



# Environmental Defenders Office

## Incorporating an Environmental Group in NSW

*Disclaimer: This factsheet is a guide only and is designed to give readers a plain English overview of the law. It does not replace the need for professional legal advice in individual cases. To request free initial legal advice on a public interest environmental or planning law issue, please visit our [website](#).*

*While every effort has been made to ensure the information is accurate, the EDO does not accept any responsibility for any loss or damage resulting from any error in this factsheet or use of this work.*

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### Overview

Environmental organisations may come together for a single issue such as opposing a particular development, or because of a shared concern over broader environmental issues. Incorporation is the way a group can have a legal identity separate from its individual members.

### Why incorporate?

Incorporation benefits individual members of the association by protecting them from legal liability for the actions of the incorporated association. If an association isn't incorporated, legal obligations are the responsibility of individual members.

Incorporating allows an organisation to:

- create a legal entity separate from the individual members;
- provide a certain amount of limited liability for members;
- continue to exist regardless of changes in membership;
- enter into enforceable contracts including buying and selling property;
- sue and be sued in the corporate name;
- attract funding more easily, and;
- apply for status as a charity or formally register as an environmental organisation.

Incorporation involves some ongoing costs, administrative burdens and legislative responsibilities. You should consider carefully whether your group needs to incorporate or whether you can work through an already incorporated group.

## Defining your objectives

Spending time to properly define your objectives is an important and worthwhile exercise. There are at least three reasons to do so.

First, it can help to provide a constant reminder of your reason for being, guiding the decisions of your organisation and helping to resolve any internal disputes.

Second, it can help to 'bulletproof' your organisation from take-over, provided you have defined your objectives in specific enough terms. Some organisations have faced take-over bids because they have defined their objects too broadly – for example, 'the protection of the environment'. Framing your objects more specifically allows for more control over the organisation. An example would be, 'protecting the environment by working for the creation of national parks'. Those who do not agree with the objectives can be prevented from joining or asked to leave.

Third, it may help you to pursue legal rights of redress, if necessary. In New South Wales, most environmental legislation allows any person to challenge a breach, or anticipated breach of environmental laws. However, Commonwealth legislation and other jurisdictions have stricter rules.

The [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) (**EPBC Act**) requires any individual or organisation that wants to apply for an injunction to remedy or restrain a breach of the Act to be an 'interested person or organisation'.<sup>1</sup>

In the case of an organisation, this means that the 'organisation's objects or purposes [include] the protection or conservation of, or research into, the environment'.<sup>2</sup>

Therefore, it is very important to ensure that your objectives adequately reflect what you do (and thus provide a constant reminder of your reason for being, e.g. to protect the environment) whilst also being mindful that they are not so narrowly defined that they prevent you from taking legal proceedings.

## How to incorporate

There are 3 main steps to incorporating:

### Step 1

The members of the group must have a meeting to pass certain special resolutions to incorporate. The group must have five or more members.<sup>3</sup> A special resolution is one passed by a majority of at least three quarters of the members who are entitled to vote and who are present at a general meeting in person.<sup>4</sup> Members must be notified of the meeting at least 21 days in advance.<sup>5</sup>

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<sup>1</sup> [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#), s 475 (**EPBC Act**).

<sup>2</sup> *Ibid*, s 475(7)(b)(i).

<sup>3</sup> [Associations Incorporation Act 2009 \(NSW\)](#), s 6 (**Incorporation Act**).

<sup>4</sup> *Ibid*, s 39.

<sup>5</sup> *Ibid*.

The group must pass a special resolution to:

- apply to NSW Fair Trading for incorporation of the association;<sup>6</sup>
- approve a statement of the association's objectives;<sup>7</sup>
- authorise a person (NSW resident, over 18 years old) to apply for incorporation;<sup>8</sup>  
and
- approve a constitution for the association.<sup>9</sup>

If a group does not already exist, five or more persons can appoint a committee of at least three people and agree to go through the above process.<sup>10</sup>

## Step 2

The association must choose a name to reserve.<sup>11</sup> If you are going to be active in the public domain, early incorporation can be a way of protecting your group name (and reputation). Failing to incorporate can mean that other groups - even development-oriented groups - can adopt your name and seriously undercut your cause and message (as some environmental groups have experienced).

