

Fact sheet: Which incorporated legal structure should we choose?

Overview

This fact sheet aims to provide Victorian not-for-profit community groups with an overview of the main incorporated legal structures available.

Note: The information contained in this fact sheet is intended as a guide only, and is not legal advice. If you or your organisation has a legal problem you should talk to a lawyer before making a decision about what to do. The information in this fact sheet is written for people or organisations resident in, or affected by, the laws that apply in Victoria, Australia and is current at 1 October 2011.

In Australia it is estimated that there are about 700,000 not-for-profit groups. Most are unincorporated – they are formal and informal groups operating without any separate legal structure. For more information about what being an unincorporated group means, see *Further Information* at the end of this fact sheet. For business, most incorporate as a company, but in the case of not-for-profit groups there is a broader range of options.

What incorporated structures are available for not-for-profits?

There are a range of incorporated legal structures which may be suitable for Victorian not-for-profit community groups. The 4 main options that we will discuss are:

- ▶ an incorporated association (this is the most common legal structure with about 135,000 across Australia of which 36,000 are incorporated in Victoria)
- ▶ a company limited by guarantee (the next most common structure with 11,000)
- ▶ a non-trading co-operative (only 1,800 of all types of co-operatives across Australia), and
- ▶ an indigenous corporation (about 2,600).

These are the most common options. However, you can also set up under a range of other legal structures such as a trust, a special Act of Parliament or a trade union. These structures will not be discussed in this fact sheet. Please seek legal advice if you think one of these structures may be suitable for your group.

Similarly, there are laws that create legal structures for business (ie. 'for-profit') organisations such as a company (where members hold shares), a sole trader or a partnership. The information in this fact sheet (and on the PilchConnect website generally) does not apply to 'for-profit' organisations.

The following pages set out a brief profile of each of the four main not-for-profit legal structures.

Incorporated Association

Features	Brief description
Relevant laws:	<i>Associations Incorporation Act 1981 (Vic)</i> <i>Associations Incorporation Regulations 1998 (Vic)</i>
Jurisdiction:	A group incorporated under the <i>Associations Incorporation Act</i> can operate in Victoria. Any Victorian incorporated association that operates regularly ('carries on business') outside Victoria will also need to register under the <i>Corporations Act 2001 (Cth)</i> as a 'Registered Australian Body'.
Government regulator:	The body responsible for registration and ongoing compliance monitoring is the Registrar of Incorporated Associations at Consumer Affairs Victoria (CAV) - see further information at the end of this document. CAV is a section within the Department of Justice, which is part of the State Government of Victoria.
Required abbreviation:	An incorporated association must use 'Incorporated' or 'Inc.' after its name.
Number:	In Victoria - approximately 36,000 incorporated associations.
Description:	The <i>Associations Incorporation Act</i> was introduced to provide a simple and inexpensive means of incorporating not-for-profit groups in Victoria. All other States and Territories have their own, similar laws which set up incorporated associations.
Most commonly used for:	It is likely that for locally focused not-for-profit community groups wanting to operate in Victoria, an incorporated association will be the best structure. Setting up an incorporated association can be easier and less expensive than setting up a company limited by guarantee. Small incorporated associations are not required by legislation to have audited accounts and, therefore, this structure may suit groups with limited funds and resources.
Not suitable for :	Groups that are <i>not</i> 'charitable' in nature and conduct significant 'trading' activities. For more information about this issue - see PilchConnect factsheet 'Incorporated association or company limited by guarantee?' Incorporated associations require a minimum of five members so this structure is not suitable for a parent organisation which wants to set up a wholly owned subsidiary (ie. with the parent organisation as the sole member).

Company limited by guarantee

Features	Brief description
Relevant laws:	<i>Corporations Act 2001 (Cth), Corporations Regulations (various)</i>
Jurisdiction:	Can operate (that is, carry on activities) anywhere in Australia.
Government regulator:	The body responsible for the registration and ongoing compliance monitoring is the Australian Securities and Investment Commission (ASIC) - see further information at the end of this document. ASIC is an independent Commonwealth government body.
Required abbreviation:	Must use the word 'Limited' or 'Ltd' after its name (although charities with unpaid directors can apply for an exemption from this requirement).
Number:	In Australia - approximately 11,000 companies limited by guarantee.
Description:	Although we often think of a 'company' as being a business, a company limited by guarantee is a special form of public company that is used by not-for-profit groups. It is a legal structure created by Commonwealth law (the <i>Corporations Act</i>), and is available for use by groups throughout Australia. It uses a company structure with 'directors', but has 'members' instead of 'shareholders'. Some of the provisions of the <i>Corporations Act</i> (eg. directors' duties and penalties) that apply to 'for-profit' companies (ie. businesses) also apply to companies limited by guarantee.
Most commonly used for:	<p>A company limited by guarantee may be a suitable structure for not-for-profit organisations wanting to operate nationally or in more than one State or Territory. Often larger not-for-profits, including those that only operate in one State, will use this structure. Some legislation requires this structure for certain types of organisations (eg. registered housing and aged care providers).</p> <p>A company limited by guarantee 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).</p>
Comment:	Companies limited by guarantee can be more costly to establish than incorporated associations and have higher ongoing compliance costs if they are required to have their accounts audited or 'reviewed'. (For more information on these requirements, see Related Links at the end of this document). The penalties for non-compliance with reporting requirements are higher than for incorporated associations, and tend to be more strictly enforced.

