

APPOINTING AND REMOVING A SECRETARY

Part 2: A Secretary's Satchel - Guide for Secretaries

New laws for Victorian incorporated associations

In November 2012, the laws regulating Victorian incorporated associations changed. The *Associations Incorporation Act 1981* (the old Act) was replaced with the *Associations Incorporation Reform Act 2012* (the new Act). This Secretary's Satchel reflects the new laws.

Important! Rules changes affecting *all* incorporated associations

From 26 November 2012 there are new laws for incorporated associations. There are also new matters that must now be covered by an organisation's rules. Organisations that were using the model rules now have new model rules that apply (unless they chose to change their rules). This Guide refers to the new model rules.

APPOINTING AND REMOVING A SECRETARY

This Part of the Guide for Secretaries covers the legal requirements for appointing and removing a secretary of an incorporated association in Victoria.

Key Points

1. Who can be the secretary?

The *Associations Incorporation Reform Act 2012* (Vic) (**'The AIR Act'**) regulates who can be the official "secretary" of an incorporated association. (This role used to be called the "public officer" of the organisation.) In addition, an organisation's own rules and policies may have particular requirements.

2. How is the secretary appointed?

Whenever there is a vacancy in the position of secretary, the committee must appoint a new secretary within 14 days. The secretary often sits on the committee, and is often elected at an association's AGM.

3. What happens after the secretary is appointed?

Every new secretary must notify Consumer Affairs Victoria (**CAV**) of particular matters after they have been appointed or if their details change. Many organisations also need to notify the Australian Taxation Office of a change of secretary.

4. When will the secretary's position become vacant?

The *Associations Incorporation Reform Act 2012* (Vic) and an organisation's rules set out the circumstances in which the position of secretary will be automatically terminated (vacated).

A secretary's position also becomes vacant if they resign or if the organisation removes the secretary from their position.

Important:

The AIR Act commenced on 26 November 2012. It changed all references to the "public officer" (under the Old Act, the *Associations Incorporations Act 1981*) to "secretary". The new laws mean that the "public officer" is now automatically called the "secretary" under the AIR Act, and the new "secretary" has all the responsibilities of the old "public officer".

If your organisation has not done so already, it should consider the impact this change has on its rules and whether amendments need to be made to reflect the change in terminology from public officer to secretary. For more information about altering rules under the AIR Act, see www.nfplaw.org.au/constitution on the Not-for-profit law Information Hub.

1. Who can be the secretary?

The secretary (formerly the “public officer”) is the principal contact point between Consumer Affairs Victoria (**CAV**) and your organisation. The secretary is legally responsible for a number of specific tasks required by the AIR Act — see Part 8: Reporting to Consumer Affairs Victoria in this Guide, and CAV’s website: www.consumer.vic.gov.au > [Clubs and not-for-profits](#).

The role of secretary discussed by this guide is the role provided for in the AIR Act, that was formerly known as the “public officer”.

The role of secretary is very important for your organisation. Your organisation should appoint a person who has the experience, skills and/or qualifications to carry out the role of secretary. Effective secretaries need to have a range of skills, including:

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

In choosing your secretary, you should also take into account:

- any restrictions or qualifications required by law, particularly the AIR Act (such as the requirement to reside in Australia and be at least 18 years of age)
- your organisation’s rules (sometimes called “the constitution”), and
- any policies your organisation has about this issue.

More details about these requirements are outlined below.

AIR Act requirements

A secretary of an association incorporated in Victoria must:

- consent to being appointed to the position (section 73(3)(a) of the AIR Act)
- be at least 18 years old (section 73(3)(b))
- be a resident of Australia (section 73(3)(c) and see further below)
- not be “insolvent under administration” (section 78(2)(c)(ii) and see further below), and

- not be a “represented person” under the *Guardianship and Administration Act 1986* (Vic) (the **GA Act**) (section 78(2)(c)(iii) and see further below).

Unless the rules of your organisation say otherwise:

- the secretary may also hold another position in your organisation (section 76), and
- there is no upper limit to the secretary’s age.

