

# Changing structure

Legal information for Victorian incorporated associations

## This fact sheet covers:

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- why an incorporated association would want to change its structure
  - 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.
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**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

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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 geographic reach of operation
- desire to operate overseas
- it has been directed to do so by Consumer Affairs Victoria (CAV)
- 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?* on the Not-for-profit Law Information Hub at [www.nfplaw.org.au/legalstructure](http://www.nfplaw.org.au/legalstructure).

However, 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 Victorian incorporated associations.

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

Victorian incorporated associations can only undertake activities in Victoria (with the exception of one-off, not-significant activities interstate), so if your organisation wants to engage in regular activities interstate, you might need to consider transferring to a CLG structure. However, there are ways of remaining an incorporated association and engaging in regular activities 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 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.

Under the *Associations Incorporation Reform Act 2012* (Vic), CAV has the power to direct an incorporated association to become a CLG because of:

- the scale or nature of the activities of the incorporated association
- the value or nature of the property of the incorporated association
- the extent or nature of the dealings which the incorporated association has with the public, or
- for any other prescribed reason.

CAV must provide written reasons to the incorporated association and give the association a chance to submit why it should remain an incorporated association before any action is taken.

## 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, being state based charities, will need to report to both the CAV and the ACNC to maintain reporting obligations. In order to minimise the reporting burden, current policy from the ACNC dictates that they will accept financial reports prepared for state and territory regulators.

# 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 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 engage in regular activities 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 CAV.

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

### 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](#).

- for groups that are not registered charities: complying with the directors' duties in the *Corporations Act 2001* (Cth) (**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). 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 duties in the Corporations Act. Insolvent trading provisions from the Corporations Act will still apply to those 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 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 its brother/sister organisation.

## Transferring from an incorporated association to CLG

If your group decides to transfer to a CLG structure, the *Associations Incorporation Reform Act 2012* (Vic) 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.

Note that groups that are registered charities will apply to ASIC to transfer, but 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 come under 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 for a special resolution.

### 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



#### 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](#).

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 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 requires at least 75% of votes of members at a general meeting in favour of the proposal to become a CLG. Check your association's rules or constitution for any additional requirements for passing a special resolution.

A special resolution will need to be passed to change the association's constitution to reflect the transfer to a CLG, and for the new constitution to be effective as at the date of the transfer. This may involve a special resolution that any reference to the old name be a reference to the new name, and any other changes required in the constitution of a CLG. The new proposed constitution is normally circulated and made available for review by members with the notice of meeting.

Members must be given notice of the proposed special resolution, including the proposed wording of the resolution, at least 21 days prior to the meeting. The effects of the transfer should be explained to the members in the notice of meeting. For more information on meetings and passing special resolutions see Parts 4 and 5 of Not-for-profit Law's [Secretary's Satchel](#). This members' vote can be held at the association's next annual general meeting or at a special general meeting called for this purpose. Some incorporated associations are able to hold meetings using technology.

If an association is required to hold a general meeting at a location attended by members in person, and the Registrar is satisfied that it is impractical to pass special resolutions the usual way at a general meeting, he or she may approve another method of passing a special resolution (such as by written resolution).

#### **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 ASIC

Once your incorporated association has passed a special resolution in favour of becoming 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 \$400)
- 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 incorporated association to CLG
- copies of the relevant sections of the *Associations Incorporation Reform Act 2012* (Vic) (Part 8) that allow the transfer
- a certified copy of the association’s certificate of incorporation (must be certified by CAV)
- a copy of the association’s rules including its statement of purposes (you can get this from CAV 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 \$330 (only available to certain CLGs).

## 5. Notify CAV

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

Under the *Associations Incorporation Reform Act 2012* (Vic), an association must notify CAV within 14 days of registration as a CLG. In May 2012, CAV advised that this notification should include a cover letter, signed copy of the meeting minutes passing the special resolution to change legal structure, and the certificate of registration from ASIC.

Once CAV has been notified that the organisation has been registered as a CLG, CAV must remove the association from its register. Once the transfer is complete, an association ceases to be an association under the *Associations Incorporation Reform Act 2012* (Vic). 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 will

### FURTHER READING

Further information on updating your details with CAV can be found [here](#).

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
<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 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 Registry (**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 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 give notification of the new ABN and 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
- WorkCover 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 Titles Office in relation to any real estate your organisation owns
- funders such as benefactors or organisations who have provided you with grants
- 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

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## Related Not-for-profit Law Resources

### ✔ [Getting Started](#)

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

### ✔ [Running the Organisation](#)

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](#)

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

## Legislation

### ✔ [Associations Incorporation Reform Act 2012 \(Vic\)](#)

### ✔ [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](http://www.nfplaw.org.au)

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