

Part 3

Secretary's legal role, powers and duties

This part of the guide covers the legal role, powers, duties and liabilities of a secretary of an incorporated association in Victoria.

Summary of key points

What are the main legal tasks of a secretary?

In Victoria, laws regulating incorporated associations shape the secretary's tasks and responsibilities.

There are specific tasks required of the secretary in the AIR Act. These include reporting to CAV on the organisation's financial affairs in the 'annual statement' and notifying CAV of changes to key information about the organisation through myCAV.

An organisation's rules will set out additional requirements.

Typically the secretary will have responsibility for organising meetings, taking minutes, dealing with memberships and keeping records of the organisation. There are tools at the end of this guide to help you understand these tasks.

What are the legal duties of a secretary and committee members?

As an 'office holder' of the association, the secretary and committee members have specific duties set out in the AIR Act when they are performing their role and carrying out their tasks.

What happens if a secretary or committee member breaches any of their legal duties?

There are consequences of breaching a duty under the AIR Act, including monetary penalties which are discussed further in this part of the guide.

These statutory duties are very similar to general duties that apply through the common law (or 'judge made' law).

Does a secretary have power to act on behalf of the organisation?

The law gives a secretary power to act on behalf of the incorporated association in certain situations. The committee may authorise the secretary to act on behalf of the organisation more broadly (called 'delegating').

When is a secretary or committee member personally liable for the debts and liabilities of the organisation?

A secretary or committee member is generally not personally liable (legally responsible) for the debts and liabilities of an organisation unless they provide a personal guarantee (for example, if they act as guarantor for a loan of the association).

What are the main legal tasks of a secretary?

The main tasks and legal obligations of the secretary of an incorporated association are contained in:

- the AIR Act and the Regulations
- the organisation's rules
- the organisation's policies and procedures (if any), and
- other legislation (for example, to do with occupational health and safety)

The law in Australia varies between each state and territory. If your organisation is incorporated outside of Victoria, you will need to check the legislation that is relevant to you.



Note

Make sure you have the most up-to-date version of your rules, including any changes that the organisation's members and CAV have approved.

If you are confused about which rules apply to you, access a copy of your organisation's rules through your myCAV account.

Your rules may not reflect all the requirements of the laws for incorporated associations. See our [Rules Checklist](#) for more information.

The legal tasks of a secretary essentially fall into two categories, external and internal responsibilities.

External responsibilities

External reporting tasks include reporting to CAV on the organisation's financial affairs in the 'annual statement' and notifying CAV of changes to key information about the organisation. This part of the guide doesn't deal with these tasks.



More information

For information about the external reporting tasks of the secretary, see part 8 of this guide: Reporting to Consumer Affairs Victoria.

Internal responsibilities

This part of the guide deals with the secretary's internal tasks related to the administration of the organisation.

While the specific internal administration tasks vary from organisation to organisation, in general the secretary is responsible for:

- organising meetings (for example, sending notices of meetings, drafting the agenda, writing and distributing minutes of meetings)
- take minutes of meetings
- dealing with applications to join the association and membership records (for example, keeping the organisation's register of members up to date)
- receiving, assessing and deciding on members' requests to have access to their personal information on the members' register restricted (this is discussed in detail in part 4 of this guide: Registers, Records and Official Documents)
- dealing with requests for access to information of the association by members (discussed in detail in part 4 of this guide: Registers, Records and Official Documents) and



- maintaining particular documents and records of the association (for example, keeping copies of funding agreements or leases)



Tip

Print the tables at the end of this guide and keep them as an ongoing checklist or reminder:

- Tool 2: Main tasks of a secretary – meetings
- Tool 3: Main tasks of a secretary – membership, and
- Tool 4: Main tasks of a secretary – record keeping

If the table refers to a clause in the model rules, and your organisation does not use the model rules, check your organisation's own rules - as they may be different.

