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This section provides information on the decision to incorporate, different mechanisms for incorporation, and some guidance on the processes involved with running an incorporated entity.

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# Incorporation: Overview

When a community organisation goes beyond being a relatively informal gathering of members and begins to deal with significant amounts of money and employing staff, it is probably time to incorporate.

Incorporation establishes an organisation as a separate entity from its members, which has the power to make contracts, employ people and have legal standing in Courts. However, incorporation also places additional obligations on your organisation, so be sure that you really want to incorporate before you go ahead.

The decision to incorporate is an important one, as it marks the point at which an informal group of individuals becomes a separate legal entity. As a group grows and develops the need for a more formal structure often becomes apparent.

Common reasons for the decision to incorporate are the increased need for accountability and the ability to access government funding.

Accountability

Accountability means the committee is legally responsible for the funds entrusted to it as well as the direction that they are steering the organisation. The process of incorporation means that:

* There is a structure that provides accountability from the decision makers (the committee) to the actual owners/members.
* Members of an incorporated association are able to comment and pass judgement (vote) on how their association is being run.
* Members know their elected committee is accountable for the finances as well as the direction of the association and will report every year at the Annual General Meeting (AGM).
* The organisation also becomes accountable to the ACT Registrar-General, so their members and any external parties (such as banks or contractors) have the assurance that the organisation is under some regulatory oversight by the ACT Government.

Unincorporated associations often have found difficulty in securing ongoing funding for their organisation's activities or projects.

## Government Funding

Most government funding programs require an organisation to be incorporated so that there is a clear legal entity to receive funds. Incorporation also means that your group can buy or sell assets, sue or be sued and open a bank account in the organisation's name. Without incorporation any funds received by the group would have to be held in a personal bank account, held as physical cash, or held by another organisation.

However, a group need not incorporate solely to receive public or private money. There are plenty of examples in the community sector where groups enter into an auspice arrangement with a pre-existing organisation so that the burden of financial reporting then rests with another organisation that has the relevant expertise and resources. This leaves individuals in the unincorporated association to focus on their primary activities without having to be too preoccupied with fulfilling the obligations that come with incorporation. Auspice arrangements can be outlined in a Memorandum of Understanding (MoU) between the relevant parties and normally dictate the terms under which funds can be spent or received.

Should we incorporate?
Before incorporating it might be worth asking the following questions:

*Does our group have a large enough membership base?* There must be at least five members before an association can incorporate however this does provide you with a membership depth that will handle unforeseen changes to the inaugural committee. A larger group of around 20 might be more viable.

*Do we have thorough financial systems that are transparent and not reliant on any one person?*

*Does our group need direction?* One of the fundamental responsibilities of the committee of an incorporated association is to ensure that the organisation is setting and monitoring strategic goals and that its activities support the organisations values and mission statement.

# Different Ways to Incorporate

Non-government organisations in the ACT can choose to be either an incorporated association or a company limited by guarantee. An incorporated association is set up under the Associations Incorporation Act 1991 (ACT). A company limited by guarantee is set up under the Corporations Act 2001 (Cth).

Setting up a company or an incorporated association means the organisation becomes a legal entity that is separate from the individuals who set it up. It can trade in its own name, enter contracts, be sued (and sue), own and sell assets. By setting up a company or incorporated association, members of the organisation limit their liability to pay the debts and losses incurred by organisation (provided they have acted legally when acting for the organisation).

Both structures are 'not-for-profit'. 'Not-for-profit' or 'non-profit' doesn't mean you can't make money. It means that if you do make money, those profits aren't to be distributed among members (which is what happens in a private company). Instead profits are put back into the organisation to help it meet its goals.

## An Incorporated Association

An incorporated association is a separate legal entity which exists where five or more people come together to pursue common aims and agree to be bound by mutual understandings.

The incorporation of associations is governed by legislation which exists in each Australian state and territory. This legislation is not uniform and is administered by regulatory authorities in each state and territory. In the ACT the relevant legislation is the *Associations Incorporation Act 1991* administered by the Office of Regulatory Services.

To be eligible for incorporation as an incorporated association, an organisation must be a not-for-profit organisation.

### Advantages

Some advantages of incorporating an organisation under the Associations Incorporation Act 1991 include the following:

**1. Separate Legal Entity**

An incorporated association is a separate legal entity to its members, giving it a number of capabilities:

* liability is limited, provided management committee members follow accepted business and community standards;
* the association has the capacity to enter into and enforce contracts, including generally the power to hold, acquire and deal with property in its own name;
* the association can receive funds in its own right; and
* the association can have perpetual succession - it continues regardless of changes in its membership.

