

Victoria and NSW
Not-for-profit Law
Guide

Social Enterprise Guide

Legal issues to consider when setting up
a social enterprise

March 2014

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Part 1: Overview of Social Enterprises



Overview of Social Enterprises

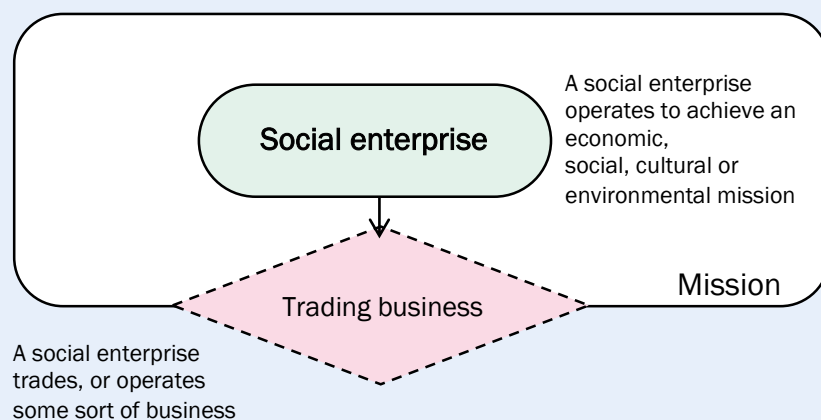
There is no special legal definition of 'social enterprise'. Social enterprises can be 'for-profit' or 'not-for-profit'. The key feature they share is the running of an enterprise to achieve an economic, social, cultural or environmental mission that benefits the public or a particular community

Examples of social enterprises include social purpose business ventures such as community investment banks, small enterprises like op shops, or employment-based enterprises like cafés that hire and train disadvantaged young people, and then use the profits of the café to sustain and expand the social enterprise (therefore employing and training more disadvantaged young people).

Some social enterprises are very public about the fact that they are a social enterprise, using this to help drive consumers to trade with them. Others do not necessarily publicise the social enterprise nature of their business.

Social enterprises worldwide are becoming increasingly sophisticated and social entrepreneurs now have more options than ever before for setting up and structuring a social enterprise, or adding a trading element to an existing not-for-profit organisation.

An example of a social enterprise



What is the definition of social enterprise?

There are non-legal definitions of 'social enterprise' that have been created for particular purposes. One that is often referred to in Australia is the definition used by Social Traders, who are a specialist social enterprise development organisation. The Social Traders definition is helpful, and may be used or required by some funders, but it is not a legal definition. The definition is:

Social enterprises are organisations that:

- a) are led by an economic, social, cultural, or environmental mission consistent with a public or community benefit*
- b) trade to fulfil their mission*
- c) derive a substantial portion of their income from trade, and*
- d) reinvest the majority of their profit/surplus in the fulfilment of their mission.*

Read more about Social Trader's discussion of this definition [here](#).

Some other jurisdictions, including the United Kingdom and the United States of America, have created special corporate structures that can be used by social enterprises. They are called 'Community Interest Companies' in the UK, and 'Benefit Corporations' in the USA. There is no special structure in Australia.

There are also a range of social enterprise certifications available around the world. These are private certifications earned when an organisation meets the criteria of the certifying body (similar to 'organic' or 'fair trade' certifications). There are certifications that can be awarded to Australian social enterprises, such as the **B Corp** certification awarded by B Lab, which is available to for-profit businesses including social enterprises. To be certified as B Corp, an organisation must meet B Lab's standards of social and environmental performance, transparency and accountability, and meet certain legal criteria.

Social enterprises in Australia can be for-profit or not-for-profit, or even a hybrid of both. There are benefits and downsides to a for-profit and not-for-profit structure in some cases, which can mean organisations create a hybrid structure to access the advantages of both for-profit and not-for-profit structures. Structuring options are discussed in more depth in Part 4 of this Guide.



Part 2: Important factors to consider when starting a social enterprise





Important factors to consider when starting a social enterprise

This section covers key considerations when setting up including:

- preliminary questions to consider
- whether a social enterprise should incorporate
- deciding between not-for-profit and for-profit
- whether a social enterprise should consider becoming a charity

Many groups are considering setting up social enterprises or adding a social enterprise to an existing organisation. When getting started, there are some very important legal decisions that groups need to make along the way, and getting them right from the start will save you time, effort and fees down the track. This part of the Guide will direct you towards the key issues you need to consider at the initial stages of starting up a social enterprise.

1. Preliminary questions

Before you start setting up your social enterprise, it is a good idea to think carefully about what you want your social enterprise to look like, what issue you are trying to address, and what approach you should take to address that issue.

Some questions to consider are:

- Can you clearly describe the particular social or environmental mission of your enterprise?
- What issue are you trying to address? How will your social enterprise contribute to resolving that issue?
- Is anyone else working to resolve the issue? If yes:
 - What can we learn from them?
 - Should we join them?
 - Where is the issue? Is it within 1 state, or is it across multiple states or territories? Where will the enterprise operate?
- Where will your funding will come from, and who will oversee the enterprise and its operations?

TIP

We recommend you read and complete our Questions About Your Group checklist on our [Before you start page](#). This checklist will help you to clarify your ideas and goals, and will help you with the further information in this Guide and on our website.



We recommend that you consider these questions now and then again after reading this Guide. Understanding the implications of the law on the operations of a social enterprise may change your views.

If the details and practicalities of your idea are still unclear in your mind, you may find it beneficial to talk to someone about your idea, or join a program that helps social enterprises get started, such as the CRUNCH program, which is run by Social Traders (normally in Melbourne), or coaching provided by Social Enterprises Sydney to groups in Western Sydney.

FURTHER READING

To read more about Social Traders and the CRUNCH program, visit the CRUNCH website at www.socialtraders.com.au/thecrunch

To read more about Social Enterprises Sydney, visit their website at www.socialenterprises.com.au.

Business Plan

A business plan is essential for setting up a successful social enterprise, and is often a critical tool when convincing funders to support your project. If you already have a business plan, you might want to revisit it after you have finished reading this Guide, once you have considered all the legal issues involved.

Your business plan should be settled before you incorporate, because it will help you to make an informed decision about your legal structure. It is time consuming and expensive to change legal structures down the track.

Business plans can be difficult to draft, however they are very helpful for making decisions, getting funding and staying on track as you progress setting up your social enterprise.

TIP – DRAFTING YOUR BUSINESS PLAN

There are many government departments, private organisations and other services available to help you formulate a great business plan.

- Social Traders have a free online business planning tool, which is designed specifically for social enterprises. Social Ventures Australia also offers a free online business planning guide, and Social Enterprises Sydney also has resources and training.
- The federal government's business website contains helpful free business planning tools, 'how-to' guides and case studies and examples to help you draft a business plan.
- On the relevant state government websites, you will find helpful free business planning guides for Victoria, New South Wales, Tasmania, Western Australia, Queensland, and South Australia.
- Some of the major Australian banks have also produced helpful free business planning tools:
 - Commonwealth Bank
 - National Australia Bank
 - Westpac, and

- [ANZ](#).

- There are also private businesses such as [Business Planning HQ](#) and [Smart Business Plans Australia](#) who, for a fee, can assist you with drafting a business plan.

Funding your organisation

Identifying sources of funding for your organisation is crucial when creating your business model, and deciding whether your organisation will be for-profit or not-for-profit will directly affect the sources of funding available to your organisation. For example, only for-profit organisations can be funded by equity purchased by investors; and only not-for-profit organisations can seek tax deductible gifts. Most philanthropic grants are only available to not-for-profit organisations (and more specifically many philanthropic grants are only available to charities - for a discussion of the difference between not-for-profit and charity see section 3 of this Part).

