

# Part 2

## The public officer’s legal role, powers and duties

This part of the guide covers the public officer’s legal role, powers and duties in New South Wales, including the legal requirements for appointing and removing a public officer of an incorporated association.

Under the *Associations Incorporation Act 2009* (NSW) (**AI Act**) it’s compulsory for the association’s committee (or board) to appoint a public officer to the association.

The public officer doesn’t have to be a member of an association’s committee, although the AI Act and the *Associations Incorporation Regulation 2022* (NSW) (**AI Regulation**) don’t prevent an association’s public officer from also holding the positions of committee member (or board member) and secretary. For some associations, a committee member will automatically be appointed the public officer by reason of their committee position.

However, it’s important to understand that the role of a public officer is a separate and independent role from the role of a committee member. This guide is focused on the legal role, powers and duties of the public officer only.

### Summary of key points

<p><b>Public officer</b></p>	<p>The <i>Associations Incorporation Act 2009</i> (NSW) (<b>AI Act</b>) regulates who can be the official ‘public officer’ of an incorporated association. In addition, an association’s own constitution and policies may have particular requirements.</p> <p>Under section 34 of the AI Act, it’s compulsory for the association’s committee (or board) to appoint a public officer to the association.</p> <p>The public officer is, by virtue of being appointed to that office, an authorised signatory for the association (section 36 of the AI Act).</p>
<p><b>How is the public officer appointed?</b></p>	<p>In the case of a new association, the public officer is nominated in NSW Fair Trading’s application form for registration of the association.</p> <p>Whenever there is a vacancy in the position of public officer, the association’s committee must appoint a new public officer within 28 days after the vacancy arises (section 35 of the AI Act).</p> <p>The position of a public officer can, but does not need to, be held by a committee member.</p>
<p><b>What happens after the public officer is appointed?</b></p>	<p>Every new public officer must notify NSW Fair Trading of their details (full name, date of birth, address and the fact of the appointment) within 28 days after they have been appointed and update those details if they change.</p>



	Associations may also need to notify the Australian Taxation Office of a change of public officer.
<b>When will the public officer's position become vacant?</b>	The AI Act and an association's constitution set out the circumstances in which the position of public officer will be automatically terminated (vacated). These circumstances may include the public officer becoming bankrupt, dying, becoming mentally incapacitated or if they cease to ordinarily reside in New South Wales (section 35 of the AI Act). A public officer's position also becomes vacant if they resign or if the association removes the public officer from their position (section 35 of the AI Act).
<b>What are the main legal tasks of a public officer?</b>	There are specific tasks required of the public officer in the AI Act and the AI Regulation. These include notifying NSW Fair Trading of any changes to key information about the association, collecting all association documents from former committee members, and returning all association documents to a committee member when the public officer leaves their role. An association's constitution may set out additional requirements and responsibilities.
<b>What are the legal duties of a public officer?</b>	The public officer has specific duties set out in the AI Act when performing their role and carrying out tasks. These statutory duties are in addition to general law duties that apply through the law developed by the courts ('judge-made' law, or common law).
<b>What happens if a public officer breaches any of their legal duties?</b>	There are consequences for breaching a duty under the AI Act and under judge-made law, including financial penalties (discussed further in this part of the guide).
<b>Does a public officer have the power to act on behalf of the association?</b>	Under the AI Act, a public officer has powers to act on behalf of the incorporated association in certain situations. The committee may (but is not required to) authorise the public officer to act on behalf of the association more broadly (this is called 'delegating').
<b>When is a public officer liable for the debts and liabilities of the association?</b>	A public officer is generally not personally liable (legally responsible) for the debts and liabilities of an association unless the public officer provides a personal guarantee (for example, agrees to act as guarantor for a loan of the association) or is found guilty of an offence under the AI Act (section 91).

## Who can be the public officer?

The public officer is the principal contact point between NSW Fair Trading (and other regulators, for example, ATO, ACNC) and your association.

The public officer is legally responsible for a number of specific tasks required by the AI Act — for more information, see **part 7** of this guide: Reporting to NSW Fair Trading, and NSW Fair Trading's webpage on the public officer.

The public officer role is very important to your association. Your association should appoint a person who has the experience, skills and qualifications to carry out the role of public officer.

