

# Incorporated association or company limited by guarantee? (SA)

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

Jul 2018



# Contents

<b>Introduction</b>	<b>3</b>
This section covers: .....	4
<b>Issue 1: Where will the group ‘operate’ or ‘carry out activities’?</b>	<b>5</b>
Where can a company limited by guarantee operate? .....	6
Where can a SA incorporated association operate? .....	6
Options for SA incorporated associations to operate outside SA .....	6
Option A – register the group as a Registered Australian Body (RAB) with ASIC .....	6
Option B – set up separate incorporated associations in each State or Territory you wish to operate in .....	6
Converting to a company limited by guarantee structure .....	7
<b>Issue 2: Will the organisation seek to become registered as a charity?</b>	<b>9</b>
<b>Issue 3: Will the organisation have capacity to pay regulatory fees?</b>	<b>12</b>
Initial application fee .....	13
Penalties and late fees.....	13
2018/19 incorporation and ongoing fees .....	14
<b>Issue 4: Annual reporting, audits and reviews</b>	<b>17</b>
Reporting tiers for CLGs .....	18
Categories of SA incorporated associations reporting requirements.....	19
<b>Conclusion</b>	<b>24</b>
<b>Resources</b> .....	<b>26</b>



# Introduction



# Introduction

---

## This section 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 group 'operate' or 'carry out activities'?
  - ▶ Issue 2: Will the group be a charity?
  - ▶ Issue 3: Will the organisation be able to pay initial and ongoing fees?
  - ▶ Issue 4: Annual reporting, audits and reviews
  - ▶ Issue 5: Other factors to consider
- 

**The aim of this guide is to help South Australian (SA) not-for-profit groups decide whether an incorporated association or a company limited by guarantee is a more suitable incorporated structure for them.**

While most SA not-for-profit groups choose between incorporating as an incorporated association or as a CLG, these are not the only forms of incorporation available for not-for-profit groups. Please read the related Not-for-profit Law fact sheet: '[Choosing a legal structure](#)', available on the Not-for-profit Law website (see the 'Getting Started' page).

An incorporated association is a type of incorporated legal structure made under the South Australian *Associations Incorporation Act 1985* (SA) (**AI Act**). A CLG is another type of incorporated legal structure made under the Commonwealth *Corporations Act 2001* (Cth) (**Corporations Act**). Both are suitable legal structures for not-for-profit groups in SA.

Incorporated associations were originally designed to be low cost to register, and simpler to run than a CLG. Changes to the laws for both incorporated associations and CLGs registered by the Australian Charities and Not-for-profits Commission (**ACNC**) as charities, which are discussed in this guide, mean that the arguments for choosing to incorporate as an association over a CLG are no longer as compelling.

This guide addresses some key factors that groups should consider when deciding between incorporating as an incorporated association or a CLG. Once you have read this guide and familiarised yourself with your organisation's options, you should seek legal advice from an advisor with experience advising not-for-profit groups. Spending some time (and, if necessary, money) getting professional advice on legal structure issues before you incorporate is a worthwhile investment in the long-term viability of your newly-formed organisation. Choosing the right legal structure can save your group considerable time, money and legal and administrative headaches further down the track!



**Issue 1: Where will the group 'operate' or 'carry out activities'?**



# Issue 1: Where will the group ‘operate’ or ‘carry out activities’?

When choosing between an incorporated association or CLG structure, it is important to think about where your group plans to operate, both when it starts and in the future.

## Where can a company limited by guarantee operate?

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

## Where can a SA incorporated association operate?

The law relating to incorporated associations is state and territory based, and each state and territory in Australia has its own laws. A group incorporated as an association under the AI Act can operate anywhere in SA. However, it cannot substantially operate in other states without taking further legal steps (discussed below).

Holding one-off or occasional activities in another state (such as a conference) would not count as ‘operating’, but carrying on more regular or substantial activities might.