The complexity of the funding sources your organisation chooses to utilise will often depend on your organisation's specific arrangements or circumstances. [The table below is intended to be a brief, generic summary of the funding sources \(or sources of capital\) available to social enterprises.](#)

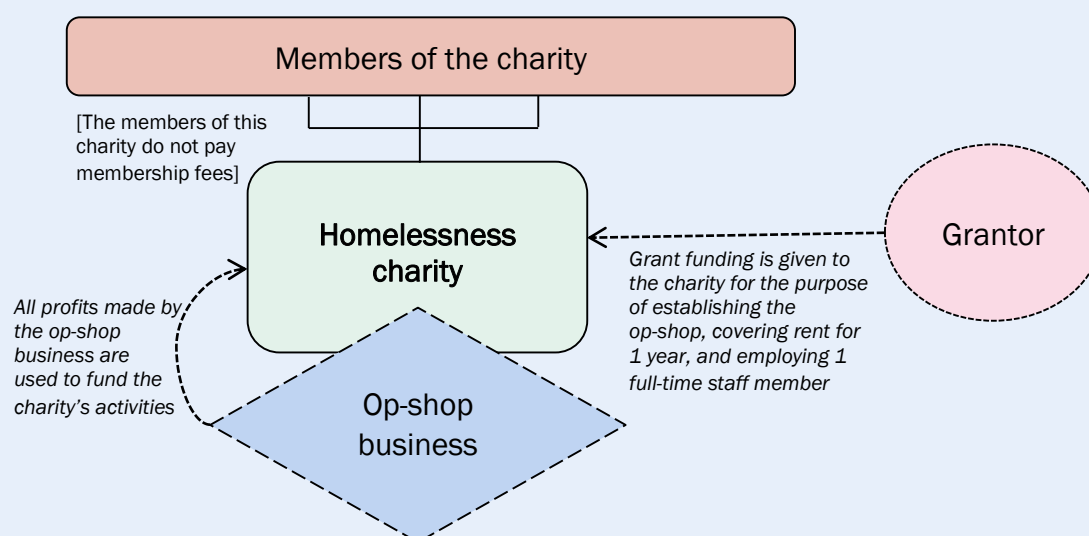
| Funding sources | Eligible/suitable entities | | Level of Complexity |
|-------------------------|----------------------------|----------------|---------------------|
| | For-profit | Not-for-profit | |
| Equity | ✓ | ✗ | High |
| Debt | ✓ | ✓ | Medium - high |
| Donations | ✗ (with some exceptions) | ✓ | Low |
| Grants | ✗ (with some exceptions) | ✓ | Medium - high |
| Social Investment Bonds | ✓ | ✓ | High |
| Crowd Funding | ✓ | ✓ | Low |
| Micro donations | ✗ (with some exceptions) | ✓ | Low |
| Membership fees | ✗ | ✓ | Low |

Case Study

A charity which focuses its mission on homelessness was given a grant to start an op-shop business, with the aim of creating an ongoing enterprise that would partly fund the charity's activities. The program would continue after the 1 year grant period if it was successful.

The terms of the grant were that it was for a 1 year period, and all the profits raised by the op-shop business would be invested back into the charity. The charity was also required to acquit the grant (ie. it was contractually required to report to the grantor).

The op-shop set up by the charity is an example of a social enterprise being set up by an existing not-for-profit organisation (the charity is an incorporated association), using grant funding. You can see the structure of the organisation and the flow of funds in the diagram below.



2. Should you incorporate?

Is it necessary to incorporate a new entity?

Before you decide to incorporate, it is a good idea to test the assumption that you need to set up and operate an incorporated entity to achieve your goals. Some options that do not require setting up a whole new organisation are discussed below.

- **Continue unincorporated:** It may be possible to undertake your activities without incorporating. There are some particular benefits to incorporating, for example: limited liability for members, the ability for the incorporated body to enter into agreements in its own name, and the preference of many funders for organisations to be incorporated.
- **Join another organisation:** Is there an existing organisation whose purposes and aims are consistent with yours? If there is, it might be a good idea to investigate joining that organisation, presenting your idea to the organisation, or teaming up in some other way to work together. Some

FURTHER READING

For more information, go to the Not-for-profit Law webpage which discusses [the incorporation decision](#).

organisations will consider proposals for new projects, or may be willing to employ you to run a new project.

- **Auspicings:** Some not-for-profit organisations are willing to auspice projects, such as social enterprises that are in the pilot, or incubation stage. This normally involves an auspicings agreement between your group and the auspicings body. An auspicings agreement is basically an agreement to work with another organisation, and a way for an organisation to access funding without being incorporated. Under an auspicings agreement, one organisation (the principal organisation) agrees to apply for funding for another person or group (the auspicee), and if the funding is received, the principal organisation receives, holds, and disperses the funding to the auspicee for their project. It is a good way for organisations to work together to achieve aligned purposes. Before approaching another organisation to auspice your project, you should carefully consider a number of important issues, including checking that the principal organisation's purposes are consistent with yours, and that the funding options that you think best suit your project can be administered by that organisation.

RELATED RESOURCES

For more information about auspicings or joining another organisation, read the part of our website which discusses [working with other organisations](#).

For a detailed list of issues you should consider before considering an auspicings arrangement, see the part of the Information Hub that discusses [agreements](#).

NOTE

Only some organisations are willing to auspice projects.

You should be aware that many philanthropic organisations won't allow auspicings arrangements, and organisations that are willing to auspice often charge an administrative fee.



3. If incorporating, should we choose to be for-profit or not-for-profit?

In this section we have summarised the key legal issues you should consider when choosing between incorporating as a for-profit or not-for-profit entity. Choosing which legal structure to adopt for your social enterprise is the most important decision you will make when getting started, and whether you are not-for-profit, for-profit, or a hybrid of the two, will significantly impact the way you can run and fund your enterprise.

Importantly, the legal structure you choose will affect:

- the sources of funding available to your social enterprise, and whether or not your enterprise can attract 'investors' for funding. For this reason, your business model will strongly impact your choice of structure
- the tax concessions your social enterprise is eligible for
- ongoing reporting and governance requirements you must meet, and
- whether or not your social enterprise can be registered as a charity.

Factors influencing the not-for-profit vs for-profit decision

When thinking about what structure is appropriate for your organisation, we recommend that you consider the following questions, which will help you to apply the information in this Guide.

| Question | Relevance |
|--|---|
| Where will your funding come from? | Donations and philanthropic funding can be generally only be directed to not-for-profits. For-profit entities can seek investors to raise funds. |
| Where do you want profits to go? | A fundamental characteristic of not-for-profit organisations is that profits are not distributed outside of the organisation – which means no dividends or distributions can be made, and <i>all</i> profits are directed to achieving the organisation’s mission. In a for-profit organisation, profits are often distributed to shareholders/investors. In a for-profit social enterprise, profits are normally partially distributed to investors and partially reinvested into the organisation. |
| Is it important for your enterprise to be perceived as not-for-profit? | Public perception may inform your choice of structure. |
| Do you want investors/owners or members? | Some structures have investors and/or owners, some have members; these are not the same. |
| Does your organisation hope to access charitable tax concessions? | Only not-for-profits can access the majority of the tax concessions available, and only not-for-profits can be charities. |

Hybrid Structures

Hybrid structures are a use of two (sometimes more) entities to form one social enterprise. Quite often, none of the legal structures discussed in this Guide are a perfect fit for a social enterprise. For example, you may want to choose a private company structure so you can have access to equity funding from socially minded investors, but will be undertaking certain activities that meet the definition of charitable. Or, you may want a not-for-profit structure, but have a particular project that could attract investors.

Hybrid structures can be useful to harness the benefits of both for profit and not-for-profit structures by:

- expanding funding avenues that might not be available to a singular corporate structure (for example, equity is not available to a not-for-profit structure such as an incorporated association)
- limiting the exposure of a charity to liabilities of trading activity by creating a for-profit subsidiary that trades and owns property, or
- enabling an enterprise to separate its activities, to obtain charity, or even DGR status, which may not have been possible if the enterprise was a singular corporate structure (this benefit is achieved if each element of the hybrid has separate governing documents).

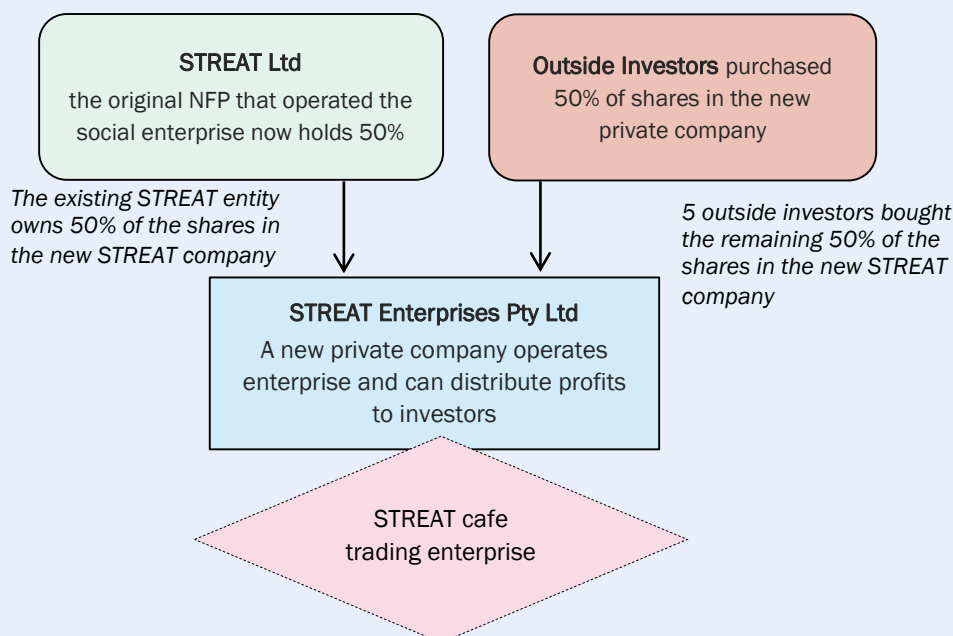
Hybrid structures are discussed in more detail at Part 3 of this Guide.

