

Duties Guide

Guide to the legal duties of not-for-profit committee members, directors and office holders

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Part A

Introduction

Introduction

This part covers:

- ▶ the origins of legal duties
 - ▶ the role of a committee member, and
 - ▶ what not-for-profit organisations are covered in this guide
-

This guide is about the legal duties that apply to people involved in governing not-for-profit organisations in Australia – that is, people who sit on a committee or board, or are office holders (people with control and influence over the governance of an organisation, even if they don't hold an official position).

As a committee member of a not-for-profit organisation, most of your functions are likely to be non-legal.

The main role of a committee member is to:

- help the organisation pursue its purpose
- make key decisions about planning, resources and strategic direction of the organisation, and
- (in larger organisations) recruit and support a chief executive to manage the organisation

You may also take on a special 'office' in the committee, like that of president, secretary or treasurer. Your tasks in these roles may include things like chairing meetings, keeping records up to date and maintaining the finances of the organisation.

However, in performing your main tasks as a committee member, there are some legal duties that you need to keep in mind. These legal duties are not onerous – in many ways they are just simple ethical principles you may think of as 'common sense' or 'good practice'. In many cases, when you are performing tasks on a committee, you will be complying with the legal duties without even thinking about them. However, it's a good idea to know what the duties are so that, in the event of any difficult situations, you can be sure to act in compliance with the law.

So, the focus of this guide is not on your main tasks as a committee member, but rather on the legal duties that underlie the way you perform your role.



Keep the legal duties in perspective

Reading about legal issues can be overwhelming, but don't let worries about legal issues stop you from being an active, involved committee member or from enjoying your role.

While reading this guide, remember – the vast majority of not-for-profit organisations carry out their activities without any issues and legal actions against committee members are rare.

You might like to think of this guide like a microscope – focusing on one small aspect of your role on the committee so we can look at it in more detail.

The aim of the guide is to explain the legal duties so you can perform tasks as an informed committee member.

We have simplified the main duties and make them easy to remember by explaining them under four main headings (refer to the heading below, 'How is the guide structured?'). We have also provided tips, examples and case studies to help you understand how the duties might arise in your organisation and to help you comply with the duties.

Sometimes, no matter how careful you have been, things go wrong. As a committee member you will need to know what to do. The guide includes a section about the consequences of the breach of a duty, the penalties that might apply if a breach is found, and the protections (for example, insurance) that committee members can get to shield themselves as much as possible from the consequences of a breach.

What not-for-profit organisations does this guide cover?

This guide is for all people who are involved in governing a not-for-profit community organisation, that is:

- community groups that are not incorporated ('unincorporated groups')
- incorporated associations
- co-operatives
- companies (generally companies limited by guarantee (CLGs)), and
- Indigenous corporations



Note – registered charities

Not-for-profits that are also registered as charities with the Australian Charities and Not-for-profits Commission (ACNC) must comply with a set of [Governance Standards](#), including duties equivalent to those discussed in this guide.

You can check if your organisation is a registered charity on the [ANC charity register](#).

If your organisation is a charity – after reading the general information in this guide – read Part E to understand the duties and obligations that apply to your organisation and its committee members.

In general, if your organisation and its committee members are meeting the duties set out in this guide, they are likely to satisfy the duties set out in the Governance Standards.



Note – unincorporated groups

This guide outlines legal duties that apply to committee members of incorporated groups, such as CLGs, incorporated associations and co-operatives.

Legal duties don't always apply to groups of people who are simply acting together (for example, as a committee that is not part of an incorporated group).

There are no specific statutory duties imposed on committee members (or other members) of groups without a formal legal structure unless they are registered as charities (see Part E of this guide). Other duties (like common law duties) that are imposed on members of unincorporated groups will depend on the circumstances and the nature of the relationship between the individual people and the group. In some cases, duties like 'director's duties' may apply. The more formal the group and the more responsibility members have, the more likely it is that duties will apply.



This guide

In general, very similar legal duties apply to these main not-for-profit legal structures. Where differences occur, we have noted them throughout the guide.

The legal duties discussed in this guide apply to all committee or board members of the organisations listed above.

The legal duties also apply in some cases to people involved in an organisation, even if they don't hold an official position on the committee or board. This happens where they are involved in key decisions and have control or influence over the affairs of the organisation (this could be a member of the organisation, or a senior employee). The law considers that a person with this level of influence should comply with the same duties as a committee member.

Some duties also continue to apply to committee members after they end their role, in particular duties relating to the use of information they received due the role they held in the organisation.

How is the guide structured?

The guide sets out:

- where the legal duties come from, who has to comply with them and why (**part B**)
- details of the four main legal duties all committee members must comply with (**part C**)
- potential consequences of not complying with your legal duties (**part D**)
- the possible protections (for example, insurance) that are available for committee members (**part D**)
- important information about the ACNC's Governance Standards which apply to registered charities (**part E**), and
- a brief outline of some of the other legal duties that committee members may need to comply with (**part F**)

At the end of this guide, there is a glossary of common terms used in the guide and a number of tables summarising the key provisions of the relevant legislation in each jurisdiction.



Why does the guide use the term 'committee' and not 'board'?

Many names are used to describe the 'governing body' of a not-for-profit organisation. The most common names are 'committee' (often used for incorporated associations) and 'board' (often used for companies limited by guarantee, Indigenous corporations and co-operatives).

The description of your governing body makes no difference legally.

The legal duties explained in this guide apply to the people on the governing body of your organisation no matter what it is called.

Similarly, different names are used to describe the governing documents of an organisation (such as 'rules' or 'constitution').

We have chosen to use the terms 'committee' and 'rules' throughout this guide. When reading this guide, you can substitute the relevant name used in your not-for-profit.

In this guide we use	The equivalent name used by your organisation might be
committee	committee of management, board, council, governing body
committee member	board member, director, councillor, trustee, office holder, 'responsible person' (of a charity)
rules	constitution, rule book, trust deed



Part B

**Background information about legal
duties**

Background information about legal duties

This part covers the four main legal duties:

- ▶ duty to act in good faith
- ▶ duty to act with reasonable care, skill and diligence
- ▶ duty not to improperly use information or position, and
- ▶ duty to disclose and manage conflicts of interests

What is a legal duty?

A legal duty is an action that you are required by law to take.

Do people involved in not-for-profit organisations have legal duties?

Yes! There is often a misconception that people who volunteer their time in not-for-profit organisations don't have to comply with any legal duties because they are 'volunteering'. This is wrong.

The legal duties outlined in this guide apply to all people who sit in a governance position in all not-for-profit organisations. It doesn't matter how small or informal your organisation is, how many members it has, or how many days or years of experience you have as a committee member. The legal duties apply to all committee members regardless of their organisation's purpose or size.

As explained in the introduction to this guide, the good news is that the legal duties are usually easy to fulfil. Nonetheless, it's important to remember that the duties are legal requirements. This means you must comply with the duties – if you don't, you could be legally responsible and penalties can apply.

Why do committee members have particular legal duties?

The law says that the relationship between a committee member and the organisation is one of 'trust' (the legal term is a 'fiduciary relationship'). There are many examples of these kinds of legal relationships in the community



Recognised 'fiduciary' relationships

- the relationship between a doctor and their patient
- the relationship between a lawyer and their client
- the relationship between an executor of a will and the beneficiaries under that will, and
- the relationship between a committee member and an organisation's members (as a whole)

In these kinds of relationships, the law says that people who are in a position of 'trust' must act in the best interests of those who have trusted them.



As a committee member you are trusted to make decisions on behalf of the organisation. Effectively, the members are entrusting the steering of the organisation to you while you are on the committee. In return, by becoming a committee member you agree to act in the best interests of the organisation and are accountable for the decisions you make. Over time, the law has formed these notions into 'legal duties'.

Where can I find these duties written down?

These legal duties come from two main sources of law:

- the common law (sometimes referred to as 'general law' or 'judge-made law'), and
- legislation (sometimes referred to as 'statute', 'parliament-made law' or 'acts')

The common law is an older source of law, and many of the legal duties found in common law have now been written into legislation. However both can still apply.

If your organisation is incorporated, the common law still applies to your committee – but you will also be subject to the legislative duties in the act under which your organisation is incorporated. If your organisation is an unincorporated group, the common law applies to you.



This guide

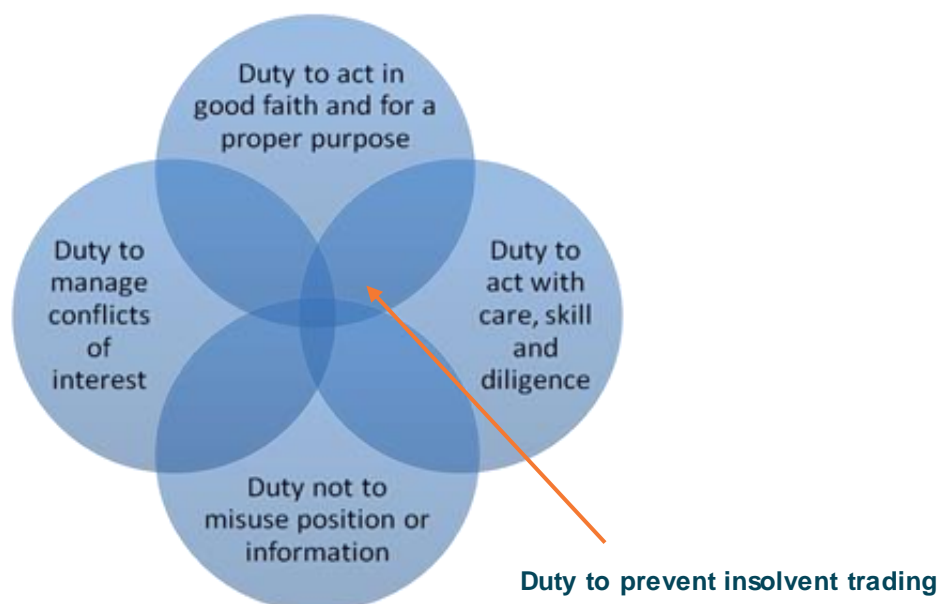
Rather than split the duties into their common law or legislative sources, in this guide, we will tell you about the general content of the four main legal duties and how to comply with them.

What are the legal duties that committee members have to comply with?

The four main legal duties are:

- the duty to act in good faith in the best interests of the organisation and for a proper purpose
- the duty to act with reasonable care, skill and diligence (including the duty to prevent insolvent trading)
- the duty not to improperly use information or position, and
- the duty to disclose and manage conflicts of interest

Each of these duties is explained in more detail in part C of this guide. Although we look at them separately, in reality the duties often overlap. A number of different duties might apply in one situation. For example, failing to act for a proper purpose can also be a breach of the duty not to misuse one's position. You might like to think of them like this:





Note on insolvent trading

Under acts (laws) that apply to certain types of legal structures (for example, companies) there is an express duty to avoid insolvent trading (see 'Duty to prevent insolvent trading' in part 2 of this guide). No matter what your organisation's legal structure, it is sensible to see the duty to prevent insolvent trading as a 'sub-duty' – acting with due care, skill and diligence includes not letting your organisation continue to operate when it can't pay its debts.

Who has to comply with the legal duties?

Any person who is on the 'governing body' of an organisation must comply with these duties.

If you have been elected to (or invited to) a position on the committee of an organisation, you are part of the governing body of the organisation and you must comply with these duties. This includes all office holders (such as chairperson, president, treasurer, secretary), as well as ordinary committee members.

The law also recognises a number of other people who may also be considered part of the 'governing body' of the organisation, even though they are not officially committee members. These include:

- people who are in a position of control or influence within the organisation
- people who participate in making key decisions that affect the operations of the organisation
- people whose instructions or wishes the other committee members are accustomed to act on (excluding people who are asked to provide professional advice), and
- people who have the capacity to significantly affect the organisation's financial standing

These people are sometimes known as 'honorary', 'shadow' or 'de facto' committee members.



Example - a founder who remains heavily involved

In 2001, you founded a not-for-profit organisation that provides support to children with a particular illness. You were a member of the committee of the organisation for ten years until you retired last year. Although you are no longer officially a committee member:

- you still regularly attend committee meetings
- committee members regularly seek your opinion, and
- no major decisions are made without your involvement

In this case, because you are a person on whose instructions and wishes the other committee members are used to acting, you may still be considered a member of the governing body of the organisation. You will need to comply with the legal duties explained in this guide.

Also, in some cases the senior officers of an organisation, like a manager, coordinator, chief executive officer (CEO) or executive director can be considered part of the 'governing body'.