**2. Lower Administrative Costs**

An incorporated association provides most of the benefits of being a company but at a lower cost.

Administrative costs of establishing an incorporated association are lower compared to incorporation under the Corporations Act 2001 as the structure is more simple and straightforward. However, there are some costs involved in ongoing reporting obligations.

Lawyers are not totally necessary to set an association up, but they are recommended – you could approach a legal firm for pro bono (free) assistance.

**3. Lower Duties and Reporting Requirements**

Generally the duties and reporting requirements imposed on incorporated associations are less onerous than for a company. However, as is the case under the *Corporations Act 2001*, persons vested with the management of affairs of an incorporated association will have certain duties and obligations. Disclosure and governance requirements of incorporated associations include:

* holding annual general meetings;
* keeping accounting records;
* preparing a statement of accounts;
* auditing (which becomes more onerous as the gross receipts of the association increase); and
* lodging annual returns.

### Disadvantages

Some disadvantages of adopting an incorporated association model are as follows:

**1. Restrictions on Operating beyond ACT Borders**

The legislation governing the incorporation of associations in each State and Territory is not uniform - different obligations are imposed on associations in respect of submission of financial accounts and auditing. This means that the association may have to register separately interstate.

Alternatively, an incorporated association can register with the Australian Securities and Investment Commission (ASIC) for national recognition as a “Registrable Australian Body”, allowing them to trade interstate.

**2. Cancellation of Incorporation**

The Registrar-General can cancel incorporation of an association on a number of grounds, including that it is no longer operating and that it has fewer than five members. Some organisations lose their incorporation status each year because they fail to lodge annual returns as required.

Under the *Associations Incorporation Act 1991* the Registrar-General can cancel the incorporation of an association if he or she is satisfied that the continued incorporation of an association would be inappropriate due to the scale, nature or value of the activities of the association. In this case, the association may be able to apply for permission to convert to a company limited by guarantee.

**3. Annual Regulatory costs and other Accounting Issues**

Annual costs need to be paid to the Office of Regulatory Services; however; these costs are likely to be less than ASIC's annual filing fees for companies limited by guarantee.

Accounting requirements for incorporated associations may not be not suitable for those with a very large budget (many $millions).

## A Company Limited by Guarantee

An organisation can incorporate as a company limited by guarantee when there are a number of stakeholders whose interests have to be accounted for and where a profit motive is not the prime objective of the organisation. The regulator for companies limited by guarantee is the Australian Securities and Investment Commission (ASIC).

"Limited by guarantee" means that if the company is wound up, and it is in debt, the liability of members is guaranteed to be a nominal amount (often in the range of $20 - $100). Directors of a company limited by guarantee will be subject to all of the duties and obligations for a commercial company set out in the *Corporations Act 2001*.

A company limited by guarantee has the following key features:

* it can trade or operate throughout Australia;
* the liability of members is limited;
* there is a cost involved in establishing the company; and
* there are ongoing reporting and administrative requirements.

### Advantages

**1. Separate Legal Entity**

A company limited by guarantee is a separate legal entity distinct from its members, as are all incorporated bodies.

**2. Limited Liability**

The liability of members is limited to a guaranteed amount that the members contribute in the event the company is wound up and its assets are otherwise insufficient to meet its liabilities. The amount of the guarantee is specified in the constitution and is often fixed at a nominal sum.

The *Corporations Act 2001* also has clear provision for companies to indemnify their officers and auditors in certain circumstances, which the various associations incorporation statutes do not have.

**3. Termination of Membership and Addition of Members**

Members can terminate their membership in accordance with the constitution of the company. A past member will not need to contribute towards the debts and liabilities of any contracts once they cease to be a member.

There is also flexibility for the addition of new members to the company under the company's constitution after registration.

**4. National Registration**

When a company is registered under the *Corporations Act 2001* it is automatically registered as an Australian company and can operate anywhere in Australia. Note that an incorporated association can also operate nationally, although it is required to register with ASIC to do so.

**5. Objectives not Restrictive**

As a company limited by guarantee, there are no restrictions on an organisation's ability to trade, earn and distribute profits; however, the organisation would not be able to distribute profits to its members or issue shares, unless it changed its company type. The constitution of the company will set out the purposes for which the funds can be used. This may make it easier to raise funds for an organisation's principal objectives.

**6. Indemnifying Directors**

The *Corporations Act 2001* provides that in certain circumstances, a company will be allowed to indemnify any officer or auditor against a liability. In certain circumstances, the Act permits a company to indemnify its officers against legal costs.

