



Environmental Defenders' Office
AUSTRALIAN CAPITAL TERRITORY

BECOMING AN INCORPORATED GROUP

A factsheet by the EDO ACT | 2018

You may wish to start your own group to voice concerns over a development or to address other environmental issues. If you do this, you need to decide whether to give your group legal authority by incorporating or becoming a company.

What is incorporation?

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. In the ACT, environment groups can become incorporated associations under the *Associations Incorporation Act 1991* (ACT) (the *Associations Act*). Another less common alternative for environment and community groups is to establish a company under the *Corporations Act 2001* (Cth), however, this option can be more complex, costly, and have higher penalties for breaching regulatory requirements. Regardless of the structure that your group chooses, you should 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 association;
- establishing clear aims and objectives which are included in the group's constitution, rules or articles of association; and
- meeting the requirements of some funding bodies that only provide grants to an

incorporated entity.

Other factors to consider are:

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

What do we need to become incorporated?

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

- at least five members (section 14);
- a constitution or articles of association to set out the group's aims and objectives and rules on how it will function including rules on voting, quorums, timing of the Annual General Meeting and other meetings (Part 3);
- a public officer to lodge documents at the Registrar-General's office (section 57);
- an auditor to annually 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 (section 60). All incorporated associations must have a public officer (section 57). If you choose to adopt the model rules as your constitution, the committee will consist of three ordinary committee members and four office-bearers of the association: president, the vice-president, the treasurer and the secretary.
- 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. Access Canberra manages incorporated associations and can provide information and advice (see below for contact details).

Does our organisation need objectives?

Your constitution must include the group's objects or purposes. Even if you do not incorporate, taking time to define your objectives can provide a focus for people in the group and establish essential ground rules. Define your objects in specific language and ensure the objects are specific enough to capture the true aims of vision of the group, but broad enough to avoid an argument that your objects are limited in scope (refer to the case studies below for examples of why you should define your objects carefully).

Objects can be important to show that you have the right to take an issue to a court or tribunal

'Standing' is the right to have an issue heard before a court or tribunal. In the past, standing was available to a 'person aggrieved' or an 'eligible person' directly affected by a decision, which made it difficult for environmental groups to establish standing. Now, much of the ACT environmental legislature contains a schedule of parties who are 'eligible entities', and therefore entitled to seek review, as well as specific decisions which are 'reviewable decisions' in the ACT Civil and Administrative Tribunal (ACAT). For example, under the *ACT Civil and Administrative Tribunal Act* (section 22Q) and the *Planning and Development Act 2007* (section 419), a group may have standing to challenge a planning decision if it fulfills certain conditions (refer to our [Standing Factsheet](#) for more information on standing). You should therefore make sure that the objects of your organisation clearly relate to the environmental issue that you are working on, in order to increase your ability to seek a review of a decision affecting the environment you wish to protect.¹

Case Study: *North Canberra Community Council v ACT Planning and Land Authority & Canberra District Rugby League Football Club Limited (Administrative Review)* [2014]

ACAT 1

The EDO ACT provided advice for the North Canberra Community Council (NCCC) in seeking review of a decision by the ACT Planning and Land Authority (ACTPLA) to vary a lease and remove its concessional status. To have standing, the NCCC needed to show that it was an 'eligible entity' which had suffered 'material detriment' under the *Planning and Development Act*

¹ Groups are also required to lodge a representation during the public consultation period in order to achieve standing pursuant to the *Planning and Development Act 2007* (Schedule 1, column 3).

2007. Pursuant to the *ACAT Act*, a group or 'body' are deemed to have suffered 'material detriment' if the decision *related to a matter included in its objects or purposes* (s 22Q). The NCCC's objects in its constitution involved the use of land for community and social purposes. The NCCC particularly relied on the object *'to protect, promote and enhance the ... social and environmental well-being of the North Canberra resident community ...'* It was argued that the decision to remove the concessional status of a lease related to the physical and social planning of North Canberra. Even though the NCCC's objects were broad, they were read down to be geographically confined and distinguished from the interest of the general public. The Tribunal therefore decided that this decision was included within the NCCC's objects, and it had standing.

Changing your organisation's objects

You can change the objects of your organisation by a special resolution at a general meeting (*Associations Act* section 30). It is important that you follow the correct procedure when changing your objects, because a failure to do so may invalidate your new objects.

