



**Community
Legal Centres
Queensland**

How to Guide: Changing to a Company Limited by Guarantee Structure

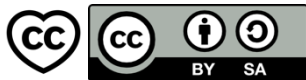
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Version: v.4 – 15 December 2020

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1. Introduction

Amendments to the **Associations Incorporation Act 1981 (Qld)** (the **Act**) means the governance requirements of company structures commonly used by community legal centres (**CLCs**), not-for-profit (**NFP**) and other charitable organisations are changing.

This guide provides a summary of those changes, the ongoing obligations of companies and incorporated association under the Act and a guide to changing to a 'public company limited by guarantee' structure if your organisation decides that is more suitable.

2. Impending changes to the Associations Incorporation Act 1981 (Qld) and practical issues for CLCs

The Queensland Government introduced the *Associations Incorporation and Other Legislation Amendment Act 2020* (Qld) to amend and update the Act. The amendments are designed to reduce red tape and improve internal governance for incorporated associations in Queensland and have either come into effect or are expected to come into effect in the 2021 /2022 year.

Given the wide sweeping changes to the Act, it is recommended that CLCs review their current rules to ensure they comply with the obligations under the Act. Tables 1.1 and 1.2 below outline the main amendments to the Act and the expected dates these requirements are set to take effect. Original target dates for commencement of some of the provisions have been delayed by the COVID pandemic, and so centres should keep up to date via the Office of Fair Trading website: <https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/associations-charities-and-non-for-profits/incorporated-associations/new-laws>.

Table 1 Amendments already in effect

Section/s	Intent	Practical issues
Section 6(2), 48(1A)	<i>Clarifying adoption of model rules</i>	<ul style="list-style-type: none"> • Able to replace their own rules with the model rules or adopt the model rules via the passing of a special resolution at a general meeting. • Adoption or replacement needs to be registered with the Office of Fair Trading (OFT) within three months of the special resolution being passed. <p>If a CLC chooses to adopt the model rules, the CLC must draft a special resolution, pass it at a general meeting and notify the OFT.</p>
Section 56	<i>Technology for meetings</i>	Permitted to conduct general meetings via communication technologies like Zoom or Skype without the need for the use of such technologies to be specifically authorised under its rules.
CLC must ensure members who participate in meetings have access and working knowledge of these technologies (if they are to be used).		
New section 89	<i>Voluntary administration</i>	Rather than applying to the Supreme Court for the appointment of a provisional liquidator, management committee has the power to voluntarily appoint an administrator to place their CLC into voluntary administration.
New section 90	<i>Voluntary winding up</i>	May be wound up voluntarily if the incorporated association resolves to do so by special resolution.
New section 92	<i>Vesting of property on cancellation</i>	Following winding up or cancellation, the Queensland Government will be permitted to provide directions regarding how surplus assets, property and money are to be vested via gazette notices (rather than by passing a regulation).
New section 92A	<i>Voluntary cancellation</i>	Can apply to the OFT Chief Executive to cancel their incorporation, bypassing formal winding up procedures. An application can only be made if the association has no outstanding debts/liabilities, has paid all applicable fees and penalties under the Act, and is not a party to any legal proceedings.

Table 2 Amendments expected to come into effect in 2021 /2022
(unless stated otherwise)

Section/s	Intent	Practical issues
Section 21	<i>Common seal</i>	Incorporated associations are no longer required to have a common seal. A CLC must amend its rules if it wishes to stop using a common seal.
Section 28	<i>Executing contracts without seal</i>	Incorporated associations are no longer required to execute documents with a seal (they can do so if they choose to).
New section 47A	<i>Internal grievances</i>	<ul style="list-style-type: none"> From 30 June 2022, incorporated associations may set out a grievance procedure in their rules for dealing with disputes between members, management committee or the association itself. The Act prescribes what the policy must cover (e.g., must involve a mediation and give each party fair opportunities). If prescribed provisions are not included in the association's rules, the model rules providing for a grievance policy will apply. <p>CLC must draft a special resolution and organise a general meeting if it chooses to set out a grievance procedure in its rules.</p>
New section 59	<i>Maintaining proper records</i>	Imposes a new obligation on management committee members to ensure the incorporated association keeps proper financial records.
Section 66	<i>Secretary to be over 18 years old</i>	Secretaries must be an 'adult' rather than an 'individual'. CLC must amend its internal governance policies to ensure its secretary is at least 18 years old.
Section 72	<i>Resolving a dispute</i>	Incorporated associations cannot make an application to the Supreme Court to resolve a dispute under the association's rules unless the association or member has made reasonable attempts to resolve the dispute under the applicable grievance procedure.