### Disadvantages

**1. Establishment Costs**

A company limited by guarantee can be expensive to establish (in excess of $1000). It is almost certain that you will need a lawyer to get the documentation in order and to advise you on the company's ongoing regulatory and filing requirements.

**2. Disclosure and Reporting Requirements**

The administrative requirements on a company are more onerous than for incorporated associations. A company limited by guarantee will be subject to the disclosure requirements that apply to public companies under the *Corporations Act 2001*. The Act imposes financial reporting and auditing obligations on companies. Visit the ASIC website for the latest reporting requirements.

**3. The Name of the Company**

Generally, companies limited by guarantee must use the word "limited" or the abbreviation "Ltd" in their name, but ASIC may waive this requirement for a non profit company. To do so, the company must pursue charitable purposes only and apply its income in promoting those purposes; must not make distributions to its members or pay fees to its directors; and the directors of the company must approve all other payments the company makes to its directors.

**Directors' Duties**

A company limited by guarantee must have at least 3 directors and at least one secretary. Officers of the company (ie the directors, secretary and those within the definition of officers in the *Corporations Act 2001*) are subject to all the duties and liabilities placed on directors by the Corporations Act and the common law (even where directors are acting in a voluntary capacity). The constitution can include provisions indemnifying officers of the company.

The obligations imposed by the *Corporations Act 2001* on directors of companies are more onerous than the obligations imposed on officers of incorporated associations; however, they are more clearly defined. In contrast the equivalent obligations of members of the committee of an incorporated association have not been as well defined through court processes.

Directors and officers liability insurance is available to cover an officer's liability.

A company may also pay the premiums for a policy indemnifying its directors for the legal costs of defending a proceeding, whatever the outcome.

# The Incorporation Process

## Name of Association

Incorporating an association under the *Associations Incorporation Act 1991* involves initially reserving an association name. If the name is available, the ACT Office of Regulatory Services will confirm its availability and reserve the name for your organisation for a period of four months.

A proposed name may be refused if the Office considers it undesirable for some reason (*e.g.* it incites racial hatred or is obscene), or because it is the same as, or too closely resembles, the name of another association.

## Applying for Registration

At least five founding members are required to form an association, each of whom must be at least 18 years of age. The application is made to the Office of Regulatory Services using a standard form and payment of a prescribed fee. The application must indicate the following matters:

* names and addresses of all inaugural committee members;
* name and address of the inaugural public officer;
* the association's intended objects and purposes;
* whether the name has been previously reserved;
* whether or not the Model Rules are to apply to the association (see below);
* whether the association intends to operate a registered office; and
* whether any deeds or trusts apply to the association.

If incorporating a company limited by guarantee, a similar application process to the above procedure is conducted by the Australian Securities & Investment Commission (ASIC).

## Objects and Purposes

All incorporated associations are required to adopt a set of objects and purposes, which are to be set out in the application for incorporation. The objects and purposes are intended to set out a brief indication of the reasons for existence, and the general functions and activities, of the association, including the manner in which it is proposed these objects will be achieved.

The objects and purposes should be broadly consistent with the name of the association and must not include objects considered to be unlawful.

It is not a requirement under the *Corporations Act 2001* for a company limited by guarantee to have a stated object or purpose in its constitution.

## Constitution or Rules of Association

The association or company must have a set of rules. The rules set out the legal basis on which the association operates. This set of rules may also be referred to as the association's or the company's "constitution".

Once incorporated, an association's rules must comply with all the requirements prescribed by the *Association Incorporation Act 1991*. Similarly, a company's constitution must comply with the requirements of the *Corporations Act 2001*.

One of the most important of these rules is an express power of amendment which allows existing rules to be amended and new rules to be added. The provisions set out the procedures to be followed in order to make such amendments.

For both associations and companies, there are a number of statutory provisions to consider. The matters listed in the Acts are the minimum required to be dealt with in the rules of incorporated associations. The association may include in its rules any other matters relevant to the achievement of the association's objects and purposes. However, if the rules include a rule that is inconsistent with the Act, or with another rule in force in the Territory, then that rule is of no effect.

### Model Rules

A generic constitution (the Model Rules) can be found in the regulations that accompany the *Associations Incorporation Act 1991*. These are a basic set of rules which may be adopted as a whole or in part by individual associations when the members do not wish to draft their own rules. The model rules also operate automatically to fill any gaps in the rules of an incorporated association unless they are expressly excluded.

