



NOT-FOR-PROFIT ORGANISATIONS - ASSOCIATION OR COMPANY LIMITED BY GUARANTEE?

You are deciding to set up a not-for-profit organisation or charity. One of the first things that you need to decide is the appropriate structure to use. Not-for-profit organisations usually chose from two different structures, they will either incorporate as an association or register a company limited by guarantee.

Very often, we receive enquiries from clients who want to know:

- What are the differences between an Association and a Company Limited by Guarantee?
- What are the advantages and disadvantages of each structure?
- What are the fees payable?
- Which structure is appropriate for my not-for-profit organisation?

We understand that it can be a daunting task to try and decide which structure is 'right' for your not-for-profit organisation. After all, you would not want to set up your not-for-profit organisation only to be told that you have used the wrong structure.

Each structure has its pros and cons and the requirements and obligations for the 'people-in-charge' vary. Therefore, we have prepared a contemporary summary of the differences between Associations and Companies Limited by Guarantee. The summary gives a brief insight into, amongst other things, the legal structure, trading ability and costs associated with each structure.

However, every not-for-profit organisation is different and has unique characteristics.

Murfett Legal has extensive and practical experience acting for many not-for-profit organisations. If you would like advice specific to your circumstances, please contact

For further information contact Murfett Legal by telephone on +61 8 9388 3100, via our website at www.murfett.com.au or email one of the following directors:

[Jason De Silva](mailto:jason.desilva@murfett.com.au) : jason.desilva@murfett.com.au

[Kelly Parker](mailto:kelly.parker@murfett.com.au) : kelly.parker@murfett.com.au

[Peter Broun](mailto:peter.broun@murfett.com.au) : peter.broun@murfett.com.au



Associations vs Company Limited by Guarantee

	Incorporated Association	Company limited by Guarantee
The Law	<p><i>Associations Incorporation Act 2015 (Act)</i> (AI Act).</p> <p>The law relating to incorporated associations is state based and each State and Territory has its own legislation.</p> <p>There are almost equivalent laws in other States and Territories.</p>	<p>The law relating to company(s) limited by guarantee is a federal Act known as the <i>Corporations Act 2001 (Cth)</i>. The law is the same regardless of which state you are in.</p>
Recommended for -	<ul style="list-style-type: none"> • Locally focused Not-for-Profit (NFP) community groups wanting to operate in Western Australia. • Groups with limited capacity to meet reporting obligations. • Groups with limited funds and resources, as costs associated with setting up and running incorporated associations are sometimes (but not always) less than those involved in Company Limited by Guarantee (CLG). 	<ul style="list-style-type: none"> • Organisations wanting to operate nationally or in more than one state or territory. • Larger NFPs, including those that only operate in one state, often use this structure. • Charities registered with the Australian Charities and NFPs Commission (CNC), as CLGs that are charities will only report to the ACNC (not also ASIC). • Housing and aged care providers (who must be CLGs). • Wholly owned subsidiary organisations, as only one member is required (but note that three directors are required).
Structure <i>Company – National recognition</i>	<p>An incorporated association is a body corporate with a legal personality separate from its members. They are registered and regulated under the Associations Incorporation Act 2015 (Act) (AI Act).</p> <p>Incorporated associations constituted by</p>	<p>A company is a body corporate with a legal personality separate from its members.</p> <p>Companies limited by guarantee are public companies constituted by members and governed by a board of directors. Companies limited by guarantee are registered and regulated under the</p>



	<p>members and governed by a committee of management (which can also be known as a board of directors).</p> <p>The AI Act imposes less onerous conditions than the Corporations Act which governs the activities of companies.</p> <p>The AI Act provides a simple and affordable means of creating a separate legal entity for small, community based groups with limited resources, which operate only in Western Australia.</p> <p>Carrying on business outside of Western Australia requires registration with ASIC as an Australian Registered Body (an ARB number is issued). If an association is registered as an Australian Registered Body, it must meet additional administrative and compliance obligations.</p>	<p>Corporations Act 2001 (Cth) (Corporations Act), which is administered by the Australian Securities and Investments Commission.</p> <p>A company's registration is recognised in the whole of Australia.</p>
Legal Status	<p>The association has a legal existence independent of its members. This means that as an entity it may:</p> <ul style="list-style-type: none">(a) sue and be sued;(b) acquire, hold and dispose of property;(c) act as a trustee;(d) make contracts and enter into tenancy agreements;(e) have a common seal;(f) receive a bequest or gift from a will; and(g) have perpetual succession. That is, the association will remain in existence regardless of who is a member until it is disbanded by operation of the law.	<p>A company limited by guarantee has broad powers equivalent to the legal capacity of an individual and a body corporate (except for the power to issue shares).</p> <p>Registration of a company creates a legal entity separate from its members. This means that, as with an incorporated association, a company may:</p> <ul style="list-style-type: none">(a) sue and be sued;(b) acquire, hold and dispose of property;(c) act as a trustee;(d) make contracts and enter into tenancy agreements;(e) receive a bequest or gift from a will; and



