



# HELP SHEET

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## Legal structuring

Any not-for-profit group has the choice of organising itself in a number of different ways. Not-for-profit community groups can be unregistered and unrecognised bodies acting under their own rules, or they can be formally recognised bodies with a legal personality of their own. The most common of these forms are the unincorporated association, the incorporated association, the company, and the co-operative.

Some other forms of organisation, such as Aboriginal Councils under the Aboriginal Councils and Associations Act 1976, are available only to particular kinds of groups and will not be covered here.

### Unincorporated associations

An unincorporated association is in general treated as a gathering of individuals without any common standing. You've come together because you agree on a particular issue or issues, and you don't see the need to involve the government in the way you run your organisation.

If you remain on an informal basis then you don't have to pay the costs associated with incorporation and you don't have to comply with the requirements and fill out the forms imposed on corporations. The downside is that in legal terms the organisation doesn't have an existence independent of the individuals who make it up. If you're the honorary treasurer of an unregistered non-profit organisation called Better Community, for example, and you're renting premises for your organisation, you will have to make the lease in your own name (acting as a trustee for Better Community). This doesn't mean, of course, that as treasurer you can deal with the business or the property of Better Community as you like -you'll basically have the obligation to act as a trustee for the organisation's purposes - but it does mean that you can be more flexible about what you do and how you do it. If you're organising a one-off or short-term activity this may be your best choice.

The extra disadvantage is that if anything goes wrong -- if the Better Community office burns down, or if people fall over the mat and injure themselves and sue - it's possible that as the lessee and as a committee member you may be held personally liable. In that case, if there isn't enough money in the Better Community cashbox to cover the payout you may have to pay for it yourself.

There can also be difficulties with opening bank accounts, problems with insurance, and confusions about who owns what property. If you stop being a member of Better Community but your name is still on the contracts there may be difficulties transferring your responsibilities to the new Treasurer. Furthermore, most foundations and most government departments will only fund incorporated organisations.

Some of these difficulties can be overcome if you are auspiced by another organisation - a church, or an existing not for profit group, or a service club. That does mean, however, that the organisation that provides the legal cover is the legal owner, and if any disagreements arise later then you may be in a weak position.

### Incorporated associations

Incorporation is a system of State Government or Territory registration that gives an association or community groups certain legal advantages in return for accepting certain legal responsibilities, and is the most common form of legal status among Australian not-for-profits. An incorporated association receives recognition as a legal entity separate from its members and offers some protection for office holders from any debts or liabilities incurred by the group as long as the association doesn't make a profit for its members. Incorporation is voluntary, but once a group has been incorporated it has to abide by relevant legislation.

Incorporation means that the law will treat you as a single entity rather than as a number of individuals. If your organisation has registered itself under the Associations Act and has a legal personality, you can have the lease in the name of Better Community Inc.

If you're an incorporated association then the lease can be in the name of Better Community, and as an

incorporated association Better Community will have limited liability; that is to say, if someone falls over in the office and sues and the cashbox doesn't have enough money to pay them then you are not personally liable (except under certain special circumstances - lawyers never say never; see the reminder at the end of the article).

Remember, too, that incorporating is not the same thing as registering as a charity or getting entitlement to tax exemption or qualifying for rebates on water or stamp tax or . Those have to be negotiated for separately under different rules.

## Companies

Where an NFP runs associated commercial activities as part of its fundraising (and/or as part of its mission) it sometimes spins these off into a company. Most such not-for-profit companies are companies limited by guarantee rather than companies issuing shares. Nobody really knows how many Australian companies are operated by NFPs (it's not easy to learn even how many companies are limited by guarantee, as it's possible for such companies to get a license to drop the word 'Limited' from their name) but there are at least ten thousand of them, with incomes ranging from \$500 to over ten million dollars.

Being a company doesn't stop you being a not-for-profit or a charity or a public benevolent institution. An NFP company can still have tax deductible status if it meets the other requirements of the tax office.

In some cases an NFP can virtually be forced to incorporate as a company, either to obtain a grant or to be licensed. This can be the case, for example, under the Aged Care Act 1997 (regarding subsidy as a care provider), or the NSW Registered Clubs Act.

Limited companies are highly regulated; incorporated associations are lightly regulated. Setting up a company is complicated and expensive; incorporating as an association is comparatively cheap and simple. Unless your organisation is very big indeed, or very much concerned with essentially commercial activities, or unless you operate in more than one state and don't want to get multiple incorporations, your best option will probably be to become an incorporated association.

## Co-operative Societies

Co-operative societies are suitable only for some purposes, and most community groups don't fit the profile. Co-ops of different kinds don't necessarily have much in common, and in the Australian context, the only real definition of a co-operative is "any organisation that is incorporated as a co-operative under state or territory legislation". General co-operatives can be found in many industries, though almost all large and well-known co-operatives are farmer co-operatives. There are approximately 2,400 registered general co-operatives in Australia. In most states, co-operatives legislation distinguishes between co-operatives that are permitted to distribute a profit to their members (reflecting the level of their use of the co-operative) and those that are non-profit-distributing. The former are generally called trading co-operatives and are mostly quite large. The latter, sometimes called community advancement co-operatives, are far more numerous, and include the registered social clubs that were originally formed by groups of people from a particular locality or built on existing sporting organisations. These were given a monopoly on gambling machines in the 1950s and prospered greatly, becoming valuable community recreation resources. By no means all clubs incorporated as co-operatives, however, and in the late 1970s all new clubs were required to incorporate as not-for-profit companies. Those already incorporated as co-operatives were allowed to remain.

Wholesale and retail co-operatives include the few remaining co-operative stores (all in country areas), specialised trade co-operatives (such as for plumbers) and specialised consumer co-operatives, selling wine, organic foods or books to university students. The most common transport co-operatives are taxi co-operatives in larger regional centres. Community services co-operatives include co-operative childcare centres and neighbourhood centres, while housing co-operatives are mainly small, formed to own or manage government-owned housing. Many co-operatives have converted themselves into companies.

Unless there are special reasons why you think this form suits your organisation, both incorporated associations and companies have a less complex system of regulation than co-operatives.

## Pros and Cons

There are advantages and disadvantages to each format, and each format suits different kinds of organisations. Probably the first thing you should consider is incorporation, moving on to look at the others only if you think that incorporation would be inconvenient or inefficient.

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