Effective public officers should have a range of skills, including:

- enthusiasm for, and knowledge of, the association and its mission
- adequate time for the task
- interest in committee work
- good working relationships with other people involved in managing the association, and
- reliability and good organisational skills

In choosing your public officer, also take into account:

- any restrictions or qualifications required by law, particularly the AI Act (such as the requirement to reside in New South Wales and be at least 18 years of age)
- your association's constitution, and
- any policies your association has about this issue

More details about these requirements are outlined below.

## AI Act requirements

A public officer of an association incorporated in New South Wales:

- must be a person who is at least 18 years old and ordinarily a resident in New South Wales (section 34(2) of the AI Act)
- can, but does not have to, be a committee member of the association (section 34(3) of the AI Act), and
- must not be bankrupt or mentally incapacitated (sections 35(1)(d) and (e) of the AI Act)

Unless the constitution of your association provides otherwise:

- the public officer may also hold another position in your association (including on the committee, such as being the secretary or president), and
- there is no upper limit to the public officer's age, subject to any other legislative requirements



### Tip

Some associations accidentally appoint a public officer who is not allowed under law to hold the position. To avoid this, before someone is appointed as public officer, get them to sign a letter in which they:

- agree to act as the association's public officer
- confirm that they satisfy the AI Act requirements for being a public officer, and
- agree to notify the association if any of these matters, or their contact details, change

### Who is a 'resident' of New South Wales?

The AI Act does not define who is a resident of New South Wales. However, generally, the public officer's primary residence (that is, the place where they usually live) must be in New South Wales.

Even if the public officer is not an Australian citizen or if they frequently travel outside Australia, they can usually still be the public officer if they are based in New South Wales. Check your association's constitution for any additional requirements.

### What does 'bankrupt' mean?

Bankruptcy is a legal process where a person is declared unable to pay their debts. It offers a person protection from further action against them by people they owe money to. A person is 'declared bankrupt' when an actual declaration of bankruptcy has officially been made about them. The usual period of bankruptcy is three years. For further information about bankruptcy, see the Australian Financial Security Authority website.

Bankruptcy records are publicly accessible on the National Personal Insolvency Index (NPII), so it's possible to check if a person has been declared bankrupt — you can search the bankruptcy register online (fees apply for searching the NPII).

## Who is a 'mentally incapacitated' person?

Generally, a person may be mentally incapacitated if they are unable to make decisions for themselves, even after any necessary information, advice or support has been given to assist.

A person's mental capacity may be in doubt if they can't:

- understand information given to them
- consider issues, options and consequences of making a decision
- remember information long enough in order to make a decision, or
- communicate their decision

Note that a finding of mental incapacity in one area does not automatically mean that a person loses capacity in another area. In most cases, a person's mental capacity will not be in doubt. If an association's committee has concerns about the mental capacity of their public officer, they should consider appointing a new public officer and seek legal advice.

## Your association's constitution and policies

Your association's constitution may provide for the appointment and removal of your public officer.

Check the constitution and any relevant policies of your association for additional requirements (over and above those in the AI Act) about who can be appointed as the public officer and the term (or length) of their appointment. For example, your constitution may require certain qualifications or experience for the role or may state that the person elected secretary or president of your association is to be the public officer.

However, the constitution and any policies of your association can't override the AI Act requirements – for example your constitution can't permit your public officer to reside outside of New South Wales or to be under the age of 18. The constitution can only provide for additional requirements over and above the AI Act requirements.

If your association is large, your constitution may state that the public officer can be a paid manager. In some large associations the constitution may allow for certain work of the public officer to be carried out by a specialist firm for a fee. However, even if the public officer delegates their functions to another person or firm, the public officer remains legally responsible for those duties being properly carried out (information on the public officer's duties follows in this part of the guide. Also see **part 7** of this guide: Reporting to NSW Fair Trading).



### Note

Make sure you have the most up-to-date version of your constitution, including any changes that the association's members and NSW Fair Trading have approved.

If you are confused about which constitution applies to you and whether the copy you have is up to date, the best thing to do is to contact NSW Fair Trading and request a copy of your association's constitution and purposes.

## Does the public officer have to be on the committee (or board)?

No, there is no requirement in the AI Act for the public officer to be on the committee (or board). But the constitution of your association may state that the public officer is a member of the committee or that a person appointed to a particular position on the committee (such as the secretary) is required to take on the role of public officer. This is optional – it's not required by the AI Act or by the AI Regulation.

