

Social enterprise guide

Legal issues to consider when setting up a social enterprise

May 2024

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Overview

What's in this guide?

Overview



Disclaimer

This guide provides information on social enterprises in Australia. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this guide.

What's in this guide?

The guide is made up of the following six parts:

| | |
|----------------|---|
| Part 1. | •What is a social enterprise? |
| Part 2. | •Important things to consider when starting a social enterprise |
| Part 3. | •Choosing an appropriate legal structure |
| Part 4. | •Setting up a social enterprise |
| Part 5. | •Running a social enterprise |
| Part 6. | • What if things change or go wrong? |

Links to more information are included in the guide.



Part 1

What is a social enterprise?

What is a social enterprise?

This part covers:

- ▶ what being a social enterprise means
- ▶ social enterprise impact models



What being a social enterprise means

There is no specific legal structure for social enterprises in Australia or a universally accepted definition of 'social enterprise'. However, working definitions agree that it involves running an enterprise that uses its revenue or business model to achieve an economic, social, cultural or environmental mission that benefits the public or a particular community.

At its core, being a social enterprise means using business models and skills to solve societal problems.

Social Traders (an Australian organisation that connects certified social enterprises with business and government for potential social procurement opportunities) describes social enterprises as an:

'innovative breed of businesses that exist to create a fairer and more sustainable world'

To receive certification with Social Traders, an enterprise must do three things:

1. have a defined primary social, cultural or environmental purpose consistent with a public or community benefit
2. derive a substantial portion of their income from trade, and
3. invest efforts and resources into their purpose such that public or community benefit outweighs private benefit

These criteria are based on the definition developed through the Finding Australia's Social Enterprise Sector (FASES) research in 2010.

The Social Traders definition may be used or required by some funders, including governments and corporates under social procurement policies.



Social Traders is an Australian organisation that connects social enterprises with social procurement opportunities and provides support to social enterprises.

Read more about Social Traders' definition of 'social enterprise' on their website.



Social enterprise sector snapshot

Finding Australia's Social Enterprise Sector (FASES) report 2010 (updated in 2016) is the first and, to date, only census of social enterprise in Australia.

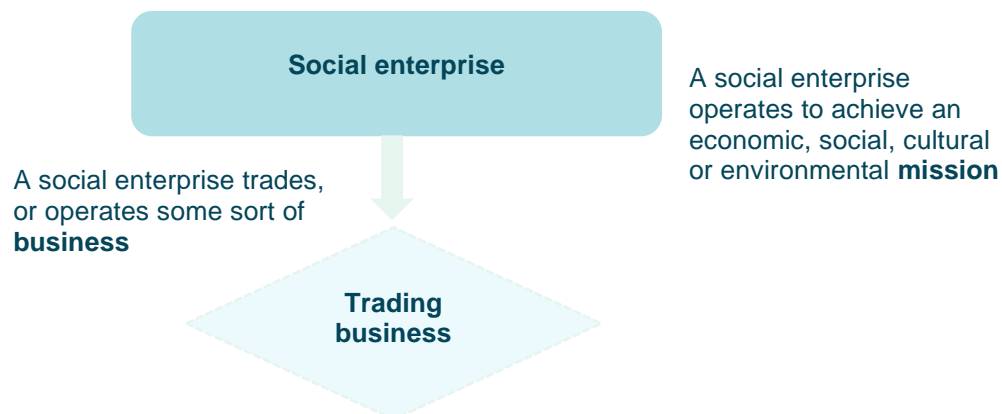
FASES found that:

- there are an estimated 20,000 social enterprises operating across all industry sectors
- 73% are small businesses, 23% are medium sized and 4% are large organisations
- 38% have been in operation for 10 years and 35% in operation for between 2-5 years
- 35% target persons with disabilities, 33% target young people and 28% women experiencing disadvantage

A social enterprise can:

- be large or small
- be 'for-profit' or 'not-for-profit', or can involve a hybrid of both
- look like a normal business offering products or services and directing its profits to a cause
- operate with its mission embedded throughout its business model
(for example, by employing underemployed populations or taking special environmental approaches to producing products and then using profits to further support the mission)

Example of a social enterprise



Social Traders also identifies three different impact models of social enterprises by their motivation:

1. employment-generating – creates employment and training opportunities for marginalised people (**direct benefit model**)
2. community need – delivers accessible products and services to meet community needs that are not met by the market (**cross subsidy model**)
3. profit redistribution – donates at least 50% of profits or revenue to charity (**donation model**)

See below for more information on these models.

Social enterprise impact models

Common social enterprise impact models can be broadly divided into three categories:

Direct benefit model

Businesses that create public value or provide a direct benefit

For example, a business that provides employment, training and support to marginalised or disadvantaged groups that are locked out of the traditional labour market.



Example –direct benefit model

Purpose Enterprises Limited (trading as Vanguard Laundry) is a Queensland-based not-for-profit social enterprise that operates a commercial laundry business and employs people who have a lived experience of mental illness and struggle to find secure employment.

Vanguard Laundry's mission is to help their staff achieve long term employment and financial stability.

As a mission-locked entity, any surplus profits Vanguard Laundry makes from running its commercial laundry business are re-invested into the laundry business to create more employment pathways or are used to support local mental health employment projects.

Vanguard Laundry is also a registered charity, with deductible gift recipient fund status, so it can receive grants and donations from private philanthropists and foundations (as well as obtain funding through corporate sponsors).

Through its social mission, Vanguard Laundry in 2019 (in its third year of business) had achieved the following impact:

- employed over 100 people, of which around half had a lived experience of mental illness and a history of unemployment (Vanguard's target employees)
- generated over \$2.2 million in laundry income and paid over \$1.5 million in employee wages (FY19)
- increased target employees' average total income by 37.7%, with a 27.8% reduction in total gross Centrelink payments in participants' first year of employment
- all of the target employees participating in the evaluation reached 26 weeks of employment, 77.1% reached one year of employment

Cross subsidy model

Businesses that create or maintain services in direct response to social or economic needs in the community and use profits to support access to those otherwise excluded from the market.

For example, a business that offers its service at commercial rates to corporate clients which provide a subsidised offering to clients in the not-for-profit sector, or those suffering from financial hardship.

Donation model

Businesses that generate profit to make donations that support other community or not-for-profit organisational activities.

For example, a business who donates 50% or more of its profits each year to a charitable organisation.



Example – donation model

Goodwill Wine Pty Ltd is a Victorian-based for-profit social enterprise that donates 50% of the profits from its online sale of wine to various charities.

Through a limited mission lock clause in its governing documents and an acknowledgment of reinvestment requirements, Goodwill Wine has been able to attract impact investment without compromising on delivering its social mission.

Through its social mission, Goodwill Wine has achieved the following impact (as at February 2023):

- donated over \$521,000 to various charities
- provided over 250,000 meals for people living in poverty in Australia
- bought fire-fighting equipment, hi-vis wet weather gear and defibrillators for volunteer fire brigades
- funded six International Animal Cruelty Investigations for Animals Australia
- helped re-home 50 orangutans
- de-sexed, vaccinated, microchipped, wormed and re-homed over 200 dogs and 300 cats, and
- employed disadvantaged Australians with half of its employees coming from either long-term unemployment or living with a disability



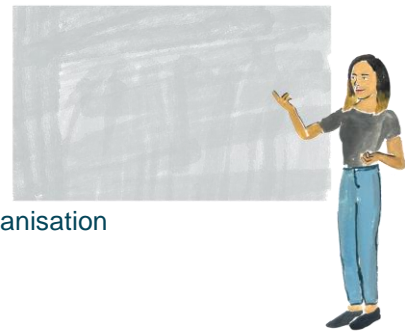
Part 2

**Important things to consider when
starting a social enterprise**

Important things to consider when starting a social enterprise

This part covers key considerations including:

- ▶ preliminary questions
- ▶ preparing a business plan, measuring impact and funding your organisation
- ▶ whether a social enterprise should incorporate
- ▶ deciding between not-for-profit and for-profit
- ▶ whether a social enterprise should consider becoming a charity



When a group or entrepreneur starts setting up a social enterprise (or adding a social enterprise to an existing organisation), they need to make some very important legal decisions.

This part of the guide covers key issues you need to consider at the initial stages of starting up a social enterprise.

Preliminary questions



Tip

We recommend you read and complete our [Questions About Your Group checklist](#) on our [Before you start webpage](#). This checklist will help you to clarify your ideas and goals.

Before you start setting up your social enterprise, think carefully about:

- what you want your social enterprise to look like
- what issue you are trying to address
- what approach you should take to address that issue, and
- what funding sources are available or will be required

Consider the questions set out in the checklist below now, and then again after reading this guide.

Checklist – questions to consider:

Can you clearly describe the particular social, community or environmental mission of your enterprise? Could your mission be considered charitable (it doesn't have to be, but this may impact your access to tax concessions)?

What issue are you trying to address? How will your social enterprise contribute to resolving that issue?

Who will you need to work with? Who should you engage in designing your social enterprise? The people you are trying to help? The people who might help fund your enterprise?

Is anyone else already doing something similar? Is there room or need for another social enterprise in the space? If yes:

- What can you learn from them?
- Should you join them?
- Where is the issue? Is it in one state, or is it across multiple states or territories? Where will the enterprise operate?

Where will your funding come from? Will you seek to access philanthropic grants? Do you want to attract investors? Will you be community-owned?

Who will oversee the enterprise and its operations? Will your enterprise have staff? Will your enterprise have 'owners' or 'members'?

If you will have shareholders, will they be a small group of people connected to you, or will you run public campaigns to find lots of shareholders?

**Tip**

Understanding the implications of the law on the operations of a social enterprise may change your views about how you will set up, operate, and fund your social enterprise.

If the details and practicalities of your idea are still unclear, you may find it beneficial to talk to someone about your idea or join a program that helps social enterprises get started.



Groups you could reach out to include:

- [Social Impact Hub](#) – helps not-for-profits who are working in a field of social impact. Social Impact Hub is a partner of the University of New South Wales and allows a team of students (supervised by a professional with expertise in the field) to work with social impact businesses on specific projects, including establishing a social enterprise.
- [Social Ventures Australia](#) – offers social impact consulting to entities around strategy and governance, organisational effectiveness, collaboration and partnerships and outcomes management.
- [White Box Enterprises](#) – a jobs focused social enterprise incubator, helps organisations uncover market-focused opportunities for generating new revenue streams and creating significant numbers of jobs for disadvantaged Australians.

A business plan

A business plan is essential for setting up a successful social enterprise and is often a critical tool when convincing funders or investors to support your project.

If you already have a business plan, you might want to revisit it after you've read this guide and considered all the legal issues involved.

You should settle your business plan before you incorporate because it will help you make an informed decision about your legal structure. It's time-consuming and expensive to change legal structures down the track.

In some cases, it can be very difficult to change structure – for example, a company limited by shares (a common for-profit structure) can't change its company type to a company limited by guarantee (a common entity structure for charities) – so it is worth putting thought and effort in at the start to set yourself up for success.



Tip

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

Checklist – things you may want to cover in your business plan:

- | | |
|---|--------------------------|
| • background to the enterprise and its mission and vision | <input type="checkbox"/> |
| • social purpose | <input type="checkbox"/> |
| • the targeted customers or beneficiaries | <input type="checkbox"/> |
| • what your social enterprise can monetise (for example, labour hire, services, goods) | <input type="checkbox"/> |
| • where relevant, information regarding the board including the background and experience of respective board members | <input type="checkbox"/> |
| • the operational structure | <input type="checkbox"/> |

- a market analysis (what is your unique proposition; are there logical alliances or other collaborators)
- a SWOT analysis (strengths, weaknesses, opportunities and threats)
- the need for the enterprise – which could include information and statistics regarding the community or public purpose and how the enterprise is working to achieve progress in the relevant area
- strategic goals within a particular timeframe, (for example the next three years)
- a marketing and fundraising plan and financial plans, including anticipated income (through grants, donations, fundraising) and expenses

Refer to the resources listed below to help you prepare your business plan.



There are many resources available to help you formulate a great business plan.

- Social Ventures Australia has published a [free online business planning guide](#)
- The Federal Government's business website contains helpful [free business planning tools, templates and 'how to' guides](#)
- 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 (we do not endorse these particular businesses – do your research before engaging the services of anyone in relation to your enterprise)

Measuring your impact

As well as having a business plan, your enterprise will need to be able to demonstrate the impact that it is making through its work towards its mission or purpose and your theory of change.



