

How to decide whether your group should incorporate

Legal information for community organisations

This fact sheet covers:

- ▶ what does it mean to 'incorporate'?
 - ▶ what are the advantages of incorporating?
 - ▶ what are the obligations of incorporated groups?
 - ▶ checklists to help your group decide whether to incorporate
 - ▶ we have decided to incorporate, what's next?
 - ▶ we have decided **not** to incorporate, what's next?
 - ▶ resources to help your group with next steps
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Use this fact sheet to help your not-for-profit group decide whether it should incorporate.

This fact sheet explains the advantages and disadvantages of incorporating. It includes references to more information about how to incorporate.

The group's decision is particularly important for anyone who is likely to be:

- on the group's board, or management committee, or
- making decisions for the group



Related Not-for-profit Law resources - other information about your group incorporating

If you are considering whether your group should incorporate, you might also like to read our fact sheets about choosing a legal structure on the [Choosing a legal structure page of our website](#).



What does it mean to ‘incorporate’?

To ‘incorporate’ means to set up a separate legal body that is registered with the government — for example, a company or an incorporated association.

When a not-for-profit group incorporates, the story usually goes something like this:

People get together for a purpose

First, a group of people get together and decide they want to do something as a group — perhaps they want to revegetate a local creek, form a swimming club, oppose a property development or set up a support group for anyone with a particular medical issue.

A group forms and starts to do things

The group exists but it hasn’t incorporated yet. Even though the group hasn’t incorporated, the people in the group might have an understanding between them about how the group operates — for example, how the group makes decisions, what kind of activities the group engages in and how the group manages its money.

The group can continue to operate like this. But there are some limitations. For example:

- funding bodies don’t usually grant money to unincorporated groups
- if the group wants to lease a room or a building to run activities, one or more of the group’s members will need to sign the lease in their personal capacity, and
- if something goes wrong and the group doesn’t have enough money to pay amounts it owes, the group’s members might have to pay those amounts personally

The group incorporates

So, the group decides that it wants to formalise its arrangements and register with the government as a separate legal entity — this process is ‘incorporating’. Once the group has incorporated, the separate legal entity is recognised by governments, the courts, other businesses, and the public. The new entity is a kind of ‘legal person’ that can do things in its own right, in the same way as a person can do things.

The advantages of the group incorporating — and the obligations of incorporated groups — are set out below.

What are the advantages of incorporating?

There are advantages of a not-for-profit group incorporating.

Your group becomes a separate legal entity

From the date a group is ‘registered’ as incorporated, it becomes a ‘legal entity’ that is separate and distinct from the people who formed, or make up, the group. That separate legal entity can do things in its own name. If a group isn’t incorporated and it wants to do anything (for example, sign an agreement), it may have to do that in the name of one or more of its members.

But once your group has incorporated and become a separate legal entity, the entity can:

- open a bank account
- arrange insurance
- sign documents and enter into contracts
- buy, sell, own, lease and rent property and other assets
- borrow money, and
- sue (take legal action in the courts) and be sued (be taken to court)



Note

It may be possible to open a bank account or secure an insurance policy in the name of an unincorporated group. But, without the benefit of limited liability that an incorporated entity has (see below for more on this), individual members of an unincorporated group may be personally liable for obligations under the bank account or insurance policy.

Greater clarity about who owns your group's property

If your group is incorporated, it can own goods and property in its own name. This makes it clear what property is owned by the group. If a group is not incorporated, there may be confusion about who owns:

- items bought for the group, and
- intellectual property developed by the group (including logos or website content)

Also, if your group is incorporated, it doesn't need to record changes to the group membership against its property. But, if a group isn't incorporated, it may need to transfer ownership from old members to new members. This transfer may involve paying a fee or taxes.

Governments often prefer to deal with a separate entity

One of the advantages of a group incorporating is that governments often prefer to deal with incorporated entities. For example:

- many government grant programs only give funding to incorporated entities, and
- some tax concessions are only available to not-for-profit groups that are incorporated – for example, Deductible Gift Recipient status (where people who donate to the group can claim a tax deduction for their donation)



Related Not-for-profit Law resources

For more information on grant funding, go to the [Fundraising page](#) of our website. For more on tax concessions, visit our [Tax page](#).

The separate entity continues even when members of your group change

Once your group is incorporated, the separate legal entity continues to exist and be recognised by governments, the courts, businesses and the public, even when membership of the group changes. This is known as enjoying 'perpetual succession'.

Usually, the separate entity will exist until it is deregistered or 'wound up'.

The new entity has 'limited liability'

If your group is incorporated, it has 'limited liability' and the entity protects the members from being personally liable for the entity's debts. If something goes wrong and your incorporated entity has to pay an amount that it cannot afford to pay, then (usually):

- the most your incorporated entity would have to pay is the amount of money and assets your entity owns, and
- the people involved in your incorporated entity will not have to pay any of the amount that your entity can't pay



Example 1 — when an incorporated entity can't pay its debts

GreenTowns Inc is an incorporated association that revegetates areas in South Australia. It enters into a contract in its name to lease equipment from a business. But GreenTowns Inc can't pay the amount it owes under the lease its fundraising event didn't make as much money as expected. If the business that leased the equipment sues to be paid the amount GreenTowns Inc owes it, then (in most cases):

- the business would be able to sue GreenTowns Inc, but the most GreenTowns Inc would have to pay is the value of its assets, and
- the business would not be able to sue any of the members of the association

This is because GreenTowns Inc is the 'legal person' that entered into the contract with the business.



