



GUIDE TO LEGAL DUTIES OF COMMITTEE MEMBERS

GENERALLY

SOURCES: https://www.nfplaw.org.au/sites/default/files/media/Duties_Guide_CTH_2.pdf;

www.ncoss.org.au/sites/default/files/public/resources/Roles_Responsibilities.pdf

www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/about-associations

© State of New South Wales (NSW Fair Trading). For current information go to fairtrading.nsw.gov.au

The *Associations Incorporation Act 2009 (NSW) (AI Act)*, and the *Associations Incorporation Regulation 2016 (AI Regulation)*.

CURRENT as at August 2019.

COPYRIGHT: © Carmen Champion This document may only be reproduced for the purposes of U3As in Australia.

DISCLAIMER: This information was created in August 2019 using the above-identified sources. The material in this guide is of a general nature and should not be regarded as legal advice or relied on for assistance in any particular circumstance. In any important matter, you should seek appropriate independent professional advice in relation to your own circumstances.

U3A Network NSW Inc accepts no responsibility or liability for any damage, loss or expense incurred as a result of the reliance on information contained in this guide.

NOTE: failure to comply with the provisions of the AI Act may attract a pecuniary penalty identified as a penalty point. Section 91 of the AI Act provides:

Offences by committee members.

(1) If an association contravenes, whether by act or omission, any provision of this Act or the regulations, each committee member of the association is taken to have contravened the same provision if he or she knowingly authorised or permitted the contravention.

(5) For the purposes of this section, an association's public officer (not otherwise being a committee member) is taken to be a committee member.

As of January 2019 one penalty point equates to \$110 (s 17 of the *Crimes (Sentencing and Procedure) Act 1999 (NSW)*).

Note: If your association is a registered charity, the ACNC's Governance Standards apply in addition to other sources of duties. See the ACNC's [Governance for Good](#).

A. The Constitution

Every incorporated association must have a constitution. This can be the NSW Fair Trading Model Constitution or the association's own constitution, which is recorded in the public register of incorporated associations, maintained by NSW Fair Trading.

What does it do: it governs the relationship between the association and its members¹. It is a contract that binds both the association and its members to abide by its terms².

B. The Management Committee (MC)

An association must have a management committee³ with at least 3 members. Each member must be aged 18 years or over, and at least 3 members of the committee must reside in Australia⁴. An association's registration may be cancelled for failure to comply with the aforesaid.

Note: the MC may only exercise such powers as are **not** required by the AI Act or the constitution to be exercised by the association in general meeting⁵.

Members of the MC must be familiar with the provisions of the AI Act, the AI Regulations and the association's constitution.

Role of the MC: the MC has two roles:

- a) The governance of the association; and
- b) The management of the association.

¹ section 26 of the AI Act.

² Section 26 of the AI Act.

³ Section 28(1) of the AI Act

⁴ Section 28(2) of the AI Act

⁵ Section 28 (3) of the AI Act, see www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/running-an-association/resolutions

“**Governance**” refers to the direction, control and accountability of the association. It attracts particular legal obligations (see below).

“**Management**” is concerned with the day to day management of the association.

Members of the MC must understand:

- a) The role of the MC⁶;
- b) The legal obligations of committee members⁷: section 30A of the AI Act;
- c) The personal liability of committee members⁸: section 30B of the AI Act; and
- d) What they need to know about their association.

The legal obligations⁹ consist of ensuring that:

- a) the aims, objectives and rules of the organisation are observed, the compliance with any laws, especially the AI Act and the AI Regulations;
- b) the association meets its contractual obligations;
- c) the association keeps accurate financial records, and
- d) the association can pay its debts.

A breach of the AI Act may attract a pecuniary penalty (usually identified by reference to the term “penalty unit”). A penalty unit is a number used to equate one unit to a monetary amount. For example, if an offence attracts a penalty of 20 penalty units, in NSW this would currently equate to 20 x \$110 which = \$2,200.

Note: Section 91 of the AI Act provides:

(1) If an association contravenes, whether by act or omission, any provision of this Act or the regulations, each committee member of the association is taken to have contravened the same provision if he or she knowingly authorised or permitted the contravention.

(2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the association has been proceeded against or convicted under that provision.

(3) In the case of a contravention of section 40 (Association not to provide pecuniary gain for its members), each person who, pursuant to subsection (1), is taken to have contravened that section is, together with the association, jointly and severally liable for all debts incurred by the association as a consequence of that contravention.

⁶<https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/associations/running-an-association/management-committee>

⁷ https://www.nfplaw.org.au/sites/default/files/media/Duties_Guide_CTH_0.pdf

⁸ https://www.nfplaw.org.au/sites/default/files/media/Duties_Guide_CTH_0.pdf

⁹ https://www.nfplaw.org.au/sites/default/files/media/Duties_Guide_CTH_0.pdf

(4) Nothing in this section affects any liability imposed on an association for an offence committed by the association under this Act.

