

## This fact sheet covers:

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- why an incorporated association would want to change its structure
  - registering as a Registrable Australian Body or incorporating in multiple jurisdictions
  - whether changing to a company is the best way to meet your organisation's needs
  - how a change to a company limited by guarantee (CLG) structure can be achieved and what happens to the association, and
  - other requirements.
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**Sometimes incorporated associations need to assess whether their legal structure is the most appropriate for achieving their aims.**

This fact sheet can help you consider whether to change 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

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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 geographical reach of operation
- desire to operate overseas
- 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 reasons are discussed in more detail below. Note that even if your organisation is undergoing significant changes, changing structure may not always be the best option, as it is time consuming, administratively complex and may require legal advice.

## CAUTION

In September 2016, NSW Fair Trading released a [‘Financial Threshold’ policy](#), which states that it may request that an incorporated association change its structure to a CLG (where it exceeds \$2 million in income and/or assets). If your organisation has been asked to change its structure by NSW Fair Trading, we suggest you seek legal advice.



## RELATED RESOURCES

For a more detailed comparison of the incorporated association structure and the company limited by guarantee (CLG) structure, read the fact sheet [“Incorporated association or company limited by guarantee?”](#) on the Not-for-profit Law’s website at [www.nfplaw.org.au/changingstructure](http://www.nfplaw.org.au/changingstructure).



## 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.

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.

## Operating interstate or overseas

Associations incorporated in New South Wales (“NSW”) are not required to have all their operations within NSW. However, if all or a majority of the association’s operations occur interstate, incorporation in that state may be more appropriate.

If the incorporated association wants to continue operating in other States, it may wish to:

- 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 in sections below.

For organisations wishing to operate overseas, there may be benefits to becoming a CLG 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 that 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.

## 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. NSW incorporated associations that are registered as charities will need to report to both NSW Fair Trading 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 will accept financial reports prepared for state and territory up until the end of the 2017 reporting period. Further information is available on the [ACNC website](#).

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 they only need to comply with and report under one, rather than two regulatory regimes (although some state and territory jurisdictions have made provisions to exempt charities from duplicate reporting obligations for incorporated associations. You can find out more information at the [ACNC website](#)).

## Becoming a Registered Australian Body or incorporating in multiple states

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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 options:

### 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 NSW Fair Trading.

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).

#### 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](#).

In summary, organisations that register as a 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, and
- 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 include directors' duties and 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 most 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](#) on Not-for-profit Law's website.



## 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 and state laws such as tax laws and charitable reporting requirements. These ongoing obligations can become very time and labour intensive.

Please note: just because the main entity may be registered as a charity and may have been granted deductible gift recipient endorsement, it does not necessarily follow that the associations incorporated in other states will receive the same treatment. Other incorporated entities are not permitted to use or share the DGR endorsement of brother/sister organisations.

### ! CAUTION

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

# Changing from an incorporated association to company limited by guarantee

If your group decides to change its structure to a CLG, the Act allows an incorporated association to “transfer” its registration to become a CLG under the Corporations Act. The steps to change structure 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. Any contracts or agreements that the association had (including employment contracts) continue to have effect after the association’s transfer to a CLG structure.

Groups that are registered charities and will continue to be registered charities will apply to ASIC to transfer legal structure, but 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 to the *Commonwealth Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) rather than the Corporations Act.



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.

## Steps to change structure to a CLG

### 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 pass a special resolution



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](#).

### 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, 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).

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

The incorporated association must hold a 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 approve the proposed transfer, and 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 consider passing a special resolution that any reference to the old name is a reference to the new name.

There are a number of statutory requirements, set out in the *Incorporated Associations Act 2009* (“**the Act**”) 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, and provide adequate explanation (the new proposed constitution is normally circulated and made available for review by members with the notice of meeting)
- the notice must specify the intention to propose the resolution as a special resolution, and
- 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 whose “proxies” (see below) 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.

## 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 such as a special, longer, notice period, or may require a higher majority than the 75% required by the legislation.



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."

## PROXIES

A proxy is a person authorised to vote on a member's behalf if they cannot attend a meeting. 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). Proxy voting must be explicitly provided for in rules.

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 application for transfer with NSW Fair Trading

Under the the Act an association must apply to NSW Fair Trading for approval to transfer registration of the association to a CLG. You need to prepare and provide the following to NSW Fair Trading:

- Form A10 – Application for approval to transfer registration of an association to a company or co-operative

- a copy of the resolution which authorises the application for transfer of registration (indicating the date the resolution was passed)
- any outstanding annual summary of financial affairs which should have been lodged under section 45 or 49 of the Act for the 3 financial years before the application is made, and
- payment of the prescribed fee.