You can read more information about reserving a name by visiting the NSW Fair Trading website at [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au) or calling 13 32 20. You can also use the Australian Securities & Investments Commission's (**ASIC**) Companies and organisations, and Business names registers to find out if a name is already taken.

Visit: [ASIC's Search ASIC's Registers page for links to their Companies and organisations register and Business names register](#)

## Step 3

The next step is to make your application. This must include both the application form to reserve your name and the application form to register the association, as well the other documents and fees discussed below.

You must apply for incorporation by lodging Form A2 – Application for registration of incorporated association accompanied by a fee of \$128 if your association's name is currently reserved, or \$164 if your association's name is not reserved. This form requires you to include your association's proposed name and objectives.

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<sup>6</sup> Incorporation Act, s 6.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid, ss. 6, 34.

<sup>9</sup> Ibid, s 6.

<sup>10</sup> Ibid, ss 6, 28.

<sup>11</sup> Ibid, s 15.

Visit: [NSW Fair Trading's Association forms page](#) to download Form A2

This application must also include a copy of the association's proposed constitution.<sup>12</sup> NSW Fair Trading has a model constitution that can be adopted by the association. If you indicate that you will adopt this model constitution you do not need to include it in your application.<sup>13</sup> You should also consider the requirements for status as a charity and for entry onto the federal Department of Agriculture, Water and the Environment's (**DAWE**) Register of Environmental Organisations.

Visit: [NSW Fair Trading's Model constitution page](#)

Visit: [DAWE's Register of Environmental Organisations page](#)

The existing committee members will be the first committee of the incorporated association and the person authorised to incorporate the association will become the association's first public officer.<sup>14</sup>

Fees may change, so check with NSW Fair Trading for current information. For more information on incorporation, contact NSW Fair Trading.

Visit: [NSW Fair Trading website](#), particularly the [Associations section](#)

## Other things to think about

### Insurance

It is no longer compulsory for an incorporated association to hold public liability insurance, although it is advisable to do so as it is possible to be sued. As an association must comply with any relevant State and Commonwealth legislation applicable to its operations, it may be required to hold insurance under other applicable legislation, for example workers compensation insurance if the association employs someone. You may also consider taking out insurance policies for any property held by the association such as contents or motor vehicle insurance.

### Public Officer

The public officer is responsible for lodging documents such as the annual return and financial statements.<sup>15</sup> The first public officer must be named in the application for registration.<sup>16</sup> Subsequent public officers must notify the NSW Fair Trading Commissioner

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<sup>12</sup> Incorporation Act, s 6(3).

<sup>13</sup> Ibid, s 6.

<sup>14</sup> Ibid, ss 6, 29, 34.

<sup>15</sup> Ibid, ss 43, 47.

<sup>16</sup> Ibid, s 6.

of their name and address within 28 days of taking office.<sup>17</sup> It is important for the public officer to remain on top of their responsibilities as penalties can be imposed for non-compliance.<sup>18</sup>

## **Committee**

The committee must have at least three<sup>19</sup> members upon incorporation. However, the number of the committee depends on the constitution of the association. The model constitution requires the committee to consist of the office bearers (president, vice-president, treasurer and secretary) and three ordinary members, meaning that under the model constitution there must be seven committee members in total.<sup>20</sup> A committee member can hold more than one position. A register must be kept with the name and address of each committee member and the date on which they became a member.<sup>21</sup>

## **Requirements after incorporation**

An incorporated association is required to meet once a year within six months of the end of the financial year.<sup>22</sup> This meeting is usually referred to as the Annual General Meeting (**AGM**) The first AGM must be held within 18 months of incorporation.<sup>23</sup>

Incorporated associations must lodge an annual financial statement with NSW Fair Trading within one month of the AGM or 7 months after the end of the previous financial year, whichever is earlier.<sup>24</sup> There are two tiers of incorporated associations. The type of financial statement that needs to be lodged is determined by the tier of the association.<sup>25</sup>

The tier of an incorporated association is determined by gross receipts and assets of that association. Because Tier 1 associations are larger and deal with more money, they are required to make more detailed financial statements than Tier 2 associations.<sup>26</sup> Generally speaking, most environmental or residents associations will fall into the Tier 2 category.

