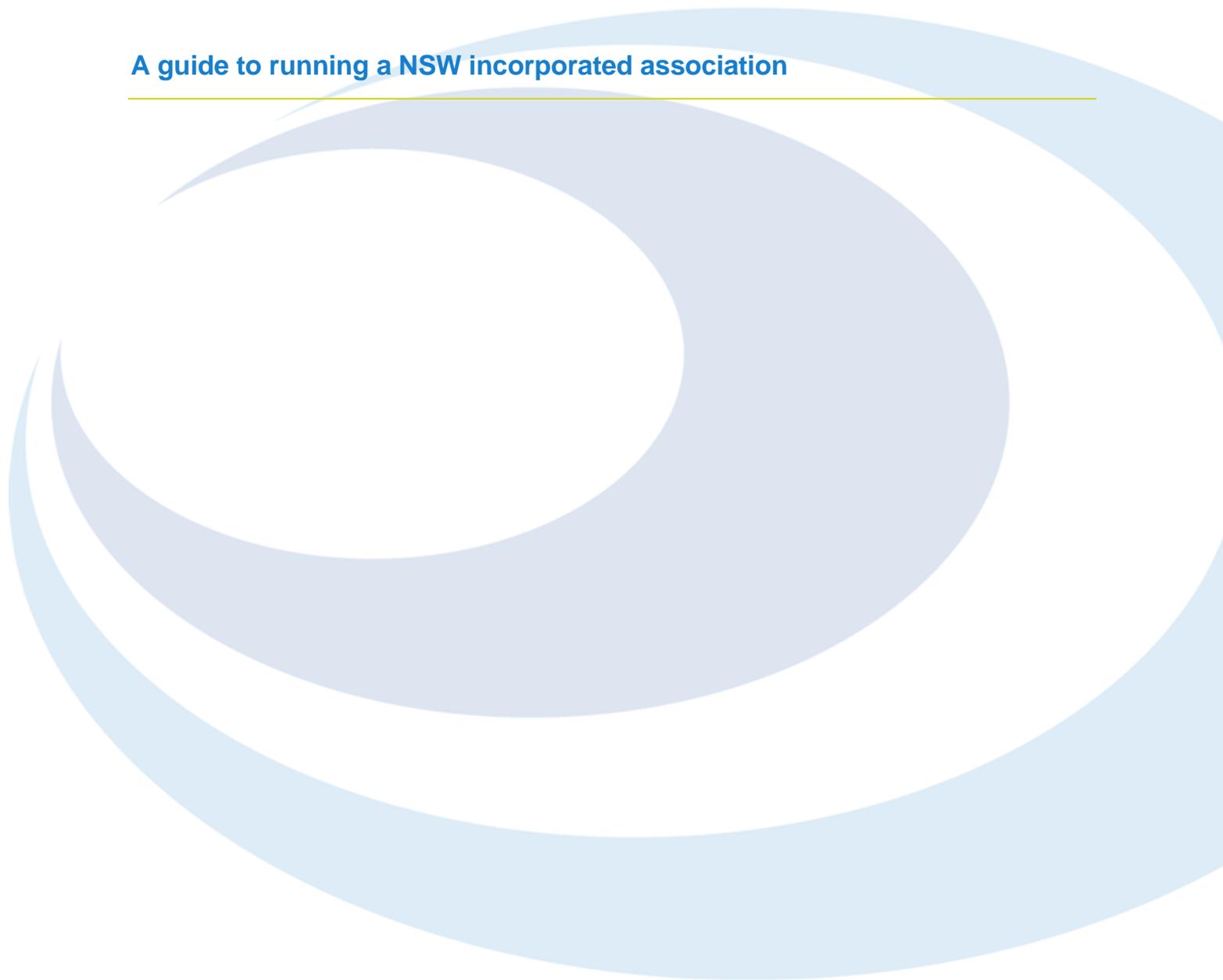


PART 3: PUBLIC OFFICER'S LEGAL ROLE, POWERS AND DUTIES

A guide to running a NSW incorporated association



PUBLIC OFFICER'S LEGAL ROLE, POWERS AND DUTIES

This Part of the [Guide for Public Officers](#) covers the legal role, powers, duties and liabilities of a public officer of an incorporated association in New South Wales.

The public officer does not have to be a member of an association's committee, although the *Associations Incorporation Act 2009* (NSW) (**AI Act**) and the *Associations Incorporation Regulation 2016* (NSW) (**AI Regulation**) do not prevent an association's public officer from also holding the positions of committee member (or board member) and secretary. For some associations, a committee member will automatically be appointed the public officer by reason of his or her committee position.

