Environmental Defenders Office (SA) Inc

INFORMATION GUIDE

Incorporated Associations in South Australia

(current as at June 2011)

Acknowledgment: Publication of this Guide was made possible with funding from the Law Foundation of South Australia

About this Guide

This guide provides some general information about incorporation of community organisations. It is aimed at conservation group, however the main principles apply equally to groups with other objectives. This guide is not to be regarded as detailed legal advice. For specific legal advice, you should contact the Environmental Defenders Office or any of the other bodies described below.

This guide also attempts to explain some of the consequences of incorporation as well as the process of seeking incorporation and ongoing legal requirements.

Further Information

Dealing with government

Responsibility for incorporated associations lies with the Office of Consumer and Business Affairs (OCBA). The Office can be contacted by phone 131882. There is also much useful information including electronic copies of forms on the Internet at http://www.ocba.sa.gov.au/Associations/forms.html.

Legislation

The Associations Incorporation Act 1985 is the relevant State law covering incorporated associations. Some of the more detailed provisions (including Forms and Fees) are contained in the Associations Incorporation Regulations 2008

Legislation is also available in electronic form from a number of sites including:

SA Parliament:
http://www.parliament.sa.gov.au/Legislation/Pages/LegislationHome.aspx

Austlii: http://www.austlii.edu.au/

SA Legislation: http://legislation.sa.gov.au/index.aspx

Forms

For organisations wishing to apply to incorporate, there are a number of forms which must be completed and lodged with OCBA. Specifically, forms 1 and 2 are needed in order to apply for incorporation. These two forms can be found on OCBA's website - http://www.ocba.sa.gov.au/assets/files/form_1_2_web_07.pdf

After incorporation, forms are usually only required if the Association decides to change its public officer or revise its constitution.

Annual reporting is not required unless an Association's gross receipts exceed $200,000 in any year.

Why Incorporate?

Create a new legal entity

An unincorporated association is not considered to be a legal entity. Members of such groups can be individually and personally responsible for any debts or liabilities incurred in the name of the group. An unincorporated association cannot hold assets in its own name. If such a group owns assets, these will usually be held by honorary "Trustees" on behalf of all the members.

If an association is incorporated it is regarded as a legal entity with a separate existence from that of its members. Once incorporated an association can;

- make contracts in its own name;
- sue and be sued in its own name (including bringing planning appeals or civil enforcement actions);
- hold assets in its own name; and
- be eligible for many types of grants.

The powers of an incorporated association are set out in section 25 of the Associations Incorporations Act 1985.

One important feature of being incorporated is that a group has "perpetual succession". This means that the incorporated association can continue to exist indefinitely regardless of changes to membership. Generally, an incorporated association would have a "common seal", which is usually a circular rubber stamp with the words "Common Seal of [full name of the association]". This seal serves as the signature of the association and is usually only used for important contracts.

Protection of Members

If an incorporated association incurs a debt or liability, then the assets of the association (such as bank accounts, computers etc.) can be used by creditors to satisfy the debt. If the association incurs debts that it cannot pay, then it can be wound up.

In most cases, individual members will have no obligation to pay the associations' debts. This protection is the main reason many groups decide to incorporate.

There are some exceptions to this general rule and these are discussed below under the heading "Rights, Liabilities and Duties of Members". It is also worth noting here that any person or company proposing to enter a substantial contract with an incorporated association is likely to also seek personal guarantees from individual members or office bearers. In this case, the individuals can be personally liable if the association cannot pay its debts.

Dealing with Government

Whilst there is no law that says only incorporated associations can receive government grants or contracts, the general practice of government is to only deal with established organisations. One of the best ways of showing that a group is serious about its work and not a "fly-by-night" operation, is to obtain status as an incorporated association.

Rights, Liabilities and Duties of Members

Rights

Because the Incorporated Association is a separate legal entity, an individual member does not have any right, title or interest in any property owned by the association (section 20(3)(b)). Membership of an association might entitle a member to use facilities or equipment owned by the association, however the legal title stays with the incorporated body. Usually, the rights of members will be set out in the association's "Rules" or constitution.

