

# Unincorporated groups

Legal information for New South Wales community organisations

## This fact sheet covers:

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- ▶ do we need a statement of objectives and rules?
  - ▶ do we need to register the name of our group?
  - ▶ how long should we remain unincorporated?, and
  - ▶ what are the dangers of remaining unincorporated?
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**This information is for NSW-based community organisations that are not formally incorporated as a separate body (for example, do not have the word 'Incorporated', 'Inc.', 'Limited' or 'Ltd' after their name).**

An unincorporated association is a group of individuals that have come together to further a common interest without forming any separate legally-recognised structure. They have not gone through an incorporation process and therefore an unincorporated group does not have its own legal identity.

Whether an unincorporated group should incorporate (or not) is an important consideration that should be reviewed from time to time, especially if the size or nature of the group's activities changes (for example, the group decides that it wants to employ a paid staff member or enter into binding contractual arrangements).

While it may seem easier (and less costly) for your organisation to remain unincorporated, there are important benefits that flow from incorporation. For discussion of the benefits of incorporation, go to the Information Hub page on the Incorporation Decision at [www.nfplaw.org.au/incorporationdecision](http://www.nfplaw.org.au/incorporationdecision).

## Do unincorporated groups need a statement of objectives and rules?

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While not required by law, it is recommended that unincorporated associations write a statement of objectives to describe their main purpose (eg. to promote public awareness of a particular endangered species) and to have at least some basic rules about how the group conducts its meetings and other activities. This is particularly important when a group intends to deal with assets or money at any stage.

The benefit of having rules, objectives and meeting procedures is that it provides the group with a clear, identifiable direction and purpose, and governs the relationships between the members. It also helps to avoid misunderstandings amongst members in the future.

Although there are no formal requirements for producing a statement of objectives or rules for an unincorporated group, to ensure everyone has a record of agreement, the rules should be written down and a copy given to each member (and new members that join). A 'master' copy (updated if any

changes are agreed) should be retained by a core member of the group or on a group platform such as a group intranet. Ideally, rules should cover issues such as:

- the purposes of the group (sometimes called the 'mission')
- the membership of the group, including eligibility and method for accepting and removing members
- the appointment and replacement of key members to govern and make key decisions for the group depending on its size
- the manner in which funds are to be managed and assets are to be held by the members
- the conduct of meetings including frequency, voting procedures and rights and quorum numbers
- delegation of authority or responsibilities amongst members
- dispute resolution procedures amongst members
- procedures for amending the rules in the future, and
- procedures for ending the group including the distribution of any remaining assets.

Unincorporated groups should note that rules regarding their governance are unlikely to be legally enforceable unless there is evidence of a clear intention by the group to create a legal relationship between its members, or where it is in the public interest to have those rules enforced.

To remove any doubt, the rules should state whether or not they are intended to be legally enforceable and this should be specifically agreed upon by members at the time. New members should also be provided with a copy of the rules and agree in writing to abide by them. This provides evidence of the members' intention and helps to avoid doubt and disputes at a later stage. Such a record of agreement may also be made in the group's minutes (or other written record) of its meeting at which the rules are discussed or by obtaining a signed acknowledgement from the members of the group. It is particularly important to do this where the group has income or assets.

## Do we need to register our group's name?

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You are not required to register the name of an unincorporated association unless it 'carries on business' under that name. Registration of business names is managed by the Australian Securities and Investments Commission (**ASIC**).

Groups should be aware that registration of a business name will not grant ownership of that name, but it does provide some protection against the name subsequently being used by others. Registration of a business name also prevents that same name from being registered by another organisation at a later date.

Because an unincorporated group has no separate legal status, registration of a business name must be undertaken by a member of the group who will then hold the business name on behalf of the group. This will need to be carefully managed if the member holding the name ceases involvement with the group.

## RELATED RESOURCES

For details on how to register a group's business name see the Not-for-profit law fact sheet on 'Setting up your organisation' at [www.nfplaw.org.au/settingup](http://www.nfplaw.org.au/settingup).



## For how long should we remain unincorporated?

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A common reason given for remaining unincorporated is the freedom to conduct affairs without having to report to government. This will generally suit small informal groups that are more social in nature (eg. a book group that meets regularly in members' houses).