While throughout this guide we refer to duties applying to committee members – remember the law says that anyone who effectively 'directs or controls' the organisation must comply with these legal duties. If you are unclear about whether these legal duties apply to your role, seek legal advice.



Other sources of duties and personal liability for committee members

Although being involved with an incorporated not-for-profit organisation offers many general protections to the individual people involved in governing the organisation, there are some laws in Australia (in addition to the four main duties of committee members) that can apply to committee members or managers personally.

Examples include competition and consumer law, occupational health and safety, employment law, environmental law and tax law. If an organisation doesn't meet its obligations under these laws, committee members can be personally responsible (as well as the organisation).

It's important to remember that action being taken against committee members is unusual, and is usually reserved for only the most serious breaches. However, committee members and managers should be aware of laws that can apply to them, and ensure plans to minimise risks of a breach of these laws are in place.



Note – Director Identification Numbers

Directors are now required to have a Director Identification Number (**DIN**).

Who needs a DIN?

If you are a director of any of the following organisations, you must have a DIN:

- a company (for example, a company limited by guarantee registered under the *Corporations Act 2001* (Cth))
- an Indigenous corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)
- a corporate trustee (for example, of a self-managed super fund)
- a Registrable Australian Body (**RAB**) (for example, an incorporated association that is registered with the Australian Securities and Investments Commission as a RAB)
- a foreign company registered with ASIC that carries on business in Australia

A director must apply for their DIN themselves because they will need to verify their identity. This application is made through a new [Australian Business Registry Service](#).

When must a director apply for a DIN?

When a director must apply for a DIN depends on the date they become a director.

A director under the *Corporations Act 2001* (Cth) must apply for a DIN:

- by 30 November 2022 if they became a director on or before 31 October 2021
- within 28 days of appointment if they became a director between 1 November 2021 and 4 April 2022, or
- before appointment as a director if they become a director from 5 April 2022

A director under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) must apply for a DIN:

- by 30 November 2023 if they became a director on or before 31 October 2022, or
- before appointment as a director if they become a director from 1 November 2022

For more information, see the [Australian Business Registry Services webpage on 'who needs to apply for a DIN and when'](#).



Part C

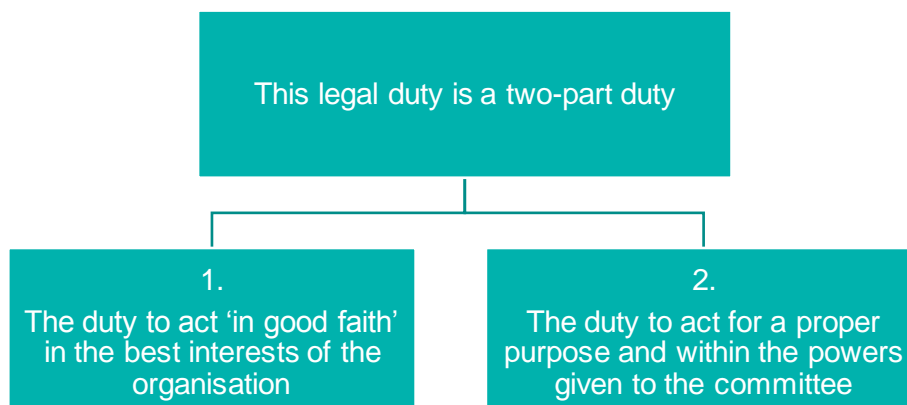
The four key duties in detail

The four key duties in detail

This part covers the four key duties in detail:

- ▶ duty to act in good faith and for a proper purpose
 - ▶ duty to act with reasonable care, skill and diligence
 - ▶ duty not to misuse information or position, and
 - ▶ duty to disclose and manage conflicts of interest
-

Duty 1– the duty to act in good faith and for a proper purpose



Duty to act in good faith in the best interests of the organisation

The phrase 'in good faith' is generally accepted to mean that you must act honestly, fairly and loyally when making decisions for your organisation.

As a committee member, it's important that your decisions are made based on what is best for your organisation. To do this, you should have regard to the purpose of the organisation and its membership as a whole, as well as its finances and operations. You should not be making decisions based on your own personal interests, preferences or alliances or those of other people or organisations you may be involved in.

In some cases, you may be in a situation where you have been elected to a committee by a 'group' or 'sector' or 'region', who might expect you to represent their interests. The duty to act in the best interests of an organisation overrides any duties you may have to particular groups of people.



When might you be on a committee as a 'representative'?

Common situations could include:

- You have been nominated by your employer to sit on the committee of your sector's peak body. While you may tell the peak body committee about the concerns of your employer and the sub-sector you work in, your ultimate duty on the peak body committee is to make decisions that are in the best interests of the peak body as a whole and all peak body members.
- You have just been elected to the committee of a state-wide organisation. People in your region keep saying it is great because you will be able to 'represent' the region at the state level. While you may tell the other state committee members about the concerns of people in your region, your ultimate duty is to make decisions that are in the best interests of the state-wide organisation, rather than your region.
- A not-for-profit is funded by your employer. As a result the not-for-profit has given the funder a position on the committee, which you have been asked to fill. In this case, your duty is to make decisions in the best interests of the not-for-profit organisation – not what might suit your employer.

As a committee member it's important that you don't allow another person or organisation (including any people or organisations that elected you to the committee) to dictate how to vote at committee meetings.

Duty to act for a proper purpose

This is the second part of the duty. As a committee member you must use your powers for the purpose for which they were given, and not for any other purpose. Again, this means not using your powers to obtain an advantage for yourself or someone else and, in particular, making decisions which help the organisation to achieve its purpose or objective - that is, 'what the organisation is set up to do'.



Example

If you are on the committee of a not-for-profit organisation that is set up for the purpose of helping rescue injured wildlife, a proposal to apply for a local grant to start a local childcare facility is unlikely to be within your organisation's purpose.

To ensure your committee is 'making decisions for the right purpose' be familiar with the aims and purpose of your organisation, so you can make decisions that guide your organisation towards achieving these aims.



Tips – complying with the duty to act in good faith and for a proper purpose

- Get a copy of your organisation's rules and make sure you understand the 'statement of purpose' or 'objectives' of your organisation. It's a good idea to have these documents at all committee meetings to check that decisions are in line with your organisation's purpose, and within your committee's powers.
- When making decisions, ask yourself – 'Am I deciding this issue based on what is in the best interests of the current and future operation of this organisation – or am I deciding this based on my own personal interests or in the interest of a select group of members or clients that I favour?'
- If you were 'appointed' to a committee by a particular organisation or group of members, remember that once on a committee your duty is to act in the best interests of that organisation, and not in the interests of those that appointed you. This doesn't prevent you from advising the committee about the views of those you represent.
- 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 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, dishonest, or made for some ulterior motive?
- There is a close link between the duty to act in the best interests of the organisation, and the duty to disclose and manage conflicts of interests. Consider whether some conflict of interest is involved in making a decision and whether action needs to be taken to disclose and manage an actual or perceived conflict of interests. See duty 4 below for more detail.

Case examples on the duty of good faith and proper purpose



The committee member versus the loud, young members

You are a long-serving member of the committee of a local, volunteer conservation group that aims to engage local residents in the preservation of a local habitat. Recently a group of local school girls became members and have started to regularly attend the organisation's weekend tree-planting activities. While many in the group have welcomed the girls, you and a few other members find them loud and annoying. You know if you could convince the committee to move its activities to weekdays between 9am and 3pm – perhaps justifying it on the basis that it would be safer to plant trees at this time – then you wouldn't have to put up with the school girls anymore.

The legal duty

As a committee member, your duty is to act in the best interests of your organisation (to engage local people in preservation activities), not for your own personal preferences, or in a way that may disadvantage one section of the membership. Though it is necessary to consider how your organisation's activities impact on the safety of the public, to continue with the plan of trying to move all activities to weekdays, for a 'sham' reason, may be a breach of your duty to act in good faith and for a proper purpose.



The person 'appointed' to a committee by another group

You are employed by a large government agency and have been asked by your employer to be their representative on the committee of a small, incorporated, faith-based organisation. The government agency you work for provides funding to the faith-based organisation to assist its work with local refugees. For this reason, the organisation has agreed to have a representative from the agency on its committee. At one committee meeting, the committee starts discussing a possible move to a new location. You know that this would not be the preference of your employer. You are confused – on the one hand, the move seems to be in the best interests of the not-for-profit organisation – but on the other hand, you were appointed by your employer, so shouldn't you be representing their interests?

The legal duty

While you may have come to be on the committee because of your employer, once you accept the position on a committee your legal duty is to act in the best interests of the organisation you govern – not any other organisation. To act or vote on 'behalf' of your employer organisation could be considered to be a breach of the duty to act in the best interests of the faith-based organisation - as well as acting for an improper purpose (for example, carrying out the policies or directions of another organisation).



A decision to close a client service

You are on the committee of an organisation which offers a number of services to people with a disability, including respite care. Your child has a disability and has received respite care services from the organisation for a number of years. Unfortunately the organisation has received major funding cuts and has to close one of its services. After looking extensively at the financial and operational evidence, overwhelmingly it seems that closing the respite care service is the most feasible option. You are obviously personally extremely disappointed with this news.

The legal duty

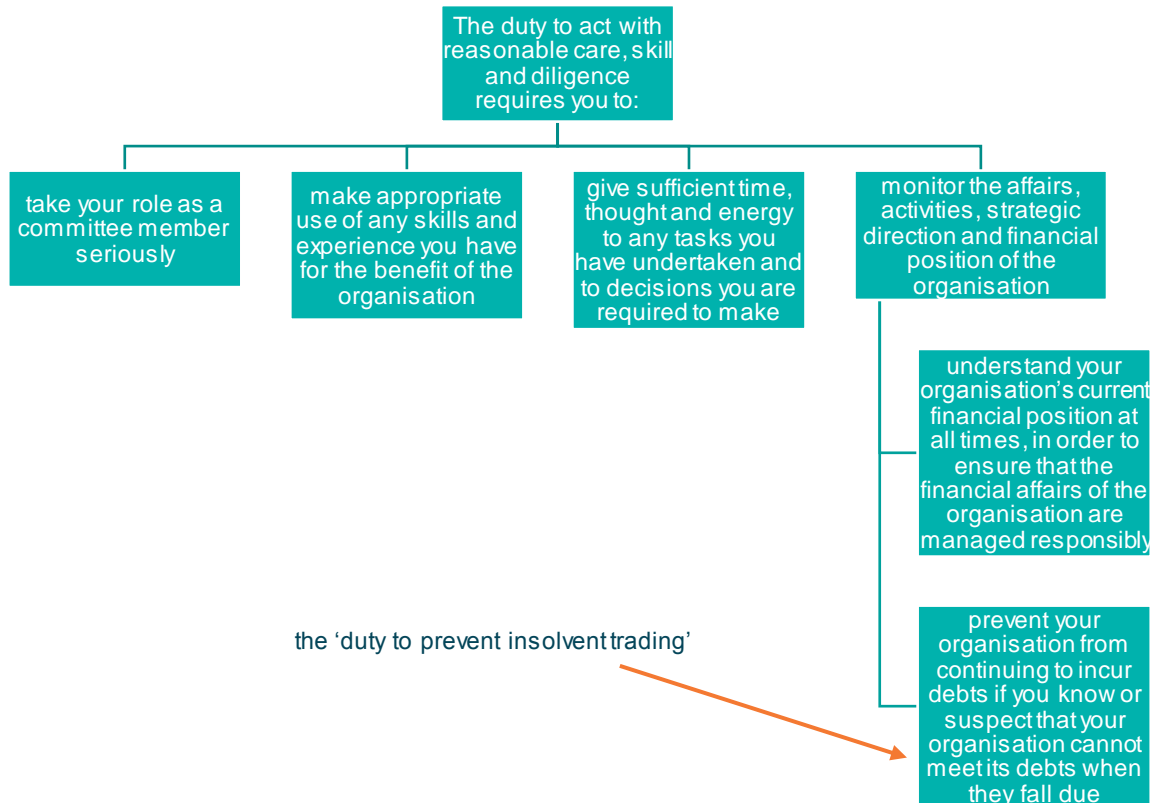
As a committee member you may be called on to make difficult decisions and sometimes these decisions may negatively affect your personal situation (for example, as a client). While you may ask questions and seek further information about alternative options, ultimately your legal duty is to make a decision in the best interests of the organisation's future – not in your or your child's personal interests.