Note that, under the model constitution, if there is no person holding the office of secretary of the association, the public officer will be deemed the secretary until a secretary is properly elected, and during this period automatically be on the committee. Refer to your association's constitution for further information.

If your association's constitution doesn't require the public officer to be a member of the committee, it will usually be the case (unless your constitution expressly states otherwise) that the public officer can't vote at committee meetings.

## Where to find a new public officer

In many cases, a new public officer is found from within the association – for example, there may be an existing member of the committee or member of the association who has suitable skills and interests.

If your association needs someone with particular expertise to fulfil the position (for example, because of the size and complexity of your association), ask around. New public officers are often found by the existing committee members (or others within the association) who can use their networks to find people who may be suitable for the role.

It may also be helpful for your association to look for someone by contacting the various volunteer brokers and support organisations. You can also advertise online or in your local paper. Organisations who can help include:

- Volunteering Australia
- Go Volunteer
- State-based volunteering bodies, such as NSW Volunteering and NSW Volunteer Centre Network
- Community Builders NSW
- Goodcompany
- OurCommunity,
- Volunteer Match, and
- Pro Bono Australia

For further ideas, speak to any peak body to which your association may belong – they may be able to put a note in their next newsletter or e-bulletin. For example, NSW Council of Social Service can point groups working in social services in the right direction for assistance in finding a public officer.

## How is the public officer appointed?

Your association's committee (or board) has responsibility for appointing the public officer (section 34(1) of the AI Act). Your association may have special requirements for how the association appoints a new public officer when there is a vacancy.

The first public officer of your association is the person nominated as public officer in the application for registration of the association (section 34(5) of the AI Act).

If the position of public officer becomes vacant, the association must fill the vacancy within 28 days (section 35(3) of the AI Act) and notify NSW Fair Trading of that appointment within 28 days (section 34(6) of the AI Act). The circumstances in which the position may become vacant are discussed below.



### Note

The public officer may be a member of the committee – but doesn't have to be.



### Example

A sample resolution of a committee to appoint a new public officer is set out below:

*The management committee appoints Ms Katherine Smith to be the public officer of XYZ Inc, effective from 1 January 2016 until the end of the next annual general meeting of XYZ Inc (or earlier resignation or termination in accordance with the constitution).*

To help make sure the public officer is eligible to hold the position, the association may also wish to state in the minutes something like this:

*The management committee has received (and will keep for its records) a written statement by Ms Katherine Smith confirming that she:*

- *agrees to act as the public officer of XYZ Inc*
- *satisfies the AI Act requirements for being a public officer, and*
- *agrees to notify the management committee of XYZ Inc if any of these matters or her contact*

## What happens after the public officer is appointed?

### Report to NSW Fair Trading

Within 28 days after a new public officer is appointed, the public officer must notify NSW Fair Trading of (section 34 of the AI Act):

- the person's full name and date of birth
- the person's address (in NSW) for service of notices, being either the person's residential address or some other address at which the person can generally be found, and
- the fact that the person has taken office as public officer

If the existing public officer's details change (for example, their address) this information must also be provided to NSW Fair Trading.



### Note

If you have just been appointed as the public officer (or you are the existing public officer and your details change), you need to notify NSW Fair Trading – even if your association or the previous people in this role have not done this in the past.

The public officer can advise NSW Fair Trading of these changes by lodging Form A9 - Notice of appointment of public officer and Notice of change of association address.



### Caution

If the public officer doesn't notify NSW Fair Trading within 28 days of their appointment, your association can be penalised.

## The association's ongoing reporting responsibilities

The association has responsibilities for reporting to NSW Fair Trading about:

- the association's financial information in its annual statement
- certain decisions made by the association's members which must be approved by NSW Fair Trading before they can become official (such as changes to the association's name, objects or constitution)
- any change in the association's official address, and
- any change to the public officer

In practice, the public officer will generally be responsible for reporting the above issues to NSW Fair Trading on behalf of the association.

As mentioned previously, the public officer must also report to NSW Fair Trading any changes in the public officer's details.

See **part 7** of this guide: Reporting to NSW Fair Trading for more information about the reporting responsibilities of the public officer of an incorporated association.