Case study

STREAT Ltd is a Melbourne-based not-for-profit social enterprise that operates café businesses and employs young homeless Australians. In 2012, STREAT bought 2 cafes and a coffee roasting business from another social enterprise. **In doing so, it changed its legal structure to form a hybrid model, which involved both a private company and a not-for-profit entity.**

In preparation for buying the cafes and coffee roasting business, STREAT formed STREAT Enterprises Pty Ltd, a private company. STREAT Enterprises would directly own the cafes and coffee roasting business, and all the enterprise's trading would be done through STREAT Enterprises. The purchase would be financed by selling 50% of the shares in STREAT Enterprises to investors. STREAT Ltd would own the other 50%.

STREAT initially operated as a not-for-profit social enterprise entity. However the social enterprise was restructured before the purchase of the cafes and coffee roasting business occurred. The final hybrid structure of STREAT looked like this:



This hybrid structure was beneficial for STREAT for three main reasons:

- it enabled STREAT Ltd to remain a public benevolent institution and keep its DGR status
- it gave STREAT access to significant amounts of funding and more funding opportunities in the future, through the sale of equity in STREAT Enterprises, and
- it transferred liability for trading and ownership of the cafes and coffee roasting business to STREAT Enterprises.

Tax concessions and their impact on the 'for-profit vs not-for-profit' decision

Social enterprises need to very carefully consider whether the benefits of tax concessions outweigh the restrictions that concessions place on an organisation. The table below sets out which types of organisation are eligible to apply for tax concessions. Most tax concessions are only available to not-for-profit organisations.

Tax concessions can provide a range of benefits, such as allowing donors to claim their donations as a tax deduction, allowing staff to claim certain salary benefits, and reducing income tax for the organisation.

It is worth noting that many social enterprises are able to operate using a for-profit structure, without accessing tax concessions, and can take advantage of the benefits of being a for-profit, such as attracting social investors. A for-profit social enterprise can still receive gifts and donations even if it does not have Deductible Gift Recipient (**DGR**) endorsement, but cannot undertake charitable fundraising activities unless it is not-for-profit. DGR endorsement can be a requirement for larger donors and grants from trusts and other philanthropic funders that require DGR, but corporations do not benefit from DGR benefits (and therefore, if donations will come from corporations, DGR is of little value). The different tax exemptions are briefly explained below (there are some exceptions to the general positions in the table below).

! CAUTION

Tax concessions can place additional administrative and reporting burdens on organisations.

| Tax Exemption | Eligible organisations | NFP | FP | Charity |
|-------------------------------------|---|-----|----|---------|
| (a) Income tax exemptions | <ul style="list-style-type: none"> Charities registered with the ACNC and endorsed by the ATO as exempt from income tax. Certain community service organisations, cultural, educational, employment, scientific, sporting and health organizations (as specified in the <i>Income Tax Assessment Act</i>). Other categories specified in the <i>Income Tax Assessment Act</i> such as a fund established (by will or trust) in order to contribute to another charitable fund, employee or employer associations, trade unions, promotion of tourism, public health organisations etc. | ✓ | ✓ | ✓ |
| (b) GST concessions | <ul style="list-style-type: none"> Charities who are registered with the ACNC and endorsed by the ATO as 'tax concession charities'. Not-for-profit organisations who have DGR endorsement from the ATO. Certain other organisations and funds, such as school charitable funds. | ✓ | ✗ | ✓ |
| (c) Fringe benefits tax concessions | <ul style="list-style-type: none"> FBT exemptions are available to some NFPs (provided the fringe benefits provided to employees are not more than the relevant capping threshold) eg: <ul style="list-style-type: none"> Public benevolent institutions Health promotion charities, and Public and non-profit hospitals. Charities registered with the ACNC and endorsed by the ATO as a charitable institution. | ✓ | ✗ | ✓ |

| | | | | |
|----------------------------|--|---|---|---|
| | <ul style="list-style-type: none"> • Certain other not-for-profit organisations (subject to the \$30,000 capping threshold): <ul style="list-style-type: none"> • religious, educational, charitable, scientific or public educational institutions • that encourage music, art, literature or science • that encourage or promote a game, sport or animal race • for community service purposes • to promote the development of Australian information or resources, or • to promote the development of agricultural, pastoral, horticultural, fishing, manufacturing or industrial resources of Australia. | | | |
| (d) DGR endorsement | <ul style="list-style-type: none"> • Organisations which fall within one of the categories of organisations specified in the <i>Income Tax Assessment Act</i> and are endorsed. • Organisations who are specifically listed in the <i>Income Tax Assessment Act</i>. | ✓ | ✗ | ✓ |

If you decide to use a not-for-profit structure for your social enterprise, tax exemptions and concessions are an important benefit you should consider. Not all tax exemptions and concessions are available to all not-for-profit organisations - some are only available to charitable organisations registered with the ACNC. DGR endorsement is also only available to certain kinds of organisations (there are particular categories that an organisation needs to fit into to be endorsed as a DGR).

The benefits associated with the tax concessions outlined below are summarised as:

- **Income tax exemption:** If your organisation qualifies for income tax exemption, then it will not have to: pay any income tax on its taxable income, lodge tax returns, or keep certain complicated financial information, which would usually be necessary to lodge a tax return. Under *the Income Tax Assessment Act*, for-profit organisations are not exempt from income tax unless their dominant or primary purpose is to promote the advancement of one of the recognized categories of charity or non for profit categories.
- **GST concessions:** Not-for-profit organisations are required to be registered for GST if the organisation has an annual turnover of more than \$150,000. An organisation that is required to be registered for GST is required to pay GST to the ATO if it sells something, and can claim an 'input tax credit' from the ATO for the amount of GST included in the price of goods and services it purchases. There are various, specific types of GST concessions for the not-for-profit sector.
- **Fringe benefits tax concessions:** Generally, fringe benefits tax is payable by an employer on the value of non-salary benefits which are provided to its employees. This tax is usually passed on to the employee by the employer. A rebate is available to eligible not-for-profit organisations
- **Deductible Gift Recipient endorsement:** DGR endorsement is a special kind of tax status allowing that people who donate to organisation to 'deduct' those donations from their own income for tax purposes. DGR endorsement also makes an organisation eligible to receive funds from certain grant makers and philanthropic bodies that can only fund DGRs. If your business

NOTE

Getting DGR endorsement is a complicated and lengthy process. You will probably need a lawyer to assist you.

plan is relying on a significant proportion of your funding coming from philanthropic grants and larger donations from trusts or funders, your organisation should carefully examine whether it is eligible for DGR endorsement.

- **State based tax concessions:** In addition to the federal taxes described above, states also collect separate taxes through the various state revenue offices, such as stamp duty. Your organisation may be eligible for state tax concessions. Eligibility for tax concessions will be based on whether the organization retains profit for its members or not (there are some additional very specific activities which can attract state tax exemptions that are unlikely to be related to a social enterprise such as activities of trade unions).

RELATED RESOURCES

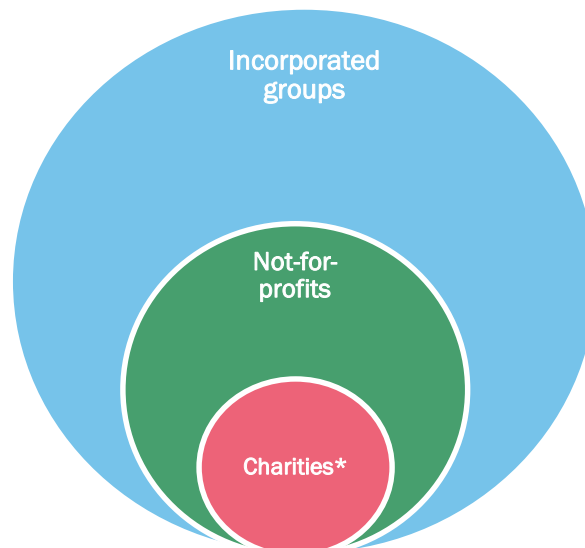
Not-for-profit Law has many resources on tax concessions that cover their implications in more detail as well as eligibility requirements and processes for applying. See the part of our Information Hub that discusses [tax](#).



4. Should our organisation register as a charity?

Only not-for-profit organisations can register to become charities (in some very limited circumstances, organisations with traditionally for-profit structures have been able to establish themselves as not-for-profit, for example Pty Ltd structures). Eligible organisations can register as charities with the ACNC.

The benefits of registering as a charity are summarised in the table on the next page. There are some limitations to becoming a charity that are also noted.



*Note some charities are unincorporated, such as trusts

According to the ACNC, to register as a charity an eligible organisation must:

- meet the definition of ‘charity’ (an organisation is likely to meet the definition of ‘charity’ if it is not-for-profit, has a charitable purpose, and be for the public benefit)
- have an Australian business number
- meet the ACNC governance standards, and
- not be a type of organization that cannot be registered (this included political party, government entity, or engaged in, or supporting terrorist or other criminal activities).