Section/s	Intent	Practical issues
New div 2 and div 3, part 7	<i>Internal Governance</i>	<p>Duties of officers will be listed in the Act, rather than applying in accordance with common law requirements, including:</p> <ul style="list-style-type: none"> • disclosure of material personal interests; • disclosure of remuneration and other benefits; • duty of care and diligence; • duty of good faith; • use of position; • use of information; and • duty to prevent insolvent trading.

CLC must adopt practices to ensure compliance with higher levels of disclosure and may need to provide training to management committee on what must be disclosed.

CLC must amend governance policies to reflect the listed duties and provide training to management committee on their obligations. For example, management committee must be aware of the CLC's financial position and always consider that position when making management decisions.

Section 5, section 49(2), new regulation	<i>Reduction in duplicated annual reporting for charities</i>	<p>The Act will provide that a regulation may exempt classes of associations from the requirement to provide annual financial reports to the OFT Chief Executive. The government intends to exempt associations that are registered as a charity the Australian Charities and NFP's Commission (ACNC).¹</p>
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CLC should remove the requirement in governance policies to provide annual financial reports to the OFT Chief Executive.

¹ The government indicates this intention in the explanatory memorandum for the Associations Incorporation and Other Legislation Amendment Bill 2019 and on the information website here: <https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/associations-charities-and-non-for-profits/incorporated-associations/new-laws>

3. Overview of legal considerations of public company limited by guarantee structure.

A public company limited by guarantee structure is commonly used by NFPs and charitable organisations. This structure is suited to NFPs and charitable organisations because any profit generated is reinvested into the company to be applied towards the NFP's or organisation's purposes or charitable objective. Given the amendments to the Act, some CLCs may prefer to convert to a public company limited by guarantee.

Whilst it is still a company, any profit is reinvested and therefore a public company limited by guarantee cannot:

- issue shares in itself; or
- pay dividends to its members (known as 'shareholders' in more traditional company structures).

Further, liability of the members of a public company limited by guarantee is limited to a fixed amount set out in the NFP or organisation's constitution – which replaces the 'rules' of an incorporated association.

Key **pro's** and **con's** that CLCs may also consider when deciding whether to change their company structure are set out below.

Pros and Cons of company limited by guarantee structure

Pro's	Con's
+ Can carry on business nationally without having to separately incorporate in each State and Territory or register as an Australian Registrable Body	- Will need to become familiar with an additional regulatory regime applicable to companies limited by guarantee under the Corporations Act 2001 (Cth) (Corporations Act) and the ACNC registration and governance requirements
+ If registered with ACNC, will primarily report to ACNC (not ASIC)	- Must only pursue charitable purposes set out in the company's constitution and apply its income in promoting those purposes
+ Is a separate legal entity distinct from its members, which have limited legal liability if the entity is wound up	- Directors still have various duties (which are contained in ACNC Governance Standard 5, rather than the Corporations Act)
	- Unless waived by ASIC, must use the word 'Limited' or 'Ltd' in name

4. Updates required to CLC governance policies

CLCs should review and amend their internal governance policies and constitution to ensure they comply with the expected amendments to the Act (see the 'Impending changes to the Associations Incorporation Act 1981 (Qld) and practical issues for CLCs' section above) - including amending its rules to prohibit the secretary from being less than 18 years of age and listing the duties of responsible persons (e.g., directors, committee members).²

CLCs should note that the actual changes required will depend on the current drafting of their policies and CLCs should seek legal assistance if they are not sure that their policies will comply with the Act.