Tip:

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

- agree to act as the organisation’s secretary
- confirm that they satisfy the AIR Act requirements for being a secretary, and
- agree to notify the organisation if any of these matters, or their contact details, change.

The AIR Act requirements about being a secretary are explained below in more detail.

Who is a “resident” of Australia?

The AIR Act does not define who is a resident of Australia. However, generally, the secretary’s primary residence (that is, the place where they usually live) must be located in Australia.

Even if the secretary is not an Australian citizen or if they frequently travel outside Australia, they can usually still be the secretary if they are based in Australia. But check the rules of your organisation for any special additional requirements.

What is “insolvent under administration”?

“Insolvent under administration” is a general term used for when a person or an organisation is (or is on the verge of being) bankrupt. Bankruptcy is a legal status that offers a person protection from further action against them by creditors (that is, people to whom the person owes money). A person is a “declared bankrupt” when an actual declaration of bankruptcy has officially been made about them. The usual period of bankruptcy is three years. For further information about bankruptcy, see www.itsa.gov.au > [Bankruptcy](#).

Bankruptcy records are publicly accessible on the National Personal Insolvency Index (**NPII**), so it is possible to check if a person has been declared bankrupt — see www.itsa.gov.au > [Creditors](#) > [NPII](#). Fees apply for searching the NPII.

A person is also considered insolvent under administration if they have entered a personal insolvency agreement (which is an agreement to repay creditors that a person who is in debt can sometimes make to avoid being declared bankrupt).

It is not possible to check if someone has entered a personal insolvency agreement, so it is a good idea to require your secretary to sign a declaration that they are not “insolvent under administration”.

Who is a “represented person”?

The term “represented person” is defined in the GA Act as a person who currently has either a guardian or administration order (or both) in effect.

A “guardian” or “administrator” is appointed by VCAT under an order which determines the scope of the guardian or administrator’s decision-making for the represented person.

Remember!

A secretary who goes to live outside Australia, or who becomes insolvent under administration or is a represented person, is no longer able to be the secretary. Under the AIR Act, the position of secretary becomes automatically vacant when any of these things occur. In this situation your organisation will need to appoint a new secretary.

Your organisation’s rules and policies

Your organisation’s rules must provide for the appointment and removal of your organisation’s secretary (this is a requirement under the AIR Act). You must check the rules and any relevant policies of your organisation for additional requirements about who can be appointed as the secretary and the term (or length) of their appointment. For example, your rules may require certain qualifications or experience for the role. But note that the rules and any policies of your organisation cannot override the AIR Act requirements – for example your rules cannot permit your secretary to reside outside of Australia or to be under the age of 18.

If your organisation is large, your rules may state that the secretary can be a paid manager. In some large organisations the rules may allow for certain work of the secretary to be carried out by a specialist firm for a fee. However, even if the secretary delegates their functions to another person or firm, the secretary remains legally responsible for those duties being properly carried out (for further information on the secretary’s duties, see Part 8: Reporting to Consumer Affairs Victoria and Part 3: Secretary’s Legal Role, Powers and Duties in this Guide).

Remember!

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

If you are confused about which rules apply to you and whether the copy you have is up-to-date, the best thing to do is to contact CAV and request a copy of your organisation's rules and purposes.

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

Does the secretary have to be on the committee?

No, there is no requirement in the AIR Act for the secretary to be on the committee. But the rules of many organisations state that the secretary is a member of the committee. This is optional – it is not required by the AIR Act or by the *Associations Incorporation Regulations 2012* (Vic) (the **Regulations**). Under the model rules, the secretary is a member of the committee.

If your rules were drafted to meet the requirements of the Old Act, they may provide for the appointment of a “public officer” as well as a “secretary”. The “public officer” role will now be taken to be the “secretary” for the purposes of the AIR Act. Your rules will now be confusing, as your organisation will have two “secretaries” – a statutory secretary, and a secretary provided for in your organisation's rules! We recommend amending your rules sooner rather than later to avoid confusion (for information on changing your rules, go to www.nfplaw.org.au/consistution).

