

Indemnity for office holders of incorporated associations (Vic)

Legal information for Victorian community organisations

This fact sheet covers:

- ▶ indemnity, and
- ▶ association liability insurance

Under the *Associations Incorporation Reform Act 2012 (Vic)* (AIR Act), an incorporated association is generally required to indemnify its office holders for liabilities they incur in good faith while performing their duties.



Disclaimer

This fact sheet provides information on indemnity for incorporated association office holders in Victoria. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this fact sheet.

The indemnity is intended to provide comfort to volunteers acting as office holders in incorporated associations as the association must reimburse them when they incur liabilities while performing their duties as office holders in good faith.

All associations should consider the potential impact of the indemnity on their organisation.

Associations should consider, among other things:

- their activities and the types of liabilities their office holders could incur from performing their duties, and
- their financial position and ability to meet the costs of reimbursing office holders for their liabilities covered by the indemnity

Insurance may be one way to manage the risk created by the indemnity for the association and could also provide further protection for office holders.

What is the indemnity?

An indemnity is an obligation contained in a document, contract, agreement, or legislation which requires a person or organisation to pay for loss or damage incurred by the indemnified party.

Under the AIR Act (section 87), incorporated associations must 'indemnify' their 'office holders' for liabilities that they incur when performing their duties as an office holder (so long as the liabilities were incurred in good faith).



The AIR Act indemnity automatically applies to every Victorian incorporated association. **Your organisation does not need to formally adopt the indemnity or write it into the association rules.** It will apply regardless. The indemnity applies in addition to any indemnity provided for in the rules, or under a policy adopted by the association.

The indemnity means that Victorian incorporated associations will be required to reimburse office holders when they can show they have incurred a liability that is covered by the indemnity. However, not all liabilities incurred by office holders will be covered. The indemnity is limited to liabilities incurred by office holders, while they are performing their duties, and only when the liabilities are incurred in good faith. These limitations are discussed further below.

Note

To be liable is to be legally responsible for an action, often meaning you must pay compensation, a fine, or some other penalty to another person or body.

Indemnity and office holders

The indemnity applies to 'office holders' of an incorporated association.

Under the AIR Act, an office holder is defined as:

- a committee member (board member)
- the secretary (including where the secretary is not on the committee), or
- any person (including an employee):
 - who makes or participates in the decision making that affects the whole or substantial part of the association's operations
 - who has the capacity to significantly affect the financial standing of the association, or
 - on whose instructions the committee is accustomed to act (excluding people who are asked to provide professional advice)



For more information on the legal duties of office holders see [our Duties Guide](#), which includes information on:

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

Our Duties Guide also sets out the consequences of breaches of duties.

Does the indemnity mean you need to take out insurance?

While office holders may be entitled to a statutory indemnity under the AIR Act for liabilities they incur, there is no requirement in the legislation for the association to take out insurance to cover the association and the office holders in relation to such liabilities.

However, incorporated associations should consider their potential exposure under the indemnity and, as part of their overall risk management, consider whether specific insurance should be obtained to address that exposure, such as association liability insurance incorporating office bearers' liability cover and association reimbursement cover.



If your association is required to indemnify an office holder, and insurance is not available, the payment must come from the association's own assets (including any cash assets or by liquidating assets, if necessary).

If the association's assets are insufficient to meet the liability incurred by the office holder under the indemnity, there are insolvency risks for the association and potential exposure for committee members as a result.

When would an association need to make a payment to an office holder under the indemnity?

An incorporated association is required to make a payment under the indemnity where an officer holder has, in good faith, incurred a liability in the course of performing their duties on behalf of the association.

What kind of liabilities does the indemnity attach to?

The indemnity applies when an office holder's responsibility to a third party leads to liability incurred in good faith while performing their duties. In certain situations, a negligence claim brought by a third party against an office holder may be covered by the indemnity.

The indemnity is also likely to apply to cover office holders when they have been involved in a contravention of legislation (for instance, the Australian Consumer Law or equal opportunity legislation), so long as the office holder can establish that, at the relevant time when the liability was incurred, they held the position of office holder, were performing their duties as office holder and were otherwise acting in good faith.

What does 'in good faith' mean?

The phrase 'in good faith' has been given a broad and imprecise meaning in cases in the past. It is generally accepted to mean that you must act honestly, fairly, and loyally when making decisions for your organisation, but its meaning depends on the context in which it is used.