Tip

If your enterprise wants to be a certified social enterprise with Social Traders, you will need to provide evidence of the impact being achieved.

Increasingly, investors and funders want to see clear articulation of how you are planning to measure and evaluate your impact and may require you to report to them on your impact.

Measuring impact is especially important for some kinds of impact investing (discussed further below) – such as payment by outcomes contracts and social impact bonds.

Checklist for measuring impact – some questions to consider:

Measuring impact is not an easy undertaking but having a plan from the start can be critical to success.

- Will you measure baselines when your operation starts so that you can measure the change that you have made down the track?
- Will you have the right data monitoring practices in place from the start?
- Have you considered privacy law implications of data tracking and reporting?
- How can you embed social impact measurement in your business model and your contracts to ensure you are getting continuous feedback?
- How can you measure more than just profit?
 - if you are an employment or training focused social enterprise, how many people did you put through a training course and give a qualification? How many people were assisted in gaining long term employment? How many hours of employment or training was provided in a financial year? Was there a reduction in relapse or re-offence, or savings to Government? What were the costs involved in direct wages and support costs?
 - if you are a direct benefit focused social enterprise offering an innovative product or service in response to a community need, what did the product or service achieve? What were the direct costs that you incurred in developing and delivering the product or service?
 - if you are a donation social enterprise, what was the value of the profit donated and any additional costs associated with managing recipient relationships? Did your donation lead to a specific outcome (such as providing safe drinking water to 10 overseas communities)?
- How can you effectively communicate the impact of your work to stakeholders?



There is an increasing range of resources on impact measurement that are publicly available, as well as a growing number of professional groups working in the area, including:

- [Social Impact Measurement Network Australia](#)
- [Centre for Social Impact](#) – see the Compass Guide to Impact Measurement
- [Emma Tomkinson's \(a social impact analyst\) resources](#)

Funding your organisation

Identifying sources of funding for your organisation is crucial when creating your business model.

Note

Some funding sources are mutually exclusive and only available to for-profits or not-for-profits. This can have a significant influence on your choice of legal structure.

For example:

- only for-profit organisations can be funded by equity purchased by investors, and
- only not-for-profit organisations that are endorsed as deductible gift recipients can seek tax deductible gifts (from individuals and some foundations which can only make donations to entities with deductible gift recipient (**DGR**) status).

Also, most philanthropic grants are only available to not-for-profit organisations (and more specifically many philanthropic grants are only available to charities or even more narrowly only to DGR endorsed entities – there is a discussion of the difference between not-for-profit, charity and DGR below).

Funding sources

Table of funding sources and structures

| Funding sources | Eligible or suitable entities | | Level of complexity |
|---|---|--|--|
| | For profit | Not-for-profit | |
| Equity (ordinary, or impact investment or crowd sourced investors) | ✓ | ✗ | Medium – high (depending on whether Pty Ltd, co-operative or public company, and how large the equity raising is) |
| Debt (commercial, through impact investing, owner loans or philanthropists) | ✓ | ✓ (owner-loans not possible) | Medium – high |
| Donations (deductible by the donor) | ✗ (with some exceptions) | ✓ | Low - medium |
| Grants (from charitable trusts, philanthropic foundations, corporate foundations, individual granting programs or giving circles) | ✗ (with some exceptions, for example small business grants, or social enterprise grants from corporate foundations or philanthropists) | ✓ (note that many philanthropic foundations can only provide grants to not-for-profits that are also endorsed as a deductible gift recipient, Item 1) | Medium – high |

| | | | |
|---|-----------------------------|---|---|
| Social Investment Bonds (usually government-led) | ✓ | ✓ | Very high |
| Crowd Funding (can be through donations or through pre-purchases) | ✓ | ✓ | Low (Note that fundraising laws are ambiguous in their application to crowd funding) |
| Micro donations | ✗ (with some exceptions) | ✓ | Low |
| Membership (as distinct from shareholders) fees | ✗ (with some exceptions) | ✓ | Low |

Impact investment

Impact investment is a growing field in Australia. It refers to methods for funding social or environmental projects that will provide the investor with **both** an impact and a financial return.

Impact investing is an alternative to grant funding in many cases. It's attractive to funders (as compared to a donation or grant) because it provides for 'capital recycling' as the same money can be used over and over to fund social projects.

Of course, not all social or environment projects can generate a financial return, however social enterprises are likely to be engaged in activities that both contribute an impact and generate income through its business model and trading revenues.



Read more about impact investing at [Impact Investing Australia](#), an organisation advocating for increased impact investing activities in Australia.

Different types of impact investing approaches are illustrated in the **funding spectrum** below.



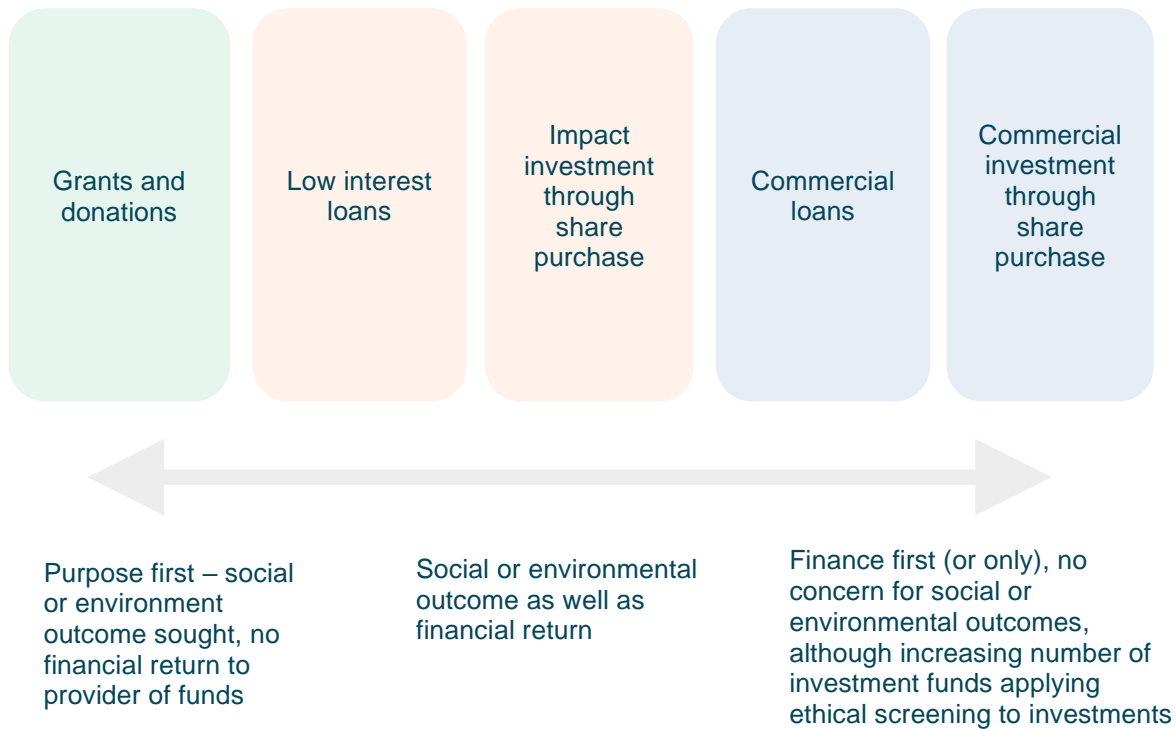
Note

Beyond this spectrum there are other more complex funding arrangements, such as bonds and notes.

The ability to issue 'equity' through share issues referred to below is limited to for profit companies limited by shares.

Other types of entity can incur debt, sometimes structured with profit participating features which have equity characteristics.

Different types of impact investing approaches



Impact investing can take many forms – from low-interest loans through to the purchase of shares (equity) in a for-profit social enterprise.

Many impact investors are interested in investing in social enterprises, as they see potential for the delivery of both financial return through trading activities, and the achievement of social or environmental impact through the work of the enterprise.



Examples of social enterprises that have received impact investments

- [STREAT](#) (see case study below)
- [Hepburn Energy](#)
- [Women's Property Initiative](#)
- [Good Cycles](#)
- [Goodstart Early Learning](#)
- [Who Gives A Crap](#)
- the [Yackandandah Community Development Company](#)



Tip

A number of organisations support the development of social enterprises and can assist in investment readiness and securing investment. The list of organisations below is not comprehensive, and we do not specifically endorse these organisations. Always conduct your own research.

- ▶ [Social Traders](#)
- ▶ [The Difference Incubator](#)
- ▶ [Social Ventures Australia](#)
- ▶ [Impact Investing Australia](#)
- ▶ [White Box Enterprises](#)
- ▶ [Social Impact Hub](#)
- ▶ [Impact Academy](#)
- ▶ [The Social Enterprise Council of NSW and the ACT](#)
- ▶ [Queensland Social Enterprise Council](#)
- ▶ [Social Enterprise Network Victoria](#)
- ▶ [Impact North](#)
- ▶ [Westpac Foundation](#)
- ▶ [Ian Potter Foundation](#)
- ▶ [Vincent Fairfax Family Foundation](#)
- ▶ [Paul Ramsay Foundation](#)
- ▶ [Trawalla Foundation](#)
- ▶ [English Family Foundation](#)
- ▶ [Wise Foundation](#)



Note

The availability of the different types of impact investing approaches to your social enterprise will depend on its legal structure.

Is it necessary to incorporate a new entity for your social enterprise?

Before you decide to incorporate a new structure for your enterprise, consider whether you need to set up and operate an incorporated entity to achieve your goals.

Some options that **don't** require setting up a whole new organisation include:

- continuing unincorporated
- running the enterprise out of your existing organisation
- joining another organisation, and
- auspicing

These options are discussed below.

Continue unincorporated

If you are a start-up, it may be possible to conduct your activities without incorporating.

However, there are some particular and important benefits that flow from incorporating – for example:

- limited liability for members or shareholders
- the ability for the incorporated body to enter into agreements and open a bank account in its own name
- the preference of many funders for organisations to be incorporated, and
- tricky issues raised by shared unincorporated ownership of businesses such as partnership law

Run the enterprise out of your existing organisation

If you are an existing organisation that wants to set up a new social enterprise as part of your organisation, you may not need to set up a new structure.

Some organisations operate a business from within their existing structure (including as another business unit).

Whether you set up a new structure will depend on whether:

- your current structure can accommodate the type of funding arrangements you are interested in, and
- your new business might expose your existing organisation to risks, in which case it would be more appropriate to put the business in a new and separate structure (which can be wholly owned by the existing organisation, have shared boards, and shared services and resources)

It may be that the pilot is run within the entity with a view to transition to a separate entity over time.



Tip

If your social enterprise is a business unit of a parent organisation and you wish to seek certification with Social Traders, you will only need to provide the profit and loss statement for the social enterprise, not the parent organisation.

