

## OUTLINE OF INCORPORATED ASSOCIATION AGAINST A PUBLIC COMPANY LIMITED BY GUARANTEE

Note: as with any legal documents, this does not replace obtaining legal advice on each sports specific requirements and it is recommended you do so

	INCORPORATED ASSOCIATION	PUBLIC COMPANY LIMITED BY GUARANTEE
<p><b>Structure</b></p> <p><i>Company - national recognition</i></p>	<p>An incorporated association is a body corporate with a legal personality separate from its members.</p> <p>Incorporated associations are registered and regulated by the <i>Associations Incorporation Act 2009 (NSW) (Act)</i> <a href="https://legislation.nsw.gov.au/view/html/inforce/current/act-2009-007">https://legislation.nsw.gov.au/view/html/inforce/current/act-2009-007</a>, which is administered by the New South Wales Office of Fair Trading (<b>OFT</b>).</p> <p><a href="https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/about-associations">https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/about-associations</a></p> <p>The 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 New South Wales.</p> <p>The Act imposes less onerous conditions than the Corporations Act which governs the activities of companies.</p>	<p>Companies limited by guarantee (<b>CLG</b>) are public companies constituted by members and governed by a board of directors.</p> <p>CLG are registered and regulated by the <i>Corporations Act 2001 (Cth) (Corporations Act)</i> <a href="https://www.legislation.gov.au/Details/C2019C00216">https://www.legislation.gov.au/Details/C2019C00216</a>, which is administered by the Australian Securities and Investment Commission (<b>ASIC</b>) <a href="https://asic.gov.au/">https://asic.gov.au/</a>.</p> <p>A company's registration is recognised Australia wide.</p>

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<p><b>Legal Status</b> <i>No real difference</i></p>	<p>The association itself has a legal existence independent of its members. This means that as an entity it may:</p> <ul style="list-style-type: none"> <li>(a) sue and be sued;</li> <li>(b) acquire, hold and dispose of property;</li> <li>(c) act as a trustee;</li> <li>(d) make contracts and enter into tenancy agreements;</li> <li>(e) receive a bequest or gift from a will; and</li> <li>(f) 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.</li> </ul>	<p>A CLG 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"> <li>(a) sue and be sued;</li> <li>(b) acquire, hold and dispose of property;</li> <li>(c) act as a trustee;</li> <li>(d) make contracts and enter into tenancy agreements;</li> <li>(e) receive a bequest or gift from a will; and</li> <li>(f) have perpetual succession. The company remains in existence until it is disbanded by operation of the law.</li> </ul>
<p><b>Trading ability</b> <i>No State boundaries for a company. Primary purpose is trade.</i></p>	<p>A primary limitation of incorporated associations is that whereas a company may trade nationally, an incorporated association is confined to trade within the State in which it is registered.</p> <p>An association incorporated in New South Wales which proposes to carry on business in another Australian jurisdiction has two alternatives. It may either:</p> <ul style="list-style-type: none"> <li>(a) incorporate as another legal entity under the equivalent associations incorporation legislation in each jurisdiction in which it intends to carry on business; or (more commonly)</li> <li>(b) register as an Australian Registrable Body (<b>ARB</b>) under the Corporations Act. An incorporated association which registers as an ARB will have compliance obligations under both the Act and the Corporations Act.</li> </ul>	<p>Once a company is registered under the Corporations Act it can operate anywhere 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 ARB.</p> <p>A company may conduct trade with the public as a primary purpose. In contrast, an incorporated association may only trade with the public if that trade is ancillary to the association's purpose.</p>

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<p><b>Winding up and the liability of members</b></p> <p><i>No real difference</i></p>	<p>Members are not liable to contribute towards the payment of the debts and liabilities of the incorporated association or the costs, charges and expenses of the winding up of the incorporated association.</p> <p>The liability of members of an incorporated association (including members who are committee members) if the association is wound up is limited to amounts due to the association by way of unpaid subscriptions, joining fees or other amounts payable under the association’s constitution.</p>	<p>A company has limited liability if wound up. It is a separate legal entity distinct from its members.</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 if the company is 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 upon in a winding up situation.</p>