Legislative resources

See the tables set out in part G for the specific sections in legislation that set out the duty to act in good faith and for a proper purpose.

Duty 2 – the duty to act with reasonable care, skill and diligence



Use of your skills and knowledge

Unless your organisation's rules say otherwise, you don't have to have any particular skills or qualifications to be a committee member. However, you do need to use whatever skills and experience you have for the benefit of the organisation and put reasonable effort into tasks you take on.



Examples

- If you are a nurse on the committee of a community health service, you don't need to use your skills to provide medical services to individual clients – but you do need to use your knowledge to help the committee make good decisions about health service provision.
- If you are a builder on the committee of a not-for-profit emergency housing provider, you don't need to be out fixing houses – but you should advise the committee on any basic issues on maintaining safe building standards.

If your committee doesn't have the required skills on a particular matter, this duty means you need to seek help from someone who does. For example, your committee may need the advice of an accountant or auditor to explain a complex financial matter.

Reasonable care, skill and diligence

As a committee member, you must take your responsibilities seriously and put the required effort into the tasks you take on. Committee members who act diligently will be well prepared for meetings, and will make sure they are properly informed about their organisation's operations and activities (for example, reading any papers and following up tasks you have agreed to do from previous meetings).

You must understand the issues the committee is making decisions on - you can't just rely on the opinions of others on the committee and become a 'rubber stamp'. All committee members have a duty to make



enquiries and satisfy themselves that the organisation is being well run, and is operating in a safe and efficient manner.

Reasonable decisions – not perfect decisions

The duty of reasonable care doesn't mean that all the decisions your committee makes have to be perfect. Sometimes, even though a committee has thoroughly researched, discussed and come to a decision on a matter (for example, approved a tender for a contract to run a project), the outcome doesn't turn out as the committee had hoped (for example, the organisation makes a loss on the project).

The law recognises that often committees have to make difficult decisions, and that no one has the ability to accurately predict the future. Just because a decision turns out not to have been beneficial for the organisation, this doesn't mean that this duty has been breached. A decision about a matter will generally be considered to have been made with reasonable care if the committee can show that:

- the decision was made in good faith and for a proper purpose (see duty 1)
- they did not have a material interest in the subject matter of the decision (see duty 4)
- they informed themselves about the subject matter to an appropriate extent, and
- they rationally believed that the judgment was in the best interests of the organisation

This is known as the 'business judgment rule', with 'business judgment' constituting any decision to act or not act on a matter relevant to the operations of the organisation (for example, incurring debt, entering into contracts, undertaking activities).

Just remember – taking calculated risks that might not work out is acceptable, but making reckless, ill-informed decisions without thinking about the consequences could be seen as a breach of this duty.

As mentioned above, there are also financial aspects to the duty to act with reasonable care, skill and diligence. These are sometimes seen as standalone duties in their own right as they are so important. They are explained in more detail below.

Duty to ensure financial affairs are managed responsibly

It's your legal responsibility to understand the finances of the organisation and ensure they are managed properly. Committee members are accountable for an organisation's solvency. They must exercise overall control over its financial affairs.

You need to understand the organisation's current financial position so you can make informed decisions about whether the organisation can responsibly enter into new transactions, contracts or other debts. It is unacceptable to think '*Oh I don't have to think about the dollars, that is the treasurer's job!*' It is not just the treasurer that has this duty – **all committee members have a duty to properly inform themselves about the organisation's financial position.**

While this duty applies to all committee members, the actions required to comply with the duty will be affected by your organisation's financial size:

- If you are on the committee of a small not-for-profit that raises money only through membership fees, has a balance of \$500 in the bank and spends very little money from month to month, then a brief treasurer's report setting out the monthly totals for the organisation will probably be sufficient.
- Alternatively, if you are on the committee of a large, well-funded not-for-profit that owns two properties, manages three others on trust, has 30 employees and an annual turnover of over \$1 million, you will need far more extensive and complex information in order to fulfil your responsibility to understand the finances.

Duty to prevent insolvent trading

The requirement to prevent insolvent trading is often regarded as a separate legal duty that is inextricably linked to the duty to use reasonable care with respect to the organisation's finances.

While the term 'trading' is a business term that may not fit well into the not-for-profit environment, this key aspect of the duty still applies to not-for-profit organisations.

Read the box below carefully so you understand this aspect of the duty.



Important! The duty to prevent 'insolvent trading'

As a committee member, your key duty regarding the finances of your organisation is to make sure it's solvent – that is, able to pay its debts when they are due. You must not allow your organisation to incur further debts if you know or reasonably suspect that the organisation cannot pay its current debts when they are due or will be unable to if it takes on further debt.

As many in the not-for-profit sector are aware, the funding environment for not-for-profits can often be unstable and unreliable. Many not-for-profits operate on very tight budgets and sometimes sail 'close to the line' in terms of their finances. For example, income from membership fees may fluctuate from year to year, donations may be affected by an economic downturn, or a government funding stream that your organisation relies heavily on may be cut. These circumstances make it very difficult to gauge a not-for-profit organisation's true financial position.

Occasionally, not-for-profit organisations get into financial trouble. As a committee member, it can be very difficult to distinguish between a temporary lack of cash flow and an endemic, dire financial situation. For some assistance, we have a separate fact sheet (['Insolvency and your organisation'](#)) that covers some of the potential 'warning signs' of insolvency.

If your organisation has any of the 'indicators of insolvency', your legal duty is to:

- take action immediately – don't do nothing and hope for the best
- inform yourself of the financial situation– investigate and fully understand the financial difficulties of your organisation
- seek professional advice – ask an accountant, insolvency expert or auditor to look over your organisation's finances (again, do this as early as possible as a professional may be able to advise of immediate actions you can legally take)
- don't approve any further debts – this includes not entering into transactions, contracts or arrangements requiring payment (for example, contracts for building, hiring staff), and
- agree as a committee on a plan of action and implement it (based on professional advice). This may include making hard but necessary decisions, for example to close services, sell assets or look to amalgamate with another organisation. It may also include an agreement about at what point the committee might need to seek advice on other options



Tips – complying with the duty of care, skill and diligence

To comply with the duty, including its financial aspects:

- Attend committee meetings and read the papers and financial statements before meetings. If you regularly find you can't do this, consider whether you should continue to serve on the committee, as you risk breaching this duty.
- If you don't understand something or want further information, speak up. Ask questions and seek clarification about matters, discussions or proposed resolutions. Don't simply go along with the rest of the committee if you disagree with their views or decision.
- Follow up on things you said you would do between meetings – adopt a culture of having 'action' items in your minutes and reviewing the status of actions at the following meeting.
- When making a decision or taking action, ask yourself, 'have I exercised the degree of care and thoroughness that a reasonable person in my position would give to this kind of decision or situation?' If you need more information, say so and make sure you get it. You don't need to make perfect decisions but you do need to make thoughtful ones.
- Know what events and activities are being conducted by the organisation and ensure that proper care has been taken to protect the organisation and all participants (for example, making sure health and safety matters have been addressed, checking that insurance is up to date).
- Make sure you are receiving clear information about the finances of your organisation. If they are presented in an incoherent format, ask that they be presented in a basic overview or dashboard format. If you need to, get training in basic financial literacy so you can understand the finances. If you don't receive any financial information at all, consider your position carefully. You could be at risk of breaching this duty and ignorance is no defence.
- Take special care when committing to large contracts, investing the funds of the organisation or borrowing funds for the organisation to use. Avoid undertaking activities that might place the organisation's funds or assets at undue risk.
- Follow up immediately on any problems identified in the financial statements or audits. Make sure the committee takes action if there is a concern about whether debts can be paid on time.

Remember – occasionally, not-for-profit organisations get into financial trouble. It's not a breach of the duty of reasonable care and skill if your organisation is in financial trouble, or even if it has to close its doors. However, it may be a breach if you know or suspect your organisation is in serious financial trouble and you don't do anything about it.

Case examples on duty of reasonable care, skill and diligence



The proud but busy committee member

You were delighted when a local not-for-profit organisation that supports disadvantaged youth asked you to join their committee. It's a not-for-profit with a strong reputation in the local community, and you were proud to be associated with it. You eagerly attended your first few monthly committee meetings. However, since then things have become busy in your work and personal life and you are finding it hard to attend regular meetings. You always seem to have things on the nights of the committee meetings! You turn up when you can (usually once every four to five months) but even then, you have rarely had time to look at the committee minutes and paperwork. You console yourself by thinking 'Oh well I'm just a volunteer' and occasionally 'They are lucky to even have someone with my business experience on the committee anyway'. You also feel that the president is a smart woman so the decisions the committee are making in your absence are probably fine.

The legal duty

If you accept a position as a committee member (even if reluctantly!) you have a legal duty to exercise reasonable care and skill in 'guiding' the organisation. Not being able to attend the occasional committee meeting is okay, but failure to attend regular meetings, without an approved leave of absence, and failure to pay attention to the 'goings-on' of the committee, could be indicators of a breach of this duty. Should anything go wrong in the organisation (for example, it gets into financial trouble and starts to trade while insolvent, or someone starts to defraud the finances) you could be legally responsible. It's not a defence to say 'I wasn't at the meeting when they made that decision' or 'I'm just a volunteer'. If you can no longer commit to giving the committee reasonable time, you should carefully consider whether to remain on the committee. Perhaps you can contribute to the organisation in some other capacity?



The worried committee member and an inaccurate media release

You are on the committee of a small advocacy not-for-profit organisation. At a committee meeting, the Executive Director hands around a number of papers, including a media release for approval. You are not quite sure if the media release is accurate and, although not an expert on defamation, you are concerned that some of the statements are not backed by fact or are possibly exaggeration. However, there is a lot of business to get through and you decide not to make an issue of it.

The legal duty

As a committee member you have a duty to make proper enquiries when you are unsure about something. Don't rely on others, especially when you have a feeling something is wrong. The media statement could contain inaccurate and defamatory material and could leave your organisation open to complaints or legal action. Your duty is to ask the probing questions, and guide and protect the organisation and its reputation.



The committee member and the urgent repairs

You are a committee member for a fairly large not-for-profit organisation, a supported accommodation service which employs ten staff. You had a pretty clear understanding of the financial position of your organisation in July last year, when the committee approved the yearly financial statements. At that time, the treasurer gave a detailed briefing to the committee about the finances and you understood that, although the organisation had ‘sailed pretty close to the wind’ all year, at the end of the financial year, the organisation managed a small surplus of \$40,000.

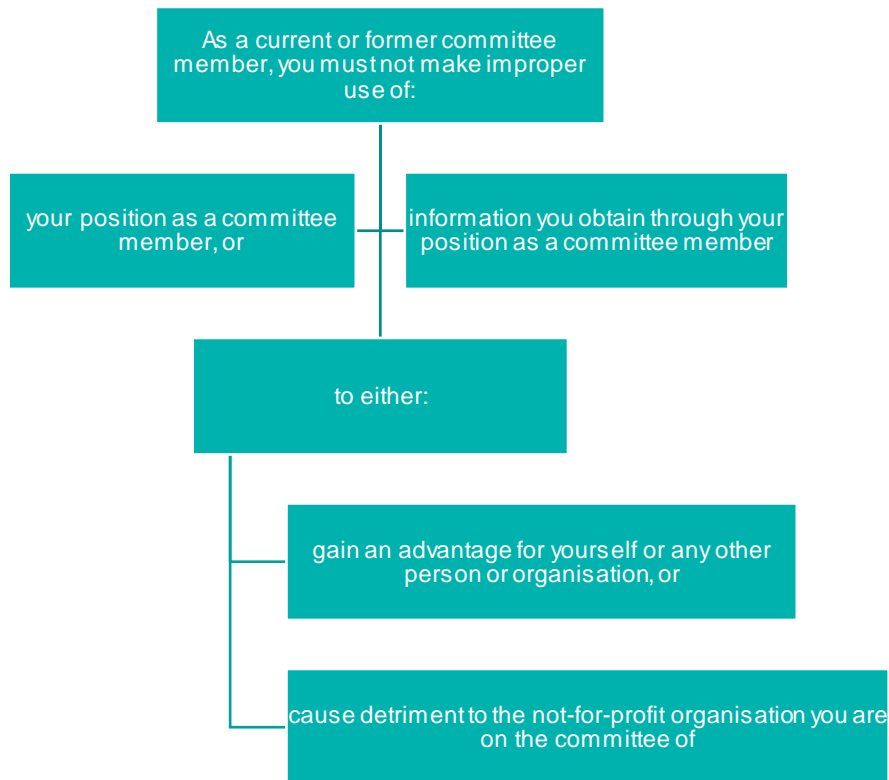
Eight months later, you attend a committee meeting and the manager of the service tells you and the other committee members that the organisation needs to enter into a contract to get substantial repairs done to two of their properties at a cost of \$50,000. The manager tells you that the repairs are extremely urgent and asks the committee to approve the signing of the repair contracts there and then, so the works can begin immediately. You feel that if you asked any questions you would be seen to be holding up the process, and would frustrate the manager, who looks stressed.

