

**Guide to the
Legal Duties of not-for-profit
Committee members and office
holders in New South Wales**

10 August 2013

This Guide is legal information only

The material provided in this resource is for general information only, and is not legal advice. If you have a specific legal problem you should talk to a lawyer before making a decision about what to do. The information is written for people and organisations affected by the laws in New South Wales, Australia, and is current at 10 August 2013.

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Part A: Introduction

What is this Guide about?

This Guide is about the legal duties that apply to people involved in governing NSW not-for-profit (NFP) organisations – that is, people who sit on a Committee or Board, or are office holders (someone with control and influence over the governance of an organisation, even if they do not hold an official position).

As a Committee member of a NFP organisation, the vast majority of your functions are likely to relate to the overall running of the NFP organisation. Your main role is to help the organisation pursue its purpose, to make key decisions about planning, resources and strategic direction of the organisation and, in larger organisations, to recruit and support a Chief Executive to manage the organisation. You may also take on a special 'office' in the Committee, like that of President, Secretary or Treasurer. Your tasks in these roles may include things like chairing meetings, keeping the records up to date and maintaining the finances of the organisation.

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

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

Note: Make sure you keep the legal duties in perspective!

Sometimes reading about legal issues can be overwhelming! It is important not to let worries about legal issues prevent you from being an active, involved Committee member or from enjoying your role!

While reading this Guide, remember the vast majority of NFP organisations carry out their activities without any issues, and legal actions against Committee members are extremely rare.

You might like to think of this Guide like a microscope, focussing on one small aspect of your role on the Committee, and blowing it up so we can look at it in more detail.

The aim of the Guide is to explain the legal duties so you can perform tasks as an informed Committee member. We have tried to simplify the main duties and make them easy to remember by explaining them under four main headings. We have also provided tips, examples and case studies to help you understand how the duties might arise in your organisation and to help you comply with the duties.

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

What NFP organisations does this Guide cover?

This Guide is for all people who are involved in governing NSW NFP community organisations, that is:

- ▶ incorporated associations
- ▶ co-operatives
- ▶ companies limited by guarantee, and
- ▶ indigenous corporations.

In general, very similar legal duties apply to these main NFP legal structures. Where differences occur, we have noted these throughout the Guide. This Guide does not apply to those involved in running trusts (often referred to as “trustees”).

The legal duties discussed in this Guide apply to all Committee or Board members of the organisation listed above. The legal duties also apply in some cases to people involved in an organisation, even if they do not hold an official position on the Committee or board. This happens where they are involved in key decisions and have control or influence over the affairs of the association (this could be a member of the organisation, or a very senior employee), and the law considers that a person with this level of influence should comply with the same duties as a Committee member.

Some duties also continue to apply to Committee members after they cease their role, in particular duties relating to the use of information received due to holding a role in an organisation.

Note: unincorporated groups

This Guide outlines requirements that apply to directors and members of incorporated entities, such as limited liability companies. It does not cover groups of individuals who are simply acting together, for example as a committee, without being attached to a specific legal entity.

Where a NFP decides against adopting a formal structure, the group will remain a collection of individuals and they will not (generally) be recognised as a separate entity. There are no statutory requirements imposed on directors or members of such groups. The duties that are imposed on such members will depend on the circumstances and the nature of the relationship between the individuals.

Note: co-operatives

New uniform laws for co-operatives, known as the Co-operatives National Law (CNL), are proposed to commence in Victoria and NSW in March 2014 with other States and Territories to follow. You can read more about the Australian Uniform Co-operatives Legislative Agreement which outlines the introduction and operation of the CNL [here](#).

How is the Guide structured?

The Guide sets out:

- ▶ where the legal duties come from, who has to comply with them and why (Part B)
- ▶ details of the four main legal duties all Committee members must comply with (Part C)
- ▶ a table of legislative provisions underlying the four main duties (Part D)
- ▶ potential consequences of not complying with your legal duties (Part E)
- ▶ the possible protections (eg. insurance) that are available for Committee members (Part E)
- ▶ some of the other legal duties that Committee members may need to comply with (Part F)

At the end of this Guide, there is a glossary of common terms used in the Guide.

Why does the Guide use the term 'Committee' and not 'Board' ?

There are many names used to describe the 'governing body' of a NFP community organisation. The most common are a 'Committee' (often used for incorporated associations) and a 'Board' (often used for companies limited by guarantee, indigenous corporations and cooperatives).

The name of your governing body makes no difference legally. The legal duties explained in this Guide will apply to the people on the governing body of your organisation no matter what it is called. Similarly different names are used to describe the governing documents of an organisation. We have chosen to use the term 'Committee' throughout this Guide, just for simplicity. When reading this Guide, you should substitute the relevant name used in your NFP.

In this Guide we use...	The equivalent name used by your organisation might be...
Committee	Committee of Management; Board; Council
Committee member	Board member; Director; Councillor
Rules	Constitution; Rule Book

Part B: Quick background information about legal duties

What is a legal duty?

A legal duty is an obligation imposed on you by law and governs the way in which you act.

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

Yes! There is a mistaken view that people who volunteer their time in NFP community organisations do not have to comply with any legal duties because they are ‘volunteering’. This is wrong.

The legal duties outlined in this Guide apply to all people who sit in a governance position in all NFP organisations. It does not matter if your organisation is small or informal your organisation is, or how many members it has, or how many days or years of experience you have as a Committee member. The legal duties apply to all Committee members regardless of your organisation’s purpose or size.

As explained in the introduction to this Guide, the good news is that most NFP organisations don’t come across any legal problems and the legal duties are easy to meet. Nonetheless, it is important to remember that the duties are ‘legal’ requirements. This means you must comply with the duties and if you do not you could be legally responsible, and penalties can apply.

Why do Committee members have particular legal duties?

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

Some recognised ‘fiduciary’ relationships:

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

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

As a Committee member you have been elected (or invited) onto the Committee by the organisation’s members and are trusted to make decisions on behalf of the organisation. Effectively, the members are entrusting the steering of the organisation to you and other Committee members for the period you are on the Committee. In return, by becoming a Committee member you agree to act in the best interests of the organisation and are accountable for the decisions you make. Over time, the law has formed these notions into ‘legal duties’.

Where can I find these duties written down?

These legal duties come from two main sources of law:

- ▶ the common law (sometimes referred to as ‘general law’ or ‘judge-made law’), and
- ▶ legislation (sometimes referred to as ‘statute’, ‘parliament-made law’ or ‘Acts’).

The common law is an older source of law, and many of the legal duties found in common law have now been written into legislation. However both can still apply. If your organisation is incorporated, the common law still applies to your group – but you will also be subject to the legislative duties in the Act under which your organisation incorporated. If you are an unincorporated group, in some situations the common law applies to you.

