

Changing your organisation's structure from an incorporated association

Information for Victorian incorporated associations

Sometimes incorporated associations need to assess whether their legal structure is the most appropriate for achieving their aims. This information sheet can help you consider whether to change structure and how to make the change.

This information sheet covers:

- ▶ why an incorporated association would want to change structure
- ▶ whether transfer to a company is the best way to meet your organisation's needs
- ▶ how a transfer can be achieved
- ▶ what a transfer does
- ▶ how membership changes when transferring
- ▶ what documents must be lodged, and
- ▶ other requirements.

Why would a Victorian incorporated association want to change its legal structure?

There are many reasons why an incorporated association may consider changing its legal structure. Some reasons that may trigger an organisation to re-think its legal structure include:

- ▶ change in size, income or assets
- ▶ increasing memberships numbers or diversity of membership
- ▶ change in place of operation
- ▶ desire to operate overseas, or
- ▶ desire to enhance public perception of organisation.

These are discussed in more detail below. For more detailed comparison of the incorporated association structure and the company limited by guarantee (CLG) structure, go to ['Incorporated association or company limited by guarantee?'](#).

However, even if your organisation is undergoing significant changes, changing structure may not always be the best option, as it is time consuming, administratively complex and may require legal advice.

Size

When an incorporated association grows in size, it may consider whether its legal structure is still the most appropriate. An incorporated association can be any size, so there's no need to change just because your organisation is growing. There are many large not-for-profit organisations operating as Victorian incorporated associations.

However, if your membership base is growing, and there are reasons for a transfer other than size, you should start the transfer process as soon as possible because it can be very time consuming for incorporated associations with large numbers of members to transfer those members to a CLG structure.

Operating interstate or overseas

Victorian incorporated associations can only operate in Victoria, so if your organisation wants to operate interstate, you might need to consider transferring to a CLG structure.

However, there are ways of remaining an incorporated association and operating in other States or nationally. These are:

- ▶ become a Registered Australian Body, or
- ▶ incorporate separately in each jurisdiction that your association operates in.

The steps to take for these two options are outlined in more detail in sections below.

For organisations wishing to operate overseas, there may be benefits to becoming a CLG under federal law as other nations may recognise and understand this structure more than the state-based incorporated association structure.

Public perception

Some groups consider that their organisation will be taken more seriously if it is a CLG, rather than an incorporated association. However, in Australia, people rarely inquire about the structure of an organisation.

Under the Associations Incorporation Reform Act, Consumer Affairs Victoria (**CAV**) has the power to direct an incorporated association to become a company limited by guarantee (**CLG**) because of:

- ▶ the scale or nature of the activities of the incorporated association
- ▶ the value or nature of the property of the incorporated association
- ▶ the extent or nature of the dealings which the incorporated association has with the public, or
- ▶ for any other prescribed reason.

CAV must provide written reasons to the incorporated association and give the association a chance to submit why it should remain an incorporated association before any action is taken.

Registered Charities

Charities that are CLGs used to be regulated by the national Australian Securities and Investments Commission (**ASIC**) – the regulator that also regulates for-profit companies. ASIC takes a very strict approach to regulating corporate entities, and some not-for-profits chose to incorporate as a state-based structure as the state regulators (in Victoria, CAV) take a more educative approach to regulating not-for-profits.

CLGs that receive charitable tax concessions will now be regulated by the new national charities regulator, the Australian Charities and Not-for-profits Commission (**ACNC**), that has publicly stated it plans to take a more educative approach to regulating charities, aiming to assist organisations to meet reporting requirements. State-based registered charities will need to report to both their state regulators as well as the ACNC, whereas charity CLGs will now only need to report to the ACNC.

Changes to the law and the not-for-profit sector:

Reforms of the not-for-profit sector in Australia are underway, including the creation of the Australian Charities and Not-for-Profits Commission (**ACNC**) which is now operating as the national regulator of charities (and later other NFPs). The ACNC will provide an independent 'one-stop-shop' national regulator and may make CLGs a more appealing structure for not-for-profit community groups, as regulation of CLGs registered as charities will move from ASIC to the ACNC.

For now, incorporated associations registered as charities will need to report to both CAV and the ACNC.

To keep up to date with these changes, [sign up to PilchConnect's e-bulletin](#).

Becoming a Registered Australian Body or incorporating in multiple states

If your incorporated association is thinking of transferring to a CLG structure because it wants to operate interstate or nationally, then you can also consider the following two options:

1. Registering as an Australian Body

An incorporated association can register with the Australian Securities and Investments Commission (**ASIC**) as a 'Registered Australian Body' (**RAB**). This means your incorporated association will be recognised by the Commonwealth government and authorised to operate in any State or Territory in Australia.

Once registered, your organisation must provide information about your registered office and office holders to ASIC and CAV.