The legal duty

The legal duty to act with reasonable care and diligence includes a duty to monitor the financial situation – and in particular a duty to not incur new debts if you know or suspect your organisation can’t meet them. The only way you can be sure not to breach this duty is to make sure you have a clear understanding of the organisation’s current financial position. It’s not sufficient to rely on your financial knowledge of five months ago. The manager may well be focussed on the day to day running of the organisation, and that is why it is your duty to look at the bigger picture. Ask for financial information so that you can confirm that the organisation can afford these renovations. Get professional advice if needed. Be satisfied that the organisation can meet all its debts – this is a duty of all committee members, not just the treasurer.

This situation might also require you to exercise your duty to use reasonable care and skill to enquire about current health and safety issues arising out of the need for urgent maintenance works. Are the clients safe in the houses? Do we need to re-accommodate them while we work out the finances and arrange for the repairs? What are the risks currently posed by the repair work? What can be done to eliminate these risks while we work out a feasible plan to get the repair work done?

Duty 3 – the duty not to misuse information or position



This duty encapsulates the idea that a committee member must be loyal to the organisation they serve.

This duty of loyalty is ongoing – it applies to you when you serve on the committee and continues to apply after you cease to be a committee member (ie. it applies to former committee members).

It's also closely linked to the duty to avoid conflicts of interest (see duty 4 below).

Duty not to misuse your position

As a committee member you must refrain from improperly using your position on a committee. While your organisation may have codes of conduct or policies that also prohibit this kind of behaviour, it's important to remember that this is also a legal duty.

Where you or someone close to you benefits from misuse of your position, this will often also constitute a conflict of interest (see duty 4). However, even where you or those close to you don't benefit from an improper use of your position, if it causes detriment to the organisation, you will have breached this duty.



Actions that might breach the duty not to misuse position

- Accepting 'kick-backs' – for example, accepting free dinners from a business that is tendering for work for your organisation.
- Using your position to 'pull strings' in the organisation – for example, to get a friend's son moved up the waiting list for an accommodation service or to get your daughter into the senior team.
- Using your position to intimidate members, volunteers, employees or other stakeholders in the organisation.
- Making unauthorised public comments or representing that you speak on behalf of the committee, when you have not been authorised to do so.

Duty not to misuse information

As a committee member, you must also refrain from improperly using any information obtained because of your position (for example, information obtained at committee meetings, information divulged to you in your capacity as a committee member) to gain a personal advantage or an advantage for someone else, or to cause any detriment to the organisation.

While the not-for-profit sector often works in a very collaborative way, and people who work in it can be very friendly, don't mistake this culture to mean that information can be shared with all.

An essential aspect of this duty is that committee members must not reveal outside the organisation information that is discussed at the committee in confidence – such as client details, commercially sensitive plans or bids, employee or salary issues. While most committee decisions can and should be conveyed to members of the organisation, there are some discussions that need to remain confidential.

People who are appointed to a committee by a special interest group or by another organisation must be aware of this duty. You should not reveal information that comes to you in your capacity as a committee member of the organisation you have been appointed to. You can't ignore your primary obligation to that organisation, even if you think your 'appointing organisation' would benefit from that information. You should report back to your 'appointing organisation' only with authorisation of the committee.



Actions that might breach the duty not to misuse information

- Providing details of your committee's discussions about an upcoming tender for a government project to another organisation you are involved in (they might use this information to compete for the same tender).
- Telling someone that the organisation you are part of is financially struggling, without the authorisation of the committee to do so, might cause detriment to the organisation and constitute a breach of this duty.
- Disclosing to people outside the organisation confidential information that you have because you are a committee member, such as membership lists, client lists, employee information, minutes of meetings and financial information.



Tips – complying with the duty not to misuse information or position

- Induct new committee members – explain how your committee works and the expectations your organisation has about use of information and position. Also, make them aware of their legal duties as committee members (perhaps give them a copy of this guide!)
- Depending on the work of your organisation, consider whether all committee members should sign a Code of Conduct and Confidentiality Agreement, to reinforce this duty. These documents could provide further details about what the organisation considers to be the improper use of position and information. It could also set out the disciplinary or other actions that might be taken against committee members for certain kinds of behaviour (as well as the possible penalties that could apply for breach of the legal duty).
- Make sure you take care with all committee papers and minutes and any paperwork that contains personal information of people involved in the organisation.
- Avoid gossip about committee happenings and maintain the confidentiality of committee discussions around sensitive matters (like client information or project tender amounts).
- Don't use any information obtained by reason of your position on the committee in any way other than it was intended you use it.



Case examples on the duty not to misuse information or position



The committee member and the new service proposal

Over a series of committee meetings, your committee has been discussing a plan to expand its services. The local council has a building that it has advertised for lease. Your committee has been working to put together a proposal for the local council to consider. It's looking to secure the lease and, with some additional funding from council, open a new welfare service in the building. Your friend works for a different not-for-profit local welfare service. She tells you that her not-for-profit is thinking of expanding and asks you whether you are aware of any suitable premises that are currently available for lease.

The legal duty

You have a duty not to misuse information gained from your position as a committee member. If the local council has publicly advertised the building for lease, this information is 'in the public domain' and therefore not confidential information, so it's probably okay to share this fact with your friend. However you have a duty to keep discussions of committee meetings confidential. You should not tell your friend about your committee's plans to lease the building, how much they are offering the council, or their proposal for a new service. This is confidential information and disclosing it might cause a detriment to your organisation (for example, if your friend's organisation uses the information to put up a similar but cheaper proposal). To do so would be a breach of the duty to not make improper use of your position or information.



The committee member and the annoying golfer

You really don't like Geoff Brown. He beat you twice at golf in the last two months and has been a real show off about it. There is also a rumour going around town that Geoff has been having an affair with a younger woman and is boasting to all about it. This also makes you angry. You happen to be on the committee of the not-for-profit that Geoff works for. At the pub on the weekend you hear him bragging. You are just sick of it! You tell him – at first kind of jokingly but later more aggressively – that if he doesn't be quiet and 'pull his head in a bit' you will arrange to have him sacked. You mention how close you are to the manager of the not-for-profit and how influential you are on the committee. When Geoff looks scared and suggests that you couldn't do that, you retaliate by threatening 'just one phone call and I can make sure you are out the door tomorrow'.

The legal duty

You must not use your position as a committee member for an improper purpose. In this situation, your actions are potentially in breach of this duty. You have used (or are intending to use) your position as a committee member to intimidate an employee of the organisation – for your own personal reasons. If it can be proved that you have done so for your own benefit, or your actions have caused detriment to the organisation, you may have breached this duty.



The conversational committee member and the dinner party

At a dinner party you tell people sitting around the table that, after six years of service on the committee, you have just retired as the chairperson of an organisation that runs anger management counselling programs. A number of people are interested in your work on the committee and ask you questions about the service. You get slightly carried away and start to tell a few of the 'personal stories' that you learnt about in the time you were on the committee. You get the feeling that the people at the dinner party have a stereotypical view of the 'kind of person' who ends up in the programs, so you think of telling them about a high profile TV personality who has recently sought services from your organisation to educate them about the prevalence of anger management issues in all areas of society.

The legal duty

As a current or former committee member, you have a duty not to make improper use of information you have gained in your position. The fact that a person has sought counselling services is confidential information. If you were to reveal this information it would be a breach of your duty. The fact that you have not made any personal financial gain out of the disclosure (you told the story at a dinner party, rather than sold it to the media) is not a defence. The revelation could cause detriment to the organisation and its reputation and this would be enough to be a breach of this duty.

You might also be liable for breach of confidentiality or breach of applicable privacy legislation. As this duty applies to former committee members, the fact that you have stood down from the committee is no defence.



The committee member with a pizza restaurant business

You are on the committee of a not-for-profit organisation that would like to set up a social enterprise – a coffee shop that is going to employ people with a disability. Your organisation is currently looking for a venue for the coffee shop.

A local real estate agent tells you about well-placed premises that are becoming vacant and might be perfect for the social enterprise café. You know the premises well as you always thought they would be perfect for a franchise of the pizza restaurant business you own. You wonder whether you could neglect to tell the committee about the real estate opportunity, and instead put in an offer for the lease on behalf of your business.

The legal duty

You have a duty not to misuse your position or information gained in your position. This includes the duty not to divert an opportunity for your own personal gain. To do so might not only breach this duty, but also the duty to act in good faith and in the best interests of the organisation (duty 1). As such, you have a duty to inform your not-for-profit organisation of the real estate opportunity.

Duty 4 – the duty to disclose and manage conflicts of interest

A conflict of interest is not the same as a disagreement between committee members.

What is a conflict of interest?

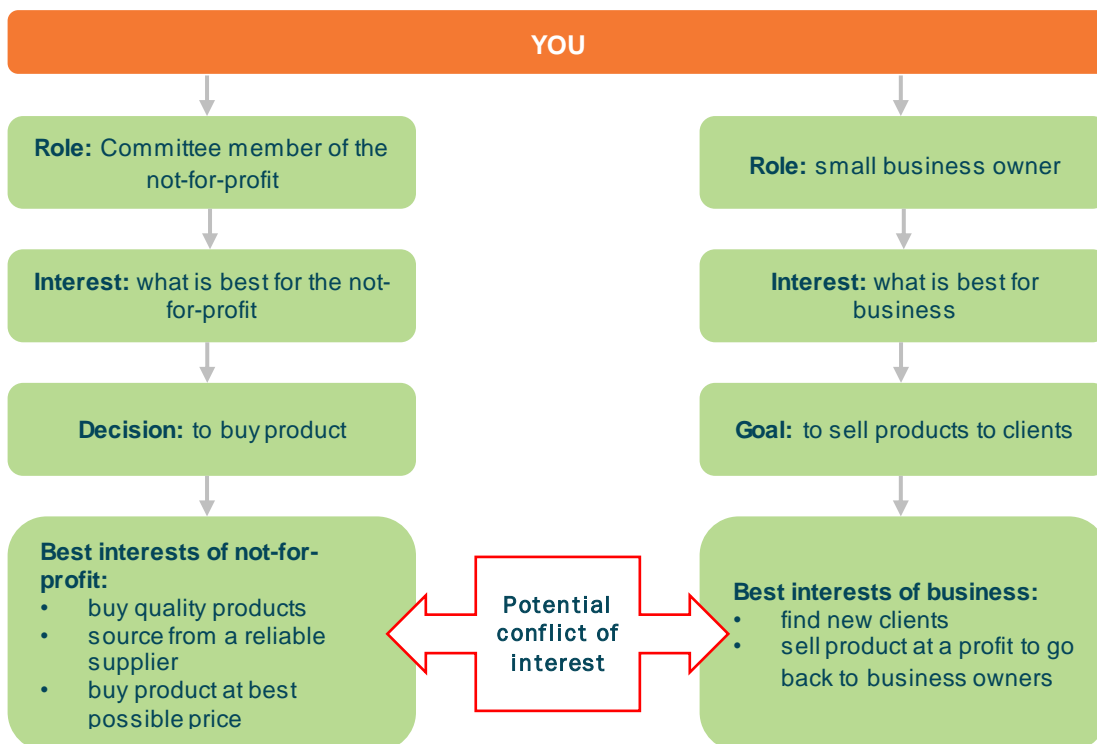
A conflict of interest arises when a committee member, who has a duty to act in the best interests of the organisation, is presented with the opportunity or potential to 'use' their position on the committee for their own personal benefit (or for the benefit of someone else, such as a relative or another organisation).

Conflicts of interest situations often arise in not-for-profit organisations and are not prohibited.

The legal duty relates to the process committee members must follow in conflict of interest situations. As a committee member you must disclose and manage conflicts of interest in a particular way (as outlined below).

A wide range of conflict of interest situations can arise in not-for-profit organisations. It's important to remember that the duty relates to **actual and potential** conflicts of interest.