		(f) have perpetual succession. The company remains in existence until it is disbanded by operation of the law.
Trading Ability	<p>Provided there is no inconsistency with the incorporated association's purposes, an association may trade or be involved in trading activities. However, an association may only trade if that trade is ancillary to the association's purpose.</p> <p>All funds raised by trading must be directed back to furthering the incorporated association's purposes.</p> <p>As noted above, in order to carry on business in a State or Territory other than the association's place of origin or principal place of business, it must be registered as an Australian Registered Body (ARB).</p>	<p>Once a company is registered under the Corporations Act it can operate in Australia. A company is entitled to carry on business nationally without having to separately incorporate in each State and Territory or register as an Australian Registered Body.</p> <p>A company may conduct trading activities as a primary purpose. In contrast, an incorporated association may only trade if that trade is ancillary to the association's purpose.</p> <p>Where the company is a not-for-profit company, all funds raised by trading must be directed back to furthering the company's objects.</p>
Winding up and the liability of members	<p>The liability of members of an incorporated association (including members who are committee members) in the event of a winding up is limited to amounts due to the association by way of unpaid subscriptions, joining fees or other amounts payable under the Rules of the association.</p>	<p>"Limited by guarantee" means the liability of the company's members is limited to the amount of the guarantee (that is, the amount a member has agreed to contribute in the event of the company being wound up). The amount of the guarantee is usually specified in the company's constitution and is often fixed at a nominal amount. The guarantee is only called in a winding up situation.</p>



<p>Office Holders' and Directors Duties and Liabilities</p>	<p>Office holders of incorporated associations are subject to equitable and common law duties. These fiduciary duties require officeholders to:</p> <p>(a) act in good faith in the best interests of the company;</p> <p>(b) act for a proper purpose; and</p> <p>(c) give adequate consideration to decisions and keep discretions unfettered.</p> <p>If they fail in any of these duties, directors may be liable to personally compensate members who suffer loss.</p>	<p>Directors of companies limited by guarantee are subject to the same equitable and common law duties as directors of incorporated associations. These fiduciary duties require directors to:</p> <p>(a) act in good faith in the best interests of the company;</p> <p>(b) act for a proper purpose; and</p> <p>(c) give adequate consideration to decisions and keep discretions unfettered.</p> <p>If they fail in any of these duties, directors may be liable to personally compensate members who suffer loss.</p> <p>In addition, a company limited by guarantee attracts the statutory directors' duties under the Corporations Act.</p>
<p>Compliance & Governance</p>	<p>Further advice available on request</p>	<p>Further advice available on request</p>
<p>Requirement for Audited Financial Statement</p>	<p>Tier 1 (revenue of less than \$250,000) – no review or audit required unless required by majority of members at general meeting or directed by the Commissioner. Financial statements must give a true and fair view of the financial position and performance of the association (cash or accruals accounting permitted).</p> <p>Tier 2 (revenue \$250,000-\$1,000,000) – must be reviewed by a member of a professional accounting body (to be prescribed by Regulations), a registered company auditor or a person the Commissioner considers appropriate – Financial statements must give a true and fair view of the financial position and</p>	<p>'Tier 3' companies must have their accounts audited by a registered company auditor.</p> <p>'Tier 2' companies must have their accounts 'reviewed' by an auditor (lesser standard than full audit).</p> <p>'Tier 1' companies not required to have audited accounts (unless required to do so by members' direction or ASIC direction).</p>



	<p>performance of the association and be prepared in accordance with Australian Accounting Standards.</p> <p>Tier 3 (revenue exceeding \$1,000,000) – must be audited by a member of a professional accounting body (to be prescribed by Regulations), a registered company auditor or a person the Commissioner considers appropriate. Financial statements must give a true and fair view of the financial position and performance of the association and be prepared in accordance with Australian Accounting Standards.</p>	
Profits	<p>An incorporated association must not secure a profit for its members (or divide a profit among members or distribute profit to members).</p> <p>However, there are instances when an association is not taken to be formed or carried on with the object of trading or obtaining pecuniary gain for its members, or to be trading or obtaining pecuniary gain for its members. Please contact us for further information.</p>	<p>A company limited by guarantee must not pay a dividend to its members.</p> <p>Generally, companies limited by guarantee must use the word "limited" or the abbreviation "Ltd" in their name, but ASIC may waive this requirement for certain not-for-profit companies.</p> <p>To do so, the company must pursue charitable purposes only and apply its income in promoting those purposes, it must not make distributions to its members or pay fees to its directors.</p>
Costs	<p>The costs associated with an incorporated association in administering an organisation should generally be minor. Additional fees are paid by a Registered Australian Body.</p>	<p>There are maintenance costs to be incurred under both entities, such as registration fees and lodgement of annual returns. These costs are marginally higher for a company; however, the costs are not prohibitive.</p> <p>The fees associated with compliance obligations under the Corporations Act are generally more than the fees required for the administration of associations. There are also substantial late fees imposed on</p>



		the notification requirements which are strictly enforced by ASIC.
Obligation to report changes to Organisation	The association must inform the Department of Commerce of any alterations to the Constitution and changes to the personal details of your Public Officer.	The company limited by guarantee needs to notify the Australian Taxation Office of the appointment of the Public Officer.
Incorporation Fees and Ongoing Fees	<p>Incorporation is done through Consumer and Business Services.</p> <p>Initial Incorporation Fee: \$180 (own rules); \$145 (model rules); and additional fee of \$67 payable if "other" category is selected.</p> <p>Annual Review Fee: Nil</p> <p>Financial reporting –</p> <p>Application for declaration of an association's financial tier - \$50</p> <p>Application for approval or an auditor or reviewer - \$40</p> <p>Application to exempt requirement to provide auditor or reviewer's representation - \$50</p>	<p>Incorporation is done through ASIC.</p> <p>Initial Incorporation Fee: \$387</p> <p>Annual Review Fee: \$1,176</p>