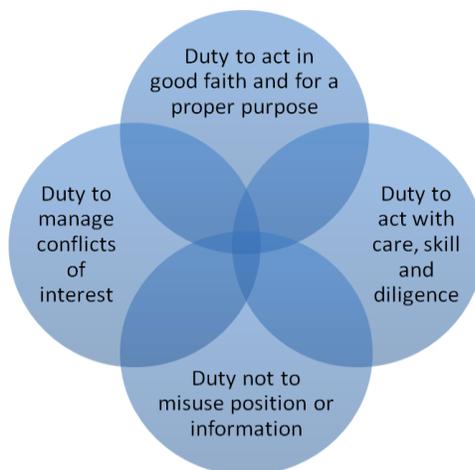
However, rather than split the duties into their common law or legislative sources, in this Guide we will tell you about the general content of the four main legal duties and how to comply with them. If you are incorporated and are interested in finding out the specific sections in the legislation that regulates your NFP, you can find these in Part D of this Guide.

Are there many legal duties that Committee members have to comply with?

The four main legal duties are:

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

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



Who has to comply with the legal duties?

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

If you have been elected to (or invited to take up) a position on the Committee of an organisation, you are clearly part of the governing body of the organisation and you must comply with these duties. This includes all office-holders (such as Chairperson, President, Treasurer, Secretary etc.), as well as ordinary Committee members.

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

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

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

Example: an organisation's founder who remains heavily involved in the Committee

In 2001, you founded a NFP organisation that provides support to kids with a particular illness. You were a member of the Committee of the organisation for 10 years before you retired last year. However, although no longer officially a Committee member, you still regularly attend Committee meetings, the other Committee members regularly seek your opinion and no major decisions are made without your involvement. In this case you may still be considered a member of the governing body of the organisation, because you are a person on whose instructions and wishes the other Committee members are used to acting. You will need to comply with the legal duties explained in this Guide.

Also, in some cases the senior officers of your organisation, like a Manager, Coordinator, Chief Executive Officer (CEO) or Executive Director can be considered part of the 'governing body'.

Remember:

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

Other sources of duties and personal liability for directors

Although being involved with an incorporated entity offers many general protections against liability to individuals, there are some laws in Australia (in addition to directors' duties) that can impose penalties on directors or managers individually where an organisation commits an offence under that legislation (unless a relevant defence, such as the defence of due diligence, can be established). It is important to remember that action being taken against directors is unusual, and usually reserved for most serious breaches. However, directors and managers should be aware of all personal liability provisions and ensure that appropriate management and compliance systems are in place to minimise the risk of exposure to these types of offences.

Examples of areas where directors can be personally liable include:

- ▶ breaches by an organisation of OHS law, and
- ▶ breaches by an organisation of certain environmental laws.

Part C: The 4 key duties in detail

Duty 1: Duty to act in good faith and for a proper purpose

The legal duty in short

This legal duty is a two-part duty which includes:

- ▶ the duty to act 'in good faith' in the best interests of the organization, and
- ▶ the duty to act for a proper purpose and within the powers given to the Committee

The legal duty in more detail

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

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

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

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

Example: common situations where you might be on a Committee as a 'representative'

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

As a Committee member it is important that you do not allow another person or organisation (including any people or organisations that elected you to the Committee) to dictate how to vote at Committee meetings.

Duty to act for a proper purpose

As a Committee member you must make decisions which help the organisation to achieve its purpose or objective - that is, 'what the organisation is set up to do'.

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

Example: acting for a proper purpose

If you are on the Committee of a NFP organisation that has set up for the purpose of helping rescue injured wildlife, a proposal to apply for a local grant to start a local childcare facility is unlikely to be within your organisation's purpose.

You will find your organisation's purpose in the governing documents of your organisation (for incorporated associations this will be in the Rules or Statement of Purposes (which is now considered to be a part of rules) of your association; for companies limited by guarantee your Constitution should contain an 'objects' clause). Guidance may also be found in other documents such as an organisation's mission or values statements.

The duty to act for a proper purpose also requires that Committee members only act within the powers that have been given to the Committee. Your organisation's governing documents will set out the powers of the Committee to make decisions. Check your Rules before you make decisions to see that it fits within the powers that the organisation has given to your Committee.

Legislation references

If you would like to know the specific sections in legislation that set out the duty to act in good faith and for a proper purpose, see the table in Part D.

NFP case studies and tips on duty of good faith and proper purpose

Case study: a decision to close a client service

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

The legal duty:

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

Case study: the Committee member versus the loud, young members

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

The legal duty:

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

Case study: the person 'appointed' to a Committee by another group

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

The legal duty:

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

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

- ▶ Get a copy of your organisation's Rules and make sure you understand the 'Statement of Purpose' or 'Objectives' of your organisation. It is a good idea to have these documents at all Committee meetings to check that decisions are in line with your organisation's purpose, and within your Committee's powers.
- ▶ When making decisions, ask yourself – *'Am I deciding this issue based on what is in the best interests of the current and future operation of this organisation – or am I deciding this based on my own personal interests or in the interest of a select group of members or clients that I favour?'*
- ▶ If you were 'appointed' to a Committee by a particular organisation or group of members, remember that once on a Committee your duty is to act in the best interests of that organisation, and not those that appointed you. This does not prevent you from advising the Committee about the views of those you represent.
- ▶ Apply the 'how will it look later' test – if someone was to analyse this decision later, would they think *'This was the decision of a reasonable, honest person who, with the knowledge they had at the time, was trying to act in the best interests of the organisation?'* Or could they possibly come to the conclusion that the decision was irrational, partial, and dishonest or made for some ulterior motive?
- ▶ There is a close link between the duty to act in the best interests of the organisation, and the duty to disclose and manage conflicts of interests. Consider whether some conflict of interest is involved in making a decision and whether action needs to be taken to disclose and manage an actual or perceived conflict of interests – see further Duty 4 below.

Duty 2: Duty to act with reasonable care, diligence and skill

The legal duty in short

This duty requires you to:

- ▶ take your role as a Committee member seriously
- ▶ make use of any skills and experience you have for the benefit of the organisation
- ▶ give sufficient time, thought and energy to any tasks you have undertaken and to decisions you are required to make, and
- ▶ monitor the affairs, activities, strategic direction and financial position of the organisation.

In relation to the financial affairs of your organisation this duty requires you to:

- ▶ understand your organisation's current financial position at all times, and
- ▶ prevent your organisation from continuing to incur debts if you know or suspect that your organisation cannot meet its current debts when they fall due (commonly known as the 'duty to avoid insolvent trading').

The legal duty in more detail

Use of your skills and knowledge

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

Example: reasonable use of personal skills for organisation

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

If your Committee does not have the required skills on a particular matter, this duty means you need to seek help from someone who does.