If you incorporate as a SA incorporated association and want to legally operate in other states, you will need to consider the options summarised below. As appropriate, you should decide whether any of the options discussed below could work for your organisation, or whether you should incorporate as a CLG from the beginning.

## Options for SA incorporated associations to operate outside SA

If your group incorporates as a SA incorporated association, but wants to operate (undertake more than one-off or occasional activities) outside SA, there are two options available to enable it to do so legally. Both of these options may involve costs and increased administration for your organisation. It is also possible for an incorporated association to convert to a CLG if necessary (discussed further below). If the group is an Indigenous incorporated association, it can transfer its registration to the Commonwealth Corporations (*Aboriginal and Torres Strait Islander*) Act 2006 (Cth).

For more detailed descriptions of the processes described below, go to the Not-for-profit Law Fact Sheet at our page [Changing your organisation’s structure](#).

### Option A – register the group as a Registered Australian Body (RAB) with ASIC

This is the option most commonly recommended (that is, rather than option B below or converting to a CLG). This will mean that your group will be regulated by the Australian Securities and Investments Commission (ASIC) as well as by the SA Consumer and Business Services (SA CBS) and that extra forms will need to be prepared and lodged by your organisation each year and when certain changes occur. Your group must also display additional information along with its name. Groups that register as RABs that are also charities apply to ASIC to become a RAB but then report to the ACNC where they would otherwise report to ASIC (and continue to report to SA CBS as usual). A \$403 fee (as of August 2018) is payable to ASIC.

### Option B – set up separate incorporated associations in each State or Territory you wish to operate in

This is sometimes known as a ‘federated structure’. This may be appropriate for your group if it has distinct parts involved in each state and territory that address distinct state or territory-specific issues, which can be very difficult to administer for a single group (especially if there are more than two separate associations required). Each incorporated association will be a separate legal entity and will need to comply with the requirements of that state or territory’s legislation (including having a separate committee of management, financial records and reporting, etc.). In addition, any Commonwealth tax concessions may apply to a separately incorporated association (eg. income tax exemption and deductible gift recipient endorsement)



and, cannot be transferred to or shared by any of the other sister/brother associations in another state. Instead, each association will need to seek and maintain its own tax concessions.



### Caution

Incorporation in multiple states can be difficult to manage and you may end up having to comply with multiple state and territory laws and report to multiple regulators!

## Converting to a company limited by guarantee structure

There is no regime under the SA AI Act for a voluntary transfer from an incorporated association to the structure of a company limited by guarantee (such a regime is in place in some other states).



### Tip

If your organisation has complex membership or funding arrangements, changing legal structure may be difficult and time consuming.

However, the Corporate Affairs Commission (**Commission**) (which is part of the SA CBS) has the power to provide notice to an incorporated association if the Commission is of the opinion that the operations or undertaking of the association would be more appropriately carried out by a body corporate under another Act, for example by a CLG under the Corporations Act. Associations can request that the Commission order that their legal structure be changed. In most cases, the Commission will grant such a request. In response to such a notice, the association may request the Commission to make an order to transfer its undertaking to a body corporate specified in the request. Under an order made by the Commission, the incorporated association is dissolved, its property becomes the property of the body corporate referred to in the order, and its rights and liabilities accrue to the new body corporate.



### Related Not-for-profit Law resource

For more information about changing legal structure more generally, go to the Not-for-profit Law fact sheet on [Changing your organisation's structure](#)

The steps to convert an incorporated association to a new body corporate are as follows:

- The members of the incorporated association should pass a special resolution that notes that transfer of the incorporated association to a body corporate
- The incorporated association must request the SA CBS to make an order regarding the transfer of the incorporated association. There is no prescribed form of communication with the SA CBS, however, the incorporated association should set out the reasoning for transferring to a body corporate
- The SA CBS may notify the incorporated association that the executive officer has determined that the incorporated association may transfer to a body corporate
- A CLG must be incorporated to accept the transfer
- The members of the incorporated association must pass a special resolution to transfer to the incorporated CLG
- The incorporated association must submit to the SA CBS the constitution of the CLG (within three months of the notice received above)
- The SA CBS may order that the incorporated association transfer to the CLG. On the date of the order:
  - the incorporated association is dissolved
  - the property of the incorporated association is transferred to the CLG, and
  - the rights and liabilities of the incorporated association are transferred to the CLG



If your organisation is considering converting its legal structure it should seek expert legal advice. Given the lack of a tailored conversion process in SA, it is particularly important for SA organisations to choose an appropriate legal structure when getting started.



