

Which incorporated legal structure should we choose?

Legal information for South Australian community organisations

This fact sheet covers:

- ▶ an overview of four common legal structures that can be used to incorporate a not-for-profit organisation
 - ▶ some options for changing between legal structures, and
 - ▶ international recognition of different legal structures
-

This fact sheet provides general information about the incorporated legal structures available to South Australian community organisations.

What incorporated structures are available for not-for-profits in South Australia?

There are four common structures that can be used to incorporate a not-for-profit organisation in South Australia:

- an incorporated association
- a company limited by guarantee (**CLG**)
- a non-distributing (formerly known as non-trading) co-operative, and
- an Indigenous corporation

These are not the only structures available for not-for-profits. For example, there are also charitable trusts, trade unions and companies limited by shares (although usually used for for-profit businesses). This fact sheet doesn't cover these structures, but for more information on charitable trusts, go to Not-for-profit Law's fact sheet on [fundraising foundations and charitable trusts](#).

Key regulators referred to in this fact sheet are:

- [Consumer and Business Services, South Australia \(CBS\)](#)
- [Australian Securities and Investment Commission \(ASIC\)](#)
- [Australian Charities and Not-for-profits Commission \(ACNC\)](#), and
- [Office of the Registrar of Indigenous Corporations \(ORIC\)](#)



Related Not-for-profit Law resource

For information on the meaning of not-for-profit, go to [What does not-for-profit mean?](#)



Quick comparison

Structure	Recommended for ...	Not suitable (or ideal) for ...
Incorporated association	<ul style="list-style-type: none"> Locally (South Australian) focused not-for-profit community groups Groups with limited capacity to meet the more extensive reporting obligations (and costs) of some other structures 	<ul style="list-style-type: none"> 'For profit' businesses Groups from interstate or operating across many states and territories in addition to South Australia
Company Limited by Guarantee (CLG)	<ul style="list-style-type: none"> Organisations that want to operate nationally or in more than one state or territory Larger not-for-profit organisations Charities registered with the ACNC as they generally only have to report to the ACNC (not ASIC) Wholly owned subsidiaries 	<ul style="list-style-type: none"> Non-ACNC registered groups without the resources to comply with ASIC's more extensive and costly operational and reporting requirements
Co-operative	<ul style="list-style-type: none"> Groups serving their members where each member is willing to share in the investment and operational risks (for example, a member owned art co-op, ski lodge or a childcare group providing community services to its members) Groups that wish to follow the co-operative principles 	<p>Groups that:</p> <ul style="list-style-type: none"> don't want to function under co-operative principles want different classes of members or different voting rights want to benefit a wider range of people than the members
Indigenous corporation	<ul style="list-style-type: none"> Aboriginal and Torres Strait Islander groups. The corporation's rule book can accommodate Indigenous customs and traditions Must be used by corporations holding or managing native title under relevant legislation 	<ul style="list-style-type: none"> Non-Aboriginal and Torres Strait Islander groups

We will now look at each of these structures in more detail.

Incorporated Associations (IA)

Feature	Brief description
Relevant laws	<ul style="list-style-type: none"> <i>Associations Incorporation Act 1985 (SA)</i> <i>Associations Incorporation Regulations 2008 (SA)</i>
Where can an IA operate?	A group incorporated under the <i>Associations Incorporation Act 1985 (SA)</i> can operate in South Australia. Any South Australian association that conducts business outside South Australia must also register with ASIC as a 'Registrable Australian Body' under the <i>Corporations Act 2001 (Cth)</i> , or incorporate separately in each state and territory that it operates in.



Government regulator	<p>CBS Licensing and Registration (CBS) is responsible for the regulation of incorporated associations in South Australia.</p> <p>If you are a 'Registrable Australian Body' you must also report to ASIC.</p> <p>If you are registered as a charity with the ACNC, you must report to the ACNC and don't need to report to CBS.</p>
Name requirements	An incorporated association must have the word 'Incorporated' or 'Inc.' at the end of its name.
How common?	It's difficult to find published figures confirming the number of incorporated associations registered in South Australia, but it's likely to be in the vicinity of 20,000 incorporated associations.
Description	The Incorporated association legal structure provides a simple and inexpensive means of incorporating not-for-profit groups and representing important facets of our community. All states and territories have their own, slightly different, laws to set up incorporated associations. An incorporated association is a legally separate body that has most of the same powers, benefits and responsibilities as a person.
Suitable for	For most locally focused not-for-profit community and industry groups, sporting clubs, social or hobby-based activities and cause-related groups wanting to operate in Western Australia, an incorporated association is an appropriate structure. It can be less complex to set up than a CLG.
Not suitable for	<p>Businesses that aim to make a profit can't be incorporated associations.</p> <p>Incorporated Associations wishing to operate outside South Australia will need to register as a 'Registrable Australian Body' with ASIC or incorporate in each other relevant state or territory, so a different structure such as a CLG may be more suitable for them.</p>

Company limited by guarantees (CLG)