A common conflict of interest scenario arises when your organisation is planning to sign a contract with a business to supply it with certain products or services, and you or your family own a business that makes and supplies those products. Your duty to act in the best interests of the organisation (ie. to obtain the most competitive price) is likely to conflict with your personal interest in you or your family being chosen as the supplier. In this situation, your conflicting interests could be depicted as follows:



As shown in this diagram, the same person can have different roles and interests which could possibly conflict.

While it may be possible that your business is a reliable supplier and offers the lowest price for the product in the region, because you stand to benefit personally from a decision, a conflict of interest situation arises.

The conflicting 'interest' does not have to be a financial interest for a conflict situation to arise.

If, as a committee member, you could influence a decision that would in any way benefit you, a relative, a friend or another organisation you have an interest in, then you are in a potential conflict of interest situation.



Examples of conflict of interest situations

- You are on the committee of an organisation that wants to employ you, or an employee is seeking election to the committee. (Note: If the rules allow this then it may be okay, but it usually gives rise to a number of conflict situations which need to be disclosed and managed.)
- Your committee is in the process of hiring a new CEO and one of the applicants is a relative of yours.
- You are on the committee of an organisation that is in financial trouble and is considering a merger with a larger organisation, and you are employed as a senior manager of that larger organisation.
- You are on the committee of two different not-for-profit organisations, but they are regularly applying for the same grants, or submitting bids for the same tenders or projects.
- Your committee is deciding which organisation they should partner with to provide their clients with government funded training and your mother is part-owner of an interested local registered training organisation.
- Your committee is making a decision about who to award a prize to, and one of the applicants is your best friend.
- You are on a committee that is considering employing your daughter as a part-time bookkeeper.

Dealing with conflicts of interest appropriately

It's important to note that the existence of a conflict of interest is not usually, in itself, a problem. Conflicts of interest are common. Inevitably there will be times when your duty to the organisation will 'come into conflict with' your personal interests or other duties you have. In fact, for many committee members, it is virtually impossible to avoid having conflicts of interest from time to time. This is especially so in small communities or specialised sectors where everyone knows each other and people might have numerous different 'hats' or 'roles'.

The legal duty relates to how the conflict of interest situation is **disclosed** and **managed**.

Disclosing the conflict of interest

Committee members must first disclose to the committee any conflicts of interest and potential conflicts of interest that arise in relation to their role.

They should do so as soon as they become aware of the conflict. When telling the committee about the conflict, or potential conflict, you must be open and honest about the nature and extent of the interest, and its relation to the affairs of the organisation.

The importance of full disclosure of direct and potential conflicts of interest can't be overstated.

If you are unsure whether something is a conflict, it's best to err on the side of caution and disclose it. This allows the committee a chance to deal with it in the proper way. Not-for-profit organisations rely heavily on their reputation in the community, and outside perceptions that your organisation is operating professionally and legally are very important.

In certain situations, you don't have to disclose a conflict of interest. This is when you have an interest only because:

- you are in a group of people for whose benefit the organisation is established, or
- you have an interest in common with all, or a substantial proportion, of the members of the organisation (for example, you will benefit if your local community development organisation arranges a tree planting program along the streets of your town but so will all members of the local community)

Some laws require committees to keep a standing register of interests. This is a list where committee members record all their relevant personal interests (such as employment, businesses their family own, other committee positions) when they join the committee.

For example, incorporated associations in NSW are required by law to record all disclosed conflicts of interest in a book available for inspection by the members of the organisation (see the tables at the end of this guide for more detail).

Organisations that are registered charities are expected by the ACNC to keep a register of interests.

Even if your organisation is not obliged to keep a register of interests, this is good practice and is something you may want to consider. The register of interests should be updated regularly. If you haven't noted an interest on the register, as soon as you become aware of a conflict you should disclose it.

Managing the conflict of interest

Once you have disclosed a conflict at the earliest possible opportunity, your next step is to manage the conflict by not participating in the decision-making about that issue.

Although the particular legislative provisions differ on exactly how to manage the conflict, we recommend the following best practice approach, which will ensure you comply with all the laws that govern the various not-for-profit legal structures.

A committee member who has a personal interest in a matter that is being considered at a committee meeting:

- should not be present in the meeting while the matter is being discussed
- should not be present for or vote on the matter, and
- should ensure that the minutes record the fact that a conflict was declared, the time the relevant committee member left and returned to the meeting, and the fact that they were not involved in the decision.

A committee member who has a conflict should also refrain from discussing the decision or trying to influence the outcome of the decision (for example, outside of or between committee meetings).

For incorporated associations in some states and territories there is an extra duty to disclose the nature and extent of conflicts of interest to members at the next 'annual' or 'special' general meeting (see the tables at the end of this guide for more information).

Major or repeated conflicts of interest

There may be a case where a conflict of interest is so egregious, or occurs so often, that you may have to seriously consider whether it's possible for you to remain on a committee. An example may be where you are on two committees that are regularly competing for the same grants or projects. In these circumstances it may become too difficult to act in the best interests of both organisations. Also, if it gets to a stage where you have to step out of the room for many of the committee discussions, it's probable that the situation is unworkable and you may need to consider resigning from the committee.



Tip

Some groups don't allow a committee member to also be an employee of the organisation in order to avoid repeated conflicts of interest.

Check your rules and policies on this issue.

Potential conflicts of interest and the reputation of your not-for-profit

Perception is a big issue with conflicts of interests – and for not-for-profits reputation is extremely important. It's important for a committee member to avoid not only actual and potential conflicts of interest, but also the perception of a conflict of interest. You should be aware of how a situation may appear to someone from outside the organisation even if it may not strictly be a conflict of interest.

Even if, as a committee member, you might never even think of using your position to influence a particular situation for your own benefit, it might look to an outsider like you have done so. As many not-for-profits rely heavily on their reputation, the need to deal with conflicts of interest in a transparent way is critical. If you are in a conflict of interest situation, the key thing to remember is to act with absolute transparency, and adopt high standards of caution, to protect the interests of the organisation.

See part E for an explanation of the slightly different conflicts duty set out in the ACNC governance standards for registered charities.



Tips – complying with the duty to manage and disclose conflicts of interest

- Conflicts of interest are common and will inevitably occur – it is how you disclose and manage them that matters.
- As a committee member, stay alert to possible conflicts of interest you might have. Advise your organisation of any actual or potential conflicts of interest as soon as you become aware of them.
- Create and foster a culture in your committee where it is normal practice for a person to disclose and manage a conflict of interest.
- When making a decision as a committee member, ask yourself, ‘am I making this decision based only on what will lead to the best outcome for this organisation?’ If the answer is that you are also considering whether the decision would lead to a favourable outcome for you (or a relative, friend or another organisation), then there is a good chance you have an interest in the matter that you may need to disclose and manage.
- It’s good practice at the beginning of a committee meeting for all committee members to check the agenda and declare any private interests which they may have in any item for discussion. Interests should be declared before any discussion of the item itself, or as soon as the committee member realises that the conflict arises.
- If in doubt about a possible conflict of interest, stay on the safe side and disclose it – it’s important to keep the trust of fellow committee members, the organisation’s members and the community. Remember even perceived conflict of interests can damage a not-for-profit’s reputation.
- Check your organisation’s rules and policies to see if they say anything about conflicts of interest. For example, some organisations have rules which prevent an organisation from employing committee members.
- Consider whether your organisation needs a policy on how it will deal with any conflicts that arise as a result of the work your organisation conducts. This is generally recommended as good practice. A policy can help remind you of your legal obligations with respect to managing and disclosing conflicts of interest (see the ‘further resources’ box at the end of this part for templates).
- Think about whether your committee would benefit from having a standing register of interests. It may be required by law. It allows any actual or potential conflicts of interest to be identified more easily. The register should be regularly updated.
- Registered charities should be aware that the governance standards apply to conflicts of interest, and require responsible persons to disclose any situation where they may appear to have a conflict between their duty to act in the best interests of the charity, and a personal or private interest. See further in part E.

Case examples on the duty to manage and disclose conflicts of interest



The committee decision to purchase office supplies

You are on the committee of management of a small local not-for-profit organisation that regularly needs office supplies and equipment. Previously, committee members have bought office supplies as they have been needed, but to become more efficient, the committee is considering having a preferred supplier. As it happens, your partner Sally owns the town's only newsagent and stationery business.

The legal duty

This situation is a potential conflict of interest. If your partner decides to bid to be the organisation's stationery supplier, and your organisation awards the business to her, you will (or may) receive a material personal interest from this transaction (you are likely to personally benefit from the profit from your partner's business). Therefore a conflict of interest situation arises.

However this situation does not mean that your organisation has to arrange to drive to the town 200km away to source supplies, or that you have to resign from the committee. Remember, it is not the actual or potential conflict of interest that is the problem so much as how it is disclosed and managed.

If you:

- tell the committee that your partner Sally owns the stationary business (disclose)
- leave the room when the committee discusses the supply contract (manage)
- leave the room and don't vote on the supply contract (manage)
- have the disclosure and the process noted in the committee's minutes (disclose),

then you will have acted appropriately and will not be in breach of this duty.

As noted above, some incorporated associations have an extra duty to disclose conflicts of interest to members at their next general meeting.

There will have been no 'conflict of interest' or alternatively you might say that the conflict of interest has been 'avoided'. The rest of the committee may call for quotes and investigate and compare possible suppliers, and then make a decision without your input.

In the end, if your organisation is satisfied that Sally's bid is the best (a decision based perhaps on comparing quality, price, ability to deliver, and the ethos of supporting local businesses) they could legitimately award the contract to Sally. If anyone in the town asserts that Sally got the contract 'because' she was your partner, you and the other members of your committee can inform them of the proper process that was followed to award the contract.



The arts scholarship and the step-son

You are a member on the committee of an organisation that promotes the arts in your region. The committee is meeting to discuss the awarding of three scholarships for talented artists to attend a very prestigious art school course. Peter, your step-son, is one of the candidates for the scholarship.

The legal duty

Because Peter is your step-son and your actions are likely to give him a benefit, you have a conflict of interest. You should disclose and manage the conflict of interest. Even if, instead of being a step-son, Peter was a close friend of yours, you should disclose and manage the conflict. Although the law does not expressly state how close the relationship must be for a conflict to arise, you should consider the perception in the local community of your organisation if you are involved in a decision to award a scholarship to a relative or close friend. If in doubt about disclosing an interest, it is best to stay on the safe side and disclose and manage the conflict.



The lawyer committee member and the tenant legal action

You are a lawyer for a major law firm. You are also on the committee of a local emergency housing not-for-profit. At one committee meeting the Executive Director tells the committee that the not-for-profit is facing legal action from a former tenant who was evicted. He is seeking a decision on whether to defend the case or try to settle it. As the paperwork is circulated, you recognise some familiar letterhead and realise it is your employer law firm that acts on behalf of the former tenant.

The legal duty

The conflict of interest doesn't have to be about a financial interest and it also doesn't have to be an actual conflict of interest. You might not even have been aware your firm was acting for the former tenant, but as soon as you find out, you are in a difficult position. Although it may be unlikely that you will find out any details about the tenant's case when you are at work, there is a possibility that you may do so. In a situation like this, think about the perceived conflict of interest and the effect of this if the tenant found out. In this situation it would be best to disclose the conflict straight away, leave the room for both the discussions and the vote and have this recorded in the meeting minutes.



Related resources

The Australian Charities and Not-for-profits Commission (**ACNC**) has published a [guide to managing conflicts of interest](#) and a [template conflict of interest policy](#). While these resources are aimed at charities, they are useful for all committee members. For further examples of conflicts of interest policies, see the website of our partner the [Centre for Philanthropy and Nonprofit studies at QUT](#).



Part D

**Consequences of breach of duties –
defences, penalties and protections**

Consequences of breach of duties – defences, penalties and protections

This part covers:

- ▶ who might take legal action against a committee member for breach of a duty?
 - ▶ what defences can be raised if an action is brought against you?
 - ▶ what penalties might be imposed if a breach is found?
 - ▶ if a penalty is imposed, how can you potentially protect yourself against having to cover the cost of any fines?
-

Legal action against not-for-profit committee members is rare. If you follow the tips in part C of this guide, it is unlikely you will act in breach of a legal duty. Good governance processes are the safest, cheapest and most effective protection against any legal action. They are also the best way to protect the reputation of your organisation.

Having said that, there are legal consequences if you are found not to have complied with your legal duties (ie. to have 'breached' the duties).

The main penalties for breach are financial (for example, a fine or paying compensation to the organisation, or both). There are a limited range of defences available to committee members who are accused of a breach of duty. There are also a number of protective actions that committee members can take to guard against penalties in certain circumstances in the unlikely event of legal action.