**Issue 2: Will the organisation seek to become registered as a charity?**

## Issue 2: Will the organisation seek to become registered as a charity?

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

After the ACNC's establishment in December 2012, charities that became registered with the ACNC that were incorporated associations, rather than CLGs, became subject to dual reporting requirements under the ACNC regime and the relevant state or territory incorporated associations regime. This therefore increased the initial and ongoing regulatory burden associated with the incorporated association structure.

However, in 2016, legislation was passed which made charities that are associations incorporated in South Australia but registered with the ACNC exempt from reporting to CBS. They only need to report annually to the ACNC via the ACNC Annual Information Statement.

Accordingly, the regulatory analysis about which structure best suits your group now depends significantly on whether it intends, after it is incorporated, to register as a charity or not.

This is because the main regulator for a CLG that registers with the ACNC as a charity will be the ACNC rather than ASIC (although applications for incorporation as a CLG and to deregister a CLG are still required to be made to ASIC, as are notifications regarding a change of name of the CLG and removal of the auditor).

Different and less complex laws apply to CLGs that are charities than to other CLGs. That is because when a CLG or other body corporate (such as a proprietary company limited by shares or RAB) becomes registered as a charity, certain Corporations Act requirements in relation to directors and members' meetings 'switch off' and are replaced with corresponding, but less onerous, requirements under the ACNC regime. A good example is the Governance Standards that apply to charities under the ACNC regime. These provide a more flexible framework around holding meetings, accountability to members and other matters. The Governance Standards:

- establish a minimum level of outcomes for the practices and procedures expected of charities that are registered with the ACNC, and
- are 'principles-based' in that they specify the outcome the registered charity should achieve, not the means of achieving it. Accordingly, the manner by which registered charities can comply with the Governance Standards will vary according to a charity's particular circumstances, such as its legal structure, size and geographical reach, sources of funding and existing governance systems and processes

In addition, the Corporations Act requirements in relation to:

- directors and members' meetings, and
- preparing financial and directors' reports and distributing those reports to members,

that apply to CLGs that are not registered charities are much more complex and prescriptive

From 1 December 2016, South Australian charities that are registered with the ACNC and hold a Collections for Charitable Purposes Licence no longer need to report annually to SA CBS. Instead, these charities will only need to report to the ACNC and comply with the ACNC's regulatory requirements. This change will apply for a charity once its current licence expires. To take advantage of this improved reporting process, charities need to notify CBS.



### Tip

The ACNC has published a template constitution for charitable CLGs. To read the template see the [ACNC website](#).



From 1 January 2017, Prescribed Associations in South Australia (that is, one which has gross receipts (excluding member subscriptions) of more than \$500,000 during the financial year) that are registered with the ACNC no longer need to report annually to CBS. Instead, if they are registered with the ACNC, these charities will only need to report to the ACNC and comply with the ACNC's regulatory requirements.

Altogether, the new landscape for charities means that for groups that intend to be registered charities, the CLG structure is often the simplest to administer, and an attractive structure choice.

Finally, the ACNC aims to take an educative regulatory approach, meaning it will use a range of measures to help organisations comply with 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). The difference in the approaches to regulatory enforcement that are adopted by the ACNC and ASIC have therefore removed some of the concerns that unincorporated groups intending to register as charities had about having a stricter regulatory compliance burden if they chose to adopt a CLG structure rather than an incorporated association structure. As a result, the CLG option has become a more accessible option for those groups also intending to register as charities after their incorporation.