The secretary may authorise someone else (for example, volunteers or paid staff) to do some or all of the particular tasks that they are responsible for (this is called 'delegating'). However, the secretary is still responsible for the tasks carried out by others. Therefore, secretaries should be careful to supervise those carrying out their tasks, and to put in place policies and procedures to ensure the tasks are carried out properly.



Note

This part of the guide deals with the internal administration tasks of the secretary only. The secretary also has external reporting functions under the AIR Act. See part 8 of this guide: Reporting to Consumer Affairs Victoria for information about these functions.

Duties and obligations under other legislation

Other laws may also apply to the secretary as an office holder of the organisation. For discussion of the concept of an 'office holder' under the AIR Act go to part 1 of this guide: Overview of an association.

Some other laws that secretaries should bear in mind are laws relating to occupational health and safety (**OHS**), fundraising, liquor licensing, gaming, industrial relations, copyright, defamation, crime, privacy, and environmental laws as well as local council by-laws. These laws can apply to the secretary, the committee, or to other members of the incorporated association.

Where such laws apply, the secretary – and the organisation generally – must comply with them. For example, criminal laws relating to theft and obtaining property by deception would apply to a secretary (or any other person) who was stealing from an organisation.



More information

For further information about Victorian OHS laws, see [our Victorian guide to Occupational health and safety](#).

Branch secretaries

If an organisation is large, it may have branches. See part 1 of this guide: Overview of an association for more information about branches and branch secretaries.

It's important for branch secretaries to keep up good communication with the secretary of the parent organisation and to maintain accurate records and registers. It's also important for the parent organisation to have written policies and procedures to help the branch secretaries in their role.

In many cases, a branch secretary is not a member of the (parent organisation's) committee and may not be the 'secretary' of the association for the purposes of the AIR Act. However, in these cases the branch secretary may still be regarded as an 'officer holder' with legal duties under the AIR Act.

For this reason, it's good practice for branch secretaries (and any other similar officers, where relevant) to assume that they have the same legal duties as the secretary of the parent organisation.

What are the legal duties of the secretary and committee members?

The AIR Act sets out a number of legal (statutory) duties that apply to office holders (and in some cases former office holders) of incorporated associations.

As an office holder, the duties apply to secretaries in the performance of their role. The legal duties are:

- duty to act in good faith and for a proper purpose (section 85)
- duty to not misuse information or office (section 83)
- duty to disclose material interest (section 80) (applies only to members of the committee), and
- duty of care and diligence (section 84)

There are similar legal duties that can come from the law developed by the courts ('common law').



More information

For more information, see [our duties guide](#).

Duty to act in good faith and for a proper purpose

Office holders must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would, if that person were an office holder in the same circumstances and held the same office as the office holder (section 85(1) of the AIR Act).

This means that the secretary must:

- act in good faith (with integrity) and in the best interests of the organisation, assisting the organisation to achieve its purpose (as contained in the organisation's purposes in its rules, and other documents such as a mission and values statements (see section 85(1)(a))
- not act for their own benefit or the benefit of a particular group of members. For example, a secretary should not receive bribes or 'kickbacks' from suppliers to the organisation and should not act in a way which treats a particular member of the association unfairly, or is not in the interests of members of the organisation as a whole (see sections 61 and 68) – for example, a secretary should not use their powers to discriminate against members of the organisation they do not like or prevent them from attending or voting at a general meeting, and
- make sure the organisation is only doing things that are permitted by the organisation's rules and purposes (see sections 34 and 35)

Duty to not misuse position or information

Office holders must not:

- misuse information acquired by virtue of holding office to gain an advantage for themselves or another person or to cause detriment to the organisation (this duty also applies to former office holders), and
- make improper use of their office to gain an advantage for themselves or another person or to cause detriment to the organisation

This means that office holders can't use their position, or the information they acquire or have access to through their position, to get an 'advantage' (financial or not) for themselves or any other person (such as a relative) or to damage the association. Some examples of misuse of information or position could be:



