AUSTRALIAN INSTITUTE *of* COMPANY DIRECTORS

NFP DIRECTOR TOOLS

Types of incorporation

Role of the board

The purpose, or primary objective, of an NFP may be to pursue a goal or special interest in a charitable, social, educational, professional or religious cause. Examples include schools, churches, sporting clubs and membership organisations representing professional groups.

Any surplus generated by an NFP cannot be distributed to its members, including any excess assets on wind-up. Surpluses must be put towards advancing the purpose for which the organisation was established.

Incorporation separates the entity from the individual members and establishes a unique legal identity. This creates certain legal rights, but also responsibilities.

Some common features of incorporation include:

- The organisation has the same legal capacity of a natural person and is able to:
  - carry on in business in its own right;
  - enter into contracts in its own name;
  - sue and be sued;
  - hold and acquire assets and property.
- The organisation has continuous existence.
- There is limited liability for the members or shareholders.
- The elected governing board operates the business on behalf of its members or shareholders and is accountable to them.

The most common types of incorporated structures (refer to the subsequent section *Comparison of types of incorporation*) are:

- Incorporated associations;
- Companies limited by guarantee;
- Cooperatives;
- Indigenous incorporations.

Incorporation associations

Incorporated associations are incorporated with their relevant state or territory government. The structure was originally intended to be used by small community organisations that operated within local communities or within state or territory boundaries. They are relatively easy to establish and operate and are inexpensive to register.

The relevant state and territory acts are:

- *Associations Incorporation Act 2009* (NSW);
- *Associations Incorporations Act 1985* (SA);
- *Associations Incorporations Act 1964* (Tas);
- *Associations Incorporation Reform Act 2012* (Vic);
- *Associations Incorporations Act 1987* (WA) - existing associations have three years to amend their Association Rules to comply with the new Act;

- *Associations Incorporations Act 2015* (WA) - for any new associations;
- *Associations Incorporations Act 1981* (Qld);
- *Associations Incorporation Act 1991* (ACT);
- *Associations Act* (NT).

Incorporated associations can be established to operate any type of business but they cannot distribute their profits to members – in other words, they must be "not-for-profit". All profits must be applied towards achieving the objectives or mission of the association. The business operates with an elected management committee and must maintain proper financial and membership records and registers.

For those incorporated associations that begin as small entities and grow in size and employ staff, the management committee often develops into a governing board of directors similar to that of companies.

Even if the association is registered with the Australian Charities and Not-for-profit Commission (ACNC), they will usually still have to comply with their state or territory legal and reporting requirements, unless their state or territory has advised otherwise.

Unincorporated associations

Although incorporated associations provide limited liability to both its members and its office-bearers, unincorporated associations do not.

Unincorporated associations provide no protection and members or office-bearers can be held personally liable for the debts of the association.

Companies limited by guarantee

Companies limited by guarantee are formed on the principle that the liability of members is limited to the amount they agree to contribute in the event the company is wound up. This is typically a nominal amount and is prescribed in the company's constitution.

Companies limited by guarantee are public companies registered under the *Corporations Act 2001* ('Act') and hence the directors will have the same legal duties, responsibilities and liabilities as directors of commercial entities that are also public companies registered under the Act.

Public companies must have at least three directors and one company secretary, but may have only one member. These companies must have the word 'Limited' or the abbreviation 'Ltd' included in their name. However, if the company is registered as a charity with the ACNC and does not allow directors to be paid, 'limited' may be dropped from use on company letterhead but still forms part of the company's legal name. If the organisation wants to remove the word from its legal name the company must apply (and pay a fee) to ASIC.

" ...if the company is registered as a charity with the ACNC and does not allow directors to be paid, 'limited' may be dropped from use on company letterhead but still forms part of the company's legal name."

Companies limited by guarantee have different financial reporting requirements based on a revenue limit. The size classifications outlined below are the same as those used to determine reporting requirements for charities registered with the ACNC.