For companies incorporated under the *Corporations Act 2001* the Act includes a series of "replaceable rules", each of which is automatically implied into a company's constitution. The replaceable rules deal with many of the same matters as those set out in the Model Rules for incorporated associations.

### Amending the Constitution

If an association wishes to alter its constitution, rules, objects and purposes, or its name, the alteration must be made by special resolution as provided in the *Associations Incorporation Act 1991*. Notice of any alterations must be lodged with the Registrar-General and any alteration or amendment will be ineffective until a notice is lodged.

Under general law, a principle has been accepted by the courts that an incorporated association cannot alter its rules for the purpose of excluding or expelling a member.

Similar arrangements for altering the constitution of an incorporated company also exist in the *Corporations Act 2001*.

## The Common Seal

Under the *Associations Incorporation Act 1991* an incorporated association is required to have a common seal.

The seal is usually a round rubber stamp which bears the full name of the organisation.

The seal is used for some legal sorts of documents with the most common use by an incorporated association being on your funding agreement.

Use of the common seal requires a signature by the authorised person for the organisation, and this is usually witnessed. A witness must see the authorised person sign and sign at the same time. The other party to the agreement or document will also sign the document and their signature is also usually witnessed. It is good practice to have all the signatures taken at the same time. This cannot be done electronically.

Who can enter into contracts on behalf of an organisation:

Organisation itself - eg. through a committee member according to the Rules or Constitution

Persons with express authority - eg. committee members with authority from a resolution for a specific purpose or period of time

Persons with implied authority - eg. by appointment to a standard position, like the Executive Officer

It is important to be very clear about who is able to sign contracts on behalf of your organisation. If your organisation has signed a contract/agreement it is bound to carry out the terms of that contract regardless of the actual authority of who signed the contract on your organisation's behalf.

Many organisations have a common seal register which is updated and tabled at each committee / board meeting and lists the times that the seal has been used. It is also sensible to have a list of people who are allowed to use the common seal.

There are no hard and fast rules about where you keep your common seal, but when you consider how important it is to your organisation, and the things that can be done with it, it is best to have something in your constitution about where it is kept and who has responsibility for it.

In the model rules the Secretary holds the common seal. In a large organisation with paid staff the seal may be kept somewhere in the office, perhaps in a safe or a secure locked facility like the personnel filing cabinet. It is good practice to keep the seal with its register of use, and the list of who can use it.

# Annual General Meetings

Annual General Meetings (AGMs) are required under the *Associations Incorporations Act 1991*.

An incorporated association must have an AGM, in addition to any other meetings, once in each calendar year. It must be held within 5 months of the end of the financial year.

At the AGM the following documents must be presented:

* Audited statement of the association's accounts for the most recently ended financial year;
* A copy of the auditor's report to the association about the association's accounts; and,
* A report signed by 2 members of the committee stating:
* The name of each member of the committee during the recent financial year;
* The principal activities of the association during the financial year, and any significant change in the nature of those activities that occurred during that year; and,
* The net profit or loss of the association for the financial year.
* The committee must also ensure that there are copies of these documents available for members immediately before and during the AGM.

These documents, and some others, need to be lodged with the Registrar General within 6 months of the end of the most recent financial year.

Most associations also use their AGM to:

* Elect the committee/board
* Appoint an Auditor
* Appoint a Public Officer
* Provide a President's (or Chair's) report
* Provide an Executive Officer's report

# Association Membership

## Membership Principles

In an incorporated association the members of the organisation are effectively its owners. Membership may be open to individuals, organisations, groups or any combination of these. The members have the power to deal with the most important and strategic issues affecting the organisation. These can include:

* changing the constitution or rules of the association;
* altering the objects of the association;
* removing other members for disciplinary reasons; and
* dealing with appointments to and removals from the board.

The rights and entitlements of members of an incorporated association will be regulated by the particular constitution or set of rules which their organisation has adopted, but there are certain features of membership which are likely to be common to most organisations. The most significant of these is that the members of an organisation are not entitled to take a share of the organisation's assets when they cease to be a member or when the organisation is wound up. Members are acting as temporary stewards or trustees of the assets of the organisation. This is in contrast to an organisation which has been formed purely for the benefit of the members.

Under the law, members cannot be liable for the debts or liabilities of the association. This means that personal liability of each member is limited to that member's subscription or membership fee. Rules usually also contain provisions which confirm this restriction of liability.

In a company limited by guarantee, members agree to guarantee to pay any debts the company may incur up to a fixed amount. Commonly this personal guarantee is limited to the sum of $10. As with an incorporated association the particular rights of the member in relation to issues such as voting at meetings, keeping a register of members, etc. will be dealt with in the company's constitution.