Example: situations when your Committee might need external skills

- ▶ Your Committee may need to ask an accountant or your auditor to help the Committee understand a complex financial matter.
- ▶ Your Committee may need to consult an arborist to advise the Committee on whether the trees in the front yard of your childcare centre are likely to fall.

Reasonable care and diligence

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

You must understand the issues the Committee is making decisions on - you cannot just rely on the opinions of others on the Committee and become a 'rubber stamp'. All Committee members have a duty to make inquiries and satisfy themselves that the organisation is being well-run, and is operating in a safe and efficient manner.

Reasonable decisions – not perfect decisions

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

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

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

This is historically known as the 'business judgment rule' – although in the NFP sector context it might be more apt for Committee members to remember it as the 'operational judgment rule'. Just remember that taking calculated risks that might not work out is OK – but making reckless, ill-informed decisions without thinking at all about the consequences could be seen as a breach of this duty.

Taking care of the organisation's financial position (and avoiding insolvent trading)

A key aspect of the duty of reasonable care and diligence is your legal responsibility to understand the finances of the organisation. Committee members are accountable for an organisation's solvency. They must exercise overall control over its financial affairs.

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

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

Examples:

- ▶ If you are on the Committee of a small NFP which raises money only through membership fees, has a balance of \$500 in the bank and spends very little money from month to month, then a brief Treasurer's report setting out the monthly totals for the organisation will probably be sufficient.
- ▶ Alternatively if you are on the Committee of a large, well-funded NFP, which owns two properties, manages three others on trust, has 30 employees and an annual turnover of over \$1 million, your responsibility to understand the finances is going to be correspondingly larger.

The most important aspect of the duty to use reasonable care about the finances of the organisation is the requirement to avoid insolvent trading. While the term 'trading' is a business term that does not fit well into the NFP environment, this key aspect of the duty still applies to NFP organisations. Please read the box below carefully so you understand this aspect of the duty.

Important Note: the duty to avoid 'insolvent trading'

As a Committee member, your key duty regarding the finances is to make sure your organisation is **solvent** – that is, able to pay its debts when they are due. **You must not allow your organisation to continue to incur further debts, if you know or reasonably suspect that the organisation cannot pay its current debts when they are due.**

As many in the NFP sector are aware, the funding environment for NFPs can often be unstable and unreliable. Many NFPs operate on very tight budgets and sometimes sail 'close to the line' in terms of their finances. For example, income from membership fees may fluctuate from year to year, donations may be affected by an economic downturn, or a government funding stream that your organisation relies heavily on may be cut. These circumstances make it very difficult to gauge a NFP organisation's true financial position.

Occasionally NFP organisations get into financial trouble. As a Committee member, it can be very difficult to distinguish between a temporary lack of cash flow and an endemic, dire financial situation. For some assistance, we have a separate PilchConnect factsheet about some of the potential 'warning signs' of insolvency – see further resources below.

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

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

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

NFP case studies and tips on duty of reasonable care, diligence and skill

Case study: the proud but busy Committee member

You were delighted when a local NFP organisation supporting disadvantaged youth, asked you to join their Committee. It's a NFP with a strong reputation in the local community, and you were proud to be associated with it. You eagerly attended your first few monthly Committee meetings. However, since then things have become busy in your work and personal life and you are finding it hard to attend regular meetings. You always seem to have things on the nights of the Committee meetings! You turn up when you can – usually once every 4-5 months – but even then, you have rarely had time to look at the Committee minutes and paperwork. You console yourself by thinking *'Oh well I'm just a volunteer'* and occasionally *'They are lucky to even have someone with my business experience on the Committee anyway'*. Also you feel that the President is a smart woman so the decisions the Committee are making in your absence are probably fine.

The legal duty:

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

Case study: the worried Committee member and an inaccurate media release

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

The legal duty:

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

Case study: the Committee member and the urgent repairs

You are a Committee member for a fairly large NFP organisation, a supported accommodation service which employs 10 staff. You had a pretty clear understanding of the financial position of your organisation in July last year, when the Committee approved the yearly financial statements. At that time, the Treasurer gave a detailed briefing to the Committee about the finances and you understood that, although the organisation had 'sailed pretty close to the wind' all year, at the end of the financial year, the organisation managed a small surplus of \$40,000.

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

The legal duty:

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

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

Tips: complying with general duty of care, diligence and skill (including understanding finances and avoiding insolvent trading)

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

The PilchConnect website has a checklist about indicators of insolvency, see www.pilch.org.au/financial/.

Legislation references

If you would like to know the specific sections in legislation that set out the duty to act with reasonable care, diligence and skill, see the table in Part D.

Duty 3: Duty not to misuse information or position

The legal duty in short

As a current or former Committee member, you must not make improper use of:

- ▶ your position as a Committee member, or
- ▶ information you obtain through your position as a Committee member to either:
 - ▶ gain an advantage for yourself or any other person or organisation, or
 - ▶ cause detriment to the NFP organisation you are on the Committee of.

The legal duty in more detail

This duty encapsulates the idea that a Committee member must be loyal to the organisation they serve. This duty of loyalty is ongoing - it applies to you when you serve on the Committee, and continues to apply after you cease to be a Committee member (i.e. it applies to former Committee members). It is also closely linked to the duty to avoid conflicts of interest (see Duty 4 below).

Duty not to misuse your position

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

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

Example: actions which might breach the duty not to misuse position

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

Duty not to misuse information

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

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

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

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

Example: actions which might breach the duty not to misuse information

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

Legislation references

If you would like to know the specific sections in legislation that set out the duty not to make improper use of information or position, see the table in Part D.

NFP case studies and tips on duty not to misuse information or position

Case study: the Committee member and the new service proposal

Over a series of Committee meetings, your Committee has been discussing a plan to expand its services. The local council has a building that it has advertised for lease. Your Committee has been working to put together a proposal for the local council to consider. It is looking to secure the lease and, with some additional funding from council, open a new welfare service in the building. Your friend works for a different NFP local welfare service. She tells you that her NFP is thinking of expanding and asks you whether you are aware of any suitable premises that are currently available for lease.

The legal duty:

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

Case study: the Committee member and the annoying golfer

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

The legal duty:

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

Case study: the conversational Committee member and the dinner party

At a dinner party you tell people sitting around the table that, after 6 years of service on the Committee, you have just retired as the Chairperson of an organisation that ran anger management counselling programs. A number of people are interested in your work on the Committee and ask you questions about the service. You get slightly carried away with the interest, and start to tell a few of the 'personal stories', that you learnt about in the time you have been on the Committee. You get the feeling that the people at the dinner party have a stereotypical view of the 'kind of person' who ends up in the programs, and you think of telling them about a high profile TV personality who has recently sought services from your organisation, in order to educate them about the prevalence of anger management issues in all areas of society.