Charitable purpose has a special legal meaning, and a new definition of what is ‘charitable’ came into effect on 1 January 2014. Charitable purposes recognised by the law include:

- relieving poverty, sickness, disease or human suffering or the needs of the aged
- advancing education
- caring for the aged or disabled
- disadvantage of individuals or families
- human rights
- advancing religion, and
- other purposes for the public benefit (a general category).

! CAUTION

According to the definition of charity in the new *Charities Act 2013 (Cth)*, an entity that is not-for-profit and has charitable purposes or purposes incidental or ancillary to, and in furtherance of, charitable purposes, and operates for the public benefit may be registered as a charity. The new legislation clearly sets out the various ‘charitable purposes’.

There are certain benefits and limitations to becoming a charity that you should consider.

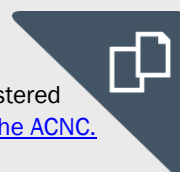
| Benefits | Limitations |
|---|--|
| Charities can often (but not always) get DGR endorsement, which gives charities greater access to donations and grant funding. | Members of charities cannot receive any benefit (ie. charities cannot return dividends to investors). |
| Charities can access federal tax concessions – income tax concessions in particular are very helpful for charities who generate income. | A charity’s activities are limited by their charitable purposes. |
| Being registered as a charity means your organisation will be searchable on the register of charities (maintained by the ACNC) – this can help the public have trust and confidence in your organisation. | Details of directors are publicly available on the register of charities. |
| If your group incorporates as a CLG, its reporting requirements are lower if it is registered as a charity (because certain obligations under the Corporations Act do not apply to charities). | If your organisation is incorporated as a state-based structure such as an incorporated association, it will need to report to both its state-based regulator, and the ACNC. |

FURTHER READING

For more information about charities, and if your social enterprise could be eligible to be registered as a charity, see the ACNC’s factsheet which discusses [who can register to be a charity with the ACNC](#).

Also see the part of our Information Hub which discusses [charities](#).

If you are not sure, you may want to get legal advice about your organisation’s eligibility for charitable status before you start the process of applying to the ACNC.



Part 3: What legal structure should we choose?

Once you have considered the issues discussed in Part 2, and have decided whether your social enterprise will be for-profit, not-for-profit, or a hybrid form of both, you need to decide the legal structure you will use.

What legal structure should we choose?

This section covers:

- not-for-profit structure options
- for-profit structure options
- the relevance of ongoing obligations on structure choice
- adding a social enterprise to an existing organisation

Once you have considered the issues discussed in Part 2, and have decided whether your social enterprise will be for-profit, not-for-profit, or a hybrid of both, you need to decide the legal structure you will use.

This is a very important decision, which will affect other issues like the different types of funding your social enterprise can receive, eligibility for tax concessions and the ongoing reporting requirements you must meet.

The following table provides an overview of structures available to social enterprises of different types.

| Structure | Can be used in for-profit? | Can be used in not-for-profit? | Can be used in a hybrid? |
|------------------------------------|--|--------------------------------|--------------------------|
| Private company (Pty Ltd) | ✓ | ✗ in general | ✓ |
| Incorporated association (Inc.) | ✗ | ✓ | ✓ |
| Company Limited by Guarantee (Ltd) | ✗ | ✓ | ✓ |
| Co-operative | can be structured to provide profit to members | ✓ | ✓ |
| Indigenous Corporation | ✓ | ✓ | ✓ |

1. For-profit

All for-profit companies have shareholders, who ultimately own 'equity' in the company through holding shares in it. There are both 'private' and 'public' companies. Public companies have shares that can be traded on a stock exchange. Private companies have shares that can only be privately held and traded. Most social enterprises use a private company structure. Shareholders are also sometimes called 'investors', but holding shares in a company is only one way of investing in a company. For-profit companies have constitutions that set out rules of the company, and will have at

least one director. Depending on the size of the company, a for-profit will also have a board of directors who are responsible for overseeing the company.

The key difference between a for-profit company and a not-for-profit company is the way that profits are used. In a for-profit company, profits can be distributed to the shareholders (normally in accordance with rules). This is called 'making distributions' or 'paying dividends'. In a social enterprise setting, a for-profit company normally distributes some profits to investors, and retains some profits to be re-directed back in to the social enterprise and achieving the mission of the company.

ASIC regulates for-profit companies, and the compliance and reporting requirements imposed by ASIC are quite onerous. The Corporations Act also imposes strict legal duties on board members, or 'directors' of private companies, including the duty to act in good faith in the best interests of the shareholders of the company.

Start-up funding for private companies generally comes from its shareholders buying initial shares in the company and also from borrowing. For-profit companies provide protection to directors and shareholders, as personal liability is limited to the unpaid amount on shares owned in the company.

! CAUTION

The legal requirement to act in the best interests of the shareholders can be a tricky area for for-profit social enterprises, as sometimes there can be a tension between the best interests of the shareholders, and the best interests of the social enterprise and its social mission.

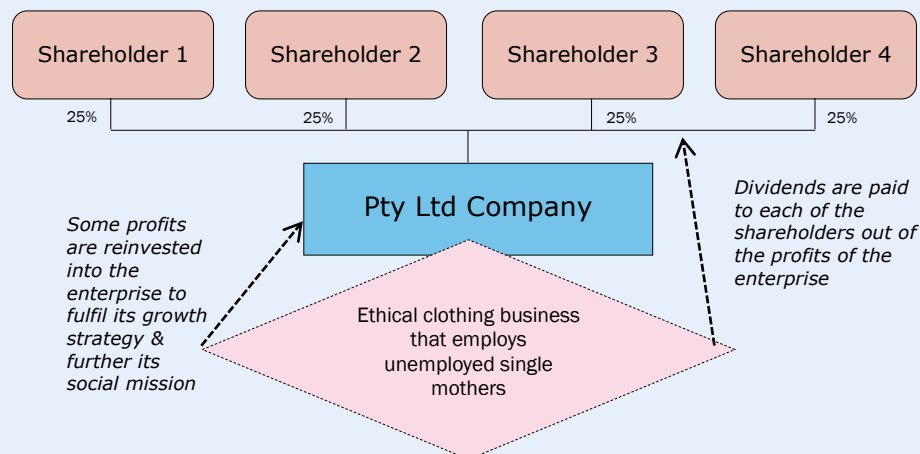
NOTE

Not-for-profit organisations can hold shares in for-profit companies. This is sometimes the case for organisations with 'hybrid' legal structures, which combine for-profit and not-for-profit structures. A not-for-profit organisation might hold shares in a private company, which carries out the day to day business of the organisation.

Example

A private company runs an ethical clothing social enterprise, set up to employ intellectually disabled young people. The op shop received its start up funding from shareholders (also called investors), who each invested money to buy 25% of the equity in the company. Shareholders can be individuals, other companies, not-for-profit entities or even trusts. They invest by buying shares in the company.

The structure of a social enterprise set up as a private company might look like this:



In this example, let's assume that the op shop now makes a profit. Because the op shop is operated by a private company, it returns money to its shareholders by paying dividends. But because the private company is also a social enterprise, some of the profits are reinvested back into the social enterprise, to further its social purposes.

A private company owes duties to its shareholders under the Corporations Act, and a social enterprise is a business that uses its profits to further its social or environmental purposes. A social enterprise with a private company structure must balance these obligations.

2. Not-for-profit structures

There are a few different legal structures which are commonly used by not-for-profit social enterprises, and they are summarised in this section. There are benefits and limitations to each structure.

| Structure | Benefits | Downsides |
|--------------------------------|--|---|
| Incorporated associations | <ul style="list-style-type: none"> • Less onerous reporting obligations • Regulator takes 'educative' approach to enforcement • Sometimes cheaper to set up | <ul style="list-style-type: none"> • Groups with less than 5 members cannot use this structure • State-based structure makes it difficult to operate across different states |
| Companies limited by guarantee | <ul style="list-style-type: none"> • National regulator • In the case of charities, simpler reporting requirements as reporting is to the ACNC not ASIC | <ul style="list-style-type: none"> • Expensive to set up • If not a charity, complex reporting requirements to a strict regulator (ASIC) |
| Co-operatives | <ul style="list-style-type: none"> • Cheaper set up costs • Fewer auditing and financial obligations | <ul style="list-style-type: none"> • Unlimited liability for members (unless it has voluntarily been incorporated under the <i>Co-operatives Act 1996</i> (Vic)) • All members must have a direct involvement with the primary activity of the co-operative |
| Indigenous corporations | <ul style="list-style-type: none"> • Takes into account indigenous customs and traditions | <ul style="list-style-type: none"> • Excludes non-indigenous groups |

TIP

For more detailed information, read our factsheets that discuss the main incorporated legal structures that are used by not-for-profit organisations on our Information Hub page, [here](#). Summaries are provided below.



Incorporated associations

An incorporated association is similar to a company in that there is a legal structure with a group of members and a governing body. The entity has a separate legal identity to its members. While members have certain rights, such as voting rights, they do not have a right to receive profits of the association. This is why incorporated associations are 'not-for-profit'.

Incorporated associations can charge a joining fee and/or subscription fee to members, and can provide members benefits consistent with their purposes (for example, a tennis club charges members a yearly fee and in return members can hire tennis courts and access discounted tennis lessons).