(5) For the purposes of this section, an association's public officer (not otherwise being a committee member) is taken to be a committee member.

Note: Division 1A of the AI Act makes certain acts "offences.

If an association incurs a debt while insolvent (or that causes it to become insolvent), a committee member who had reasonable grounds to suspect that the association was insolvent (or would, by incurring the debt, become insolvent) commits an offence under section 68 (1).

If a committee member knowingly authorises or permits an association to contravene a provision of this Act or the regulations, the committee member is also taken to have contravened the provision: see section 91.

Note: even people not elected to the MC may be bound by the above obligations. They include, inter alia, people who are in a position of control or influence within an organisation.

C. **What Are the Legal Duties of Committee Members**¹⁰.

The law considers the relationship between a committee member and the association as one of 'trust' (the legal term is a "fiduciary relationship"). That relationship of "trust" requires committee members to act, at all times, in the best interests of the association and its members.

A legal duty is an action that you are required by law to take. Personal liability for failure to comply with a duty can be avoided if the matter or thing was done or omitted in good faith for the purposes of the association¹¹.

The duties imposed upon committee members consist of:

- a) **The duty to act in good faith:** "In good faith" means that you must act honestly, fairly and loyally when making decisions for your association.

Only make decisions which help your association to achieve its purpose or objective as set out in the Constitution.

Do not make decisions based on your own personal interests, preferences or the interests of a third party. **Ask yourself:** 'Am I truly deciding this issue based on what is in the best interests of the current and future operation of this association.

Apply the '*how will it look later*' test – if someone was to analyse this decision later, would they think 'This was the decision of a reasonable, honest person who, with the

¹⁰ Section 30A of the AI Act

¹¹ Section 30B of the AI Act

knowledge they had at the time, was trying to act in the best interests of the organisation'? Or could they possibly come to the conclusion that the decision was irrational, partial, and dishonest or made for some ulterior motive?

- b) **the duty to act with reasonable care, skill and diligence.** This duty requires you to:
- i. take your role as a committee member seriously,
 - ii. give sufficient time, thought and energy to any tasks you have undertaken and to decisions you are required to make,
 - iii. understand your association's current financial position at all times, and
 - iv. prevent your association from continuing to incur debts if you know or suspect that it cannot meet its current debts when they fall due (commonly known as the 'duty to prevent insolvent trading').

A decision about a matter will be considered to be made with reasonable care if the MC can show that:

- i. the decision was made in good faith and for a proper purpose;
- ii. none of the members of the MC had a material interest in the subject matter of the decision,
- iii. the members of the MC informed themselves about the subject matter to an appropriate extent, and
- iv. the members of the MC rationally believe that the judgment was in the best interests of the association.

A key aspect of the duty of reasonable care and diligence is members of the MC's legal responsibility to understand the finances of their association: see below.

- c) **The duty not to improperly use information¹² or position¹³.** A current or former committee member must not make improper use of their position as a committee member, or of information they obtain through their position as a committee member to either, gain an advantage for themselves or any other person or organisation, or cause detriment to their association. This duty is ongoing.
- d) **Disclosure of interests¹⁴.** If a committee member has a direct or indirect interest in a matter being considered or about to be considered at a committee meeting, and the interest appears to raise a conflict with the proper performance of his or her duties in relation to the consideration of the matter the committee member must, as soon as possible after becoming aware of this interest, disclose the nature of the interest at a committee meeting.

¹² Section 32 of the AI Act

¹³ Section 33 of the AI Act

¹⁴ Section 31 of the AI Act

The committee must deal with any disclosure of interest as required by section 31 of the AI Act. The details of the interest must be recorded in the committee meeting minutes and in the Register of disclosed interests.

Unless the committee determines otherwise, the committee member cannot: be present while the matter is discussed at the committee meeting or take part in any decision of the committee with respect to that matter.

D. **Compliance with Statutory and Reporting Obligations**

Committee members and the public officer are primarily responsible for ensuring an incorporated association complies with its statutory and reporting obligations. Failure to comply with these obligations may lead to the issue of a penalty notice, prosecution, or in some instances, cancellation of the association's incorporation.

E. **General /Financial Obligations**

NFP Association & Pecuniary Gain¹⁵.

An NFP association must not secure a monetary gain for its members. Committee members have a duty to ensure that any profits made by an association are only used to further the objects for which the association was established, and which are identified in the constitution.