However, if your organisation incorporates as a CLG but is not a registered charity (or loses its charitable registration), its main regulator will be ASIC, and will therefore be subject to ASIC's more stringent regulatory approach, and the full suite of legal requirements that apply to CLGs under the Corporations Act.

If your organisation incorporates as an incorporated association in SA but is not a registered charity (or loses its charitable registration), its main regulator will be SA CBS.



**Issue 3: Will the organisation have capacity to pay regulatory fees?**

## Issue 3: Will the organisation have capacity to pay regulatory fees?

**The amount of money your group has to pay, both in initial and ongoing regulatory fees, may be a factor in determining whether an incorporated association or CLG is the best structure for it.**

In general, ASIC fees that apply to CLGs are higher than the fees that SA CBS charges incorporated associations. Your group will need to be realistic about the resources it has (or is going to have), and how diligent it will be with regard to information up-keep and fee administration (as, for example, late fees are significant for CLGs regulated by ASIC). In general, the ACNC does not charge fees for charities when lodging forms and submitting notifications.

Groups that are charitable CLGs will largely report to the ACNC, not ASIC (although CLGs still incorporate with ASIC), and the ACNC does not currently charge fees for lodging reporting and notifications. The ACNC can charge late fees where charities do not lodge information within required timeframes. For charities, the difference in fees between incorporated associations and CLGs is far less significant. Incorporated associations that are not registered charities will continue to report to SA CBS (and pay the required fees to SA CBS).

### Initial application fee

The initial application fee for incorporation as a CLG is higher than that for an incorporated association (see the incorporation and ongoing fees table below). However, there are significantly lower fees for not-for-profit CLGs that meet the requirements of a 'special purpose company'.



#### Note for charities

Many charities that are CLGs will meet the definition of 'special purpose company' and will only need to pay the lower incorporation fee and ongoing filing fee if:

- they are formed for charitable purposes and are registered under the Australian Charities and Not-for-profit Commission Act 2012 (Cth) (ACNC Act) as a charity; and
- their constitutions:
  - prohibit the CLG from making distributions to its members and paying fees to its directors; and
  - require the directors to approve all other payments the CLG makes to directors



#### Related resource

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

### Penalties and late fees

The late fees for not complying with legal requirements (for example to lodge documents or pay fees) are generally higher for a CLG than for an incorporated association.

ASIC, the regulator of CLGs not registered as charities, imposes penalties for late reporting and is systematic in its collection of late fees. If your organisation is late lodging documents, ASIC late fees can quickly accumulate. Late fees may be payable in some circumstances by incorporated associations to the regulator of incorporated associations, SA CBS.



A comparison of the main fees payable by each structure is set out below. Fees listed are for the 2018/2019 year and are indexed (i.e. go up) each year.



### Note for Charities

There are late fees for charities reporting to the ACNC although they are not frequently applied. CLGs registered as charities will no longer undertake financial reporting to ASIC, and therefore the ASIC fees listed below do not apply.



### Tip

Remember that some organisations may be required to have audited accounts because of another requirement (eg. because it is in a funding agreement with the government, or because the members or committee of management believe it is good practice), even though it is not required by the Corporations Act (for companies) or the AI Act (for associations) or the *Australian Charities and Not-for-profit Commission Act 2012* (Cth) (**ACNC Act**).

## 2018/19 incorporation and ongoing fees

For fees for incorporated associations see the CBS [website](#) and the webpage on [Fees for incorporated associations](#).