The legal duty:

As a current or former Committee member, you have a duty not to make improper use of information you have gained in your position. The fact that a person has sought counselling services is confidential information. If you were to reveal this information it would be a breach of your duty. The fact that you have not made any personal financial gain out of the disclosure (eg. you told the story at a dinner party not sold it to the media) is not a relevant defence. The revelation would cause detriment to the organisation and its reputation and this would be enough to show a breach of this duty. (You might also be liable under other actions for breach of confidentiality or breach of applicable privacy legislation). As this duty applies to former Committee members, the fact that you have stood down from the Committee is no defence to a breach of this duty.

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

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

Duty 4: Duty to disclose and manage conflicts of interest

The legal duty in short

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

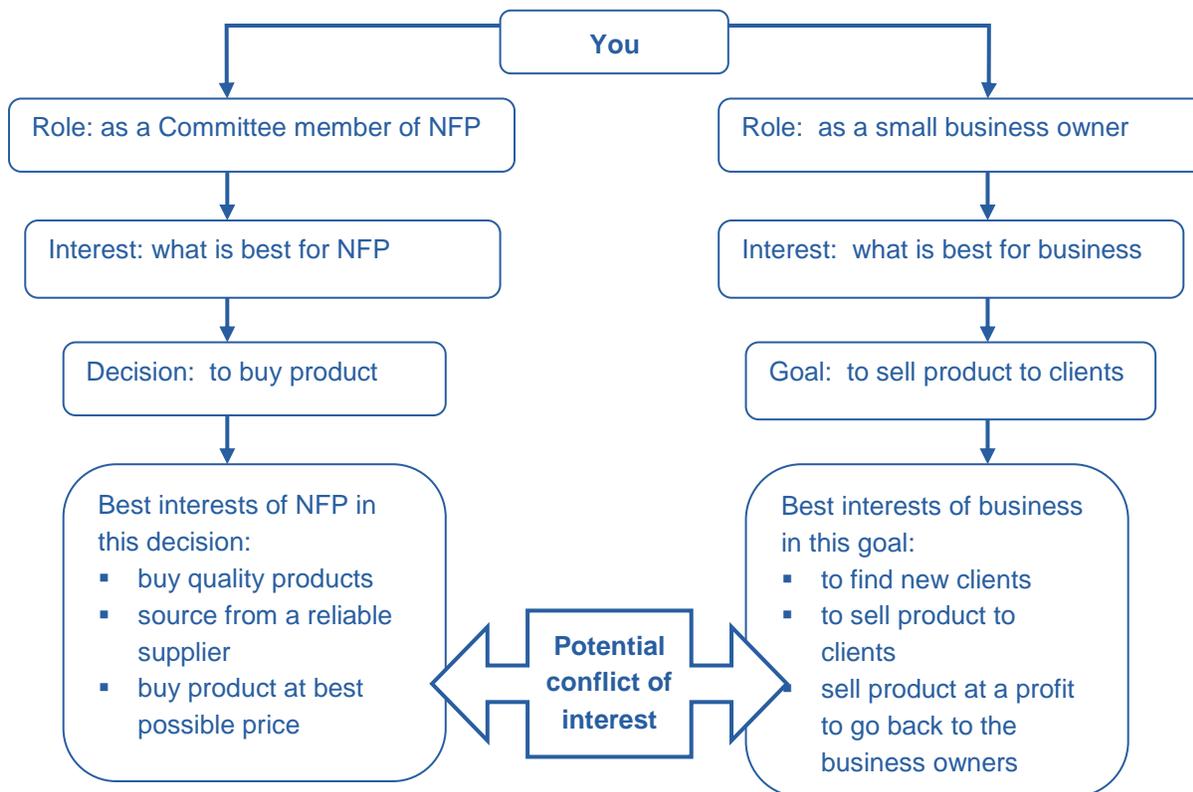
A conflict of interest situation arises when a person, who has a duty to act in the best interests of another, is presented with the opportunity or potential to 'use' that position in some way for their own personal benefit (or for the benefit of relatives or another organisation).

Conflicts of interest situations often arise in NFP community organisations and are not prohibited. The legal duty relates to the process Committee members must follow in conflict of interest situations. As a Committee member you must disclose and manage conflicts of interest in a particular way.

The legal duty in more detail

What is a conflict of interest?

A wide range of conflict of interest situations can arise in NFP organisations. A common conflict of interest scenario arises when your organisation is looking to sign a contract with a business to supply it with certain products or services, and you or your family owns a business that makes and supplies those products. In this situation, your differing interests could be depicted as follows:



As shown in this diagram, the same person can have differing roles and different interests which could possibly conflict. While it may be possible that your business is a reliable supplier and offers the lowest price for the product in the region, because you stand to benefit personally from a decision, then a conflict of interest situation arises.

The conflicting 'interest' does not have to be a financial interest for a conflict situation to arise. If, as a Committee member, you could influence a decision that would in any way benefit you, a relative, a friend or an organisation you own or work for, then you are in a potential conflict of interest situation.

Examples of conflict of interest situations in NFP organisations

- ▶ You are on the Committee of an organisation which wants to employ you, or an employee is seeking election to the Committee. (Note: If your Rules allow this then it may be OK, but it usually gives rise to a number of conflict situations which need to be disclosed and managed.)
- ▶ Your Committee is in the process of hiring a new CEO and one of the applicants is a relative of yours.
- ▶ You are on the Committee of an organisation which is in financial trouble and is considering a merger with a larger organisation and you are employed as a senior manager of that larger organisation.
- ▶ You are on the Committee of two different NFP organisations, but they are regularly applying for the same grants, or submitting bids for the same tenders or projects.
- ▶ Your Committee is deciding which organisation they should partner with to provide their clients with government funded training – and your mother is part-owner of an interested local Registered Training Organisation.
- ▶ Your Committee is making a decision about who to award a prize to and one of the applicants is your best friend.
- ▶ You are considering employing your son/daughter as a part-time bookkeeper.

The legal duty relates to how to deal with the conflict

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

Disclosing the conflict of interest

The legal duty about conflicts of interest requires Committee members to disclose to the Committee conflicts of interest which arise in relation to their role. When telling the Committee about the conflict, or potential conflict, you must be open and honest about the nature and extent of the interest and its relation to the affairs of the organisation.

The importance of full disclosure of direct (or even potential) conflicts of interest cannot be overstated. If you are unsure of whether something is a conflict, stay on the safe side and disclose it. This way the Committee has a chance to deal with it in the proper way. NFP organisations rely heavily on their reputation in the community and outside perceptions that your organisation is operating professionally and legally are very important.

