert are outlined below.

Transferring from an incorporated association to a CLG does not affect the identity of your organisation but, upon transfer, your organisation will cease to be an incorporated association.



TIP

Transferring to a CLG can be expensive and time consuming. Seek legal advice for your organisation before starting the process, especially if you have a large membership base.

Any contracts or agreements that the association has (including employment contracts) continue to have effect after the association’s transfer to a CLG structure.

Groups that are registered charities (and that will continue to be registered charities) will apply to ASIC to transfer legal structure, however, once transferred to the CLG structure will be regulated by the ACNC on an ongoing basis, and will not need to comply with ASIC annual reporting requirements for companies. CLGs that are not registered charities will report to ASIC and be regulated by ASIC on an ongoing basis.

An Indigenous organisation can choose to transfer its registration from under the Corporations Act to the *Commonwealth Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

Steps to transfer to a CLG

The steps described below are general in nature and should give you a good idea of what to expect, but are not exhaustive.

1. Check your company name is available and reserve it

The incorporated association can use the ASIC Connect “Check Name Availability” search to see if their desired name is available. They then have the option to lodge an application to reserve the name for two months using ASIC Form 410 described above. This gives the incorporated association time to prepare its application and to hold a meeting to achieve member approval of the transfer.

2. Propose a new constitution and new directors of the company

The committee of the incorporated association should agree on the new constitution and the new directors for the proposed CLG. A CLG will need:

- at least three directors and a company secretary (the company secretary can be one of the directors) – these people need to provide their consent to become a director of the new company
- a constitution

- a registered office
- at least one member
- a name which is not identical to the name of an existing company or registered business name, and
- an auditor - who must be appointed within one month of the registration of the company, even if your company is not required to have audited financial statements. There are certain exemptions from this requirement, but they are limited to small registered charities.

If your organisation is a registered charity and/or endorsed as a DGR, care should be taken to ensure that these benefits are preserved during the transfer process, including ensuring that your new constitution contains the necessary requirements to allow the tax concessions available to the incorporated association to continue for the company. We recommend you seek legal assistance in the preparation of your new constitution, particularly to ensure your tax concessions are not affected by the transition. It is also recommended that the new constitution includes provisions that properly deal with how the terms of office and other matters relating to the management committee are to be managed (see below for information on dealing with members).



TIP

You can find out whether a business name is in use or if very similar names are in use by searching ASIC business name registries. You can run a name availability search at [ASIC Connect](#).

3. Pass a special resolution of the association's members

The incorporated association must hold a general meeting where members of the association pass a special resolution agreeing that the association will become a CLG and agreeing on the new name.

A special resolution will need to be passed to change the association's constitution so that it is appropriate for the new CLG structure of the organisation. The membership should resolve that the new constitution will be effective from the date of the transfer to the CLG structure. The members may also need to pass a special resolution that any reference to the old name is a reference to the new name.

There are a number of statutory requirements applicable to special resolutions of incorporated associations. In order for a special resolution to be valid and be capable of changing the rules of the organisation, the incorporated association must comply with the following requirements:

- a special resolution can only be passed at a general meeting of members. This can either be the annual general meeting (**AGM**) or a special general meeting. A special resolution cannot be passed at a committee or board meeting, or by a resolution without a meeting.
- at least 21 days' notice of the general meeting must be given to all members
- the notice must state the text of the proposed special resolution
- the notice must specify the intention to propose the resolution as a special resolution and provide adequate explanation (the new proposed constitution is normally circulated and made available for review by members with the notice of meeting)
- the special resolution will only be passed if at least 75% of those members eligible to vote and that in fact vote on the resolution, vote in favour. This includes members who are not actually present themselves but are entitled to cast a proxy vote (see below) and whose proxies cast votes on their behalf. It excludes those members who abstain from voting (for example, members who do not

attend the meeting, or who attend but abstain from voting at the meeting) – though the abstaining members can still be counted for the purpose of assessing whether a quorum is present at a meeting.

It is a requirement that a notice of a special resolution advises the organisation's members that a special resolution is proposed. There are no requirements for the wording to be used, however, we recommend using wording along the following lines:

- “It is intended that the following resolution be proposed as a special resolution,” or
- “The following resolution will be proposed as a special resolution.”

