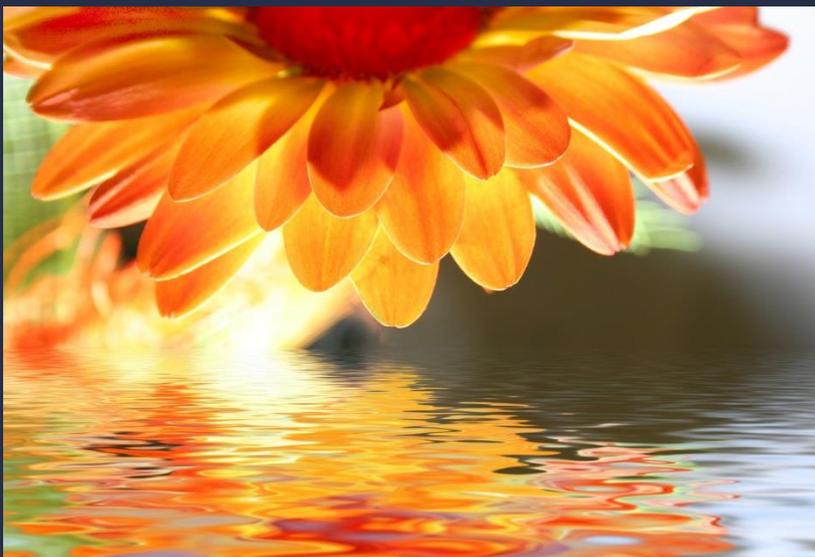


Charities Guide

How to change legal structure from an incorporated association in New South Wales to a company

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Prolegis
Lawyers



About Prolegis

Prolegis Lawyers works exclusively for Charities, Philanthropy and Not-for-Profits.

We are the largest group of lawyers in any law firm in Australia that specialises exclusively in this area of law.

Our areas of expertise include:

- Establishing and re-structuring entities
- Governance
- Taxation and duties – including charity registration and obtaining deductible gift recipient status
- Charitable fundraising
- Employment law
- Reporting and compliance
- Disputes
- Mergers, service contracts and other agreements

Overview

This guide is designed for charities in NSW who wish to transfer their registration from an association incorporated under the *Associations Incorporations Act 2009 (NSW)* (Associations Incorporations Act) to a company limited by guarantee under the *Corporations Act 2001 (Cth)* (Corporations Act). It is based on the applicable law as at September 2015.

A high level summary of the steps involved in this process is set out below. These steps are as follows:

1. Prepare a company constitution;
2. Pass a special resolution authorising an application to transfer to be made;
3. Apply to NSW Fair Trading for approval to transfer;
4. Apply to The Australian Securities and Investments Commission (ASIC) to register the association as a company;
5. Request NSW Fair Trading deregister the association;
6. Notify regulatory and other bodies of change of registration; and
7. Update records and comply with ongoing company obligations.

Before proceeding, a charity should obtain legal advice in relation to the legal, tax and financial implications of transferring to a company.

Why do charities transfer their registration from an association to a company?

Incorporated associations in NSW are a type of body corporate typically intended for small-scale, non-profit and non-commercial activities. Charities may choose or may be asked by the Director-General under the Associations Incorporation Act to transfer their registration from an association to a company if their activities, property or revenue grow in scale or nature or interstate such that it would be more appropriate to continue as a company under the Corporations Act.

A company structure offers a number of advantages in respect of governance and control that allows additional flexibility to meet the challenges of how a charity operates. These include significant additional flexibility regarding membership composition, meeting requirements and procedures and removal of the need to report to NSW Fair Trading.

Importantly, as set out under s601BM of the Corporations Act, the transfer of a charity's registration to a company does not create a new legal entity, affect the charity's existing property, rights or obligations (except as against the members of the body in their capacity as members) or render defective any legal proceedings by or against the body or its members.

What are the steps?

Step 1: Prepare a company constitution

To transfer registration to a company, your charity will first need to prepare a company constitution to reflect its new entity type and which will replace the rules which currently govern it as an incorporated association.

Why is the constitution important?

Under the Corporations Act, a constitution is a contract between the company and each member, the company and each director and company secretary, and between a member and each other member, under which each person agrees to observe the provisions of the constitution that apply to them.