It is clear, however, that fraud and other forms of dishonesty will always breach the duty of good faith. It is also likely that wilful disregard and gross negligence will breach the duty. Depending on the context, other serious breaches of fiduciary duties may also breach the duty of good faith. However, mere carelessness, even amounting to negligence, is unlikely to breach the duty.



See our [Duties Guide](#) for more information on 'good faith' and how it applies in the context of an office holder's legal duty to act in good faith and for a proper purpose.

Limitations on indemnity: obligations owed to the association

It is unlikely that the indemnity will apply where an office holder is liable to the association, as opposed to a third party. As is understood from section 87 of the AIR Act, the indemnity of office holders applies against any liability they incur in good faith in the course of performing their duties. The specific language of section 87 implies that the indemnity is limited to liabilities owed to third parties and not liabilities incurred to the association itself.

Limitations on indemnity: fines and penalties

An office holder who is found to have breached one of the legal duties set out in the AIR Act, and is fined, will not be entitled to rely upon the indemnity under section 87 of the AIR Act to pass on the cost of the fine or their legal costs from the association.

For example, under section 83 of the AIR Act, an officer holder who makes improper use of information to gain advantage for themselves or to cause detriment to the association is liable to a penalty of up to \$20,000. Where penalties are imposed on office holders for breaches of these civil penalty provisions, the indemnity under section 87 of the AIR Act cannot be relied upon by the office holder. In addition, the association's insurance policy may also not respond.

Indemnity risks for the association

Incorporated associations face the risk that they will be required to pay or reimburse office holders under the indemnity and will thereby incur significant expenses. Where an office holder incurs a large liability that the indemnity applies to, an association may suffer severe financial difficulties or even insolvency if it has a small asset pool and cannot cover the costs of reimbursing the office holder. There are additional risks for committee members of the incorporated association if debts are incurred when the association is insolvent.

Associations may be able to reduce their potential exposure by ensuring that an appropriate level of insurance is in place covering the association for claims arising from the management of the association and providing for reimbursement to the association for liabilities incurred by office holders for wrongful acts.

There is a risk that office holders may assume that because a statutory indemnity applies, any risk of personal liability will be fully eliminated by the indemnity. This is not the case, however, as the indemnity may not apply in certain circumstances and, even if it does, without insurance cover in place the indemnity will be limited to the assets of the association.

If the assets are insufficient to cover the full amount of an office holder's liability, they may be found to be personally liable for the remainder of that liability. Also, the indemnity will not be available where a liability is incurred by an office holder other than in the course of performing their duties, where they have not acted in good faith or if a statutory penalty has been imposed that is not indemnifiable.

How can you manage the risks raised by the AIR Act indemnity?

The risks can be managed by educating office holders about the law so that the likelihood they incur a liability is reduced.

The risks can also be reduced by obtaining relevant insurance.

If office holders incur liabilities while performing their duties, association liability insurance (or other relevant insurance) may be available to provide protection against their legal liability, including damages and legal costs, for wrongful acts. These policies may also include a reimbursement component which reimburses an association for amounts that it is required to pay to its office holders when office holders incur liabilities for such wrongful acts. The liability to indemnify the office holder may arise under the AIR Act indemnity or pursuant to the association rules or policies.



Find more information about insurance (to manage the risk created by the indemnity) our [Risk Management and Insurance Guide](#).

What is association liability insurance?

An incorporated association (or individual committee members) may elect to take out association liability insurance to provide some protection for liabilities incurred by office holders, including committee members for wrongful acts. Broadly speaking, association liability insurance is designed to protect an association and the association's office holders against legal action for wrongful acts committed in managing the association.

Association liability insurance policies may also reimburse an association where it has indemnified its office holders or committee members for the liability incurred (whether under the AIR Act indemnity or otherwise).

Such policies generally cover directors and officers, committee members, and potentially also employees acting in a managerial or supervisory capacity against liability for 'wrongful acts' committed in the course of performing their duties.

'Wrongful acts' may include:

- making misstatements or misleading statements
- neglect, breach of duty, contract, trust, statute, or warranty of authority



- actual or alleged violations of employment laws or any other employment related obligation or matter, and
- other acts or omissions as set out in the insurance policy.

