

Incorporated association or company limited by guarantee? (NSW)

A comparison between the two most common legal structures for not-for-profit organisations in New South Wales

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Introduction

Introduction

This guide covers:

- ▶ the differences between an incorporated association and a company limited by guarantee

Key issues to consider when choosing between structures:

- ▶ issue 1: where will the organisation conduct its business?
 - ▶ issue 2: will the organisation apply to register as a charity?
 - ▶ issue 3: will the organisation be able to pay initial and ongoing fees?
 - ▶ issue 4: will the organisation be able to meet annual reporting requirements?
 - ▶ other factors to consider when choosing between structures
-

The purpose of this guide is to help community organisations in New South Wales decide whether an incorporated association (IA) or a company limited by guarantee (CLG) is a more suitable incorporated structure for them.

While most not-for-profit groups choose between incorporating as an IA or a CLG, these are not the only forms of incorporation available for not-for-profit groups. For information on whether your group should incorporate and other legal structures available, see Not-for-Profit Law's resources on ['The incorporation decision'](#) and ['Choosing a legal structure'](#).

This guide is not legal advice. Please refer to the [full disclaimer](#) that applies to this guide.

Regulatory framework for IAs and CLGs

An IA is a type of legal structure, incorporated under the *Associations Incorporation Act 2009* (NSW) (**NSW AI Act**).

A CLG is another type of legal structure, incorporated under the *Corporations Act 2001* (Cth) (**Corporations Act**). A unique feature of a CLG is that members of the CLG must specify an amount they are willing to contribute to the property of a CLG if the CLG's assets don't cover its liabilities when it's wound up. This agreed amount is known as a 'guarantee' and is usually specified in the CLG's constitution. IAs also provide members with the benefit of limited liability – their liability is limited to the membership fee.

Both IAs and CLGs are suitable legal structures for not-for-profit groups in New South Wales.

While IAs are relatively straight-forward and less costly to register, changes to the law have made running an IA more complex.

Recent reforms to corporate whistleblower protection laws have also increased IA and CLG obligations. From 1 July 2019, IAs are subject to the corporate whistleblower protection regime if they are trading or financial corporations. Unless a class exemption is granted, from 1 January 2020, a CLG, or an IA that is a trading or financial corporation, must have a whistleblower policy in place and make this policy available to officers and employees.



Note

As at 16 October 2019, ASIC are consulting about the mandatory requirement for charities and small not-for-profits to have a whistleblower policy.



Note – registered charities

CLGs that have registered charity status (charity CLGs) are regulated by the Australian Charities and Not-for-profits Commission (**ACNC**). Once registered with the ACNC, some Corporations Act requirements will no longer apply; however, similar provisions under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**) will apply. See the [Australian Securities and Investments Commission \(ASIC\) website](#) for a list of the Corporations Act sections that will no longer apply (and those that will) to charity CLGs.

CLGs that don't have registered charity status are regulated by ASIC, which imposes more stringent regulatory and reporting requirements. In contrast, the ACNC takes a more educative approach as the regulator and works with organisations to ensure compliance. Although, in the case of serious misconduct (for example, fraud) ASIC, ACNC and Fair Trading NSW (**Fair Trading**) are all going to be stringent!

IAs in New South Wales:

- with charity status are regulated by Fair Trading and the ACNC, and
- without charity status are regulated only by Fair Trading

Fair trading takes a similar approach to the ACNC in its role as regulator.

From 1 October 2018, IAs in NSW with charity status only need to report to the ACNC and are not required to also report to Fair Trading NSW. ACNC then sends relevant information securely to Fair Trading NSW for those IAs.

Tax considerations

From a tax perspective, it's likely to be important that your group is endorsed as both a tax exempt charity and a Deductible Gift Recipient (**DGR**) if it qualifies. The type of legal structure your group adopts will not generally determine whether it qualifies for tax concessions or exemptions. The purposes of your group, the content of its constitution and the nature of its activities will be important to determine whether it qualifies for tax concessions and exemptions.

Your group may apply to the Australian Taxation Office (**ATO**) to be endorsed as a tax exempt charity. If successful, the group will be eligible for tax concessions and exemptions for income tax, fringe benefits tax and goods and services tax. At the same time, the group can also apply to be endorsed as a DGR.

Your group must first be registered with the ACNC before it can apply to the ATO for tax concessions and exemptions, and DGR status. While technically this is a two-stage process, as a practical matter, the applications to the ACNC and the ATO can be prepared together. Once the ACNC has considered the application, it will refer the application to the ATO.



Related Not-for-profit Law resource

For more information about tax concessions and exemptions, see the [tax resources on our website](#).

