

Changing structure

Legal information for Western Australian incorporated associations

This fact sheet covers:

- why an incorporated association would want to change its structure
- registering as a Registrable Australian Body or incorporating 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.

Incorporated associations in Western Australia are governed by the *Associations Incorporation Act 2015 (WA)* (**the Act or new Act**). Previously, incorporated associations were governed by the *Associations Incorporation Act 1987 (WA)* (**previous Act**). On 1 July 2016, the new Act took effect and replaced the previous Act.

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.

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 the Commissioner of the Department of Commerce Western Australia (**Commissioner**)
- 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 Incorporated Association or Company Limited by Guarantee Guide on the [Legal Structures](#) page of the Information Hub.

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 (although it must have a minimum of 6 members), 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

Western Australian incorporated associations need to meet requirements of other states if seeking to operate as an association outside the state, 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 as 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 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.

Direction from the Commissioner

Under the Act, the Commissioner 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 matter the Commissioner considers relevant or any other prescribed reason.

The Commissioner 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 need to report to both the state regulator 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, with an option to extend the reservation for a further two months, within 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 the Commissioner.

Your organisation will be given a 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).

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](#).

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 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.

Please note that just because the main entity may be registered as a charity and may have been granted deductible gift recipient (**DGR**) 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.

! 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.

Transferring from an incorporated association to a CLG

The Act allows for an incorporated association to transfer its incorporation to a CLG structure. The steps to transfer incorporation 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 has (including employment contracts) continue to have effect after the association's transfer to a CLG structure.

However, if you receive funding from a third party (for example, a government department, affiliated bodies or accreditation bodies), you should check that the proposed change in structure does not conflict with any requirements under the relevant funding agreement and will not affect ongoing funding.

The Department of Commerce recommends that associations consider what approvals, if any, they should obtain before calling a general meeting to consider a change in structure. For example (this is not an exhaustive list):

- associations that have gaming or liquor licences should contact the Department of Racing, Gaming and Liquor to find out if their licences will be affected by their proposed change of structure.
- associations governed by the *School Education Act 1999* (WA) (e.g. school councils, non-government schools) may require prior approval from the Minister of Education before passing the special resolution to transfer
- associations that have been appointed as trustee of trust land or hold a lease should contact the relevant regulatory body to ensure their tenancy arrangements will not be affected by their proposed change of structure, or
- associations that own land should make enquiries as to the process of updating the title to reflect the change of corporate 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 *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 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 pass 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) who will each 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 or too similar 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 general meeting where members of the association pass a special resolution agreeing to:

- transfer incorporation to become a CLG
- approve the new name of the CLG (where applicable), and



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](#).

- amend/replace the rules of the CLG (effective from the date of the transfer to the CLG structure).

The special resolution may also state 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 a board meeting, or by resolution without meeting
- proper written notice of the general meeting or AGM must be given to all members, providing certain information about the proposed special resolution (requirements for notices are discussed below), 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 may include members who are not actually present themselves but whose “proxies” (see below) cast votes on their behalf. It excludes 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 the 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.

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).

VOTING BY PROXY OR POSTAL VOTE

Members can vote by proxy or postal vote only if specifically allowed under the organisation's rules. The Department of Commerce recommends that organisations give careful consideration to whether proxy or postal voting should be allowed by its rules. These methods of voting allow members who cannot attend to vote, but at the same time those members will not be able to participate in the discussion at the meeting.

Proxy vote

A proxy is a person authorised to vote on a member's behalf if they cannot attend a meeting. A written proxy form providing the proxy with authority to vote must be completed. The proxy may be given authority to vote as the proxy sees fit, or can provide specific authority for the proxy to vote only in a certain way. Organisations may have rules about when proxy forms need to be received (eg at least 48 hours prior to the relevant meeting).

Postal vote

A postal vote allows a member to cast his or her own vote by post or email. Allowing this method of voting may result in more members casting their vote than might be the case if the vote were restricted to those who

actually attended the meeting.

The Department of Commerce recommends that consideration be given to the process for casting these votes, e.g., whether a formal ballot paper is to be used, the date and time by which the votes must be received and what can be put in place to prevent fraudulent casting of proxy votes (e.g. a person casting more than one vote).

It is a requirement that a notice of a special resolution advises the organisation's members:

- that a special resolution is proposed and of the wording of the proposed special resolution, and
- the time and place of the general meeting at which it is proposed to move the resolution.

There are no requirements for specific wording to be used in the notice. 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.”

Usually, a copy of the new constitution will be included with the notice along with an explanation about what is changing in the constitution and why.

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 with the Department of Commerce

Once your incorporated association has passed a special resolution in favour of becoming a CLG, your organisation must submit an 'Application for approval to transfer incorporation under another law' with the Department of Commerce.

The application must be made within one month of the special resolution being passed and should be accompanied by the prescribed fee (\$150) and the following information:

- a copy of the members' special resolution, and
- a statement:
 - as to the period within which the transfer application is expected to be made
 - as to the reasons for the intended transfer

- as to whether the entity to which the association intends to transfer is subject to rules that prohibit the distribution of profits to that entity's members
- declaring that the association's creditors are not likely to be materially prejudiced by the transfer, and
- if the association receives funding, evidence that the association's funding bodies have been advised of the proposed transfer.

5. Lodge documents with ASIC

Once the Department of Commerce has approved the application to transfer, 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 (approximately \$463)
- 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 Act that allow the transfer
- a certified copy of the association's certificate of incorporation (must be certified by the Department of Commerce)
- a copy of the association's rules including its statement of purposes
- 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 the Department of Commerce

Once the company has been registered under the Corporations Act:

1. ASIC will issue the company with an Australian Company Number (ACN) and a certificate of registration
2. the organisation must notify the Commissioner in writing within 14 days of registration as a CLG, and
3. the organisation's status as an incorporated association is then automatically cancelled.

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 stationary, etc. (however you will need to change the name regardless), anddo not need to inform parties, including banks, of 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 Australian Taxation Office (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 ABN eg. banks, ATO, ASIC, etc. (however you will need to do this regarding new name regardless)need to update stationary with new ABN etc (although likely to happen regardless)

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, and 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 its address and contact information. 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
- WorkCover and other insurers
- superannuation funds
- funding bodies and benefactors or organisations who have provided you with grants
- 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
- Landgate in relation to any real estate your organisation owns
- 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.

Other Related Resources

- ✔ [Australian Securities and Investments Commission \(ASIC\)](#)
- ✔ [Australian Charities and Not-for-Profits Commission \(ACNC\)](#)

Legislation

- ✔ [Associations Incorporation Act 2015 \(WA\)](#)
- ✔ [Associations Incorporation Regulations 2016 \(WA\)](#)
- ✔ [Corporations Act 2001 \(Cth\)](#)
- ✔ [Australian Charities and Not-for-Profits Commission Act 2012 \(Cth\)](#)

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

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