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

you are in a group of people for whose benefit the organisation is established, or

you have an interest in common with all, or a substantial proportion, of the members of the organisation (for example, you will benefit if your local community development organisation arrange a tree planting program along the streets of your town but so will all members of the local community).

Some laws require Committees to keep a standing register of interests. This is a list where Committee members record all their relevant personal interests (eg. employment, businesses their family own, other Committee positions etc.) when they join the Committee. The register of interests should be updated regularly. If you haven't noted an interest on the register, as soon as you become aware of a conflict you should disclose it.

Managing the conflict of interest

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

Although the particular legislative provisions differ on exactly how to manage the conflict, we recommend the following best practice approach, which will ensure you comply with all the laws that govern the various NFP legal structures.

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

- ▶ should not be present in the meeting while the matter is being discussed
- ▶ must not be present for or vote on the matter, and

- ▶ should ensure that the minutes record the fact that a conflict was declared, the time the relevant Committee member left and returned to the meeting and the fact that they were not involved in the decision.

You should also refrain from discussing the decision or trying to influence the outcome of the decision (for example, outside of or between Committee meetings).

Major or repeated conflicts of interests

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

Some groups do not allow a Committee member to also be an employee of the organisation. Check your Rules and policies on this issue.

Potential conflicts of interest and the reputation of your NFP

Perception is a big issue with conflict of interests - and for NFPs: your reputation is extremely important. It is important for a Committee member to avoid, not only actual and potential conflicts of interest, but also the perception of a conflict of interest. You should be aware of how a situation may appear to someone from outside the organisation.

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

NFP case studies and tips on duty to manage and disclose conflicts of interest

Case example: the Committee decision to purchase office supplies

You are on the Committee of Management of a small, local NFP organisation that regularly needs office supplies and equipment. Previously Committee members have just bought office supplies as they have been needed, but in order to become more efficient, the Committee is considering having a preferred supplier. As it happens, your partner Sally owns the town's only newsagent and stationery business.

The legal duty:

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

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

If you:

- ▶ tell the committee that your partner Sally owns the newsagent / stationary business (disclosure)
- ▶ leave the room when the Committee discusses the stationery contract (manage)
- ▶ leave the room and do not vote on the stationery contract (manage) and
- ▶ have the disclosure and the process noted in the Committee's minutes (disclosure),

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

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

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

Case example: the arts scholarship and the step-son

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

The legal duty:

Peter is your step-son and therefore you have a conflict of interest as you are in a position where your actions are likely to cause him a benefit. You should disclose and manage the conflict of interest. Even if, instead of being a step-son, Peter was a very close friend of yours, you should disclose and manage the conflict. Although the law does not state in detail how close the relationship is to you, consider the perception in the local community of your organisation if you are involved in a decision awarding a large prize to your close friend. If in doubt about disclosing an interest, stay on the safe side and disclose.

Case study: the lawyer Committee member and the tenant legal action

You are a lawyer for a major law firm. You are also on the Committee of a local emergency housing NFP. At one Committee meeting the Executive Director tells the Committee that the NFP is facing legal action from a former tenant who was evicted. He is seeking a decision on whether to defend the case or try to settle it. As the paperwork is circulated, you recognise some familiar letterhead and realise it is your employer law firm that acts on behalf of the former tenant.

The legal duty:

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

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

- ▶ Remember that conflicts of interest are common and will inevitably occur – it is how you disclose and manage them that matters.
- ▶ As a Committee member, stay alert to possible conflicts of interest which you might have. Advise your organisation of any actual or potential conflicts of interest as soon as you become aware of them. Create and foster a culture where it is normal practice for a person to disclose and manage a conflict of interest.
- ▶ When making a decision as a Committee member, ask yourself: Am I making this decision based only on what will lead to the best outcome for this organisation? If the answer is that you are also considering whether decision would lead to a favourable outcome for you (or a relative, close friend or another organisation), then there is a good chance you might have an interest in the matter you may need to disclose and manage.
- ▶ It is good practice at the beginning of a Committee meeting to check the agenda and declare any private interests which you may have in any item for discussion. You should declare it before any discussion of the item itself, or as soon as you realise the conflict arises.
- ▶ If in doubt about a possible conflict of interest, stay on the safe side and disclose it – it is very important to keep the trust of fellow Committee members, the organisation’s members and the community. Remember even perceived conflict of interests can damage a NFP’s reputation.
- ▶ Check your organisation’s Rules and policies to see if they say anything about conflicts of interest. For example, some organisations have rules which prevent an organisation from employing Committee members.
- ▶ Consider whether your organisation needs a policy on how they will deal with any conflicts which arise as a result of the work which your organisation undertakes. A policy can help remind you of the legal process that the law requires you to take (see further resources).
- ▶ Also think about whether your Committee would benefit from having a standing register of interests. It may be required by law. It allows any actual or potential conflicts of interest to be identified more easily. The register should be regularly updated.

Legislation references on conflict of interest

If you would like to know the specific sections in legislation that set out the duty to manage and disclose conflicts of interest, see the table in Part D.

Further resources on conflict of interest

For examples of Conflicts of Interest policies, see the website of our partner the Centre for Philanthropy and Nonprofit studies at QUT -

<https://wiki.qut.edu.au/display/CPNS/Conflict+of+interest+policy+-+examples>

Part D: Legislative provisions underlying duties

If you are interested to read the legislation which sets out the legal duties for your NFP organisation, the table on the following pages can be used to help you find these.

The legislation is specific to each legal structure, so you will need to know your organisation's legal structure to work out the duties.

Table: the specific sections in legislation that outline the 4 main legal duties of Committee members

Note: changes for companies limited by guarantee registered as charities with the ACNC

As regulation of charities registered with the ACNC moves from ASIC to the ACNC, the source of the duties for directors of charities will change. Companies limited by guarantee registered as charities will no longer be subject to the duties codified in Corporations Law, but will still need to comply with common law duties (which are substantially the same).

Note: unincorporated groups

This Guide outlines requirements that apply to directors and members of incorporated entities, such as limited liability companies. It does not cover groups of individuals who are simply acting together, for example as a committee, without being attached to a specific legal entity.

Where a NFP decides against adopting a formal structure, the group will remain a collection of individuals and they will not (generally) be recognised as a separate entity.

There are no statutory requirements imposed on directors or members of such groups. The duties that are imposed on such members will depend on the circumstances and the nature of the relationship between the individuals.

