



## 39. Organising an environmental group

Environmental lobby and action groups may be more effective than individuals working alone. They often form a separate association for a single issue campaign. The group has to decide how it is going to be structured to operate. This Fact Sheet explains many of the differences between unincorporated and incorporated associations. It also sets out the process and requirements for groups that wish to become incorporated.

### An association that has not incorporated formally is an unincorporated association, per definition

There are three essential features to an unincorporated association. These are:

- It must have members;
- The formation of the association must have occurred at an identifiable point in time; and
- There must be a contract binding amongst the members.

These are not hard to meet. Any group must have members or it is not a group. At some point there must have been a conscious decision to form an association; often this is the point at which a group chooses its name. A contract is a legally binding agreement. The contract between members of the association consists of the rules of the association as acknowledged by the members, regardless of whether they are written down. If they are written down they are referred to as the association's 'Constitution' or 'Rules'. The kinds of matters that may be addressed in the Rules of an unincorporated association are the same as those for an incorporated association. (Refer to the text box at the end of this Fact Sheet).

### What is the legal status of an unincorporated association?

An unincorporated organisation has no legal existence of its own. In most cases the board or committee of the association, who are usually also the trustees with legal ownership of the association's assets, will act on behalf of or represent the association. This has some very important consequences for the conduct of the association:

- An unincorporated association cannot hold property in its own name. Any assets of the association are held by trustees (often the board or executive committee of the association) on behalf of all of the members at any particular time.
- Similarly, any gifts to the association must be expressed as being for all present and future members of the association or for the charitable purposes of the association otherwise such gifts risk being declared invalid.
- An unincorporated association cannot sue in its own name. It is possible for members to bring a representative action on behalf of the association because all members have a common interest in the action.
- The association can only enter into a contract if every member of the association is a party to the contract, or if the contract is concluded by a member who is authorised by the rest of the members to act on their behalf.
- An unincorporated association cannot be sued in its own name.

- Members are not usually liable for a breach of contract by the association. The courts have held that members cannot authorize the board to make a contract that is personally binding on all members. Except in exceptional circumstances, the members of the board will be personally liable as representatives of the association and also because they control the operations of the association.
- If a member commits a tort (a civil wrong such as negligence or trespass) their liability will not be affected by their membership of the association. In cases where the association as a whole is considered to have committed the tort, the board will be personally liable.
- It can be difficult to dissolve an unincorporated association. Where possible, the Rules of the association should provide for the dissolution of the association and the distribution of surplus assets. Where this is not the case the association can be dissolved by unanimous vote of the members. Otherwise the court will have to become involved. Often the Rules of the association will state that any surplus assets are given to another association with similar objectives. If this is not the case, then surplus assets are distributed equally between the people who were members at the time the association was dissolved. Many of these issues can be resolved by having clear written Rules or by incorporating the association.

In summary, an unincorporated association is nothing more than the aggregate of its members with an agreement as to how it is to be run.



### What are the effects of incorporation?

Once incorporated, an association becomes a separate legal entity distinct from its members. This means that it can sue and be sued, it can enter into contracts and it can own property in its own name.

Members of an incorporated association have limited liability. This means that should the association encounter financial difficulties, the liability of each member is limited to their annual membership (which they have already paid).

Should an incorporated association need to be dissolved, the process that is applied is the same as for companies wound up under corporations law. The process can be implemented by a special resolution of the members (which is a vote at a meeting of members with at least 75% of members voting in favour of the resolution).

Alternatively, an association can be wound up by order of the court.

An incorporated association will have a common seal with which to execute documents and it is entitled to and must, use the word 'Incorporated' or 'Inc.' after its name.



### What associations are eligible to apply to become incorporated?

An association is eligible to be incorporated if it satisfies three criteria, which are:

- Have more than five members;
- Be formed for an approved purpose; and
- Be a non-profit organization.

An "approved purpose" may be one of a wide range of purposes, including religious, charitable, sporting, recreational, educational and political purposes as well as the promotion of literature, science or the arts, or the operation of a community or cultural centre. The Commissioner for Fair Trading ("Commissioner") has further discretion to approve any other purpose. If the Commissioner refuses to exercise this discretion in favour of the applicant, the applicant may appeal to the State Administrative Tribunal ("SAT") for a review of the Commissioner's decision.