Example 2 — when a court orders an incorporated entity to pay compensation

If a court orders GreenTowns Inc to pay an amount as compensation after an accident or a dispute, the rules discussed in Example 1 apply in the same way:

- GreenTowns Inc can be sued for the amount of the order, but the members of the association (usually) can't be sued, and
- the most GreenTowns Inc would have to pay is the value of its assets



Examples 1 and 2 — if the group was not incorporated

However, if GreenTowns Inc was not incorporated:

- in example 1, the equipment leasing contract would likely have been entered into in the names of one or more members (maybe in the name of the president) so the business would be able to sue those individual people for the amount the group owed, and
- in example 2, the court wouldn't have been able to order the 'group' to pay as the group didn't exist as a separate entity — so the court would have ordered the individuals involved to pay the amount

In both examples, a limit on the amount that the group had to pay would not apply. And the individuals involved in the unincorporated group could be personally liable for the full amount that the group owed.

Exception – when the limits to liability do not apply (and directors or officers may be liable)

There is an important exception to the limited liability rules. If a director or officer of an incorporated group breaches their duties to the entity, they are likely to be personally responsible for any loss that results from the breach.

These duties, known as 'directors' duties', are set by law. The law says that directors (and other officeholders) must:



- always act in good faith in the best interests of the entity and for a proper purpose
- exercise reasonable care, skill and diligence in carrying out their role. This includes making sure the entity can pay all of its debts on time and that it does not trade while insolvent
- manage conflicts between personal interests and the entity's interests, and
- never take advantage of their position or information they have gained in the role for personal advantage

If any directors or other officeholders breach their duties, they may be held responsible for their breach. In that situation, the individuals may have to pay any amounts owing because of the breach from their own pocket.



Related Not-for-profit Law resource

For more information on directors' duties, see our [Duties Guide](#).



Example — a director isn't careful about the group's finances

Sam is a committee member of the incorporated association GreenTowns Inc. He and other committee members ignored warnings from GreenTowns Inc's accountant that the entity might not be able to pay all of its debts when due.

If someone sues GreenTowns Inc for money owing and GreenTowns Inc doesn't have enough money to pay, the committee members could be investigated by a government regulator. If the regulator finds they breached their duty to make sure GreenTowns Inc doesn't trade while insolvent, they may have to pay the amount owing personally.

What are the obligations of incorporated groups?

Once a group incorporates, it has certain obligations. The entity's obligations depend on the state or territory where the group is based and the type of incorporated entity (for example, a company limited by guarantee or an incorporated association).



Related Not-for-profit Law resource

For more information about the types of entities that a group can incorporate, go to our [Legal Structures page](#).

In general, an incorporated group is required to:

- have a name — for an incorporated association, the name must end in 'Incorporated' or 'Inc', and for a company limited by guarantee, the name must end in 'Limited' or 'Ltd'
- have a 'constitution' or a set of written rules that every person involved in the group agrees to comply with — the document must set out a statement of the group's purpose (objects)
- pay an initial registration fee to the relevant state, territory or federal government — usually between \$50 and \$450
- have a minimum number of members



- have people who are willing to hold certain positions in the group — for example, be on the board or committee of management or be the treasurer or secretary
- record the names of people in those positions and tell the government — these details are publicly available
- hold certain meetings and keep certain records
- provide the government with financial information about the organisation each year — including money received and money spent, and
- pay an annual fee to government

The entity's ongoing obligations and reporting requirements will also vary depending on whether:

- the entity is registered as a charity with the Australian Charities and Not-for-profits Commission, or
- the entity becomes endorsed as a Deductible Gift Recipient by the Australian Taxation Office

Because incorporated groups have these obligations, it's important that your group has people who are willing to hold positions in the entity and make sure it meets its legal obligations.



Related Not-for-profit Law resource

The Not-for-profit Law website has information to help you meet your ongoing obligations — see, [Reporting to government](#).

Checklists to help your group decide whether to incorporate

When your group is deciding whether it should incorporate, consider:

- **Professional advice** - You may want to seek legal or financial advice, because the decision whether to incorporate is often a decision about assessing risk
- **Costs and time** - Your group must be sure that it will be able to meet the costs and obligations of being an incorporated group. And people in the group must be willing to take on tasks like organising formal meetings and keeping proper financial records
- **Information becoming public** - If your group incorporates, certain information about it may become publicly available — for example, the names of certain office holders in the group, some financial information, and the rules of the group
- **Likely activities** - Your group's current activities might not favour incorporation, but the group's likely future activities could support incorporation – for example, if the group is likely to lease property
- **Undertaking certain regulated activities** - For some activities, for example for some types of housing, aged care, and native title activities, the government requires a group to be incorporated. You should consider getting legal advice about these matters

Use the following checklists to help you decide whether your group should incorporate.