For payments and fees for CLGs see 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	SA incorporated associations	Commonwealth CLG Note – many of these requirements do not apply to CLGs registered as charities	Notes for charities
Initial application for incorporation	\$196	\$403 An additional fee applies to register without the word 'limited' in the name. These fees apply to CLGs registering and not registering with the ACNC.	No application fee to become registered as a charity, but must pay fee to SA CBS or ASIC to incorporate (as either an incorporated association or a CLG).
Requirement for audited financial statement (approx. \$2,000 to \$20,000+ per year)	Only for incorporated associations with gross annual receipts exceeding \$500,000.	'Tier 3' (as defined below) companies must have their accounts audited by a registered company auditor. 'Tier 2' companies must have their accounts 'reviewed' by an auditor (lesser standard than full audit). 'Tier 1' companies are not required to have audited accounts (unless required to do so by members' direction or ASIC direction)	Incorporated associations that are charities must report both to SA CBS Services and ACNC (ACNC tiers are the same as for CLGs, although deductible gift recipient ( <b>DGR</b> ) status is not relevant). CLGs that are charities only report to the ACNC. The ACNC Act specifies that only medium and large charities need to provide financial reporting to the ACNC, however from 2014 onwards the Annual Statement has included basic financial questions. You can read more about charity reporting obligations in Not-for-profit Law's fact



			sheet <a href="#">Financial reporting for charities</a> .
Annual fee when lodging financial statement	\$93.50 (only necessary for prescribed associations).	There is no fee to lodge financial statements with ASIC. However, annual review fees are payable as follows: \$1,224 (\$9,374 advance payment for 10 years); or \$49 (\$366 advance payment for 10 years) for 'special purpose companies' (companies formed for 'charitable purposes' and registered as charities, have non-profit and non-distribution clauses in their constitution and certain rules relating to directors)	There is no fee to lodge financial reporting statements with the ACNC. Incorporated associations that are registered as charities and are prescribed associations need to lodge with both SA CBS (including a fee) and ACNC (no fee). Medium and large CLGs registered as charities only need to lodge financial reporting with ACNC (no fee).
Late fees when lodging annual statement	Late lodgement fees apply as follows: <ul style="list-style-type: none"> <li>• \$36.50 if lodged one month late</li> <li>• \$75 if lodged more than one, but no more than 3 months late, and</li> <li>• \$159 if lodged more than 3 months late</li> </ul>	Late lodgement fees will apply if financial statements are not lodged within 4 months of the end of the relevant financial year. Late payment of the annual review will incur late fees as follows: <ul style="list-style-type: none"> <li>• \$79 if payment is received within 1 month after the due date</li> <li>• \$329 if payment is received more than 1 month after the due date</li> </ul>	The ACNC may charge late fees both to incorporated associations and CLGs that are registered as charities.
Lodge details of changes to information (eg. address, names of officers)	None for public officer changes, \$66.50 for changes to name	None, except for change of name, for which a \$403 fee applies.	The ACNC does not charge to change details.
Lodge changes to constitution or rules	\$66.50.	None	The ACNC does not charge to change details.
Failure to lodge changes of details within required period (i.e. address, names of officers, change to rules or constitution)	Fees are as follows: <ul style="list-style-type: none"> <li>• \$36.50 if lodged one month late</li> <li>• \$75 if lodged more than one, but no more than 3 months late, and</li> <li>• \$159 if lodged more than 3 months late</li> </ul>	Fees are as follows: <ul style="list-style-type: none"> <li>• \$79.00 first month late, and</li> <li>• \$329.00 for more than a month</li> </ul>	The ACNC may charge late fees.



### Note

If you choose to be a CLG or other body corporate (such as a RAB) and are not a registered charity, your organisation will be regulated by ASIC, a body that is systematic in imposing late fines and can be inflexible in relation to 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 quickly accumulate. To date, the ACNC as the main regulator for charities that are structured as CLGs, has taken a more educative and 'lighter touch' approach to regulation. This may change in the future.



# **Issue 4: Annual reporting, audits and reviews**



# Issue 4: Annual reporting, audits and reviews

**Generally, the regime for incorporated associations under the SA AI Act is more straightforward than the regime for CLGs under the Commonwealth 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, CLGs that are registered as charities have different and less complex obligations under the ACNC Act, and reporting fees are also lower (waived entirely in many cases to date). 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 incorporated associations, CLGs and charities, see the [Reporting to Government page](#) on the Not-for-profit Law website.