Co-operative

Features	Brief description
Relevant laws:	<i>Co-operatives Act 1996</i> (Vic) <i>Co-operatives Regulations 1997</i> (Vic)
Jurisdiction:	A group incorporated under the <i>Co-operatives Act</i> can operate (that is, carry on its activities) in Victoria. However, there are also a number of ways that co-operatives can register to be (concurrently) recognised in other States and Territories.
Government regulator:	The body responsible for the registration and ongoing compliance monitoring is Registrar of Co-operatives, Consumer Affairs Victoria (CAV) - see further information at the end of this document. CAV is a section within the Department of Justice, which is part of the State Government of Victoria.
Required abbreviation:	Must include the word 'Co-operative' in its name and the word 'Limited' or 'Ltd' at the end of its name.
Number:	In Victoria - approximately 900 co-operatives.
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 values, including self-help, self-responsibility, democracy, equality, equity and solidarity. There are both trading and non-trading co-operative structures. Only a co-operative which has rules to prevent surpluses or profits from being distributed to members is suitable as a not-for-profit structure.
Most commonly used for:	Co-operatives are generally set up for the mutual benefit of members (for example, for a member owned ski lodge). They can be a suitable not-for-profit structure for providing community services to its members.
Not suitable for:	Co-operatives are run according to co-operative principles (one member, one vote) and may not be suitable for organisations that are larger (difficult to get a quorum at meetings) or want to have non-voting members.

An indigenous corporation

Features	Brief description
Relevant laws:	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth) (began on 1 July 2007, replacing the <i>Aboriginal Councils and Associations Act 1976</i>)
Jurisdiction:	Can operate (carry on activities) anywhere in Australia.
Government regulator:	The body responsible for the registration and ongoing compliance monitoring is the Office of the Registrar of Indigenous Corporations (ORIC) - see further information at the end of this document.
Required abbreviation:	'Aboriginal Corporation' (or a number of other allowable variations)
Number:	In Australia - approximately 2,600 indigenous corporations.
Description:	<p>The structure of an indigenous corporation is somewhat similar to a company limited by guarantee, although ORIC has some additional powers to those of the Australian Securities & Investments Commission, including power to call meetings of members and appoint special administrators.</p> <p>Indigenous corporations can, but do not have to be, 'not-for-profit'. Indigenous corporations which want to be not-for-profit have to have a 'rule book' which prevents surpluses or profits from being distributed to members.</p> <p>Only Aboriginal and Torres Strait Islander organisations can incorporate using this structure.</p>
Most suitable (or required) for:	The indigenous corporation is specifically designed to meet the needs of Aboriginal and Torres Strait Islander groups, and takes into account indigenous customs and traditions. Corporations holding or managing native title under the <i>Native Title Act 1993</i> and the <i>Native Title (Prescribed Bodies Corporate) Regulations 1999</i> must incorporate under this Act.
Not suitable for:	Non-Aboriginal and Torres Strait Islander groups.

Changing between legal structures

It is usually possible for your group to change its legal structure.

Subject to obtaining the consent of your members and meeting other requirements, it is possible for your group to at any time 'convert' or 'migrate' from an incorporated association into a company limited by guarantee or a co-operative. It is also possible for a company limited by guarantee or a co-operative to transfer to being an incorporated association. If the group is an indigenous one, it can transfer its registration to being under *Corporations (Aboriginal and Torres Strait Islander) Act*.

Although these options are available, there are legal and administrative requirements which can be costly and time consuming – that is why it is a good idea to think about the group's future needs when deciding which legal structure to incorporate under.

Overseas recognition

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 our *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 company structure (that is, incorporation under the *Corporations Act*) will be a more readily understood and well recognised legal structure in other countries, compared with other structures such as an incorporated association.

OK, so what next?

Having read the brief profiles, you might already have an idea of which structure would work well for your group.

You will note that two of the above structures – co-operatives and indigenous companies - 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 Related Resources section below.

For most not-for-profit groups wanting to incorporate, the main decision is whether to choose to be an incorporated association or a company limited by guarantee. This is a detailed issue and different lawyers have different views. What is best will depend on the particular circumstances and future plans of your group. We have developed a separate fact sheet *Incorporated association or a company limited by guarantee?* to discuss this issue in more depth (see Related Resources below).

Further Information

Related PilchConnect resources

PilchConnect Fact Sheet: What does 'not-for-profit' mean?

PilchConnect Fact Sheet: What is 'incorporation' and should our group incorporate?

PilchConnect Fact Sheet: Incorporated association or a company limited by guarantee?

For online legal information resources for Victorian community organisations about:

- ▶ unincorporated groups see: www.pilch.org.au/UG/
- ▶ choosing between an incorporated association and a companies limited by guarantee (including links to legislation and regulator websites) see www.pilch.org.au/legalstructure
- ▶ setting up an incorporated association see: www.pilch.org.au/incorporatedassociation
- ▶ the legal duties of members of a committee of management in an incorporated association see: www.pilch.org.au/positionsia
- ▶ setting up a company limited by guarantee see: www.pilch.org.au/companylg
- ▶ the legal duties of directors of a company limited by guarantee see: www.pilch.org.au/positionsclg/
- ▶ the legal requirements for financial reporting and audits see: www.pilch.org.au/reporting/

Related legislation

Associations Incorporation Act 1981 (Vic)

Associations Incorporation Regulations 1998 (Vic)

Corporations Act 2001 (Cth)

Corporation Regulations (various)

Co-operatives Act 1996 (Vic)

Co-operatives Regulations 1997 (Vic)

Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)

Related links

Consumer Affairs Victoria, see www.consumer.vic.gov.au

Office of the Registrar of Indigenous Corporations, see www.oric.gov.au

Australian Securities and Investment Commission, see www.asic.gov.au/asic/asic.nsf

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