

RIGHTS AND RESPONSIBILITIES

COMMITTEE AND OFFICER DUTIES

On 1 July 2016 the *Associations Incorporation Act 2015* (the Act) commenced replacing the previous *Associations Incorporation Act 1987*. The Act provides for the regulation of incorporated not-for-profit organisations in Western Australia.

The Act formalises the obligations of committee members and officers, which already existed under common law and reflect general community expectations about good governance practices. These duties include:

- duty of care and diligence;
- duty of good faith to act in the best interests of the association and for a proper purpose;
- duty not to misuse their position;
- duty not to misuse information; and
- duty not to allow the association to trade while insolvent.

WHO DO THESE DUTIES APPLY TO?

Every incorporated association has a management committee or board that has the power to manage the affairs of the association and an obligation to ensure that it complies with its legal responsibilities.

Depending on an association's structure and activities there may also be other people involved who do not hold a formal committee position but are in a position to influence the management committee. The Act recognises these individuals as 'officers' of an association.

The duties detailed in the Act are applicable to:

- a member of the management committee of the association;
- a person who makes or participates in making decisions that affect the whole/substantial part of the association's operations such as a chief executive officer, financial controller, manager;
- a person who has the capacity to significantly affect the association's financial standing;
- a person whose instructions, or wishes, the management committee is accustomed to following. For example a former office holder, a patron or another organisation (such as a peak body or another affiliated association). This excludes advice given by a person in a professional capacity such as an accountant, auditor, financial planner or lawyer.

DUTY OF CARE AND DILIGENCE

Discharging a duty of care and diligence can involve a committee member or officer:

- being prepared for meetings (reading any papers and the financial statements);
- broadly understanding the financial position of the association;
- following up on action items;
- keeping themselves informed about the association's operations and activities;
- asking questions; and
- taking steps to ensure that the association meets its obligations under other laws, for example occupational health and safety, taxation and employment.

Anyone looking to improve their knowledge of these obligations should refer to the Department's good governance INC Guide available to browse and download from www.consumerprotection.wa.gov.au/inc-guide.

ARE THERE ANY DEFENCES AGAINST CLAIMS OF A BREACH OF DUTY?

There are defences to ensure that committee members and officers who act in good faith are protected even if an unfortunate result is produced.

For example:

- where an officer has reasonably relied on information or expert advice from certain persons in good faith; or
- after making an independent assessment of the information and given their own knowledge of the association's structure and complexities.

Information or advice may be provided by:

- an employee who the officer believed to be reliable and competent in relation to the matters;
- a professional advisor or expert in relation to matters that the officer believed to be within their competencies. i.e. accountant, lawyer, financial planner, auditor;
- another officer of the association in relation to matters within their authority – i.e. asking the treasurer for information about particular financial activities or arrangements; and
- a subcommittee (that the officer was not a member of) in relation to matters within their authority.

DUTIES RELATING TO DEBTS AND INSOLVENCY

A committee member has a duty to prevent an association incurring debts while it is insolvent or in situations where the debt would cause it to become insolvent. This duty is breached if:

- an association incurs debt while it is insolvent or it becomes insolvent by incurring the debt;
- before incurring the debt there were reasonable grounds to expect that the association was already or would become insolvent by incurring the debt; and
- the person was a member of the committee at the time the debt was incurred.

To fulfil their duty, committee members should all work to ensure that:

- accurate accounts are kept of the transactions, financial position and performance of the association; and
- the association's solvency status is monitored on an ongoing basis.

Allowing an association to operate while insolvent is a serious matter with significant penalties. However, it should be noted that a breach of this duty would not make a committee member personally liable for the association's debts.

MORE INFORMATION

INC GUIDE

You may wish to refer to the Management Committee chapter of the INC Guide for more information. The INC Guide is available at www.consumerprotection.wa.gov.au/inc-guide.

SELF CHECK

The Incorporated Associations Health Checklist provides a summary of the main obligations under the Act. Download the checklist at www.consumerprotection.wa.gov.au/associations-and-clubs.

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