Examples of wrongful acts that may be covered by insurance include:

- negligently giving the wrong advice
- requesting someone to perform a dangerous task
- dismissing staff without following due process, and
- misleading or deceiving the public in some way

However, it is important to understand the limitations on such insurance policies that may be available to associations.

In general, such 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 their position or information. Cover is always subject to the terms and conditions of the specific policy .

If the association's constitution or governing rules do not mandate that the association maintain relevant insurance cover on behalf of its directors and officer holders, an association is not required to take out such insurance. However, for the reasons outlined above, there are good reasons for the association to have such insurance cover in place.

Questions to consider when taking out association liability insurance

If your association is considering association liability insurance, or other relevant insurance products, it is important to consider the following questions:

- who should be covered by the insurance product being considered?
- what is the appropriate policy to take out to suit your association's needs?
- is the scope of cover appropriate for your association's needs?

An association liability insurance policy must be carefully considered and negotiated to ensure the appropriate level of cover is obtained to suit the needs of your association. For example, you will need to consider whether current and future office holders are covered and whether the cover extends to key employees involved in the decision-making processes of the association, or who act in a managerial or advisory capacity on behalf of the association.

It may be necessary to obtain a policy that covers past office holders. Optional cover may be available to extend cover to retired office holders in respect of past acts. If that is not available, a separate stand-alone run-off insurance policy may be available for purchase to cover the liability of retired office holders.

The most common type of policy covering associations is a 'claims made and notified' policy, where all claims or any circumstances that may give rise to a claim must be notified to the insurer during the insurance period in order for cover to apply. It is important under such policies that the association did not have knowledge of any fact, situation or circumstance that could have led to a claim before the start of the insurance period.

It is also important to consider the potential impact of exclusions commonly seen in association liability policies such as:

- claims arising from circumstances known to the association at the inception of the policy which ought reasonably to have been notified in a prior policy period, and
- claims arising from deliberately fraudulent or dishonest acts or wilful violations of law or breach of duty (note – these exclusions are usually only applicable when there is a formal written admission by the office holder or a finding in a final, non-appealable, adjudication against the office holder)

All exclusions need to be carefully reviewed and considered at the time of entering into the policy to ensure your association and office holders are appropriately covered.



What if we already indemnify our office holders or committee members?

Although the model rules do not provide for it, some associations may have rules or policies that incorporate an indemnity for office holders or committee members. The rules of an association operate alongside the AIR Act indemnity, which can be confusing. However, an association's rules cannot have the effect of limiting or overriding the section 87 AIR Act indemnity. If they do, section 48(4) of the AIR Act declares such provisions to be of no effect.

Some issues to consider are:

- do the indemnities cover the same kinds of liabilities?
- does the AIR Act indemnity apply to more people in your organisation than the indemnity that you already have (because it extends to all office holders, not just committee members)?
- should the association's rules or policy be amended to bring them into line with the statutory indemnity to avoid confusion?



Tip

Organisations that already have an indemnity should compare it with the AIR Act indemnity.

The AIR Act indemnity could be narrower or broader than your existing indemnity.

Organisations with a narrower indemnity than the AIR Act indemnity should talk to their insurer about whether their insurance covers the AIR Act indemnity as well as their rules indemnity.

What questions should you be asking your broker or insurer?

If you already have a policy that may apply to cover costs related to the indemnity, you should check with your insurer about the scope of the policy and confirm that it covers liabilities that may be incurred by the association as a result of the AIR Act indemnity. If not, you may need to increase the scope of your insurance cover.



If you are looking at insurance for the first time, it is important to ask the broker or insurer about the scope of the coverage of the policy, and read our [Risk Management and Insurance Guide](#) for more information.

It is however important to note that most association liability insurance policies will not cover acts that are outside the scope of the office holder's duties such as criminal or fraudulent acts (although usually only applicable when there is an actual finding of dishonesty against the office holder).

In some circumstances, legislation may also expressly prohibit insurance or indemnity for civil penalties incurred by an office holder of an incorporated association. Further, even where no statutory prohibition applies, Australian courts may refuse to allow an indemnity on public policy grounds, particularly where indemnity or insurance would undermine the purpose of the penalty. Association office holders should therefore discuss the extent to which civil or pecuniary penalties may not be insured under the policy being considered with their broker.