## Constitutional Provisions

The constitution or rules are the primary sources of information on eligibility for, and rights of, membership of an organisation.

The Constitution is taken to bind each member and the association to the matters contained in them as if the rules had been signed and sealed by each member of the organisation and contained contractual obligations on the part of each member to observe all of the rules.

The term "member" should be clearly defined, particularly if there are different levels of membership. It is quite possible for an organisation, within its rules or constitution, to create different classes of membership with each class having separate rights and entitlements. A common example is the use of "associate memberships" which are designed to allow interest groups to observe the activities of an organisation without offering them any direct involvement in its affairs. For instance, an organisation's rules or constitution might specify that a representative from the local community council may attend meetings as an associate member while having no rights to vote or participate in any decision-making process.

Careful consideration should be given to the rules or constitution of an organisation before deciding whether or not someone is eligible to become a member.

## Register of Members

Under the *Associations Incorporation Act 1991*, an incorporated association must keep an up to date register of its members. The governing committee must ensure that the register of members is available for inspection by association members at all reasonable times.

The register of members is to be kept at the address of the public officer or the registered office of the association or at another place in the ACT nominated by the committee. The place for inspection of the register must be identified in the association's annual return.

The register of members must list the name of the association and the name and address of each member of the association. The register is also to indicate the date that each member became and ceased to be a member.

## Cessation of Membership

The model rules for incorporated associations provide that a person ceases to be a member of an association if the person:

* dies;
* resigns from membership of the association;
* is expelled from the association;
* fails to renew their membership of the association; or
* if the member is a corporate or institutional member and ceases to exist.

## Engaging your Members

Many organisations have difficulty growing their membership base and involving their members in the work of the organisation.

In law, if not always in practice, an incorporated association is a member-based organisation.

Staying engaged with your members and involving them in the operation of the organisation is good practice and will benefit your organisation in the long term by building community support, providing you with resources such as volunteers, pro-bono advice and donations, and become a source of new board members who are interested and engaged with the organisation.

The membership is also the final level of accountability for your organisation, but they can only perform this function if they know what is happening.

### Communicate with your Members

Make sure your members are informed about the work of the organisation in an open and accountable fashion. Remember the members are the owners of your incorporated association and elect the committee to govern on their behalf.

Ensuring that there are ways that you communicate with members is also a good way of keeping them interested in your work. If they don’t know what their organisation is doing then they are less likely to be interested in supporting that work on an ongoing basis. The members need to feel confident that their values and ethical framework are informing the way the organisation carries out its work. This is part of the accountability equation, but it also provides guidance for the staff and volunteers. Sometimes not all members agree with all the work of the organisation, but they support the overall direction and reasoning.

### Serving the Membership

It helps if members, and potential members, know what they may receive when they sign-up for membership. They also need to know how the organisation will treat them and how accountable to them it will be for its work.

Organisations are required to keep an up-to-date membership database under the *Associations Incorporation Act 1991*. Yo may receive requests for information from that database, but divulging this information to others, including interested government officials, may be infringing privacy laws unless the members have agreed to their information being distributed. It is good practice to guard the privacy of your membership database. Listing the membership names in publications would also require the permission of members.

Some ideas for engaging members include:

* Call or survey your members to ask what skills they could contribute or what opportunities they would like to get more involved
* Advertise any opportunities for engagement in newsletters and other communications
* Use membership surveys as an evaluation tool to ensure that your organisation is fulfilling its membership duties effectively
* Hold member events where members can engage with the board and staff in a social environment and develop closer personal relationships with your organisation

# Dissolving an Association

An incorporated association may wind itself up voluntarily by passing a special resolution of members in general meeting.

The ACT Supreme Court has powers to wind up an association if it becomes inactive, unable to pay its debts, or operates contrary to its objects.

There are similar mechanisms for winding up companies limited by guarantee under the *Corporations Act 2001*. However, legal advice should be sought in taking such a course of action.

The surplus property, including remaining funds and assets, of an incorporated association cannot be distributed among the members. Any surplus property may be vested in another organisation if that organisation:

* has substantially similar objects or purposes to the association being wound up;
* is non-profit; and
* provides in its rules for surplus property to be passed to a similar organisation on dissolution or winding up.

The recipient organisation does not necessarily need to be an incorporated association.

Alternatively, surplus property may be vested in a fund, authority or institution specified in the *Income Tax Assessment Act 1966*. These entities usually have charitable purposes.

The surplus property of a company limited by guarantee may be distributed among its current members in accordance with the *Corporations Act 2001*.