If your organisation's rules do not require the secretary to be a member of the committee, it will be implied (unless the rules expressly state otherwise) that the secretary cannot vote at committee meetings.

Where to find a new secretary

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

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

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

- Volunteering Australia www.govolunteer.com.au and www.volunteeringaustralia.org
- State-based volunteering peak bodies, such as Volunteering Victoria www.volunteeringvictoria.org.au/
- Leadership Victoria www.leadershipvictoria.org which now includes the Greatconnections program and regional groups, such as Leadership Ballarat and Western Region www.lbwr.org/
- goodcompany www.goodcompany.com.au
- Australia Business Arts Foundation (for arts organisations) www.abaf.org.au. Note this organisation will merge with Artsupport Australia in 2013
- OurCommunity www.ourcommunity.com.au, and
- Pro Bono Australia www.volunteermatch.com.au.

For further ideas, speak to any peak body to which your organisation may belong — they may be able to put a note in their next newsletter or e-bulletin. For example, the Victorian Council for Social Service (VCOSS) (www.vcross.org.au > [What we do](#) > [Training and development](#)) can point groups working in social services in the right direction for assistance in finding a secretary.

2. How is the secretary appointed?

The way in which your organisation appoints the secretary must be set out in your organisation's rules (item 10 of Schedule 1 to the AIR Act). Your organisation may have special requirements for exactly how the association goes about appointing or electing a new secretary when there is a vacancy.

Your rules may require that your secretary is elected by members (normally at the AGM), or may allow the committee to appoint a secretary.

Remember!

The secretary is often a member of the committee – but does not have to be.

The first secretary of your association is the person who applied for incorporation (unless the application specified another person) and must consent to being the first secretary (section 72 of the AIR Act).

If the position of secretary becomes vacant, the association must fill the vacancy within 14 days, in accordance with the procedure provided in its rules, and notify CAV of that appointment within 14 days (section 73(1) of the AIR Act).

Most associations have a rule that allows the committee to appoint someone to the role of secretary if there is a short term or “casual” vacancy. If your organisation’s rules have a different procedure for the appointment or election of a new secretary, and 14 days is not long enough to carry out the procedure, then the committee must appoint a temporary (“interim”) secretary within 14 days. This temporary secretary only holds the position until a permanent secretary is appointed or elected under the association’s rules (section 73(2) of the AIR Act). The circumstances in which the position may become vacant are discussed below, at [4. When will the position of secretary become vacant?](#)

Tip:

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

The management committee appoints Ms Katherine Smith to be the secretary of XYZ Inc, effective from 1 January 2013 until the end of the next annual general meeting of XYZ Inc (or earlier resignation or termination in accordance with the rules).

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

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

- *agrees to act as the secretary of XYZ Inc*
- *satisfies the AIR Act requirements for being a secretary, and*
- *agrees to notify the management committee of XYZ Inc if any of these matters or her contact details change.*

Electing a secretary at the annual general meeting

Many organisations’ rules say that the secretary must be elected by members of the association at the annual general meeting (**AGM**). The model rules follow this procedure. Check your own organisation’s rules, as well as your organisation’s policies and procedures, for:

- how and when candidates for secretary are nominated
- how and when information about the candidates is distributed to all members before the AGM, and
- what happens if only one candidate is nominated or if no one is nominated.

What if no one is elected secretary at the annual general meeting?

If a secretary is not elected at the AGM for some reason (for example, no one was nominated or eligible), the rules may provide that the committee can appoint a secretary. In large organisations, where the secretary may be a paid manager of the organisation, this is often the case. But you need to check your own organisation's rules carefully.

What if the position becomes vacant between annual general meetings?

If the position of secretary becomes vacant between AGMs (for example, the secretary resigns), check your rules to find out how to appoint a new secretary.

Remember!

Under the AIR Act, a new secretary must be appointed within 14 days. CAV must be notified of the change within 14 days of the new appointment.

