

12. Incorporation

What does incorporation mean?

Incorporation gives your group its own legal identity (the group becomes a 'separate legal entity' from its members). The group can enter into contract, sign a lease, employ people, and sue and be sued.

The Details

Contracts can only be made by legal identities, e.g. a person or a company.

A person creates a contract in their own name and on their own behalf, but a company operates completely separately from its owners/members/employees and individuals cannot be held personally legally liable for the actions of the company.

“Clubs” have no legal status – Clubs are just a collection of people doing things on their own behalf. The formation of a Club, or affiliating with Arc, does not automatically create a separate legal entity. There are advantages in being an informal group of people. It doesn't cost anything and there aren't any obligations to fulfil. However, a lack of legal identity also brings some important disadvantages.

Most Clubs will be considered unincorporated associations, meaning the Executive members act in their own name, are personally liable for debts and can be sued if something the Club does goes wrong.

For example, if a Club member is injured at a Club event due to negligence, e.g. food poisoning because of dodgy sausages, individual Executive members can be sued to recoup medical and other costs. Or if you sign an agreement to hire the function room at the local pub for your Club's AGM, and there is damage caused to the room (voting gets a little contentious and a fight breaks out), the pub can sue you for the costs of repairing. Or you approve for print 1000 flyers advertising the Club's end of term camp with a similar logo to a high-end hotel chain, and they sue for copyright infringement. Worse still, your flyer also displays some not-so-nice comments about staying at said hotel chain and they also sue for defamation.

The two most common ways to create a separate legal identity and minimise legal risk to members are:

- Incorporate under NSW *Associations Incorporation Act 2009*;
- Form a company limited by guarantee under the *Corporations Act 2001*.

Benefits of Incorporating

Once incorporated, a Club has a separate legal existence that is distinct from that of its members.

Incorporation removes personal liability BUT gives the Club the same powers as an individual to:

- own and sell of property and other assets
- enter into contracts
- sue and be sued

One of the main benefits of incorporating a group, so that it has a separate legal identity from its individual members, is that the group then has 'limited liability'. 'Limited liability' means that in most cases, the responsibility for debts of the group or any legal costs the group may be ordered to pay, is limited to the amount of money and assets held by the group. This helps protect the people involved in the group from being personally liable if anything goes wrong with the group (that is, from being required to pay any debts or costs of the group from their own money or assets).

An important exception to understand is that limited liability will not apply to protect individuals if a director or officer of an incorporated group breaches their directors' duties. These are duties prescribed by legislation and case law (judge-made law) and are largely the same whether you are a director of a company or an association. These duties include:

- always acting in the best interests of the group
- being honest and careful in your dealings both with the group and on behalf of the group
- knowing what the group is doing, including how the group is faring financially
- ensuring that the group keeps proper financial records, and
- making sure that the group can pay all of its debts on time.

Should you incorporate?

It is a good idea for all Clubs to think about and make a decision on whether or not to incorporate. This is one of the big legal decisions you will face as a group. It is a particularly important issue for people who are (or have been approached to be) involved on the Executive, or who have decision-making functions in the group.

Deciding whether or not to incorporate depends on the amount of risk involved in the Clubs every day activities. If the Club frequently enters contracts which involve a lot of money, it is worth considering. Some businesses will not enter contracts with an unincorporated association because there is greater chance of not recovering money that is owed.

If your Club is entering contracts worth more than the Club's bank account can cover, it may be worth considering incorporation.

E.g. If the Club President hires a venue for \$10,000 for a Club ball and the Club only sells \$6,000 worth of tickets, can the Club afford to pay the shortfall or pay the costs to cancel the event?

Without incorporation, the person who signed the contract is the person who must pay up, so Executives need to be really careful about signing agreements in their own name if there is a chance that Club funds can't cover the debt.

However, there are also significant legal obligations and increased reporting mechanisms (including providing the government with regular financial information, increased record keeping and annual fees) that go with being an incorporated association (and company) so you need to decide whether it is worth the cost and ongoing compliance requirements. These compliance requirements will need to be met by future years as well.

Incorporated Association vs Company

Incorporating your Club is much cheaper and easier than forming a company.

Ongoing legal compliance (financial reporting etc.) is less onerous, and it is easier to make changes to the Executive. Penalties for non-compliance and breaches are also less severe.

Most Clubs will be considered a Tier 2 Association (income and expenditure are less than \$250,000 and current assets are valued at less than \$500,000) which is even cheaper and less onerous than a Tier 1 Association.

| | Incorporated Association | Registered Company |
|-----------------|---------------------------------|--|
| Regulation | NSW Office of Fair Trading | Australian Securities and Investments Commission |
| Application Fee | \$128 | \$387 |
| Compliance | Local Court | Federal Court of Australia |
| Penalties | Civil & Criminal | Civil & Criminal |

But incorporation isn't a cover all. You still need to make sure that the Club can meet its debts before entering money contracts. If the Club incurs a debt in circumstances where the amount cannot be repaid, all members of the Executive could be held personally liable (it's an offence punishable by a \$5500 fine or jail time).

The Executive also has obligations to act in the best interests of the Association.

We don't want to incorporate, what do I have to do?

If your unincorporated Club chooses not to incorporate (that is, to stay unincorporated), your group will not be recognised as a 'legal entity'. Some of the benefits of not incorporating are:

- the group doesn't have to register with government or tell government or the public about who its members are or its financial situation, and
- the group doesn't have to pay any registration or annual fees to government.

Remaining unincorporated will not prevent the Club from carrying on its day to day activities in the same way that an incorporated group might. Your Club can still also take out insurance to try to protect it from possible liability (although insurance may be more difficult or more expensive to get when unincorporated). Also, unincorporated groups still have legal obligations, and will need to comply with employment law, occupational health and safety law, consumer law, tax laws and a range of other laws. Be aware that while incorporated and unincorporated groups may look the same from the outside, in the eyes of the law there is a vast difference, and if something goes wrong, the courts will treat the two organisations very differently.

FAQs

Can Clubs create contracts?

Clubs can create and enter into contracts; however, we recommend meeting with the Arc Clubs team before signing any contracts involving large sums of money.

How can a Club create a separate legal identity?

Clubs can create a separate legal entity by registering to become incorporated or registering to be a company (see links below)

What are the benefits of becoming incorporated?

Incorporation helps create a separate legal identity and helps minimise legal risks.

Where can I find out more information?

Incorporation Information: NSW Government Fair Trading 'Before Incorporating'

http://www.fairtrading.nsw.gov.au/ftw/Cooperatives_and_associations/About_associations/Before_incorporating_a_new_association.page

Incorporation Information: Not for profit Law Information Hub 'The incorporation decision'

www.nfplaw.org.au/incorporationdecision

Registering a Company

<http://asic.gov.au/for-business/registering-a-company/>

Related Documents

Clubs Handbook (www.arc.unsw.edu.au/clubs/clubshandbook)

Section 15 – Managing Risk

| Need Help? | | | |
|---|--|--|--|
| Call Us | Email Us | Visit us | Office Hours |
| 02 9065 0930 <i>(during office hours)</i> | clubs@arc.unsw.edu.au | Level 2, Basser College <i>(just off the Basser steps past the Quadrangle)</i> | During Term: 10am - 4pm Outside Term: By appointment only |
| Files and Forms: www.arc.unsw.edu.au/clubforms | | Clubs Handbook: www.arc.unsw.edu.au/clubs/clubshandbook | |

Arc Legal and Advocacy: advice@arc.unsw.edu.au