By **30 June 2022**, it is recommended that CLCs incorporate an internal governance procedure or dispute resolution process into their governance policies (it may also be outlined in the CLC's rules). If a CLC does not have a grievance procedure in place by 30 June 2022, the CLC must observe the grievance procedure in the model rules (to be developed by the OFT in consultation with industry bodies).³

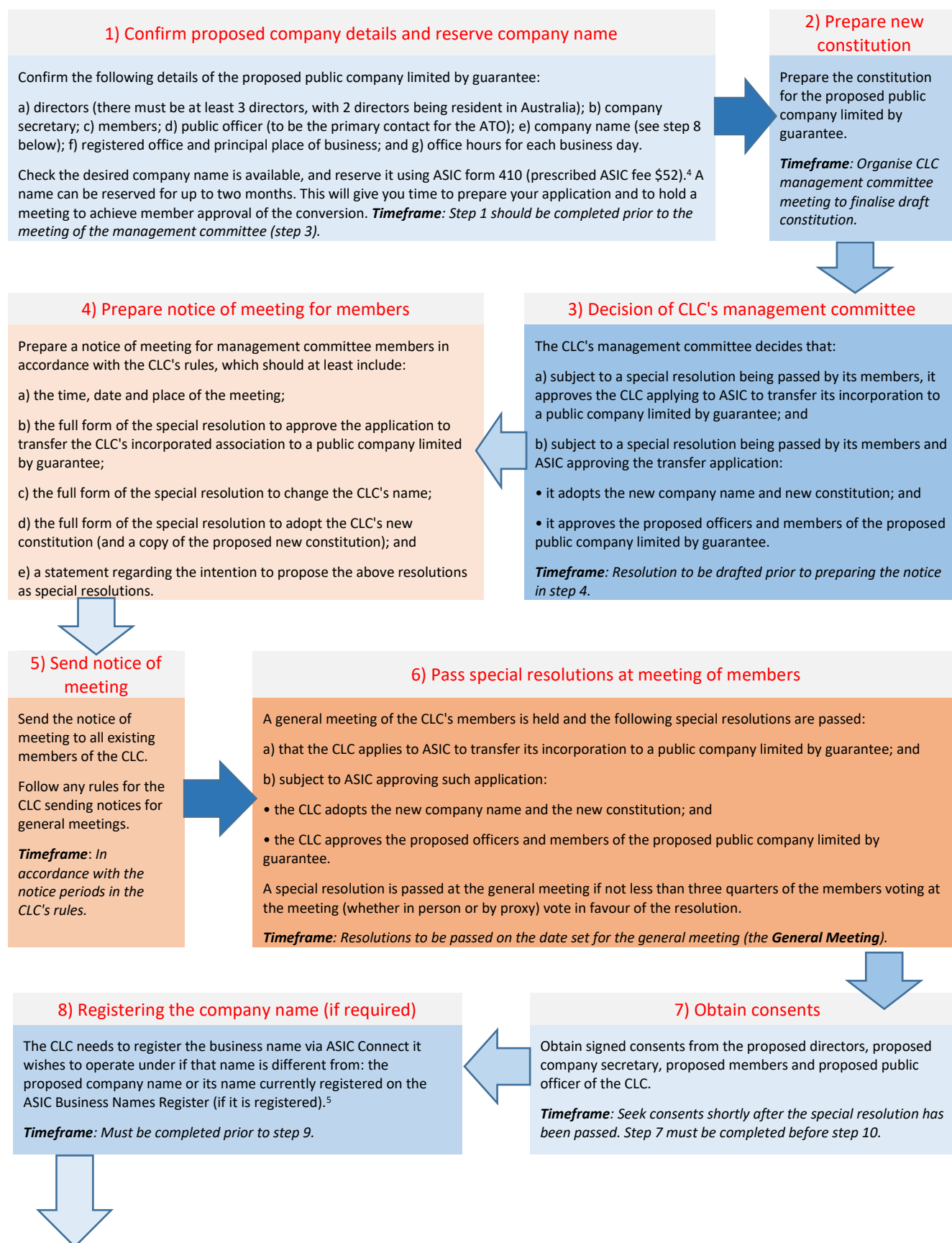
To assist CLCs in changing to a public company limited by guarantee structure, the following resources have been included as part of this guide:

- a general roadmap of the steps to change to a public company limited by guarantee structure; and
- a checklist of the required documents.

