

Fact sheet: Duties of committee of management members in Victorian incorporated associations

Overview

This fact sheet sets out the legal duties of members of the Committee of Management of not-for-profit organisations that are incorporated in Victoria under the *Associations Incorporation Act 1981* (Vic).

In some incorporated associations, it is possible that an office holder may not be on the Committee of Management (eg. the public officer or secretary). It is generally accepted that these people will also owe the same legal duties to the organisation as Committee of Management members. In this fact sheet, we will just refer to Committee of Management members.

If you are a Committee of Management member you are required by law to comply with certain legal duties. You owe these duties personally to the organisation, and if you breach them you may be personally liable to pay fines or compensation (that is, from your own money or assets). Legal cases involving breach of legal duties by Committee of Management members in not-for-profit organisations are uncommon. However, these duties are not only required by law, but also represent best practice in governance of a community organisation. Compliance will assist you in running an effective organisation.

Separate legislation exists in each State to regulate incorporated associations. Our focus is on the legal situation for Victorian incorporated associations only. If your organisation is incorporated as a company limited by guarantee, please see the Related Resources section at the end of this document for separate fact sheets on these issues.

Note: The information contained in this fact sheet is intended as a guide only, and is not legal advice. If you or your organisation has a legal problem you should talk to a lawyer before making a decision about what to do. The information in this fact sheet is written for people or organisations resident in, or affected by, the laws that apply in Victoria, Australia and is current at 1 October 2008.

Introduction

The *Associations Incorporation Act 1981* (Vic) sets out a few specific duties that apply to Committee of Management members. However, it is generally accepted that the common law 'directors duties' also apply to Committee of Management members in incorporated associations. These are duties that the courts have recognised in cases over time and are explained in greater detail below. If you are a member of the Committee of Management of an incorporated association you should be aware of these legal duties in carrying out your role. In short they are:

- ▶ a duty not to make improper use of your position as a committee member or any information gained in course of your role;
- ▶ a duty to disclose a financial interest in a contract with the organisation, and not to take part in any decision of the committee in regard to such a contract;
- ▶ a duty of good faith and loyalty to the organisation; and
- ▶ a duty to exercise reasonable care and skill in carrying out the role of committee member of the organisation.

Committee of Management members also have a duty to comply with their own constituent documents. In the case of an incorporated association these are usually called the 'rules' of the Association. These are the rules that set out what the organisation has been established to do and how the members intend it to be run.

Tip: It is likely that there will be some changes to Victoria's *Associations Incorporation Act* in early 2009 as a result of a State Government review process. The Consumer Affairs Victoria website has further information. We will update this Fact Sheet when any changes occur.

The Role of the Committee of Management

What does the Committee of Management do?

The Committee of Management is ultimately accountable for the performance of the organisation. It is also responsible for overall governance by ensuring that the organisation complies with its legal obligations, that it is financially viable and there is appropriate management of risks.

It is therefore very important that committee members recognise and keep separate their own personal interests from those of the organisation. This applies even where your group is very small and the office holders /Committee of Management members are also the only members.

Who do these duties apply to?

Generally, the duties apply to members of the organisation's Committee of Management. If your incorporated association has office holders such as a secretary or public officer who are not on the Committee of Management, the duties may also apply to these people.

No matter how your organisation is structured, it is a good idea for all people involved in the governing of a community organisation to comply with the duties, as they represent best practice in the governance of an organisation.

It is worth noting that there is no such thing as a 'silent' or 'token' Committee of Management member. Even where (as is usually the case) committee members of not-for-profit organisations are not paid for their role and act in a voluntary capacity, they are still required to comply with the duties.

Tip: It is a good idea to make sure that new members of the Committee of Management are given a copy of the 'rules' of the organisation as part of their induction, and understand their roles and responsibilities. You should also make sure that the 'Public Officer' is aware of their formal responsibilities under the *Associations Incorporation Act*.