### Who else should be notified of the appointment of a new public officer?

If your association is registered for tax purposes (for example, if it has an ABN), the association must also notify the Australian Taxation Office (**ATO**) of certain changes, including the appointment of a new public officer. The ATO must be notified of a change in public officer within 28 days of the association becoming aware of the change. For more information, go to the ATO webpage 'Not-for-profit key personnel'.



#### Tip

An outgoing public officer should notify the ATO and other authorities of the new office holder's details before they leave their role. This will ensure a smooth transition from one person to the next.

In addition to the public officer, who is referred to as a 'primary contact', an association may authorise another person (including a committee member) to make enquiries to the ATO about tax affairs. A tax officer will only discuss your association's account with your authorised contact person. You will need to notify the ATO if your authorised contact person changes.

The ATO can be notified of a change of public officer or other authorised contact person by:

- sending the form 'Change of Registration Details' (NAT 2943) which you can request through the ATO Public Ordering Service, or
- online, through the Australian Business Register or the ATO's online services for business

The ATO has a useful checklist 'Handover checklist: not-for-profit administrators' on its website.



#### Tip

Consider whether there are other people, organisations or agencies that should be notified of a change of public officer. Check your association's policies and important documents such as funding agreements and leases.

## When will the position of public officer become vacant?

Under the AI Act (section 35(1) of the AI Act), the position of public officer becomes vacant:

- if the public officer:
  - dies



- resigns the office in writing addressed to the association's committee
- is removed from office by resolution of a general meeting of the association (see below)
- becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with their creditors or makes an assignment of their remuneration for their benefit
- becomes a mentally incapacitated person, or
- no longer ordinarily resides in New South Wales, or
- in such other circumstances as the association's constitution may provide

If any of these circumstances apply, the association doesn't have to pass a resolution removing the person as public officer. Their position is automatically terminated (vacated) under the AI Act. Where an automatic vacancy occurs, an association must appoint a new public officer within 28 days of the vacancy (section 35(3) of the AI Act).

The positions of public officer and all committee members also become vacant if an external administrator is appointed to run the association (section 56(1)(a) of the AI Act).

Public officers can also retire or be removed from office. Members of an association can remove a public officer by resolution of a general meeting (section 35(1)(c) of the AI Act). For more information about passing resolutions at general meetings, see **part 5** of this guide: Special General Meetings. The constitution of an association can provide other ways to remove a public officer (for example by resolution of the committee).



### Note

If the position of public officer becomes vacant, the association must fill the vacancy within 28 days, and NSW Fair Trading must be notified within 28 days of the vacancy being filled.

The public officer will have access to documents and information about the association because of their role. After they have left their position, these documents must be returned to the committee within 14 days (section 35(2) of the AI Act). A penalty applies under the AI Act for failing to comply with this requirement.

It's good practice for the outgoing public officer to sign a statement confirming they have returned all relevant documents after they have finished in the position.



### Tip

To assist the transfer of information from one public officer to the next, it's a good practice to:

- arrange a handover from the outgoing to the incoming public officer
- arrange for the new public officer to seek information from the outgoing public officer (for example, logins and passwords, financial records, copies of documents lodged with NSW Fair Trading) as soon as they are appointed or elected
- ensure that public officers store all information securely in a central place (such as the association's office or computer), including back-ups of electronic data, and
- provide a copy and explain the association's policies and procedures to the next public officer



## Removing a public officer

Sometimes an association may have to remove a public officer from office (for example, because the person is not carrying out their duties properly). Under section 35(1)(c) of the AI Act, a public officer may be removed from office by resolution of a general meeting of the association.

### What if the removed public officer is a member of the committee?

If the removed public officer is also a member of the committee, depending on your association's constitution, the person may be automatically removed as a committee member. However, check what is stated in your constitution.

### What if the public officer is an employee of your association?

If the public officer is also an employee of your association, their employment arrangements should be carefully considered. If the person's main role is as the public officer, the association may no longer want to employ them.



### Caution

If your association wants to remove a public officer who is also an employee, this will mean that the person no longer has a paid position within the association. Seek legal advice before taking any action to remove the public officer.

The association must ensure it complies with relevant contractual and statutory requirements about terminating (ending) a person's employment. Under the national *Fair Work Act 2009* (Cth), it's illegal to dismiss an employee on a range of grounds.