Incorporated associations must have a set of 'purposes', as well as rules of the association (also known as a constitution), which are to be lodged with Consumer Affairs Victoria (**CAV**), upon applying to become an incorporated association. The activities of the association must be directed to those purposes and comply with the rules. Incorporated associations can make a profit, but that profit must be re-invested into activities directed to achieving the purposes of the association.

An incorporated association is run by an elected management committee and secretary, and must have rules that govern how the incorporated association functions. The laws relating to incorporated associations are different in each State or Territory

NOTE

- In Victoria, the [Associations Incorporation Reform Act 2012 \(Vic\)](#) is regulated by [Consumer Affairs Victoria](#).
- In New South Wales, the [Associations Incorporation Act 2009 \(NSW\)](#) is regulated by the [NSW Department of Fair Trading](#).



Company limited by guarantee

A company limited by guarantee works differently to other companies formed under the Corporations Act. The members of CLGs agree to a 'guarantee' (that is, pay the company's debts if the company can no longer pay them) up to a certain amount. This means that a CLG doesn't have shareholders, so it can't raise money by issuing shares, and pay dividends to its members. For this reason a company limited by guarantee is also 'not-for-profit'.

CLGs are subject to the same strict legislation as they are regulated under the same legislation as Australian companies (the **Corporations Act**), however some most requirements of CLGs are different (and more simple) than those that apply to for-profit companies.

If a CLG is registered as a charity, the majority of requirements under the Corporations Act no longer apply, and the CLG reports to the ACNC instead, in line with the ACNC Governance Standards and financial reporting requirements.

REMEMBER

Companies Limited by Guarantee are regulated by ASIC, unless they are a charity, where much regulation is the responsibility of the ACNC instead.



Co-operatives

Co-operatives are organisations based on voluntary, democratic participation from the members that form the organisation. Those members own and control the group, and income is used to develop the cooperative, or is proportionally returned to the members. Co-operatives can be run for the members, but as a social enterprise must also be run to benefit the community in some way. Co-operatives have their own special legislation and rules, which vary between states.

Many of the 'original' social enterprises, such as mutual societies, were set up as co-operatives. There are 2 main types of co-operatives:

- co-operatives that have share capital and can pay returns to members, and
- co-operatives that do not pay returns to members and may or may not have share capital.

Cooperatives that trade for the benefit of their members (ie. their members can make a profit) cannot be not-for-profit structures. However, like other not-for-profit structures, co-operatives can trade to make profit and be not-for-profit so long as the profits cannot be distributed to members.

NOTE

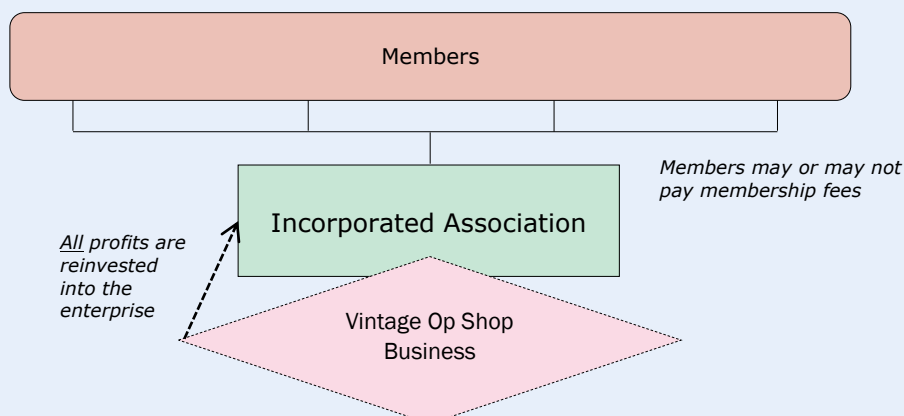
Similarly to incorporated associations, Victorian co-operatives are regulated by Consumer Affairs Victoria (which regulates the *Co-operatives Act 1996 (Vic)*) and NSW co-operatives are regulated by Fair Trading NSW (which regulates the *Co-operatives Act 1992 (NSW)*). A new uniform national regime came into effect in March 2013. Administration of the uniform laws continues to be the responsibility of each State and Territory, but with a commitment to achieve uniform processes and policies.



Indigenous corporations

Indigenous corporations are established under the *Corporations (Aboriginal and Torres Strait Islanders) Act 2006 (Cth)* and are regulated by the [Federal Office of the Registrar for Indigenous Corporations \(ORIC\)](#). Indigenous corporations are registered with ORIC, and the laws that apply to them were written to meet the needs of indigenous communities. There are reporting and other compliance and governance requirements, but they are more relaxed than those that apply to other organisations.

Example of a not-for-profit social enterprise structure



Like the earlier example, this incorporated association also runs a vintage op shop social enterprise, set up to employ intellectually disabled young people. The op shop was set up as a

not-for-profit incorporated association with DGR funding, and received its start-up funding from community donations received through crowdfunding, using a platform called Kickstarter.

The fundamental characteristic of a not-for-profit social enterprise is that all of its profits are reinvested to further the purposes of the social enterprise.

In this example, let's assume that the op shop now makes a profit. Because the op shop is operated by a not-for-profit incorporated association, all of its profits are reinvested back into the social enterprise to further its social purposes.

Hybrid structures

As discussed at earlier points in this Guide, it is possible to use a combination of not-for-profit and for-profit structures to achieve an outcome that will suit your business plan, and enable the opportunity for both equity investment and access to tax concessions.

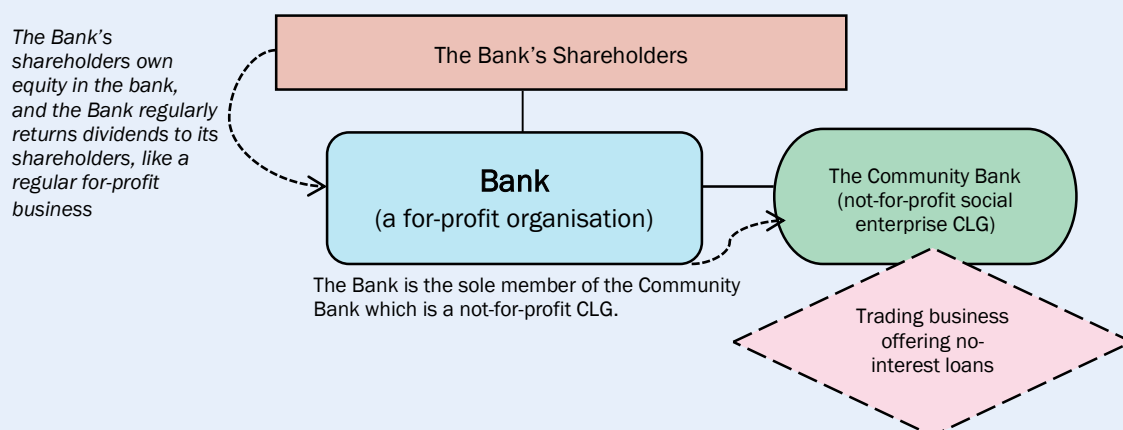
A hybrid case study

An Australian bank has decided that it needs to improve its public image by getting more involved in community assistance. The bank's board has decided it wants to set up a social enterprise to offer small, no-interest loans to entrepreneurial immigrants who want to set up their own businesses. The bank wants the enterprise to be separate from its other businesses for several reasons, such as:

- the community bank is not expected to make any profit, and the bank would like this to be made clear to its shareholders, and
- the bank's board wants to make sure the community bank is able to be set up as a charity and receive the benefits of registration as a charity, and therefore wants to separate the community bank's activities from the rest of the bank.

The board has decided that the social enterprise would be set up as a CLG, with the bank being the only guarantor (or member). Because the bank is a for-profit company, the social enterprise became part of a hybrid structure.

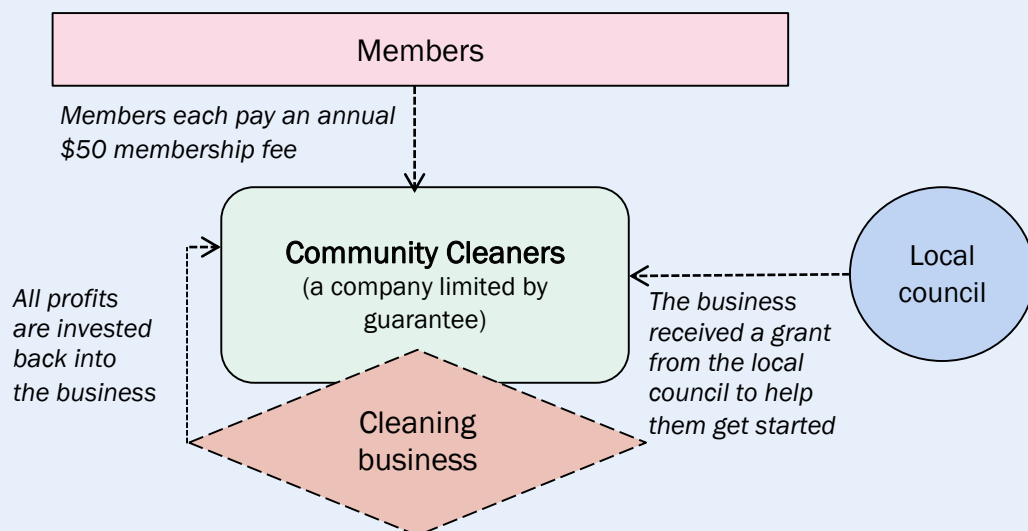
As you can see, the bank and its social enterprise have a hybrid structure: a for-profit organisation has incorporated a not-for-profit organisation to run the social enterprise.