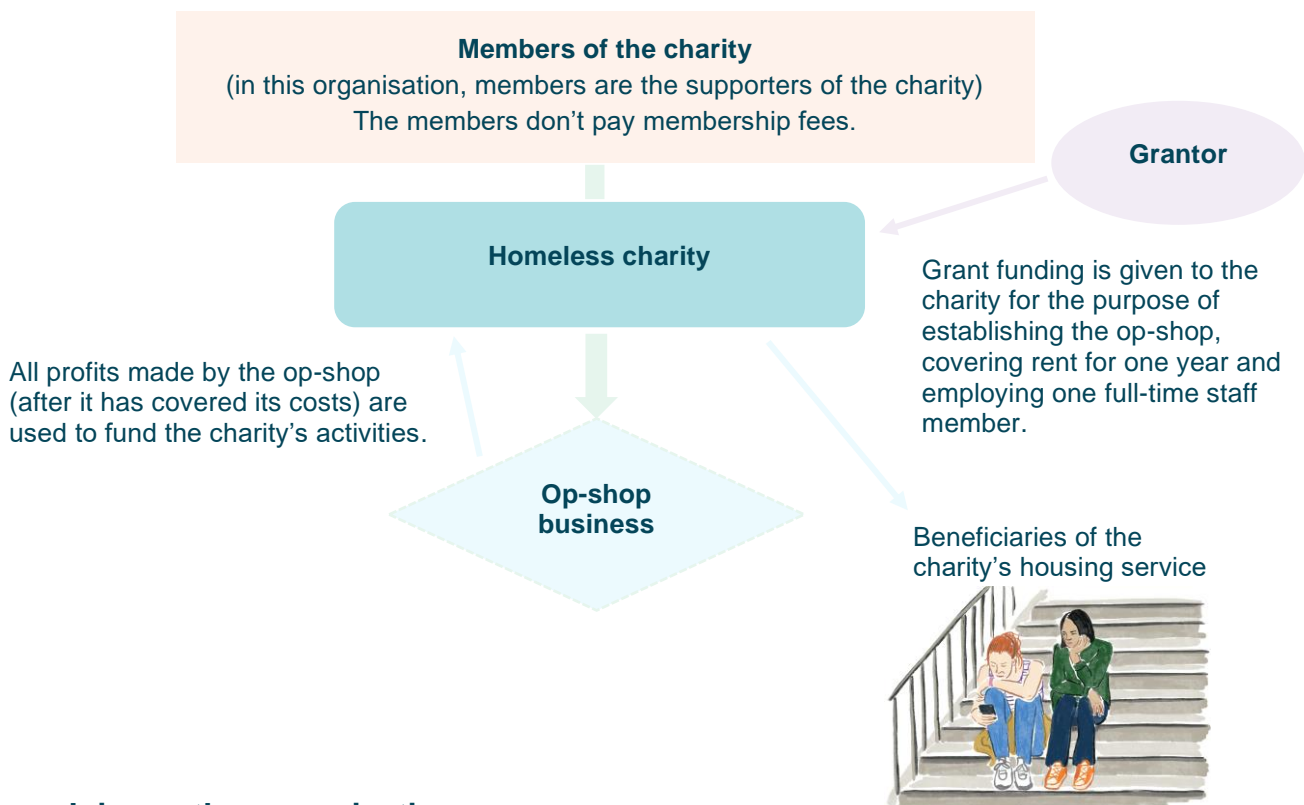


Example – a social enterprise run by an existing organisation

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 op-shop business model would be tested during the one-year grant, and if successful, the business would be continued after the one-year grant period by the charity. The terms of the grant were that it was for a one-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 (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.

See the structure of the organisation and the flow of funds in the diagram below.



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

Rather than starting an organisation from scratch, it can be more efficient to run your idea within an existing organisation, as you can benefit from their existing infrastructure (such as premises, payroll, insurance, financial staff).

Auspicings

Some not-for-profit organisations are willing to auspice projects, such as social enterprises that are in the pilot, or incubation stage. To 'auspice' means to provide support, sponsorship or guidance.

This normally involves an auspicings agreement between your group and the auspicings body. An auspicings agreement is basically an agreement to work in, or under the auspices of, another organisation, and a way for an organisation to access funding without being incorporated or without satisfying grant criteria (such as holding certain insurance).

Under an auspicings agreement, one organisation (the principal organisation or auspicor) 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.

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
- the funding options that you think best suit your project can be accessed and administered by that organisation (for example, do they have the right tax endorsements)

Auspicing can be a useful transition tool to use if you are setting up your own organisation and want to work under the auspices of another organisation while going through the process of setting up an entity and potentially applying for registration as a charity, deductible gift recipient (**DGR**) endorsement, or certification as a social enterprise.



Example – auspicings

‘Let’s Study’ is a local study group formed by parents to advance their children’s educational development and provide support to each other. When Let’s Study was first formed four children were involved in the program. Other parents heard about the group and started sending their children to Let’s Study sessions. The parents responsible for running the Let’s Study sessions constantly worry about any personal liability they might have as a result of having the children under their supervision and care during the sessions.

The group currently holds its sessions in a school venue free of charge. However, the school can no longer provide the space due to renovations. The study group has identified a council-owned location available free of charge for holding the study sessions. The council requires groups using the venue to be incorporated and have insurance. The parents running the session are all employed full-time and can’t dedicate more time to the group. They realise that incorporating will take time, effort and involves ongoing reporting obligations, so they decide against setting up an incorporated entity.

Study Victoria Inc is an incorporated association which has a purpose of promoting and engaging children in education from early stages of schooling. One of the ways in which Study Victoria achieves this purpose is through supporting study groups across Victoria. It recognises the need for parents throughout Victoria to network and support each other and their children’s education and is willing to auspicings study groups. Study Victoria has standard terms and conditions for auspicings. Its insurance covers auspicings groups but requires groups to meet a set of safety standards. Let’s Study decides to accept Study Victoria’s terms and conditions and adopt their safety measures to get the benefits of being auspicings, including access to the council venue.



For more information on incorporating, go to our webpage [What does incorporation mean, and should you incorporate?](#).

For more information about auspicings or joining another organisation, see our webpage on [working with other organisations](#).



Note

Only some organisations are willing to auspicings projects.

Many philanthropic organisations won’t allow auspicings arrangements, and organisations that are willing to auspicings often charge an administration fee (which usually represents a % of the funds raised).

If you decide to incorporate, should you be for-profit or not-for-profit?



Note

Choosing which legal structure to adopt for your social enterprise is the most important decision you will make when getting started.

And whether your social enterprise is not-for-profit or for-profit, or is a hybrid structure, 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 it can attract investors
- the tax concessions your social enterprise may be eligible for (if any)
- ongoing reporting and governance requirements you must meet, and
- whether your social enterprise can be registered as a charity

Factors influencing the decision whether to be not-for-profit or for-profit

When thinking about what is appropriate for your organisation, consider:

- **Where will your funding come from?**

Donations and philanthropic funding or grants can generally only be directed to not-for-profits.

For-profit entities can seek equity investors to raise funds by issuing shares. Similarly, not-for-profits can also seek investors to raise funds through impact investment usually involving debt structures (as they can't issue share capital) but this can be more complex (as debt, unlike risk capital or equity, generally has to be repaid).

- **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 to members, and all profits are directed to achieving the organisation's mission (the 'mission lock').

In a for-profit organisation – which is a wealth creation vehicle, profits are often distributed to shareholders or investors and so can provide a return on investment. 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 or owners or members?**

Some structures have investors and/or owners, some have members; these are not the same and different rights attach.

- **Does your organisation hope to access charitable and other tax concessions?**

These concessions are typically only available to not-for-profits registered as charities – and the entity then needs to have a charitable or public purpose. DGR endorsement is even more limited, so this impacts the choice of structure.

Using a hybrid structure to form a social enterprise

Hybrid structures are a use of two (or more) entities to form one (or more) social enterprises (or a group operating as one).

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 also be undertaking certain activities that are charitable so you may access income tax exemptions for your charitable activities. 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 for parts of its activities, 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)

If you use a hybrid structure for your organisation, you will need to consider how the entities are going to work together.

You may need to prepare an agreement between the entities to document this relationship. Documenting the relationship can also assist in demonstrating to potential investors and third parties that the organisations work together to further a particular mission, and that the not-for-profit is not being used as a vehicle to raise funds to further the for-profit's work, (sometimes called 'social washing').

In a hybrid structure you also need to consider how to manage any conflicts between the entities. Preparing a conflict-of-interest policy can help manage this.

Hybrid structures are discussed in more detail in [part 3](#) of this guide.



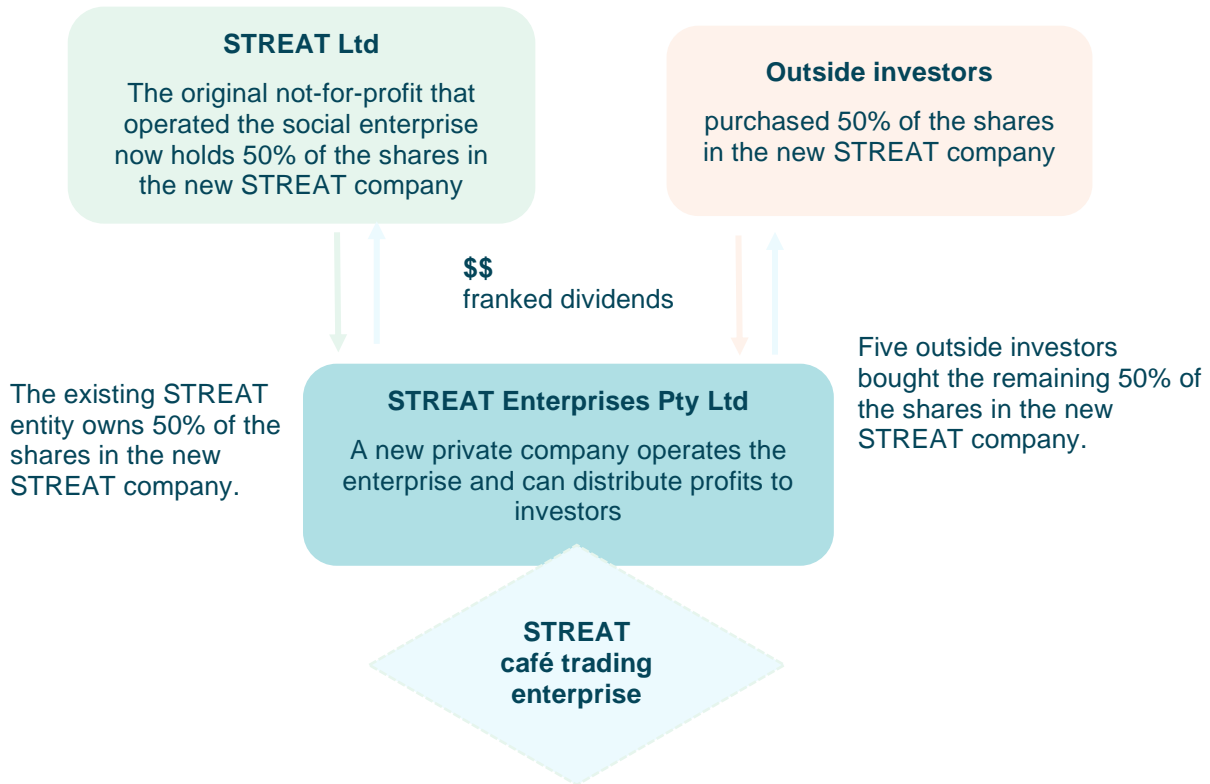
Example – hybrid structure

STREAT Ltd is a Melbourne-based not-for-profit social enterprise that operates café businesses and employs young homeless Australians. In 2012, STREAT bought two 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 the original 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 to raise funds. STREAT Ltd would own the other 50% and enter into a shareholders agreement with the investors.

STREAT initially operated as a not-for-profit social enterprise entity. However, the opportunity to fund the business acquisition through equity investment led to the need to add a for-profit arm to the organisation.

See the structure of the organisation and the flow of funds in the diagram below.



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

- STREAT Ltd could remain focused as a public benevolent institution on its supported employment model
- STREAT got access to significant funding and more funding opportunities in the future, through the sale of equity in STREAT Enterprises, and
- STREAT quarantined risk and liability for trading and ownership of the cafés and coffee roasting business to STREAT Enterprises



Read more about the STREAT social enterprise in Social Ventures Australia's online publication '[STREAT's ahead: funding social impact with equity](#)'.



Note

In such a hybrid structure, the Pty Ltd pays company tax, but can distribute franked dividends.

STREAT Ltd as an income tax exempt charity can receive a cash franking refund (so that the net position is that no tax has been paid on profits that were distributed back to the not-for-profit structure).

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

Social enterprises need to 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 organisations 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 (discussed further below)

Tax concessions are usually only available to charities registered with the Australian Charities and Not-for-profits Commission (**ACNC**).

DGR endorsement is available to a narrower set of charities and the *Income Tax Assessment Act 1997 (Cth)* (**Tax Act**) has particular classes of DGR:

- Item 1 for 'doing charities' like Public Benevolent Institutions, Health Promotion Charities, Harm Prevention Charities, environmental organisations, cultural organisations and certain entities specifically listed in the Tax Act, and
- Item 2 for 'funding charities' for public and private ancillary funds



Caution

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



Note

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 investors.

A for-profit social enterprise can still receive gifts and donations even if it doesn't have DGR endorsement but can't conduct charitable fundraising activities unless it is not-for-profit (the donors may also not receive tax deductibility for such gifts or donations).

DGR endorsement can be a requirement for larger donors and grants from trusts and other philanthropic funders which are set up as ancillary funds under the Australian income tax legislation (the 'funding' charities with Item 2 DGR status) because under tax law they can only give to Item 1 DGR endorsed organisations (the 'doing' charities).