- using details from the register of members to conduct a mail-out about a friend's business
- authorising their own petty cash reimbursements
- executing contracts for the organisation when they have a personal interest in the contract (for example a contract to purchase stationery from their own stationery business), or
- providing information about job applicants for a position available in the association to a friend who is applying for the position

Duty to disclose material personal interest (only applies when the secretary is a member of the committee)

A member of the committee who has a material personal interest in a matter being considered at a committee meeting must, as soon as the member becomes aware of their interest in the matter, disclose to the committee:

- the nature and extent of that interest, and
- how the interest relates to the activities to the organisation

The above details must be recorded in the minutes of the meeting at which the matter is being considered. The committee member must also disclose the nature and extent of their personal interest in the matter at the next AGM.

This duty helps committee members to avoid conflicts of interest, that is, where the interest of the committee member (or interests of a friend, family, or another organisation in which they are involved) are at odds (in 'conflict') with the interests of the organisation.

A secretary may have a 'conflict of interest' if, for example, an opportunity is available to the organisation that the secretary could profit from personally – for example, if the organisation was looking for an electrician, and the secretary owns an electrics business.



Example

The committee of XYZ Inc is deciding on pay rates for staff. The secretary of XYZ Club Inc is on the committee, and her partner is a paid staff member of the organisation.

The secretary must:

- tell the meeting that her partner is a member of staff (as she may have a conflict of interest)
- not be present at the meeting while her partner's pay rate is being considered
- not vote on motions about her partner's pay rate
- make sure that the minutes record what she told the committee, and also how the meeting dealt with the matter (for example, she left the room while her partner's pay rate was discussed and voted on), and
- disclose the nature and extent of the personal interest to members at the annual general meeting

To comply with the legal duty to manage conflicts of interest, office holders need to take a three step approach when they become aware of a material personal interest.

**Office holders must disclose, manage and record:**

1. Disclose ↓	As soon as they become aware of the material personal interest, office holders must disclose the nature and extent of the interest to the committee as well as how that interest relates to the activities of the organisation. The interest must also be disclosed at the next AGM.
2. Manage ↓	Office holders must not: <ul style="list-style-type: none"> • be present at the meeting while the matter in which they have a material personal interest is being considered, or • vote on the matter
3. Record	Office holders must ensure that meeting minutes record: <ul style="list-style-type: none"> • that they disclosed a material personal interest • the nature and extent of that interest and how it relates to the activities of the organisation, and • that they left the meeting for the relevant discussion and vote and returned afterwards

In certain situations, the statutory duties about conflicts of interest in sections 80 and 81 of the AIR Act don't apply.

An office holder **doesn't** need to disclose a conflict of interest if:

- the material personal interest exists only because:
 - the office holder is an employee of the association
 - the office holder is in a group of people for whose benefit the organisation is established, or
- the material personal interest is one that the office holder has in common with all, or a substantial proportion, of the members of the organisation

Even if the secretary is not a member of the committee they should be aware of the above obligations with respect of material personal interests so that when any such interests arise in respect of committee members, they are duly recorded by the secretary in the minutes.

**Tip**

People's perceptions about whether there is a conflict of interest are important. So, even if you are legally allowed to participate in discussions or vote on matters in which you have a personal interest as one of the exceptions applies, it is usually good practice not to do so.

Avoiding conflicts of interest gives members and other people dealing with the organisation confidence that the organisation is well managed, and that decisions are being made fairly and for the benefit of the organisation.

Duty to act with care and diligence

An office holder must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would if that person:

- were an office holder of the organisation in the same circumstances applying at the time of the exercise of the power or the discharge of the duty, and
- occupied the same office, and had the same responsibilities, as the office holder

Unless your organisation's rules say otherwise, you do not have to have any particular qualifications to be an office holder, but you should use whatever skills and experience you have for the benefit of the organisation.

