



Government of South Australia

Office of Consumer and
Business Affairs

How to incorporate

A guide to the *Associations
Incorporation Act 1985*



how to incorporate

Welcome to the guide to incorporating your association

You can form an association for many reasons, but, if you want it to continue to develop and grow after your involvement with it has finished, how can you achieve that? An incorporated association offers a number of advantages. Perhaps most importantly, it has an independent existence at law, and it can continue to do what it was set up for long after its original members have gone. So, how do you incorporate an association?

This booklet is designed to provide you with guidance and direction through the basic steps when you are considering incorporating. It explains the more significant benefits of incorporation, outlines the responsibilities that go with incorporation, and gives pointers on where to get more information if you need it.

The Office of Consumer and Business Affairs (OCBA) sincerely thanks the South Australian Council on Social Services for its support in the development of this booklet.

We hope that, in the following pages, you will find the answers to some of your questions about incorporation. If you need more help, visit OCBA's website at www.ocba.sa.gov.au or call us on 1300 138 918.

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What is incorporation?

Groups of people come together in an organised way for many purposes. Incorporating separates the individual person (member) from the entity. Incorporation makes the group of people (body), a single legal entity with certain rights and legal protections as well as some additional obligations.

Those that do not incorporate are known as unincorporated associations and their status under the law is quite ambiguous. Incorporation does have some major benefits for the larger groups that are active in our community.

Forms of incorporation include legislation covering very specific activities such as the *South Australian Co-operative and Community Housing Act (1991)* to the Commonwealth Corporations Act that regulates the activities of the entire commercial sector as well as a very small number of not-for-profit organisations. If you think your group may be better served by incorporation under another act, you should seek legal advice.

For most not-for-profit organisations in South Australia, incorporation under the *Associations Incorporation Act (1985)* is the best option and is the focus of this booklet. The *Associations Incorporation Act (1985)* is administered by the Office of Consumer and Business Affairs (OCBA).

Should we incorporate?

Generally, once the group starts to accumulate money and assets and starts to become active in the community, it should seriously consider incorporating in a way that separates the individual person (member) from the entity. The benefits of incorporating your association include:

- **Simplifies and clarifies the management and ownership of the money and other assets of the body.** Bank accounts are held in the name of the association. Assets are purchased and owned by the association. The association can enter into contracts.
- **Provides some legal and financial protection for the management committee of the association** who otherwise might be liable for damages arising from the activities of the association. If your group doesn't incorporate, it has no separate legal existence. If you incur legal liabilities under a contract, such as for rent or for an employee, or any other way, such as an accident not covered by insurance then the members of the committee could be personally responsible for the debts. Incorporation protects committee members from most personal liability but leaves them with the responsibility to act honestly and prudently.
- **Clarifies and formalises the objectives of the association.** To become incorporated, associations need to state clearly the purposes for which they are being formed. The purposes, frequently known as the objects of the association, are fixed in the rules of the association (also known as the constitution). The regulating body must be advised of any changes.

- **Sets out regulations about how the association shall operate.** These regulations are designed to ensure that the association operates fairly, responsibly and accountably to its members. They also protect against dishonesty and manage matters such as conflict of interest. Being incorporated also requires that some information is regularly made available to the regulating body and to the public about the affairs and operations of the association.
- **Allows organisations to apply for a much wider range of public and private funding.** Many government and philanthropic organisations make it a basic requirement that applicants for funding are incorporated.
- **Allows some incorporated bodies to enjoy tax advantages.** Considering the benefits incorporation provides within this Act, the cost for incorporation is a worthwhile investment.

The process of incorporation involves some work in drafting a constitution, completing the forms and meeting the other requirements that some groups find arduous. This booklet is designed to provide you with guidance and direction through the basic steps when you are considering incorporating.

Once incorporated, there are some regular compliance tasks required such as the keeping of records, holding of elections and submitting of returns.

Can we incorporate?

Wide ranges of associations are eligible for incorporation. Section 18 of the Act sets out the eligibility criteria in detail however generally an association is eligible for incorporation when formed for:

- a religious, educational, charitable or benevolent purpose, or
- the purpose of promoting or encouraging literature, science or the arts, or
- the purpose of providing medical treatment or attention or promoting the interests of persons who suffer from a physical, mental or intellectual disability, or
- the purpose of sport, recreation or amusement, or
- the purpose of establishing, carrying on or improving a community centre or promoting the interests of a local community or section of the local community, or
- conserving resources or promoting the interests of students or staff of an educational institution, or
- political purposes, or
- the purpose of administering a scheme or fund for the payment of superannuation or retiring benefits to the members of an organisation or employees of a body corporate, firm or person, or
- the purpose of promoting the common interests of persons engaged in or interested in a business, trade or industry, or
- any purpose approved by the Minister of Corporate Affairs.