Members of incorporated bodies also have certain rights to ensure that those responsible for managing the association are accountable for their actions. The extent of such rights will depend on the particular constitution of the association, however it is common for such rights to include:

- Voting rights at General Meetings;
- Right to be elected to any management committee;
- Right to inspect financial records; and
- Right to call special general meetings on specific topics.

Debts and civil liability

Unless provided for in the Association's constitution or by personal guarantee, a member of an incorporated association is not liable to contribute towards any payment of debts or liabilities caused by the association. This would include the costs of winding up an association that cannot meet its debts. This protection of members does not apply if the debt or liability was incurred before the association was actually incorporated.

Despite this general protection, incorporation does not offer complete protection to members or office bearers.

In the area of public liability, it is not uncommon for an injured person to sue both the incorporated body and any individuals they believe may be liable. For example, an individual who attends a fundraising function and who is hurt by a collapsing trestle table or burnt at a sausage sizzle or some other type of accident may seek to make any individuals who were involved personally liable as well as the association. This is particularly the case when the association is poor but the individual has assets.

The Volunteers Protection Act 2001 (SA) provides some protection against personal liability for volunteers who work for an incorporated body. The Act attempts to shift liability away from the individual and towards the incorporated body in cases of personal and property loss or damage.

Under the Act, the volunteer is given immunity from personal civil liability for acts or omissions done or made in good faith without recklessness in the course of carrying out community work for the incorporated organisation (section 4). This general immunity is subject to certain exceptions, for example if the volunteer was acting contrary to instructions, or was under the influence of recreational drugs. You may wish to refer to the Environmental Defenders Office work sheet on the Volunteers Protection Act 2001 for more information.

This Act does not replace the need for an incorporated organisation to have adequate public liability insurance covering members, office bearers and volunteers. This is discussed further below.

Another situation where members may not be able to claim protection from liability is defamation (see section 4 of the Act). Even if an individual was speaking or writing on behalf of an association, they may still be personally sued. Again, adequate public liability insurance is important.

It is also clear that a person cannot claim immunity from prosecution for a criminal act by arguing that they were acting on behalf of the association.

As well as possible personal liability for those directly involved in causing personal injury or defamation, the office bearers of an association may also be personally liable for their conduct, particularly in relation to debt matters. For example, the management committee members of an association may be personally liable if they incur debts on behalf of the association either fraudulently or without reasonable expectation that the debt can be paid when it falls due. (section 49AD, Associations Incorporation Act 1985).

Public Liability Insurance

This type of insurance is designed to protect policy holders from having to personally pay compensation to those injured by their conduct. Many individuals have this type of policy included with their household contents insurance policy. Incorporated Associations will usually need to take out separate insurance to cover public liability.

Generally, for an incorporated association to be liable, the injury or damage must occur on the premises owned or occupied by the association or while the association

was meant to be exercising a supervisory role. This would include association-held functions on public or private land.

It has been suggested that the office bearers or management committee of an incorporated association may be liable for personal injury in circumstances where they failed to take out appropriate public liability insurance. Whilst there is no legal obligation for an Incorporated Association to take out public liability insurance, failure to do so may be a factor taken into account in determining liability. This could particularly be the case where the activities undertaken by the association are inherently risky (for example, bungy jumping or hang-gliding). Some of these activities are now covered under the Recreational Services (Limitation of Liability) Act 2002, which helps to limit the liability of providers. It may be argued that the President, secretary, treasurer or other office bearers of an association should be held liable, even if they were not directly involved in the incident leading to the injury.

As a result of the large degree of uncertainty associated with legal liability, it is common for those organising potentially risky activities to seek to have participants sign "disclaimers". From a legal perspective, these are of dubious value, as Courts are reluctant to allow people to escape the consequences of their negligent behaviour. For example, see the Australian Plaintiff Lawyers' Association's Inquiry into the Trade Practices Amendment (Liability for Recreational Services) Bill 2002, submitted on November 12 2002. Among other issues raised in this submission, it is stated that a party should not be able to contract out of liability for risks that they can exercise control over by getting consumers to sign a disclaimer. On the other hand, such a disclaimer may be evidence of "contributory negligence" on the part of the injured person, in that it shows they were aware of the possible inherent dangers of the activity.