If your organisation uses model rule 57 (or a similar rule) the committee must appoint another member of the committee to be the secretary within 14 days of the position becoming vacant, and that person will remain appointed until the next AGM. If your rules do not provide for filling vacancies of the secretary position, model rule 57 will be automatically included in your rules.

3. What happens after the secretary is appointed?

Report to CAV

Within 14 days after a new secretary is appointed, the secretary must notify CAV of certain details (section 74 of the AIR Act and regulation 11 of the Regulations).

If the existing secretary's details change (for example, their address) this information should also be provided to CAV.

Important:

If you have just been appointed as the secretary (or you are the existing secretary and your details change), you need to notify CAV – even if your organisation or the previous people in this role have not done this in the past!

The secretary can advise CAV of these changes by:

- lodging the “Change of Association Details” form with CAV in person, by post or by fax (the form is available on CAV’s website: www.consumer.vic.gov.au > Clubs and not-for-profits > Fees and Forms. CAV also accepts completed and signed forms scanned (PDF format) and sent by email, or
- updating the details online via CAV’s website: www.consumer.vic.gov.au.

There is no lodging fee to pay for submitting these forms.

Tip:

To notify CAV or lodge forms online, the secretary must first obtain a “User ID” and a “Passcode”. The secretary (and only the secretary) can apply to obtain these via CAV’s website: www.consumer.vic.gov.au > Clubs and not-for-profits > Fees and Forms and click on the link on that page “Request a User ID and Password”.

Remember!

If the secretary does not notify CAV within 14 days of their appointment, your association can be fined.

Ongoing reporting responsibilities

The secretary has responsibilities for reporting to CAV about:

- the organisation’s financial information in its annual statement, and
- decisions made by the organisation’s members which must be approved by CAV before they can become official (such as changes to the rules).

See Part 8: Reporting to Consumer Affairs Victoria in this Guide for more information about the reporting responsibilities of the secretary of an incorporated association.

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

If your organisation is registered for tax purposes (for example, if it has an ABN), the organisation must also notify the Australian Tax Office (ATO) of certain changes to the organisation, including the appointment of a new secretary. Note that the ATO refers to the relevant contact person for tax purposes as the “public officer”. This role does not have to be filled by the “secretary” but most organisations appoint their “secretary” as the “public officer” for ATO purposes. The ATO must be notified of a change in public officer (ie secretary) within 28 days of the organisation becoming aware of the change, go to [ATO nonprofit information](http://www.ato.gov.au).

Tip:

It will be easier for your organisation to appoint the same person as the secretary/public officer for both the ATO and CAV. However, you should check who your organisation has appointed in each case – they may be different.

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

In addition to the secretary, an organisation may authorise another office bearer to make enquiries to the ATO about the organisation's tax affairs. A tax officer will only discuss your organisation's account with your authorised contact person (who may be your secretary). You will also need to notify the ATO if your authorised contact person changes.

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

- telephone – phone 1300 130 248 between 8am and 6pm Monday to Friday
- sending the form “Change of Registration Details” (NAT 2943) which can be requested by phone or via the ATO website, or
- online, if your organisation is registered for ATO online services.

The ATO has a useful fact sheet [“How do I ensure the Tax Office can speak to my organisation's representative?”](#) which can be downloaded from the ATO website www.ato.gov.au > Non-Profit > Your situation > Record keeping and managing your tax affairs > Changes to your organisation, including key staff.

You may need to consider whether there are other people, organisations or agencies that should be notified of a change of secretary. Check your organisation's policies and important documents such as funding agreements and leases.

4. When will the position of secretary become vacant?

Under the AIR Act (section 78(2) and (3)), the position of secretary becomes vacant if the secretary:

- dies
- resigns in writing
- is removed from office by special resolution (see below at [5. Removing a secretary](#)), or

- becomes insolvent under administration, a represented person, or no longer lives in Australia (see discussion of these criteria at [1. Who can be the secretary?](#)).