What next?

This guide addresses some key factors that groups should consider when deciding between incorporating as an IA or a CLG. Once you have read this guide and are familiar with your group's options, you should get legal advice from a professional with experience advising not-for-profit groups.

Spending some time (and, if necessary, money) getting professional advice is a worthwhile investment in the long-term viability of your group. Choosing the right legal structure can save your group considerable time, money and legal and administrative headaches down the track.



Note

We provide free legal advice to eligible organisations. Visit our website for our [eligibility requirements](#), and [make an enquiry online](#).



Summary of the issues

	CLG	IA
<p>Issue 1 Will you carry on business in multiple states?</p>	A CLG can carry on its business anywhere in Australia	An IA can only carry on its business in the state where it is incorporated
<p>Issue 2 Will you want to register as a charity?</p>	The ACNC regulates a CLG registered as a charity (and not ASIC). ACNC requirements are less complex than ASIC requirements.	Most IAs registered as a charity only need to comply with ACNC requirements. Some must comply with both ACNC and state regulator requirements.
<p>Issue 3 Will you be able to pay initial and ongoing fees?</p>	Initial and ongoing fees are generally higher for a CLG than an IA. Fees for a CLG registered as a charity are reduced.	Initial and ongoing fees are generally lower for an IA than a CLG. Fees for an IA registered as a charity are reduced.
<p>Issue 4 Will you be able to meet reporting requirements?</p>	Reporting and auditing requirements for a CLG are mostly more complex than for an IA. These requirements are less complex for a CLG registered as a charity.	Reporting and auditing requirements for an IA are mostly less complex than for a CLG. These requirements are less complex for an IA registered as a charity.
<p>Issue 5 Other considerations</p>	Other things to consider when deciding whether to incorporate as a CLG or IA include members' rights and numbers, officer holder duties and whether you'd like flexibility adopting a constitution.	



**Issue 1: Where will the
organisation conduct
its business?**

Issue 1: Where will the organisation conduct its business?

When choosing whether to incorporate as an IA or a CLG, it's important to think about where your group plans to conduct its business, both when it starts and in the future.

Where can each corporate structure conduct its business?

Where can a CLG conduct its business?

A CLG is incorporated under the Corporations Act and can carry on its business anywhere in Australia.

Where can a NSW IA conduct its business?

A group incorporated as an association under the NSW AI Act can carry on its business anywhere in NSW. However, it can't carry on its business in other states without taking further legal steps (discussed below).

Occasional or one-off activities in another state (such as holding a conference or a fundraising event) would not normally count as carrying on its business, but carrying on more regular or substantial activities might.

If you incorporate as an IA in NSW and want to conduct business regularly in other states, to operate legally in those other states, you should consider:

- the options summarised below, or
- incorporating as a CLG instead

Options for NSW IAs to carry on business outside NSW

If your group incorporates as an IA in NSW, but wants to carry on its business regularly outside NSW, it has two options to do this legally:

- Option A – register the IA as a Registrable Australian Body (**RAB**), or
- Option B - set up separate IAs in each state or territory in which you want to operate

Both options involve costs and will increase your administration.

A third option is to convert the IA to a CLG (discussed below).

For more information on the processes described below, see our [Changing legal structure fact sheet](#).

Option A – register the IA as a Registrable Australian Body

This option is recommended most often (that is, rather than option B below or converting to a CLG). By registering with ASIC as a RAB under the Corporations Act, your IA can carry on its business throughout Australia (all states and territories).

To register as a RAB, you must:

- check whether your [group's name is available](#)
- lodge an [application form](#) for registration of a RAB (including supporting documents such as your group's constitution and a certified copy of your organisation's certificate of incorporation)
- pay a fee (see the Table of Fees under issue 3), and
- display your IA's name (with additional information) outside every office and place of business open to the public



In addition, your IA will have to display its Australian Registered Body Number (**ARBN**) on all public documents and update ASIC of any change to its name, constitution, directors (or equivalent), address and business hours.

An IA that is registered as a RAB must comply with certain sections of the Corporations Act as well as the NSW AI Act.

If the IA is also registered as a charity, you can still file an application to become a RAB through ASIC. If your charity becomes a RAB, your group will have to:

- report to the ACNC, instead of ASIC, on most matters (see issue 2 below), and
- comply with the requirements of the ACNC and the ACNC Act, including reporting, record keeping and governance standards



Related resources

For more information about registering as a RAB, go to the [Changing your organisation's structure](#) page on our website. See also the Australian Registrable Body page on the [ASIC](#) website.