For more information on fair and lawful termination, see the Fair Work Ombudsman's webpage 'Ending employment'.

## The public officer's main tasks and legal obligations

The main tasks and legal obligations of a public officer of an incorporated association are contained in:

- the AI Act and the AI Regulation
- the association's constitution (which outlines the rules of the association)
- the association's policies and procedures (if any), and
- other legislation (for example, work health and safety legislation)

The laws in Australia relating to incorporated associations vary between each State and Territory. If your association is incorporated outside New South Wales, you will need to check the legislation that is relevant to you.



### Tip

Make sure you have an up-to-date version of your constitution, including any changes that the association's members and NSW Fair Trading have approved.

If you are unsure whether the copy you have is up to date, contact NSW Fair Trading and request a copy of your association's constitution.

Your constitution may not reflect all the requirements of the laws for incorporated associations. If there are any compulsory legal requirements missing from your constitution, those requirements will still apply to your association.

### The public officer is responsible for:

- notifying NSW Fair Trading of any change in the association's official address within 28 days
- collecting all association documents from former committee members and delivering the documents to the new committee member
- returning all association documents to a committee member within 14 days, when they vacate (leave) their role as public officer
- acting as the official contact for the association for any external (including governmental) body or person wishing to contact the association, including taking delivery of documents served on the association and bringing them to the attention of the committee as soon as possible, and
- custody of any documents as required by the constitution

For further information about external reporting tasks, see **part 7** of this guide: Reporting to NSW Fair Trading.

The public officer may authorise someone else – for example, the association's secretary, (if the public officer does not assume the role of the secretary), a committee member, volunteers or paid staff) – to do some or all of the particular tasks that they are responsible for (called 'delegating').

However, the public officer remains legally responsible for the tasks carried out by others. Therefore, public officers 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.

#### Duties and obligations under other legislation

Other laws may also apply to the public officer as a person who is involved the management of the association.

Other laws that public officers should bear in mind are laws relating to employment, work health and safety (**WHS**), fundraising, liquor licensing, gaming, industrial relations, copyright, defamation, crime, privacy, and environment laws as well as local council by-laws. These laws can apply to the public officer, the committee, or to any member of the incorporated association.

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



For further information about New South Wales WHS laws, see our webpage 'Work health and safety laws'.

## The legal duties of the public officer and other committee members

In New South Wales, the legal duties of public officers and committee members come from:

- legislation (the AI Act and the AI Regulation), and
- the law developed by the courts ('judge-made law' or common law)

'Statutory duties' under the AI Act generally apply to committee members (see sections 30A, 31, 32 and 33 of the AI Act) – this will include the public officer if the public officer is also a committee member.

A public officer's duties under judge-made law arise because of the position of trust that a person in that role holds and because they are trusted to act in the best interests of the association. These duties are sometimes called 'fiduciary duties'. These fiduciary duties under judge-made law overlap with statutory duties under the AI Act.



**In practical terms, the combined effect of the AI Act requirements and judge-made law is that a public officer should:**

1.	• act honestly, fairly and for a proper purpose
2.	• not misuse their position or information
3.	• disclose and properly manage conflicts of interest, and
4.	• act with reasonable care, diligence and skill, and use their skills for the benefit of the association

These duties overlap and are discussed briefly below (if there is a specific statutory duty under the AI Act, the section number from the Act is included).

### **Duty 1 – act honestly, fairly and for the benefit of the association**

Acting honestly and fairly for the benefit of the association means that a public officer should:

- act in good faith (with integrity) and in the best interests of the association, assisting the association to achieve its objectives (as contained in the association’s objects in its constitution)
- not act for their own benefit or the benefit of a particular group of members. Examples of acting for their own benefit include:
  - receiving bribes or ‘kickbacks’ from suppliers to the association
  - acting in a way which treats a particular member of the association unfairly, or is not in the interests of members of the association, and
  - using their powers to discriminate against members of the association they don’t like or prevent them from attending or voting at a general meeting
- make sure the association is only doing things that are permitted by the association’s constitution and objects (see section 26(1) of the AI Act), and
- make sure their decisions are based on what is best for the association and which will help guide the association towards achieving its objectives

### **Duty 2 – not misuse position or information**

A public officer must also not misuse their position, or the information they have access to through their position, to (directly or indirectly) get an ‘advantage’ (financial or not) for themselves or any other person (such as a relative, friend or another association) or to cause detriment to the association (see sections 32 and 33 of the AI Act).