What are the legal duties of office holders under Victoria's *Associations Incorporation Act*?

The fundamental point to remember is that a Committee of Management member has an obligation to act in the best interests of the organisation, even if this is not in the committee member's own personal best interests. As noted above, some of the duties of Committee of Management members are set out in the legislation and some are imposed by the law generally.

The duties set out below are found in section 29A - 29C of Victoria's *Associations Incorporation Act*.

Duty not to make improper use of position

If you are a member of the Committee of Management of an incorporated association, you must not knowingly or recklessly make improper use of your position to financially benefit yourself or another person, or to harm the association.

Duty not to make improper use of information

If you are a member (or even a former member) of the Committee of Management of an incorporated association you must not knowingly or recklessly make improper use of information you have gained in the position to financially benefit yourself or another person, or to harm the association.

Example 1: If a member of the Committee of Management obtained information about an upcoming government tender for which the organisation is applying, it would be an improper use of his or her position, and information gained in the position, to then use that information to help with a tender application on behalf of, for example, another not-for-profit organisation or a business owned by a family member.

Example 2: It is a breach of duty for a committee member to use information that the organisation holds about its members for an unrelated personal reason.

For example, if a member of a child care centre Committee of Management used the financial details of families using the service to approach them about the committee member's own private business, this would almost certainly be an improper use of position as well as an improper use of information gained in the position. (Although not the subject of this fact sheet, such behaviour may also breach privacy laws).

Duty to disclose a conflict of interest

It is a conflict of interest if, as a member of a Committee of Management, has a private financial (pecuniary) interest, directly or indirectly, in a contract that the organisation is considering. If this occurs, the conflict of interest must be disclosed to the Committee as soon as the member becomes aware of it. The member will be permitted to take part in discussions about the contract but must not take part in any decision of the Committee with respect to that contract.

This does not mean that your organisation cannot have business dealings with committee members. But it does mean that the conflict of interest must be disclosed to the rest of the Committee of Management and that the committee member with the conflict should not vote on the contract.

Obligation to disclose to the Annual General Meeting (AGM)

Where a committee member has a conflict of interest as set out above, there is also an obligation to disclose the nature and extent of that conflict of interest in the statement presented by the organisation to its members at the AGM.

Direct and indirect pecuniary (financial interests) in a contract

A *direct* pecuniary interest in a contract is a financial interest held by the committee member personally. An *indirect* financial interest is one held by another party related to the committee member, such as by a family member or a company controlled by that member. Both direct and indirect financial interests may give rise to a conflict of interest.

Example: If an organisation proposes to enter into a contract with a committee member, or a company controlled by a committee member this may raise a conflict of interest. It may also amount to a breach of the committee member's duty to act in good faith in the best interests of the organisation (see further below)

For example, it might be suggested that the cleaning of the organisation's premises be done by a company controlled by a committee member. On the face of it, the committee member has a conflict of interest because she has a financial interest in the proposed contract. She should fully disclose the interest and not take part in committee's decision on the contract.

Tip: It is a good idea to have all members of a Committee of Management declare any ongoing conflicts of interest when they join the committee. As a Committee you can also encourage openness about declaring conflicts and make it a normal occurrence for directors to step out of meetings or abstain from voting when they have a conflict.

Duties imposed by the general (common) law

The following duties are not set out in the *Associations Incorporation Act* but are imposed on Committee of Management members by the common law generally. These common law duties are ones that the courts have recognised in cases over time.

Duties of good faith and loyalty to the organisation

These are sometimes called ‘fiduciary duties’. A ‘fiduciary’ is someone who stands in a position of trust and power over another. The law imposes fiduciary duties on Directors and Committee of Management members because they are considered to stand in such a position of trust and power in relation to their organisation.