Corporations and simple charitable trusts do not have the same restrictions and may be able to grant to for-profit social enterprises. The different tax exemptions are briefly explained below (there are some exceptions to the general positions in the table below).

Summary of tax exemption and concession eligibility

| Tax exemption or concession | Eligible organisation | Not-for-profit | For profit | Charity |
|--|---|----------------|---------------------|---------|
| 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 | ✓ | ✓ (very limited) | ✓ |
| 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 | ✓ | ✗ | ✓ |
| Fringe benefits tax rebate or exemption | <ul style="list-style-type: none"> FBT exemptions are available to some not-for-profit organisations (provided the fringe benefits given to employees are not more than the relevant cap), for example: <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 Certain other not-for-profit organisations (subject to the caps): <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 | ✓ | ✗ | ✓ |
| 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 | ✓ | ✗ | ✓ |

- | | | | |
|--|---|----------------------|----------------------|
| | <ul style="list-style-type: none"> Organisations who are specifically listed in the <i>Income Tax Assessment Act</i> | (only limited types) | (only limited types) |
|--|---|----------------------|----------------------|

Summary of tax concession benefits

| Tax exemption or concession | Benefits |
|--|---|
| Income tax exemption | <p>If your organisation qualifies for income tax exemption, it won't 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.</p> <p>Under the Tax 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 recognised categories of charity or not-for-profit categories</p> |
| GST concessions | <p>Not-for-profit organisations are required to be registered for GST if the organisation has an annual turnover of more than \$150,000.</p> <p>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.</p> <p>There are various, specific types of GST concessions for the not-for-profit sector</p> |
| Fringe benefits tax rebate or exemption | <p>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 or exemption is available to eligible not-for-profit organisations.</p> |
| Deductible Gift Recipient endorsement | <p>DGR endorsement is a special kind of tax status allowing people who donate to the organisation to 'deduct' those donations from their own income for tax purposes.</p> <p>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 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.</p> |
| State based tax concessions | <p>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 (for example, exemption from payment of council rates, stamp duty, and payroll tax).</p> <p>Eligibility for tax concessions will be based on whether the organisation retains profit for its members (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)</p> |



Note

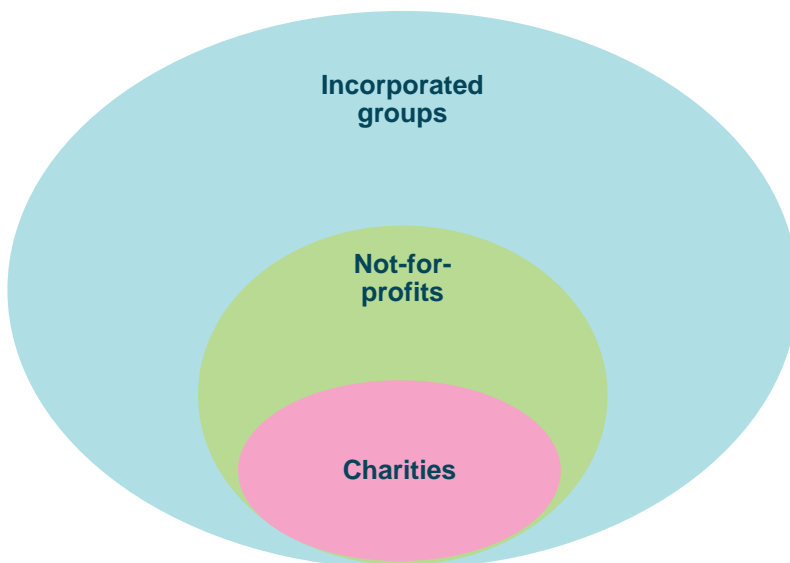
Getting DGR endorsement is a complicated process which can be lengthy. The DGR categories are limited, and the objects of the entity need to align closely with the specific DGR category. This means entities with broader and holistic environmental, social, and governance (**ESG**) objects struggle to obtain DGR and may need to split out its objects into different entities to obtain DGR endorsement or consider specific listing.

The [Australian Tax Office has published useful guidance](#), but you will probably need a lawyer to assist you.



See [our tax webpage](#) for more information on tax concession eligibility and application requirements.

Should your organisation register as a charity?



There are over 600,000 not-for-profit organisations in Australia of which around 10% are registered charities. Not-for-profit organisations also include sporting, political, clubs and other entities.

Note some charities are unincorporated, such as trusts, and some, but not all charities and not-for-profits are deductible gift recipients.

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 which incorporate the relevant not-for-profit mission and asset locks).

Eligible organisations can register as charities with the Australian Charities and Not-for-profits Commission (**ACNC**). The benefits of registering as a charity are summarised in the table below. There are some limitations to becoming a charity that are also noted.

Summary of benefits and limitations to becoming a charity

| Benefits | Limitations |
|--|---|
| Charities can apply for (but may not necessarily qualify for) DGR endorsement, which gives charities greater access to donations and grant funding. | Members of charities can't receive any financial benefit (ie. charities can't return dividends to investors). |
| Charities can access federal tax concessions – income tax concessions in particular are very helpful for charities who receive or generate income. | A charity's activities are limited by their charitable purposes – all of a charity's activities should be in furtherance of its mission. |
| Some registered charity subtypes (including PBI and health promotion charity) can access fringe benefits tax exemptions up to a threshold amount making it a more cost-effective model to employ staff. Further, for employment focused social enterprises, it can enable the enterprise to offer greater benefits (such as salary packaging) to the disadvantaged cohort and provide greater impact. | While the ACNC allows a charity to be registered with multiple charity subtypes, if the charity applies for DGR endorsement with the ATO under a specific charity subtype (ie. PBI), the charity's dominant purpose must relate to that charity subtype (ie. providing benevolent relief) and it can't have other purposes that are outside that charity subtype, unless those purposes are ancillary or incidental. This limits charities and social enterprises from obtaining DGR endorsement with broad environmental, social, or governance purposes. |
| Being registered as a charity means your organisation will be searchable on the register of charities (maintained by the ACNC) and can use the 'Registered Charity Tick' on your printed and digital media – this can help the public have trust and confidence in your organisation. | Details of directors are publicly available on the register of charities (however, the same details are publicly available on ASIC irrespective of if the enterprise is a registered charity or not). In certain circumstances, these details can be withheld from the register. |
| If your group incorporates as an incorporated association or CLG, its reporting requirements are lower if it is registered as a charity (because certain obligations under certain state and territory-based incorporation legislation and Corporations Act do not apply to charities). | If your organisation is incorporated as a state-based structure such as an incorporated association, in some cases it may need to report to both its state-based regulator, and the ACNC (some states have made changes to reduce double reporting for incorporated associations). |

Eligibility for registration as a charity

| To register as a charity with the ACNC, 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 provides a public benefit – see the note below) | <input type="checkbox"/> |
| • provide the ACNC with information regarding the organisation's charitable purpose | <input type="checkbox"/> |
| • select the appropriate charity subtype for the organisation's activities (some of which align with the categories for DGR endorsement) [note – this isn't always the case] | <input type="checkbox"/> |
| • describe the organisation's activities and how these work towards the charity subtype identified | <input type="checkbox"/> |
| • select the people or communities that the organisation's activities are intended to benefit | <input type="checkbox"/> |
| • provide a full list of the organisation's responsible persons such as board members, directors or trustees | <input type="checkbox"/> |
| • have an Australian Business Number | <input type="checkbox"/> |
| • provide the ACNC with its name, which must be the same as the name on the Australian Business Register, listed in the organisation's governing document and registered with any other regulators (such as ASIC) | <input type="checkbox"/> |
| • identify all of the places where the organisation will operate | <input type="checkbox"/> |
| • provide the ACNC with the required contact details | <input type="checkbox"/> |
| • notify the ACNC as to what type of legal structure the organisation is | <input type="checkbox"/> |
| • upload a copy of the organisation's governing document | <input type="checkbox"/> |
| • provide information regarding the organisation's finances such as its financial year end date, current financial situation and estimate future revenue | <input type="checkbox"/> |
| • select any tax concessions the organisation intends to apply for | <input type="checkbox"/> |
| • meet the ACNC governance standards in order to become and remain registered, and | <input type="checkbox"/> |
| • not be a type of organisation that can't be registered (this includes political party, government entity, or an entity engaged in, or supporting terrorist or other criminal activities) | <input type="checkbox"/> |

Charitable purposes



Note

Under the definition of charity in the *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 legislation clearly sets out the various ‘charitable purposes’.

Charitable purposes recognised by the law include:

- advancing health
- advancing education
- advancing social or public welfare
- advancing religion
- advancing culture
- promoting reconciliation, mutual respect and tolerance between groups of individuals in Australia
- promoting or protecting human rights
- preventing or relieving the suffering of animals
- advancing the security or safety of Australia or the Australian public
- advancing the natural environment
- other purposes for the public benefit (a general category)
- promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a state or territory (if promoting a change the change is in aid or furtherance of one or more of the above purposes, or if opposing a change that change is in opposition or hindrance of one or more of the above purposes)

The requirement that a charity operates for the ‘public benefit’ means that to be a charity, organisations must have a broad purpose or be assisting a broad enough category of people to be said to be providing a public benefit through its work.



For more information about charities, and whether your social enterprise could be eligible to be registered as a charity, see [the ACNC’s registration checklist](#).

Also see [our webpage on charities](#).



Part 3

What legal structure should you choose?

What legal structure should you choose?

This part covers:

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



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

This is a very important decision, because as noted in [part 2](#) of this guide, it will affect issues like:

- the different types of funding your social enterprise can receive
- your social enterprise's eligibility for tax concessions and charity registration, and
- ongoing reporting requirements and other regulatory issues your social enterprise must meet



Note

Even within the for-profit and not-for-profit categories there are several options, and each structure has relative pros and cons.

It's always a good idea to seek legal advice about the benefits and downsides of each structure in relation to your particular plans.

Structures available to social enterprises

The table below 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? |
|--|----------------------------|--------------------------------|--------------------------|
| Public Company (Ltd) (can be listed or unlisted) | ✓ | ✗ in general | ✓ |
| Private company (Pty Ltd) | ✓ | ✗ in general | ✓ |
| Unit trust (these do not necessarily provide limited liability protection) | ✓ | ✗ in general | ✓ |

| | | | |
|------------------------------------|---|--------------|---|
| Discretionary trust | ✓ | ✗ in general | ✓ |
| Incorporated association (Inc.) | ✗ | ✓ | ✓ |
| Company Limited by Guarantee (Ltd) | ✗ | ✓ | ✓ |
| Distributing Co-operative | ✓ | ✗ | ✓ |
| Non-distributing Co-operative | ✗ | ✓ | ✓ |
| Indigenous Corporation | ✓ | ✓ | ✓ |



The key difference between a for-profit company and a not-for-profit company is the way that profits are used or distributed.

For-profit structures

In a for-profit company, profits can be distributed to the shareholders (normally in accordance with its rules or constitution). This is called ‘making distributions’ or ‘paying dividends’. **In a social enterprise setting, a for-profit company needs to augment how it deals with profits so that it can meet definitions of social enterprise.**

For-profit social enterprises normally distribute some profits to investors and retain some profits to be used by the social enterprise to create public value and achieve the mission of the organisation.

To be certified with [Social Traders](#), a for-profit company will need to include provisions in its governing documents demonstrating social primacy – such as by inserting a mission and distribution lock whereby the dividends able to be distributed (private benefits) will not exceed an amount equivalent to or more than the measured public benefit created by the entity in pursuit of the mission (this becomes a measurement and accounting question as to how those benefits are measured and verified).

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 can be unlisted or listed on the Australian Securities Exchange (**ASX**).

Private companies have shares that can only be privately held and traded (ie. they can’t be widely offered like in public companies, although some exceptions apply).

Most for-profit social enterprises use a private or unlisted public company structure.

If a company has multiple shareholders, the company should prepare a shareholders agreement to regulate the rights and obligations of shareholders in the context of their ownership of shares in the company (this document regulates the joint enterprise, its business plan and funding and addresses defaults and ability to transfer shares).



Note

Private companies (Pty Ltd) can have a maximum of 50 non-employee shareholders. If your organisation would like more shareholders than this, it should consider being a public company (it’s unlikely it will need to be listed on a security exchange), or a co-operative.