<p><b>Committee Members and Directors Duties and Liabilities</b></p> <p><i>Higher standard for company directors</i></p>	<p>Under the Act an association must establish a committee to manage its affairs.</p> <p>The common law imposes fiduciary duties on committee members. These fiduciary duties require them to:</p> <ul style="list-style-type: none"> <li>(a) act honestly</li> <li>(b) act in good faith; and</li> <li>(c) in what they consider to be the best interests of the incorporated association.</li> </ul> <p>If they fail in any of these duties, committee members may be liable to personally compensate members (or the association) who suffer loss.</p> <p>The Act provides protection for committee members against being held personally responsible for the association's liabilities.</p> <p>Unless there are exceptional circumstances the "veil" of incorporation will not be lifted to expose an association's members or council members to personal liability in relation to the business carried on by the association.</p> <p>The Act also imposes statutory duties on committee members. These duties are similar to the common law duties above and require a committee member to:</p> <ul style="list-style-type: none"> <li>• carry out his or her functions for the benefit, so far as practicable, of the association and with due care and diligence (s 30)</li> <li>• disclose interests that may give rise to a conflict (s 31)</li> <li>• NOT dishonestly use association information (s 32)</li> <li>• NOT dishonestly use their committee position (s 33)</li> <li>• avoid insolvent trading (ss 68-69).</li> </ul> <p>Breaches of these sections are offences under the Act and attract financial penalties as well as the potential for imprisonment.</p>	<p>The Board of a company is structured as decided by the organisation and set out in its constitution.</p> <p>Directors of CLG are subject to the same equitable and common law duties as directors of incorporated associations. These fiduciary duties require directors to:</p> <ul style="list-style-type: none"> <li>(a) act in good faith in the best interests of the company;</li> <li>(b) act for a proper purpose; and</li> <li>(c) give adequate consideration to decisions and keep discretions unfettered.</li> </ul> <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 CLG attracts the statutory directors' duties under the Corporations Act.</p> <p>These statutory duties include duties to:</p> <ul style="list-style-type: none"> <li>(a) act in good faith and in the best interests of the company;</li> <li>(b) act with due care and diligence;</li> <li>(c) act for a proper purpose (that is, not for personal advantage or to the company's detriment);</li> <li>(d) not use information acquired for personal advantage or to the company's detriment;</li> <li>(e) disclose material personal interests;</li> <li>(f) not to vote on a matter involving a material personal interest, nor be present when such matters are considered;</li> <li>(g) avoid insolvent trading;</li> </ul>
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		<p>(h) retain appropriate discretions, for example when delegating functions to sub-committees of the board; and</p> <p>(i) avoid conflicts of interest.</p> <p>Directors of companies who breach these duties are exposed to both civil and criminal penalties. They may be individually liable for penalties up to \$200,000. The company also may be liable for penalties up to \$1 million.</p> <p>The Corporations Act does provide that, in certain circumstances, a company may indemnify its directors and officers against personal liability which they could incur in the course of performing their duties.</p>

<p><b>Compliance and Governance Obligations</b></p> <p><i>Higher onus for company</i></p>	<p>The Act imposes a range of compliance obligations on incorporated associations. These include the following matters:</p> <ul style="list-style-type: none"> <li>(a) Having at least 5 members;</li> <li>(b) Must not be formed or carried on for the purposes of providing pecuniary gain to or for its members (s 5);</li> <li>(c) An alteration of the constitution of an incorporated association must be lodged and registered by OFT before it takes effect;</li> <li>(d) Ensuring compliance with its constitution about calling and holding meetings;</li> <li>(e) Holding an annual general meeting (<b>AGM</b>) each calendar year within 6 months of the end of the financial year of the incorporated association;</li> <li>(f) Depending on its size, an incorporated association must submit to its members at an AGM, a statement containing details of all income and expenditure during the last financial year, assets and liabilities, mortgages, charges and securities affecting any of the incorporated association's property, and details relating to any trust of which the association was trustee during the previous financial year, or any trust which contains funds of the incorporated association and the statement must be kept for at least 7 years after the date of submission;</li> <li>(g) Depending on its size, association accounts should be audited and also provided to members at an AGM. Note an audit is good governance and financial management regardless of the size of the organisation;</li> <li>(h) At, or soon after, the AGM, a committee member must certify that the committee member attended the AGM and</li> </ul>	<p>A company's compliance obligations are more onerous than those associated with incorporated associations. Under the Corporations Act CLG are subject to the disclosure requirements that apply to public companies. These include:</p> <ul style="list-style-type: none"> <li>(a) Requirements to notify ASIC of all material changes in administration and governance of the company, including change of name, address, company secretary, directors and constitution;</li> <li>(b) Hold an annual general meeting (<b>AGM</b>) each calendar year within 5 months of the end of the financial year of the incorporated association.</li> <li>(c) Requirement to lodge annual statements of solvency;</li> <li>(d) Requirements regarding the administration of company business such as the conduct of formal meetings, passing and recording resolutions;</li> <li>(e) Requirements relating to maintenance of company financial records;</li> <li>(f) Requirements relating to the maintenance of company registers;</li> <li>(g) Detailed procedures must be followed in relation to the appointment and removal of auditors.</li> <li>(h) Have at least 3 directors and 1 secretary;</li> <li>(i) Have at least 1 member;</li> <li>(j) Have a registered office address and principal place of business located, open and accessible in Australia;</li> <li>(k) Be managed by a Constitution or Replaceable rules;</li> <li>(l) Maintain a record of all directors' and members' meeting minutes and resolutions;</li> </ul>
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	<p>that the statement referred to in (f) was submitted to members at the AGM;</p> <p>(i) The association must have a public officer;</p> <p>(j) An incorporated association must maintain adequate and accurate accounting records of its financial transactions; and</p> <p>(k) Be governed in accordance with the association's constitution.</p>	<p>(m) Appoint a registered company auditor within 1 month of its registration; and</p> <p>(n) Receive and review an annual company statement and pay an annual review fee. A charitable or not-for-profit company may be eligible for a reduced annual review fee if it meets the criteria under the definition of 'special purpose company' in regulation 3(a), (b), (c) or (d) of the <i>Corporations (Review Fees) Regulations 2003</i>;</p> <p>Company members are entitled to vote at AGMs and special. Subject to the company's constitution members vote on issues such as changes to the company's constitution and the appointment of directors.</p> <p>Operating as a CLG also imposes more onerous accounting and financial obligations.</p>

