

OUTLINE OF AUSTRALIAN CAPITAL TERRITORY INCORPORATED ASSOCIATION AND PUBLIC COMPANY LIMITED BY GUARANTEE

	INCORPORATED ASSOCIATION	PUBLIC COMPANY LIMITED BY GUARANTEE
<p>Structure <u>Company - national recognition</u></p>	<p>An incorporated association is a body corporate with a legal personality separate from its members.</p> <p>Incorporated associations constituted by members and governed by a committee of management (which can also be known as a board of directors).</p> <p>Incorporated associations are registered and regulated under the <i>Associations Incorporation Act 1991</i> (Act) (AI Act), which is administered by the Office of Regulatory Services.</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 <u>only</u> in the Australian Capital Territory. Carrying on business outside of the Australian Capital Territory requires registration with the Australian Securities and Investments Commission (ASIC) as an Australian Registered Body (an ARB number is issued).</p> <p>The AI Act imposes less onerous conditions than the Corporations Act which governs the activities of companies. If an association is registered as an Australian Registered Body, it must meet additional administrative and compliance obligations.</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.</p> <p>Companies limited by guarantee are registered and regulated under the <i>Corporations Act 2001</i> (Cth) (Corporations Act), which is administered by the Australian Securities and Investments Commission.</p> <p>A company's registration is recognised, and a company may operate, Australia wide.</p>
<p>Legal Status <u>No real difference</u></p>	<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; 	<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;

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	<p>(e) have a common seal;</p> <p>(f) receive a bequest or gift from a will; and</p> <p>(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>	<p>(b) acquire, hold and dispose of property;</p> <p>(c) act as a trustee;</p> <p>(d) make contracts and enter into tenancy agreements;</p> <p>(e) receive a bequest or gift from a will; and</p> <p>(f) have perpetual succession. The company remains in existence until it is disbanded by operation of the law.</p>
<p>Trading ability</p> <p><u><i>A company may trade in any State or Territory in Australia</i></u></p> <p><u><i>An incorporated association may trade where it is consistent with its purposes but must be registered to trade outside of its local jurisdiction.</i></u></p>	<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.</p>	<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 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>
<p>Winding up and the liability of members</p> <p><u><i>No real difference</i></u></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) 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>A company has limited liability in the event of it being wound up and 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 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><u><i>Similar standards for office holders and directors</i></u></p>	<p>Office holders of incorporated associations are subject to equitable and common law duties. These fiduciary duties require officeholders to:</p> <ul style="list-style-type: none"> (a) act in good faith in the best interests of the company; (b) act for a proper purpose; and (c) give adequate consideration to decisions and keep discretions unfettered. <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> <ul style="list-style-type: none"> (a) act in good faith in the best interests of the company; (b) act for a proper purpose; and (c) give adequate consideration to decisions and keep discretions unfettered. <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>These statutory duties include duties to:</p> <ul style="list-style-type: none"> (a) act in good faith and in the best interests of the company; (b) act with due care and diligence; (c) act for a proper purpose (that is, not for personal advantage or to the company's detriment); (d) not use information acquired for personal advantage or to the company's detriment; (e) disclose material personal interests; (f) not to vote on a matter involving a material personal interest, nor be present when such matters are considered; (g) avoid insolvent trading; (h) retain appropriate discretions, for example when delegating functions to sub-committees of the board; and (i) avoid conflicts of interest. <p>The Corporations Act sets out two defences which may be available to an office holder to defend a claim that he/she has</p>
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		<p>breached a statutory duty - the 'business judgment rule' and 'reasonable reliance on information or advice'.</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 provides that, in certain circumstances, a company may indemnify its directors and officers against personal liability which they may incur in the course of performing their duties.</p>
<p>Compliance and Governance Obligations</p> <p><i>Higher onus for company → means more robust structure, with more checks and balances</i></p>	<p>The AI Act imposes a range of compliance obligations on incorporated associations. These include the following matters:</p> <ul style="list-style-type: none"> (a) Must not be formed or carried on for the purposes of providing financial gain for its members. (b) An alteration of the statement of purposes or rules of an incorporated association must be lodged and approved by the Registrar before it takes effect. (c) An incorporated association must hold an annual general meeting (AGM) each calendar year within 5 months of the end of the financial year of the incorporated association. (d) An incorporated association must submit to its members at an AGM, the audited statement of the association's accounts for the most recently ended financial year of the association; a copy of the auditor's report to the association in relation to the association's accounts for that financial year; a report signed by 2 members of the committee stating: (a) the name of each member of the committee of the association during the most recently ended financial year of the association and, if different, at the date of the report; and (b) the principal activities of the association during the most recently ended financial year and any significant change in the nature of those activities that occurred during that financial year; and (c) the net profit or loss of the association for the most recently ended financial year. (e) The reporting requirements for incorporated associations 	<p>A company's compliance obligations are more onerous than those associated with incorporated associations. Under the Corporations Act companies limited by guarantee are subject to the disclosure requirements that apply to public companies. These include:</p> <ul style="list-style-type: none"> (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. (b) Hold an annual general meeting (AGM) each calendar year within 5 months of the end of the financial year of the company. (c) Requirement to lodge annual statements of solvency. (d) Requirements regarding the administration of company business such as the conduct of formal meetings, passing and recording resolutions. (e) Requirements relating to maintenance of company financial records. (f) Requirements relating to the maintenance of company registers. (g) Requirements relating to directors reporting: A company limited by guarantee is required to prepare only a streamlined directors' report, rather than a full directors' report. The streamlined report must contain: (a) the organisation's short and long term objectives; (b) the