CAUTION

Remember that any special resolution must also meet any requirements specified in the rules of your incorporated association. For example, the rules of your incorporated association may place other requirements on the passing of a special resolution, or may require a higher majority than the 75% prescribed by the legislation.



PROXIES

A proxy is a person authorised to vote on a member's behalf if they cannot attend a meeting. In the ACT, proxy voting is only available for special resolutions if an association's rules provide for it. If your organisation uses the model rules, there is no provision for proxy voting. The appointment of a proxy is usually required to be in writing using a specified form. Organisations may have rules about when proxy forms need to be received (e.g. at least 48 hours prior to the relevant meeting).

Note: a 'Representative' is different from a proxy. A Representative is the person who a company or organisational member nominates as its Representative to attend and exercise that company's or organisation's voting rights at a meeting of members.



CAUTION: MEMBERSHIP MAY NOT AUTOMATICALLY TRANSFER TO A NEW COMPANY

Legal opinion is divided about whether there can be an 'automatic' transfer of the members of the incorporated association to the new CLG.

TRANSFER OF MEMBERS TO CLG

If you accept legal opinion that all members of the original association become members of the new CLG, these members must not be subject to any greater liabilities as members of the new organisation than they were as members of the transferring association (ie. additional charges to become a member of the new organisation or liabilities transferred across from other transferring associations). However, given the division of opinion the safest option is for each member of an incorporated association to apply 'afresh' to be a member of the new CLG. At the general meeting, members can be given an application form for membership of the soon-to-be CLG, and asked whether, if the incorporation is transferred, they agree to become members of the company in accordance with the provisions of the company's constitution. If this approach is impracticable or impossible, you may need to speak to a lawyer, especially if the guarantee that members provide is more than nominal (eg. \$1).



4. Lodge documents with AC

Once your incorporated association has passed a special resolution in favour of becoming a CLG, your organisation will need to apply for the registrar-general's consent to apply for registration of the

association as a CLG. The relevant form is available from the AC's website, titled "Application for s.82 Transfer of Incorporation".

The registrar-general must give an incorporated association permission to apply for registration of the association as a CLG if the association has passed a special resolution in favour of becoming a CLG and the form is completed correctly. The form must be signed by the public officer and 2 members of the committee of the incorporated association.

5. Lodge documents with ASIC

Once your incorporated association has received approval from the registrar-general to become a CLG, your organisation will need to take a number of steps. It must complete and lodge with ASIC the following documents. You will most likely need legal assistance to prepare these documents:

- ASIC Form 202 "Application for registration of a body corporate as a company"
- the prescribed ASIC fee (approximately \$463 at January 2016)
- a copy of the proposed constitution
- evidence (such as a director's statement) required by section 601BC(7) of the Corporations Act
- evidence (such as a director's statement) required by section 601BC(8) of the Corporations Act
- a copy of the general meeting minutes showing the members' special resolution approving the transfer from the incorporated association to the CLG
- copies of the relevant sections of the Act (Part 6) that allow the transfer
- a certified copy of the association's certificate of incorporation (must be certified by AC)
- a copy of the association's rules including its statement of purposes (you can get this from AC if you don't have it)
- any outstanding association annual statements, and
- if there are "charges" on the association's property (like loan securities or mortgages), you will need to lodge ASIC Form 309 "Notification to details of charge" and the relevant associated documents.

If the CLG is applying to be registered without the word "limited" in its name, ASIC Form 432 "Application to approve registration of a company name without the word "limited"", also needs to be lodged, with an additional fee of approximately \$382 (only available to certain CLGs).

6. Notify AC

Once the company has been registered, ASIC will issue the company with an Australian Company Number (**ACN**) and a certificate of registration. The association must notify AC of its registration as a CLG. This notification should be in the form of a cover letter and the certificate of registration from ASIC.

Once AC has been notified that the organisation has been registered as a CLG, AC must remove the association from its register. Once the transfer is complete, an association ceases to be an association under the Act. However, the new CLG is considered to be the "same" organisation for the purpose of contracts and liabilities.

7. Notify the ACNC

If your organisation is a registered charity with the ACNC, once the company has been registered, your organisation must notify the ACNC of its change of structure by lodging [Form 3B: Change of charity details](#).