Case study

A local migration agent and his wife decided to start up a not-for-profit cleaning business, which employs new migrants who have been settled in their local community, and pays them a fair wage. The business was set up as a company limited by guarantee. The agent and his wife, as well as some of the agent's colleagues, became the members of the company limited by guarantee, and they each pay an annual \$50 membership fee. The business also successfully applied for a grant from the local council, which they used to buy cleaning equipment, train their staff, and buy some vehicles.

The diagram below illustrates the structure of this social enterprise, as well as their flow of funding.



A new structure on the horizon?

The UK and USA have created specific legal structures especially for social enterprises that aim to reduce the tension between social mission and accountability to investors.

In the UK, this special legal structure is called a "community interest company" (CIC). People establishing CICs can choose between three structures: a company limited by guarantee, a company limited by shares, or a public limited company. Those last two types of CIC can issue shares to investors, but with restricted rights attached to these shares, such as a cap on dividends. This allows social enterprises to choose company structures which give them access to equity funding, while still maintaining the character of a social enterprise.

In the USA, the special legal structure is called a "benefit corporation", which has particular legal requirements that allow it to generate both shareholder and social benefit. The US-based not-for-profit organisation called "B Lab" lobbied for this special legal structure. B Lab is a not-for-profit organisation which certifies some corporations (around the world) as 'B Corps', if they meet certain standards of social performance, accountability and transparency. Certification by B Lab is not a legal structure, but is a public endorsement by B Lab that a company meets the standards set by B Lab.

There are a small number of businesses in Australia who have been certified as B Corp, such as [Small Giants](#), [Whole Kids](#) and [TOM Organic](#).

3. Ongoing obligations as a consideration

Different reporting and compliance obligations will apply to your enterprise, depending on which legal structure you choose. You should consider what level of reporting and compliance you and your enterprise can manage before deciding on a legal structure. Also, be aware that some regulators are stricter than others. Some regulators, like the ACNC, take a more educative approach to enforcement, whereas regulators like ASIC generally take a stricter approach.

The reporting requirements are different for each legal structure, and they depend on the nature of the regulator, whether only State, Federal, or both State and Federal law applies, and whether or not the social enterprise is a charity. Before choosing a legal structure, you should be aware of the reporting requirements you will need to comply with.

In general, there are more not-for-profit structures available with simpler reporting requirements than for-profit. However, charities and not-for-profits generally need to complete more complex reporting (like a company) if they are large, and/or have been endorsed as DGR.

RELATED RESOURCES

The table below provides an outline of the different regulators and reporting requirements for different company structures. The Not-for-profit Law website has more detailed resources on reporting for different structures, [here](#).



| Entity | Regulator | State or federal? | How onerous are the reporting requirements? |
|--|--|-------------------|---|
| Proprietary Limited Company | ASIC | Federal | Medium - high |
| Incorporated association | State regulator | State | Low - medium |
| Incorporated association (which is also a charity) | State regulator + ACNC | State and federal | Medium |
| Company limited by guarantee | ASIC | Federal | Medium - high |
| Company limited by guarantee (which is also a charity) | ACNC (with residual aspects regulated by ASIC) | Federal | Low |
| Co-operative | State regulator | State | Low - medium |
| Indigenous corporation | ORIC | Federal | Low |

4. Adding a social enterprise to an existing not-for-profit organisation

Many not-for-profit organisations are considering starting trading activities to help provide funding certainty into the future. As philanthropic and Government funding becomes harder to secure in some sectors, creating a social enterprise is worth considering for some organisations.

There are, however, some key considerations for organisations to consider when undertaking an analysis of the costs and benefits of starting up a social enterprise in addition to their existing organisation's activities. The considerations listed below are in addition to the consideration outlined above:

- would the starting of a trading enterprise be consistent with the organisation's purposes? If not, how hard would it be to change the purposes?
- does the organisation access charitable tax concessions? This will be relevant to both starting an enterprise and changing your organisation's purposes – both of which could affect your continued eligibility. We recommend that you seek tax advice before making any changes
- could starting the enterprise expose your organisation to financial risk or reputational risk? Are there structures to put in place that could mitigate this risk?
- do people in your organisation have the relevant skills for the enterprise? What would it cost your organisation to recruit the right people?
- is there a compelling business case for the enterprise? Should your organisation get some advice about the market for your purposes enterprise?
- will the new enterprise advance your mission or fund your organisation's activities?



Part 4: Setting Up

Once you have decided to incorporate using a legal structure, you can begin setting up your organisation

Setting up a social enterprise

This part covers:

- ▶ forming a committee or board
- ▶ finding members
- ▶ drafting rules or a constitution
- ▶ holding meetings
- ▶ registering as a charity (if desired)
- ▶ applying for tax concessions (if desired)

The process of setting up a social enterprise under one of the legal structures discussed in Part 3 of this Guide is called 'incorporation'. The incorporation process involves several steps and issues to consider.

Once your organisation has decided which incorporated structure it will use, the next step is to set up your organisation following the process required by the relevant legislation. The incorporation process is different for each type of legal structure; however there are some basic steps that all organisations should take, such as applying for an Australian Business Number (ABN) and registering a business name.

There are also several fundamental issues you need to consider when setting up your organisation. Six of those fundamental issues are discussed in this Part.

1. Forming a committee or board

A fundamental incorporation step is forming a governing body, such as a committee of management or a board. The legislation governing incorporated associations refers to the governing body as a 'committee of management', and the legislation governing companies limited by guarantee uses the term 'board'. In this section, we will use the term 'committee'. The term you use to refer to your committee is not important, but its role, the duties of its members, and its composition are very important, and you should consider them carefully.

FURTHER READING

For more information on forming a committee, go to Justice Connect's ['Secretary's Satchel'](#). Parts 1, 2, 3 and 7 of the Secretary's Satchel are particularly relevant.



The role of a committee

It is the role and responsibility of an organisation's committee to govern and direct the strategy of the organisation. The committee is responsible for making decisions about the overall running of the organisation. The committee is elected by the members of the organisation, and in most structures, the committee is accountable to the members.

Who should be on a committee?

To be effective, a committee needs the right group of people, with, knowledge and experience that fit with the organisation's strategic goals. To help you put together a committee of people with those necessary skills, we recommend developing a 'skills matrix' specific to your organisation. A committee member should be committed to the mission of the organisation, and prepared to devote time and energy to the committee.

There are several positions that usually make up a committee, such as a chairperson or president, treasurer and secretary. The committee may have other members who do not have a special role, who are sometimes called 'ordinary committee members'.

The size of the committee is an important consideration for start-ups. When deciding how many committee members you should have, you should take into account the size of your organisation and understand that 'bigger isn't necessarily better' – a board that is too large can be ineffective, or inefficient.

It is important that prospective committee members understand your expectations of them, and their legal duties.

A skills matrix

It is important to have the right mix of skills, experience and diversity on a committee. When you are thinking about committee members, it is a good idea to have a process for identifying the skills you need on your board, which will vary depending on the nature of your organisation.

To develop a skills matrix, you can follow the steps below.

1. What is your strategy?

Your organisation has a mission. What is your strategy to achieve that mission? Write down each strategic priority or goal, and think about the knowledge, skills, competencies and experience required to achieve them, and write them down too. Also think about the skills required for a committee to meet the legal obligations incorporated groups have (reporting, preparing financial statements etc). Don't forget to think about your vision for the future – what kind of committee, with what kind of committee members, will be needed to take the organisation forward?

2. What issues does your organisation deal with?

Consider the key issues and challenges that face your organisation – particularly in light of its mission and activities. Write these down, and then review what skills or experience is needed to most effectively deal with each of them. If there are any extra skills you didn't write down in step 1, write these down now.

3. What are your priorities?

All the skills you wrote down in steps 1 and 2 might seem important. However, it is important to prioritise them, and work out which ones are high, medium, and low priority. You might like to rank each skill with a number, such as high = 3, medium = 2 and low = 1.

4. What skills are needed?

Determine what skills and what levels of experience need to be represented on the committee. Remember, you might have volunteers or employees 'on the ground' who carry out the activities of the organisation, so some of the skills you have listed might be their responsibility. But some skills, such as financial management, might be best represented at committee level.

5. Create your skills matrix

Finally, create your skills matrix, using the data from steps 1-4. The skills or experience needed can go in column 1 of a table and the rest of the columns can be the directors.