There are several aspects to this duty of good faith and loyalty:

- ▶ you must act in good faith in the best interests of your organisation, even if this is not in your own best interests;
- ▶ you must act for a proper purpose, and never take advantage of your position as an office holder or information you have gained in the role for personal advantage; and
- ▶ you must avoid conflicts of interest between your own personal interests and the interests of the organisation.

Duty to exercise reasonable care and skill

A member of the Committee of Management is required to act with the skill and careful attention that a reasonable person in a similar position would bring to the role.

What if I have a special skill or qualification?

While you do not have to have special qualifications to be a member of a Committee of Management, if you do have a particular skill you are expected to make use of it. For example, if you are a qualified accountant you will be expected to utilise that skill in your role on the committee.

You should take care to ensure that you understand what the organisation is doing and inform yourself properly about any decisions that need to be made. You should make decisions that you rationally believe to be in the best interests of the organisation.

Can I rely on the advice of others?

If you are relying on information or advice from a manager or employee of your organisation you should make sure you are satisfied that it is reasonable to rely on the information or advice. If you are not satisfied with information provided by the organisation's managers or employees you should make further investigations.

This obligation to understand and assess information for yourself (rather than just rely on the advice of the treasurer or manager for example) applies to financial reports as well as more general information about the organisation's activities.

Tip: Read the Management Committee papers and ask questions if anything is unclear! As a member of the Committee of Management you should make sure you take reasonable steps to place yourself in a position to monitor the activities and management of your organisation.

Obligation to prevent insolvent trading

As part of the duty to exercise reasonable care and skill, it is generally accepted that Committee of Management members have an obligation to prevent their incorporated association from trading while insolvent.

Your incorporated association will be 'insolvent' if it cannot pay its debts. Your incorporated association should not incur any new debts if it is unable to meet its existing debts. If you suspect, or have reasonable grounds to suspect, that your incorporated association cannot pay its debts when they fall due, you should stop and get professional advice immediately.

A Committee of Management member may be in breach of their legal duties if they let an incorporated association continue to operate while insolvent. The committee member could be personally liable, even though the organisation is incorporated and generally has limited liability.

Beware: If your organisation has registered with ASIC as an 'Australian registerable body' (some incorporated associations are required to register with ASIC so they can carry on their activities in another State), the Committee of Management members are explicitly required by Part 5B.2 of the *Corporations Act 2001* (Cth) to comply with the 'directors' duties' provisions in Part 2D.1 of that Act. If you think your organisation may fall in to this category, you may need to seek further legal advice. For more information about directors duties, see the Related Resources section below.

Penalties for breach of the duties

A fine may be imposed for breach of the duties set out in the *Associations Incorporation Act* (sections 29A-C). In addition, if a person is found guilty of making improper use of information or their position the court may order them to pay compensation to the organisation.

While legal cases involving office holders of not-for-profit organisations are uncommon, it is important to bear in mind that serious penalties including fines, orders to pay compensation to the organisation and orders barring a person from management of an organisation may be imposed by the courts.

How do I comply?

While you should be aware of the duties of members of a Committee of Management, you should not let them prevent you from contributing to the work of your organisation by serving on the Committee of Management as a member or office bearer.

Generally you will fulfil your duties if you:

✓	act honestly and diligently
✓	act with reasonable care in the best interests of your organisation
✓	never take advantage of your position for personal advantage
✓	never use information gained to benefit yourself, your family, an associate or another organisation
✓	always disclose any conflict
✓	comply with the terms of your organisation's constitution or rules (constituent documents)

Related Resources

Related PilchConnect fact sheets

PilchConnect fact sheet: Duties of directors in a company limited by guarantee

Related legislation

Associations Incorporation Act 1981 (Vic)

Corporations Act 2001 (Cth)

Related links

For online legal information resources for Victorian community organisations about:

- ▶ the people involved in an incorporated association see www.pilch.org.au/positionsia
- ▶ the people involved in a company limited by guarantee see www.pilch.org.au/positionsclg
- ▶ information about financial insolvency see www.pilch.org.au/financial