Who can bring a legal action against a committee member for breach of duty?

Because it's quite rare for a legal action to be taken against a committee member, this guide doesn't detail the technical grounds for a legal action. In summary – a legal action about a breach of the legislative or common law duties could possibly be taken by:

- a regulator (for example, a state or territory fair trading or consumer affairs regulator, the Australian Securities and Investments Commission (**ASIC**))
- someone owed money by the organisation (for example, a creditor, often in a case of insolvent trading)
- someone appointed to look into the finances of an organisation that is in financial trouble or having to close down (for example, an administrator or liquidator)
- the new committee of an organisation (for example, against a former committee member), or
- the members of an organisation (as a group, not individually)

Even where there is no legal action, the legal duties discussed in this guide represent best practice in governance. Remember – if you act in accordance with the legal duties at all times, you are protecting the reputation and longevity of your organisation.

This is because an organisation that has an honest and conscientious committee that is careful to comply with its legal duties will be more likely to be financially stable, attract new members and enjoy the support of the community. In contrast, an organisation that has a disorganised, self-interested, reckless committee is more likely to end up with internal disputes, financial difficulties and lose standing in the community. While



legal actions may be rare they are possible. And compliance is not difficult – so why risk it? No one wants to end up having to defend themselves in court!

Possible defences against an allegation of a breach of duty

If you are facing an accusation (or possible legal action), that you have breached a legal duty, there are a number of defences you may be able to use to defend yourself (set out below).

Note – this is a very general discussion on the topic and any defences that may be available would depend on the particular circumstances and the source of the duty (for example, common law or a particular legislative provision). If your committee does find itself facing an accusation or legal action you should seek legal advice.

Your conduct met the standard imposed by the duty

Under this defence you are saying that your actions and behaviour are in line with the standard set by the legal duty, so there was no breach. For example, if you are accused of a conflict of interest, you may respond by asserting that no conflict arose, or that you disclosed and managed the conflict in accordance with the legislation. It's helpful if you show evidence of this – for example meeting minutes that record you disclosing the interest and stepping out of the room when the matter was discussed and voted on.

'Business judgement' rule

This defence is only available in relation to the duty to use reasonable care, diligence and skill (duty 2 above), but it's not a defence to a claim of insolvent trading.

The law recognises it's sometimes a difficult task to make decisions about the future (for example, whether to approve a proposal for a new project). A decision about a matter will be considered to be made with reasonable care if you can show that you:

- made the decision in good faith and for a proper purpose
- didn't have a material interest in the subject matter of the decision (see duty 4)
- informed yourself about the subject matter to an appropriate extent, and
- rationally believed that the judgment was in the best interests of the organisation

This is known as the 'business judgement rule' (better termed the 'reasonable judgement rule' in the not-for-profit context).

In simple terms – if as a committee member you have made thorough inquiries about a proposal and have complied with all of your other duties – then just because a particular decision turned out not to be a good one does not mean you have breached this duty (unless it is a decision no reasonable person could make).

Delegation

In general, even if a committee delegates an action to an employee, or a sub-committee, the committee members are still legally responsible for that action. You can't get out of your duties simply by delegating them to others. However, the common law and legislation allow that a committee member will not be responsible if they:

- reasonably believed that the person they had delegated to would undertake those actions to the same standard as would be required of the committee member, and
- after making proper inquiries, reasonably and honestly believed that the delegate was reliable and competent

Committee members can't delegate their duty of reasonable care and diligence.

Reliance on advice

If you have relied on the advice of a professional to make a decision, this might form part of a defence to a claim that you have breached a duty. It's generally agreed that it's reasonable for committee members to rely on advice from an external person like a lawyer.

If, as a committee member, you make a decision based on professional advice, and you have relied on that advice in good faith, and after making an independent assessment of the information, having regard to your own knowledge of the organisation and the complexity of the structure and the operation of the organisation, then the court might accept that you did your best and discharged your duty.

Excused by court from liability (usually available only to CLGs and incorporated associations)

For CLGs (companies limited by guarantee) and incorporated associations, there are special provisions (for example sections 1318 and 1317S of the *Corporations Act 2001* (Cth)) under which a court has an opportunity to 'forgive' committee members for breach of duties, where the court determines they acted honestly and 'ought fairly to be excused' for the breach.

Reasonable grounds to expect solvency

This defence applies to the duty not to operate while insolvent, and more specifically, not to incur debts while insolvent. If you had grounds to expect, and you did expect, that the organisation was solvent and would remain solvent when you incurred the debt, the court may accept that you honestly weren't aware of the insolvency. Or, if you took all reasonable steps to prevent the organisation from incurring the debt, then the court may excuse the breach.

Did not participate in management

If you could not, due to illness or some other 'good reason', participate in the governance of the organisation as a committee member at the time of the breach, a court may decide you weren't involved in the wrongdoing.

Unacceptable defences

As mentioned throughout this guide, if you breach a legal duty there are a number of responses that will not be sufficient and will not be accepted by a regulator or the court as a defence.



Examples of defences that will not be allowed by a court

- 'I just joined the committee and don't have the same experience as some of the other committee members'
- 'I didn't understand what was going on at committee meetings'
- 'I didn't agree with the decision which is now in question (but I didn't say or do anything about it)'
- 'I am just a volunteer'
- 'I didn't even want to be on the committee in the first place'
- 'I did what the other committee members told me to do'

Possible consequences of a breach of duty

Generally when a not-for-profit organisation incorporates, one of the key benefits of incorporation is that the members of the organisation (including its committee members) aren't liable for the debts of the organisation. This is known as 'limited liability'. It protects members of an organisation from having to use their own personal income to pay outstanding debts of the organisation.

However, if it is found that you have breached a legal duty as a committee member, you may be liable for that breach from your own personal income. Remember, this is a rare event and will usually be accompanied by a significant degree of deliberate wrongdoing or gross negligence. If you are sufficiently committed to the role of a committee member and act with integrity, diligence, honesty and accountability, you shouldn't incur any liability.

Just so you are aware, we have set out the penalties that are possible for breach of a legal duty below.

Fines or compensation

If a person breaches a duty (for example, a committee member is found to have failed to exercise reasonable care and diligence in carrying out their duties), a court may order the person to pay a fine or to compensate the organisation (or both) for the amount of money the organisation lost as a result of the breach.

The amount of the fine that can be imposed is set by legislation and differs depending on your legal structure. You should seek specific advice about this if it becomes relevant for you.

Disqualification

The courts may also make orders disqualifying a person from sitting on a committee in the future for a period of time.

In extreme cases

If committee members are deliberately dishonest or reckless and the breach is significant, then some of their actions may attract criminal penalties. If a person is found guilty by a court of breaching a duty where a criminal penalty applies, the person may be fined more heavily. In very extreme cases (for example where your actions are deliberately fraudulent and the amount of money taken is considerable) the courts may order imprisonment.



Note – registered charities

A charity must take reasonable steps to ensure its responsible persons fulfil their duties under the governance standards. For more information regarding charities, see part E of this guide.

Possible financial protection for committee members

Indemnity provisions

Some organisations may have a clause in their rules which says the organisation agrees to indemnify (ie. pay a penalty or legal fees for) committee members. In some circumstances, depending on the wording of the indemnity, this may cover committee members who have breached their legal duties.

It's important to be aware of the limitations of an indemnity clause:

- the ability to do this is sometimes prohibited by law
- it only covers a committee member to the extent of the organisation's funds (often low)
- it usually doesn't cover committee members who have acted with deliberate recklessness or fraudulently or without good faith
- it will often only cover committee members after a court action has been finalised (the committee member will have to cover their own costs and then later seek reimbursement)

Insurance

An organisation (or individual committee members) may elect to take out Directors and Officers (**D&O**) insurance to provide some protection for committee members. D&O insurance is designed to protect an organisation's committee members against legal action. Some D&O policies will also reimburse an organisation where it has indemnified its committee members.

D&O policies generally cover nominated committee members against liability for 'wrongful acts' committed in the course of their office. 'Wrongful acts' may include breaches of duty, neglect, misstatement, incompetence or other acts or omissions as set out in the insurance policy.

It's important to understand the limitations of D&O insurance. In general D&O policies will not cover committee members for dishonest or fraudulent actions, insolvent trading or a wilful breach of duty or a contravention of the duty not to misuse position or information.

If your organisation has or is considering D&O insurance, it's important to read the policy carefully and understand the extent of the policy – who is covered, what is covered and what is excluded. You should also be aware of the length of time you will be covered after you leave the committee.



Related Not-for-profit Law resources

For more information on insurance, see our [‘Insurance and Risk Management’ guide](#).

Victorian incorporated organisations can also refer to our [‘Indemnity for office holders of incorporated associations’ fact sheet](#) as particular rules apply to them.

Legal help if your organisation (or its committee) faces legal issues

Not-for-profit Law is a service of Justice Connect. We provide free and low-cost legal information, training, phone advice and case work services for eligible not-for-profit organisations. You can find out more about our service on [our website](#).



Part E

Information for registered charities

Information for registered charities

This part covers:

- ▶ summary of the six Governance Standards
 - ▶ duties that make up Governance Standard 5, and
 - ▶ what if a responsible person breaches the Governance Standards?
-

Organisations registered as charities with the ACNC need to meet the ACNC's six Governance Standards, which are a set of core minimum requirements for the governance of a charity.

The Governance Standards broadly require charities to remain charitable, operate lawfully and be run in an accountable and responsible way. Standard 5 sets out duties of committee members (called 'responsible persons' by the ACNC) similar to those in legislation and common law.

A charity must meet the Governance Standards when it applies to be registered with the ACNC, and must continue to meet them to maintain its registration.

In some cases, charities have to comply with the Governance Standards instead of duties under other statutes. For example, for some charities incorporated under the *Corporations Act 2001* (Cth), certain provisions of the Corporations Act don't apply, (though those organisations still need to comply with common law duties which are substantially the same as Corporations Act duties in any case). For charities registered with a state regulator (for example, an incorporated association or co-operative), the governance standards apply in addition to duties under the state regime and the common law duties.

There is an exemption from compliance with the Governance Standards for 'basic religious charities'. There are very strict requirements about what is a 'basic religious charity'. For more information visit the [ACNC website](#).



Note

You can check if your organisation is a registered charity by searching the [ACNC charity register](#).



Summary of the six Governance Standards



Related resource

The ACNC has developed a helpful resource on the Governance Standards '[Governance for Good](#)'.

Governance Standards and duties

The duties in the Governance Standards apply to the 'responsible persons' of registered charities. This is a concept similar to a committee member or office holder. Responsible persons includes directors, trustees, and executives with significant influence over the strategic direction of an organisation.



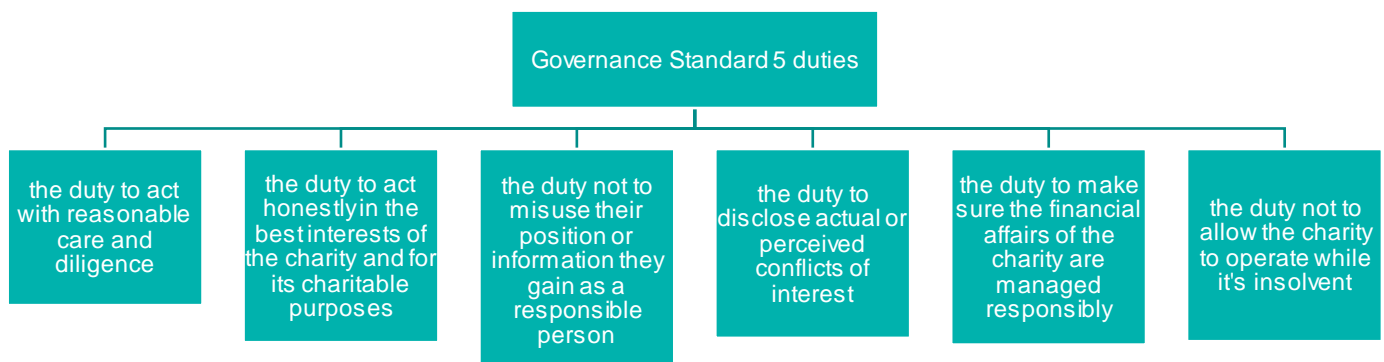
Related resource

The ACNC has produced a fact sheet called '[Responsible persons – board or committee members](#)'.

Governance Standard 5

Governance Standard 5 sets out the duties that apply to the responsible persons in a charitable organisation. These are similar to the duties in legislation and common law explained earlier in this guide.