Your organisation will be given an ARBN (Australian Registered Body Number) which must be displayed after its name and other details on its public documents.

More information on the process of registering and all of the obligations of being an RAB is on the ASIC website. If you're considering this option, go to www.asic.gov.au, click on 'for companies', 'running your company', 'more about Registrable Australian Bodies'.

If your group is an incorporated association and is registered as a charity, once it becomes an RAB, it will not need to report to ASIC on an ongoing basis, and rather will report to the ACNC (as well as its state-based regulator).

Warning!

Once your organisation is registered as a RAB, the office holders (including committee members) will need to understand and comply with the provisions of the *Corporations Act* in respect of directors' duties (including the insolvent trading provisions). From July 2013, most *Corporations Act* duties will not apply to RABs that are also registered charities – these groups will need to comply with ACNC governance standards rather than duties in the *Corporations Act*. Insolvent trading provisions will still apply.

There are significant penalties for breaches of *Corporations Act* provisions. For information, go to www.pilch.org.au/duties and the [Guide to the Legal Duties of Committee Members](#).

In summary, organisations that register as a RAB have the following obligations *in addition* to those under the incorporated associations laws and laws for charities:

- ▶ using the ARBN on all public documents
- ▶ notifying ASIC or, if registered as a charity, the ACNC, of certain changes to the organisation, and
- ▶ for groups that are not registered charities: complying with the directors' duties in the *Corporations Act* (groups that are registered as charities need to comply with Governance Standards for charities that include directors' duties and administered by the ACNC rather than ASIC, but this applies to registered charities regardless of whether they become a RAB).

2. Incorporating separately as an association in other States or Territories

Your association can set up other incorporated associations in the other States or Territories that you wish to operate in. This is called a 'federated structure'.

If you have distinct groups involved in each State and Territory or if you want to limit the liability of the group from state to state, this can be an option worth considering.

However, if you don't intend to operate distinct groups in each state, setting up other incorporated associations can be difficult to administer, because your local administration staff or volunteers will need to look after all the requirements (like reporting) for the other states, especially if you operate in more than one other state.

Each (state-based) incorporated association will be a separate legal entity and will need to comply with the requirements of that state or territory's legislation (including requiring a separate committee, finances, reporting etc, as well as with federal laws such as tax laws and charitable reporting requirements).

Warning!

You may have to comply with as many as 8 different State and Territory laws and report to 8 different regulators if you choose this option!

Transferring from an incorporated association to a company limited by guarantee

If your group decides to transfer to a CLG structure, the *Associations Incorporation Reform Act* allows an incorporated association to “transfer” its registration to become a CLG under the *Corporations Act*. The steps to convert are outlined below.

Transferring from an incorporated association to a CLG does not affect the identity of your organisation but, upon transfer, your organisation will cease to be an incorporated association. Any contracts or agreements that the association had (including employment contracts) continue to have effect after the association’s transfer to a CLG structure.

Note that groups that are registered charities will apply to ASIC to transfer, but will be regulated by the ACNC on an ongoing basis, and will not need to comply with ASIC reporting requirements. CLGs that are not registered charities will report to ASIC and be regulated by ASIC on an ongoing basis.

Tip:

Transferring to a company limited by guarantee can be expensive and time consuming. Seek legal advice for your organisation before starting the process, especially if you have a large membership base.

If your organisation is an indigenous one, it can transfer its registration to come under the *Commonwealth Corporations (Aboriginal and Torres Strait Islander) Act* instead.

The steps for transfer are:

1. Propose a new constitution and who the new directors of the company will be

The committee of the incorporated association should agree on the new constitution and the new directors for the proposed CLG. A CLG will need:

- ▶ at least three directors and a company secretary (the company secretary can be one of the directors)
- ▶ a constitution
- ▶ a registered office
- ▶ at least one member

- ▶ a name which is not identical to the name of an existing company or registered business name, and

Tip:

You can find out whether a business name is in use or if very similar names are in use by searching ASIC business name registries. You can run a name availability search at <http://connectonline.asic.gov.au>.

- ▶ an auditor - the auditor must be appointed within one month of the registration of the company, even if your company is not required to have audited financial statements.

Your constitution should also contain the necessary requirements to allow the tax concessions available to the incorporated association to continue for the company. We recommend you seek legal assistance in the preparation of your new constitution, including to ensure your tax concessions are not affected by the transition.

2. Pass a special resolution of the association's members

The association must hold a meeting where members of the association pass a special resolution agreeing that the association will become a CLG. A special resolution means you will need at least 75% of votes of members at a general meeting in favour of the proposal to become a CLG. Check your association's rules for any additional requirements for passing a special resolution.

Members must be given notice of the proposed special resolution, including the proposed wording of the resolution, at least 21 days prior to the meeting. For more information on meetings and passing special resolutions see Parts 4 and 5 of the PilchConnect [Secretary's Satchel](#).