Distributing co-operatives can also be used to structure a for-profit enterprise.

Shareholders are also sometimes called 'investors' but holding shares in a company is only one way of investing in a company – there are other types of investment that can be made such as bonds and debentures (which are in the nature of debt).

Start-up funding for private and public companies and for-profit co-operatives generally comes from its shareholders buying initial shares in the company and also from taking out loans.

For-profit companies provide protection to directors and shareholders, as personal liability is limited to the unpaid amount on shares owned in the company. There are often disclosure requirements associated with offering shares to investors (although exceptions apply, especially where offerings are smaller, or investors are sophisticated or from your personal networks).

For-profit companies have constitutions that set out rules of the company and will have at least one director and shareholder. Depending on the size of the company, a for-profit will also have a board of directors who are responsible for overseeing the company.

ASIC regulates for-profit companies and the compliance and reporting requirements imposed by ASIC are quite onerous. *The Corporations Act 2001 (Cth)* (**Corporations Act**) also imposes strict legal duties on directors of private and public companies, including the duty to act in good faith in the best interests of the company.

Regulatory requirements for Pty Ltds are generally lower than for public companies or co-operatives.



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.

Common structure choices for for-profit social enterprises

In many circumstances, a for-profit social enterprise will fall into one of two categories:

- an entity with a small pool of owners, which will often use a Pty Ltd structure, or
- an entity with a larger pool of owners, which will typically choose between a public company structure and a co-operative structure

Organisations in this category should seek advice about the relative merits of each of these structures before deciding on a structure.

There are other, more complex structures, such as trusts and partnerships, which can be used in for-profit social enterprises.



Note

As Justice Connect doesn't offer advice to for-profit entities, we are only able to provide limited information about starting up for-profit social enterprises. You should seek advice on the best structure for your organisation.

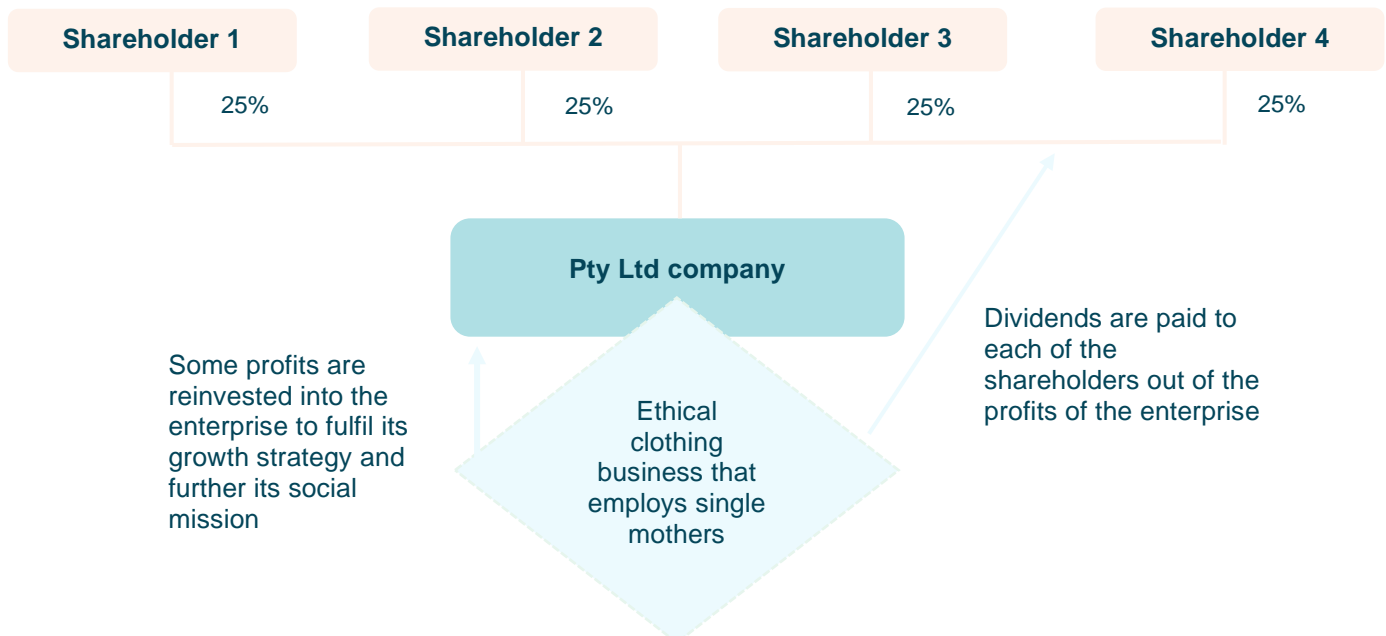


Example of a for-profit social enterprise structure

A private company runs an ethical clothing social enterprise, set up to employ intellectually disabled young people. The 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 way this structure of a social enterprise set up as a private company might look is shown below.

In this example, let's assume that the shop now makes a profit. Because the 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, the business directs at least 50% of the profits into the social enterprise to further its social purposes or uses these profits to further the mission of the organisation in other ways, such as by providing education scholarships to employees.



Balancing obligations

A private company owes duties to its shareholders under the Corporations Act including the legal requirement to act in the best interests of the company and its shareholders. This 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 fulfilling the social enterprise mission that uses its profits to further its social or environmental purposes. A social enterprise with a private company structure must balance these obligations.

It can be helpful to add clauses to the company constitution that clearly state that the business has a social mission, and that directors may consider that social mission when making decisions, so long as to do so is within the law. Provided the solvency of the entity is not put at risk (in which case the interests of creditors need to be considered), it's permissible to take a broader view of the entity's interests, including environmental, social and governance factors and the non-financial stakeholders it relies on to be sustainable.



Examples of for-profit social enterprises

- The [Yackandandah Community Development Company](#) uses an unlisted public company structure, with community members as shareholders. Its constitution is available on its website and can be viewed as an example of a for-profit constitution that includes permissive clauses around pursuing a community purpose
- [thankyou.](#) uses a Pty Ltd structure, that is owned by a charitable trust
- [Hepburn Energy](#) uses a combination of a for-profit co-operative structure (a distributing co-operative) that owns a Pty Ltd structure

Not-for-profit structures

The benefits and limitations to each legal structure commonly used by not-for-profit social enterprises are summarised in the table below.

| Structure | Benefits | Downsides |
|--|--|--|
| Incorporated associations | <ul style="list-style-type: none"> • less onerous reporting obligations • the regulator takes 'educative' approach to enforcement • sometimes cheaper and easier to set up | <ul style="list-style-type: none"> • groups with less than five members can't use this structure • state-based structure makes it difficult to operate across different states (may have to register under Corporations Act as Registrable Australian Body for interstate activities) • may need to transition to a CLG if grow too large |
| 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"> • can be expensive to set up • if not a charity, complex reporting requirements to a strict regulator (ASIC) |
| Non-distributing co-operatives | <ul style="list-style-type: none"> • for organisations passionate about co-operative principles, the structure enshrines co-operative principles | <ul style="list-style-type: none"> • fewer co-operatives in Australia and fewer professionals with co-operatives expertise • co-operative principles and associated obligations will not suit all social enterprises |
| Indigenous corporations registered with the Office of the Registrar of Indigenous Corporations (ORIC) | <ul style="list-style-type: none"> • takes Aboriginal and Torres Strait Islander customs and traditions into account • the <i>Corporations (Aboriginal and Torres Strait Islanders) Act 2006 (Cth)</i> (CATSI Act) has reduced burdens | <ul style="list-style-type: none"> • ORIC structures are less flexible • excludes non-Indigenous groups, although can have joint ventures with non-Indigenous (subject to Supply Nation rules) |



We've summarised the legal structure options below.

For more information, see our webpage [Which incorporated legal structure should you choose?](#)

For a not-for-profit to be considered a social enterprise, it must have a defined primary social, cultural or environmental purpose consistent with a public or community benefit. Many not-for-profit social enterprises are also charities.

While many not-for-profits can be run purely for the benefit of their members (for example, a tennis club), often the group of people or cause to be helped through a not-for-profit social enterprise is separate from its membership. Members are often involved because they have an interest in the cause or purpose of the not-for-profit social enterprise. It's also acceptable for the members of a social enterprise to be the people that the organisation is trying to assist, so long as membership is open and targeted enough to be consistent with the meaning of social enterprise (for example, a group may operate to benefit its members who are all unemployed refugee women).

If a group is set up to only benefit its members, this will also be relevant when seeking to register as a charity or be endorsed as a Deductible Gift Recipient. Again, the conditions of membership and types of members, as well as the group's purpose, must be consistent with charitable purposes, and satisfy the 'public benefit' test. This is possible, but your group may need to seek some advice about how to ensure that the requirements for charitable registration are being met.



Tip

It's important to remember that not-for-profit doesn't mean the enterprise can't make profit – in fact, to have a sustainable business model, enterprises must operate to create value and a surplus.

Rather, the key difference is that instead of being focused on wealth creation for shareholders, a not-for-profit uses all of its assets and revenue to achieve its social mission.

Incorporated associations

State or territory-based entity

An incorporated association is a state or territory-based entity which was originally designed to be low cost to register and simpler to run than a company limited by guarantee. However, recent changes to the laws for both incorporated associations and companies limited by guarantee that are registered charities with the ACNC means that these considerations are less relevant.

Separate legal identity

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'.

Management committee, members and rules or constitution

Incorporated associations are run by an elected management committee (with mandated minimum numbers of committee members varying in each state) and a secretary or public officer. An incorporated association must have rules (also known as a constitution), and must usually have 'purposes', which are lodged with the relevant state regulator (such as, Consumer Affairs Victoria or NSW Department of Fair Trading), when applying to become an incorporated association. The activities of the association must be directed to its 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 (ie. mission locked).

Incorporated associations can charge a joining fee or subscription fee to members and can provide members benefits consistent with their purposes (for example, a tennis club charges members an annual fee and in return members can hire tennis courts and access discounted tennis lessons, although note that such a club would be unlikely to be considered a social enterprise). Incorporated associations can also provide benefits to other groups, such as by running programs, services, or emergency relief, so long as this is consistent with the purpose of the organisation.

Regulator

Incorporated associations have different regulators in each state, depending on where it is registered and carries out its activities.



Note

A key question to consider is **where** the enterprises will operate or carry out activities.

If the enterprise is only likely to operate locally or in its 'home' state or territory (such as a local disability respite centre), an incorporated association structure would be suitable as incorporated associations are generally limited to only conducting business within its 'home' state or territory.

Another consideration is the size of the enterprise. A number of state regulators will request that large, incorporated associations (determined by factors such as revenue, business model and employees) transition to an alternate legal structure that they feel is more appropriate.

Company limited by guarantee

Separate legal identity

A company limited by guarantee (**CLG**) is a **not-for-profit company** and works differently to other companies formed under the Corporations Act. The members of CLGs agree to provide a 'guarantee' up to a certain amount (usually a small amount like \$10), which they agree to contribute in the event the company is wound up. The liability of members is limited to this amount. A CLG doesn't have shareholders, so it can't raise money by issuing shares, and it cannot pay dividends to its members.

Members, directors and a constitution

A CLG is governed by a constitution, which can be tailored to suit the company's mission and rules regarding its members and directors, including the classes of members (if any) and different rights attached to each class (ie. voting or non-voting).

Not state or territory based

If your enterprise is operating interstate or internationally, you may wish to consider establishing a CLG which is not restricted to operating only within the state of registration. A CLG must have a minimum of one member and three directors (all the directors must be over the age of 18 and two must be Australian residents).

Regulator

CLGs are regulated under the same strict legislation as Australian companies (the Corporations Act), however some requirements for CLGs are different (and simpler) from those that apply to for-profit companies.

If a CLG is registered as a charity, most requirements under the Corporations Act no longer apply to it and are in effect 'switched off' while it remains registered with the Australian Charities and Not-for-profits Commission (**ACNC**). A CLG that is a registered charity is also no longer liable for many common fees and penalties under the Corporations Act including the annual company registration fee payable to ASIC. The primary regulator of a charitable CLG is the ACNC.

**Note**

CLGs are regulated by ASIC, unless they are a registered charity, in which case the regulator will be ACNC instead. But they must still notify ASIC of certain changes to the CLG.