Feature	Brief description
Relevant laws	<ul style="list-style-type: none"> • <i>Corporations Act 2001</i> (Cth) • <i>Corporations Regulations</i> (various)
Where can a CLG operate?	A CLG can operate (that is, carry on activities) anywhere in Australia.
Government regulator	<p>ASIC is the independent Commonwealth government body that regulates corporations, including CLGs.</p> <p>However, CLGs that are registered charities are regulated by the ACNC and mostly report to the ACNC, not ASIC. They only have to report to ASIC in some limited situations (for example, if they change their name). This is because registered charity CLGs are generally exempt from some of the obligations applying to public companies under the <i>Corporations Act 2001</i> (Cth) (Corporations Act).</p>
Name requirements	A CLG must use the word 'Limited' or 'Ltd' after its name (although CLGs that meet certain requirements can apply for an exemption from this requirement).
How common?	CLGs are a popular structure. There are well over 15,000 CLGs in Australia.



Description	<p>Although we often think of a 'company' as being a business, a CLG is a special type of company structure most often used for not-for-profit or charitable groups across Australia.</p> <p>Just like a business company, it has 'directors' and 'members' (analogous to 'shareholders').</p> <p>The liability of the company's members is limited to the amount the members undertake to contribute to the property of the company if it is wound up (usually a nominal amount such as \$1). Some of the provisions of the Corporations Act (for example, directors' duties and penalties) that apply to 'for-profit' companies also apply to CLGs.</p>
Most commonly used for	<p>Not-for-profits that want to operate across Australia, or in multiple states, often consider becoming a CLG. Larger not-for-profits, including those that only operate in one state, also often use this structure. It's a common structure for registered housing and aged care providers because of their size and complexity.</p> <p>A CLG structure is also suitable for a wholly owned subsidiary organisation, as it can be set up with just one member (but does need to have three directors and a secretary).</p>
Comment	<p>CLGs can be more costly to establish and operate than incorporated associations, as they are generally required to be incorporated and run as a public company, including being required to hold an annual general meeting once every calendar year and (for CLGs over a certain size) to have their financial accounts independently audited. These requirements don't apply to CLGs registered as charities, which instead have to comply with the ACNC's Governance Standards.</p> <p>As a general statement, the penalties for non-compliance with reporting requirements and directors duties may be higher for CLGs than for incorporated associations and may be more strictly enforced (again, this is different for CLGs registered as charities, which fall under the ACNC regime).</p>

Co-operatives

Feature	Brief description
Relevant laws	<ul style="list-style-type: none"> • <i>Co-operatives National Law (South Australia) Act 2013 (SA) (CNL)</i> • <i>Co-operatives (South Australia) Regulations 2015 (SA)</i>
Where can a co-operative operate?	A group incorporated under the <i>Co-operatives National Law (South Australia) Act 2013 (SA)</i> can operate (that is, carry on its activities) in South Australia. However, co-operatives can register to be (concurrently) recognised so that they can operate in other states and territories.
Government regulator	<p>CBS Licensing and Registration.</p> <p>Co-operatives that are registered charities also need to report to the ACNC.</p>
Name requirements	A co-operative must include the word 'Co-operative' in its name and the word 'Limited' or 'Ltd' at the end of its name.
How common?	There are approximately 50 non-distributing co-operatives in South Australia. Most co-operatives have been established for a long time and it's uncommon to start a new co-operative, although in recent years there has been a movement towards using non-trading co-operatives for social enterprise and community buy-outs (for example, Hepburn Wind , Australia's first community-owned wind farm).
Description	A co-operative is an organisation that is concerned with providing for the needs of its members. The co-operative structure is based on certain co-operative principles set out in the CNL. These are voluntary and open membership, democratic member control,



member economy participation, autonomy and independence, education training and information, cooperation among co-operatives and concern for the community.

There are both distributing and non-distributing co-operative structures. Only a co-operative that has rules to prevent surpluses or profits from being distributed to members is suitable as a not-for-profit structure.

Suitable for

Co-operatives are generally run by, and set up for, the mutual benefit of members (for example, a community childcare co-operative). The members share the investment and operational risks, all the benefits and any losses, and they have equal voting rights. A non-distributing co-operative can be a suitable not-for-profit structure for providing community services to members (such as employee-member or client-member health services co-operatives), and in some cases can provide services to others on a contractual basis.

Not suitable for

A non-distributing co-operative structure is not suitable for organisations looking to make a profit, hoping to have different types or classes of members or hoping to benefit a wider range of people than the co-operative's membership base (for example, most charities, as charities usually provide benefit to wider groups of people than their own members).

Co-operatives are also not suitable for groups that don't want to function under the co-operative principles or that don't have resources to manage active membership requirements.