² For an example of how to describe these duties, see clause 47 and 48.1 of the ACNC template constitution for a charitable company limited by guarantee, available here: <https://www.acnc.gov.au/tools/templates/constitution-charitable-company-limited-guarantee>

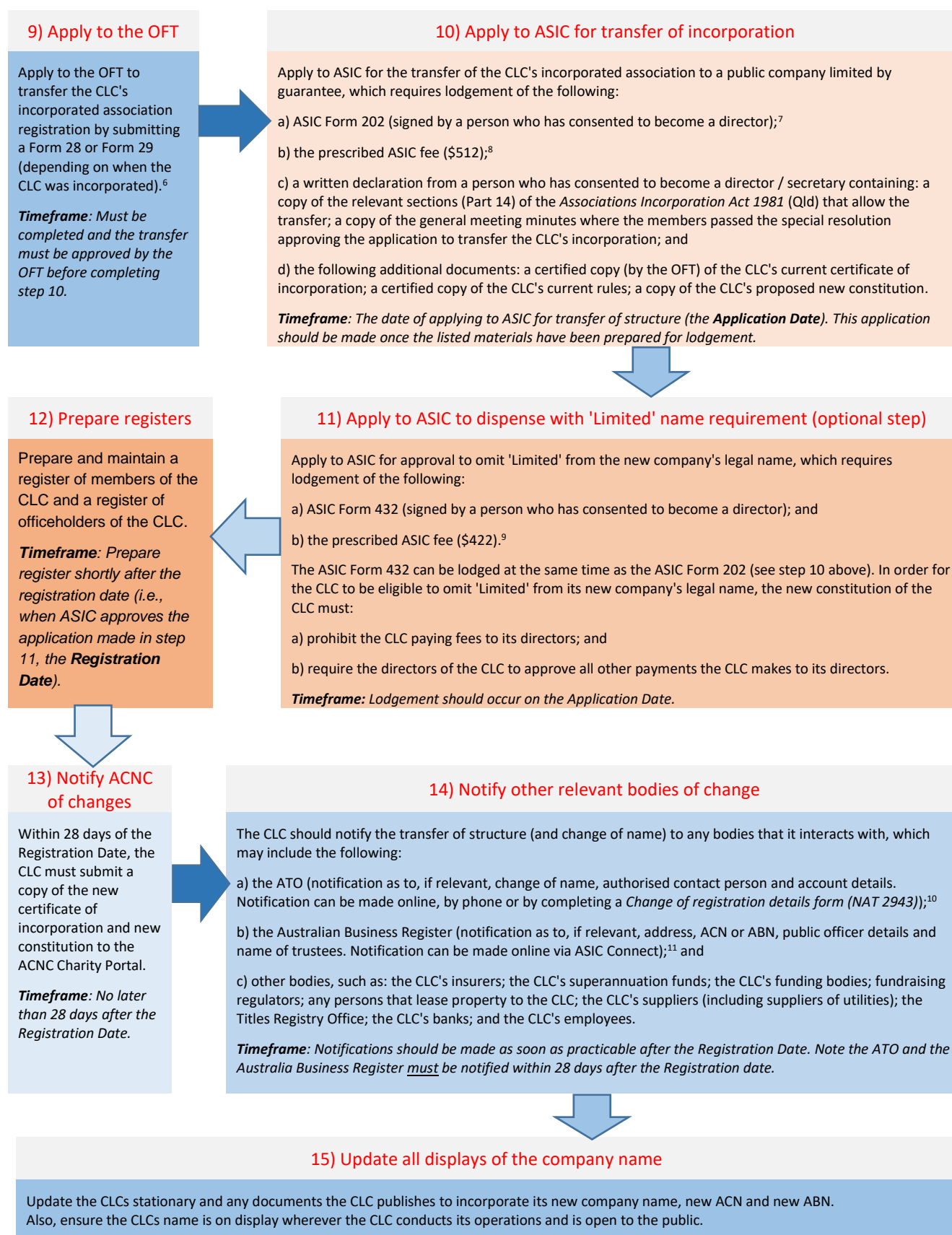
³ For more information on the grievance procedure see the dedicated Queensland government website here: <https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/associations-charities-and-non-for-profits/incorporated-associations/new-laws>

5. Roadmap for converting to a public company limited by guarantee



⁴ Current as at 20 August 2021. See current fee and ASIC Form 410 here: <https://asic.gov.au/regulatory-resources/forms/forms-folder/410-application-for-reservation-of-a-name/>.