To discharge your duty to act with care and diligence you should:

- know the organisation's financial position and make sure the committee takes action if there is a concern about whether debts can be paid on time. Every member of the committee must do this, rather than leaving it entirely to the treasurer
- be conscientious of your organisation's activities, policies and affairs
- attend and actively participate in committee meetings
- following up action items between committee meetings
- keep your organisation's records up to date, and
- report to CAV accurately and on time



Note – duty to prevent event insolvent trading

The committee is responsible for overseeing the financial affairs (and financial health) of the organisation. If an organisation is trading while insolvent, it means it is continuing to operate and enter into contracts or incur debts it cannot repay.

A key part of the duty to exercise care and diligence is a duty to prevent the organisation from trading while 'insolvent'. This 'sub-duty' arises as a result of the application of the *Corporations Act 2001* (Cth) in the AIR Act (refer to section 152 of the AIR Act).

An incorporated association that trades while insolvent may be liable to pay a financial penalty to CAV of up to \$20,000. For more information, see [our fact sheet on 'Insolvency and your organisation'](#).

If an office holder doesn't have the required skill or knowledge on a particular matter, this duty means that they need to seek help from someone who does. For example, a secretary may need to ask the organisation's treasurer or auditor for help in understanding the organisation's financial position.

Business judgements

The law recognises that running an organisation involves making informed decisions on behalf of the organisation. These decisions will not always, with the benefit of hindsight, benefit the organisation, but this does not mean the person making the decision has breached a duty owed to the organisation.

As a result, the AIR Act has a 'business judgment' defence to claims that an office holder has failed to meet the standard of care and diligence required under section 84(1) of the AIR Act (see section 84(2) and (3)).

This defence can be relied on where the office holder:

- makes a decision or undertakes a course of action honestly, in good faith and for a proper purpose
- does not have a material interest in the subject matter of the decision
- informs themselves about the subject matter of the decision to the extent that they reasonably believe to be appropriate, and
- rationally believes the decision or course of action is in the best interests of the association (even if in hindsight the decision was not the best choice for the organisation)



Note

The 'business judgment' rule only applies as a defence to the duty of care and diligence in the AIR Act. It cannot be relied on as a defence for any of the other statutory duties in the AIR Act discussed above.

Relying on information and advice

The AIR Act contains a defence to claims that an office holder has breached any of the statutory duties if the office holder has reasonably relied on information or advice.

When determining what will be reasonable, the AIR Act 'presumes' that a number of sources of information or advice can be reasonably relied upon – as long as the office holder relies on them in good faith and independently assesses their merit.

The presumption applies to information or advice received from:

- employees of the association who the secretary reasonably believes are reliable and competent
- professional advisors where the subject matter of the information or advice falls within their expertise
- another office holder acting within their authority, and
- a sub-committee of the association, provided that the office holder is not a member of the sub-committee

What happens if a secretary doesn't comply with their legal duties?

CAV's powers to investigate and intervene

If there are allegations that the secretary (or others involved in running the organisation) are not complying with their legal duties, or that the organisation is in breach of its legal obligations, CAV may decide to investigate the organisation or send a letter requesting compliance. CAV has advised that, before doing so, it would usually need to be informed of the problem by a committee member, or a member of the organisation. CAV may then:

- appoint an inspector to investigate the organisation's activities (sections 162-167 of the AIR Act), or
- in serious cases (for example, gross mismanagement by the committee), apply to the Magistrates' Court for a statutory manager to be appointed to take over the running of the organisation (section 116 of the AIR Act)

In some circumstances, CAV can wind up an organisation by either:

- certifying that particular matters have occurred (set out in section 127 of the AIR Act), or
- applying to the Supreme Court to wind up the organisation (see section 126 of the AIR Act)

In either case there is a procedure that must be followed, including giving notice to the organisation. If your organisation receives such notice (or correspondence indicating that CAV or another person intends to take action to wind up your organisation), you should seek legal advice urgently, and may be able to oppose this action.