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

Key Points

1. What are the main legal tasks of a public officer?

In New South Wales, laws regulating incorporated associations shape the public officer's tasks and responsibilities. There are specific tasks required of the public officer in the AI Act and the AI Regulation. These include notifying NSW Fair Trading of any changes to key information about the association, collecting all association documents from former committee members, and returning all association documents to a committee member when they (the public officer) leaves their role. An association's Constitution may set out additional requirements and responsibilities.

2. What are the legal duties of a public officer?

The public officer has specific duties set out in the AI Act when performing their role and carrying out tasks. These statutory duties are in addition to general law duties that apply through the law developed by the courts ("judge-made" law, or common law).

3. What happens if a public officer breaches any of their legal duties?

There are consequences for breaching a duty under the AI Act and under judge-made law, including financial penalties, which are discussed further in this Part.

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

The AI Act provides a public officer powers to act on behalf of the incorporated association in certain situations. The committee may (but is not required to) authorise the public officer to act on behalf of the association more broadly (this is called “delegating”).

5. When is a public officer liable for the debts and liabilities of the association?

A public officer is generally not personally liable (legally responsible) for the debts and liabilities of an association unless the public officer provides a personal guarantee (for example, agrees to act as guarantor for a loan of the association) or is found guilty of an offence under the AI Act (refer section 91).

1. What are the main tasks and legal obligations of a public officer?

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

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

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

Remember!

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

If you are confused about which rules under your Constitution apply to you and whether the copy you have is up-to-date, the best thing to do is to contact NSW Fair Trading and request a copy of your association's Constitution.

Your Constitution may not reflect all the requirements of the laws for incorporated associations. If there are any compulsory legal requirements missing from your Constitution, those requirements will apply anyway to your association even if they are not specifically included in your Constitution.

The legal tasks of a public officer has both external and internal responsibilities. The public officer is responsible for:

- notifying NSW Fair Trading of any change in the association's official address within 28 days
- collecting all association documents from former committee members and delivering the documents to the new committee member

- returning all association documents to a committee member within 14 days, when they leave their role as public officer
- acting as the official contact for the association for any external (including governmental) body or person wishing to contact the association, including taking delivery of documents served on the association and bringing them to the attention of the committee as soon as possible, and
- custody of any documents as required by the constitution.

For further information about the external reporting tasks, see [Part 8: Reporting to NSW Fair Trading](#) in this Guide.

The public officer may authorise someone else (for example, the association's secretary (if the public officer does not assume the role of the secretary), a committee member, volunteers or paid staff) to do some or all of the particular tasks that they are responsible for (this is called "delegating"). However, the public officer remains legally responsible for the tasks carried out by others. Therefore, public officers should be careful to supervise those carrying out their tasks, and to put in place policies and procedures to ensure the tasks are carried out properly.

Duties and obligations under other legislation

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

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

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

For further information about New South Wales WHS laws, see the Not-for-profit Law Information Hub at www.nfplaw.org.au/OHS.

2. What are the legal duties of a public officer (and other committee members)?

Legal duties apply to public officers and committee members, and require them to act in a certain way when performing their role. The legal duties in New South Wales come from two sources:

- legislation (that is, the AI Act and the AI Regulation), and

- the law developed by the courts (that is, “judge-made law” or common law).

The legislative requirements (under the AI Act) generally apply to committee members (see sections 30A, 31, 32 and 33 of the AI Act), which will include the public officer if the public officer is also a committee member. These requirements are called “statutory duties”.

A public officer's duties under judge-made law arise because of the position of trust that a person in that role holds and because they are trusted to act in the best interests of the association. These duties are sometimes called “fiduciary duties”. These fiduciary duties under judge-made law overlap significantly with statutory duties under the AI Act. In practical terms, the combined effect of the AI Act requirements and judge-made law is that a public officer should:

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

These duties all overlap, and are discussed briefly below (note: if there is a specific statutory duty under the AI Act, the section number from the Act is included). Detailed information can be found at Justice Connect’s Information Hub at www.nfplaw.org.au/people.