⁵ If the CLC's business name was registered in Queensland on 28 May 2012, the name was automatically transferred to the ASIC Business Names Register. See the ASIC Regulatory Guide 235 Registering your business name, available here: <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-235-registering-your-business-name/>. Also see section 18(2) of the *Business Names Registration Act 2011* (Cth).



⁶ Use the Form 29 if the CLC was incorporated before 1 July 1982. Use the Form 28 if the CLC was incorporated after 1 July 1982. Both forms are available here: <https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/associations-charities-and-non-for-profits/incorporated-associations/running-an-incorporated-association/changing-your-associations-status/transfer-to-a-company-status>

⁷ ASIC Form 202 is available here: <https://asic.gov.au/regulatory-resources/forms/forms-folder/202-application-for-registration-of-a-body-corporate-as-a-company/>

⁸ Current as at 20 August 2021. See current fee here: <https://asic.gov.au/regulatory-resources/forms/forms-folder/202-application-for-registration-of-a-body-corporate-as-a-company/>

⁹ Current as at 20 August 2021. See current fee and ASIC Form 432 here: <https://asic.gov.au/regulatory-resources/forms/forms-folder/432-application-to-change-a-company-name-to-omit-the-word-limited/>

¹⁰ ATO Change of registration details form (NAT 2943) form is available here: <https://www.ato.gov.au/Business/Registration/Update-your-details/>

¹¹ ASIC's guide to updating business details is available here: <https://asic.gov.au/for-business/updating-your-business-name-details/>

6. Checklist of documents required to be prepared and lodged by CLC to change to public company limited by guarantee structure

The checklist below is a **general guide** to the documents required to be prepared and lodged by CLCs to convert to a public company limited by guarantee structure and is designed to be used in conjunction with the roadmap included in this guide.

You should seek specific legal assistance to ensure these are the correct steps and documents for your organisation.

No.	Document / step	<input checked="" type="checkbox"/>
1	ASIC Form 410: Application for reservation of a company name	<input type="checkbox"/>
2	Constitution (certified copy)	<input type="checkbox"/>
4	Notice of meeting	<input type="checkbox"/>
	Members resolution	<input type="checkbox"/>
7	Letter attaching consent to act as director form	<input type="checkbox"/>
	Consent/s to act as director	<input type="checkbox"/>
	Consent/s to act as secretary	<input type="checkbox"/>
9 (OFT Form 28 or 29)	OFT Form 28: Application for authority to transfer an association's incorporation	<input type="checkbox"/>
	Certificate of Incorporation (if OFT Form 28 is submitted)	<input type="checkbox"/>
	OFT Form 29: Application for authority to transfer a corporation's incorporation from RECI Act	<input type="checkbox"/>
	Letters patent (if OFT Form 29 is submitted)	<input type="checkbox"/>
10	ASIC Form 202: Application for registration of a body corporate as a company	<input type="checkbox"/>
	Prescribed ASIC Fee	<input type="checkbox"/>
	Director's statement required by s601BC(7) of the Corporations Act	<input type="checkbox"/>
	Director's statement required by s601BC(8) of the Corporations Act	<input type="checkbox"/>
	Copy of meeting minutes	<input type="checkbox"/>
	Certified copy (by OFT) of the association's certificate of incorporation	<input type="checkbox"/>
	Certified copy of the association's rules (incl. statement of purposes)	<input type="checkbox"/>
	Copy of Part 14 of the <i>Incorporation Associations Act 1981</i> (Qld)	<input type="checkbox"/>
	Constitution (certified copy)	<input type="checkbox"/>
	Any outstanding annual statements (if applicable)	<input type="checkbox"/>
11 (optional)	ASIC Form 432: Application to change a company name to omit the word 'Limited'	<input type="checkbox"/>
	Prescribed ASIC Fee	<input type="checkbox"/>
13	ACNC Form 3B: Change of charity details	<input type="checkbox"/>

7. Ongoing obligations for an Incorporated Association and a Public Company Limited by Guarantee

The following table sets out the ongoing obligations of incorporated associations (referred to as 'IA') and public companies limited by guarantee (referred to as 'Co.' below) under the Act.¹²

All Queensland CLCs are listed as charities on the ACNC Charity Register.