Unless approved otherwise, an association will not be incorporated if its purpose is to make profit for its members or to engage in trade or commerce.

Formation meeting

The first step is to hold a meeting with the group of interested people to authorise a person to apply for incorporation on the group's behalf. This person can be appointed as the association's first Public Officer. Their initial duties could be to develop the name of the association, complete all forms and the association rules in conjunction with the association's members.

Your association's public officer

An incorporated association must appoint a public officer. The public officer must be a person* of or above the age of 18 years and be a resident of South Australia. Ideally the person will be closely associated with the association. The public officer performs an important role within an incorporated association, acting as the central contact person for the association. Any notice or other document can be served on an incorporated association by serving it on its public officer. The public officer must sign most of the forms and returns lodged with the Office of Consumer and Business Affairs.

Failure to have a public officer is a breach of the Act and can mean penalties being levied against the association. In most cases, the public officer is a member of the association, however this is not a requirement. It is common for a public officer to have other responsibilities within the association, such as being a member of the committee of management.

For more information

An information sheet outlining the role of a public officer is available via the Office of Consumer and Business Affairs website at www.ocba.sa.gov.au

* an individual, not a company, trust or partnership.

Your association's name

The name selected for your association when you are considering incorporation should reflect the association's nature, object and purpose. It would be considered unsuitable if the chosen name:

- is a name that may be mistaken for the name of another association incorporated under an Act
- is a registered business name or may be mistaken for a registered business name
- is a name that is identical to a name reserved or registered under the Corporations Act
- does not contain the word 'Incorporated' or the abbreviation 'Inc.' as part of and at the end of its name
- contains a restricted word
- is misleading as to the objectives and purpose of the association.

For more information

1. To check the possible availability of an intended name, first search the Australian Securities and Investments Commission National Names Index at www.search.asic.gov.au/gns001.html
2. Restricted word information can be found on the Office of Consumer and Business Affairs website at www.ocba.sa.gov.au.
3. To apply for ministerial consent to register a name that contains a restricted word, a letter must be written outlining the reasons why you believe the Minister should approve the proposed name. An additional fee (see Associations Fee Schedule) must accompany this letter and be forwarded to the Office of Consumer and Business Affairs.

Rules for your incorporated association

An incorporated association must have its own set of rules that govern the day-to-day management of the association. A copy of these rules (also known as a constitution) must be lodged with the Office of Consumer and Business Affairs. The association's rules are available to the public for payment of a fee.

The association's rules must be accessible to all its members. Many associations as a matter of policy provide their members with a personal copy of the rules and have found that this helps with the effective management of the association.

An association may either develop its own rules or seek professional assistance. Either way, there are specific matters that must be provided for in the rules. The rules must not contain any provision that is contrary to or inconsistent with the Act.

The association's rules must cover the following matters:

- the name of the association
- the objects or purpose of the association
- the powers of the association and by whom and in what manner they are exercised
- membership (if there are members) including types of:
 - o membership
 - o subscriptions
 - o resignations
 - o expulsions, and
 - o register of members;
- who has the management and control of the funds and other property of the association
- the powers, duties and manner of appointment of the committee, including the:
 - o composition
 - o terms of office of members of the committee

- o notice of proposed appointments/elections to the committee
 - o filling of casual vacancies occurring on the committee
 - o proceedings of committee
 - o disqualification of committee members;
- the calling of and procedure at general meetings, including:
 - o annual general meetings
 - o special general meetings
 - o notice of meetings
 - o proceedings at meetings
 - o voting at meetings
 - o poll at meetings
 - o special and ordinary resolutions
 - o whether members are entitled to vote by proxy;
 - appointment of an auditor of a 'prescribed association'
 - the manner in which the rules of the association may be altered.

Once completed, the agreed version of the rules must be submitted with an application to incorporate. A copy of the rules must be kept for the association's records.

For more information

To assist associations to develop a sound and effective set of rules, the Office of Consumer and Business Affairs has made available a set of model rules. These rules have been developed including a checklist of requirements to assist associations to comply with their obligations under the Act.

The model rules are available in hard copy from any Office of Consumer and Business Affairs office or can be downloaded in electronic format from www.ocba.sa.gov.au/associations. Downloading is most convenient because the rules can be easily modified into a typed document.

Associations should read the model rules carefully and complete them where required with information to suit the needs of the particular association.

Committee of management

The way in which an association operates is largely governed by its rules/constitution.

Generally the rules will provide for members of the association to elect a committee of management and for the management of the affairs of the association to rest with the committee. In addition to providing for a Chairperson, the rules often provide for the committee to include a Secretary and a Treasurer. Sometimes these positions are given different titles e.g. President instead of Chairperson.

The Chairperson presides at meetings of members of the association and of the committee.