Option B – set up separate IAs in each state or territory where you want to carry on business

Sometimes known as a 'federated structure', your group might decide to set up separate IAs in each state or territory. This may be appropriate for your group if it is carrying out distinct activities in each state and territory.

Each IA will be a separate legal entity and will need to:

- comply with the requirements and fees of that state or territory's legislation (including having a separate management committee, financial records and reporting), and
- maintain its own tax concessions – this is because any Commonwealth tax concessions enjoyed by one IA (for example, income tax exemption and Deductible Gift Recipient (**DGR**) endorsement) can't be transferred to or shared by any other association in another state within the same group



Caution

Incorporation in multiple states can incur more fees and be difficult to manage. You may end up having to meet multiple state and territory laws and report to multiple regulators. This will be more administratively burdensome than Option A.

Converting an IA to a CLG

If you incorporate as an IA and the circumstances of your organisation change (for example, you expand from carrying on business in NSW only, to conducting business across one or more state borders), your group can 'convert' or 'migrate' from an IA to a CLG.

**Tip**

If the group is an Indigenous organisation, it could transfer its registration to be registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). These corporations are regulated by the Office of the Registrar of Indigenous Corporations.

Converting from an IA to a CLG does not affect the identity or continuity of the organisation. Any contracts to which the IA was a party (including employment contracts) will continue and be enforceable after the IA's transfer to a CLG. Any charity registration and charity tax concessions (including a DGR endorsement) can also be preserved.

However, there are costs and administration involved in converting your organisation's incorporated structure, so you should consider your options carefully before taking this step.

For more information, go to our '[Changing legal structure](#)' webpage.

**Tip**


Converting to a CLG has some significant legal and administrative requirements which can be costly and time consuming. Before making this decision, we recommend you get legal advice about what conversion would involve for your organisation, especially if it has a large membership base.

Conducting business overseas

If your group wants to carry on its business overseas, you will need to get legal advice about the requirements under the laws of the country in which you want to operate.

Using Australia as an example, any overseas (foreign) company that wants to 'carry on business' (conduct activities) in any part of Australia must register with ASIC under the Corporations Act. Many other countries will have similar requirements, even if your group is operating as a not-for-profit.

Generally, a CLG structure will be a more readily understood and recognised legal structure in other countries, compared with other structures such as an IA.



**Issue 2: Will the
organisation apply to
register as a charity?**



Issue 2: Will the organisation apply to register as a charity?

If your organisation intends to register as a charity, or is already registered as a charity, this significantly affects your choice about the best legal structure for your group.

Implications of charity status for each legal structure

Legal structure	Implications of charity status
CLG	<p>A Charity CLG's main regulator is the ACNC rather than ASIC (although applications for incorporation will still be made to ASIC, and applications for Commonwealth tax concessions are still decided by the ATO).</p> <p>Different and less complex laws apply to charity CLGs than to other CLGs. When a CLG is registered as a charity, most Corporations Act requirements 'switch off'. For example, the ACNC governance standards prescribe a more flexible framework around holding meetings, directors' duties, annual reporting and record keeping. The Corporations Act requirements for CLGs that are not charities are more complex and prescriptive.</p> <p>A charity CLG is no longer required to:</p> <ul style="list-style-type: none"> • lodge changes to its constitution with ASIC – instead it must provide this information to the ACNC • send a copy of its constitution to members who request a copy – it will be available for free via the ACNC online register • notify ASIC of a change to its address details – instead it must provide this information to the ACNC • notify ASIC of the appointment, resignation or retirement of directors, secretaries and alternate directors or submit personal details of directors and secretaries – instead it must provide this information to the ACNC, and • review their details – a charity CLG is not sent an annual statement each year for review, or • pay an annual review fee – however, if the last annual review date was before registration with the ACNC, the company must pay the annual review fee to ASIC <p>Generally speaking, for groups that intend to be registered charities, the CLG structure is often the simplest to administer and an attractive structure choice.</p>
IA	<p>Generally, an IA registered as a charity is only required to comply with the ACNC regime.</p> <p>The reporting requirements for IAs were recently streamlined with the introduction of a new reporting exemption for IAs in 2018. From the financial year ending on (or after) 30 June 2018, an IA registered as a charity with the ACNC, will (generally) not be required to lodge an annual statement with Fair Trading or pay an annual fee. Instead, the IA will only need to submit an Annual Information Statement to the ACNC.</p> <p>Some IAs registered as charities must continue to comply with both ACNC and Fair Trading requirements. See the ACNC website for information about IAs registered as charities that still have to report to both ACNC and Fair Trading.</p>



Note

A RAB that is a registered charity is regulated by both ASIC and the ACNC – it applies to ASIC to become a RAB, but then reports to the ACNC where it would otherwise report to ASIC. For more information, see [FAQs: Registrable Australian Bodies and the ACNC on the ACNC website](#).