The duties that make up Governance Standard 5 shown in the diagram below.



Generally, it's the responsibility of an individual committee member to comply with their legal duties. An important difference for a registered charity is that (under the ACNC Regulations) it's the responsibility of the charity itself to take reasonable steps to make sure its responsible persons are complying with their duties under Governance Standard 5. However, note that responsible persons will generally still have legal duties placed on them directly under common law, and any applicable state-based duties.

The duties in Governance Standard 5 are mostly equivalent to the general duties from statute and common law discussed earlier in this guide. However, a difference in the conflict of interest duty under Governance Standard 5 is that this explicitly requires responsible persons of registered charities to disclose **perceived** conflicts of interest (although, as discussed above, it would be good practice for committee members of non-registered charities to do this as well). A perceived conflict is a conflict that does not necessarily exist but may appear to others like a conflict.



Example – perceived conflict

Bob is on the board of a charity that helps sick animals. Bob's granddaughter gets a job as the CEO of the RSPCA. Although both organisations operate in the same field, it seems unlikely that this would cause a conflict. However, it could be perceived that Bob may provide information about his organisation to his granddaughter. Under Governance Standard 5, Bob is required to disclose this 'perceived conflict'.

What if a responsible person breaches the Governance Standards?

Charities cannot seek compensation from responsible persons for breaches of the duties in the Governance Standards. It may be possible to take action under state laws if registered as a state-based entity (e.g. an incorporated association) or under the common law. It is very unusual for action to be taken against committee members or responsible persons for breaches of duties. Action is reserved for only the most concerning scenarios.



As mentioned above, under the Governance Standards, it is the responsibility of the charity, not the individual person, to take reasonable steps to ensure that the responsible persons understand and fulfil their duties. However, if a charity has taken those reasonable steps but a responsible person breaches their duties, it might be possible for a charity to seek compensation or damages under common law from the responsible person. This would be an unusual step.



Tip – declarations

Governance Standard 4 requires **all** responsible persons to sign a declaration relating to disqualifying offences (ie. to confirm that they are not disqualified from acting as responsible persons). The ACNC has developed a [template declaration](#) that charities can use. Responsible persons should sign this declaration before they are elected and charities should have copies of these declarations on hand at meetings where responsible persons are elected.



Note for charities

The defences for a breach or alleged breach of duty contained in the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) are very similar to the defences that are explained in part D above, so they are not set out here.

For further information see part 3 of our '[Guide to Running a Charitable Company Limited by Guarantee](#)', which provides more detail on Governance Standard 5 for registered charities.



Note – governance standard six

In an [announcement on 27 November 2020](#), the Federal Government outlined its plan to give the Australian Charities and Not-for profits Commission (**ACNC**) the power to deregister a charity which doesn't take reasonable steps to participate in the National Redress Scheme (**Scheme**). This has been done by creating an additional governance standard in the *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth).

The Scheme was created in response to [recommendations](#) by the [Royal Commission into Institutional Responses to Child Sexual Abuse](#). For more information about the Scheme, see the [National Redress Scheme website](#).

This new governance standard requires registered charities to take all reasonable steps to become a participating non-government institution in the Scheme if a claim has been, or is likely to be, made against them under the Scheme.



Part F

Committee members' other legal obligations

Committee members' other legal obligations

This part covers:

- ▶ other legal duties that may apply to committee members
 - ▶ other laws that may apply to not-for-profits, and
 - ▶ other legislative obligations that apply to specific subsectors of not-for-profits
-

In addition to the four main legal duties explained in part C of this guide, committee members should also be aware of other legal duties that may apply to them and to their organisation. Again, don't let this list overwhelm you! [Our website](#) contains guides and fact sheets that provide plain-language information about the laws that apply to not-for-profits.

Other legal duties in incorporating legislation

If you are involved in an incorporated group (for example, an incorporated association or a CLG), the legislation under which your organisation incorporated will contain other legal requirements with which your organisation must comply. Often, these legal requirements are imposed on the organisation as a whole (rather than individual committee members), but the committee will have a key role in making sure the organisation complies with the relevant act.

Record keeping

If incorporated (as an incorporated association or CLG), your organisation will be legally required to:

- keep proper records of the organisation, including a members' register, financial records, minutes of committee meetings, minutes of general meetings of members
- ensure the organisation's name and registration number appear on official documents, and
- provide access to the organisation's records (in certain circumstances)

In addition, committee members must return records that belong to the organisation when leaving.

Meetings

If incorporated, your organisation will be legally required to:

- hold meetings of the committee, and
- in certain circumstances, organise and hold general meetings of all members, such as an annual general meeting (AGM)

Submitting documents to the regulator, and keeping the regulator up to date

If incorporated, your organisation will be legally required to:

- submit annual financial statements (which may need to be approved by members at an AGM) to the regulator (these will often need to be in a specified format and contain particular information)



- keep the regulator up to date about the name of a key contact person for your organisation and an address for your organisation to receive mail, and
- provide other documents or information that the regulator requires

If your group is incorporated as an association and is a charity, it will be registered with both the relevant state regulator and with the ACNC, and may need to meet reporting requirements to both. If your group is a CLG and a charity, for the most part you will no longer need to report to ASIC, with most reporting and enforcement transferring to the ACNC.

For more information about reporting requirements, go to the '[Reporting to government](#)' section of our website.

Your organisation's rules

You should also check your organisation's rules for other legal requirements that might apply. The act under which your organisation incorporated gives your rules the force of a contract, so requirements in your rules can be legally enforceable and it is the committee's responsibility to ensure that they are followed.

Other sources of duties and personal liability for committee members

As noted earlier in this guide, there are some laws in Australia (in addition to the four main duties of committee members) that can apply to committee members personally. Examples include employment law, tax law, work health and safety and environmental law. If an organisation doesn't meet its obligations under these laws, committee members may in some cases be personally responsible for the organisation's debts or be subject to penalties. Some of these penalties include significant fines, payment of compensation or a term of imprisonment. For more information about the personal liability of committee members, see part 3 of our '[New to a board or committee](#)' fact sheet.

Other laws that may apply to not-for-profits

For completeness, the table below includes some of the laws that apply to for-profit and not-for-profit organisations, which may apply to your organisation.

Whether your organisation has to comply with these laws will depend on a range of factors, including your organisation's activities, funding arrangements, contracts, legal structure, size and the kind of people involved in your not-for-profit.

This is a basic outline of some laws that may affect your organisation and is not intended to give a comprehensive overview of all the laws that may be relevant. If in any doubt about the law you should seek legal advice.

Legal topic	State	A selection of legislation that might apply
Health and safety laws	CTH	<i>Work Health and Safety Act 2011</i>
	VIC	<i>Occupational Health and Safety Act 2004</i>
	NSW	<i>Work Health and Safety Act 2011</i>
	QLD	<i>Work Health and Safety Act 2011</i>
	SA	<i>Work Health and Safety Act 2012</i>
	WA	<i>Occupational Health and Safety Act 1984</i>
	TAS	<i>Work Health and Safety Act 2012</i>
	ACT	<i>Work Health and Safety Act 2011</i>
	NT	<i>Work Health and Safety (National Uniform Legislation) Act 2011</i>
Employment, superannuation and unfair dismissal		Most Australian workers are covered by Commonwealth legislation such as the <i>Fair Work Act 2009</i> (Cth) and <i>Independent Contractors Act 2006</i> (Cth) with respect to their employment. Some workers, such as some



Legal topic	State	A selection of legislation that might apply
		state or local government workers will be covered by state legislation. Generally, workers in WA will be covered by state legislation, other than those employed by companies. Some state legislation still applies to all workers in a particular state, for example laws relating to long service leave entitlements. Superannuation is generally covered at the Commonwealth level.
	CTH	<i>Age Discrimination Act 2004; Australian Human Rights Commission Act 1986; Disability Discrimination Act 1992; Racial Discrimination Act 1975; Sex Discrimination Act 1984</i>
Equal Opportunity, human rights and anti-discrimination law	VIC	<i>Equal Opportunity Act 2010; Charter of Human Rights and Responsibilities Act 2006</i>
	NSW	<i>Anti-Discrimination Act 1977</i>
	QLD	<i>Anti-Discrimination Act 1991</i>
	SA	<i>Equal Opportunity Act 1984</i>
	WA	<i>Equal Opportunity Act 1984</i>
	TAS	<i>Anti-Discrimination Act 1998</i>
	ACT	<i>Discrimination Act 1991</i>
	NT	<i>Anti-Discrimination Act 1996</i>
Charity tax concession laws		<i>Income Tax Assessment Act 1997 (Cth)</i> Various state Acts can also provide concessions relating to, for example, stamp duty, payroll tax and land tax.
General tax laws		In particular legislation relating to Pay as You Go Withholdings
	CTH	<i>The Australian Consumer Law (ACL)</i>
	VIC	<i>Fundraising Act 1998; Gambling Regulation Act 2003</i>
Fundraising laws	NSW	<i>Charitable Fundraising Act 1991; Lotteries and Art Unions Act 1901</i>
	QLD	<i>Collections Act 1966; Charitable and Non-Profit Gaming Act 1999</i>
	SA	<i>Collections for Charitable Purposes Act 1939; Lottery and Gaming Act 1936</i>
	WA	<i>Charitable Collections Act 1946; Gaming and Wagering Commission Act 1987</i>
	TAS	<i>Collections for Charities Act 2001; Gaming Control Act 1993</i>
	ACT	<i>Charitable Collections Act 2003; Lotteries Act 1964</i>
	NT	<i>Gaming Control Act 1993; note that rules and guidelines also apply under the NT Code of Practice for Responsible Gambling</i>
	CTH	<i>Crimes Act 1914</i>



Legal topic	State	A selection of legislation that might apply
Working with children laws	VIC	<i>Working with Children Act 2005</i>
	NSW	<i>Child Protection (Working with Children) Act 2012</i>
	QLD	<i>Working with Children (Risk Management and Screening) Act 2000</i>
	SA	<i>Children's Protection Act 1993</i>
	WA	<i>Working with Children (Criminal Record Checking) Act 2004</i>
	TAS	<i>Registration to Work with Vulnerable People Act 2013</i>
	ACT	<i>Working with Vulnerable People (Background Checking) Act 2011</i>
	NT	<i>Care and Protection of Children Act 2007</i>
	CTH	<i>Privacy Act 1998</i>
Privacy laws	VIC	<i>Privacy and Data Protection Act 2014; Health Records Act 2001</i>
	NSW	<i>Privacy and Personal Information Protection Act 1998; Health Records and Information Privacy Act 2002</i>
	QLD	<i>Information Privacy Act 2009</i>
	SA	<i>The Department of Premier and Cabinet Information Privacy apply to government agencies</i>
	WA	<i>Freedom of Information Act 1992</i>
	TAS	<i>Personal Information and Protection Act 2004</i>
	ACT	<i>Information Privacy Act 2014; Health Records (Privacy and Access) Act 1997</i>
	NT	<i>Information Act 2003</i>
		Common law as well as state legislation applies
Negligence and defamation	VIC	<i>Wrongs Act 1958; Defamation Act 2005</i>
	NSW	<i>Civil Liability Act 2002; Defamation Act 2005</i>
	QLD	<i>Civil Liability Act 2003; Defamation Act 2005</i>
	SA	<i>Civil Liability Act 1936; Defamation Act 2005</i>
	WA	<i>Civil Liability Act 2002; Defamation Act 2005</i>



Legal topic	State	A selection of legislation that might apply
	TAS	<i>Civil Liability Act 2002; Defamation Act 2005</i>
	ACT	<i>Civil Law (Wrongs) Act 2002</i>
	NT	<i>Personal Injuries (Liabilities and Damages) Act 2003; Defamation Act 2006</i>
Contract law		The common law and a range of state and Commonwealth Acts apply, such as <i>Competition and Consumer Act 2010</i> (Cth)
	CTH	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
Planning and Environment laws (many other Acts also apply)	VIC	<i>Planning and Environment Act 1987; Environment Protection Act 1970</i>
	NSW	<i>Environmental Planning and Assessment Act 1979; Protection of the Environment Operations Act 1997</i>
	QLD	<i>Sustainable Planning Act 2009; Environmental Protection Act 1994</i>
	SA	<i>Development Act 1993; Planning, Development and Infrastructure Act 2016; Environment Protection Act 1993</i>
	WA	<i>Planning and Development Act 2005; Environmental Protection Act 1986</i>
	TAS	<i>Land Use Planning and Approvals Act 1993; Tasmanian Planning Commission Act 1997; Environmental Management and Pollution Control Act 1994</i>
	ACT	<i>Planning and Development Act 2007; Environmental Protection Act 1997</i>
	NT	<i>Planning Act 1999; Environmental Assessment Act 1982</i>



Note

It is very important for committee members to understand the laws about health and safety in an organisation (known as WHS laws). WHS laws may impose particular duties on committee members. For further information about these duties, see our guide: [Community Organisations and WHS Laws](#).