Legal structure	Incorporated associations	Companies limited by guarantee (not registered as a charity)	Cooperatives	Indigenous companies
Legislation	<i>Associations Incorporation Act 2009 (NSW)</i>	<i>Corporations Law 2001 (Cth)</i>	<i>Cooperatives Act 1992 (NSW)</i>	<i>Corporations (ATSI) Act 2006 (Cth)</i>
Regulator of compliance with duties	NSW Fair Trading	Australian Securities and Investments Commission (ASIC)	NSW Fair Trading	Office of Registrar for Indigenous Corporations (ORIC)

Legal structure	Incorporated associations	Companies limited by guarantee (not registered as a charity)	Cooperatives	Indigenous companies
Duty to act in good faith in the best interests of the company and for a proper purpose				
Duty to act in good faith in the best interests of the company and for a proper purpose	No statutory duty - see common law	s.181 and s.184	s.221 duty to act honestly in discharge of duties	s.265-5(1)
Duty to act with reasonable care and skill				
Duty to act with reasonable care and skill	No statutory duty - see common law	s 180(1)	s.222	s.265-1(1)
Business judgement rule	Not required because there is no corresponding statutory duty	s 180(2)		s.265-1(2)
Duty to avoid insolvent trading	s.68	s.588G and Part 5.7B (Div. 3)	s.343B which applies Part 5.7B of the Corps. Act	s.531-1 which applies Part 5.7B and s.588G of the Corps. Act
Duty not to improperly use information or position for benefit self / others or to the detriment of the organisation				
Duty not to misuse info	s.32	s.183 and s.184	s.223(1)	s.265-15
Duty not to misuse position	s.33	s.182 and s.184	s.223(2)	s.265-10
Duty to disclose and manage conflicts of interest				
Duty to disclose a material personal interest in a matter being considered at	s.31(1)	s.191	s.234	s.268-1

Legal structure	Incorporated associations	Companies limited by guarantee (not registered as a charity)	Cooperatives	Indigenous companies
a committee meeting				
Duty to not be present at meeting while matter in which CM has a conflict is being considered	s.31(5) and (6)	s.195(1)(a)	s.234(7)(a)	s.268-20(a)
Duty not to vote on contracts in which CM has material personal interest	s.31(5) and (6)	s.195(1)(b)	s.234(7)(b)	s.268-20(b)
Duty to document disclosed conflicts of interest	s.31(3) must be recorded by the Committee in a book kept for that purpose	s.191(3) record in minutes of directors meeting	s.238 record in minutes of directors meeting	s.268-1(4) record in minutes of directors meeting

Note: This table is for general information only. There may be other sections in the legislation that apply to your individual circumstances. The common law may also apply in addition to the legislation. If you have a specific issue, you will need to seek legal advice.

Key: CM = committee member s. = section numbers.

Part E: Consequences of breach of duties - defences, penalties & protections

Legal action against NFP Committee members is extremely rare. If you follow the tips we have set out in Part C of this Guide, it is unlikely you will act in breach of a legal duty. Good governance processes are the safest, cheapest and most effective protection against any legal action. They are also the best way to protect the reputation of your organisation.

Having said that, there are legal consequences if you are found not to have complied with your legal duties (i.e. to have 'breached' the duties). The main penalties for breach are financial (e.g. a fine or paying compensation to the organisation, or both). There are a limited range of defences available to Committee members who are accused of a breach of duty. Also, there are a number of protective actions that Committee members can take to guard against penalties, in the unlikely event of legal action.

In this Part of the Guide we will cover:

- ▶ Who might take legal action against a Committee member for breach of a duty?
- ▶ What defences you can raise if an action is brought against you?
- ▶ What penalties might be imposed if a breach is found?
- ▶ If a penalty is imposed, how can you protect yourself against having to cover the cost of any fines?

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

Because it is quite rare for a legal action to be taken against a Committee member, this Guide will not go into detail about the technical grounds for a legal action. In summary, a legal action about a breach of the (legislative or common law) duties could possibly be taken by:

- ▶ a regulator (eg. NSW Fair Trading), ASIC)
- ▶ someone the organisation owes money to (eg. a creditor, often in a case of insolvent trading)
- ▶ someone appointed to look into the finances of an organisation that is in severe financial trouble or having to close down (eg. an administrator or liquidator)
- ▶ the new Committee of an organisation (eg. against a former Committee member), or
- ▶ members of an organisation (eg. as a group, not individually).

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

This is because an organisation that has an honest, conscientious and compliant Committee will be more likely to be financially stable, attract new members and enjoy the support of the community. In contrast, an organisation that has an unorganised, self-interested, reckless Committee is more likely to end up with internal disputes, financial difficulties and lose standing in the community. While legal actions may be rare they are possible. And compliance is easy – so why risk it? No one wants to end up having to defend themselves in court!

Possible defences against an allegation of a breach of duty

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

Your conduct met the standard imposed by the duty

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

'Business judgement' rule

This defence is available only in relation to the duty to use reasonable care, diligence and skill (see Duty 2 above), but it is not a defence to a claim of insolvent trading. The law recognises it is sometimes a difficult task to make decisions about the future (eg. whether to approve a proposal for a new project). If, as a Committee member you have made thorough inquiries about a proposal and have complied with all of your other duties, then just because a particular decision turned out not to be a good one, does not mean you have breached this duty. This is known as the 'business judgement rule' (better termed the 'operational judgement rule' in the NFP context).

Delegation

In general, even if a Committee delegates an action to an employee, or a sub-Committee, the Committee members are still legally responsible for that action. You cannot get out of your duties simply by delegating them to others.

However, generally speaking, a Committee member may not be responsible if they:

- ▶ reasonably believed that the person they had delegated to would act properly, and
- ▶ after making proper inquiries, reasonably and honestly believed that the delegate was reliable and competent.

Committee members cannot delegate their duty of reasonable care and diligence.

Reliance on advice

If you have relied on the advice of a professional to make a decision – this might form part of a defence to a claim that you have breached a duty. It is generally agreed that it is reasonable for Committee members to rely on advice (eg. from an external person like a lawyer). If, as a Committee member, you make a decision based on advice, and you have relied on that advice in good faith and after making independent assessment of the information having regard to your own knowledge of the organisation and the complexity of the structure and the operation of the organisation, then the court might accept that you did your best and discharged your duty.

Excused by Court from liability

(only available for companies limited by guarantee and incorporated associations)

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

Unacceptable defences

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

Examples of unacceptable defences which will not be allowed by a court

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

Possible consequences if you are found to have breached the duties

Generally when an NFP organisation incorporates, one of the key benefits of incorporation is that the members of the organisation (including its Committee members) are not liable for the debts of the organisation. This is known as ‘limited liability’. It protects members of an organisation from having to use their own personal income to pay outstanding debts of the organisation.

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

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

Fines or compensation

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

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

Disqualification

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

In extreme cases

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

Possible financial protection for Committee members

Indemnity provisions

Some organisations may have a clause in their Rules which says the organisation agrees to indemnify (pay a penalty for) Committee members and in some circumstances, depending on the wording of the indemnity, this may cover committee members who have breached their legal duties. It is important to be aware of the limitations of an indemnity clause:

- ▶ it only covers a Committee member to the extent of the organisation's funds (often low)
- ▶ it usually does not cover Committee members that have acted with deliberate recklessness or fraudulently, and
- ▶ it will often only cover Committee members after a court action has been finalised (e.g. the Committee member will have to cover their own costs and then later seek reimbursement).