For both Tier 1 and Tier 2 associations, a summary of the association's finances for the year must be lodged with NSW Commissioner of Fair Trading, and this must be accompanied by the prescribed fee, which is currently (FY2021-2022) \$202.00 for Tier 1 associations, and \$48.00 for Tier 2 associations.<sup>27</sup>

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<sup>17</sup> Incorporation Act, s 34.

<sup>18</sup> Ibid ss 34, 45, 49.

<sup>19</sup> Ibid s 28(2).

<sup>20</sup> [Associations Incorporation Regulation 2016 \(NSW\)](#), Sch 1 ('Model constitution') (**Incorporation Regulation**).

<sup>21</sup> Incorporation Act, s 29.

<sup>22</sup> Ibid s 37(2)(a).

<sup>23</sup> Ibid s 37(1).

<sup>24</sup> Ibid ss 45(2)(a), 49(2)(a).

<sup>25</sup> Ibid.

<sup>26</sup> Incorporation Regulation, cll 8-10; <https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/running-an-association>

<sup>27</sup> Incorporation Act, ss 45, 49; Incorporation Regulation, Sch 5.

A Tier 1 association's statement must also be accompanied by the association's financial statements for the year, an auditor's report of these statements, and any resolutions that were passed by the AGM and related to these documents.<sup>28</sup>

## **Procedures**

The constitution should provide general requirements about how meetings and affairs will be conducted. Even if it is not required by the constitution of your association, it is good practice for an incorporated association to appoint a chairperson or convener to ensure that meetings are conducted properly.

Any decisions the association makes must be recorded as written minutes which will be confirmed or amended at the next meeting.<sup>29</sup> These minutes must provide an accurate record of what took place at the meeting. It is also important to keep a record of who attends each meeting or at least the number of people who attend. These records help to facilitate the effective operation of the group. Complying with the constitution and any legal requirements can also help prevent messy take-overs and internal disputes. It is hard to fall back on the letter of the law when the group has acted informally for years.

**N.B. Good governance will also build the group's credibility for submissions, funding applications and other external documents.**

An association must also ensure that proper accounting records are kept which correctly record and explain the transactions of the association and its financial position.<sup>30</sup> This will help when it comes to lodging financial statements to the Commissioner of NSW Fair Trading at the end of each financial year, as discussed above.

Accounting records and meeting procedure minutes can be kept in written or electronic form.<sup>31</sup> If records are made and kept in electronic form, they must be capable of being converted into hard copy.<sup>32</sup> All records must be kept for a period of at least 5 years.<sup>33</sup>

## **Registering to conduct charitable fundraising**

A charity is a not-for profit organisation that has been set up exclusively or mainly for charitable purposes. Charitable purposes are grouped under four broad headings:

- relief of financial hardship;
- advancement of education;
- advancement of religion; and

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<sup>28</sup> Incorporation Act, s 45.

<sup>29</sup> Ibid, s 50.

<sup>30</sup> Ibid.

<sup>31</sup> Incorporation Regulation, cl 14.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

- other charitable purposes for the benefit of the community.

Conservation and protection of the environment are considered charitable purposes for the benefit of the community.

There is no registration scheme for charities in NSW, but there is a registration scheme for conducting charitable fundraising appeals under the [Charitable Fundraising Act 1991 \(NSW\)](#).

A group must hold an authority to fundraise under this Act.<sup>34</sup> An authority may be granted for a single fundraising appeal or for an indefinite period and number of events.<sup>35</sup> Conditions may be placed on the authority.<sup>36</sup> To register, an organisation only needs to have one or more charitable purposes and conduct fundraising for that purpose.<sup>37</sup>

#### Do I need to register with the ACNC?

The Australian Charities Not-for-profits Commission (**ACNC**) is a Commonwealth Government agency. It registers and regulates charities nationally, mainly for taxation purposes.