Other legislative obligations that apply to specific subsectors of not-for-profits

Depending on the purpose and activities of your organisation, there may be specific legislation that applies to your not-for-profit. For example, the childcare, aged care and housing sectors have detailed legal and regulatory obligations that need to be adhered to. As a committee member, it is part of your duty of reasonable care and diligence (see duty 2) to understand and ensure compliance with these legal requirements. Your sector peak body should be able to provide you with further information about these laws.



Part G

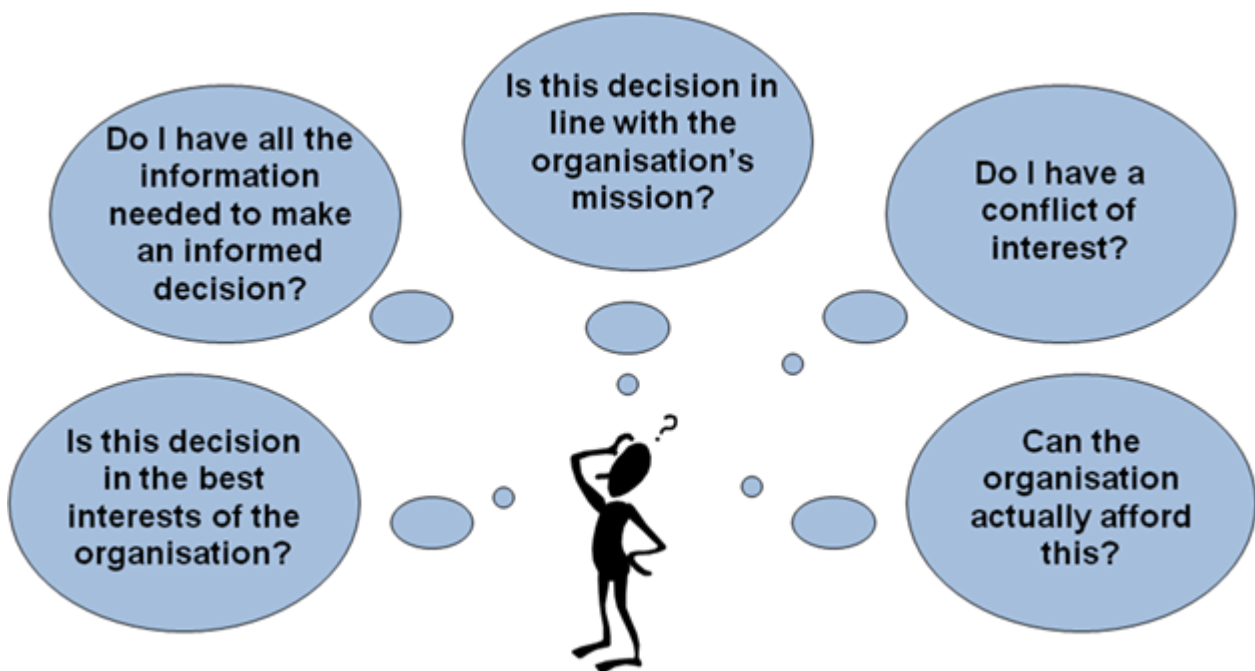
Conclusion

Conclusion

The legal duties that apply to people who govern not-for-profit community organisations are essentially common sense standards requiring reasonable care, diligence and honesty. Compliance with the duties will help to ensure that your organisation is well run, has a good reputation and continues to receive the support of the community.

It's important that you understand the duties and how they operate in the not-for-profit context. But it is equally important to remember that the duties are not hard to comply with. Legal action against committee members is rare. Don't let fears of legal action stop you from being an active, involved committee member, or from enjoying your important role in the not-for-profit sector.

While this guide analyses each of the four main duties in detail (part C), to conclude, the following 5 summary questions are the key ones to keep in mind as you go about your committee duties:





Glossary

Glossary

ACNC – the Australian Charities and Not-for-profits Commission

ACNC Act – *Australian Charities and Not-for-profits Commission Act 2012* (Cth) – legislation passed by the Federal Government creating the ACNC and new laws for charities

ACNC Regulations – *Australian Charities and Not-for-profits Commission Regulation 2013* (Cth) – legislation that provides more detailed requirements for charities in relation to the ACNC register and reporting, and sets out the Governance Standards

Act – an Act (or Act of Parliament) is legislation – a document in which the law has been written down and passed by the Parliament

Board – the name used to describe the governing body of some organisations – it is usually the name used to describe the governing body of a company limited by guarantee

Business (reasonable) judgment rule – a defence that relates to the duty to act with reasonable care, diligence and skill. This defence protects Committee members who make reasonable, considered decisions where the outcome does not end up favourable to the organisation

Breach – failure to act in accordance with a duty; to disobey a legal requirement

Committee (or committee of management) – the name used to describe the governing body of some not-for-profit organisations – it is usually used as the name for the governing body of an incorporated association. We have used the term ‘committee’ throughout this guide for simplicity. You should substitute this for the term ‘board’, ‘council’, ‘trustees’ or whatever other name is used for the governing body of your not-for-profit organisation, if it is different

Committee members – the name given to the people who sit on a committee – often used as the name for the members of the governing body of incorporated associations. We have used the term ‘committee member’ throughout this guide, just for simplicity. You should substitute this for the term ‘director’ ‘board member’, ‘council member’ or whatever other name is used by the governing body of your not-for-profit organisation, if it is different

Common law – ‘judge-made’ law that has developed in the courts over time. As the cases decided by judges were followed by other judges in later cases, a body of law developed and it came to be known as the common law. In more recent times, much of the common law has been written into legislation, and both the common law and legislation can apply to not-for-profit organisations

Company limited by guarantee (abbreviated to **CLG** in this guide) – an incorporated, not-for-profit legal structure often used by organisations that operate nationally

Comply – to obey or act in accordance with a legal duty; the opposite of breach

Constitution – a name for the governing document of an organisation - it is usually the name used for the governing documents of a company, but can also be used to refer to the governing document of other not-for-profits

Co-operative – an incorporated legal structure which can be not-for-profit. Co-operatives are governed by the co-operatives legislation in the state in which they are registered and are democratic organisations owned and controlled by their members

Corporations Act – *Corporations Act 2001* (Cth) – legislation passed by the federal government and includes provisions that set out the laws about companies limited by guarantee. The Corporations Act is the legislation in which you will find the specific wording of the legal duties that apply to people who sit on the governing body of a company

Defence – a response or answer to a claim that you have breached a legal duty

Directors – the name given to the people who are members of a Board of Directors

Duty – a requirement or obligation

Fiduciary duties – the legal obligation of one person (a person who holds a position of trust and confidence) to act in the best interests of another (the person that has entrusted the person in the position of trust). The relationship between a committee member and a not-for-profit organisation is a relationship of trust and the common law says that committee members owe their organisation fiduciary duties (see Duties 1 – 4)

Govern – make key decisions on behalf of a group

Governing body – a standard term used to refer to the group of people who make decisions for an organisation. Often these people are quite easy to identify as they are formally appointed to the committee or board. However the governing body also refers to the key 'decision makers' in the organisation even if they are not on the committee or board

Governing documents – the documents that set out the rules that the organisation has agreed to run by, which form a legal document that guides the organisation. The governing documents often have different names but for most incorporated associations they include the Rules and purposes of the association; other not-for-profit organisations may have a Constitution or Rule Book. Depending on the organisation, the governing documents might also extend to any by-laws, regulations, codes of conduct or other policies that have been adopted by the organisation

Incorporated association – an incorporated legal structure, usually established for not-for-profit purposes, governed by the associations incorporation Act in the state or territory of registration and typically used by organisations that operate at the state or territory level

Incorporated/incorporation – a formal process whereby an organisation formally establishes under a certain legal structure by 'registering' with the relevant government department. The incorporated legal structures that can be chosen by not-for-profit organisations include an incorporated association, co-operative, company (usually a CLG) or Indigenous corporation. When an organisation incorporates it is formally recognised by the law, which means it can legally own property, enter into contracts, and sue or be sued. One of the main benefits of incorporation is the limited liability of members

Indemnity – a document or agreement whereby a person or organisation agrees to pay for the penalty or legal fees of another person if something goes wrong. For example, some not-for-profits have an indemnity clause in their governing documents which says that the organisation will pay for certain liabilities (such as costs, expenses and charges) on behalf of its committee members

Indigenous company – an incorporated legal structure that can be used by not-for-profit organisations that involve Aboriginal or Torres Strait Islander people. Indigenous companies can operate nationally

Insurance or directors and officers insurance – a kind of insurance that people on the governing body of a not-for-profit organisation can buy to pay for them in the event of a breach of the duties. The insurance has limitations and will not protect committee members for all breaches

Legislation – a document in which the law has been written down and passed by a Parliament. See **Act** above.

Liable – to be legally responsible for an action, often meaning you have to pay a fine or some other penalty is imposed

Limited liability – the liability of members is limited to the amount of their membership fees or guarantee (usually a nominal sum such as \$10) if the organisation has any debts when it is wound up. Limited liability is one of the benefits of incorporation. However there are exceptions to limited liability, and the critical exception for the purpose of this guide is that committee members who breach their duties may be personally liable

Must – indicates an action is mandatory, which means it is something the law says that it is essential that you do (and if not you will be in breach)

Not-for-profit organisation – any group (usually set up for a community or social purpose) that directs its profits back into the purpose of the group, rather than distributing the profits to the individuals involved in the group



Objectives – a statement about the purpose for which the organisation was set up. All incorporated organisations must have a purpose and for CLGs, this is usually found within the ‘Objectives’ clause, whereas for incorporated associations, they are often referred to as ‘purposes’. As a Committee member, it is important to know the objectives of your group, so you can comply with the duty to act for a proper purpose (see Duty 1)

Penalty – a punishment; particularly a fine, but may also be disqualification for a position (e.g. disqualification from serving as a committee member) or in rare cases imprisonment

Purposes – see **Objectives** above.

Registered charity – a charity registered with the ACNC

Register of interests – a list where committee members can record all their relevant personal interests (e.g. employment, businesses their family owns, other committee positions etc.) when they join the committee to help them to comply with the disclosure requirements for the duty to disclose and manage conflicts of interest (see Duty 4)

Rule Book – the name often used for the governing document of an Indigenous corporation

Rules – the name usually used for the governing document of an incorporated association but can also refer to the governing document of other not-for-profit legal structures

Unincorporated group – any community group that has not incorporated – an unincorporated group has usually formed for a common, lawful purpose and has more than one member. The legal duties apply to the governing body of an unincorporated group via the common law

WHS – an acronym for workplace health and safety. In some jurisdictions, this is called occupational health and safety (OHS)

Resources

Related Not-for-profit Law resources

The [Not-for-profit Law website](#) has further resources on the following topics:

- ▶ [Getting started](#)
This page sets out the things you will need to take into consideration when deciding on whether to establish a not-for-profit organisation, including links to helpful resources.
- ▶ [Before you start](#)
This page includes specific matters to address prior to setting up a not-for-profit organisation.
- ▶ [The incorporation decision](#)
This page gives guidance to those not-for-profits grappling with the decision to either formally incorporate, or remain as an unincorporated group.
- ▶ [Choosing a legal structure](#)
This page lists the various types of not-for-profit legal structures, allowing you to determine the best structure for your group.
- ▶ [The people involved](#)
This page explains the different roles of different people involved in a not-for-profit organisation.
- ▶ [Reporting to government](#)
This section explains the different situations where community organisations may be required to report to government.
- ▶ [Insolvency and your organisation](#)
This fact sheet provides useful information for incorporated associations and companies limited by guarantee that are facing financial difficulties or are concerned about becoming insolvent.

Other resources

- ▶ [Not-for-Profit Governance Principles](#)
This is a guide provided by Australian Institute of Company Directors that provides principles and guidance for not-for-profits on good governance.

Legislation

- ▶ [Australian Charities and Not-for-profits Commission Act 2012 \(Cth\)](#)
- ▶ [Corporations Act 2001 \(Cth\)](#)