Case study example

A young lawyer has a great idea for a social enterprise. She wants to set up an incorporated association called 'Love, Mum', which will hold meetings for unemployed young mothers in the Epping area. At the meetings, the young mothers have their children cared for while they network and bake healthy treats for kids, which are sold at the local farmers market each week under the business name 'Love, Mum'. 50% of the earning will be distributed to the young mothers, with the remaining 50% going back into the organisation. The young lawyer has applied for several local council grants to help get her social enterprise off the ground.

The young lawyer needs to put a committee of management together. Here is what her process of creating a skills matrix looks like.

1. The organisation's mission is to assist young mothers in the local community by supporting them socially, emotionally, and financially, building their self-esteem and teaching them how to cook healthy food for their families. The organisation's strategy is to create a business that sells healthy, tasty food for children, whilst assisting disadvantaged young mothers. Its strategic priorities include:

- building a successful business (skills: finance, accounting, legal, management, employment, fundraising, experience building a business from a start up, managing risk, NFP experience)
- supporting young mothers in a professional manner (skills: social work, managing people, counselling, mental health experience)
- creating a safe childcare environment (skills: childcare qualifications and experience, managing staff, legal)
- giving each mother a small income through receiving a percentage of business earnings (skills: finance, accounting, management, financial counselling)
- preparing safe and tasty foodstuffs for sale (skills: cooking, food safety, sales, marketing/advertising, safe food preparation experience), and
- selling goods in a community, commercial environment (skills: sales, marketing, community

liaising).

2. The organisation faces the following issues:

- food safety (skills: commercial food preparation experience, legal, organisation, management)
- childcare and child safety (skills: management, childcare experience and qualifications, legal)
- providing adequate, professional counselling services (skills: psychological, social and financial counselling, social work, legal)
- mental health of clients (skills: social work, counselling, mental health experience)
- fundraising issues (skills: fundraising experience, accounting, financial management experience), and
- food sales (skills: sales experience, marketing and advertising experience, accounting, management).

3. Here, the skills identified as being necessary are prioritised (1 = low, 2 = medium, 3 = high)

| | | | |
|---------------------------|---|--------------------------------------|---|
| Legal | 3 | Psychological and social counselling | 3 |
| Accounting | 3 | Financial counselling | 2 |
| Financial management | 3 | Social work | 3 |
| Management of staff | 2 | Mental health experience | 2 |
| Organisational management | 3 | Experience starting a business | 2 |
| Childcare | 3 | Fundraising experience | 3 |
| Sales | 1 | Food preparation | 1 |
| Marketing/advertising | 2 | Food safety | 2 |
| Managing risk | 2 | Cooking | 1 |
| Community liaising | 2 | NFP experience | 2 |

4. The skills and experience that would be useful on this committee of management are: legal, accounting/financial management, organisational management, social work, fundraising experience, NFP experience, risk management experience and experience starting up a business.

The other skills listed in step 3 can be taken care of by employees or volunteers.

5. The young lawyer thinks 4 people would be a good sized committee of management to begin with. She will be seeking members for her committee who have the skills listed in the matrix. Where a candidate has a particular skill, she can put a ✓ in their column alongside that particular skill. By the time she fills the positions, she hopes to have at least 1 ✓ next to each skill needed to run the organisation.

| Skill | Member 1 | Member 2 | Member 3 | Member 4 |
|---------------------------|----------|----------|----------|----------|
| Legal | | | | |
| Accounting | | | | |
| Financial management | | | | |
| Organisational management | | | | |
| Social work | | | | |
| Fundraising experience | | | | |
| NFP experience | | | | |
| Risk management | | | | |
| Start up experience | | | | |

Where do I find good candidates?

Sometimes it can be difficult to find qualified, experienced committee members who have the necessary skills to help govern your particular organisation.

Recruiting the right people to join your board can be a challenge. If you are able to find great people to govern your organisation

These are some useful websites you can use to recruit board members:

- [Volunteering Australia](#)
- [Leadership Victoria](#)
- [Good Company](#)
- [Pro Bono Australia](#), and
- [Our Community](#).

2. Finding members

The role of members

Members play a fundamental role in a not-for-profit organisation.

The members of an organisation have certain rights and responsibilities under the relevant legislation, depending on the legal structure of the organisation. Generally, members of the organisation attend general meetings and vote on matters such as:

- electing the committee
- changing the organisation's name, rules or purpose
- amalgamating the organisation with another organisation
- removing an auditor, and
- winding up the organisation voluntarily.

Members have certain rights, such as the right to notices of meeting, the right to attend general meetings, the right to remove committee members by special resolution and the right to access certain records of the organisation.

Importantly, the committee is accountable to the members of the organisation.

The importance of a membership strategy

You will need to consider how many members you want your organisation to have, and in making this decision, there are a number of factors you should consider, such as:

- if your members pay a membership fee, it may be good for fundraising to have many members
- don't forget that the members come together to vote at the annual general meeting. Having too many members may cause an administrative burden, and may make decision making difficult
- having too few members might empower one or two members who are difficult or 'rogue', and
- having too few members may make it too easy for the board to be spilled, or directors to be removed.

As you can see, it is important to have a membership strategy. You can set down your membership strategy in the form of including membership criteria, limits and other requirements in your organisation's rules or constitution.

RELATED RESOURCES

The Not-for-profit Law Information Hub has information about the rights and responsibilities of [members](#) of not-for-profit organisations.



3. Drafting your rules or constitution

Incorporated organisations such as incorporated associations or companies limited by guarantee are required to have a set of rules, or a constitution, which governs the internal affairs of the organisation. There are laws as to what matters must be covered by the rules, depending on the legal structure of your organisation.

The committee and the members are bound by the rules of the organisation.

Where do we start?

There are model rules published by Consumer Affairs Victoria (**CAV**) for incorporated associations in Victoria, which can be adopted, or varied and adopted. Not-for-profit Law also has a set of Simple Rules for incorporated associations. The ACNC is in the process of drafting a precedent constitution for charitable companies limited by guarantee. There are also resources available on the Justice Connect website which can help you draft your rules or constitution. It is important to think carefully about what your rules are, because any changes to your rules must be approved by your members at a general meeting.

FURTHER READING

See the section of our Information Hub that [discusses rules](#). Also, see the factsheets in the section of our Information Hub that explain [incorporation](#) and [legal structures](#), as those factsheets contain valuable guidance on drafting rules for specific types of organisations.



4. Holding meetings

Meetings are an important part of the operations of any organisation. Meeting requirements differ depending on the legal structure, but generally, the meetings required will include:

- committee meetings (for committee members), and
- annual general meetings (for members).

It is important for your organisation to conduct meetings in accordance with the relevant laws and regulations. Once a meeting has been conducted, there may be requirements for forms to be completed and filed with the relevant regulator, as well as records to be made for the organisation itself, such as minutes and resolutions.

FURTHER READING

There are resources on our Information Hub that explain the [meeting requirements](#) of not-for-profit organisations.



5. Registering as a charity (if desired)

Whether or not you should register your organisation as a charity is something you should consider at the incorporation stage. You should consider how 'charity' is defined, and whether or not your organisation is eligible to become a charity. There are advantages and disadvantages in doing so, which are discussed above in Part 2, section 4.

FURTHER READING

For more information about whether or not your organisation should be registered as a charity, and for more information about what organisations are eligible for charity status and what that status means, see the [charities page](#) of our Information Hub.



6. Applying for tax concessions (if desired)



Your organisation may be eligible for tax concessions. You should think about applying for tax concessions at this incorporation stage. Tax concessions were discussed in detail in Part 2, section 3 of this Guide.

FURTHER READING

For more information about tax concessions, eligibility and how to make the necessary applications see the [tax](#) page on our Information Hub. The ATO also has an excellent resource called the [GiftPack](#), which contains detailed information about tax concessions for not-for-profit organisations.





Part 5: Operating a social enterprise

Once you have incorporated, there are many other things you should consider, depending on the nature of your social enterprise and the activities it undertakes

Operating a social enterprise

This part covers:

- insurance
- employment
- occupational health and safety
- documents and record keeping
- intellectual property
- advertising
- running events
- privacy, and
- ongoing compliance and governance requirements

Once you have set up your organisation, there are many other things you should consider. Running a social enterprise involves following many regulations and laws about lots of different things.

Insurance

There are many risks and legal issues associated with running a social enterprise. Some risks simply cannot be avoided, so it is a good idea for your enterprise to have adequate insurance. As well as taking a common sense approach to getting insurance for your enterprise, you should carefully consider the specific risks your enterprise faces, and make sure that your insurance covers those specific risks. You should also check the laws that apply to your organisation regarding insurance, and make sure you follow them.

RELATED RESOURCES

For extensive information on risk and insurance, go to the Not-for-profit Law Information Hub for extensive information on [risk and insurance](#).