NSW Fair Trading will make a decision on the application and either refuse or make a transfer of registration declaration. If NSW Fair Trading refuses the application, this decision can be appealed at the NSW Civil & Administrative Tribunal.

## 5. Lodge documents with ASIC

Once your incorporated association has passed a special resolution in favour of becoming a CLG, and received authority from NSW Fair Trading, your organisation 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 (around \$479 at September 2017 (refer to [ASIC's website](#) for updates to fees))
- 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 members' special resolution approving the transfer from incorporated association to CLG
- copies of the relevant sections of the Act (Part 7 Division 3) that allow the transfer
- a certified copy of the association's certificate of incorporation (this needs to be certified by NSW Fair Trading), and
- a certified copy of the association's rules including its statement of purposes (you need to get this from NSW Fair Trading if you don't have it).

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 \$395 (only available to certain CLGs).

Once the company has been registered, ASIC will issue an Australian Company Number (**ACN**) and a certificate of registration.

## 6. Notify NSW Fair Trading

Once the new company is registered, your organisation will need to notify NSW Fair Trading. They require you to provide them with the following documents::

- a copy of the certification of incorporation for the company, and
- the original association's certificate of incorporation.

Now that the transfer is complete, an association ceases to be association under the Act. However, the new CLG is considered to be the 'same' organisation for the purpose of contracts and liabilities.

## 6. 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 often does not ‘match’ the old 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:

	<b>Benefits</b>	<b>Downsides</b>
<b>Retaining old ABN</b>	<ul style="list-style-type: none"><li>do not need to change ABN on stationary, etc. (however you will need to change the name regardless), and</li><li>do not need to inform parties, including banks, of change of ABN.</li></ul>	<ul style="list-style-type: none"><li>in many cases you 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.</li></ul>
<b>Applying for new ABN</b>	<ul style="list-style-type: none"><li>your ABN and ACN will match, and this will avoid confusion when filling in forms, in particular with government bodies.</li></ul>	<ul style="list-style-type: none"><li>need to notify bodies of new ABN eg. banks, ATO, ASIC, etc. (however you will need to do this regarding new name regardless)</li><li>need to update stationary with new ABN etc (although likely to happen regardless)</li></ul>

To retain the ABN, the organisation will need to write a letter to the Australian Business Register (**ABR**) outlining the conversion that has taken place, advising that the organisation has elected to retain its ABN, and providing details of the updated name and new ACN. If the organisation is registered as a charity with the ACNC, it will also need to lodge a 'Change of Details' form (Form 3B) with the ACNC.

To change the ABN so that it is consistent with the ACN, an organisation needs apply for a new ABN through the ABR and telephone the ATO to cancel its existing ABN.

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 name of the entity on all your public documents, including the letterhead.

## 7. Notify the ATO, banks, Titles office etc

Your organisation will need to notify people or companies that your organisation has relationships with of your organisation’s new name (eg, the change from “XYZ Inc” to “XYZ Ltd”) and ABN, for example:

- the ATO – to confirm any tax concessions are transferred to the new entity and for PAYG and GST registrations
- SafeWork NSW 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, eg. power, telephone, internet service provider, office supplies, etc.
- the Titles Office in relation to any real estate your organisation owns
- benefactors that may have 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.

## 8. 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.

# Resources

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## Not-for-profit Law Resources

- Getting started – [www.nfplaw.org.au/gettingstarted](http://www.nfplaw.org.au/gettingstarted)

This page sets out the things you will need to take into consideration when deciding on whether to establish a not-for-profit organisation, including links to helpful resources

- Choosing a legal structure – [www.nfplaw.org.au/legalstructure](http://www.nfplaw.org.au/legalstructure)

This page lists the various types of not-for-profit legal structures, allowing you to determine the best structure for your group.

## Legislation

- [Associations Incorporation Act 2009 \(NSW\)](#)
- [Corporations Act 2001 \(Cth\)](#)
- [Australian Charities and Not-for-profits Commission Act 2012 \(Cth\)](#)

## External Resources

- [NSW Fair Trading webpage on transfer of incorporation](#)
- [ASIC Fact Sheet on reporting for CLGs](#)
- [ASIC webpage page on starting a company](#)
- [ACNC Fact sheet on reporting](#)
- [ACNC webpage on registering as a charity](#)

A Not-for-profit Law Information Hub resource. Access more resources at [www.nfplaw.org.au](http://www.nfplaw.org.au)

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