

The most common legal structure when establishing a non-profit organisation in New South Wales ('NSW') is that of an incorporated association. This article will discuss the registering of and the running of an incorporated association. It will also discuss the closing of an incorporated association.



### **A. WHAT IS AN INCORPORATED ASSOCIATION?**

An incorporated association is a type of legal structure where an organisation has its own legal identity. This means that the incorporated association is its own legal person (with power similar to a natural person) and is therefore able to do things in its own name. This includes:

- Suing another person/organisation or being sued;
- Purchasing, selling and holding assets in its own name;
- Entering contracts in its own name; and
- Continuing to operate even when its members leave or change.

Generally, small not-for-profit groups such as sports clubs, cultural societies and charities register to become incorporated associations. It is not compulsory to incorporate an association, however, non-profit organisations do so because of the benefits associated with being a separate legal entity.

### **B. STARTING (REGISTERING) AN INCORPORATED ASSOCIATION**

Incorporated associations tend to operate solely in the state or territory that they have been registered in. This is because they are governed by state or territory legislation and administered by a government body in the state or territory that they were registered in. In NSW, incorporated associations are subjected to the [\*Associations Incorporation Act 2009 \(NSW\)\*](#) and administered by NSW Fair Trading. It is important to note that incorporation laws vary between states/territories and the requirements to register an organisation as an incorporated association may therefore be different.

An organisation should only apply to register as an incorporated association if it is planning to run as a non-profit entity (ie the organisation will not be operating as a business and members will not be receiving a profit). There are several steps involved in applying for registration as an incorporated association, including:<sup>1</sup>

- Having at least five members involved with the association;
- Completing the appropriate form (in most cases this will be the 'Application for Registration of an Incorporated Association form');<sup>2</sup>
- Choosing and specifying the proposed name of the association;
- Choosing and specifying the official address of the association, which must be located in NSW;

<sup>1</sup> *Associations Incorporation Act 2009 (NSW)* s 6 ('AIA').

<sup>2</sup> <https://www.fairtrading.nsw.gov.au/help-centre/forms/associations-forms>.



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- Providing a statement of the association's objects (ie the purpose of the association and the proposed activities that the association will carry out);
- Providing a copy of the association's proposed constitution;
- Identifying the first public officer of the association (who must reside in NSW); and
- Paying the prescribed fee (of \$170.00).

### C. RUNNING AN INCORPORATED ASSOCIATION

There are several obligations that an association must comply with once it has been incorporated. These include complying with statutory obligations in relation to management of the association, keeping and maintaining proper records, and maintaining minutes. Failing to adhere to these responsibilities could result in the association being fined, prosecuted and/or deregistered.

#### **C.1. MANAGEMENT AND OPERATION OF AN INCORPORATED ASSOCIATION**

To ensure that an incorporated association does not become deregistered or penalised, it is essential that:

- The association always has a minimum of five members;
- A committee (of at least three members) is established to carry out the functions of the association with due care and skill;
- Members do not receive a profit (or monetary gain) from the activities of the association and any profit received is used to further advance the association;
- NSW Fair Trading is informed of the appointment of the public officer within 28 days after he or she takes office, and the position of public officer is filled within 28 days of a vacancy arising;<sup>4</sup> and
- NSW Fair Trading is informed about a change in the official address of the association within 28 days.<sup>5</sup>

#### **C.2. RECORD KEEPING AND MAINTAINING MINUTES**

An incorporated association is required to keep and maintain records. This includes:

- Keeping a register with particulars of committee members;
- Keeping records of all disclosures made by committee members regarding any conflicts of interest;
- Keeping financial records for reporting purposes; and
- Keeping minutes of committee and general meetings.

### D. CLOSING AN INCORPORATED ASSOCIATION

An incorporated association can be closed through being wound up or cancelled.

#### **D.1. WINDING UP**

An association may be wound up either voluntarily or involuntarily. Voluntary winding up occurs when the association resolves to do so by special resolution.<sup>10</sup>

Involuntary winding up can occur when an application is made (eg by a creditor or member of the association) to the Supreme Court for an order to wind up the association.<sup>11</sup> The Supreme Court can order for the association to be wound up on several grounds. For instance, an association can be wound up if it is insolvent or if it provided members with monetary gain.

#### **D.2. CANCELLATION**

An association's registration may be cancelled either voluntarily or involuntarily. To voluntarily cancel its registration, an association needs to apply to NSW Fair Trading (ie the Secretary) by submitting an application in the approved [form](#).<sup>12</sup> After applying, NSW Fair Trading will decide whether to cancel the registration or refuse the application.

<sup>3</sup> A/A s 28.

<sup>4</sup> Ibid ss 34-35.

<sup>5</sup> Ibid s 13

<sup>6</sup> Ibid s 29.

<sup>7</sup> Ibid s 31.

<sup>8</sup> Ibid s 50(1)(a).

<sup>9</sup> Ibid s 50 (1)(b).

<sup>10</sup> Ibid s 62.

<sup>11</sup> Ibid s 63.

<sup>12</sup> Ibid s 72.



An association's registration can be involuntarily cancelled by NSW Fair Trading on several different grounds. Such grounds include the association having less than five members or not establishing and maintaining a committee. Before cancelling, NSW Fair Trading must give notice to the association and provide them 28 days to make submissions in respect of the proposed cancellation. Once an association's registration has been involuntarily cancelled, its property becomes vested in NSW Fair Trading (ie under their control). NSW Fair Trading then determines how to appropriately distribute the association's assets and pay off its debts.

### **E. CONCLUSION**

Many non-profit organisations elect to become incorporated associations. Comasters Law Firm can help clients with matters relating to incorporated associations. This includes registering to become incorporated and applying to voluntarily cancel registration.

<sup>13</sup> Ibid s 76.

<sup>14</sup> Ibid s 77(1).

<sup>15</sup> Ibid s 77(2).

Comasters Law Firm can assist clients with registering, running and closing an incorporated association.

### **CONTACT US**