Tip

The ACNC and ASIC websites also have helpful resources, including:

- a template constitution for charitable CLGs – see the template at the [ACNC website](#)
- a table summarising when, and in relation to what matters. Charity CLGs should contact the ACNC or ASIC – see the table at the [ASIC website](#), and
- a table summarising the reporting obligations of companies and registered bodies also registered with the ACNC – see the table at the [ASIC website](#)

Obligations to ACNC

Registered charities have ongoing obligations to the ACNC. They must:

- meet ACNC governance standards (more information on these is below)
- keep records that correctly document and explain their net wealth, performance and operations
- submit an Annual Information Statement (and, for medium and large sized charities, a financial report) every year
- maintain their eligibility to be registered by remaining not-for-profit, pursuing their charitable purpose and otherwise complying with the ACNC Act, and
- notify the ACNC of changes, including to charity details, and of any breach of the ACNC Act, including governance standards


The governance standards focus on the management of charities and deal with matters such as their processes, activities and relationships. There is some flexibility in how to comply with the governance standards, however your organisation must:

- show accountability to members and provide members with the chance to raise concerns about how the charity is governed
- follow Australian laws and not commit any serious offences or those that could lead to a fine of 60 penalty units or more (approximately \$12,600)
- take reasonable steps to make sure all responsible people in the organisation (such as the board or committee members) are not disqualified from managing a corporation under the Corporations Act or disqualified from being a responsible person of a registered charity by the ACNC Commissioner (if a person does not meet this standard, your group must remove that person from their position), and
- take reasonable steps to make sure responsible people understand and carry out the duties set out in the governance standards

In the absence of fraud or serious or persistent wrongdoing, the ACNC takes an educative regulatory approach. This means the ACNC uses a range of measures to help organisations meet their legal obligations, rather than taking a strict approach (as is generally taken by ASIC, which regularly issues fines for failing to meet reporting deadlines). Unless your group is requested to do so, it is not required to submit evidence that it meets the governance standards to the ACNC.

**Note**

If your organisation incorporates as a CLG but is not a registered charity (or loses its charitable registration), it will be regulated by ASIC, and subject to both ASIC's stringent regulatory approach and the full suite of legal requirements for CLGs under the Corporations Act.



Issue 3: Will the organisation be able to pay initial and ongoing fees?

Issue 3: Will the organisation be able to pay initial and ongoing fees?

The amount of money your group has to pay (both in initial and ongoing fees) may be a factor in working out whether an IA or CLG is the most appropriate structure for your group.

In general, ASIC charges CLGs higher fees and penalties than Fair Trading charges IAs. Your group will need to be realistic about the resources it has (or is going to have), and how organised it is going to be about keeping information up-to-date and paying fees on time (to avoid late fees which can be significant for CLGs regulated by ASIC).

Groups that are charities and incorporated as CLGs will largely report to the ACNC, not ASIC (although, as noted above, CLGs still incorporate with ASIC), and the ACNC does not charge fees for lodging reporting and notifications. However, the ACNC can charge penalties when charities don't lodge information in time.

IAs that are charities in a transitional period must continue to report to Fair Trading (and pay the required fees to Fair Trading) as well as to the ACNC. Visit the [ACNC website](#) for more information on your reporting requirements during this transitional period.

An overview of the different types of fees payable by each structure is set out below, followed by a table comparing the fee amounts. The fees listed are for the 2019/2020 financial year and are indexed (they will change each financial year).

In addition to the fees payable below, your group may also need to audit its accounts. The costs of preparing audited financial statements can vary from \$2,000 to \$20,000 or more. Details of auditing requirements are set out under issue 4 below.

Initial application fee, ongoing fees and fees for certain changes

The initial application fee for incorporation as a CLG is higher than that for an IA.

Ongoing fees and fees for certain changes are payable by both IAs and CLGs that are not registered charities with ACNC. These include:

- annual fees:
 - fees for lodging financial statements for IAs, and
 - annual review fees for CLGs
- fees for changes of name, and
- fees for changes to the rules of an IA

The annual fee for lodging an annual review with ASIC is also materially higher than the annual fee for lodging financial statements with Fair Trading.

However, fees are significantly reduced for CLGs that meet the requirements of a 'special purpose company' as set out in the *Corporations (Review Fees) Regulations 2003*.