Your constitution must comply with the *Corporations Act 2001* (Cth) and *Australian Charities and Not-for-Profits Commission Act 2012* (Cth), and requirements under tax law.

In particular, as a charity, the constitution must:

- set out your charitable purposes;
- show that your charity is a not-for-profit during operations and on winding up; and
- set out how your charity is governed and is accountable to its members.

Who will be the members and officers?

In preparing the constitution, you will need to consider who will be the members and directors of the company. A company limited by guarantee must have at least one member and 3 directors (at least two of which must ordinarily reside in Australia) and one secretary.

The directors, secretary and members of the company may be the same as those of the association. However, because you are transferring registration to a company with a new constitution, you will need to obtain:

- the written consent of each proposed director and secretary of the company to their appointment; and
- the written agreement of each proposed member to the guarantee amount set out in the constitution (usually between \$1 and \$10). This is the amount that the members agree to contribute if there are any outstanding liabilities on the winding up of the company.

Can you use the ACNC model constitution?

As a starting point, you may wish to use the ACNC template constitution for a charitable company limited by guarantee (and guidance notes). This is available free of charge from the ACNC website ([link](#)). If your charity is endorsed as a deductible gift recipient, you may need to include an additional deductible gift recipient winding up clause (see the ACNC guidance notes).

Step 2: Pass a special resolution authorising an application to transfer to be made

To commence the transfer process, under the Associations Incorporation Act, your charity must first pass a Special Resolution authorising an application to be made to the Director-General (being the NSW Commissioner for Fair Trading) seeking a transfer of registration declaration.

A resolution is passed as a Special Resolution if it is supported by at least three-quarters of members present and entitled to vote on the resolution at a members' meeting.

You will need to provide your members with 21 days' notice of the meeting and of the terms of the proposed special resolution.

If your governing rules permit, you may also pass a Special Resolution by a postal ballot supported by at least three-quarters of members.

Your charity should also determine by resolution:

- The company name under which the association is to apply to become registered (this may be your charity's current name but with the words 'Limited' instead of 'Inc' at the end);
- the proposed constitution for the company on registration; and
- the persons who are to become the directors, officers and members of the company on registration (subject to their written consent).

See the NSW Fair Trading website for guidance on general meetings ([link](#)) and Special Resolutions ([link](#)).

As a practical matter, if your charity has many members, and you wish these persons to be members of the company following the transfer, it may be convenient to obtain their written agreement to the guarantee amount when issuing notices to them or at the general meeting.

Step 3: Apply to NSW Fair Trading for approval to transfer

Once your charity has passed a Special Resolution authorising an application to be made, you need to prepare Form A10 'Application for approval to transfer registration to a company or co-operative' ([link](#)) and lodge it with NSW Fair Trading.

In completing Form A10, you will need to prepare the following:

- A signed statement of two committee members, or one committee member and the public officer:
 - confirming that the company to which the association intends to transfer will be subject to a constitution that prohibits a distribution of profits to members during its operation and on winding up; and
 - setting out the names of any bodies from whom the association receives funding and providing evidence in writing that those bodies have been advised of the proposed transfer (ie. by attaching copies of letters sent to any bodies from whom your charity receives funding, notifying them of the proposed transfer).
- A certified copy of the Special Resolution authorising the making of the application. This resolution should be signed and dated by a committee member.
- Any outstanding annual summary of financial affairs (Form A12) and any other documents requirement to be lodged under section 45 or 49 of the Associations Incorporations Act (as the case may be) for the three financial years before the application is made. You can check whether you have any outstanding documents by contacting NSW Fair Trading Registry Services on 1800 502 042.
- A cheque for the prescribed fee as set out on the NSW Fair Trading website ([link](#)) (currently \$61).

Once you have completed Form A10 and finalised the supporting documentation (referred to above), it may be lodged with NSW Fair Trading for consideration by the Director-General.

If the application for transfer is approved, a certificate entitled 'Transfer of Registration Declaration' will be issued, declaring that the Director-General has no objection to the association becoming registered as a company limited by guarantee under the Corporations Act.

You will also be issued with a copy of the association's 'Certificate of Incorporation as an Association', certified by NSW Fair Trading. You will need to include these in your application to ASIC.

Step 4: Apply to ASIC to register the association as a company

You may then proceed to apply to ASIC to register the association as a company under the Corporations Act. To do this, you need to prepare and lodge ASIC Form 202 'Application for registration of a body corporate as a company' ([link](#)). In preparing Form 202, you will need to prepare the following.