Insurance

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

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

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

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

Legal help if your organisation (or its Committee) face legal issues

PilchConnect is a legal service for Victorian and NSW NFP organisations. We provide free and low cost legal information, training, phone advice and case work services for eligible NFP organisations. You can find out more about PilchConnect's legal services at www.pilchconnect.org.au or call us on 1800 706 220.

Part F: Other legal obligations on Committee members

In addition to the four main legal duties explained in Part C of this Guide, Committee members should also be aware of other legal duties that may apply to them. Again, don't let this list overwhelm you! PilchConnect's website contains Guides and Fact sheets that provide plain-language information about the laws that apply to NFPs, see: www.pilchconnect.org.au.

Other legal duties in incorporating legislation

If you are involved in an incorporated group, the legislation under which your organisation incorporated will contain other legal requirements that your organisation must comply with. Often, these legal requirements imposed on the organisation as a whole (rather than individual Committee members), but the Committee will have a key role in making sure the organisation complies with the relevant Act (eg. the Associations Incorporation Act 2009 for NSW incorporated associations).

Record-keeping

If incorporated, your organisation will be legally required to:

- ▶ keep proper records of the organisation, including a members register, financial records, minutes to Committee meetings, minutes of general meetings of members
- ▶ ensure the organisation's name and / or registration number appear on official documents
- ▶ provide access to the organisation's records to a member of the organisation (in certain circumstances), and
- ▶ return records that belong to the organisation when leaving.

Meetings

If incorporated, your organisation will be legally required to:

- ▶ hold an Annual General Meeting at a certain time once a year
- ▶ hold meetings of the Committee, and
- ▶ in certain circumstances, organise and hold general meetings of all members.

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

If incorporated, your organisation will be legally required to:

- ▶ submit annual financial statements (which have been approved at the AGM) to the regulator (these will often need to be in a specified format and contain particular information)

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

Your organisation's Rules or Constitution

You should also check your organisation's Rules for other legal requirements that might apply to your organisation. The Act under which your organisation incorporated gives your Rules the force of a contract, so requirements in your Rules can be legally enforceable.

Other laws that may apply to NFPs

The table below include some of the laws which apply to NSW organisations (both for-profit and NFP). Some of these might apply to your organisation. Whether your organisation has to comply with these laws may depend on a range of factors, including your organisation's activities, funding arrangements, contracts, legal structure, and the kind of people involved in your NFP. For further information about the laws, see the PilchConnect website at www.pilchconnect.org.au.

Legal topic	Legislation that might apply
health and safety laws	<i>Work Health and Safety Act 2011</i> (NSW)
employment and unfair dismissal	<i>Fair Work 2009</i> (Cth); <i>Independent Contractors Act 2006</i> (Cth)
equal opportunity, human rights and anti-discrimination law	<i>Anti-Discrimination Act 1977</i> (NSW) and a range of federal anti-discrimination laws
charity tax concession laws	<i>Income Tax Assessment Act 1997</i> (Cth) and NSW tax laws
fundraising laws	<i>Charitable Fundraising Act 1991</i> (NSW)
working with children laws	<i>Children Protection (Working with Children) Act 2012</i>
privacy law	<i>Privacy and Personal Information Protection Act 1998</i> (NSW); <i>Health Records and Information Privacy Act 2002</i> (NSW)
negligence and defamation	<i>Civil Liability Act 2002</i> (NSW); <i>Defamation Act 2005</i> (NSW) and the common law
contract law	<i>Competition and Consumer Act 2010</i> (Cth) and a range of NSW and federal Acts and the common law
planning and environment laws	<i>Environmental Planning and Assessment Act 1979</i> (NSW); <i>Protection of the Environment Operations Act 1997</i> (NSW)

Note: Committee members and health and safety laws

It is very important for Committee members to understand the laws about health and safety in an organisation (commonly known as OHS laws). OHS laws may impose particular duties on Committee members.

Other legislative obligations that apply to specific subsectors of NFPs

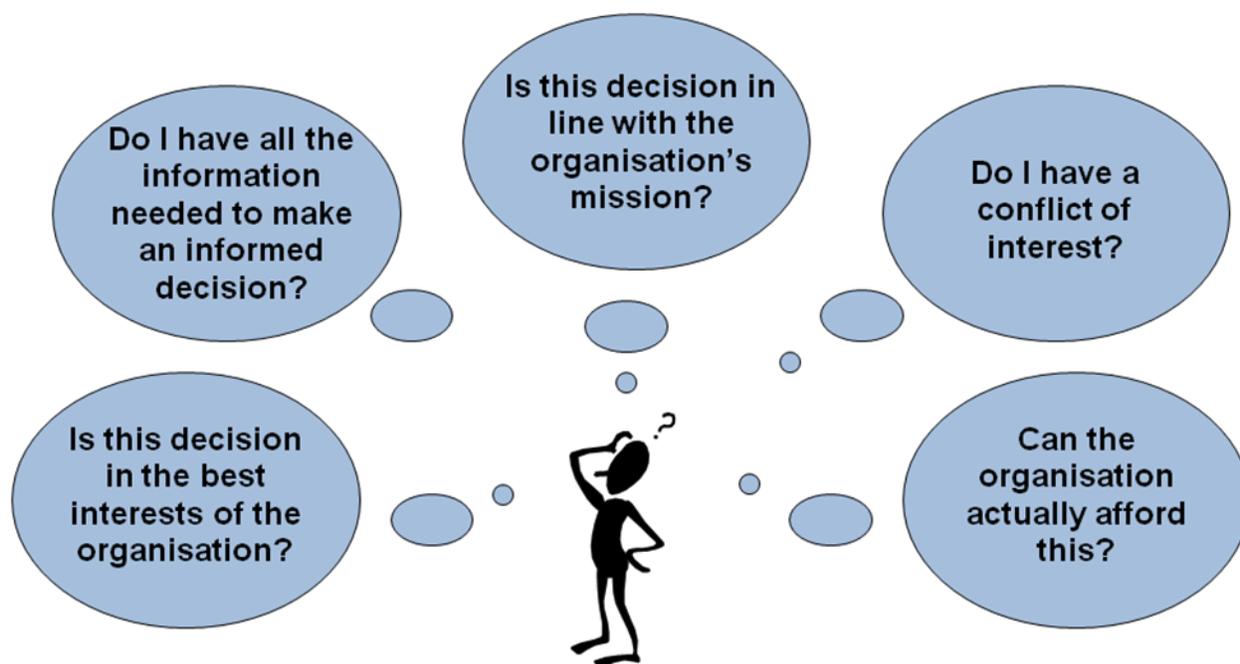
Depending on the purpose and activities of your organisation, there may be specific legislation that applies to your NFP. For example, the childcare, aged care and housing sectors have detailed legal and regulatory obligations that need to be adhered to. There are others. As a Committee member, it is part of your duty of reasonable care and diligence (see Duty 2) to understand and ensure compliance with these legal requirements. Your sector peak body should be able to provide you with further information about these laws.