Where there are changes to the responsible persons, address details or governing documents, your organisation must also lodge these changes on the [Charity Portal](#).

NOTE

The ACNC may review the changes to your charity's details to ensure it's still operating on a not-for-profit basis, has charitable purposes and remains eligible for the subtype(s) of charity for which it has applied.

8. Retain old ABN or apply for new ABN?

Most companies have an ACN that “matches” their ABN (the ACN is incorporated within the longer ABN). When incorporated associations convert to a CLG structure, they are issued an ACN that will almost certainly not “match” the ABN of the organisation. There are benefits and downsides to the two options of retaining the ABN or applying for a new ABN as follows:

	Benefits	Downsides
Retaining old ABN	<ul style="list-style-type: none">do not need to change ABN on stationery, etc. (however, you will need to change the name regardless), anddo not need to inform parties, including banks, of a change of ABN.	<ul style="list-style-type: none">in many cases will need to quote both ABN and ACN, where normally only ABN would be required (eg. in communications with ASIC or the ATO). This can lead to confusion.
Applying for new ABN	<ul style="list-style-type: none">your ABN and ACN will match, and this will avoid confusion when filling in forms, in particular with government bodies.	<ul style="list-style-type: none">need to notify bodies of new the ABN eg. banks, ATO, ASIC, etc. (however, you will need to do this regarding new name regardless)need to update stationery with the new ABN etc (although likely to happen regardless)

To retain the ABN, the organisation will need to write a letter to the Australian Business Registrar (**ABR**) outlining the conversion that has taken place, providing the updated name, new ACN, new entity type and a formal request to retain the ABN.

To change the ABN so that it is consistent with the ACN, an organisation needs to write to the ABR outlining the conversion that has taken place, providing the updated name, new ACN, new entity type and a formal request to change the ABN to match the ACN.

When providing either of these requests to the ABR, organisations can update other details, such as address and contacts. You need to change the ABN and/or name of the entity on all your public documents, including the letterhead.

9. Notify the ATO, banks, Titles Office etc.

Your organisation will need to give notification of the new ABN and/or name to people or companies your organisation has relationships with (e.g. the change from “XYZ Inc” to “XYZ Ltd”). For example:

- the ATO – to confirm any tax concessions are transferred to the new entity and for PAYG and GST registrations
- WorkSafe and other insurers
- superannuation funds
- funding bodies
- fundraising regulators (if you have fundraising licences)
- people or companies that you lease property or equipment from
- your organisation's suppliers, e.g. power, telephone, internet service provider, office supplies, etc.
- the Land Titles Office in relation to any real estate your organisation owns
- benefactors, in particular anyone that you know has named your organisation in their will
- your bank and anyone your organisation has loans from, and
- your employees.

All of this needs careful management to co-ordinate the timing and the notifications.

Resources

Related Not-for-profit Law Resources

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

Not-for-profit Law's Getting Started page of the Information Hub has information on incorporating and choosing a legal structure.

- ✔ Running the Organisation - www.nfplaw.org.au/runningtheorg

Not-for-profit Law's Running the Organisation page features information on governance, meetings, record keeping, constitution and includes the popular Secretary's Guide.

- ✔ Working with Other Organisations - www.nfplaw.org.au/workingwithothers

Not-for-profit Law's Working with other organisations page has information on auspicing, MOUs, joint ventures, partnerships, mergers and amalgamations.

Legislation

- ✔ [Associations Incorporation Act 1991 \(ACT\)](#)
- ✔ [Corporations Act 2001 \(Cth\)](#)
- ✔ [Australian Charities and Not-for-profits Commission Act 2012 \(Cth\)](#)

Other Related Resources

- ✔ [ASIC Fact Sheet on reporting for registered charities](#)
- ✔ [Australian Charities and Not-for-profits Commission \(ACNC\)](#)

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

© 2016 Justice Connect. You may download, display, print and reproduce this material for your personal use, or non-commercial use within your not-for-profit organisation, so long as you attribute Justice Connect as author and retain this and other copyright notices. You may not modify this resource. Apart from any use permitted under the *Copyright Act 1968* (Cth), all other rights are reserved.

To request permission from Justice Connect to use this material, contact Justice Connect at PO Box 16013, Collins Street West, Melbourne 8007, or email nfplaw@justiceconnect.org.au