Indigenous corporations

Feature	Brief description
Relevant laws	<ul style="list-style-type: none"> • <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth) • <i>Corporations (Aboriginal and Torres Strait Islander) Regulation 2017</i> (Cth) • <i>Corporations (Aboriginal and Torres Strait Islander) Determination 1/2014</i>
Where can an Indigenous corporation operate?	An Indigenous corporation can operate (carry on activities) anywhere in Australia.
Government regulator	Office of the Registrar of Indigenous Corporations (ORIC)
Name requirements	An Indigenous corporation must have the words 'Aboriginal Corporation', 'Torres Strait Islander Corporation' (or a number of allowable combinations) in its name.
Number	In 2018, there were over 3,000 Indigenous corporations across Australia.
Description	<p>The structure of an Indigenous corporation is somewhat similar to a company limited by guarantee, in that it's an incorporated, separate legal entity, which can offer its members the benefit of limited liability.</p> <p>Indigenous corporations can, but don't have to be, 'not-for-profit'. Indigenous corporations that want to be not-for-profit must have a 'rule book', which prevents surpluses or profits from being distributed to members. An Indigenous corporation's rule book can accommodate Aboriginal or Torres Strait Islander customs and traditions.</p> <p>Only Aboriginal and Torres Strait Islander organisations can incorporate using this structure and registered corporations can access ORIC's advice and support services.</p>
Most suitable (or required) for	The Indigenous corporation structure is designed to meet the needs of Aboriginal and Torres Strait Islander groups and can accommodate Indigenous customs and traditions. Corporations holding or managing native title under the <i>Native Title Act 1993</i> and the



Native Title (Prescribed Bodies Corporate) Regulations 1999 must incorporate as this structure.

Not suitable for

Non-Aboriginal and Torres Strait Islander groups, or Aboriginal or Torres Strait Islander groups that would prefer to be regulated by a State regulator, ACNC or ASIC (for example, some Indigenous organisations might choose to form a co-operative). For commercial activities to be conducted for the benefit of Indigenous people, particularly if holding Native Title rights, it could be more preferable to use the Prescribed Body Corporate structure (a corporation that is set up to manage or hold native title).

Incorporated Association or CLG

The tables above outline the key features of the four structures covered in this fact sheet.

Most groups in South Australia choose between incorporating as an incorporated association or a CLG. For a more detailed comparison of these two structures, go to Not-for-profit Law's guide, 'Incorporated association or company limited by guarantee?' on the [Legal Structure page](#).

Changing between legal structures

It's usually possible for your group to change its legal structure, but there can be legal and administrative costs involved, and making the change can be time consuming. It's a good idea to think about your group's future needs when deciding which legal structure to incorporate under to avoid having to change your structure down the track.

Where organisations do need to change structure, some common transitions are:

- 'converting' or 'migrating' from an incorporated association into a CLG. This is possible with member approval if other requirements for a CLG are met. For more information go to Not-for-profit Law's [Changing legal structure page](#), or
- if the group is an Indigenous one, transferring its registration as an incorporated association or a CLG to an Indigenous corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)

International recognition

If your group wants to operate overseas, you will need to seek legal advice about what the laws of the other relevant countries 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 2001* (Cth).

In general, a CLG structure may be a more internationally recognised structure than an incorporated association. Co-operatives may also be able to operate overseas (depending on the particular country) because of internationally recognised co-operative principles.

OK, so what next?

Having read this fact sheet, you may have an idea of which structure would work well for your group.

Most not-for-profit groups that want to incorporate choose between becoming an incorporated association and a CLG. What is best for your group will depend on your circumstances and the future plans of your group.

Co-operatives and Indigenous corporations are quite specialised. If your group would like to set up as one of these legal structures, we have provided links to websites with further information about these in the resources section below.

Resources

Not-for-profit Law resources

- ▶ [Getting started](#)

This page of the Not-for-profit Law website contains links to resources and information produced to assist groups in their initial stages.

- ▶ [The incorporation decision](#)

Resources on deciding which is the best legal structure for your organisation.

- ▶ [Setting up the organisation](#)

Legislation

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

This is the legislation that governs the setting up and running of an incorporated association in South Australia.

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

This is a link to the regulations which govern the setting up and running of an incorporated association in South Australia.

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

This is a link to the legislation which govern the setting up and running of a CLG.

- ▶ [*Co-Operatives National Law \(South Australia\) Act 2013*](#)

This is a link to the regulations which govern the setting up and running of a co-operative in South Australia.

- ▶ [*Corporations \(Aboriginal and Torres Strait Islander\) Act 2006 \(Cth\)*](#)

This is a link to the legislation which govern the setting up and running of an Indigenous Corporation.

Consumer and Business Services, SA

- ▶ [Incorporated Associations](#)

This page of the CBS website contains information on South Australian incorporated associations.

- ▶ [Co-operatives](#)

This page of the CBS website contains information on co-operatives.



Australian Securities and Investment Commission

- ▶ [For companies – an overview](#)

This page contains an overview of starting, running and closing a company and contains information relevant to CLGs.

- ▶ [Registrable Australian Bodies](#)

This information sheet sets out the steps involved in registering an Australian body.

Australian Charities and Not-for-profit Commission

- ▶ [Who can register with the ACNC \(as a charity\)](#)

- ▶ [Obligations for registered charities](#)

Office of the Registrar of Indigenous Corporations

- ▶ [Start a corporation](#)

- ▶ [Rule book](#)

Other Resources

- ▶ [Get Mutual Website](#)