Co-operatives

Co-operatives are organisations based on voluntary, democratic participation of the members that form the organisation. One of their distinguishing features is that they are part of a movement of co-operatives, and in jurisdictions that have adopted the harmonised *Cooperative National Law*, the 'cooperative principles' are included in the laws. These principles are expressed throughout the law, for example through limitations on having different classes of membership, and through 'active membership' requirements, and when registering a co-operative, the relevant Registrar must be satisfied that the organisation follows the co-operative principles.

Many of the 'original' social enterprises, such as mutual societies, were set up as co-operatives. There is debate about whether all mutual societies meet definitions of social enterprises such as the criteria set out by Social Traders. This ultimately depends on whether the organisation can be said to be pursuing a community or public purpose.

As with other not-for-profit structures, it is possible to structure a co-operative so that it clearly meets the commonly accepted definitions of social enterprise, for example a co-operative enterprise that works to provide employment opportunities for its members, who are underemployed people with a disability.

There are two 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 make distributions to their members can't 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 can't be distributed to members.

The co-operative structure is a specialist structure, and it can be hard to find pro bono advice on setting up a co-operative. The co-operative movement is actively advocating for improved ecosystems, and have created online resources for non-distributing co-operatives, so this position may change.



For more information about starting a co-operative, see the [Business Council of Co-operatives and Mutuals website](#).

**Note**

Administration of the *Co-operatives National Law* (a uniform national regime) continues to be the responsibility of each state and territory, but with a commitment to achieve uniform processes and policies.

Examples of not-for-profit social enterprise structuring



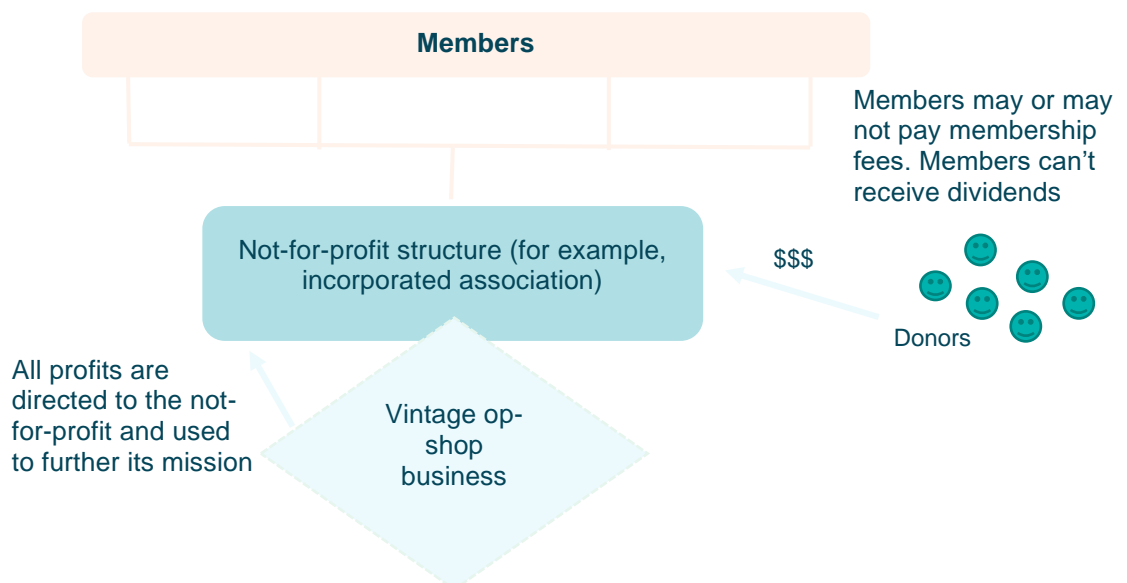
Example one – a not-for-profit social enterprise structure

See the structure of the enterprise and the flow of funds in the diagram below.

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 crowdfunding platform. Individual donors can claim a tax deduction for their donation.

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



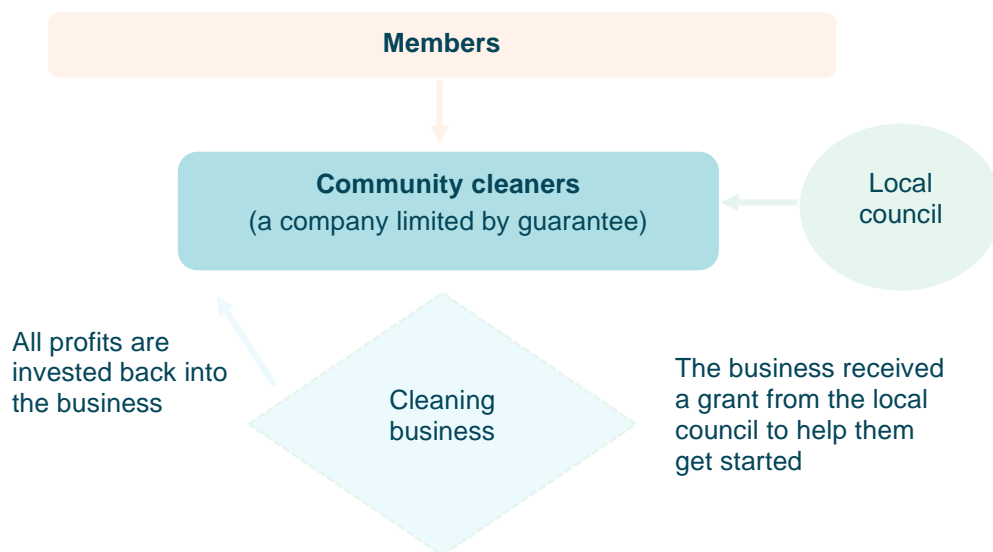


Example two – a not-for-profit social enterprise structure

A local migration agent and his wife decided to start a not-for-profit cleaning business, which employs new migrants who have 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 vehicles.

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



Indigenous corporations

Registered with ORIC

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 have reporting and other compliance and governance requirements, but they are more relaxed than those that apply to other legal structures. Like co-operatives, there are fewer lawyers with relevant expertise in Indigenous corporations, however the structure can be used to set up a social enterprise and there are support services available. Contact the specialist regulator for Indigenous corporations, [ORIC](#), for more information about setting up an indigenous corporation.

Supply Nation

Organisations can apply to [Supply Nation](#) for registration (if not-for-profit) or certification (if for-profit) as an Indigenous business.

A **not-for-profit** Indigenous corporation can be registered with Supply Nation if it:

- is at least 50% owned by Indigenous persons
- is a sole trading business, a partnership, and incorporated entity or trading through a trust
- is located in Australia, and
- makes the majority of its revenue through providing a product or service as opposed to grants and donations

A **for-profit** Indigenous corporation can be certified with Supply Nation if it:

- is at least 51% owned, managed and controlled by Indigenous persons

- is a sole trading business, a partnership, a private incorporated entity or trading through a trust, but not a franchise or registered charity
- is located in Australia, and
- has trading evidence of \$50K income in the last 12 months

Businesses registered or certified with Supply Nation are entered into Supply Nation's Indigenous Business directory, which is a pathway to connecting an organisation with procurement teams. In particular, the Federal Government uses Supply Nation to identify Indigenous businesses for procurement opportunities in project supply chains in accordance with their Indigenous Procurement Policy.



For more information about Supply Nation registration or certification, see [Supply Nation's website](#).

Hybrid structures

As discussed at earlier points in this guide, it's 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 investment opportunities and access to tax concessions.

Hybrid structures can also allow for innovation and flexibility, as enterprises can tailor the formal legal structure to their needs.



Note

The not-for-profit organisation can't simply be a means to raise additional funds through donations and philanthropy that are then transferred to the for-profit entity. There must be clear logic to demonstrate how the mission of the not-for-profit entity is amplified using the hybrid model.

Important considerations in adopting a hybrid structure

Adopting a hybrid structure can also create other issues to be managed, including:

- additional regulatory, compliance and accounting burdens – often with dual regulators (ASIC and ACNC)
- establishing appropriate governance of the entities and independence between them
- considering any shared services or resources between the entities
- putting processes in place to monitor and report on the activities, projects and services of the entities
- managing conflicts between the entities, and
- creating a compelling narrative and contractual framework between the entities

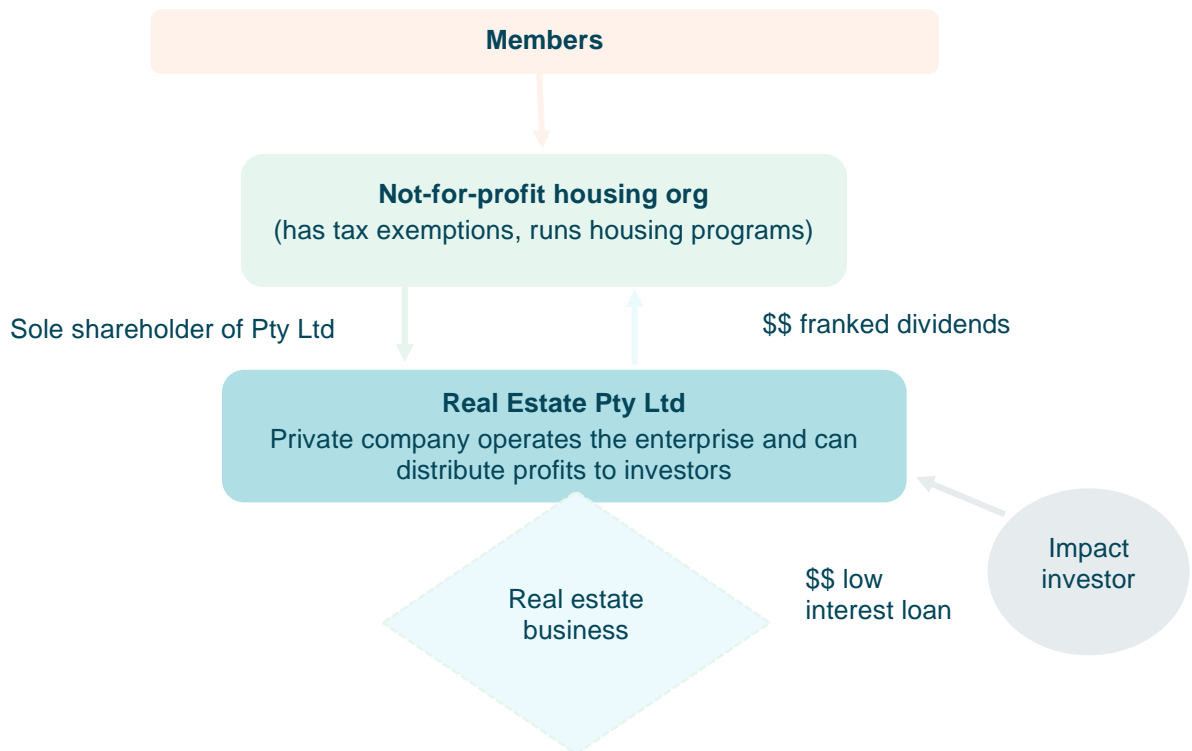


Hybrid case study one – not-for-profit with for-profit entity

See the structure of the enterprise and the flow of funds in the diagram below.

A not-for-profit homelessness organisation has the relevant skills and expertise to start a rental management business. It decides to create a real estate agency that will generate profits to support the not-for-profit’s work providing accommodation to homeless families.

It sets the business up as a separate entity to manage risk and uses a for-profit structure in case it wants to raise equity capital in the future. It receives an impact investment low-interest loan to help cover the costs of setting up the business.





Hybrid case study two – for-profit with not-for-profit subsidiary

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.

