Should your group incorporate?

Legal information for community organisations

This fact sheet covers:

- what it means to incorporate
- benefits of incorporation
- responsibilities of incorporation
- next steps if your group decides to incorporate
- next steps if your group decides **not** to incorporate

Use this fact sheet to help your community group decide whether it should incorporate.

This fact sheet explains the advantages and disadvantages of incorporation and links to resources that can help you take the next step.

The decision is particularly important for people who govern the group or make significant decisions on its behalf.

Disclaimer

This fact sheet provides information on the decision whether to incorporate. 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 fact sheet.

What it means to incorporate

Incorporation means creating a separate legal entity that is recognised by law, such as an incorporated association or a company limited by guarantee.

When a community group incorporates, the story usually goes something like this:

People get together for a purpose

A group of people come together to pursue a shared goal, such as revegetating a local creek, forming a swimming club, opposing a property development or establishing a support group.

A group forms and starts to do things

When people come together for a shared purpose, the group will usually start as an unincorporated group. Because it is not a separate legal entity, this can create practical challenges. For example:

- funding bodies may be reluctant to provide grants
- members may need to sign contracts or leases in their personal names
- individuals may be personally responsible for the group's debts and other liabilities

The group incorporates

The group decides to formalise its arrangements by registering as a separate legal entity. Once incorporated, the organisation can act in its own name and is recognised separately from its members by governments, courts, businesses and the public.

The benefits and responsibilities of incorporation are outlined below.

Benefits of incorporation

Your group becomes a separate legal entity

Once incorporated, the organisation can act in its own name. It can:

- open bank accounts
- obtain insurance
- enter contracts
- buy, own, lease and sell property and other assets
- borrow money
- sue (take legal action in the courts) and be sued (be taken to court)

Note

It may be possible for an unincorporated group to open a bank account or obtain insurance. However, members of the group may remain personally responsible for obligations associated with those arrangements.

The organisation can own property in its own name

If a group is incorporated, ownership of property and assets is generally clearer.

This includes:

- equipment and other physical assets
- land and buildings
- intellectual property such as logos, websites and publications

An incorporated organisation can continue to hold these assets even when membership changes. By contrast, unincorporated groups may need to transfer ownership between individuals over time.

Incorporation can make it easier to access funding and government programs

Governments and funding bodies often prefer dealing with incorporated organisations.

For example:

- many grant programs require applicants to be incorporated
- some tax concessions and registrations may be easier to obtain as an incorporated organisation (some organisations seeking Deductible Gift Recipient endorsement choose to incorporate)

For more information on grant funding, see our fundraising webpage. For more information on tax concessions, see our tax webpage.

The organisation continues even when membership changes

An incorporated organisation continues to exist even when individual members leave or new members join.

This is sometimes referred to as **perpetual succession**.

The organisation continues until it is deregistered or wound up.

The organisation has limited liability

One of the main benefits of incorporation is limited liability.

In general, members are not personally responsible for the organisation's debts and liabilities. If the organisation cannot meet its obligations, creditors can usually only recover against the organisation's assets, not the personal assets of members.

For example, if an incorporated organisation enters into a lease and cannot pay the amount owing, the creditor will generally have a claim against the organisation rather than against individual members.

By contrast, if an unincorporated group enters a contract, the individuals who signed the contract may be personally liable for the group's obligations.

Example 1 – when an incorporated organisation can't pay its debts

GreenTowns Inc is an incorporated association that carries out revegetation projects in South Australia. It leases equipment but later cannot make the required payments because a fundraising event raises less money than expected.

If the equipment supplier sues for the outstanding amount, the claim will generally be against GreenTowns Inc, not its individual members. In most cases, the supplier can recover only against the association's assets and cannot pursue members personally for the debt.

This illustrates one of the key benefits of incorporation: the organisation is legally separate from its members and is generally responsible for its own debts and liabilities. However, members may still be liable for amounts they personally owe to the association, such as unpaid membership fees.