Listed charities are generally exempt from some obligations applying to public companies under the Corporations Act – as such, this guide specifies the obligations of a charity listed on the ACNC Charity Register.

¹² It is important to note that all Queensland CLC's listed on the Community Legal Centres Queensland directory (as at 20 August 2021) are listed as charities in the ACNC Charity Register, and this impacts their obligations if they transfer to a public company limited by guarantee structure.

Obligation

Structure

Explanation

Office holder, director and management committee duties	Incorporated Association	<p>Officers have a range of duties, which will soon be listed in the Act, including:</p> <ol style="list-style-type: none"> 1. disclosure of material personal interests; 2. duty of care and diligence; 3. duty of good faith; 4. use of position; 5. use of information; and 6. duty to prevent insolvent trading. <p>Given the CLC's are registered charities, CLC's (and its responsible persons) that are industry associations also have the duties listed immediately below.</p>
	Company	<p>Charities must abide by the ACNC Governance Standards, including:</p> <ol style="list-style-type: none"> 1. remain not-for-profit and work towards their charitable purpose; 2. take reasonable steps to be accountable to and hear the governance concerns of their members; 3. must not commit a serious offence under any Australia law (e.g., fraud or penalty of 60 penalty units or more); 4. take reasonable steps to be satisfied that responsible persons are not disqualified from management a corporation under the Corporations Act or disqualified from being a responsible member by the ACNC Commissioner; 5. must take reasonable steps to ensure responsible members are subject to, understand and carry out the duties of responsible persons; 6. must take reasonable steps to become a participating non-government institution if the charity is, or is likely to be, identified as being involved in the abuse of a person either: <ul style="list-style-type: none"> (a) in an application for redress made under section 19 of the <i>National Redress Scheme for Institutional Child Sexual Abuse Act 2018</i> (Cth); or (b) in information given in response to a request from the National Redress Scheme Operator (Secretary of the Department of Social Services) under section 24 or 25 of the <i>National Redress Scheme for Institutional Child Sexual Abuse Act 2018</i> (Cth).¹³ <p>Responsible persons (e.g., directors, committee members) are exempt from the directors' duties in the Corporations Act, however are subject to the following duties (which are based on those statutory duties):</p> <ol style="list-style-type: none"> 1. act with reasonable care and due diligence; 2. act honestly in the best interests of the charity and for its purposes; 3. not misuse the position of responsible person; 4. not misuse information obtained performing duties; 5. disclose any actual or perceived conflict of interest; 6. ensure that the charity's financial affairs are management responsibly; 7. not allow a charity to operate while insolvent.¹⁴

¹³ The 6 ACNC Governance Standards are explained in greater detail here: <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/governance-standards>

¹⁴ These duties are specified in ACNC Governance Standard 5, which is available here: <https://www.acnc.gov.au/for-charities/manage/governance-standards/governance-standard-5-duties-responsible-persons/what-are>