(a) Act honestly, fairly and for the benefit of the association

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

- act in good faith (with integrity) and in the best interests of the association, assisting the association to achieve its objectives (as contained in the association’s objects in its Constitution)
- not act for their own benefit or the benefit of a particular group of members. For example, a public officer should not receive bribes or “kickbacks” from suppliers to the association and should not act in a way which treats a particular member of the association unfairly, or is not in the interests of members of the association as a whole – for example, a public officer should not use their powers to discriminate against members of the association they do not like or prevent them from attending or voting at a general meeting
- make sure the association is only doing things that are permitted by the association’s Constitution and objects (see section 26(1) of the AI Act), and
- make sure their decisions are based on what is best for the association and which will help guide the association towards achieving its objectives.

(b) Duty to not misuse position or information

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

Some examples of misuse of information or position could be:

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

(c) Disclose and properly manage conflicts of interest (only applies when the public officer is a member of the committee (see section 31) of the AI Act)

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

Example:

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

The public officer must:

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

association. A public officer may have a “conflict of interest” if, for example, an opportunity is available to the association that the public officer could profit from personally – for example if the association was looking for an electrician, and the public officer owns an electric business.

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

- **disclose:** tell the committee about any actual or even potential conflict of interest – for example, being a member of a competing association, or owning a business that is tendering for a contract, and tell the committee about (and include in the statement provided to members at the annual general meeting) any direct or indirect interest they have in a matter (see section 31(1) of the AI Act)
- **manage:** not be involved in any discussion about the matter in which they have an interest (see section 31(5)(a) of the AI Act) and not take part in any decision of the committee with respect to the matter in which they have an interest (see section 31(5)(b) of the AI Act), and
- **record:** ensure that any disclosure by a committee member of a conflict of interest is recorded in a book kept for this purpose. This book must be available for inspection by any member of the association on payment of a fee (see sections 31(3) and 31(4) of the AI Act).

Tip:

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

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

(d) Duty to act with reasonable care, diligence and skill, and use your skills for the benefit of the association

This duty is sometimes called exercising care and diligence (see section 30A). It means the public officer is required to meet the standard of an average public officer in an association of a similar type and size, taking into account their particular skills and capabilities. Unless the association's Constitution states otherwise, you do not have to have any particular qualifications to be a public officer. However, you do need to use whatever skills and experience you do have for the benefit of the association and put reasonable effort into the tasks you take on, be aware of your obligations and seek to perform those obligations to the level of your skill and experience.

This duty includes things such as:

- knowing the organisation's financial position and making sure the committee takes action if there is a concern about whether debts can be paid on time (every member of the committee must do this, rather than leaving it entirely to the treasurer)
- attending and participating in meetings
- following up action items between meetings
- keeping the association's records up to date, and
- reporting to NSW Fair Trading and other regulators accurately and on time.

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

Business judgements

The law recognises that running an association involves making informed decisions on behalf of the association. While a public officer will not be involved in committee decisions, she or he may be asked to sign documents as an authorised signatory. These decisions will not always, with the benefit of hindsight, benefit the association, but this does not mean the person making the decision has breached a duty owed to the association. A decision will generally be considered to have been made with reasonable care if it can be shown that the public officer:

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

This defence is historically known as the "business judgment rule".

Note:

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

Personal liability of committee members if acting in good faith

Under section 30B of the AI Act, committee members (including the public officer where they are also a committee member) and others acting under the direction of a committee member, are protected from

personal liability for actions (or omissions) done in good faith for the purpose of exercising the committee members' functions under the AI Act.

3. What happens if a public officer does not comply with their legal duties?

NSW Fair Trading's powers to investigate and intervene

If there are allegations that the public officer (and/or others involved in running the association) are not complying with their legal duties, or that the association is in breach of its legal obligations, NSW Fair Trading may decide to investigate the association or send a letter requesting compliance. To establish whether your association is complying with its legal duties, NSW Fair Trading has the power to give any person (including a public officer) a written notice requiring that person to:

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

An authorised officer from NSW Fair Trading may also enter the incorporated association's premises and inspect and copy any document that relates to the association's business to determine compliance with the AI Act (see section 86 of the AI Act). This can be done either with or without the association's consent in certain circumstances, or in accordance with a search warrant issued by a magistrate (see sections 86 and 87 of the AI Act).

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

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

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

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

- refuse or fail to comply with a requirement of NSW Fair Trading (for example, to produce relevant documents - refer section 85 of the AI Act). **Note:** It is an offence under the *Crimes Act 1900* (Cth) to furnish false or misleading information and/or documents (refer section 85(2) of the AI Act), or
- obstruct or hinder an authorised officer in the exercise of the officer's functions under the AI Act (see section 92 of the AI Act).