If any of these circumstances apply, the organisation does not have to pass a resolution removing the person as secretary. Their position is automatically terminated (vacated) under the AIR Act. It is important to understand that where automatic vacancy occurs, an association must appoint a new secretary within 14 days of the vacancy.

The position of secretary also becomes vacant if a statutory manager is appointed to run the association (section 78(2)(e) of the AIR Act).

Secretaries can also retire or be removed from office. Members of an association can remove a secretary by special resolution (section 78(2)(b)). The rules of an association can provide other ways to remove a secretary (for example by resolution of the committee). The processes for retirement and removal of a secretary must be contained in an association's rules (section 78(1) of the AIR Act).

Remember!

If the position of secretary becomes vacant, the organisation must fill the vacancy within 14 days in accordance with its rules, and CAV must be notified within 14 days of the vacancy being filled.

What does it mean when the secretary reaches the end of their “term”?

If the secretary is a member of the committee, they must be appointed for a particular length of time (see item 9(b) of Schedule 1 of the AIR Act). This length of time is called their “term” of office.

In many organisations, including those using the model rules, a secretary's term of office is one year, and the position of secretary becomes vacant (and up for election) at the organisation's next annual general meeting. In some organisations, the rules allow the person who was secretary in the previous year to be re-elected for the next year.

You need to check your organisation's rules carefully to find out how your organisation nominates and elects a new secretary when the current secretary's term of office ends.

Return of documents of the organisation

The secretary will have access to documents and information about the organisation because of their role. After they have left their position, these documents must be returned to the committee within 28 days (section 88 of the AIR Act). If the documents are not returned after further request, the organisation can apply to the Magistrates' Court for an order directing the person to return them.

It is good practice for the outgoing secretary to sign a statement confirming they have returned all relevant documents after they have finished in the position.

Tip:

To assist the transfer of information from one secretary to the next, it is a good practice to:

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

5. Removing a secretary

Sometimes an organisation may have to remove a secretary from office (for example, because the person is not carrying out their duties properly).

The AIR Act says that an incorporated association must have procedures for the removal of a secretary in its rules (item 10 of Schedule 1 of the AIR Act). These procedures commonly involve the committee removing the secretary. In all organisations (and provided for in model rule 55) the secretary may be removed by special resolution at a general meeting of members (section 78(2)(b) of the AIR Act). For more information about passing resolutions at general meetings, see Part 6: Special General Meetings in this Guide. Under the model rule 55, a secretary who is proposed to be removed can write a letter to the chairperson and request their letter to be sent to members, or ask that the letter be read aloud at the general meeting.

What if the secretary is a member of the committee?

If the removed secretary is also a member of the committee, depending on your organisation's rules, the person may be automatically removed as a committee member. However, check what your rules say.

What if the secretary is an employee of your organisation?

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

If your organisation wants to remove a secretary who is also an employee, *and* this would mean that the person no longer has a paid position within the organisation, you should seek legal advice before taking any action to remove the secretary. The organisation needs to ensure that it complies with relevant contractual and statutory requirements about terminating (ending) a person's employment. Under the national *Fair Work Act 2009* (Cth), it is illegal to dismiss an employee on a range of grounds. More information on fair and lawful termination can be found on the website of the [Fair Work Ombudsman](#) at www.fairwork.gov.au.

Further information

Non-for-profit Law resources

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

- for information about taking a role in an incorporated association in Victoria see www.nfplaw.org.au/people

Legislation

The [Associations Incorporation Act Reform Act 2012 \(Vic\)](#) is the legislation that regulates incorporated associations in Victoria.

The [Associations Incorporation Reform Regulations 2012 \(Vic\)](#) contain additional requirements for incorporated associations in Victoria, including the model rules.

Government

Consumer Affairs Victoria website contains a variety of online resources, including online access for incorporated associations. See: www.consumer.vic.gov.au > Clubs and not-for-profits.

The Fair Work Ombudsman website contains information about employers' obligations and the Small Business Fair Dismissal Code. See www.fairwork.gov.au

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 organisation.

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