Related resource

For more information about special purpose companies, go to [ASIC's website](#).



Note for charities

Many charities will meet the definition of 'special purpose company' and will be eligible to pay the reduced annual review fees if they:

- apply their income in promoting their charitable purposes
- have non-profit and non-distribution clauses in their constitutions (prohibiting distributions to members and directors)
- have certain rules relating to directors, and
- meet certain other requirements under the *Corporations (Review Fees) Regulations 2003*

Penalties and late fees

ASIC, the regulator of CLGs not registered as charities, charges penalties for late reporting and in general is rigorous in its collection of late fees and rarely waives them. ASIC's late penalties increase substantially if a document is not received within a month after the prescribed time. If your group is late lodging documents, ASIC late fees can quickly accumulate.

For charity CLGs, from the 2014 reporting period, they only have to submit an Annual Information Statement to the ACNC (along with a financial report if the charity has annual revenue of \$250,000 or more). Charity CLGs no longer need to file an annual review, provide financial reports, pass a solvency resolution or pay an annual review fee to ASIC. If your charity CLG receives an annual review fee from ASIC that you think doesn't need to be paid, you should contact ASIC to request the fee be withdrawn.



Note for charities

The ACNC will not charge lodging and notification fees. However, it may still charge penalties for late lodgement of documents. The size of the penalty will depend on the size of the charity. Charity CLGs no longer report financial information to ASIC, so the ASIC fees listed below do not apply.



Table of Fees for 2019/2020

For fees for IAs see the [Association fees page on the Fair Trading website](#).

For payments and fees for CLGs see the [Fees page on the ASIC website](#).

For penalties for charities that fail to lodge documents on time with the ACNC see the [penalties page on the ACNC website](#).

Type of fee	NSW IAs	CLGs (that are not charities)	Charities
Initial application for incorporation	\$134 (If the association name has not been reserved, the fee is \$173. The fee to reserve a name is \$52)	\$408 (this fee applies to CLGs regardless of charity registration)	There is an additional fee of \$408 to change a CLG name to omit the word 'limited'. This can only be done if the company is to be a registered charity There is no application fee to become registered as a charity, but you must pay fee to Fair Trading or ASIC to incorporate (as either an IA or a CLG)
Annual fees	For lodging financial statements: Tier 1 associations: \$196 Tier 2 associations: \$47 (see Issue 4 for an explanation of the different tiers)	For annual reviews: Public company - \$1,240 (\$9,499 advance payment for 10 years), or Public special purpose company - \$50 (\$371 advance payment for 10 years) There is no fee to lodge financial statements with ASIC	There is no fee to lodge financial reporting statements with the ACNC (See Issue 4 regarding financial reporting obligations)
Late fees when lodging annual statement	Late lodgement fees apply as follows: <ul style="list-style-type: none"> • Tier 1 associations – \$95 within one month of the due date • Tier 1 associations –\$121 for later than a month • Tier 2 associations –\$28 within one month of the due date • Tier 2 associations – \$36 for later than a month 	\$80 if payment is received within 1 month after due date \$333 if payment is received more than 1 month after due date	The ACNC may charge late fees both to IAs and CLGs that are registered as charities that fail to lodge an Annual Information Statement by the due date \$210-\$1,050 for small charities \$420-\$2,100 for medium charities \$1,050-\$5,250 for large charities (see issue 4 for an explanation of the different reporting tiers)
Lodge details of changes to information (eg address, names of officers)	No fee applicable, except for change of name, which incurs a \$65 fee if the association name has been reserved, and \$103 fee if the name has not been reserved	\$408 (for change of name)	None




Type of fee	NSW IAs	CLGs (that are not charities)	Charities
Lodge changes to constitution or rules	\$52 (for changes to either the constitution or objects or the association)	None	None
Failure to lodge changes of details within required period (ie. address, names of officers, change to rules or constitution)	None	\$80 if document is received within 1 month after the prescribed time \$333 if document is received more than 1 month after the prescribed time	The ACNC may charge administrative penalties for failing to notify of changes



Caution

If you choose to incorporate as a CLG and are not a registered charity, your organisation will be regulated by ASIC, a body that imposes late fines and is inflexible in waiving fines. If you forget or are late or did not realise that you had to file documents or notify ASIC of certain changes, ASIC late fees can accumulate quickly and be crippling for small groups.

In contrast, Fair Trading, the regulator for associations, is known to be less rigorous in imposing late fees, and the ACNC, which regulates charity CLGs, is likely to take a more educative approach to regulation.



Issue 4: Will the organisation be able to meet annual reporting, audit and review requirements?