Size	Criteria	Reporting requirement
Small company limited by guarantee	The company is limited by guarantee for the whole year. The company is not a deductible gift recipient. The company's gross consolidated revenue for the financial year is less than $250,000.	The company must prepare the following reports when requested by a member: • an annual financial report; • a directors' report in accordance with s 300B of the *Corporations Act 2001*.
Other	The company is limited by guarantee with gross consolidated revenue of less than $1million.	The company must prepare the following: • an annual financial report; • a directors' report in accordance with s 300B of the *Corporations Act 2001*. The reports must be: • prepared in accordance with Chapter 2M; • audited or reviewed.
Other	The company is limited by guarantee with gross consolidated revenue of $1 million or more.	Must prepare the following: • an annual financial report; • a directors' report in accordance with s 300B of the *Corporations Act 2001*. The reports must be: • prepared in accordance with Chapter 2M; • audited.

Cooperatives

The International Co-operative Alliance (ICA)[1] defines a cooperative as:

> *"…an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise."*

Cooperatives apply the concepts of self-help and responsibility, sharing, democracy, equality and solidarity in order to benefit all members.

They are considered different to other incorporated structures due to their:

- member ownership;
- democratic structure (one vote only per shareholder regardless of shareholding); and
- funds and assets are used for the mutual benefit of all members not individual owners/investors.

Cooperatives can be established as either distributing or non-distributing (also referred to as trading or non-trading), meaning profits of the cooperative can or cannot be distributed to its members. To be classified as an NFP the cooperative must be a non-distributing entity and its rules or constitution must contain a clause prohibiting the distribution of profits or assets, on winding-up, to its members.

Under the Australian Uniform Co-operative Laws Agreement (AUCLA), national legislation for co-operatives has been developed and is being progressively adopted by each of the states and territories.

Each state and territory will pass its own law to adopt the template law or alternative consistent law, however cooperatives will continue to register with, report to and be supervised by their relevant state or territory government department. Hence, a review of the relevant state or territory law will be required.

As an example of Co-operatives National Law (CNL) state laws, NSW CNL laws consists of the following:

[1] The International Co-operative Alliance is a non-profit international association representing 284 co-operative federations across 95 countries (January 2015), http://ica.coop/en/international-co-operative-alliance.

- *Co-operatives (Adoption of National Law) Act 2012*
- *Co-operatives National Law (NSW) (CNL)*
- *Co-operatives National Regulations (NSW) (CNL)*

Like the other incorporation structures, small cooperatives are exempt from some of the reporting requirements (refer to the subsequent section *Comparison of types of incorporation*).

To determine if a cooperative is 'small' the CNL has taken a similar approach to that used by the Corporations Act 2001 for determining small proprietary companies, however the gross limits are lower.

Cooperatives will be classified as small if they meet two of the three following characteristics:

- the cooperative has consolidated revenue of less than $8 million for the financial year;
- the cooperative has consolidated gross assets of less than $4 million at the end of the financial year;
- the cooperative has fewer than 30 employees at the end of the financial year.

The above limits include any entities controlled by the cooperative during the year.

Indigenous incorporations

Indigenous organisations (Aboriginal and/or Torres Straight Islander controlled organisations) can register using any type of incorporation, however an additional option exists with registration as a corporation with the Office of the Registrar of Indigenous Corporations (ORIC) under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

A unique advantage of registering an organisation under the CATSI Act is that the governing rule book can be sensitive to Aboriginal and Torres Strait Islander customs and traditions.

Some other factors unique to the CATSI Act include[2]:

- the members can choose not to be liable for the debts of the corporation;
- corporations can operate nationally;
- it is free to register the corporation;
- the registrar may exempt an organisation from lodging an annual report;
- profits of the organisation can be distributed to members if the rules allow it.

The Registrar of Indigenous Corporations also offers assistance, support and information and training programs for indigenous corporations. They may also grant exemption from particular reporting requirements or extend lodgement times in special circumstances.