The considerable expense of public liability insurance can be a major disincentive to groups wishing to undertake worthwhile activities.

Whilst the value of public liability insurance is easily identified, it is also important for groups to assess whether or not their activities are risky enough to warrant the expense. For example, groups working at a policy or administrative level are far less likely to need public liability insurance than groups which organise major events or which use chainsaws or heavy machinery.

An example where insurance is necessary is where an event is to be held on local council land such as parks and reserves. As a pre-requisite to the use of public land, the Council will often require that the association have public liability insurance to cover any injuries that may be caused. The rationale for this approach is that the council, as owner of the land, does not wish to be liable for the negligent actions of the association. Ultimately, the real question is whether insurance cover will be adequate to compensate any negligent injury. It is also in the interests of both councils and associations to avoid claims against their own policies in order to keep premiums down.

Legal costs

As a separate legal entity, an incorporated association can commence legal proceedings in its own name. Such proceedings can include:

- Merits appeals under the Development Act 1993
- Civil enforcement under the Development Act 1993 (section 85 applications)
- Civil enforcement under the Environment Protection Act 1993 (section104 applications)
- Judicial Review of Administrative Action in the Supreme Court
- Judicial Review of Administrative Action at a Federal level.
- Private criminal prosecutions (in limited cases)

If the Court proceedings are unsuccessful, costs may be awarded against the association. In these circumstances, individual members are not liable to pay this debt. If the association does not have the funds to pay the legal costs ordered against it, it may be wound up.

An opposing party in a legal proceeding may seek to have the proceedings stymied by arguing that the case is very weak and that substantial legal costs may be incurred with no reasonable prospect of recovery of those costs from the association.

In these circumstances, a Court can order payment by the association of "security for costs" (Supreme Court Civil Rules 2006, Rule 194). This means that before the proceedings can continue, the association must pay a pre-determined amount to the Court to be held as a surety in the event that the association is unsuccessful and has legal costs ordered against it. If the "security for costs" is not paid, the legal proceedings may be dismissed without the Court hearing any evidence or argument about the merits of the case.

When a Court is asked to order "security for costs" against an applicant, it must carefully weigh up a number of factors including whether or not the case was brought for private or personal gain or "in the public interest". A court is less likely to order security for costs against a publicly-motivated incorporated conservation group that has a strong case, than it would against a more private or personal action.

A similar type of order that may be sought against an incorporated body to obstruct Court proceedings is a request for "undertakings as to damages". The purpose of such an order is to compensate the party against whom the action is brought for any losses that may result from the legal action. This could include costs incurred as a result of a delayed development. It is most commonly sought in response to an application for an "injunction" or stop-work order. As with "security for costs", failure to meet the undertaking can result in proceedings being dismissed before the merits of the case is decided.

Where an incorporated association is unsuccessful in court action and has costs awarded against it, these costs can be recovered from the assets of the association, but not from the members or office bearers personally.

The process of incorporating

The process for incorporation is set out in Part 3 of the Associations Incorporation Act 1985 (SA). Part 4 covers the management of internal affairs, and the ongoing duties of officers and committee members. Section 21 also governs the rights and liabilities of members.

To be eligible for incorporation the association must fit into a category provided in section 18 of the Act (set out below). If the association is to be formed to provide a pecuniary profit for its members then it cannot be incorporated under the AI Act. It must then be incorporated under the Corporations Act of the relevant State or Territory.

> 18. (1) An association formed-
>
> **(a) for a religious, educational, charitable or benevolent purpose**; or
>
> (b) for the purpose of promoting or encouraging literature, science or the arts; or
>
> (c) for the purpose of providing medical treatment or attention, or promoting the interests of persons who suffer from a particular physical, mental or intellectual disability; or
>
> (d) for the purpose of sport, recreation or amusement; or
>
> **(e) for the purpose of establishing, carrying on, or improving a community centre, or promoting the interests of a local community or a particular section of a local community**; or
>
> **(f) for conserving resources or preserving any part of the environmental, historical or cultural heritage of the State**; or
>
> (g) for the purpose of promoting the interests of students or staff of an educational institution; or
>
> (h) for political purposes; or
>
> (i) for the purpose of administering any scheme or fund for the payment of superannuation or retiring benefits to the members of any organisation or the employees of any body corporate, firm or person; or
>
> (j) for the purpose of promoting the common interests of persons who are engaged in, or interested in, a particular business, trade or industry; or
>
> (k) for any purpose approved by the Minister,
>
> is, subject to this Act, eligible to be incorporated under this Act.