Issue 4: Will the organisation be able to meet annual reporting, audit and review requirements

Generally, the regulatory regime for IAs under the NSW AI Act is more straightforward than the regime for CLGs under the Corporations Act.

If you wish to incorporate as a CLG that is not a registered charity, your group will need ongoing help from a person who has a good understanding of running a company, or access to professional legal or accounting advice.

However, as discussed under issue 2, charity CLGs are largely governed by the ACNC Act instead of ASIC. The ACNC Act has different and less complex obligations, and reporting fees are also lower (or can be waived in some cases). Therefore, concerns about the complexity of the Corporations Act and reporting to ASIC are not as relevant to groups who are or will be charities.



Related Not-for-profit Law resource

For more information about reporting to government for IAs, CLGs and charities, see our [‘Reporting to Government’](#) webpage.

Some IAs and CLGs must have their accounts independently audited or reviewed each year. Audit and review costs for IAs and CLGs are largely similar. For both IAs and CLGs, the type of audit or review required will depend on the ‘tier’ your organisation falls into. There are three tiers for CLGs and two tiers for IAs (outlined below). Under both structures, only larger organisations (as well as CLGs that have DGR status) need to audit their accounts.

However, keep in mind that many groups conduct audits for reasons other than their size, including being required to under a funding agreement or because the members or committee of management believe it’s good practice.

An independent audit may cost between \$2,000 and \$20,000 or more, depending on the size and complexity of your organisation.

The reporting requirements for IAs were recently streamlined with the introduction of a new reporting exemption for IAs in 2018. For groups incorporated as an IA and registered as a charity with the ACNC, for any financial year of the association ending on or after 30 June 2018, the IA will not be required to lodge an annual statement with Fair Trading or pay an annual statement lodgement fee. Instead, the IA will only need to submit an Annual Information Statement to the ACNC.

Reporting tiers for CLGs

For CLGs, there are three categories or 'tiers' with different auditing requirements. The table below sets out the tiers and the corresponding requirements for financial reporting and auditing under the Corporations Act for CLGs that are not registered as charities. See the [ASIC website](#) for further details.

	Definition of CLG category	Reporting and auditing requirements
Tier 1 'small'	CLGs with annual (consolidated) revenue less than \$250,000 and no DGR status (during the relevant financial year)	Not required to prepare a financial report, director's report, notify members of annual reports or have accounts audited or reviewed, unless required to do so under ASIC direction or members' direction (any group of members that make up at least 5% of the votes can direct the CLG to prepare a financial statement or director's report and can require either a review or audit)
Tier 2 'medium'	CLGs with annual (consolidated) revenue between \$250,000 and \$1 million and no DGR status Or CLGs with annual revenue less than \$1 million and DGR status	The company must: <ul style="list-style-type: none"> • prepare a financial report and have the report reviewed or audited. A review is not as comprehensive or expensive as a full audit. A review doesn't need to be done by a registered company auditor, but it must be done by a member of and holding a practicing certificate issued by either Chartered Accountants Australia and New Zealand, CPA Australia, or the Institute of Public Accountants • prepare a directors' report, and • give annual reports to any member who chooses to receive them
Tier 3 'large'	Annual (consolidated) revenue over \$1 million, whether DGR status or not	The company must: <ul style="list-style-type: none"> • prepare a financial report • have the financial report fully audited by a registered company auditor • prepare a directors' report, and • give annual reports to any member who chooses to receive them



Note for charities

The same tiers apply under the ACNC Act, and similar reporting requirements apply with financial reports submitted to the ACNC rather than ASIC. In contrast to CLGs regulated by ASIC, being endorsed as a DGR will not trigger higher tier reporting requirements by the ACNC. The ACNC Act specifies that only medium and large charities need to provide financial reporting to the ACNC. The Annual Information Statement (an ACNC document), which all charities (other than Indigenous organisations registered and reporting to the Office of the Registrar of Indigenous Corporations) must provide the ACNC, includes basic financial questions. Some charities (including basic religious charities and non-government schools) only need to answer part of the Annual Information Statement.

Reporting tiers for IAs

For NSW IAs, there are two categories or 'tiers' of auditing requirements. The table below sets out the tiers and corresponding requirements for financial reporting and auditing under the NSW AI Act.