Checklist 1: Possible liability for debts or civil legal actions

If your group incorporates, this will help to limit the extent to which its directors and officers may be personally liable to pay compensation, debts, or legal costs that the group may have to pay.

If you answer yes to any of the following, it's more likely that the group should incorporate:

- Will the group's activities involve risks where someone – a group member, a volunteer, employee, client or member of the public – could get hurt? For example, will the group use equipment or be involved in outdoor activities, activities involving food or alcohol, or protest or campaign activities?



- Could the group's activities harm someone's reputation? For example, is there a chance the group might defame someone while advocating or campaigning about an issue?
- Will your group be entering into an agreement under which it will owe money? For example, will the group buy equipment, lease property, take out a loan, or arrange credit?
- Will your group be hiring employees or independent contractors?
- Is it possible that your group will need to take legal action against another party and so may have legal costs awarded against it? Your group might need to do this as part of a campaign or advocacy.



Related Not-for-profit Law resource

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 page](#).

Checklist 2: Ownership of goods, equipment and property

It's usually easier for a group to own things if the group is incorporated.

If you answer yes to any of the following, it's more likely that the group should incorporate:

- Does your group need to open bank accounts?
- Does your group need to take out insurance (for example, to protect its volunteers)?
- Will your group own land or buildings?
- Will your group need to own or lease equipment – a computer, a phone, a car, office furniture?
- Will your group own shares or other assets, or significant amounts of money?

Checklist 3: Reputation, seeking grants or funding opportunities

Being incorporated may enhance the reputation of your group.

If you answer yes to any of the following, it's more likely that the group should incorporate:

- Will your group be applying for funding through government grants or from other private philanthropic funders?
- Will your group apply for Deductible Gift Recipient status?



Tip

Some local government funding, private funding, and small grant funding programs don't require incorporation. An unincorporated group can also receive funds by having an incorporated organisation receive and hold the funds on their behalf. For more information go to our webpage on [Auspicing](#). Your group should also investigate whether the organisations it would like to approach for funding require the groups they fund to be incorporated.



We have decided to incorporate, what's next?

If your group decides to incorporate, you need to decide which type of incorporated entity is right for your group. Taking time to select the most appropriate structure for your group will help the group continue its activities and pursue its purpose while managing potential risk and liability.



Related Not-for-profit Law resource

For more information about the types of entities that a group can incorporate, go to our [Legal Structures](#) webpage.

We have decided not to incorporate, what's next?

If your group decides not to incorporate, it should:

- **Review its decision from time to time** Your group should review its decision to stay unincorporated at least every year and whenever there is a significant change in its activities — for example, if it employs a paid staff member, receives a large grant, wants to lease property, or grows and wants to take on further activities or seek funding
- **Be aware of the disadvantages of remaining unincorporated** If your group chooses to stay unincorporated, it will not be recognised as a 'legal entity', and will not have the benefits of limited liability and perpetual succession (explained above)

While your group remains unincorporated

Advantages of remaining unincorporated

Benefits of remaining unincorporated include:

- the group can remain informal and doesn't have to hold meetings in a specific format — although it can have rules or a constitution to govern these matters
- the group doesn't have to register with government, or tell a government, or the public, about who its members are or its financial situation, and
- the group doesn't have to pay any registration or annual fees to government

Unincorporated group can still operate

Remaining unincorporated will not stop your group carrying on its day to day activities. Your unincorporated group can still have a formal set of operating rules (a constitution), hold meetings, and issue statements about its financial dealings.

Insurance

Group members can take out insurance to protect the unincorporated group from possible liability — although insurance may be more difficult, or more expensive, to get for an unincorporated group than for an incorporated entity.

Complying with the law

Unincorporated groups still have legal obligations, and will need to comply with laws such as employment law, occupational health and safety law, consumer law and tax laws.



Caution

Be aware that while incorporated and unincorporated groups may look the same from the outside, in the eyes of the law there are differences between them. And if something goes wrong, the courts will treat the two types of organisations differently. To recap information on this, go back to the heading 'The new entity has limited liability'.



Tip

Deciding whether to incorporate is often about assessing risk – you may want to seek legal advice on this. It's a good idea to regularly review this decision as your organisation changes and grows. If your organisation takes on more responsibilities or higher risk activities, or wants to apply for further funding, it can decide to incorporate.



Resources

Not-for-profit Law Resources

▶ [Choosing a legal structure](#)

You can read about the various types of not-for-profit legal structures and start to work out the best structure for your group.

▶ [Governance and directors' duties](#)

You can read information, links, and fact sheets about the responsibilities and duties that apply to directors and officers of organisations.

▶ [Fundraising](#)

You can read about the fundraising laws in each state and territory.

▶ [Tax](#)

You can read about DGR (that is, enabling your group's donors to claim a tax deduction for their donations) Fringe Benefits Concessions, GST, income tax exemptions and state tax laws.