Consequences of a breach of duty under the AI Act

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

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

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

For example, in cases of insolvent trading, a public officer and any person who is a committee member of the association may commit an offence by allowing the association to incur debts whilst insolvent (refer sections 68 and 91 of the AI Act). When facing liability for insolvent trading, a public officer and the association's committee members may have the following defences available to them:

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

Consequences of breach of duty under judge-made law

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

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

Even though a number of the duties under the AI Act apply to current or former committee members only (for example, sections 31 to 33 of the AI Act), the public officer may be liable for certain offences under the AI Act even though they are not a member of the committee. In particular, as mentioned above section 91(5) of the AI Act provides that the public officer will be considered to be a committee member for the purposes of that section and, consequently, may be taken to have contravened the AI Act or the AI Regulation if the public officer knowingly authorised or permitted the contravention. Also remember that a public officer may automatically be appointed secretary (and thus a committee member) if there is no appointed secretary.

On the other hand, the duties under judge-made law apply only where someone has a “fiduciary duty” to the association. A public officer will owe a fiduciary duty in respect of the duties of a public officer, but if the public officer is not on the committee and does not take part in making governance decisions for the association, then the scope of the fiduciary duty may be limited. It will depend on the circumstances - sometimes a person who is not “technically” on the committee may need to comply with common law duties. For more information, see Not-for-profit Law’s Guide to Legal Duties of Committee Members at www.nfplaw.org.au/governance.

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

The AI Act gives the public officer certain express powers to act on behalf of the association (for example, to lodge documents with NSW Fair Trading and notify them of any changes to key information about the association - see Part 1 "Responsibilities"). Also, as the public officer is also an "authorised signatory" of the association (see section 36(1) of the AI Act and Part 1 "Responsibilities" of this Chapter) the public officer has the power to execute documents on behalf of the association. For more information, see [Part 8: Reporting to NSW Fair Trading](#) in this Guide.

Additionally, the AI Act allows an incorporated association to appoint a person to execute documents (including deeds) on its behalf either generally or in specific circumstances (see sections 22 and 36(2) of the AI Act). A deed is a particular type of legally binding document similar to a contract and is required in some situations, such as for a transfer of land. Associations can also give “express” or “implied” authority to an individual to make, vary, ratify or discharge a contract on behalf of the association (see section 21 of the AI Act).

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

Table 1: Express and implied authority

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

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

As a general rule, the public officer is not personally liable for the debts and liabilities of the association, including any costs, charges and expenses incurred in winding up the association, unless the AI Act or the association’s Constitution provides otherwise. The same applies to committee members and members of the incorporated association (see section 26(2) of the AI Act and rule 9 of the Model Constitution - **Note:** always refer to your association's Constitution). However, a public officer may be held to be jointly and severally liable (ie together with and separately responsible) with the committee members for the debts and liabilities of the association if the debt was incurred and the association was insolvent or likely to

become insolvent as a result of the debt (section 68 of the AI Act) and the public officer knowingly authorised or permitted the debt to be incurred. In addition, if a public officer has specifically accepted personal liability (for example, if they have given a personal guarantee for a loan by the association), the public officer will be liable for those particular debts.

Remember that a public officer can be liable for a breach of duty (see above, [2. What are the legal duties of a public officer](#) (and other committee members?)), and in some circumstances can be ordered to pay compensation.

Further information

Not-for-profit Law resources

Not-for-profit Law's Information Hub contains a variety of resources and information sheets for community organisations – go to www.nfplaw.org.au.

Legislation

The *Associations Incorporation Act 2009* (NSW) is the legislation that regulates incorporated associations in New South Wales.

The *Associations Incorporation Regulation 2016* (NSW) contain additional requirements for incorporated associations in New South Wales.

Government

The NSW Fair Trading website contains a variety of online resources, including online access for incorporated associations. See www.fairtrading.nsw.gov.au/ftw/Cooperatives_and_associations/About_associations.page.

Other links

See Part 1: The Association in a Nutshell in this Guide for links to other organisations and online resources to assist you and your association.

©2017 Justice Connect

You may download, display, print and reproduce this material for your **personal use**, or **non-commercial use within your not-for-profit organisation**, so long as you attribute Justice Connect as author and retain this and other copyright notices. You may not modify the Guide. Apart from any use permitted under the *Copyright Act 1968* (Cth), all other rights are reserved.

To request permission from Justice Connect to use this material, contact Justice Connect at PO Box 16013, Collins Street West, Melbourne 8007, or email nfplaw@justiceconnect.org.au