	Definition of CLG category	Reporting and auditing requirements
Tier 1 'small'	IAs with gross annual receipts for a financial year of more than \$250,000 (ex GST) or current assets exceeding \$500,000	The IA must: <ul style="list-style-type: none"> lodge the <i>Annual summary of financial affairs – Tier 1</i> form (available on the Fair Trading website) within one month of the AGM and no later than 7 months after the end of the association's financial year, and have their annual accounts audited and lodge a copy of the audited financial statements, audit report and any resolution passed in relation to the financial statements or auditor's report with Fair Trading, unless exempted
Tier 2 'medium'	IAs with gross annual receipts of \$250,000 (ex GST) or less and current assets of \$500,000 or less	The IA must: <ul style="list-style-type: none"> lodge an <i>Annual summary of their financial affairs – Tier 2</i> within 1 month of the AGM and no later than 7 months after the end of the association's financial year

'Current assets' refers to assets (other than real property or assets that are capable of depreciation) held by the association as at the end of the IA's last financial year, including amounts held in financial institutions, stocks and debentures.



Note for charities

The reporting tiers under the ACNC Act are similar to the tiers for CLGs under the Corporations Act (see the table on the previous page). Since the end of the financial year at 30 June 2018, most IAs registered as charities are only required to lodge an Annual Information Statement with the ACNC and no longer need to lodge an annual statement with Fair Trading. If your IA is a registered charity, make sure you know which reporting tier you fall into with the ACNC, and what your reporting requirements are. For more information visit the [ACNC website](#).




Tip

Some organisations may be required to have audited accounts because of another requirement (for example, because this is in a funding agreement with the government, or because the members or committee of management believe it's good practice) even though it's not required by the Corporations Act (for CLGs), the NSW AI Act (for IAs) or the ACNC Act.



Related Not-for-profit Law resource

For more about the reporting obligations of charities, read our Financial reporting for charities fact sheet on the [charities reporting page of our website](#).



Issue 5: Other factors you should consider

Issue 5: Other factors you should consider

The issues discussed above are four of the main factors for your group to consider when choosing its legal structure.

However, there are other factors that may affect your group's decision whether to incorporate as an IA or CLG. The table below lists some factors which may be relevant to your group's aims, activities or circumstances.

Feature	Description
Flexibility of constitution	<p>IA: Under the NSW AI Act, an IA's constitution must address specific topics. Fair Trading scrutinises constitutions when an IA incorporates and whenever a constitution is amended. A representative of the IA must certify that the constitution complies with the requirements of the NSW AI Act. Changes to an IA's constitution only takes effect when it is registered by Fair Trading.</p> <p>CLG: In contrast, the Corporations Act provides for more flexibility in a company's constitution, and ASIC is less likely to reject a proposed constitution. Generally, changes to the constitution of a CLG take effect from the date they are approved by the members. Changes to the constitution generally must be notified to ASIC within 14 days or late fees will apply.</p>
Directors (board members) and office holder duties	<p>IA: IA committee members' duties are set out in the NSW AI Act. The penalties for breaching these duties are lower than for directors of a CLG that is not a charity.</p> <p>CLG: The potential liabilities of CLG board members are more serious under the Corporations Act than for committee members and other office holders of an IA. There are significant penalties for directors of CLGs who breach their duties.</p> <p>Charity CLGs must comply with the ACNC governance standards instead of the civil directors' duties under the Corporations Act. Criminal penalty provisions under the Corporations Act still apply.</p> <p>The common law (ie. judge-made) duties and liabilities of board members are similar for both structures. For more information about the duties of board and committee members, see our page on 'Governance'.</p>
Number of members	<p>IA: NSW IAs must have a minimum of five members and three committee members.</p> <p>CLG: In contrast, groups wanting to incorporate as a CLG need only one member. This structure may be suitable for not-for-profit organisations wanting to retain a higher degree of control (but remember, this type of company still needs three directors, two of whom must live in Australia) or, where the organisation is to become a subsidiary of another.</p> <p>In general, members of CLGs and IAs will have voting rights and be able to call meetings and exercise some control over the organisation (for example, to remove directors or committee of management members).</p>
Speed of incorporation	<p>IA: Fair Trading will generally process applications for incorporation of an IA within five business days of receipt (it may take longer if you apply through Service NSW).</p>