Some examples of misuse of information or position could be:

- using details from the register of members for a mail-out about a friend’s business
- authorising their own petty cash reimbursements
- executing contracts for the association when they have a personal interest in the contract (for example a contract to purchase stationery from their own stationery business)
- providing information about job applicants for a position available in the association to a friend who is applying for the position, or
- revealing confidential information which is discussed at meetings held by the association (for example, client details, commercially sensitive plans or bids, employee or salary issues etc.) to people outside the association

## Duty 3 – disclose and properly manage conflicts of interest (only applies when the public officer is a member of the committee)

A conflict of interest may arise when a public officer sits on the committee, and their personal interests (or interests of a friend, family, or another association) are (directly or indirectly) at odds (in ‘conflict’) with the interests of the association.

A public officer may have a ‘conflict of interest’ if an opportunity is available to the association that the public officer could profit from personally – for example, if the association was looking for an electrician, and the public officer owns an electric business. See section 31 of the AI Act.



### Example

The committee of XYZ Inc is deciding on pay rates for staff. The public officer of XYZ Inc is on the committee, and their partner is a paid staff member of the association.

The public officer must:

- disclose to the committee that their partner is a member of staff (as they may have a conflict of interest)
- not take part in discussions about their partner’s pay rate
- not vote on motions about their partner’s pay rate
- make sure that the minutes record what they told the committee, and also how the committee dealt with the matter (for example, they left the room while their partner’s pay rate was discussed and voted on)
- record the disclosure in the association’s conflicts of interest register (a book kept by the committee for the purpose of recording conflicts of interest), and
- include details of their interest in the financial statement submitted to members at the annual general meeting

To comply with the legal duty to manage conflicts of interest, a public officer needs to take a three-step approach when a conflict arises.

**This means that a public officer should:**

**Disclose** – tell the committee about any actual (you are being influenced), perceived (you could appear to be influenced) or even potential (you could be influenced) conflict of interest

For example, if the public officer is a member of a competing association, or owns a business that is tendering for a contract, they should tell the committee about any direct or indirect interest they have in the matter and include this in the statement provided to members at the annual general meeting (section 31(1) of the AI Act)



**Manage** – unless the committee otherwise determines, not be involved in any discussion about the matter in which they have an interest (section 31(5)(a) of the AI Act) and not take part in any decision of the committee with respect to the matter in which they have an interest (section 31(5)(b) of the AI Act)



**Record** – mark sure any disclosure by a committee member of a conflict of interest is recorded in a book kept for this purpose. This book must be available for inspection by any member of the association on payment of a fee determined by the committee (sections 31(3) and 31(4) of the AI Act).

**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's usually good practice not to do so.

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

**Duty 4 – act with reasonable care, diligence and skill, and use your skills for the benefit of the association**

This duty is sometimes called exercising due care and diligence (section 30A).

It means the public officer is required to meet the standard of an average public officer in an association of a similar type and size, taking into account their particular skills and capabilities.

Unless the association's constitution states otherwise, you do not have to have any particular qualifications to be a public officer. However, you do need to use whatever skills and experience you do have for the benefit of the association and put reasonable effort into the tasks you take on, be aware of your obligations and seek to perform those obligations to the level of your skill and experience.

This duty includes things such as:

- knowing the association's financial position and making sure the committee acts 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)
- attending and participating in meetings
- following up action items between meetings

- keeping the association’s records up to date, and
- reporting to NSW Fair Trading and other regulators accurately and on time

If a public officer does not 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 public officer 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 association involves making informed decisions on behalf of the association. While a public officer will not be involved in committee decisions, they are automatically an authorised signatory (except to the association’s bank account) and may be asked by the committee to sign official documents on behalf of the association as an authorised signatory. These decisions will not always, with the benefit of hindsight, benefit the association, but this does not mean the person making the decision has breached a duty owed to the association.