Reporting requirements under the CATSI Act differ according to the corporations size and income, as follows:

Size	Size criteria (must meet two of the stated criteria)	Reporting requirement
Small corporations	Consolidated gross operating income (CGOI) less than $100,000; Consolidated gross assets (CGA) valued at less than $100,000; Fewer than five employees.	General report only
Medium corporations	CGOI between $100,000 and $5 million; CGA between $100,000 and $2.5 million; Between five and 24 employees.	General report; Financial report; and Audit report; or Financial report based on reports provided to government funders.
Large corporations	CGOI of $5 million or more; CGA valued at $2.5 million or more; More than 24 employees.	General report; Financial report; Audit report; and Directors' report.

[2] Australian Government, Office of the Registrar of Aboriginal and Torres Strait Islander Corporations, http://www.oric.gov.au/publications/other-publication/comparative-table-incorporation-legislation, accessed June 2016

Comparison of types of incorporation

Feature	Incorporated association	Company limited by guarantee	Co-operative	Indigenous corporations
National or state/territory based	State/territory based. Register in all states where operating a business or register with ASIC as an Australian registered body.	Can operate nationally without further registration.	Can operate nationally without further registration.	Can operate nationally without further registration.
Relevant laws	Relevant state or territory associations incorporations acts and regulations	*Corporations Act 2001* and regulations	National Co-operatives Law (NCL) under the Australian Uniform Co-operative Laws Agreement (AUCLA). Co-operatives will continue to be regulated and supervised by the relevant state or territory government. WA, Qld and Act have not joined the AUCLA.	*Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and regulations.
Regulator	Relevant state or territory department of fair trading and/or consumer affairs and/or commerce.	Australian Securities and Investments Commission (ASIC)	Relevant state or territory department of fair trading and/or consumer affairs and/or commerce.	Office of the Registrar of Indigenous Corporations (ORIC).
Governance body	Management committee: president, vice-president treasurer, secretary.	Board of directors.	Board of directors.	Board of directors.
Public officer	Public officer. Must all be over 18 and ordinarily reside in Australia.	Company secretary. Must all be over 18 and ordinarily reside in Australia.	Must appoint a secretary. Must be over 18 and ordinarily reside in Australia.	At least one secretary for large/medium entities and a contact person for small entities. Must be over 18yrs.
Reporting to regulator	Annual return lodged with state/territory regulator. Annual report lodged with the ACNC, if registered with the ACNC.	Report to ASIC unless registered with ACNC, in which case report to ACNC.	Annual return lodged with state/territory regulator. Annual report lodged with the ACNC, if registered with the ACNC.	Annual report lodged with Registrar, even if registered with the ACNC. No reporting to ACNC.
Audited financial statements	This requirement differs across the states and territories. The financial report may not be required to be audited for small incorporated associations. ACNC requirements if registered with ACNC.	The audit requirement differs according to the size of the company based on gross consolidated revenue. ACNC requirements if registered with ACNC.	Small cooperatives are not required to be audited unless the members require it. Large cooperatives must be audited. ACNC requirements if registered with ACNC.	Small corporations are not required to be audited.

Feature	Incorporated association	Company limited by guarantee	Co-operative	Indigenous corporations
Governance documents	Model rules or constitution	Replaceable rules or constitution	Co-operative rules	Rule book that can be sensitive to Aboriginal and/or Torres Strait Islander customs and traditions.
Members liability	Limited liability when incorporated.	Members liability is limited to the amount guaranteed in the company constitution.	Usually limited to what is owed to the co-operative due to their membership: that is, unpaid share capital or members fees or subscriptions.	Members can choose to have limited liability when registering.
Number of members/ shareholders	There is often a minimum number of members, usually approximately five or six. There is usually no maximum number. There is usually no minimum age for members.	There is often a minimum number of members, usually one. There is usually no maximum number. Members are not required to be over 18 unless the constitution requires it.	There is a minimum of five shareholders. Members are not required to be over 18 unless the Rules require it.	There is a minimum of at least five members (unless approved by the registrar). There are age and indignity requirements for members.

About us

The Australian Institute of Company Directors is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership includes directors and senior leaders from business, government and the not-for-profit sectors.

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