Neither the association nor its members may make a pecuniary gain from the operations of the association. This does not prevent the association from raising money (i.e. making a profit) through donations, subscriptions and the like, as long as the money is put towards the beneficial purpose of the association. Neither does it prevent employees of the association from being paid salaries, or members receiving money from the association to which they would be equally entitled if they were not a member of the association. The association may provide services and facilities to its members and may trade with members and the public, as long as:

- the trade is ancillary to the principal purpose of the association ; and
- any trading with the public is not substantial in volume in relation to the other activities of the association.



## Who administers incorporated associations?

The Department of Consumer and Employment Protection (“DOCEP”) administers the incorporation of associations, with specially trained staff to advise on legal matters. Further information including contact details is available at the end of this Fact Sheet.



## What is the process of incorporation?

Before an association can apply for incorporation, it must publish a notice in a form prescribed by DOCEP in a newspaper circulating in the area in which the association is based. This notice must be published at least one month, and not more than three months, before the application for incorporation is sent to the Commissioner.

Any person may request the Commissioner to refuse the application. The request must be made within one month of the publication of the notice. The objector must provide reasons for their request. If the Commissioner refuses the request the objector has 14 days (from receiving notice of the refusal) to appeal to the SAT for a review of the decision of the Commissioner.

Assuming that the application has not been refused because of an objection, the Commissioner will receive an application for incorporation. The application must be made by a person properly authorized by the association to make the application. The application must be in the prescribed manner and form and accompanied by a copy of the Rules of the association. The applicant must also provide a certificate certifying:

- The applicant’s authority to make the application and verifying the particulars of the application
- The Rules provided are a true copy of the Rules of the constitution and cover all the matters required under the Act
- That the association has more than five members and
- the application has been advertised as required.

The Commissioner will not incorporate an association if the name sought as part of the application is offensive, identical or likely to be confused with the name of an existing association or business or likely to mislead the public as to the objects and purposes of the association. If the Commissioner refuses to incorporate an association under a particular name, the applicant may apply to the SAT for a review of the decision of the Commissioner.

The Commissioner must be satisfied that the activities of the association are not more appropriately carried out by a body corporate created under some other law. That is, if it is more appropriate to form a company, co-operative or partnership rather than an incorporated association. The Commissioner may also refuse to incorporate an association if he, or she, feels that incorporation is against the public interest. If the Commissioner refuses an application for incorporation, the applicant may apply to the SAT for a review of the decision of the Commissioner.

If all of these requirements are satisfied, the Commissioner will incorporate the association by issue of a certificate of incorporation.



## What are the costs?

The disadvantage of incorporation is that official recognition brings with it a number of formalities and rules and some additional fees.

There is a base cost of \$108.00 to have an association incorporated. Further fees are imposed for tasks that require the action or approval of the Commissioner or DOCEP. These include:

- Approval of the purpose of the association - \$32.50;
- Changing the Rules of the association - \$18.00; and
- Changing the purpose of the association - \$18.00.



## What are the formalities?

There are a number of technical requirements imposed upon incorporated associations:

- Membership
  - An incorporated association must have at least six members.
  - There are no age restrictions on membership.
  - Incorporated bodies may be members.
- Office Bearers
  - There are no restrictions on the age and qualifications of office bearers or even on the number of office bearers and the positions that must be filled.
- Meetings
  - The members of the association must meet at least once a year within four months of the end of the financial year (the Annual General Meeting).
  - There is no requirement that the committee (if any) meet.
- Information
  - The association must keep a register of its members.
  - The association must keep such accounting records as correctly record and explain the transactions and financial position of the association.
  - An annual financial statement must be submitted to the Annual General Meeting.
  - The Commissioner can request an audited financial statement at any time.



## Does incorporation provide protection from defamation?

Incorporating an association does not protect its members from liability for defamation. Where a statement is issued in the name of the association, members can still be sued for defamation and the complainant most likely would bring the action against the members of the board who authorized the release or publication of the statement.



