



ENVIRONMENTAL DEFENDER'S OFFICE (ACT)

Becoming an incorporated group

March 2010 - Fact Sheet 4

*You may wish to start your own group to oppose a particular development or to address broader environmental issues. If you do this you need to decide whether to give your group legal authority – by incorporating or becoming a company. Incorporation is more common and in the ACT is covered by the **Associations Incorporation Act 1991 (ACT)**.*

What does it mean to incorporate?

Incorporation is a form of registration that gives a group legal advantages in return for accepting certain legal responsibilities. Incorporation gives a group its own formal separate legal identity; you are no longer a group of individuals. In the ACT environment groups can become incorporated associations under the *Associations Incorporation Act 1991 (ACT)* (Associations Act). Another, but less common alternative, is to establish a company under the *Corporations Act 2001 (Cth)*.

The former is a simpler process, resulting in an entity that is less costly to create and maintain, has less ongoing regulatory requirements, and for which the penalties for breaching any regulatory requirement are not as severe. Regardless of the structure it would be prudent to obtain independent legal advice before proceeding.

What are the advantages of being incorporated?

Advantages to incorporation include:

- providing a separate legal entity which can open bank accounts, enter into contracts, take out insurance, hold assets, etc. in its own right;
- providing a certain amount of limited liability of individual members for actions of the incorporated association;
- limiting the financial liability of the group's members in respect of the debts of the group;
- establishing clear aims and objectives which are included in the group's constitution or articles of association; or
- meeting the requirements of some funding bodies that only provide funds to an incorporated entity.

There are other factors to consider such as:

- the costs, both financial and administrative, of creating and maintaining the incorporated entity;
- the risks associated with being a director or office bearer of an incorporated entity, risks that are similar to those of being a director of a company;
- whether your group activities and experience may suit a less formal way of organising, for example an affinity group model or empowerment model; or
- if you can work under the banner of an established incorporated group.

What do you need to become incorporated?

To become an incorporated association under the Associations Act, you will need:

- at least five members [s.14];
- a constitution or articles of association to set out the group's aims and objectives and rules on how it will function, voting, quorums, timing of the AGM and other meetings [Part 3];
- a public officer to lodge documents at the Registrar-General's office [s.57];
- an auditor to check the financial affairs of the group [Part 5]; and
- a committee made up of at least three members to organise the activities and manage the finances of the group [s.60].

You can only incorporate if your group is formed to carry on a lawful purpose without financial gain for members.

What do we need in our constitution or articles of association?

The *Associations Incorporation Regulation 1991* contains a model set of rules that can be adopted as your constitution or articles of association. Alternatively, if you decide to change the constitution to suit the group's needs, or totally replace it with your own, a checklist of the core rules that must be included in your constitution is available. The ACT Registrar-General and their office manage incorporated associations and can provide information and advice.

Do we need objectives?

Your constitution must include the group's objectives. Even if you do not incorporate, take time to define your objectives. This provides a focus for people in the group. When you are taking on an issue that will require dedication over some period of time, ground rules are essential.

Define your objectives in specific enough terms. Some organisations have difficulty because they have defined their objects too broadly, for example, 'the protection of the environment'. However, 'protecting the environment by working for the creation of national parks' is more specific. Those who do not agree with the objectives cannot change the broad objective of the organisation. In circumstances where it may be necessary to pursue legal rights of redress, a group's objectives as set out in a constitution will be a relevant factor in determining standing.

How do we apply to incorporate?

You need to get an application for incorporation form from the Registrar General's office or website. There are fees associated with incorporation and you should contact the Registrar General's office or their website for current fees and a checklist on what documents should be lodged with your application.

What do we need to do once we are incorporated?

There are a number of legal obligations which follow incorporation. Some of the obligations are that you must:

- notify the registrar general's office of the public officer and committee members;
- keep and maintain a publicly available register of your members;
- hold an annual general meeting once a year;
- keep true and fair accounts;
- have a common seal; and
- have a registered address (not just a post office box).

What are the financial requirements of being incorporated?

If the incorporated group is to hold a bank account you must apply for a tax file number. If it is a not-for-profit entity, an application is made for income tax exemption. Without either of these your bank will be required to withhold income tax out of any payment of interest. Application forms are available at the Australian Taxation Office.

Will we be eligible for tax deductibility?

The Federal Government keeps a Register of Environmental Organisations approved for tax deductibility under the *Income Tax Assessment Act 1997* (Cth). Any money paid into a public fund of a registered organisation can be claimed by the person giving the money as a tax deduction. The Commonwealth Department of Environment, Water, Heritage and the Arts administer the register of Environmental Organisations. Under the *Income Tax Assessment Act 1997* to be eligible your organisation must meet the following criteria:

- have been established for the principal purpose of either:
 - protection and enhancement of the natural environment or of a significant aspect of the natural environment [s.30.265(1)(a)]; or
 - provision of information or education, or the carrying on of research, about the environment or a significant aspect of the environment [s.30.265(1)(b)];
- have at least 50 individual voting financial members [s.30.275(b)(i)];
- be not-for-profit [s.30.270];
- establish and maintain a public fund in Australia for gifts of money or property for its environmental purposes that is only used to support the body's environmental purposes [s.30.265(3) and Taxation Ruling 95/27].

Disclaimer

The law described in this Fact Sheet is current at 31 March 2010.

The ACT EDO Fact Sheets have been designed to give readers plain English background knowledge to planning and environmental decision making in the ACT. They cannot replace the need for professional legal advice in individual cases. Please contact us as we may be able to provide additional advice.

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