The entries highlighted in bold above are the categories most often relied on by conservation groups.

In some cases, an association may be incorporated as part of its establishment. In other cases, a group might start off being an unincorporated body, and then apply to become incorporated at a later date. In that situation, upon incorporation any property that was held by any person for or on behalf of the association (eg. a trustee) becomes the property of the incorporated association (Associations Incorporation Act 1985, section 20(3)(b)).

Any rights and liabilities held by the association before incorporation are not cancelled out once it is incorporated (Associations Incorporations Act 1985, section 20(3)(c)). Any contracts the association was involved in prior to incorporation continue to operate.

Procedural requirements

An Association wishing to incorporate must apply to the Office of Consumer and Business Affairs (OCBA) using forms 1 and 2.

Section 20 of the Associations Incorporation Act 1985 states the criteria which must be fulfilled in order for an association to be incorporated. OCBA must incorporate an association once it is satisfied that;

1. it is eligible to be incorporated under the AI Act;
2. the rules (constitution) of the association conform with the requirements of the AI Act; and
3. the name of the association is not misleading, confusing or undesirable.

Once satisfied of these things, OCBA will then register the rules of the association and issue a Certificate of Incorporation to the association (Section 20(1)).

Incorporation of an association may be declined if the Corporate Affairs Commission (through OCBA) believes that it would be better incorporated under another Act (such as the Corporations Act or the Industrial Relations Act (SA) 1972) or it thinks that the incorporation of the association is not in the public interest (section 20(2)(b)).

Forms 1 and 2:

Forms 1 and 2 are the initial documents that must be filled out and lodged with the Corporate Affairs Commission (OCBA) to apply for incorporation of the association. Form 1 is the actual application that must be accompanied by form 2, a copy of the rules of the association and the checklist for the proposed rules. Form 2 is a statutory declaration that states that the person applying for incorporation is authorised to do so, the particulars of the application are correct and that the attached rules are a true copy.

A fee is payable to OCBA when lodging forms 1 and 2.

Association Name

All incorporated associations must have a name (section 20(1)(c)), which must include the word "Incorporated" or the abbreviation "Inc." at the end. Often groups will simply add "Inc." to their existing name upon incorporation.

The main determinant of whether a name is available for use as the name of an incorporated association is whether it is likely to be confused with an existing organisation, company or business name (section 20(1)(c)(ii). In some cases, OCBA staff will simply advise that a name is not available, but in other cases, permission may be sought from the owners of similar names. For example, the Environmental Defenders Office (SA) Inc., needed the permission of our sister organisation in NSW before we could use this name.

At a practical level, the OCBA database of incorporated associations is linked to both the national companies register and the State business names register. If a proposed name is unavailable, then OCBA will give the applicant the chance to choose an alternative name.

Names that are offensive, obscene etc. will be refused (section 20(1)(c)(iii), as will names that are misleading as to the nature, objects or purpose of the organisation (section 20(1)(c)(i).

It is possible for an applicant for incorporation to reserve a desired name in advance. Form 9d is used for this purpose. In practice, this procedure is rarely followed because it is expensive and barely useful. If your chosen name is not available, OCBA will simply tell you and give you a chance to choose a new name. Reservation is only likely to be useful if two or more applicants are racing to use the same name.

Association Rules

Incorporated associations must have rules, often called a constitution. These rules are binding on the association and its members. The rules must be sent to the OCBA for registration and can be made available for inspection on request to any members of the public desiring to do so.

