

# Incorporating as an incorporated association in New South Wales

Legal information for NSW community organisations

## This fact sheet covers:

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- nominating a Public Officer
  - considering your management committee
  - deciding on a name for your organisation
  - drafting or adopting a constitution for the association
  - deciding on the purposes of the association
  - completing NSW Fair Trading's Application for Registration of an Incorporation Association form
  - sending the form, documents and fees to NSW Fair Trading
  - awaiting notice of incorporation from NSW Fair Trading, and
  - ongoing compliance.
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**In New South Wales, the process of setting up an incorporated association is set out in the *Associations Incorporation Act 2009 (NSW) (AI Act)* and the *Associations Incorporation Regulation 2016 (NSW) (AI Regulation)*.**

NSW Fair Trading (**Fair Trading**) is the government body responsible for regulating incorporated associations in NSW. To become an incorporated association you must apply to Fair Trading.

While setting up an incorporated association is a relatively simple process, there are a few important decisions that your organisation will need to make (and may need to get legal advice on). Set out below is a brief explanation of the main requirements and considerations for setting up an incorporated association in New South Wales, and links to Fair Trading and other relevant websites.

## 1. Overview

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Once you have decided that you would like to incorporate an association in New South Wales, you will need to follow the steps set out below, each of which is explained in more detail in the rest of this information sheet.

**Step 1 – decide that you will incorporate:** Before you can complete and lodge an application form to incorporate, you will need to formally decide to incorporate an association. If you are already operating as an unincorporated association, your current members will need to pass a special resolution agreeing to incorporate. A special resolution is a resolution passed by 75% or more of your members. If you are not already operating as an unincorporated association and want to jump straight

to incorporation, your newly established incorporated association must have at least 5 individuals to be members of the association (with approval to be a member from each).

You cannot incorporate if you are planning to operate as a business or to provide **pecuniary gain** to members. **The term ‘pecuniary gain’ is defined in section 5 of the AI Act, and would include providing members with gains such as a dividend payment or a disposable interest in property.**

**Step 2 – make an application:** Applications for registration of an association are made to the Commissioner for Fair Trading, Department of Finance, Services and Innovation using the application form provided by Fair Trading. The application must:

- specify the proposed name of your association and its first official address (cannot be a Post Office box)
- indicate whether the application has been authorised by:
  - 5 or more individuals (the association should keep copies of any document recording the authorisation of each of its members), or
  - an existing unincorporated body (a copy of the special resolution authorising the application must be attached)
- identify and include details of the person who is to be the association’s first Public Officer
- attach a copy of your association’s proposed constitution, or a statement that your association adopts the Model Constitution without modification
- include a statement of your association’s objects
- indicate the principal activity of the association
- provide details of the association’s:
  - end of financial year
  - sources of income
  - estimated total revenue and current assets for the first year of operation, and
  - property held on trust
- include copies of any required special resolution, as described above, and
- be accompanied by the required fee.

**Step 3 – wait to hear from Fair Trading:** Once Fair Trading has received your organisation’s application for incorporation, it will review the paperwork. Fair Trading will generally process applications for incorporation of an incorporated association within 5 business days of receipt (it may take longer if you apply through Service NSW). Fair Trading may also contact you for more information or to discuss your constitution.

## 2. Nominating a Public Officer

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The AI Act requires an organisation to nominate a ‘Public Officer’. This person is the contact person for the organisation. The person must agree to give their details (such as their name and address) to Fair Trading for this purpose.

The Public Officer must be over 18 years of age, be ordinarily resident in New South Wales and consent to be the association's Public Officer. The AI Act sets out a number of the duties and requirements for the role of Public Officer.

Usually, the Public Officer lodges the application to incorporate with Fair Trading.

An incorporated association must have a Public Officer at all times and the position must be filled within 14 days of it becoming vacant. The Public Officer has an ongoing administrative role in the organisation, particularly in relation to providing information to Fair Trading.

Detailed guidance on the Public Officer's role in an incorporated association can be found on Fair Trading's [website](#) (see the Resources at the end of this fact sheet for further details).

