

# Indemnity for office holders of incorporated associations

Legal information for Victorian community organisations

## This fact sheet covers:

---

- what is the indemnity?
  - who is an office holder?
  - does the indemnity mean we need to take out insurance?
  - what is the risk that indemnity creates?
  - how can we manage this risk?
  - what questions should we be asking our broker or insurer? and
  - what happens if we are required to make a payment to an office holder under the indemnity?
- 

**The Associations Incorporation Reform Act 2012 (AIR Act) came into effect on 26 November 2012. The AIR Act includes a new indemnity provision that requires every incorporated association to indemnify its office holders for liabilities they incur in good faith while performing their duties.**

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

All associations should consider the potential impact of the new indemnity on their organisation. Groups should consider, among other things, their activities and the types of liabilities their office holders could incur, as well as their financial position and ability to meet the costs of reimbursing office holders for their liabilities covered by the indemnity.

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

## What is the indemnity?

---

Under the AIR Act, every association must now 'indemnify' its office holders for liabilities that they incur when carrying out their duties as an officer holder (so long as the liability was incurred in good faith). This means all associations must pay back office holders (to the extent the group has assets to cover the liability) when they can show they have incurred a liability that is covered by the indemnity.

The new indemnity automatically applies to every Victorian incorporated association (your group does not need to write the indemnity into its rules). The new indemnity applies in addition to any indemnity that may be already written into your rules or a policy.

## Who is an office holder?

The indemnity applies to “office holders” of an incorporated association. An office holder is:

- a committee member
- the secretary (including where the secretary is not on the committee)
- any person (including an employee):
  - that makes or participates in the decision making that affects the whole or substantial part of the association’s operations, or
  - that has the capacity to affect the financial standing of the association, or
  - on whose instructions the committee is accustomed to act.

## Does the indemnity mean we need to take out insurance?

---

No. While it is now compulsory for all associations to indemnify their office holders, there is no requirement in the legislation to take out insurance.

Associations should consider their potential exposure under the indemnity, and, as part of their overall risk management, consider whether or not specific insurance (for instance, directors and officers insurance) should be taken out to cover the association’s potential liability under the new indemnity (discussed below).

If your association was required to pay an office holder under the indemnity, and insurance was not available, the payment would come from the association’s own assets (including any cash assets and/or by liquidating assets, if necessary).

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

---

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

## What kind of liabilities does the indemnity attach to?

The indemnity will be available where the liability is owed by an office holder to a third party and the liability was incurred by the office holder in good faith in performance of their duties. For instance, in certain situations, a negligence claim brought by a third party against an office holder may be covered by the indemnity.

The indemnity is also likely to apply to protect office holders in situations where an office holder incurs a liability because they have been involved in a contravention of legislation (for instance, the Australian Consumer Law legislation or equal opportunity legislation) - so long as the office holder can show they acted in good faith.

## What does 'good faith' mean?

'Good faith' has different meanings in different contexts. Conduct that would normally fail to meet the requirement of good faith includes:

- acting maliciously
- acting prejudicially to the interests of the association
- gross negligence, and
- acting fraudulently.

An office holder who acts honestly, with reasonable care and diligence, and in the interests of the association will be acting in good faith.

## Liabilities owed to the association

It is unlikely that the indemnity will apply where an office holder is liable to the association. For instance, an office holder who is found to have breached one of the new statutory duties set out in the AIR Act and is fined probably will not be able to make a claim against the association under the indemnity.

## What is the risk that the indemnity creates?

---

The indemnity creates a risk for incorporated associations that they will be required to pay or reimburse office holders under the indemnity at significant expense to the association. Where an office holder incurs a large liability that the indemnity applies to, an association may suffer severe financial difficulties or even insolvency if it has a small asset pool and cannot cover the costs of reimbursing the office holder. This risk can be mitigated by ensuring an appropriate level of director's and officers' liability insurance is in place.

There is also a risk that office holders may assume that because the indemnity is now in force, any risk of personal liability will be fully eliminated by the indemnity. This is not the case. If the assets of the organisation are used up and cannot cover the full amount of an office holder's liability, the office holder would be liable for the remainder. Also, the indemnity will not be available where a liability is incurred by an office holder other than in the course of performing their duties and/or where they have not acted in good faith.

# How can we manage the risks raised by the AIR Act indemnity?

The risks can be managed by educating office holders about the law so that the likelihood they incur a liability is reduced. If office holders incur liabilities while performing their duties, directors and officers liability insurance may provide protection against their legal liability, including damages and legal costs, for wrongful acts. These policies may also include a reimbursement component which reimburses an association for amounts that it is required to pay to its office holders under the AIR indemnity (and may also cover costs of any other indemnities an association may have provided to its office holders).

## RELATED RESOURCES

Further information about insurance to manage the risk created by the indemnity can be found in Not-for-profit Law's Risk Management and Insurance Guide at [www.nfplaw.org.au/insurance](http://www.nfplaw.org.au/insurance).

## What if we already indemnify our officer holders or committee members?

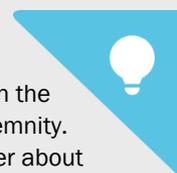
Some associations may already have an indemnity for office holders or committee members in their rules or in a separate policy or document. This can be confusing, as for these organisations, there are now two sources of indemnity obligations. These organisations need to remember that regardless of the indemnity in their rules, the AIR Act indemnity applies as well.

Some issues to consider are:

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

### TIP

Organisations that already have an indemnity should compare the indemnity they provide with the AIR Act indemnity. The AIR Act indemnity could be narrower or broader than your existing indemnity. Organisations with a narrower indemnity than the AIR Act indemnity should talk to their insurer about whether their insurance covers the Act indemnity as well as their rules indemnity.



## What questions should we be asking our broker or insurer?

If you already have a policy that may apply to cover costs related to the indemnity, you should check with your insurer about the scope of the policy, and confirm that it covers the AIR indemnity. You may need to increase the scope of your insurance coverage.

If you are looking at insurance for the first time, it is important to ask the broker or insurer the scope of the coverage of the policy, and read Not-for-profit Law's Risk Management and Insurance Guide at [www.nfplaw.org.au/insurance](http://www.nfplaw.org.au/insurance).

The types of wrongful acts that may be covered by directors and office holders insurance include negligently giving the wrong advice, requesting someone to perform a dangerous task, dismissing staff without following due process and misleading or deceiving the public in some way. It is important to note that most directors' and officers' liability insurance policies will not cover acts that are outside the scope of the office holder's duties such as criminal or fraudulent acts.

# Resources

---

## Related Not-for-profit Law Resources

The Not-for-profit Law Information Hub ([www.nfplaw.org.au](http://www.nfplaw.org.au)) has more resources on the following topics:

- ✔ Insurance and risk ([www.nfplaw.org.au/riskinsurance](http://www.nfplaw.org.au/riskinsurance))
- ✔ Employees and volunteers ([www.nfplaw.org.au/people](http://www.nfplaw.org.au/people))

## Legislation

- ✔ [\*Associations Incorporation Reforms Act 2012 \(Vic\)\*](#)

This legislation includes a new indemnity provision for incorporated associations.

A Not-for-profit Law Information Hub resource. Access more resources at [www.nfplaw.org.au](http://www.nfplaw.org.au)

© 2014 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 this resource. 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](mailto:nfplaw@justiceconnect.org.au).