Section 5 of the AI Act defines "pecuniary gain" as follows:

(1) An organisation provides "pecuniary gain" for its members if:

- (a) it carries on any activity for the purpose of securing pecuniary gain for its members, or*
- (b) it has capital that is divided into shares or stock held by the organisation's members, or*
- (c) it holds property in which the organisation's members have a disposable interest (whether directly, or in the form of shares or stock in the capital of the organisation or otherwise), or*
- (d) it is an organisation that is, or is included in a class of organisations that is, prescribed by the regulations for the purposes of this subsection.*

(2) For the purposes of subsection (1) (a), an organisation does not provide pecuniary gain for its members merely because of any of the following:

- (a) the organisation itself makes a pecuniary gain, unless that gain or any part of it is divided among or received by the organisation's members or any of them,*
- (b) the organisation is established for the protection of a trade, business, industry or calling in which the organisation's members are engaged or interested, but the organisation itself does*

¹⁵ Section 40

not engage or take part in, or in any part or branch of, any such trade, business, industry or calling,

(c) members of the organisation derive pecuniary gain through the enjoyment of facilities or services provided by the organisation for social, recreational, educational or other like purposes,

(d) members of the organisation derive pecuniary gain from the organisation by way of bona fide payment of remuneration,

(e) members of the organisation derive pecuniary gain from the organisation of a kind which they could also derive if they were not members of the organisation,

(f) members of the organisation compete for trophies or prizes in contests directly related to the objects of the organisation,

(g) the organisation provides pecuniary gain of a class prescribed by the regulations for the purposes of this section.

Associations can retain profits (instead of applying it towards their purpose), as long as there is for a genuine reason for this related to its purpose. By contrast, if an organisation continues to retain significant profits indefinitely without applying this to its purpose, this may indicate that the organisation is not working solely towards its stated purpose.

What financial records does our organisation have to keep? The AI Act requires incorporated associations to keep records which correctly record and explain its financial transactions and financial position. These records are intended to be kept for the preparation of appropriate financial statements. Where the records relate to a Tier 1 Association, they must be kept in accordance with Australian Accounting Standards.

Can't we just leave all this financial stuff to the Treasurer? No - the law is clear that all members of the committee are responsible for managing the association's finances, not just the treasurer. Each committee member is, in fact, jointly responsible for managing the finances of the organisation, and satisfy themselves that the financial statements give a 'true and fair' view of the association's financial affairs.

Duties of the Treasurer

The treasurer is generally charged with the task of ensuring that financial transactions are properly recorded and reported, and the presenting of financial reports at committee meetings. It is important that these reports are easily understood by all the committee members. In particular, the treasurer must ensure that the MC approves or ratifies all payments made, that

details of all payments are recorded in the minutes, and that the association keeps all financial records in NSW.

Committee Meetings/Association's Financial Health

Every meeting should have in front of it something that gives a picture of the association's then current financial state of health.

As soon as practical after the end of an association's financial year, the MC must ensure that final financial statements are prepared and accepted by it. The financial statements of a Tier 2 incorporated association must give a **true and fair view** of its financial performance and position during and at the end of the financial year. Those of a Tier 1 association must be audited.

An association must present its completed and approved financial statements to members at the annual general meeting (AGM).

F. Miscellaneous Obligations

Association Records: The MC must ensure the association keeps and maintains the records required by the Act or otherwise required for the efficient running of the association.

Public officer: the MC must appoint a public officer who is over 18 years of age and a resident of New South Wales. The public officer is, by virtue of that office, an authorised signatory for the association. The MC must fill the office of public officer within 28 days of a vacancy. The new public officer must advise Fair Trading of the details of the appointment within 28 days of taking office.

A former public officer must ensure that all documents of the association in their possession are delivered to a committee member within 14 days of vacating office.

The public officer must advise Fair Trading of a change of official address within 28 days after the current address becomes obsolete or unusable.

Official address: the official address must be an address in NSW at which the public officer can generally be found, and at which documents can be served on the association by post.

The official address cannot be a post office box.

The public officer must advise Fair Trading of a change of official address within 28 days after the current address becomes obsolete or unusable.

Obligations under any other legislation? Associations must comply with any relevant State and Commonwealth legislation that applies to its operations.

Visit the following organisations' websites for more information:

- Australian Charities and Not-for-profits Commission www.acnc.gov.au
 - Australian Taxation Office www.ato.gov.au
 - Information and Privacy Commission www.ipc.nsw.gov.au
 - Anti-Discrimination Board of NSW www.antidiscrimination.justice.nsw.gov.au
 - NSW Industrial Relations (employment) www.industrialrelations.nsw.gov.au
 - Fair Work Ombudsman (employment) www.fairwork.gov.au
 - SafeWork NSW www.safework.nsw.gov.
-