There are certain legal requirements that the rules must satisfy. These are set out in sections 23 and 23A, and include;

- stating the name of the association and setting out its objects;
- not containing any provision that is contrary or inconsistent with the AI Act;
- provisions that deal with:
    - membership
    - the powers, duties and manner of appointment of the committee
    - how general meetings are called and what procedure must be followed at meetings

- who has the management and control of the funds and property of the association
- the powers of the association and by whom and in what manner they may be exercised
- how the rules of the association may be altered
- any other matter prescribed by Regulation. [Section 23A]

For the convenience of the public, the OCBA has produced a set of standard or model rules which are known to satisfy all legal requirements. There is no legal obligation to use these standard rules but they do provide a convenient way of satisfying the legal requirements. These rules can be downloaded from the OCBA web site at: http://www.ocba.sa.gov.au/assets/files/assoc_rules.pdf

If custom-made rules are to be used, then the authors should be careful to ensure that items covered by the OCBA checklist are all covered.

Members

Interestingly, it is not necessary for an incorporated association to have any members. In practice, most associations have provision for members of various class including "ordinary", "junior", "corporate", "family", "life member" etc etc. Whatever provisions are made for membership, it would be wise to include a provision that protects the organisation from hostile take-over. A common provision is for all applications for membership to be approved by the management committee of the association before being accepted.

Management

All incorporated associations must have identified management arrangements (section 23A(1)(c)(vi). This need not be a traditional hierarchical structure, however it does need to be identifiable, and recorded in the organisation’s rules or constitution.

It is important to realise that just because an organisation does not have "traditional" office bearer roles of president, chairperson, secretary or treasurer, does not mean that those making management decisions can be protected from liability. The Act provides that persons exercising managerial functions may be liable, whether or not they hold any title or position (see section 3(1), and Part 5, Division 2).

The most common arrangement however is for an association to elect a committee to administer the affairs of the association. Employees of an association may become committee members unless otherwise stated by the rules of the association.

The officers of an association include the committee members and any other person involved in the management or direction of the association.

Duties of officers and committee members of the incorporated association include;

- the holding of an annual general meeting (section 39);

- the appointment of officers of the association;
- the disclosure of any direct or indirect financial or other interest in any contract with the association (section 31) - a member that has an interest may not vote on the matter or take part in the decision about the contract (section 32);
- acting without an intent to deceive of defraud the association (section 39A(1));
- not making improper use of information acquired by his or her position to gain an advantage or cause detriment to the association (section 39A(2));
- taking all reasonable steps to ensure compliance with the AI Act;
- to not falsify the books or records of the association;
- the proper keeping of accounting and other records (section 39C(1), and section 35(1)); and
- the provision of binding rules to regulate the activities of the association.

Failure of members of the association to meet their obligations under the AI Act can attract criminal prosecution and fines. It is a general defence under the AI Act if the person accused proves that the offence was not done intentionally and did not result from a failure to take reasonable care to avoid the offence from happening (section 58A).

The officers and committee members of an incorporated association are obliged to act prudently and with due diligence in their management of the association and when making decisions and/or entering into agreements on behalf of the association. Officers and committee members must inform themselves of and fulfil their obligations under the AI Act.

Meetings

It is not compulsory for an incorporated association to hold annual general meetings, but the rules of incorporated associations usually do require them to be held. Meetings must be held as stated in the rules.

Minutes of the proceedings of all meetings must be entered into books kept specifically for that purpose (section 51(1)(a)). The minutes must be confirmed at a subsequent meeting and signed by the presiding member (section 51(1)(b)). Minutes are considered as proof that the meeting was held, that the proceedings recorded did occur and that all appointments of officers were validly made (section 51(4)). If the minutes are not correctly recorded, the association and the individual officers involved may be held responsible and required to pay a fine of up to $2500 (section 51(2)).

Usually the minute books will be kept at the association's office or in the custody of an officer of the association, unless otherwise specified by the rules. Members must be able to inspect the minutes free of charge (section 51(6)).

Powers of the Incorporated Association

Under section 25 of the Associations Incorporation Act an incorporated association has the power to;

- acquire, hold, deal with and dispose of any real or personal property (this includes land, money or other assets);
- administer any property on trust;
- open and operate any bank accounts;
- invest money in any form of investment;
- borrow money;
- give security for the discharge of liabilities incurred by the association, eg mortgage for an office;
- appoint agents; and
- enter into contracts it considers necessary or desirable.