Example 2 – when a court orders an incorporated organisation to pay compensation

If a court orders GreenTowns Inc to pay compensation following an accident or dispute, the claim will generally be against GreenTowns Inc, not its individual members. In most cases:

- GreenTowns Inc may be required to pay the compensation awarded by the court, but its members will not be personally liable, and
- recovery will generally limited to the association's assets

Examples 1 and 2 – if the group was unincorporated

However, if GreenTowns Inc was unincorporated:

- in Example 1, the equipment lease would likely have been signed by one or more members personally, meaning the supplier could pursue those individuals for the debt, and, and
- in Example 2, the court could not make an order against the group itself because the group would not be a separate legal entity. Instead, the court may make orders against the individuals involved

Unlike an incorporated organisation, an unincorporated group does not generally provide members with the same protection from personal liability. As a result, individuals involved in the group could be personally liable for some or all of the group's debts and other liabilities.

Important exception: directors and office holders can still be personally liable

Limited liability does not protect directors, committee members or other office holders who breach their legal duties.

These duties arise under legislation, common law and, in some cases, the organisation's governing rules. They generally include duties to:

- act in good faith and in the best interests of the organisation
- exercise reasonable care and diligence
- manage conflicts of interest appropriately
- avoid using their position or information obtained through the role for personal advantage.

A breach of these duties can result in personal liability.

For more information on directors' duties, see our Duties Guide.

Example 3 – a committee member ignores financial warning signs

Sam is a committee member of GreenTowns Inc. He and the other committee members ignore warnings that the association may not be able to pay its debts when they fall due.

If GreenTowns Inc later cannot pay money it owes, the committee members may be investigated by the relevant regulator and could be held personally liable if they are found to have breached their duties.

Responsibilities of incorporation

Incorporation brings legal responsibilities. The exact requirements depend on the organisation's legal structure and where it is registered.

In general, an incorporated organisation must:

- have an approved name
- adopt a constitution or set of governing rules
- have a minimum number of members
- appoint people to required governance positions
- keep records and hold required meetings
- provide information to government regulators
- meet financial reporting requirements
- pay any applicable registration or annual fees

Additional obligations may apply if the organisation:

- is registered as a charity, or
- receives tax endorsements or concessions

Because of these obligations, a group should ensure it has people willing and able to oversee governance, administration and compliance.

For more information on meeting your ongoing obligations, see our reporting to government webpage.

Should your group incorporate?

When deciding whether to incorporate, consider:

- **Risk** – would incorporation help protect members from personal liability?
- **Cost and administration** – can the group meet ongoing governance and reporting obligations?
- **Public information** – are you comfortable with some information becoming publicly available?
- **Future plans** – might the group employ staff, lease property or seek significant funding?
- **Legal requirements** – will the group carry out activities that require an incorporated structure?

Even if the group incorporates, it should still have adequate insurance and a risk management plan – for more information go to our risk and insurance webpage.

Tip

Incorporation is not always required to access funding. Some grants and funding programs are available to unincorporated groups, and an incorporated organisation may be able to receive and hold funds on a group's behalf through an auspicing arrangement. Before applying, check whether the funding body requires applicants to be incorporated. For more information, see our webpage on auspicing.

If your group decides to incorporate

If your group decides to incorporate, choosing the right legal structure is an important next step. The most suitable structure will support your group's activities and purpose while helping it manage risk and meet its legal obligations.

For more information about the types of entities that a group can incorporate, go to our legal structures webpage.

If your group decides not to incorporate

An unincorporated group can still operate effectively.

For example, it can:

- adopt a constitution or other operating rules
- hold meetings and keep records
- raise funds
- carry out activities and programs
- obtain some forms of insurance

However, an unincorporated group:

- is not recognised as a separate legal entity
- does not have the benefit of perpetual succession
- does not generally provide members with the same protection from personal liability as an incorporated organisation

Unincorporated groups must still comply with relevant laws, including employment, work health and safety, tax and consumer protection laws. Additional requirements may apply if the group is registered as a charity.

Tip

Review the decision not to incorporate regularly, particularly if the group grows, takes on higher-risk activities, employs staff, signs leases or seeks substantial funding. Incorporation can be reconsidered at any stage.

Caution

Incorporated and unincorporated groups may look similar from the outside, but they are treated differently under the law. This difference can become important if the group faces a legal claim or financial liability.

More information from our website

- Choosing a legal structure – compare the available legal structures and work out which one is best suited to your group
- Governance and directors' duties – learn about the duties and responsibilities of directors, committee members and other office holders
- Fundraising – find information about fundraising laws and requirements across Australia
- Tax – learn about tax concessions and endorsements, including Deductible Gift Recipient endorsement, income tax exemptions, GST concessions, fringe benefits tax concessions and state tax obligations