Feature	Description
	<p>CLG: In general, ASIC often processes an application for incorporation of a CLG within 24-48 hours of paperwork being filed online (but it will take longer if it includes an application for a licence to omit the word 'limited' from the name of the organisation).</p>
<p>Rights of members</p>	<p>IA: Members of IAs are not automatically entitled to appoint proxies and call meetings. The rights and liabilities of members – for example, the rights of members to vote and call meetings – must be in the association's constitution. The model constitution for IAs includes a similar rule that 5% of the total number of members can call a special general meeting of the IA. Note that the model constitution for IAs can be updated from time-to-time by Fair Trading, in which case, the changes will then apply to any IA that has also adopted the model constitution.</p> <p>CLG: Members of CLGs are entitled to appoint a member or a non-member as a proxy (a person to vote at meetings on their behalf). Members of CLGs with at least 5% of the votes that may be cast at a general meeting of the company may call, and arrange to hold, a general meeting, provided that they meet certain procedural requirements and pay the expenses of calling and holding the meeting.</p> <p>See our 'Members' rights' fact sheet for more information.</p>
<p>Legislation requiring a particular form of incorporation</p>	<p>In limited circumstances, there are laws that require organisations that undertake specific activities to adopt a particular legal structure. For example, in NSW, if an organisation wants to register under the <i>Registered Clubs Act 1976</i> (Cth) it is generally required to be a company. There are also requirements for organisations that want to provide aged care services to adopt a particular structure.</p> <p>Your organisation should get advice about any laws that might apply to the field you are working in.</p>
<p>Availability of information about the organisation to the public</p>	<p>IA: Fewer details are required to be made public.</p> <p>CLG: The name, date and place of birth and address of each director must be provided to ASIC and, generally, these details will be available to the public (for a fee). Further, a CLG is required to keep a register of details of members of the organisation, and must make this available to all members for free, and to the public for a fee.</p> <p>Certain details of registered charities (both IAs and CLGs) are also made available on the ACNC Register (the register of charities maintained by the ACNC) – for example, governing rules, names of directors, annual statements.</p>
<p>Amalgamation</p>	<p>IA: The NSW AI Act provides for an IA to amalgamate with another. This means that all of the assets, liabilities and staff automatically transfer to the amalgamated association without the need for winding up or termination of employment.</p> <p>CLG: The Corporations Act doesn't have an identical provision for amalgamation. Instead, CLGs that want to merge must do this by establishing a new entity or transferring assets from one to the other. For more information see our Amalgamation and Mergers page.</p>



Conclusion

Conclusion

As highlighted in this guide, a number of factors influence a group's decision whether to become an IA or a CLG. There is no quick and easy answer, but considering these factors will help you work out which structure best suits the activities, circumstances, direction and resources of your group.

Remember this analysis will change as laws are amended. Access our updates and alerts by [subscribing to the Not-for-profit Law Update](#).



Note

Remember, the main issues are:

- charity status, and
- where the organisation will conduct business in pursuit of its purposes

Resources

Not-for-profit Law resources

▶ [Getting started](#)

This page sets out things you need to consider when deciding whether to establish a not-for-profit organisation. It includes links to helpful resources.

▶ [Before you start](#)

This page includes specific matters to address before setting up a not-for-profit organisation.

▶ [The incorporation decision](#)

This page gives guidance to not-for-profits grappling with the decision whether to incorporate or remain an unincorporated group.

▶ [Choosing a legal structure](#)

This page lists the types of not-for-profit legal structures, to help you work out the best structure for your group.

▶ [Governance](#)

This page provides information about how an organisation should be run, and includes information about directors' duties.

Legislation

▶ [*Associations Incorporation Act 2009 \(NSW\)*](#)

▶ [*Associations Incorporation Regulation 2010 \(NSW\)*](#)

▶ [*Corporations Act 2001 \(Cth\)*](#)

▶ [*Australian Charities and Not-for-profits Commission Act 2012 \(Cth\)*](#)

Australian Charities and Not-for-profits Commission (ACNC)

▶ [Reporting to the ACNC](#)

This page on the ACNC website provides an overview of the reporting requirements for registered charities, according to their size.

▶ [Registering as a charity](#)

This page on the ACNC website provides a summary of the steps to take to register your not-for-profit as a charity.

▶ [Manage my charity](#)

This page on the ACNC website provides a list of the steps to take to manage a charity, and includes guidance on meeting governance standards, keeping records and annual reporting.



Australian Securities and Investments Commission (ASIC)

▶ Starting a company

This page within the ASIC website gives guidance on how to start a company, whether for-profit or not-for-profit.

▶ Reporting obligations of companies limited by guarantee

This page within the ASIC website provides an overview of the reporting requirements for CLGs that are not charities.

▶ Information Sheet 30 - Fees for commonly lodged documents

Download this ASIC factsheet for a list of company registration fees.

Fair Trading NSW

▶ Before incorporating a new association

This page covers 10 important things to consider before incorporating a new association in NSW.

▶ Incorporating an association

This section of the Fair Trading website sets out steps to incorporate an association.

▶ Financial reporting for incorporated associations

This page on the Fair Trading website summarises the annual reporting requirements for NSW IAs.