A decision will generally be considered to have been made with reasonable care if it can be shown that the public officer:

- made a decision or undertook a course of action honestly and for a proper purpose
- did not have a material interest in the subject matter of the decision
- informed themselves about the subject matter of the decision, and
- rationally believed that the decision or course of action was in the best interests of the association (even if in hindsight the decision was not the best choice for the association)

This defence is historically known as the ‘business judgment rule’.



### **Note**

The ‘business judgment’ rule only applies as a defence to the duty of reasonable care and diligence. It can’t be relied on as a defence for any of the other statutory duties of the public officer discussed above.

### **Personal liability of committee members if acting**

Under the AI Act (section 30B), committee members (including the public officer where they are also a committee member) and others acting under the direction of a committee member, are protected from personal liability for actions (or omissions) done in good faith for the purpose of exercising the committee members’ functions under the AI Act.

## **What happens if a public officer does not comply with their legal duties?**

### **Fair Trading’s powers to investigate and intervene**

If there are allegations that the public officer (or others involved in running the association) are not complying with their legal duties, or that the association is in breach of its legal obligations, NSW Fair Trading may decide to investigate the association or send a letter requesting compliance.

To establish whether your association is complying with its legal duties, NSW Fair Trading has the power to give any person (including a public officer) a written notice requiring that person to:

- produce such information as the person possesses in connection with the affairs of an association to NSW Fair Trading, and
- furnish such documents as the person possess in connection with the affairs of the association to NSW Fair Trading (section 85 of the AI Act)

An authorised officer from NSW Fair Trading may also enter the incorporated association’s premises and inspect and copy any document that relates to the association’s business to determine compliance with the AI Act (section 86). This can be done either with or without the association’s consent in certain

circumstances, or in accordance with a search warrant issued by a magistrate (sections 86 and 87 of the AI Act).



### Note

In exercising these powers, an authorised officer from NSW Fair Trading must do as little damage as possible. NSW Fair Trading must compensate all interested parties for any damage caused by an authorised officer in the exercise of these powers (unless the authorised officer was obstructed or hindered by the occupier of the premises).

NSW Fair Trading's powers to investigate and intervene also include:

- appointing a person as an administrator for the purposes of the provisions of Part 5.3A of the *Corporations Act 2001* if NSW Fair Trading is of the opinion that the association is, or is likely to become, insolvent (section 54(2) of the AI Act)
- appoint an administrator to administer an association's affairs if the association has persistently failed to comply with requirements of the AI Act or AI Regulation (section 55 of the AI Act)
- direct the association to apply for cancellation of its registration (section 73 of the AI Act)
- cancel the association's registration (section 76 of the AI Act), or
- apply to the Supreme Court to wind up the association (section 63(2) of the AI Act)

NSW Fair Trading must follow a procedure, including giving notice to the association. If your association receives such notice (or correspondence indicating that NSW Fair Trading or another person intends to take action to wind up your association), you should seek legal advice urgently.

Under the AI Act it's an offence for an incorporated association (or anyone involved in its activities – such as the public officer and committee members) to:

- refuse or fail to comply with a requirement of NSW Fair Trading (for example, to produce relevant documents, section 85 of the AI Act), or
- obstruct or hinder an authorised officer in the exercise of the officer's functions under the AI Act (section 92 of the AI Act)

### Consequences of a breach of duty under the AI Act

It is an offence under the AI Act for any person, including a public officer, to obstruct or hinder an authorised officer (such as a NSW Fair Trading investigator) who is performing functions under the Act and a court may order them to pay a penalty.

If an association contravenes the AI Act (section 91(1) of the AI Act) or the AI Regulation, each committee member of the association is taken to have contravened the same provision if they knowingly authorised or permitted the contravention. For the purpose of this section the AI Act (section 91(1)), an association's public officer (not otherwise being a committee member) is taken to be a committee member.

Some breaches of the AI Act may attract criminal penalties, or the court may order imprisonment or both (sections 32, 33, 68 and 69 of the AI Act).

For example, in cases of insolvent trading, a public officer and any person who is a committee member of the association may commit an offence by allowing the association to incur debts while insolvent (sections 68 and 91 of the AI Act).