Requirements

There must be a notice of a general meeting 21 days before the meeting (*Associations Act* section 70). The notice needs to say that the resolution will be proposed as a *special resolution*. The proposed resolution should also be stated in full in the notice. A special resolution requires at least three quarters of the members entitled to vote and *who actually attend and vote at the meeting*, to vote in favour of the resolution. After the special resolution has been passed, you must lodge your new objects with the Registrar-General within one month.

Case study: *Ginninderra Falls Association Inc v ACTPLA (Administrative Review) [2017]*

ACAT 108

As in *North Canberra Community Council* (above), the Ginninderra Falls Association (GFA) needed to show that the decision to approve a development application was *related to a matter included in its objects or purposes* in order to have suffered 'material detriment' and be an 'eligible entity' under the *Planning and Development Act*.

What is the number of members required for a special resolution? The GFA had changed the objects in their constitution, via a special resolution. The respondents argued that under the

Associations Act section 70(b), three-quarters of the *total members eligible to vote* must vote in favour of the resolution. This argument was rejected by the Tribunal which found that only three quarters of those who actually vote in favour are required to pass a special resolution.

At what date will the entity's standing be considered? The GFA had therefore validly altered its objects, however, it had done so in a time between when the decision about the DA was made and when the notice of the decision was given. The Tribunal found that the proper date upon which to consider whether the decision relates to an entity's objects or purposes is the date that *the decision was made*. Because the GFA had changed its objects after the decision was made, its standing was considered under its previous objects.

Did the objects of the GFA relate to the decision? The GFA's objects included the creation of a national park. The relevant decision was a decision to approve a development near the proposed national park. The Tribunal noted that the standing provisions have a 'wide operation' and, consistent with other cases, found that the decision related to the GFA's objects and purposes.

How do we apply to incorporate?

You can complete an [Application to incorporate and association \(Online\)](#). The online application allows you to attach documents, such as a copy of your constitution, and is completed and paid for online. This is the preferred method of lodgment as well as being the quickest.

The application can also be made by printing an [Application to incorporate an association \(DOC 243KB\)](#) or [\(PDF 211KB\)](#) and either emailing, posting or lodging it at an Access Canberra Service Centre, accompanied by the prescribed fee.

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;
- have a common seal;

- have a registered address (not just a post office box); and
- keep true and fair accounts by maintaining financial records (Part V of the Act outlines requirements for financial accounts, audits and annual reports. From July 2017, associations that are charities registered with the ACNC are exempt from these requirements, and must instead meet requirements under Commonwealth legislation and report to the ACNC). For more information about audits, see the [Access Canberra Incorporated Associations Handbook](#).

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 should be made for an income tax exemption. Without either of these, your bank will be required to withhold income tax out of any payment. Application forms are available at the Australian Taxation Office. Refer to the [ATO tax basics for not-for-profit organisations factsheet](#) for more information.

Will we be eligible for tax deductibility?

The Federal Government keeps a Register of Environmental Organisations approved for tax deductibility status 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. To be eligible under the *Income Tax Assessment Act 1997* 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 (section 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 (section 30.265(1)(b))
- have at least 50 individual voting financial members (section 30.275(b)(i));
- be not-for-profit (section 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 (section 30.265(3) and Taxation Ruling 95/27).

Where can we find more information?

For more information about the incorporation process, see the Access Canberra [Incorporated Associations Handbook](#), or contact Access Canberra (www.accesscanberra.act.gov.au or call 13 22 81).

For further information on associations that are charities registered with the Australian Charities and Not-for-profits Commission, see www.acnc.gov.au. Justice Connect also has information about incorporation for not-for-profit organisations. See www.nfplaw.org.au

Disclaimer

The law described in this Fact Sheet is current at 31 January 2018. The EDO ACT 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. While every effort has been made to ensure the content is as accurate as possible, the EDO does not accept any responsibility for any loss or disadvantage resulting from reliance or use of this work. Duplication and reproduction of the information provided in any EDO ACT Fact Sheet is permitted with acknowledgment of the EDO ACT as source. The ACT EDO Fact Sheets Project was carried out with the assistance of funds made available by the ACT Government under the ACT Environment Grants.