	<p>vary depending on the association's total revenue for the financial year. The reporting requirements are as follows:</p> <ul style="list-style-type: none"> (i) Accounts of an incorporated association must be audited by a person who is not an officer of the association and who has not prepared or assisted with the preparation of those accounts; (ii) If an incorporated association has gross receipts or assets at the end of a financial year of the association exceeding \$400,000, the accounts must be audited by a person who is a member of the Institute of Chartered Accountants in Australia, the Institute of Public Accountants or CPA Australia or who is registered as an auditor under the Coprotations Act, being a person who is not: <ul style="list-style-type: none"> A. an officer of the association; or B. a partner, employer or employee of an officer of the association; or C. a partner or employee of an employee of an officer of the association. <p>(f) At, or soon after, the AGM, a committee member must certify that the committee member attended the AGM and that the statement referred to in (d) was submitted to members at the AGM.</p> <p>(g) The secretary of an incorporated association must lodge an annual statement (including a statement of particulars relating to the association in the approved form, an audited statement of the association's accounts, a copy of the auditor's report in relation to those accounts and any prescribed documents, a statement by two members of the committee of the association certifying whether the provisions of the AI Act that apply to the association in relation to that year in relation to the preparation of the annual statement of the association's accounts and the auditing of the accounts and presentation of the audited accounts at the annual general meeting of the association have been complied with) with the Registrar within the period of 6 months beginning at the end of each financial</p>	<p>organisation's strategy to achieve these objectives; (c) the organisation's principal activities during the last year; (d) how those activities assisted the organisation achieve its objectives; (E) how the organisation measures its performance (i.e. KPI's used); (F) how many Board meetings were held; (G) for each class of members the amount which a member is liable if the organisation were to be wound up; and (H) the total amount that the organisation's members would be liable to contribute if the organisation were to be wound up. In addition, the following information is contained for each director that served during the year: (a) their name and period of the year served; (b) their qualifications, experiences and special responsibilities; and (c) how many meetings they attended.</p> <ul style="list-style-type: none"> (h) Detailed procedures must be followed in relation to the appointment and removal of auditors. (i) Have at least 3 directors and 1 secretary. (j) Have at least 1 member. (k) Have a registered office address and principal place of business located, open and accessible in Australia. (l) Be managed by a Constitution or Replaceable rules. (m) Maintain a record of all directors' and members' meeting minutes and resolutions. (n) Appoint a registered company auditor within 1 month of its registration. (o) 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 Corporations (Review Fees) Regulations 2003. <p>Company members are entitled to vote at annual general meetings and extraordinary general meetings. The members vote on issues such as changes to the company's constitution</p>
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	<p>year of the association.</p> <p>(h) An incorporated association must maintain adequate and accurate accounting records of its financial transactions.</p> <p>(i) It must be governed in accordance with the Association's Rules, which must address the 11 matters set out in Schedule 1 of the AI Act.</p> <p>(j) It must have at least 5 members.</p>	<p>and the appointment of directors.</p> <p>Operating as a company limited by guarantee also imposes more onerous accounting and financial obligations.</p>
<p>Profits</p> <p><u><i>Profits cannot be distributed to members - no real difference</i></u></p>	<p>An incorporated association must not secure a profit for its members (or divide a profit among members or distribute profit to members). However, 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, only because—</p> <p>(a) the association obtains a pecuniary gain, none of which is received by any of its members, or otherwise credited to its members; or</p> <p>(b) the association buys or sells or otherwise deals in goods or services where those transactions are ancillary to the principal object of the association and, if the transactions are carried out with persons other than its members, the transactions—</p> <p>i. are not substantial in number or value in relation to the other activities of the association; or</p> <p>ii. consist of charging admission fees to displays, exhibitions, contests, sporting fixtures or other events organised for the purpose of promoting the objects of the association; or</p> <p>(c) the association—</p> <p>i. is established with the object of protecting a trade, business, industry or calling in which its members are engaged or interested; and</p> <p>ii. does not engage in, or in a branch or part of, the trade, business, industry or calling; or</p> <p>(d) the association provides facilities or services for its</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. 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>

	<p>members; or</p> <p>(e) its members derive a pecuniary gain from the enjoyment of facilities or services provided by the association for social, recreational, educational or other like purposes; or</p> <p>(f) any of its members receives remuneration from the association for goods or services supplied by the member, or otherwise obtains a pecuniary gain from the association to which the member would be entitled if he or she were not a member of the association; or</p> <p>(g) its members compete for trophies or prizes in contests directly related to the objects of the association.</p>	
<p>Costs</p> <p><i><u>Higher costs for company (but not significantly higher)</u></i></p>	<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 the notification requirements which are strictly enforced by ASIC.</p>