Consequences of a breach of duty under the AIR Act

It's an offence under the AIR Act for an office holder (including a secretary) to fail to comply with any of their statutory duties, and a court may order them to pay a penalty. The penalties vary, but they are significant: up to approximately \$20,000.

In addition, if the secretary breaches their duties under the AIR Act in a way that is 'knowing' or 'reckless' (see above – What are the legal duties of a secretary?) a court may also order them to pay compensation to the organisation (section 83(5) of the AIR Act). This could result in very serious outcomes for a secretary.

Do penalties apply if the secretary is not a member of the committee?

As mentioned in part 1: 'Overview of an association' of this guide, a secretary is defined as an 'office holder' under the AIR Act and therefore, even if they aren't on the committee, the statutory duties and penalties under the AIR Act apply to them (except for the conflict of interest provisions, if a secretary is not on the committee).

Does a secretary have power to act on behalf of the organisation?

The AIR Act gives the secretary certain express powers to act on behalf of the organisation. Specifically, the secretary can:

- execute any contract or other document to bind the organisation along with the signature of a committee member (section 38 of the AIR Act), and
- authenticate any document or proceeding on behalf of the organisation (see section 37 of the AIR Act)



The secretary is acting on behalf of the organisation when they sign statements and forms and submit them to CAV as part of their external reporting tasks. For more information, see part 8: Reporting to Consumer Affairs Victoria in this guide.

Additionally, the AIR Act allows an incorporated association to appoint a person to execute a deed on its behalf either generally or in specific circumstances (section 39 of the AIR Act). A deed is a particular type of legally binding document similar to a contract and is required in some situations, such as for a transfer of land. Associations can also give 'express' authority to a person (or the organisation's authority to do so may be implied by their conduct) to make, vary or discharge a contract in the name of (or on behalf of) the organisation (section 41 of the AIR Act). If appropriate, the committee may decide to give this authority to the secretary.

These types of authority are set out in the table below, with examples.

Express and implied authority

Authority	Explanation	Example/comment
'Express' authority	Express authority is when the committee has given the secretary direct instructions. In substantial or important matters, the secretary should only enter into a contract (or legally bind the organisation) on express authority of the committee.	An example of express authority would be where the committee passes a resolution authorising the secretary to sign a building contract for a new kitchen area in the organisation's club house.
'Implied' authority	Implied authority to act on behalf of the organisation is a less precise source of authority. However under judge-made law, a secretary has implied authority to do all the things a secretary in such a position would customarily (ordinarily) do.	A secretary of a multi-million dollar sporting club with poker machines will have greater implied authority (customary power) than the secretary of a newly incorporated tiddly-winks club with seven members and a \$10 bank balance.
	<p>A secretary generally has implied authority to legally bind the organisation in:</p> <ul style="list-style-type: none"> • matters incidental to their duties, and • matters incidental to their express authority 	<p>Matters incidental to a secretary's duties might include:</p> <ul style="list-style-type: none"> • buying minute books • printing the organisation's rules, and • buying paper for notices of meetings <p>Matters incidental to express authority might include:</p> <ul style="list-style-type: none"> • organising to pay GST and insurance after having been expressly authorised by the committee to buy an expensive piece of equipment for the organisation

When is a secretary personally liable for the debts and liabilities of the organisation?

As a general rule, the secretary will not be personally liable for the debts and liabilities of the organisation, including any costs incurred in winding up the organisation, unless the AIR Act or the association's rules expressly provide for such. The same applies to members of the committee and members of the incorporated association (section 52(1) of the AIR Act).

However, if a secretary has specifically accepted personal liability (for example, if they have given a personal guarantee for a loan by the organisation), the secretary will be liable for those particular debts.

Remember that a secretary can be personally liable for a breach of duty (see above – [What are the legal duties of a secretary?](#)), and in some circumstances can be ordered to pay compensation.