To access charity tax concessions and other benefits, you may need to register as a charity with the ACNC. Registration with the ACNC is voluntary.

You do not need to register with the ACNC to apply for or hold an NSW charitable fundraising authority. However, if you are registered with the ACNC there are streamlined application and reporting processes available.

Each organisation conducting charitable fundraising appeals should consider whether ACNC registration is appropriate based on their own circumstances and eligibility.

For more information, contact the ACNC.

Visit: [NSW Fair Trading's Rules for fundraising page](#) to read the [Charitable Fundraising Guidelines](#)

Not-for-profit organisations with a charitable purpose are generally exempt from payroll tax.<sup>38</sup>

Organisations with charitable purposes may be eligible for exemption from duties payable under the *Duties Act 1997 (NSW)*.<sup>39</sup>

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<sup>34</sup> [Charitable Fundraising Act 1991 \(NSW\)](#), Pt 2 Div 2.

<sup>35</sup> *Ibid*, s 17.

<sup>36</sup> *Ibid*, s 19.

<sup>37</sup> *Ibid*, s 5.

<sup>38</sup> [Payroll Tax Act 2007 \(NSW\)](#), s 48.

<sup>39</sup> [Duties Act 1997 \(NSW\)](#), s 275.

Visit: [The Revenue NSW website](#) for more information about tax and duty exemptions

### Tax deductions for donations

The Federal government keeps a Register of Environmental Organisations approved for tax deductibility under the *Income Tax Assessment Act 1997*.<sup>40</sup> Any money paid into the public fund of a registered organisation can be claimed by the person giving the money as a tax deduction.<sup>41</sup>

The Federal Department of Environment administers this register. To be eligible for the Register, a number of criteria must be satisfied. Some of these criteria must be included in the constitution of the organisation. To be eligible, an organisation must:

- be established for the principal purpose of:
  - protection and enhancement of the natural environment or of a significant aspect of the natural environment;<sup>42</sup> or
  - the provision of information or education, or the carrying on of research, about the environment or a significant aspect of the environment,<sup>43</sup>
- have at least fifty individual voting financial members,<sup>44</sup>
- be not-for-profit;<sup>45</sup> and
- 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.<sup>46</sup>

Visit: [DAWE's Register of Environmental Organisations page](#) for more information

### Other tax issues

Charities also need to apply for additional endorsement through the Australian Taxation Office (**ATO**) to receive income tax concessions (deductible gift recipient status and income tax exemption). Organisations can do this when registering for an Australian Business Number.

Not-for-profit organisations are not exempt from goods and services tax (GST). However, Income Tax Credit can be claimed to offset tax paid.

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<sup>40</sup> [Income Tax Assessment Act 1997 \(Cth\)](#), Subdivision 30-E.

<sup>41</sup> Ibid Subdivision 30-A.

<sup>42</sup> Ibid ss 30-265(1)(a).

<sup>43</sup> Ibid ss 30-265(1)(b).

<sup>44</sup> Ibid ss 30-275(b).

<sup>45</sup> Ibid ss 30-270(1).

<sup>46</sup> Ibid ss 30-265(2).



Visit: [ATO's Application for endorsement for charity tax concessions](#) page for more information on how the tax system affects your association

## Glossary

Key terms used in this factsheet:

**ACNC** means the Australian Charities Not-for-profits Commission

**AGM** means Annual General Meeting

**ASIC** means the Australian Securities & Investments Commission

**ATO** means the Australian Taxation Office

**DAWE** means the federal Department of Agriculture, Water and the Environment

**EPBC Act** means the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#)

**Incorporation Act** means the [Associations Incorporation Act 2009 \(NSW\)](#)

**Incorporation Regulation** means the [Associations Incorporation Regulation 2016 \(NSW\)](#)