Employment

Even if your social enterprise begins with only volunteers, there are still legal obligations you need to follow. Before your social enterprise starts working with its first volunteer, and especially before it hires its first employee, you should familiarise yourself with the legal obligations relating to volunteers, employees and independent contractors.

RELATED RESOURCES

Go to the Not-for-profit Law Information Hub for more information on the legal obligations that your organisation owes to [volunteers, contractors and employees](#).



Occupational health and safety

Occupational health and safety (OHS) laws vary between states. OHS laws are important, and onerous, however they don't apply to certain organisations. If the legislation applies to your social enterprise, you need to be aware of your responsibilities. The laws in both Victoria and NSW also include personal obligations which must be met by 'officers' of organisations, such as directors or committee members. Some of these obligations have criminal penalties for breach. It is vital you are aware of what laws apply to you personally, your directors/committee members, and your organisation, and ensure that you meet your obligations.

Some of the obligations are general, such as the duty to provide and maintain a working environment that is safe and without risks to health, and some obligations are very specific, such as the obligation to establish a health and safety committee, if requested.

RELATED RESOURCES

Go to our Information Hub for more information on [OHS requirements in Victoria](#), and for help understanding if your organisation is subject to the new legislation.

You should also read the information on our website relating to discrimination, equal opportunity and human rights.

There are other resources on our Information Hub in relation to [volunteers](#) and [employees](#).



Documents and record keeping

Your document and record keeping obligations largely depend on what legal structure you decide to adopt for your enterprise. As discussed earlier in this Guide, some structures have different document and record keeping obligations to others, and depending on how much document and record management your enterprise can handle, this may affect what structure you choose.

RELATED RESOURCES

Go to our Information Hub for more information on [documents and record-keeping](#).



Intellectual Property

When starting up a social enterprise, you will need to think about a name, a logo, business know-how and maybe a website. You need to consider intellectual property legal issues, and make sure that your intellectual property is protected. You should also make sure that you don't infringe anyone else's intellectual property. Infringement can be accidental, such as by creating a logo which is almost identical to someone else's, or using someone else's intellectual property in your marketing communications.

There are laws about marketing and advertising in Australia. If your social enterprise wishes to advertise, or say anything about itself in public (such as on a website), it needs to comply with Australian consumer law. There are also specific laws relating to different mediums of communication, such as television, radio, print and online. Before you start your website, and before you start marketing or advertising your enterprise, you should make sure you aren't breaking any laws.

RELATED RESOURCES

Go to our Information Hub for more information on [intellectual property](#) issues. The Information Hub also contains detailed information on the laws of [advertising and promotions](#).



Events and fundraising activities

Unfortunately, running an event for your social enterprise is (often) not as simple as it sounds. There are many things you need to consider and various laws you need to comply with when organizing events and activities. An important issue to consider when organizing an event is licensing. Community organisations require licenses for certain activities. After you decide on what sort of events and activities your enterprise will be involved in, you should investigate what licenses are required.

RELATED RESOURCES

The Information Hub contains detailed information on [running events](#) and [raising money](#).



Privacy

Privacy is an important part of Australian law, and the federal government has recently made changes to the national privacy legislation. However, the fundamentals of privacy are still the same. You should be aware of privacy laws, because they can affect you in many ways, such as if you have employees and hold information about them, or if you have a donor mailing list, or if you have access to people's health records.

RELATED RESOURCES

The Information Hub contains up to date information on [privacy](#) laws.



Governance and ongoing compliance

Different legal structures require organisations to meet different ongoing compliance and governance requirements. Once you decide what legal structure your enterprise will use, you should become very familiar with the compliance and governance obligations you will be required to meet.

EXAMPLE

Private companies are required to comply with the Corporations Act. The Corporations Act contains a number of duties the directors of the company must comply with, such as the duty to operate in the best interests of the company. Private companies are also required to adopt constitutions, or follow the replaceable rules contained in the Corporations Act. The Act also contains governance requirements that the company must follow.



The compliance and governance obligations for private companies are different (and more onerous) than those which apply to not-for-profit corporate structures.

RELATED RESOURCES

The Not-for-profit Law Information Hub has lots of information on positions within a not-for-profit organisation and the legal duties that apply to office-holders, on the [governance](#) page.





Part 6: If things change or go wrong

After your organisation has been running for a while, issues may come up which have a legal component.

If things change or go wrong

This section covers

- when things go wrong
 - when your structure is no longer working
 - deciding to work with other organisations
 - ending your organisation/s
-

Things don't always go to plan when you are operating a social enterprise. Conflict may arise between employees, someone might take your enterprise to court, or you may encounter financial difficulties sooner than you expected.

Some issues that may come up include:

- breakdowns in agreements
- loss of key staff or committee members
- governance issues
- property issues
- being taken to court
- losing funding
- investor relations, and
- public perception issues.

There are also times where your organisation will go through change – at times of growth, retraction and even in response to changes in the law. When things change, you should stay on top of what is happening in your organisation, and be mindful of the options available to you, such as changing the nature of your organisation, working with another organisation or winding up.

FURTHER READING

For more information on what to do [when things go wrong](#), visit our Information Hub.

When your structure no longer works

As your organisation changes and evolves, the legal structure you choose at the start may no longer be appropriate. It may be that your organisation is incorporated in Victoria and you want to start operating nationally, or your organisation may decide to apply for DGR endorsement, and need to change its rules or constitution to make sure it reflect its current activities. Your group might increase significantly in size, or you may become registered as a charity. There are many different circumstances which will require an organisation to change its governing documents or its entire legal structure.

Changing your governing documents

Different organisations have different governing documents, depending on their legal structure. For example, companies have constitutions, and if a company wants to change its constitution it must follow the procedure outlined in the Corporations Act. Whichever set of procedures apply, your organisation must follow them carefully.

Deciding to work with other organisations

It may be appropriate to combine with another organisation for any number of reasons. It may be more efficient to work with another organisation of the same purpose, another organisation may give you access to more funding, or you might find that joining forces with other like-minded people can help you accomplish your mission faster and more effectively!

There are a variety of ways you can work with another organisation, such as merging organisations, entering into auspicing arrangements (as discussed earlier in this Guide), forming joint ventures or forming partnerships. These are legal arrangements which require negotiating and the signing of legal documents, and should be discussed with a lawyer.

CAUTION

Even if you completely trust the people working in the other organisation and have no concerns at all, you should always put any kind of arrangement into writing.

For more information, see our Information Hub topic on [working with other organisations](#).



Ending your organisation

Sometimes a decision needs to be made to end an organisation. This decision may be appropriate for a variety of reasons, such as if your organisation runs out of funding, or if your organisation no longer wishes to pursue its social mission. The way to end your organisation will depend on the legal structure you have chosen. Your legal structure will determine what must be done with any surplus funds or assets, and depending on your complicated your legal structure is, you should see a lawyer and ask them to help you.

RELATED RESOURCES

For more information, go to the section of our Information Hub which discusses [winding up](#).





Extra Help

Organisations that work with Social
Enterprises

Organisations that work with Social Enterprises

1. Organisations

The following organisations provide various forms of assistance to Social Enterprises. They each have different criteria, some are free and some charge for their services. This list is not comprehensive, and we do not specifically endorse these organisations. We always recommend that you undertake your own research.

- ✔ [School for Social Entrepreneurs Australia](#)
- ✔ [Social Ventures Australia](#)
- ✔ [Centre for Social Impact](#)
- ✔ [Business Models Inc](#)
- ✔ [Social Traders](#)
- ✔ [Social Enterprises Sydney](#)
- ✔ [Volunteering Australia](#)
- ✔ [Chartered Secretaries Australia](#)
- ✔ [Governance Institute of Australia](#)
- ✔ [B Lab](#)

Resources

Not-for-profit Law Information Hub Pages

- ✔ [Getting Started](#)
- ✔ [Tax](#)
- ✔ [Risk and Insurance](#)
- ✔ [People Involved](#)
- ✔ [Running the Organisation](#)
- ✔ [Communications and Advertising](#)
- ✔ [Fundraising and Events](#)
- ✔ [Reporting to Government](#)
- ✔ [Changing or Ending your Organisation](#)
- ✔ [Working with Others](#)
- ✔ [Important Agreements](#)
- ✔ [Disputes and Conflict](#)

Government Agencies

- ✔ [The Australian Charities and Not-for-profits Commission](#)
- ✔ [Consumer Affairs Victoria](#)
- ✔ [Office of Fair Trading NSW](#)
- ✔ [The Australian Securities and Investments Commission](#)
- ✔ [The Australian Taxation Office](#)





Contact us:

nfplaw@justiceconnect.org.au

NFP Law home:

justiceconnect.org.au/nfplaw

NFP Law legal information:

nfplaw.org.au



Melbourne Office

PO Box 16013
Melbourne VIC 8007
DX 128 Melbourne

Tel +61 3 8636 4400
Fax +61 3 8636 4455

Sydney Office

GPO Box 863
Sydney NSW 2001
DX 78 Sydney

Tel +61 2 9114 1793
Fax +61 2 9114 1792

ABN: 54 206 789 276 | ACN: 164 567 917