## Tax deductions

The federal government keeps a register of the environmental organisations that it approves for tax deductibility, so that money donated to the registered organisation can be claimed by the donor as an approved tax deduction. For information on the eligibility of an association for registration for such purposes visit the Australian Government's Department of Environment and Heritage website:

<http://www.deh.gov.au/tax/reo/index.html>

## Rules

An unincorporated association can operate without written rules. Most associations choose to prepare a written set of Rules or a Constitution to govern the operations of the association. This can be done to provide certainty to members, particularly as an association grows. The presumption is that the constitution is not intended to legally bind members as a contract unless the financial interests of members are affected, or the Rules specifically provide otherwise.

There are certain matters that should be dealt with in the rules, as a matter of common sense, even for an unincorporated association. If the association is to be incorporated the following matters must be provided for:

1. The name of the association;
2. The objects or purposes of the association, including a provision in, or substantially in, the following terms —
  - a) The property and income of the association shall be applied solely towards the promotion of the objects or purposes of the association and no part of that property or income may be paid or otherwise distributed, directly or indirectly, to members of the association, except in good faith in the promotion of those objects or purposes;
3. The qualifications (if any) for membership of the association;
4. The register of members of the incorporated association;
5. The entrance fees, subscriptions and other amounts (if any) to be paid by members of the association;
6. The name, constitution, membership and powers of the committee or other management body and provision for —
  - a) the election or appointment of members of the committee;
  - b) the election or appointment of members of the committee;
  - c) the terms of office of members of the committee;
  - d) the grounds on which, or reasons for which, the office of a member of the committee shall become vacant;
  - e) the filling of casual vacancies occurring on the committee; and
  - f) the quorum and procedure at meetings of the committee;
7. The quorum and procedure at general meetings of members of the incorporated association;
8. The time within which, and manner in which, notices of general meetings and notices of motion are to be given, published or circulated;
9. The manner in which the funds of the association are to be controlled;
10. The intervals between general meetings of members of the incorporated association and the manner of calling general meetings;
11. The manner of altering and rescinding the rules and of making additional rules of the incorporated association;
12. Provisions for the custody and use of the common seal of the incorporated association;
13. The custody of records, books, documents and securities of the incorporated association; and
14. The inspection by members of the incorporated association of records and documents of the incorporated association.

## Contacts and further information

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| Department of Consumer and Employment Protection (DOCEP), Perth  | Tel: (08) 9282 0777 |
| State Law Publisher, William Street Perth (for copies of WA legislation)<br>Or access the information online at <a href="http://www.slp.wa.gov.au">www.slp.wa.gov.au</a> | Tel: (08) 9321 7688 |
| Department of the Environment and Heritage (DEH), Canberra<br>Or access the information online at <a href="http://www.slp.wa.gov.au">www.slp.wa.gov.au</a>               | Tel: (0)2 6274 1111 |

## The Environmental Defender's Office WA (Inc)

The Environmental Defender's Office WA (EDO) is a community legal centre specialising in public interest environmental law.

The objects of the EDO include:

- ◆ to provide community groups and individuals with legal advice and representation to help protect the environment;
- ◆ to promote law reform that improves environmental protection; and
- ◆ to provide community education about environmental law.

The EDO is a non-profit, non-government organisation. The EDO receives its principal funding from the Federal Attorney-General's Department. However, these funds are limited and donations from the public provide a vital source of funds for many of our activities. Donations over \$2 are fully tax deductible. The EDO also welcomes people with a commitment to the environment to join as members.

If you require legal advice on an environmental issue or wish to find out more about the EDO, please contact us at the following address:

**Environmental Defender's Office WA (Inc)**  
**Second Floor, Kings New Office Tower**  
**533 Hay Street, PERTH WA 6000**

**Tel: (08) 9221 3030      Fax: (08) 9221 3070**

Email: [edowa@edo.org.au](mailto:edowa@edo.org.au)      Web: [www.edo.org.au/edowa](http://www.edo.org.au/edowa)

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