### 3. Considering your management committee

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Your association will need a committee (sometimes known as a board), which will govern the association in accordance with the association's constitution and the law. The committee is required to:

- include 3 or more members of the association
- only have committee members who are aged 18 years or more, and
- have at least 3 committee members who ordinarily reside in Australia.

### 4. Deciding on a name for your organisation

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The AI Act requires an organisation to choose a name and Fair Trading must approve that name.

Choosing a name is normally a simple task, but your organisation should make sure that the name chosen is not being used by (or too similar to) any other organisation as Fair Trading will not approve the name if this is the case. Search Fair Trading's [register of incorporated associations](#) and the Australia Securities and Investment Commission's [business names register](#) for this purpose.

When you decide on a name, your organisation may also wish to look into the laws that are available to protect the intellectual property rights in that name (for more information on this, go to Not-for-profit Laws [Intellectual Property](#) page).

Once your organisation is incorporated, you will need to use the word 'Incorporated' or 'Inc' at the end of your association's name. This indicates to the public that your organisation is incorporated and has limited liability.

The AI Act requires you to use the full name of the organisation on all business documents. Your organisation may use a common seal (stamp), which must also include the full name of the organisation. Organisations are no longer legally required to have a common seal.

If, after incorporation, your organisation wants to change its name, your organisation must pass a special resolution at a meeting, and then the Public Officer must apply to Fair Trading for approval of the change of name. The name change is not official until you get the approval notice from Fair Trading.

As of 1 September 2016, an association is no longer required to reserve a name prior to making an application to register an association, or an application to change an association's name. A two level fee structure applies for lodging an application to register an association or to change an association's name, depending on whether the name has been previously reserved (see below for further information).

## 5. Drafting or adopting a constitution for the association

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The AI Act requires associations to incorporate with a constitution, which is effectively a set of rules. The constitution governs the internal affairs of the association and must set out requirements for certain matters for example for membership, meetings and powers of the association's committee. Your organisation should note that the constitution of an incorporated association forms a contract between the association and its members. This means that the provisions of the constitution are binding on the association itself, on the members of the management committee and the members on the association.

Schedule 1 to the AI Act (found at the end of the AI Act) sets out the list of matters that an association's constitution **must** cover. You can include other rules on top of these minimum requirements. The constitution must also include the objects of the association.

To help organisations wishing to become incorporated associations, the AI Regulations include a Model Constitution that meets all the requirements of the AI Act. The Model Constitution is set out in Schedule 1 to the AI Regulation.

From 1 September 2016, there are three new matters that every constitution must address:

- the maximum number of consecutive terms of office of any office-bearers on the committee (if specified)
- the kinds of resolutions that may be voted on by postal or electronic ballot (the electronic voting method is new), and
- the winding-up of the association.

### NOTE

If your Constitution does not specifically address one or more of the 17 required matters listed in Schedule 1 of the AI Act, then the rules relating to those matters as written in the Model Constitution will apply to your association and will form part of your constitution.



While the Model Constitution is an easy option for newly forming incorporated associations to use for their constitution, your group should be careful and take the time to consider (and possibly get legal advice) on whether the Model Constitution is suitable for your organisation.

In addition, certain matters are required to be included in an association's constitution in order to be registered as a charity, and as part of any application for endorsement as a Deductible Gift Recipient (DGR). If your group hopes to be registered as a charity or to obtain DGR endorsement, you should get

legal advice on drafting your constitution and whether the Model Constitution is suitable for your organisation more generally.

If your group has decided to use the Model Constitution, you should remember to insert your association's name, details of your financial year and your association's purposes into the template to complete the document.

### CAUTION

Although called 'Model' Constitution, it may not have all of the wording that many organisations need in certain circumstances, for example when they try to register for minor gaming licences or apply for tax concessions or a grant in the future.



## 6. Decide on the purposes of the association

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The AI Act requires that an application for an incorporated association must include a statement of the association's purposes (also known as 'objects'). The purposes are then recorded in the Register of Incorporated Associations.

The AI Act does not detail what must be included in your purposes. In general, your purposes should set out the main purposes that the organisation is trying to achieve, and the planned activities of the organisation.

While writing your association's purposes sounds like a simple task, your organisation should be aware that the wording of its purposes may have significant legal implications in the future. Importantly, your organisation cannot legally act beyond its purposes.