Obligation	Structure	Explanation
Reporting	Incorporated Association	<p>Required to lodge an annual return and audited financial statements.</p> <p>Required to notify the OFT of certain changes (e.g., changes to the positions of president, secretary and treasurer and changes to the incorporated association's postal address or the secretary's residential address).</p> <p>ACNC registered charities will soon no longer be required to lodge a summary of their annual financial records with the OFT or pay annual lodgement fees.¹⁵ However, charities will have to notify the ACNC of certain changes, including change of legal name, address for service, change in responsible persons (committee members, directors, trustees), and changes to governing document (constitution, rules or trust deed).</p>
	Company	<p>Required to submit an Annual Information Statement with ACNC (with a financial report, if the company is medium or large) within six months of the end of the charity's reporting period.</p> <p>Required to notify the ACNC of certain changes, including change of legal name, address for service, change in responsible persons (committee members, directors, trustees), and changes to governing document (constitution, rules or trust deed).</p> <p>Not required to report to ASIC. No requirement to report to OFT.</p>
Records	Incorporated Association	<p>Management committee will soon be required to ensure proper financial records are maintained.¹⁶</p> <p>However, ACNC requires all charities to keep financial records. The specific obligations are dependent on its size, complexity, activities, how it spends or receives money, and whether it has extra obligations from state regulators.¹⁷</p>
	Company	<p>ACNC requires all charities to keep financial records.¹⁸ This requirement replaces the obligations to keep written financial records under the Corporations Act.</p> <p>The charity may need to report to other government regulators who have their own record-keeping requirements, such as the ATO.¹⁹</p>
Fees (current as at 2 March 21)	Incorporated Association	<p>Annual return of association fee of \$58.60. Change of rules fee of \$22.10. Change of name fee \$83.80. No fees for change of details relating to an incorporated association.²⁰</p> <p>ACNC has the power to charge late fees for lodgement of forms (ranging from \$222 to \$5,550)²¹ and also waive late fees.²² The ACNC takes a 'risk-based' approach waiving fees.</p>
	Company	<p>No fees to notify ACNC of changes. No ASIC or ACNC review or annual lodgement fees.</p> <p>ACNC has the power to charge/waive late fees for late lodgement of documents.²³</p>

¹⁵ This will be the effect of the new section 49, Division 2, Part 9 of the *Associations Incorporation Act 1981* (Qld) (change expected in 2021-22).

¹⁶ This obligation will be imposed by new section 59 of the *Associations Incorporation Act 1981* (Qld) (change expected in 2021-22).

¹⁷ The ACNC lists the record keeping requirements here: <https://www.acnc.gov.au/for-charities/manage-your-charity/obligations-acnc/keep-charity-records#financial>

¹⁸ The ACNC lists the record keeping requirements here: <https://www.acnc.gov.au/for-charities/manage-your-charity/obligations-acnc/keep-charity-records#financial>

¹⁹ The ACNC lists potential obligations to other government regulators here: <https://www.acnc.gov.au/for-charities/manage-your-charity/other-regulators>

²⁰ Fees listed are current as at 20 August 2021. Full list of current fees available here: <https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/associations-charities-and-non-for-profits/incorporated-associations/incorporated-associations-forms-and-fees>

²¹ Current as at 20 August 2021. See current penalties here: <https://www.acnc.gov.au/tools/topic-guides/penalties>

²² The size of late fees is dependent on the size of the organisation and is available here: <https://www.acnc.gov.au/tools/topic-guides/penalties>

²³ The size of late fees is dependent on the size of the organisation and is available here: <https://www.acnc.gov.au/tools/topic-guides/penalties>

Obligation	Structure	Explanation
Constitution / Rules	Incorporated Association	<p>Required to have a set of rules. Although they can use the model rules.</p> <p>The rules (i.e., governance document) must be lodged with the ACNC and must address the matters set out in the ACNC governance standards. Must notify the ACNC of a change to the rules.</p>
	Company	<p>Not required to have a constitution. May rely on the replaceable rules in the Corporations Act, or a combination of both.</p> <p>Constitution (if any) must be lodged with the ACNC and must address the matters set out in the ACNC governance standards.</p> <p>Must notify the ACNC of a change in the constitution. The change has effect when approved by members and is not dependent on the ACNC's approval.</p>
Members	Incorporated Association	There must be at least seven members. No age restriction on members generally, however the secretary must be an adult. ²⁴
	Company	There must be at least one member. The constitution can set out a minimum and maximum number of members.
Liability of members	Incorporated Association	The liability of members is limited to that amount which they have agreed in the constitution to contribute on the dissolution or winding up of the company which can be nominal.
	Company	
Management committee / directors	Incorporated Association	Must have at least 3 members who sit on the management committee. The management committee must include the offices of president, treasurer and secretary.
	Company	Must have at least three directors and at least one secretary.

²⁴ This requirement will be inserted by the amendments to section 66 of the *Associations Incorporation Act 1981* (Qld) (change expected in 2021-22).