Some incorporated associations and some CLGs must have their accounts independently audited or reviewed each year. For incorporated associations, audited accounts must be prepared for an association where the gross receipts in that association's previous financial year is in excess of \$500,000 or as otherwise prescribed by regulation. For CLGs, the type of audit or review required will depend on which of three 'tiers' your organisation falls into. Under both structures, only larger organisations (as well as CLGs of any size with DGR status) need to fully audit their accounts.

An independent audit may cost between \$2,000 and \$20,000+, depending on the size of your group. Therefore the requirement for audited accounts needs to be considered carefully.



## Tip

Many organisations may need to undertake audits for other reasons as well, including being required to do so under a funding agreement.

## Reporting tiers for CLGs

There are three categories or 'tiers' of CLG based on the organisation's annual revenue. Each tier has different reporting and auditing requirements. The table below briefly sets out the tiers and the corresponding requirements for financial reporting and auditing under the Corporations Act.

	Definition of CLG category	Reporting and auditing requirements
<b>Tier 1 (known as 'small companies')</b>	CLGs with annual revenue less than \$250,000, and which do not have DGR status.	Not required to prepare financial report, directors' report, 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 members can direct the CLG to prepare a financial statement or directors' report and can require either a review or audit).



<b>Tier 2</b>	CLGs with annual revenue less than \$250,000.00 that are a DGR OR with an annual review of between \$250,000.00 and \$1,000,000.00 (whether or not they are DGR)	<p>Must:</p> <ul style="list-style-type: none"> <li>• prepare financial report and have report 'reviewed'. This is not as comprehensive or expensive as a full audit (however CLGs can choose to have report 'audited' nonetheless);</li> <li>• prepare a directors' report; and</li> <li>• give annual reports to any member who elects to receive them</li> </ul>
<b>Tier 3</b>	Annual revenue over \$1 million, whether DGR or not.	<p>Must:</p> <ul style="list-style-type: none"> <li>• have accounts fully audited by a person who is registered as an auditor under the Corporations Act;</li> <li>• prepare a director's report; and</li> <li>• give annual reports to any member who elects to receive them</li> </ul>



### 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. Note that for registered charities, in contrast to CLGs regulated by ASIC, being endorsed as a DGR will not trigger higher tier reporting requirements.



### Related Not-for-profit Law resource

You can read more about the reporting obligations of charities in Not-for-profit Law's fact sheet [Financial reporting for charities](#).

## Categories of SA incorporated associations reporting requirements

For incorporated associations in SA, there are two reporting categories that are based on an organisation's gross annual receipts. The categories have different auditing requirements. The table below briefly sets out the requirements for financial reporting and auditing under the SA AI Act for each category.

Definition of IA category	Reporting and auditing requirements
Incorporated associations with annual gross receipts in the previous financial year of no more than \$500,000.	The association must keep accounting records that accurately reflect the transactions and financial position of the association.
<p>Incorporated associations:</p> <ul style="list-style-type: none"> <li>• that had gross receipts in the previous financial year:                             <ul style="list-style-type: none"> <li>– in excess of \$500,000, or</li> <li>– such greater amount as is prescribed by regulation, or</li> </ul> </li> <li>• that is prescribed or of a class prescribed by regulation (prescribed associations)</li> </ul>	<p>Prescribed associations need to keep accurate accounting records and must:</p> <ul style="list-style-type: none"> <li>• prepare accounts at the end of the financial year</li> <li>• have the accounts audited</li> <li>• attach to the accounts before they are audited, a statement from the committee signed by two or more members of the committee:                             <ul style="list-style-type: none"> <li>– stating whether or not they fairly reflect the results of the operations and state of affairs of the association as at the end of the financial year, and</li> </ul> </li> </ul>



- stating whether or not the committee has reasonable grounds to believe that the association will be able to pay any debts if and when they are due, and
- giving particulars of any subsidiary of the association within the meaning of section 46 of the Corporations Act, and
- giving particulars of any trust for which the association is trustee

Lodge reports and audit within six months of the end of the association's financial year



### Note for charities

The same tiers apply under the ACNC Act as under the Corporations Act, and similar reporting requirements apply for charitable CLGs, however reports are submitted to the ACNC rather than ASIC. Incorporated associations that are not registered as charities will need to report to the SA CBS, and report to the ACNC.



