

Overview of incorporation

Incorporation is the process of creating an organisation with a legal entity that is separate from its members.

Incorporation creates an entity able to contract, sue and be sued and own property in its own name.

There are 3 common ways to incorporate, the latter 2 are most relevant for not-for-profits:

- An incorporated company limited by shares;
- An incorporated (public) company limited by guarantee; and
- An incorporated association.

Being a member of Landcare Victoria does not mean your organisation is incorporated.

The model of incorporation most likely to be relevant and appropriate for Landcare Victoria groups is an incorporated association, however, we will also touch on companies limited by guarantee for context.

Legal and financial implications of remaining unincorporated for Landcare groups

Legal:

- Contracts can't be made in the association's own name.
- The association can't be named as a party to legal proceedings, members may be required to enter legal proceedings personally.
- Property can't be held in the association's own name.
- There is no general limited liability for members.

Financial:

- It is more difficult to obtain insurance.
- Unincorporated associations do not ordinarily have access to government grants (unless otherwise auspiced).
- There is no requirement under law to keep proper accounts and financial records but there may be tax requirements if seeking or maintaining charity and not-for-profit status.

What it means to be unincorporated as a Landcare Victoria Inc. Member



- Landcare Victoria accepts liability and provides insurance coverage for unincorporated member groups under certain conditions (only for Landcare insurable activities)
- Landcare Victoria provide auspiced grants:
 - In 2023 the value of auspiced grants was \$208,079;
 - In 2022 the value of auspiced grants was over \$990,469.

Pros and cons of each option (1)

Incorporating as an incorporated association:

Pros:

- Simple and relatively inexpensive.
- The association will be a separate legal entity.
- Members have limited liability.
- Less complex governance and statutory obligations imposed on directors or committee members than a company.
- Able to register as a charity – subject to eligibility - with the ACNC and be a NFP making the organisation exempt from income tax.

Cons:

- Lesser-known legal structure that carries some ambiguity.
- Cannot operate outside of Victoria (if incorporated in that state).

Pros and cons of each option (2)

Incorporating as a company limited by guarantee:

Pros:

- Well understood and widely used legal structure for not-for-profits.
- Limited liability and a separate legal entity.
- Can be cost effective with limited reporting requirements (for small special purpose companies).
- Able to register as a charity – subject to eligibility - with the ACNC and be a NFP making the organisation exempt from income tax.

Cons:

- Potentially more costly and complex to run than an incorporated association.
- Directors owe complex and onerous statutory duties to the company, creating more complex governance requirements for smaller bodies with less resources.
- Unlikely to be necessary for most Landcare Victoria groups given geographic operation and impact.

Pros and cons of each option (3)

Remaining unincorporated

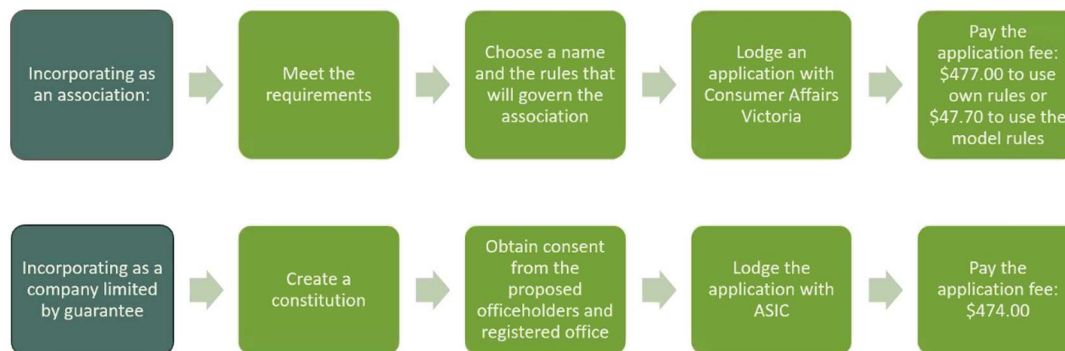
Pros:

- No requirement to abide by external legislative governance standards.
- Overall easier and more cost effective.
- Some challenges of being unincorporated are mitigated by being a member of Landcare Victoria (as discussed earlier).
- Able to register as a charity – subject to eligibility - with the ACNC and be a NFP making the organisation exempt from income tax.

Cons:

- No limited liability.
- Not a separate legal entity.
- The association can't enter contracts, hold property or apply for grants in its own name.
- In most circumstances, cannot sue in its own name to protect its own interests.
- For unincorporated members of Landcare Victoria, liability and insurance coverage is not perfect and may not comprehensively mitigate those risks.

How to become incorporated



Case study



- CMY is an organisation that operates in rural Victoria for the preservation of native birds.
- A donor has decided to bequeath a piece of land to a member of the organisation.
- There has been a dispute on the management committee over the use of the land.
- During the dispute, the majority of CMY's committee members resign.
- Whilst this dispute is ongoing the land has been left unfenced and a number of birdwatchers enter the property and fall into a mine shaft.
- What are the differences if CMY is incorporated versus unincorporated?

Key Takeaways

Being a member of Landcare Victoria does not mean your organisation is incorporated

You do not need to be incorporated to be an income tax exempt organisation

Incorporation can provide your members with additional protection, but it may not be right for all organisations