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<b>Director Identification</b>	<p>Director identification is not required legally for an association unless the association is also registered with ASIC as an ARB and has an ARBN. Good governance dictates that an association should keep a clear record of when directors join and leave the board. This facilitates the proper rotation of directors in accordance with the constitution.</p>	<p>The Australian Taxation Office and the Australian Business Registry Services (<b>ABRS</b>) have introduced a Director Identification Numbers (<b>DIN</b>) system. The DIN is a unique identification number assigned to Directors of companies to verify their identity, and which will be permanently attached to the Director.</p> <p>Directors of companies and associations that are registered with ASIC will be required to apply and maintain a DIN. Please note that you do <u>not</u> need a director ID if you are a secretary of a company.</p> <p>All directors of companies must apply for their own director ID online at <a href="https://abrs.gov.au">ABRS.gov.au</a> (no one can apply on their behalf).</p> <p>Directors who were appointed before 1 November 2021 must apply for a director ID on or before 30 November 2022. Directors appointed for the first time between 1 November 2021 and 4 April 2022 must apply for a director ID within 28 days of their appointment. From 5 April 2022, directors appointed for the first time must apply prior to their appointment.</p> <p>For more information about who needs a director ID, including how to apply, please visit <a href="https://www.abrs.gov.au/director-identification-number">https://www.abrs.gov.au/director-identification-number</a></p>



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<p><b>Profits</b> <i>Profits may be distributed to members</i></p>	<p>Incorporated associations may not be formed for the purposes of earning profit for members. If the association earns a profit from commercial activity, this profit may not be distributed amongst the members. Profits are used to further the objectives of the association and not to provide personal gain for its members. Any profit must be used for activities carried on by the association.</p>	<p>As a CLG, there are no restrictions on the entity's ability to trade, earn and distribute profits.</p> <p>A CLG cannot issue shares. However, unless restricted by its constitution, a CLG may make distributions to its members. The constitution of the company will specify the purposes for which profits may be used – for example, in furtherance of the company's principal objectives. <u>Care must be taken in drafting such distribution clauses.</u></p> <p>CLG are often used for 'not-for-profit' activities.</p> <p>Generally, CLG must use the word "limited" or the abbreviation "Ltd" in their name. ASIC may waive this requirement for a not-for-profit company. 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 and the directors of the company must approve all other payments the company makes to its directors.</p>
<p><b>Costs</b> <i>Higher costs for company</i></p>	<p>Costs associated with administering an incorporated association should generally be minor.</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 these 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 the notification requirements which are strictly enforced by ASIC.</p>

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<b>Basic pros &amp; cons</b>	<p><b>Pros</b></p> <ul style="list-style-type: none"> <li>• Simpler registration and less registration and reporting fees.</li> <li>• If an association operates with a relatively small turnover and within one State or Territory only, incorporating under association incorporation legislation of that State is more appropriate.</li> </ul> <p><b>Cons</b></p> <ul style="list-style-type: none"> <li>• Depending on the State some less accountability in terms of governance and financial reporting.</li> <li>• Legislation varies from state to state.</li> <li>• For organisations that operate beyond the border of the State or Territory in which they are incorporated, there are requirements to also register with ASIC and seek an Australian Registered Body Number (<b>ARBN</b>). This means that there are reporting requirements to the State or Territory body <u>and</u> to ASIC.</li> </ul>	<p><b>Pros</b></p> <ul style="list-style-type: none"> <li>• Stricter governance standards.</li> <li>• Can operate nationally without having to separately incorporate in each State and Territory or register as an Australian Registered Body.</li> </ul> <p><b>Cons</b></p> <ul style="list-style-type: none"> <li>• Higher set up (ie incorporation and legal fees) and ongoing administrative costs (ie annual review fee and industry funding fee).</li> <li>• More onerous reporting requirements.</li> </ul>