The association's rules (constitution) may limit or extend the association's powers. It is common for associations to include the general power to undertake all lawful activities to achieve its objectives.

On-going obligations of incorporated associations

Once registered, many incorporated associations have few, if any, dealings with OCBA. There is no annual registration fee and the only contact is likely to occur through an incorporated association changing its public officer or its constitution.

The Public Officer

The Public Officer is the human link between the association and the OCBA or the general public. Every incorporated association must have a Public Officer who must be a resident of South Australia and be aged 18 or over (section 56).

Usually, the Public Officer is a senior member or an office holder, but this is not essential and the public officer has no management responsibility by reason only of this position.

The Public Officer is the person that receives letters and notices sent by the OCBA and is the person responsible for filing notices of rule and name changes. If the Public Officer changes address or is replaced, the OCBA must be notified (section 56(5)). Failure to notify or appoint a Public Officer within one month of incorporation or resignation can result in fines being imposed. Form 10 is for notification to the Corporate Affairs Commission that the Public Officer of the incorporated association has either changed address or has been replaced.

One of the most important roles of the public officer is to be a contact point between the general public and the association. If a member of the public wants to know who is "behind" an incorporated body, they will inquire at OCBA and be given the name and address of the public officer. The person chosen to fill this role must therefore be prepared for their details to be given out by OCBA. There is also an OCBA pamphlet which describes the role of public officer in more detail.

Financial Records

Incorporated associations must take reasonable steps to keep accounting records that record and explain the transactions and financial position of the association. Failure to do so can lead to an officer of the association being personally fined up to $1250 (section 39C(1)). At the very least, an Association should keep a receipt book, a deposit book, correctly filled out cheque butts, bank statements and a general ledger. These records should be kept at the association's office or in the possession of an officer, such as treasurer (section 39C(2)).

If the rules of the association allow, a member may have the right to inspect the financial records. If not, application may be made to the District Court if made in good faith and the inspection is to be made for a proper purpose (section 39D(1)).

To achieve proper accountability, many incorporated associations have their financial records audited by an independent qualified accountant. Whilst this might be good practice, it is not legally required unless an organisation has gross receipts of over $200,000 in any year. Such organisations must also lodge annual financial reports with OCBA. Auditing may also be required under a particular association's rules, however reports need not be lodged with OCBA.

In addition, most government or public bodies that provide grants or enter service agreements with incorporated bodies will require audited financial statements and annual reports.

The decision whether or not to require an auditor will normally rest with the association itself. For small organisations with annual turnover in the hundreds or low thousands, auditing may not be justifiable unless the services of an auditor can be obtained pro bono.

Altering the Rules of an Association

From time to time, incorporated associations revise their constitutions to reflect changing fortunes or circumstances (section 24). For example, the constitution of a small voluntary organisation may be inappropriate if that organisation grows into a body that owns property or employs staff.

Form 6 is an application to register any alterations to the rules of the association. The form can be downloaded at
http://www.ocba.sa.gov.au/assets/files/assoc_form6_7.pdf

This form is only lodged when the association has either;

- altered or rescinded any rules;
- substituted a new set of rules; or
- altered the name of the association.

It must be signed by the Public Officer of the association and accompanied by the association's new rules (section 24(3)). Accompanying the application will be form 7 and the checklist for the alteration of the rules. Form 7 is a statutory declaration by the public officer that the alteration of rules is true.

The "checklist" must be completed and attached to the forms. The checklist is a guide to both the association and OCBA that the amended rules of the incorporated association have the basic requirements set out in the Act.

An alteration comes in to effect at the time it is passed unless it is a name change, which comes into effect at the time of registration.

There is an application fee to register any alteration of the association’s rules or its name

Fees

Current fees can be obtained by checking the Associations Incorporation Regulations 2008 Schedule 2 or by ringing OCBA. OCBA’s website also provides a schedule of fees, which includes the fees payable for lodging an application for incorporation:
http://www.ocba.sa.gov.au/assets/files/07_assoc_feeschedule_06_bizgate.pdf

It should also be noted that the fees quoted on printed forms are often out of date.