Another important consideration when deciding what to include in your purposes is whether your organisation will apply for tax concessions or seek registration as a charity. There are laws that provide certain eligible not-for-profit organisations with tax concessions (such as exemptions from income tax and DGR endorsement). Access to these concessions will depend on your purposes, among other things.

If your organisation intends to apply for tax concessions, you should seek legal advice on suitable wording for your organisation's purposes. Legal advice at this early stage will save your organisation from having to amend its purposes in the future.

## 7. Completing NSW Fair Trading's Application for Registration of an Incorporated Association form

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The required form is available from Fair Trading's [website](#).

## 8. Sending the form, documents and fees to NSW Fair Trading

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Your organisation should submit the completed Application for Registration of an Incorporated Association form to Fair Trading, along with the organisation's statement of purposes and constitution and any other documentation required by the form.

You will also need to pay the fee which is set out in Schedule 5 of the Regulation. There are two options for the fee, depending on whether you reserve the association's name in advance or not:

- \$128 (as at May 2017) if the name of the association has been reserved; and
- \$164 (as at May 2017) if the name of the association has not been reserved.

If you decide to reserve a name prior to incorporating your association, application for reservation of name is \$48 (as at May 2017).

An association is not required to reserve a name prior to making an application to register an association, or an application to change an association's name. However, if you choose to reserve a name ahead of actual incorporation, the reservation of name is valid for three months.

## 9. Awaiting notice from NSW Fair Trading

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Once Fair Trading has received your organisation's application for incorporation, it will review the paperwork. Fair Trading will generally process applications for incorporation of an incorporated association within 5 business days of receipt (it may take longer if you apply through Service NSW).

If Fair Trading does not approve the constitution you have drafted, you may wish to seek legal advice about whether your constitution complies with the requirements in the AI Act.

If Fair Trading accepts your application for incorporation, a Certificate of Incorporation (with your organisation's registration number) will be sent to your organisation at the address included on the application form. You should keep this Certificate, a copy of your organisation's statement of purposes and a copy of your constitution in a secure place.

## 10. On-going compliance

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Once you are registered as an incorporated association, your organisation will need to comply with the requirements of the AI Act, the AI Regulation and your organisation's constitution. If your association is also a registered charity, it will need to comply with the requirements associated with being a registered charity.

You should become familiar with all of these requirements to make sure your organisation and its committee is complying with the law.

# Resources

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## Related Not-for-profit Law Resources

- ✔ Getting Started – [www.nfplaw.org.au/gettingstarted](http://www.nfplaw.org.au/gettingstarted)

This page contains resources to help those who are in the process of getting their not-for-profit organisation started.

- ✔ Running the organisation – [www.nfplaw.org.au/runningtheorg](http://www.nfplaw.org.au/runningtheorg)

This page contains resources to assist those running not-for-profit organisations to understand and comply with legal requirements.

## New South Wales Fair Trading Resources

- ✔ [Application for Registration of an Incorporated Association](#)

Your organisation will need to complete this form and provide it to Fair Trading (along with a copy of your organisation's purposes, constitution and the relevant fee) to register as an incorporated association in New South Wales.

- ✔ [Model Constitution](#)

Note that this is not a perfect 'model' and some organisations may need to make amendments to this constitution.

- ✔ [About associations](#)

Fair Trading's website has information and fact sheets about setting up and running an incorporated association in New South Wales.

- ✔ [Public Officer's role](#)

This page outlines the role of a Public Officer, who can be a Public Officer and the responsibilities of a Public Officer.

## Legislation

- ✔ [Associations Incorporation Act 2009 \(NSW\)](#)

This is the link to legislation that governs the setting up and running of an incorporated association in New South Wales.

- ✔ [Associations Incorporation Regulation 2016 \(NSW\)](#)

This is a link to the regulations which further govern the setting up and running of an incorporated association in New South Wales. The 'Model Constitution' is set out in Schedule 1 of the Regulations.

A Not-for-profit Law Information Hub resource. Access more resources at [www.nfplaw.org.au](http://www.nfplaw.org.au). Justice Connect Not-for-profit Law acknowledges the generous support of our funders and supporters. Find out more at [www.nfplaw.org.au](http://www.nfplaw.org.au)

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