- A statement by a director or secretary confirming that:
 - the association is not administered externally, there is no application to the court to wind up the body, and no application has been made to approve a compromise or arrangement between the body and other person.
 - the transfer of registration has been authorised and that association has met the requirements under the Associations Incorporation Act, and annexing the relevant sections of the Associations Incorporation Act and a copy of the certificate issued by the Director-General (referred to at step 3).
- a copy of a current Certificate of Incorporation as an Association, certified by NSW Fair Trading and issued within 3 months of the lodging of this application (issued at step 3)
- a certified copy of the current rules of the association, certified by a director or secretary using ASIC Form 911 ([link](#)).
- the proposed constitution to take effect on registration as a company limited by guarantee (prepared at step 1);
- a cheque for the prescribed fee for registration as a company ([link](#)) (currently \$463).

Prior to lodging Form 202, you must ensure that you have obtained the written consent of each proposed director and secretary to their appointment, and the written agreement of each proposed member to the guarantee amount set out in the constitution, as required under the Corporations Act (s601BC(5)).

Once you lodge Form 202, ASIC will then process the application and if successful:

- Issue your charity with an Australian Company Number (ACN);
- register it as a company limited by guarantee; and
- issue you with a certificate confirming the company's name, ACN, company type, that it is registered under the Corporations Act, the State in which it is taken to be registered and the date of registration.

Subject to it being available, your new company name will be the name included on Form 202 and your constitution will be that which was lodged with Form 202.

On registration your ABN will remain the same as it was when your charity was an association.

Step 5: Request NSW Fair Trading deregister the association

As soon as practicable after becoming registered as a company, you need to provide the following to NSW Fair Trading to allow the association to be deregistered:

- a copy of the certification of incorporation of the company issued by ASIC (at step 4); and
- the original certificate of incorporation of the association. If the association's original certificate of incorporation has been lost or destroyed, you will need to prepare a statutory declaration to that effect.

NSW Fair Trading will then cancel the association's registration.

Step 6: Notify regulatory and other bodies of change of registration

Following registration as a company, you must notify the following:

Australian Business Register

You must update your charity's ABN details (including entity name, entity type and associate details (i.e. new directors or public officer) within 28 days of becoming aware of the change in details. The fastest way to update this information is to do so online using an AUSkey ([link](#)). Alternatively, the ATO can provide you with a paper form to complete and lodge.

Australian Charities and Not-for-Profit Commission (ACNC)

You must notify the ACNC of the change to the charity's name, its governing documents and responsible persons (such as directors) within 28 days for a medium and large charity and 60 days for a small charity. You may do this via the ACNC charity portal and there is more information on the ACNC website ([link](#)).

Government bodies and funding bodies

Relevant bodies may include state regulators (such as NSW Fair Trading if your charity has a fundraising authority), WorkCover and other insurers, superannuation funds, funding bodies, suppliers, companies that you lease property or equipment from and titles office in relation to real estate.

You may wish to send a copy of the certificate of incorporation issued by ASIC as evidence that the transfer of registration has been completed.

Step 7: Update records and comply with ongoing obligations

Using your ACN and ABN

Following registration, you will need to include your ABN and new ACN on all public documents (including your website and any contracts), *unless you apply for a new ABN for your charity which will include your ACN.*

If you apply for a new ABN, you will also need to re-apply to the ACNC and Australian Taxation Office for your charity registration and tax endorsements.

Updating your records

You should take any action necessary to ensure your website and marketing materials, letterhead, bank accounts and other records are changed to reflect the transfer of registration.

Establishing registers and minute book

Within 14 days of being registered as a company, your charity must set up a members register and minute book in accordance with the requirements under the Corporations Act (s601BK). The company must also keep in its records the consents and agreements of the officers and members of the company on registration.

Holding your first Annual General Meeting (AGM)

Your charity must hold its first AGM after registration in the same calendar year of its registration in accordance with the requirements under the Corporations Act (s601BR).

Ongoing obligations

As a company limited by guarantee, your charity will need to comply with the ACNC governance standards and the relevant sections of the Corporations Act that continue to apply to you (some obligations under the Corporations Act have been 'switched off' for registered charities). You can find out more information about these obligations from the ACNC website ([link](#)).



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