The effects of the transfer should be explained to the members in the notice of meeting, and normally the proposed new constitution is circulated and made available for review by members.

This members' vote can be held at the association's next annual general meeting or at a special general meeting called for this purpose.

Warning! Membership does not automatically transfer to new company

As there is no 'automatic' transfer of the members of the incorporated association to the new company limited by guarantee. As a result, each member of an incorporated association has to apply 'afresh' to be a member of the new CLG. At the general meeting, members can be given an application form for membership of the soon-to-be CLG, and asked whether, if the incorporation is transferred, they agree to become members of the company in accordance with the provisions of the company's constitution. This can save the hassle of needing separate new application form for each pre-existing member.

3. Lodge documents with ASIC

Once your incorporated association has passed a special resolution in favour of becoming a CLG your organisation will need to take a number of steps. It must complete and lodge with ASIC the following documents. You will most likely need legal assistance to prepare these documents:

- ▶ ASIC form 202 'Application for registration of a body corporate as a company'
- ▶ the prescribed ASIC fee (around \$400)
- ▶ a copy of the proposed constitution
- ▶ evidence (such as a director's statement) required by section 601BC(7) of the *Corporations Act*
- ▶ evidence (such as a director's statement) required by section 601BC(8) of the *Corporations Act*
- ▶ a copy of the members' special resolution approving the transfer from incorporated association to CLG
- ▶ copies of the relevant sections of the *Associations Incorporation Reform Act* (Part 8) that allow the transfer
- ▶ a certified copy of the association's certificate of incorporation (this needs to be certified by CAV)
- ▶ a copy of the association's rules including its statement of purposes (you need to get this from CAV if you don't have it), and
- ▶ if there are 'charges' on the association's property (like loan securities or mortgages), you will need to lodge ASIC form 309 'Notification to details of charge' and associated documents also need to be lodged.

If the CLG is applying to be registered without the word 'limited' in its name, ASIC form 432 'Application to approve registration of a company name without the word "limited"', also needs to be lodged, with an additional fee of \$330 (only available to certain CLGs).

4. Notify CAV

Once the company has been registered, ASIC will issue the company with an Australian company number (ACN) and a certificate of registration.

Under the *Associations Incorporation Reform Act*, an association must notify CAV within 14 days of registration as a CLG. CAV advised in May 2012 that this notification should include a cover letter, signed copy of the meeting minutes passing the special resolution to change legal structure, and the certificate of registration from ASIC.

Once CAV has been notified that the organisation has been registered as a CLG, CAV must remove the association from its register. Once the transfer is complete, an association ceases to be

association under the *Associations Incorporation Reform Act*. However, the new CLG is considered to be the 'same' organisation for the purpose of contracts and liabilities.

5. Apply for a new ABN

Once the company is registered, you will need to apply for a new ABN and to cancel the ABN for the association. You need to change the ABN and name of the entity on all your public documents, including the letterhead.

6. Notify the ATO, banks, Titles office etc

Your organisation will need to notify people or companies your organisation has relationships with of your organisation's new name (eg, the change from "XYZ Inc" to "XYZ Ltd") and ABN, for example:

- ▶ the ATO – to confirm any tax concessions are transferred to the new entity and for PAYG and GST registrations
- ▶ Workcover and other insurers
- ▶ superannuation funds
- ▶ funding bodies
- ▶ fundraising regulators (if you have fundraising licences)
- ▶ people or companies that you lease property or equipment from
- ▶ your organisation's suppliers, eg. power, telephone, internet service provider, office supplies
- ▶ the Titles Office in relation to any real estate your organisation owns, and you will need to complete transfer forms will need to be completed
- ▶ funders such as benefactors or organisations who have provided you with grants
- ▶ your bank and anyone your organisation has loans from, and
- ▶ your employees.

All of this needs careful management to co-ordinate the timing and the notifications.

Resources

PilchConnect resources

[Fact sheet: What does not-for-profit mean?](#)

[Fact sheet: What is incorporation and does our group need to incorporate?](#)

[Fact sheet: Which incorporated legal structure should we choose?](#)

For online legal information resources for Victorian community organisations about:

- ▶ unincorporated groups see: www.pilch.org.au/UG/
- ▶ choosing the right legal structure 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 and company limited by guarantee see: www.pilch.org.au/duties/
- ▶ setting up a company limited by guarantee see: www.pilch.org.au/companylg/
- ▶ the Secretary's Satchel – Guide for Secretaries see: www.pilch.org.au/secsguide/
- ▶ the legal requirements for financial reporting and audits see: www.pilch.org.au/reporting/

Legislation

Associations Incorporation Reform Act 2012 (Vic)

Corporations Act 2001 (Cth)

Australian Charities and Not-for-profits Commission Act 2012 (Cth)

External Resources

[ASIC Fact Sheet on reporting for registered charities](#)

[The ACNC's homepage](#)