The Secretary is responsible for all general correspondence. He or she should maintain adequate correspondence files and bring relevant correspondence before the committee for consideration.

The Treasurer attends to the banking of the association's income and recording transactions in the association's books and records. He or she should provide regular financial reports to the committee. The Treasurer should also prepare the association's financial reports and statements for consideration and adoption by the committee before they are presented to members.

Obtain, complete and lodge the forms

Obtain the forms

Obtain copies of Form 1 and Form 2 and a Checklist of Association Rules. Complete Form 1 and Form 2 and use the checklist as a guide to draft your own association's set of rules.

Complete Form 1

(Application for incorporation of an association)

You must provide details about the purpose for which the association is being formed (in particular Item 3).

Complete Form 2

(Statutory declaration to accompany application for incorporation)

This form must be signed and declared before a Justice of the Peace. The endorsement sections must be written or typed on the copy of the rules and then signed by a Justice of the Peace. The wording on the form is as follows 'This is the annexure marked "A" referred to in the statutory declaration of _____ made on the _____ day of _____ 20 ____ before me (Justice of the Peace signature) _____ '.

Complete your association's rules

Must be clearly printed or typed on single sided sheets of A4 size white paper. Use the Office of Consumer and Business Affairs' Checklist of Rules.

Lodge the forms

Check that both forms are fully completed, signed and endorsed. Your proposed association's rules must accompany Forms 1 and 2. Lodgement can be made at the Office of Consumer and Business Affairs. If the documents are deficient they will be returned to the lodging party for amendment.

The fee must be paid at the time of lodgement. This fee may alter in July each year.

Assessment and certificate of incorporation

If all requirements have been met the Office of Consumer and Business Affairs will approve the incorporation. A certificate of incorporation will then be issued. You can normally expect to receive it in about 14 days. The certificate is evidence of the association's corporate status and should be kept secure. It will be needed to open bank accounts or to access grants from certain funding agencies.

Statutory obligations

The Associations Incorporation Act 1985 stipulates many different obligations upon an incorporated association. An incorporated association must hold an annual general meeting at least once in each calendar year.

Annual general meeting

The first annual general meeting must be held within 18 months of the date of incorporation and within six months after the expiration of the first financial year of the association. The second and any subsequent annual general meeting must be held within five months after the end of the incorporated association's financial year.

Financial obligations

Associations with gross receipts (as defined in section 3 of the Act) in excess of \$500,000 are required to lodge with the Office of Consumer and Business Affairs a Periodic Return (Form 9), financial accounts, a committee statement, a committee report and a copy of the auditor's report. These documents and the appropriate fee should be lodged within six months of the end of the association's financial year. (Late fees apply if lodged after that time.) The public officer must sign the periodic return.

Other obligations

An incorporated association has a number of other obligations. They include the requirement to:

- ensure that the association's full name appears in legible characters on all official documents, including business letters, accounts, official notices, publications, cheques and receipts. The word 'Incorporated' may be abbreviated to 'Inc'
- act in accordance with its objects and rules

- notify the Office of Consumer and Business Affairs if the position of public officer becomes vacant, and appoint a new public officer within one month
- ensure proper accounting records are kept which correctly record and explain the transactions of the association and its financial position
- ensure that minutes of all committee and general meetings are kept
- ensure that the association must not incur debts if there are reasonable grounds to expect that the association will not be able to pay all its debts as and when they fall due
- ensure that the association does not do any act with intent to defraud creditors or any other person
- have a common seal (i.e. a rubber stamp with the full name of the association on it) that serves as a signature of the association.

Investigations

The Office of Consumer and Business Affairs has a responsibility to the public to ensure incorporated associations act in an honest and diligent manner and that they are maintaining accounting records. The Office of Consumer and Business Affairs also recommends proper minute taking at meetings.

The Office of Consumer and Business Affairs does not investigate matters such as association's rules as these are an internal document used for the administration of the association. Similarly, internal disputes between members, matters that occurred more than 3 years ago or any theft-related incidents that don't relate specifically to a breach of the Act must be dealt with by the association itself.

For more information

If you require any additional information please contact the Office of Consumer and Business Affairs.

notes

Additional Resources

An example of Rules: for an Incorporated Association (to be lodged with Forms 1 and 2 and Checklist)

Public officer responsibilities: information that outlines the role of the public officer and required duties

Administration of affairs: information to assist in the running of an incorporated association and explain some of the account keeping and audit requirements of the Associations Act 1985. Includes information about required qualifications of an auditor.

Dealing with suspected breaches: provides guidance in relation to suspected breaches of the Associations Act 1985.

Contact OCBA

If you require any additional information or copies of the above publications please contact OCBA's Business and Occupational Services Branch on

telephone 1300 138 918.

www.ocba.sa.gov.au

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