### Tip

Remember that some organisations may be required to have audited accounts because of another requirement (eg. because this is in a funding agreement with the government, or because the members or committee of management believe it is good practice) even though it is not required by the Corporation Act (for companies) or the AI Act (for associations) or the ACNC Act.



**Issue 5: Other factors  
for your group to  
consider**



## Issue 5: Other factors for your group to consider

The issues discussed above (where your group is going to operate, the skills or expertise available to your group, whether your group will be a registered charity, and its financial capacity) are four of the main factors for groups to consider when choosing their legal structure.

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

Feature	Brief Description
Flexibility of rules or constitution	<p>The Corporations Act provides some flexibility in a company's constitution, and ASIC is unlikely to reject a proposed constitution. Changes to the constitution of a CLG take effect from the date passed by the members (unless otherwise set out). Flexibility is even greater if your CLG is registered as a charity (and therefore reports to the ACNC).</p> <p>The requirements for rules under the SA AI Act are straightforward. SA CBS has provided a step-by-step guidance document to assist organisations in drafting rules that are compliant with the AI Act. You can access the guidance document <a href="#">here</a>. Changes to the rules must be by special resolution or according to the rules, and come into effect at the time when the alteration is passed. The alteration must be notified to the Commission with supporting documentation within one month.</p>
Directors (board member) and office holder duties	<p>The potential liabilities of CLG board members are more serious under the Corporations Act than for committee members and other office holders of an incorporated association. There are significant penalties for directors of CLGs who breach their duties. CLGs registered with the ACNC are required to comply with the ACNC governance standards instead of the civil directors' duties under the Corporations Act. However, the criminal penalty provisions and the duty to prevent insolvent trading under the Corporations Act still apply. In addition, directors of CLGs registered with the ACNC are still subject to directors' duties arising at common law and in equity as these have not been 'turned off'.</p> <p>Incorporated associations have office holders' duties set out in legislation, however, the penalties for breaching the duties are lower than those for directors of a CLG. The common law (i.e. 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 Not-for-profit Law's page on governance <a href="#">here</a>.</p>
Number of members	<p>Groups wanting to incorporate as a CLG need only one member. This may suit a not-for-profit organisation wanting to retain a higher degree of control (but remember, this type of company still needs 3 directors) or where the organisation is to be a subsidiary of another organisation.</p> <p>There is no minimum number for membership for SA incorporated associations. In general but subject to the rules, members will have voting rights and be able to call meetings and exercise some control in the organisation (for example, to remove a committee of management member).</p>