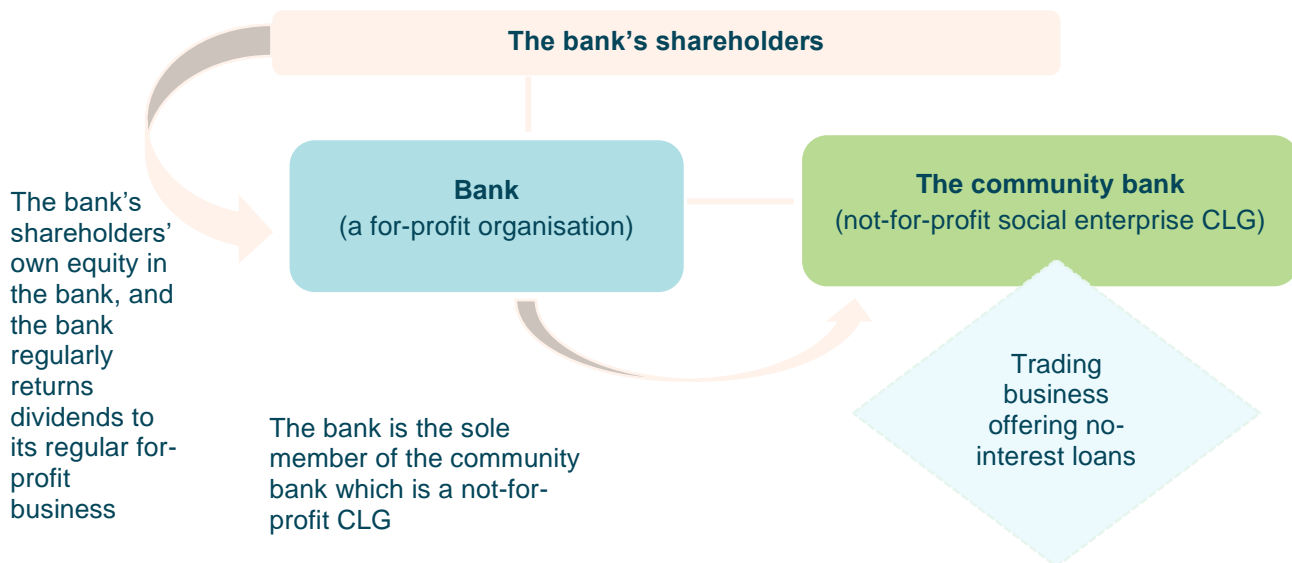
The bank wants the enterprise to be separate from its other businesses for several reasons, such as:

- the community bank is not set up to make any profit for the bank, rather, any profits will be reinvested into the community bank, 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 creates 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

See the structure of the enterprise and the flow of funds in the diagram below.



Ongoing obligations as a consideration

Different reporting and compliance obligations will apply to your enterprise, depending on which legal structure you choose.

Before choosing a legal structure, consider the reporting requirements you will need to comply with and what level of reporting and compliance your enterprise can manage. The reporting requirements depend on the nature of the regulator – whether only state, federal, or both state and federal law applies – and whether the social enterprise is a charity.

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 and penalties for non-compliance are usually higher and stricter.

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 or have been endorsed as DGR.

Different regulators and reporting requirements

The table below provides an outline of the different regulators and reporting requirements for different company structures.

| Entity | Regulator | Reporting requirements |
|-----------------------------|----------------|--|
| Proprietary Limited Company | ASIC (Federal) | <p>How onerous are the reporting requirements? Medium to high</p> <p>Reporting requirements for a proprietary company limited by shares under the Corporations Act vary according to whether the company is classified as small or large (which can change year to year). A company is considered small if it (inclusive of any entities it controls) passes at least two of the following tests:</p> <ul style="list-style-type: none"> consolidated revenue of less than \$50 million for the financial year consolidated gross assets of less than \$25 million at the end of the financial year, and / or fewer than 100 employees at the end of the year <p>A company that does not satisfy at least two of these tests is classified as large.</p> <p>All proprietary companies are required by the Corporations Act to keep sufficient financial records to record and explain their transactions and financial position.</p> <p>If either the shareholders with at least 5% of the votes in the company, or ASIC, directs it to do so, a 'small' company according to the tests listed above must prepare:</p> <ul style="list-style-type: none"> an annual financial report, including: <ul style="list-style-type: none"> an annual profit and loss statement a balance sheet, and a statement of cash flows, a directors' report about the company's operations such as dividends paid <p>Large proprietary companies must prepare annual financial reports and a directors' report, have the financial report audited and send both reports to shareholders and to ASIC.</p> |

| | | |
|---|--|--|
| Incorporated association | State / territory regulator | <p>How onerous are the reporting requirements? Low to medium</p> <p>Reporting requirements for incorporated associations vary based on the state of incorporation, which will determine the regulator and applicable legislation.</p> |
| Incorporated association which is also a charity | State regulator + ACNC (Federal) | <p>How onerous are the reporting requirements? Medium</p> <p>An incorporated association that is registered with the ACNC only needs to report to the ACNC, who will share information with the state regulator (ie. NSW Fair Trading). However, the organisation will still need to update the state regulator if certain changes are made to the organisation.</p> <p>Reporting requirements to the ACNC vary based on the organisation's revenue: For reporting periods starting from the 2022 Annual Information Statement:</p> <ul style="list-style-type: none"> • If annual revenue is less than \$500,000 the organisation will need to produce an Annual Information Statement, and there will be no audit or review by ACNC • If annual revenue is between \$500,000 and \$3 million, the organisation will need to produce an Annual Information Statement and annual financial report, which will be (at a minimum) reviewed by ACNC, and • If annual revenue is larger than \$3 million, the organisation will need to produce an Annual Information Statement and annual financial report, which will be audited by ACNC <p>An incorporated association that is a registered charity is subject to the ACNC reporting obligations.</p> <p>These include:</p> <ul style="list-style-type: none"> • notifying the ACNC of any material changes including change in legal name, address for service, governing documents or responsible persons • maintaining correct financial records which account for all transactions and the financial position of the charity, and which allow accurate financial statements to be prepared and audited if required • maintaining operational records which explain the activities of the charity including any overseas activities, and • submitting an Annual Information Statement to the ACNC <p>The charity also has an ongoing duty to comply with the ACNC governance standards and must be able to demonstrate compliance if required.</p> |
| Company limited by guarantee | ASIC (Federal) | <p>How onerous are the reporting requirements? Medium to high</p> <p>A company limited by guarantee that is not registered with the ACNC will be regulated by ASIC and must meet the ASIC reporting requirements set out at the 'proprietary limited company' section above.</p> |
| Company limited by guarantee which is also a charity | ACNC with residual aspects regulated by ASIC (Federal) | <p>How onerous are the reporting requirements? Low</p> <p>A company limited by guarantee registered with the ACNC must meet the ACNC reporting obligations, outlined at the 'incorporated association which is also a charity' section above.</p> |

| | | |
|---|----------------------------------|--|
| Co-operative | State regulator | <p>How onerous are the reporting requirements? Medium</p> <p>Reporting requirements will vary based on the state the organisation is located in, as this will determine the regulator and applicable legislation. Reporting requirements will also vary based on whether the organisation is considered as 'large' or 'small.'</p> |
| Co-operative which is also a charity | State regulator + ACNC (Federal) | <p>How onerous are the reporting requirements? Medium to high</p> <p>A co-operative registered with the ACNC must meet the ACNC reporting obligations, outlined at the 'incorporated association which is also a charity' section above.</p> |
| Indigenous corporation | ORIC (Federal) | <p>How onerous are the reporting requirements? Low</p> <p>Reporting requirements to ORIC vary based on whether an organisation is considered small, medium or large. The appropriate corporation size is based on revenue and the requirements for each size are found on the ORIC website.</p> <ul style="list-style-type: none"> • a small corporation with income of less than \$100,000 must provide a general report only • a small corporation with income of more than \$100,000 and below \$5 million, and a medium corporation with income of less than \$5 million must provide a general report, a financial report and an audit report, and • a large corporation or any size corporation with income over \$5 million must provide a general report, a financial report, an audit report, and a directors' report <p>For small and medium corporations receiving public funding, the financial report is based on reports to government funders.</p> <p>The ORIC website includes information on what each report should contain.</p> |
| Indigenous corporation which is also a charity | ORIC (Federal) | <p>How onerous are the reporting requirements? Low</p> <p>ORIC remains the regulator for an ORIC registered organisation that is also a registered charity. The charity only needs to report to ORIC as ORIC shares the information with the ACNC. If the charity meets all of its requirements to ORIC under the relevant legislation, it will meet all its requirements to the ACNC.</p> |



Our website has more detailed [resources on reporting for different structures](#)



Part 4

Setting up a social enterprise

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)
- ▶ applying for certification



The process of setting up a social enterprise under one of the legal structures discussed in part 3 of this guide involves ‘incorporation’. This part of the guide is focussed on setting up a not-for-profit social enterprise.

! Note

If you want to set up a for-profit social enterprise or a hybrid structure, you should seek legal advice. Some, but not all, of the information in this section is relevant to for-profit structures.

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.



For more information, see [our webpage on setting up your organisation](#) and [our webpage with guides to running an organisation](#).

The incorporation process is different for each type of legal structure, however there are some basic fundamental steps that all organisations should take.

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 part, we will use the term ‘board’. The term you use to refer to your board is not important, but its role, the duties of its members, and its composition are very important, and you should consider them carefully.

The role of a board

It's the role and responsibility of an organisation's board to govern and direct the strategy of the organisation. In performing its role, responsibilities commonly reserved to the board include:

- monitoring the operational and financial position and performance of the organisation generally
- driving organisational performance to provide accountability to its members
- assuring a prudential and ethical base to the organisation's conduct and activities with regard to the relevant interests of stakeholders, and
- reviewing and approving the organisation's compliance, control systems and codes of conduct to prevent exposure to undue risk

The board is responsible for making decisions about the overall running of the organisation and usually also approves membership applications.

The board is elected by the members of the organisation, and in most structures, the board is accountable to the members. The members therefore control the organisation's mission and values through appointment of the board and control of changes to the constitution and objects.



Because of board members' special position of trust, they also have certain legal duties with which they must comply – see our [Duties Guide](#) for more information.

Who should be on a board?

To be effective, a board needs the right group of people, with knowledge and experience that fit with the organisation's strategic goals.

To help you put together a board of people with those necessary skills, we recommend developing a 'skills matrix' specific to your organisation. A board member should be committed to the mission of the organisation and prepared to devote time and energy to the board.

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

The size of the board is an important consideration for start-ups.

When deciding how many board members you should have, you should take into account the minimum number of board members required by the relevant legislation and 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's important that prospective board 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 board. When you are thinking about board members, it's 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. This is also a useful tool for managing board succession as the organisation evolves.

Follow the steps below to develop a skills matrix

| | |
|----------------|---|
| Step 1. | <p>What is your strategy?</p> <p>Your organisation has a mission. What is your strategy to achieve that mission?</p> <ul style="list-style-type: none"> • 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 board to meet the legal obligations incorporated groups have (such as reporting, preparing financial statements). • Don't forget to think about your vision for the future – what kind of board, with what kind of board members, will be needed to take the organisation forward? |
| Step 2. | <p>What issues does your organisation deal with?</p> <p>Consider the key issues and challenges that face your organisation – particularly in light of its mission and activities.</p> <ul style="list-style-type: none"> • Write these down, and then review what skills or experience is needed to deal with each of them most effectively. • If there are any extra skills you didn't write down in step 1, write these down now. |
| Step 3. | <p>What are your priorities?</p> <p>All the skills you wrote down in steps 1 and 2 might seem important. However, it's 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).</p> |
| Step 4. | <p>What skills are needed?</p> <ul style="list-style-type: none"> • Determine what skills and what levels of experience need to be represented on the board. • Remember, you might have volunteers or employees 'on the ground' who carry out the activities of the organisation (although this is often not the case with start-ups), so some of the skills you have listed might be their responsibility. But some skills, such as financial management, might be best represented at board level. |
| Step 5. | <p>Create your skills matrix</p> <p>Finally, create your skills matrix, using the data from steps 1 to 4. The skills or experience needed can go in column 1 of a table and the rest of the columns can be the directors.</p> |

We've set out a case study example for developing a skills matrix below.



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 board together.

Her process of creating a skills matrix looks like this:

Step 1.**What is your strategy?**

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 and advertising, safe food preparation experience), and
- selling goods in a community, commercial environment (skills: sales, marketing, community liaising)

Step 2.**What issues does your organisation deal with?**

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)

Step 3.**What are your priorities?**

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 and advertising | 2 | Food safety | 2 |

| | | | | | |
|----------------|--|-----------------|---------------------------|-----------------|-----------------|
| | Managing risk | 2 | Cooking | 1 | |
| | Community liaising | 2 | Not-for-profit experience | 2 | |
| Step 4. | What skills are needed? | | | | |
| | The skills and experience that would be useful on this board are: legal, accounting and financial management, organisational management, social work, fundraising experience, not-for-profit 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. | | | | |
| Step 5. | Create your skills matrix | | | | |
| | The young lawyer thinks four people would be a good-sized board to begin with. She will be seeking members for her board who have the skills listed in the matrix. Where a candidate has a particular skill, she can put a <input type="checkbox"/> in their column alongside that particular skill. By the time she fills the positions, she hopes to have at least 1 <input type="checkbox"/> 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 | | | | |
| | Not-for-profit experience | | | | |
| | Risk management | | | | |
| | Start-up experience | | | | |



Tip

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

These websites maybe useful to recruit committee members:

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

Given the personal aspects, it is often helpful to trial people before appointing them to ensure they are a suitable fit.