When facing liability for insolvent trading, a public officer and the association's committee members may have the following defences available to them:

- the debt was incurred without the public officer's or committee member's authority or consent, or
- at the time the debt was incurred the public officer or committee member did not have reasonable grounds:
  - to believe that the association was insolvent, or
  - to expect that if the association incurred the debt, it would become insolvent



## Consequences of breach of duty under judge made law

If a public officer or committee member is in serious breach of their duties under judge-made law, they may be taken to court (sued) by the association and may have to pay compensation for any loss or damage they have caused.

### Do penalties apply if the public officer is not a member of the committee?

Even though certain duties under the AI Act apply to current or former committee members only (for example, sections 31 to 33 of the AI Act), the public officer may be liable for certain offences under the AI Act even though they are not a member of the committee.

In particular, (as mentioned above) section 91(5) of the AI Act provides that the public officer will be considered to be a committee member for the purposes of that section and, consequently, may be taken to have contravened the AI Act or the AI Regulation if the public officer knowingly authorised or permitted the contravention. Also remember that a public officer may automatically be appointed secretary (and so will be a committee member) if there is no appointed secretary.

On the other hand, the duties under judge-made law apply only where someone has a ‘fiduciary duty’ to the association. A public officer will owe a fiduciary duty in respect of the duties of a public officer, but if the public officer is not on the committee and does not take part in making governance decisions for the association, then the scope of the fiduciary duty may be limited. It will depend on the circumstances – sometimes a person who is not ‘technically’ on the committee may need to comply with common law duties.



For more information, see our duties guide.

## Does a public officer have power to act on behalf of the association?

The AI Act gives the public officer certain express powers to act on behalf of the association – for example, to lodge documents with NSW Fair Trading and notify them of any changes to key information about the association.

Also, as the public officer is also an ‘authorised signatory’ of the association (sections 36(1) of the AI Act), the public officer has the power to execute documents on behalf of the association. For more information, see **part 7** of this guide: Reporting to NSW Fair Trading.

Additionally, the AI Act allows an incorporated association to appoint a person to execute documents (including deeds) on its behalf either generally or in specific circumstances (sections 22 and 36(2) of the AI 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’ or ‘implied’ authority to a person to make, vary, ratify or discharge a contract on behalf of the association (section 21 of the AI Act).

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

Authority	Explanation	Example / comment
<b>Express authority</b>	Express authority is when the committee has given the public officer direct instructions.  In substantial or important matters, the public officer should only enter into a contract (or legally bind the association) on express authority of the committee.	An example of express authority would be where the committee passes a resolution authorising the public officer to sign a building contract for a new kitchen area in the association’s club house.



<b>Implied authority</b>	Implied authority to act on behalf of the association is a less precise source of authority. However, under judge-made law, a public officer has implied authority to do all the things a public officer in such a position would customarily (ordinarily) do.	A public officer of a multi-million-dollar sporting club with poker machines will have greater implied authority (customary power) than the public officer of a newly incorporated tiddlywinks club with seven members and a \$10 bank balance.
	A public officer generally has implied authority to legally bind the association in: <ul style="list-style-type: none"> <li>• matters incidental to their duties, and</li> <li>• matters incidental to their express authority</li> </ul>	Matters incidental to a public officer's duties might include: <ul style="list-style-type: none"> <li>• buying minute books, and</li> <li>• printing the association's constitution</li> </ul> Matters incidental to express authority might include: <ul style="list-style-type: none"> <li>• organising to pay GST and insurance after having been expressly authorised by the committee to buy an expensive piece of equipment for the association</li> </ul>

## When is a public officer personally liable for the debts and liabilities of the association?

As a general rule, the public officer is not personally liable for the debts and liabilities of the association, including any costs, charges and expenses incurred in winding up the association, unless the AI Act or the association's constitution provides otherwise.

The same applies to committee members and members of the incorporated association (section 26(2) of the AI Act and rule 6 of the model constitution – **Note:** always refer to your association's constitution).

However, a public officer may be held to be jointly and severally liable (ie. together with and separately responsible) with the committee members for the debts and liabilities of the association if the debt was incurred and the association was insolvent or likely to become insolvent as a result of the debt (section 68 of the AI Act) and the public officer knowingly authorised or permitted the debt to be incurred. In addition, if a public officer has specifically accepted personal liability (for example, if they have given a personal guarantee for a loan by the association), the public officer will be liable for those particular debts.

Remember that a public officer can be liable for a breach of duty (see above) and in some circumstances can be ordered to pay compensation.