An unincorporated group is able to be arranged in any way it feels appropriate and is generally not restricted in how it conducts its meetings and activities (subject to general legal requirements such as food handling regulations etc.). This may be ideal for small groups with low-risk activities (like a book group), and possibly also for groups that are focussing on short-term issues which require urgent attention (but which again are low risk), or groups not wishing to have any information (for example, their annual revenue) disclosed on a publicly-available register.

While an unincorporated structure allows a flexible arrangement between members, there are a number of associated risks to bear in mind, which may lead to a decision to incorporate.

## What are the dangers of remaining unincorporated?

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If your group chooses to remain unincorporated it will not have its own legal status. This creates a number of potential issues that to be aware of.

### Personal liability of members

Without a separate legal 'identity' for the group as distinct from the individuals involved in the group, an unincorporated association is unable to be sued as a separate body if it incurs liability or debt. Instead, individual members within the group could potentially each bear personal responsibility for the group's liabilities or debts arising from its actions. It is therefore important that each member of a group which chooses not to incorporate is fully aware of the risk of personal liability created through their involvement, especially its key decision makers or members named on contracts.

### Practical difficulties for unincorporated associations

Groups should also consider the other practical difficulties that arise from remaining unincorporated, which include:

- **an inability to enter into contracts or agreements under the group's name** (including applications for tax concessions). Agreements will instead need to be entered into by all the members or by an individual member on behalf of the unincorporated group. An individual member signing for the

group will therefore be responsible and liable for performance of the group's obligations under the agreement. Further, the group will not have legal standing to enforce the obligations of any other party to the agreement and will be dependent on the individual member to enforce the relevant agreement

- **an inability to own/lease property in the group's name.** Proprietary interests will need to be held by an individual member on behalf of the unincorporated group
- **an inability to sue or bring a legal action in the group's name**
- **difficulties in receiving benefits or gifts bestowed upon the group as a whole, and**
- **fundraising activities.** Charities wishing to raise money by requesting donations from the public may need to be registered under the *Charitable Fundraising Act 1991* (NSW). You should seek advice if your group is set up for a community or charitable purpose and intends to fundraise or wants the other benefits involved in being a charitable institution such as income and fringe benefits tax exemptions and deductible gift recipient status.

While it is not possible for an unincorporated association to receive goods in the group's name, an individual member can receive a gift on trust for the unincorporated association. When this occurs, that individual must act as trustee and use those goods for the benefit of the association (that is, must use it to advance the purposes of the group).

#### TIP

Most grants from both government or philanthropic trusts and foundations require groups to be incorporated to be eligible – they will not give grants to individuals even if they agree to hold the money on behalf of the group.

## Practical considerations

When assessing the pros and cons of incorporation you should take into account the following factors as well as any other issues relevant to your group's particular circumstances:

- the group's objects or its purpose
- risks associated with the group's activities, and potential individual liability of members involved
- the number and type of agreements the group will need to enter into (eg. leases, bank accounts, insurance contracts etc)
- the importance of securing a binding commitment by members to the group's objects or purpose
- the scale of the group's activities
- the assets to be owned by the group
- the number of members and the criteria for admitting people to membership
- the intended timeframe of the association, and
- the additional legal and reporting obligations involved in incorporation.

#### TIP

The Department of Fair Trading NSW lists a number of [issues to be considered before deciding to incorporate an association](#).

# Resources

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## Related Not-for-profit Law Resources

The Not-for-profit Law Information Hub ([www.nfplaw.org.au](http://www.nfplaw.org.au)) contains many resources for community organisations. The following resource is particularly relevant to this fact sheet:

### ▀ [Getting Started](#)

This page has links to fact sheets and guides designed to assist community groups with the preliminary questions that arise when first starting out, or looking to formally incorporate.

## Department of Fair Trading NSW

The [Department of Fair Trading NSW](#) has useful information about choosing the right structure for your group including information about incorporated associations in NSW. It also contains useful information about business names and licensing.

A Not-for-profit Law Information Hub resource. Access more resources at [www.nfplaw.org.au](http://www.nfplaw.org.au)

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