<p>Speed of incorporation</p>	<p>In general, ASIC often approves an application for incorporation of a CLG within 24-48 hours of paperwork being filed online (but if it includes applying for a licence to omit the word 'limited' from the name of the organisation, it will take longer). At July 2018 the Government of South Australia website states that associations can expect a certificate of incorporation in 'approximately 14 days' (provided the documents lodged are not found to contain deficiencies).</p>
<p>Rights of members</p>	<p>CLGs are entitled to appoint a member or a non-member as a proxy (a person to vote at meetings on their behalf). Also, for CLGs not registered as a charity, a small percentage of members is able to force a members' meeting to be called (members with at least 5% of the votes that may be cast at a general meeting may call and hold a general meeting, but must meet procedural requirements and pay any expenses). There are no similar mandatory requirements for SA incorporated associations. For associations, the rights and liabilities of members – for example, the rights of members to vote and call meetings – must be written into the association's rules. See the '<a href="#">Members' Rights</a>' fact sheet on the Not-for-profit Law website for more information.</p>
<p>Legislation requiring a particular form of incorporation</p>	<p>In limited circumstances, there are laws that require organisations that are undertaking specific activities to adopt a particular legal structure. Your organisation should seek 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>For a CLG, the name, date and place of birth of each director must be provided to ASIC and these details are available to the public (for a small fee). Further, a company is required to keep a register containing the details of members of the organisation, and is required to make this available to all members for free, and to the public for a fee. For an incorporated association, only the details of the public officer need to be provided to SA CBS. There is no legislative requirement to keep a register of members. Certain details about registered charities (both incorporated associations and CLGs) are available on the ACNC Register (the register of charities maintained by the ACNC) – eg governing rules, names of directors, annual statements etc.</p>
<p>Flexibility for amalgamation</p>	<p>The Corporations Act does not provide for amalgamation and therefore usually requires that either one or both amalgamating entities wind up (with the possibility of termination of employment etc.), and then incorporate a new company. The SA AI Act makes provision for one incorporated association to amalgamate with another, with the property, rights and liabilities of both associations becoming those of the incorporated association formed by the amalgamation without the need for winding up (ending) the original organisations. For more information see the <a href="#">Amalgamation and Mergers page</a> of the Not-for-profit Law website.</p>
<p>Operating overseas</p>	<p>If your group wants to operate overseas it will need to seek legal advice about what the laws of the relevant country might require. 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. As a general comment, a CLG structure will be a more readily understood and recognised legal structure in other countries, compared with other structures such as an incorporated association.</p>



**Conclusion**



# Conclusion

---

As highlighted in this guide, a number of factors will influence a group's decision about whether to become an incorporated association or a CLG. There is no quick and easy answer, but weighing the various factors will help you to determine which structure best suits the activities, circumstances, direction and resources of your particular group.

It is important to remember that as a result of changes in the law at both state and federal levels, as well as changes to the regulation of charities by the ACNC, this analysis will continue to change. You can keep in touch with us and access updates and alerts by subscribing to the Not-for-profit Law Update [here](#)

# Resources

---

## Not-for-profit Law resources

- ▶ [Getting started](#)

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

- ▶ [Before you start](#)

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

- ▶ [The incorporation decision](#)

This page gives guidance to those not-for-profits grappling with the decision to either formally incorporate, or remain as an unincorporated group.

- ▶ [Choosing a legal structure](#)

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

- ▶ [Governance](#)

This page provides information about how the organisation should be run, including information about directors' duties.

## Relevant laws and regulations

- ▶ [Associations Incorporation Act 1985 \(SA\)](#)

- ▶ [Associations Incorporation Regulations 2008 \(SA\)](#)

- ▶ [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 within 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 should you wish to register your not-for-profit as a charity.

## Australian Securities and Investments Commission ASIC)

- ▶ [Reporting obligations of companies limited by guarantee](#)

This page within the ASIC website provides an overview of the reporting requirements for companies limited by guarantee which are not charities.

- ▶ [Starting a company](#)



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

▶ [Special purpose companies](#)

This page on the ASIC website provides information about special purpose companies (which will include some CLGs).

## **Chartered Accountants Australia and New Zealand**

▶ [Enhancing not-for-profit annual and financial reporting \(2013\)](#)

▶ [A guide for charities reporting under the ACNC Act 2012 \(Cth\)](#)

Chartered Accountants Australia and New Zealand has published a helpful guide and a recent update for not-for-profit organisations relating to financial reporting obligations.

## **SA CBS**

▶ [Example of Rules for an Incorporated Association](#)

This page on the SA CBS website provides information about preparing the rules for an incorporated association.

▶ [Information for incorporated associations](#)

This page on the SA CBS website provides information including a 'Checklist for healthy associations' and relevant forms for SA incorporated associations.