Part G: Conclusion

The legal duties that apply to people who 'govern' NFP community organisations are essentially common sense standards. Compliance with the duties will help to ensure that your organisation is well run, has a good reputation and continues to receive the support of the community.

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

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



Glossary

Words or phrases that are in *italics* are separately defined.

ACNC – Australian Charities and Not-for-Profits Commission

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

Associations Incorporation Act 2009 (NSW) – *legislation* passed by the NSW Government that sets out the laws about NSW *incorporated associations*. The *Associations Incorporation Act 2009* is the legislation which sets out the specific wording of the legal *duties* that apply to people who sit on the *governing body* of an incorporated association

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

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

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

common law – ‘judge-made’ law that has developed in the courts over time. As the cases decided by judges were followed by other judges in later cases – a body of law grew up and it came to be known as the common law. In more recent times, much of the common law has been written into *legislation*, and both the common law and legislation can apply to NFP organisations

Committee (or Committee of Management) – the name used to describe the *governing body* of some NFP organisations – it is usually used as the name for the governing body of a NSW *incorporated association*. We have used the term ‘Committee’ throughout this Guide – just for simplicity. You should substitute the term ‘Board’, ‘Council’, or whatever other name is used for the governing body of your NFP organisation, if different

Committee members – the name given to the people who sit on a *Committee* – often used as the name for the members of the governing body of *incorporated associations*. We have used the term ‘Committee member’ throughout this Guide, just for simplicity. You should substitute the term ‘Director’ ‘Board member’, ‘Council member’ or whatever other name is used by the governing body of your NFP organisation, if different

company limited by guarantee – an *incorporated* legal structure often used by NFP organisations which operate nationally Limited by guarantee means that the liability of the company's members is limited to a certain amount (see *limited liability*)

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

Constitution – a name for the *governing document* of an organisation - it is usually the name used for the governing documents of a *company limited by guarantee* but can also be used by other *NFPs*

cooperative – a NSW, *incorporated* legal structure which can be NFP

Cooperatives Act 1992 (NSW) – legislation passed by the NSW Government and sets out the laws about *cooperatives*. The Cooperatives Act is the legislation in which you will find the specific wording of the legal *duties* that apply to people who sit on the *governing body* of a cooperative

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

Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) – legislation passed by the federal government and includes a part that sets out the laws about *indigenous corporations*. The *Corporations (ATSI) Act* is the legislation in which you will find the specific wording of the legal duties that apply to people who sit on the governing body of an indigenous corporation

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

directors - the name given to the people who are members of a *Board of Directors*

duty – a requirement or obligation

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

fiduciary duties – the legal duties that people who hold a position of trust owe to people who trust them. The relationship between a *Committee member* and a *NFP* organisation is a relationship of trust and the *common law* says that Committee members owe their organisation fiduciary duties (see Duties 1 - 4)

govern – make key decision on behalf of a group

governing body – a standard term used to refer to the group of people who make decisions for an organisation. Often these people are quite easy to identify as they are formally appointed to the *Committee* or *Board*. However the governing body also refers to the key ‘decision makers’ in the organisation

governing documents – the documents that set out the rules that the organisation has agreed to run by which form a legal document that guides the organisation. The governing documents often have different names but for most NSW *incorporated associations* they include the *Rules* and *Purposes* of the association; other *NFP* organisations may have a *Constitution* or *Rule Book*. Depending on the organisation, the governing documents might also extend to any by-laws, regulations, codes of conduct or other policies which have been adopted by the organisation

incorporated association – an *incorporated, not-for-profit* legal structure used in NSW (and other States and Territories)

incorporated / incorporation – a formal process whereby an organisation arranges itself in a certain way (into a structure) and ‘registers’ with government. The legal structures that can be chosen by NFP community organisations include an *incorporated association, co-operative, company limited by guarantee, or indigenous corporation*. When an organisation incorporates it is

formally recognised by the law - which means it can legally own property, enter into contracts, sue or be sued. One of the main benefits of incorporation is the *limited liability* of members

indemnity – a document or agreement whereby a person or organisation agrees to pay for the *penalty* or legal fees of another person, if something goes wrong. For example, some NFPs have an indemnity clause in their *governing documents* which says that the organisation will pay for certain fines for *breach* of duties on behalf of its *Committee members*

indigenous company – an *incorporated* legal structure which can be used by NFP organisations that involve Aboriginal or Torres Strait Islander people. Indigenous companies can operate nationally

insurance – see *directors and officers insurance*

legislation - a document in which the law has been written down and passed by a Parliament

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

limited liability – when NFP organisations incorporate, one of the benefits is that members of the group, including *Committee members* get limited liability. This means that they are only responsible to pay the group for their membership fees (or guarantee amount), and are not liable to pay for the groups debts out of their own personal money. However there are exceptions to limited liability – one is that *Committee members* who *breach* their *duties* may be personally *liable*

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

may – indicates a discretion which means it is something the law says you can do if you want to, but you don't have to do it

NFP – an abbreviation meaning not-for-profit

NFP organisation – any group (usually set up for a community or social purpose) where the members of the group put any profits or money made by the group back into the activities of the group, rather than distribute the profits to individuals involved in the group

objectives – a statement about the purpose for which the organisation was set up – in a *Constitution* there is often an 'objectives' clause, whereas in an *incorporated association* it is often know as *purposes*. As a *Committee member*, is important to know the objectives of your group, so you can comply with the duty to act for a proper purpose (see Duty 1)

OHS – an abbreviation meaning occupational health and safety

penalty – a punishment; particularly a fine or a money payment but may also be disqualification for a position (eg. not allowed to be a *Committee member* anymore) or in rare cases imprisonment

Purposes - a statement about the purposes for which the organisation was set up – for NSW *incorporated associations* this is often know as 'statement of objectives' and is found in the *Rules*. A statement of objectives must be included in an application for registration of an incorporated association. As a *Committee member*, it is important to know the objectives of your group, so you can comply with the duty to act for a proper purpose (see Duty 1)

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

Rule Book – the name often used for the *governing document* of an *indigenous corporation*.

Rules – the name usually used for the *governing document* of a *NSW incorporated association* but can also be used by other non-profit legal structures

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