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 board
- 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 call and attend general meetings, the right to remove board members by special resolution and the right to access certain records of the organisation.

Importantly, the board is accountable to the members of the organisation. Often there is a founding member or members. A consideration is whether the founding member has any special control rights.

A further strategic consideration is the nature of the membership group and whether it is a small group (or sole member), the board members are the only members or there is a more democratic, broad-based membership (often where subscription fees are used as a fund-raising device).

The importance of a membership strategy

You will need to decide how many members you want your organisation to have. Factors to consider in making this decision include:

- if your members pay a membership fee, it may be good for fundraising to have many members
- members come together to vote at the annual general meeting – having too many members may cause an administrative burden in providing adequate notice, and may make the decision making process more difficult
- how active is the member engagement – better to have a smaller group of active members, than a large group where many are inactive
- having too few members might empower one or two members who are difficult or 'rogue'
- are there founder members with control rights (often useful in group structures), and
- having too few members may make it too easy for the board to be spilled, or directors to be removed

Also consider whether you want to have classes of members, with different rights and responsibilities attached to each. For example, you could have a general class of members who pay a membership fee and are entitled to vote, and a separate class of honorary members comprised of individuals or bodies who have made a significant contribution to the organisation and may not be required to pay a membership fee or have voting rights.

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



Our website has information about the rights and responsibilities of [members](#) of not-for-profit organisations.

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 board and the members are bound by the rules of the organisation.

Model rules are published by many regulators for incorporated associations which can be adopted or used as a starting point and varied and adopted.

It's important to think carefully about your rules because any changes to your rules must be approved by a special resolution of 75% (or more if your rules require a higher threshold) of your members at a general meeting who are eligible to vote and depending on your structure may require payment of a fee for lodging the updates.

If you intend to become a registered charity, your constitution will also include the organisation's mission and not-for-profit provisions, including mission lock and asset lock on winding up (any surplus needs to be distributed to a charity with an equivalent mission). It's important that this is carefully drafted and accurately reflects your intended objectives and activities, as the organisation will be restricted to using its assets, profits and income for its stated purpose.



The ACNC has published a [template constitution for charitable companies limited by guarantee](#).

Also see our [webpage on managing an organisation's rules or constitution](#) and our webpages on [incorporation](#) and [legal structures](#) (these include guidance on drafting rules for specific types of organisations).

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:

- board meetings (for board members), and
- general meetings (Annual General Meetings (**AGM**) or Special General Meetings for members)

It's 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.

Registered charities

An organisation that is registered with the ACNC is not required to hold an AGM (unless specifically provided for in its governing documents). Instead, it is required to comply with [ACNC Governance Standard 2](#), which requires registered charities to take reasonable steps to be accountable to their members and allow their members adequate opportunities to raise concerns about how the charity is run.

Under Governance Standard 2, being accountable includes letting the members know about the organisation's activities and allowing members to raise concerns and ask questions about how the organisation is run. To meet this standard, Governance Standard 2 suggests holding a meeting at least annually with the members, providing information to members on the charity's activities and finances, as well as having clear processes for appointing board or committee members.



For more information, see our [webpage on holding meetings](#).

Registering as a charity (if desired)

Whether you should register your organisation as a charity is something you should consider at the incorporation stage.

Consider how 'charity' is defined, and whether your organisation is eligible to become a charity. There are advantages and disadvantages in doing so (discussed in [part 2](#) of this guide).

After completing an application to register as a charity, it takes a few weeks for a case worker to be assigned to review the application. Once a case worker is assigned, it will typically take between one to three months for the application to be finalised. The ACNC may request more information if required, such as a business plan if one is not initially provided.



For more information about whether your organisation should be registered as a charity, what organisations are eligible for charity status, and what that status means, see our [webpage 'Should your group register as a charity?'](#).

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 are discussed in detail in [part 2](#) of this guide.

The organisation will usually apply for tax concessions at the same time as applying for ACNC registration. The timeframe is the same as listed above for the ACNC application, although DGR applications are processed by the ATO and these can take much longer to process.



For more information about tax concessions, eligibility and how to make the necessary applications see our [tax webpage](#).

Also see [the ATO's webpage on tax concessions \(gifts and fundraising\) for not-for-profit organisations](#).

Applying for certification

Social Traders certification

If you want to become a certified social enterprise, you could go through the Social Traders certification process.

Regardless of whether a social enterprise is for-profit or not-for-profit, Social Traders relies on **three criteria for certifying social enterprises**:

1. **Primary social purpose:** a defined primary social, cultural or environmental purpose consistent with a public or community benefit
2. **Trading requirement and history:** it derives a substantial portion of its income from trade
3. **Partial distribution lock:** it invests efforts and resources into its purpose such that the public or community benefit outweighs the private benefit.



See Social Traders' website for [more information about the certification process](#) and to access the [portal to apply for certification](#).

Benefits and limitations to certifying with Social Traders

A summary of the benefits and limitations to becoming a certified social enterprise are set out in the table below.

| Benefits | Limitations |
|--|--|
| <ul style="list-style-type: none"> Becoming certified with Social Traders publicly verifies an enterprise's social enterprise status and can assist in marketing and credibility of an organisation. | <ul style="list-style-type: none"> There is an annual fee associated with certifying with Social Traders. |
| <ul style="list-style-type: none"> It can assist in obtaining social procurement contracts as various stakeholders, including government and other businesses rely on third party certification when they work with social enterprises. | <ul style="list-style-type: none"> The certification application process requires a number of financial and business documentation. |
| <ul style="list-style-type: none"> Being certified with Social Traders allows the enterprise to access new opportunities and connect with Social Traders list of business and government members through its procurement portal. | <ul style="list-style-type: none"> Flexibility |
| <ul style="list-style-type: none"> Access to resources and social enterprise networks to increase the enterprises capability. | |

B Lab certification

Your **for-profit organisation** may also wish to apply to B Lab to become a certified B Corporation (or B Corp).

B Corps are for-profit businesses that make a positive impact across their workers, customers, suppliers, community and the environment.

To become a certified B Corp, a business must meet the highest standards of verified social and environmental performance, public transparency, and legal accountability to balance profit and purpose.

Becoming a certified B Corp can assist an organisation to remain focused on its positive impact as it's able to easily assess its achievements and progress in this area, attracting partnerships due to the B Corp certification, serving communities, and building consumer confidence. Accordingly, certified B Corps must amend their legal governing documents to require their board of directors to balance profit and purpose.

B Corps don't require the asset or distribution locks associated with the Social Traders model and therefore have greater flexibility in making distributions in a manner which can attract conventional financial capital which is attractive to venture capital, private equity and impact investors.

Notable B Corps include:

- clothing retailer, Patagonia
- Ben and Jerry's Ice Cream, and
- crowdfunding platform, Kickstarter



See the [B Corporation Australia & New Zealand website](#) for more information.



Part 5

Operating a social enterprise

Operating a social enterprise

This part covers:

- ▶ insurance
- ▶ employment
- ▶ work 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 can't be avoided, so it's 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 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.



For more information on risk and insurance, see our webpage on [risk and insurance](#).

Employment

Even if your social enterprise begins with only volunteers, you must still comply with legal obligations.

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. Volunteers, employees and independent contractors enjoy different protections and rights.



For more information on the legal obligations that your organisation owes to volunteers, contractors and employees, see:

- our webpages '[Managing people](#)', '[Managing employees](#)' and '[Managing volunteers](#)', and
- the [Fair Work Commission website](#)

Work health and safety

Work health and safety (**WHS**) laws vary between states. The laws in some states 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's vital you are aware of what laws apply to you personally, your directors and 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.



For more information, see our webpages '[Work health and safety laws](#)', '[Managing people](#)', and '[Discrimination laws](#)'.

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.



For more information, see our webpage '[Documents, records and requests for access](#)'.

Intellectual property

When starting up a social enterprise, you 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 you don't infringe anyone else's intellectual property. Infringement can be accidental, such as by creating a logo which is almost identical (or confusingly similar) 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.



For more information, see our webpages [‘Communications and advertising’](#) and [‘Understanding intellectual property laws’](#).

Events and fundraising activities

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 organising events and activities.

An important issue to consider when organising 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.



For more information, see our webpages [‘Fundraising’](#) and [‘Holding events’](#).

Privacy

Privacy is an important part of Australian law. 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.



For more information, see our webpage [‘Privacy laws’](#).

Contracting and risk management

Once your organisation is established, you may enter into contracts with other organisations or third parties. In doing so, you should be careful to review the contract to ensure you understand your obligations, and if necessary, seek the assistance of a lawyer.

You should also be aware of managing the risk of your organisation. Policies and procedures are one way to assist with risk management. For example, you should develop a Work, Health and Safety policy that complies with the relevant legislation, and develop a risk register where potential risks can be identified, and techniques can be formulated to address and minimise the risk.



SafeWork NSW has [published tools and templates to help improve health and safety in your organisation](#).

Small Business WA has a [useful webpage ‘Risk management’](#) which provides a high-level overview of risk management.

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.



Note

Private companies are required to comply with the Corporations Act. The Corporations Act sets out 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.

Charities must comply with the [ACNC Governance Standards](#) to be registered and remain registered with the ACNC.

While a registered charity, some (but not all) of the duties of directors outlined in the Corporations Act are displaced by the ACNC Governance Standards, specifically [Governance Standard 5 – Duties of Responsible Persons](#).



For more information on positions in a not-for-profit organisation and the legal duties that apply to officeholders, see our webpage [‘Responsibilities of the board and committee members’](#) and our [‘Guides to running an organisation’](#).

The ACNC has also published a [Governance for Good guide](#) to assist charity board members understand their governance obligations and to support charities to meet the ACNC's Governance Standards.



Part 6

If things change or go wrong

If things change or go wrong



This part covers:

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

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.



Tip

If you are facing difficulties, you should seek legal assistance early. [Contact us](#) to find out whether you are eligible for free legal help.



For more information on managing internal and external disputes and conflicts that your organisation may face, see our webpage '[Handling disputes and conflicts](#)'.

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 reflects 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, requiring members to pass a special resolution (requiring 75% of the member votes (or more if your rules require a higher threshold)) to approve the amended constitution. Whichever set of procedures apply, your organisation must follow them carefully.



For more information, see our webpages [‘Changing structure from an incorporated association’](#) and [‘Managing an organisation’s rules or constitution’](#).

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 that has 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, you should always put any kind of arrangement into writing.



For more information, see our webpage on [‘Working with others’](#).

Organisations that work with social enterprises

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. Always conduct your own research.

- ▶ [Social Traders](#)
- ▶ [The Difference Incubator](#)
- ▶ [Social Ventures Australia](#)
- ▶ [Centre for Social Impact](#)
- ▶ [B Lab](#)
- ▶ [Business Council of Cooperatives and Mutuals](#)
- ▶ [One10](#)
- ▶ [Business Models Inc](#)
- ▶ [Governance Institute of Australia](#)
- ▶ [Volunteering Australia](#)
- ▶ [The Social Enterprise Council of NSW and the ACT](#)
- ▶ [Queensland Social Enterprise Council](#)
- ▶ [The Alliance of Social Enterprise Networks Australia](#)
- ▶ [Social Enterprise Network Victoria](#)
- ▶ [Impact Investing Australia](#)

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. You should also be aware of the risks of insolvent trading and incurring debts when there is no reasonable basis for the entity to pay them as and when they fall due, as this is an area of personal risk for committee members (and a circumstance where the limited liability provided by incorporation may not protect you). If the organisation runs into financial difficulties, seek advice promptly.

The way to end your organisation will depend on the legal structure you have chosen. If the organisation is solvent, it may be possible to organise an orderly winding up. Your legal structure will determine what must be done with any surplus funds or assets, and depending on how complicated your legal structure is, you should see a lawyer and ask them to help you.



For more information, see our webpage '[Ending your organisation](#)'.

