

Protections for board members of not-for-profit community organisations

Legal information for not-for-profit community organisations

This fact sheet covers:

- The importance of understanding the different protections available to board members
- The difference between volunteer and paid board members
- Practical protections available to board members
- Legal duties and responsibilities of board members
- Legal protections available to board members
- The thing you can't protect against – reputational damage

1. The importance of understanding the different protections available to board members

CASE STUDY: JENNY THE VOLUNTEER BOARD MEMBER OF YOUTH INC

Introduction: Jenny was delighted when a local NFP organisation, Youth Inc. recently asked her to join their board. Youth Inc. supports disadvantaged young people in the local area. The organisation has a strong reputation in the local community, and she was proud to be associated with it. Jenny has never been on a board before, but she is ready and willing to learn and eagerly attends the first few monthly board meetings.

Youth Inc. recently received a large grant to set up a new service in partnership with another NFP organisation. The board has many decisions to make, including assessing the impact of the grant on the operation of the organisation, finding the right NFP partner organisation, entering into a lease agreement and hiring new staff. During this time, there are countless board papers to read, extra board meetings and lots of complicated debate about the financials.

Jenny knows that she has certain responsibilities as a board member, but she is unsure what would happen if she only read some of the board papers, if she voted on financial decisions without fully understanding the decision, or if she started skipping some of the board meetings. Jenny knows she is a volunteer board member, but isn't sure if this provides her with any special protection, whether she is covered by insurance, or if the organisation would protect her if something went wrong.

Board members are elected (or invited onto the committee or board) 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 each board member for the period they are on the board. In return, board members agree to act in the best interests of the organisation and comply with their duties and responsibilities as board members.

This also means that board members, are accountable (individually and collectively) for their actions and the decisions they make on behalf of the organisation.

If a board member of a not-for-profit organisation fails to comply with their legal duties or legal responsibilities:

1. The board member may be found personally liable - if a board member is found personally liable, they will be required to pay any debts or costs of the organisation from **their own money or assets**.
2. The board member may be subject to fines, subject to disqualification from acting as a board member or, in extreme cases, be imprisoned.
3. The organisation itself may be liable (that is, legally responsible) for an action, often meaning they will have to pay a fine or some other penalty to another person or body.
4. The organisation or board member may suffer reputational damage (which could impact future funding).

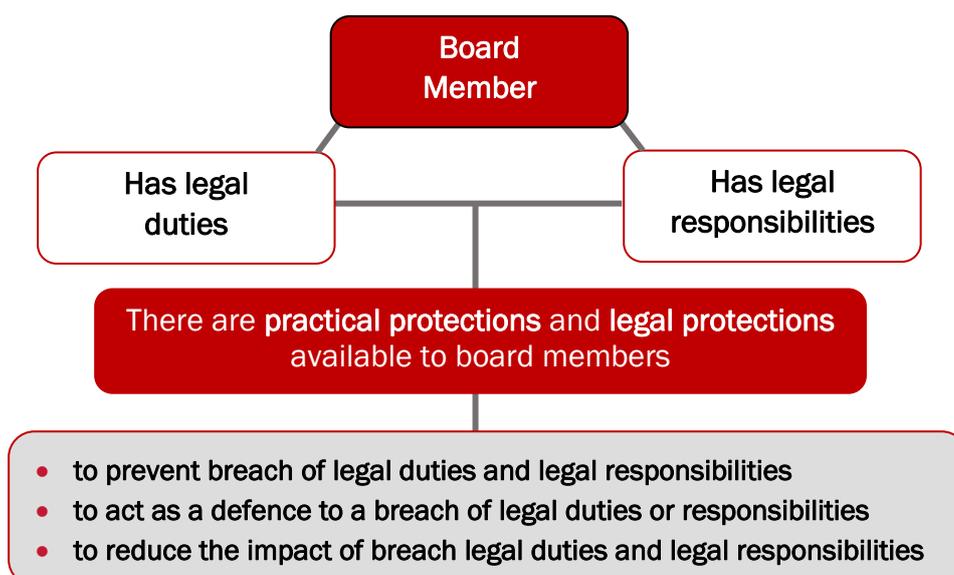
'LEGAL DUTIES' & 'LEGAL RESPONSIBILITIES'

In this factsheet:

'Legal duties' is a reference to the duties that are linked to the governance of an organisation, sometimes referred to as director's duties or governance standards.

'Legal responsibilities' refers to the laws and regulations that impact the day-to-day operation of the organisation, such as employment law that board members must ensure that their organisation is complying with.

The law does however provide certain **legal protections** for the situation when a board member breaches a duty or responsibility even though they took all reasonable steps to comply with their duties and responsibilities. There are also **practical** steps that board members can take to protect themselves. In this fact sheet we refer to these as '**protections available for board members**'. It is important that board members inform themselves of these protections, alongside their legal duties and responsibilities.



NOTE: FOR PROFIT AND NOT-FOR-PROFIT ORGANISATIONS



Both not-for-profit and for-profit organisations have board members. The duties and responsibilities of board members of a not-for-profit organisation are, generally speaking, equivalent to those of a board member of a for-profit organisation. In this factsheet we only consider the protections for board members of not-for-profit community organisations.

CAUTION: UNINCORPORATED COMMUNITY ORGANISATIONS



This factsheet focuses on the legal duties and responsibilities and legal and practical protections that apply to committee members of incorporated groups, such as companies limited by guarantee, incorporated associations and cooperatives. The duties of, and protections afforded to the governing members of unincorporated groups can sometimes be a complicated legal issue. For more information see our:

- Duties Guide, available on our Not-for-profit Law website at <https://www.nfplaw.org.au/governance>, and
- Factsheet 'What is incorporation and does our group need to incorporate' available on our Not-for-profit Law website at <https://www.nfplaw.org.au/incorporationdecision>

If your organisation is in doubt, seek legal advice.

2. The difference between volunteer and paid board members

All incorporated community organisations have some form of ‘governing body’ often referred to as a board or committee. Your not-for-profit community organisation may refer to the individuals that are elected or appointed to the board or committee as board members, committee members, directors, trustees or responsible persons. What an organisation calls its board members will differ from organisation to organisation.

Board members of not-for-profit community organisations can be:

- Volunteer board members – that is, they volunteer their time, experience and expertise without the expectation (or receipt) of payment (referred to in this factsheet as ‘**volunteer board members**’)
- Paid board members – that is, the person is paid for their services as a board member (sometimes known as directors’ fees). This payment may be for example, compensation for responsibility or time involved, and is increasingly being used as a way to attract more skilled board members (referred to in this factsheet as ‘**paid board members**’).



RELATED RESOURCES

For more information about whether your community organisation is able to pay its board members, see our factsheet ‘**Payment of board members**’ available on our Not-for-profit Law website at <https://www.nfplaw.org.au/governance>

Collectively, this factsheet will refer to ‘volunteer board members’ and ‘paid board members’ as ‘**board members**’.

A board member can be personally liable for breach of a legal duty or responsibility regardless of whether the board member is a paid board member or a volunteer board member. However, in some cases the protections that are afforded to volunteer board members are different to paid board members. Where relevant, this factsheet will point out the differences between the protections afforded volunteer board members and paid board members.

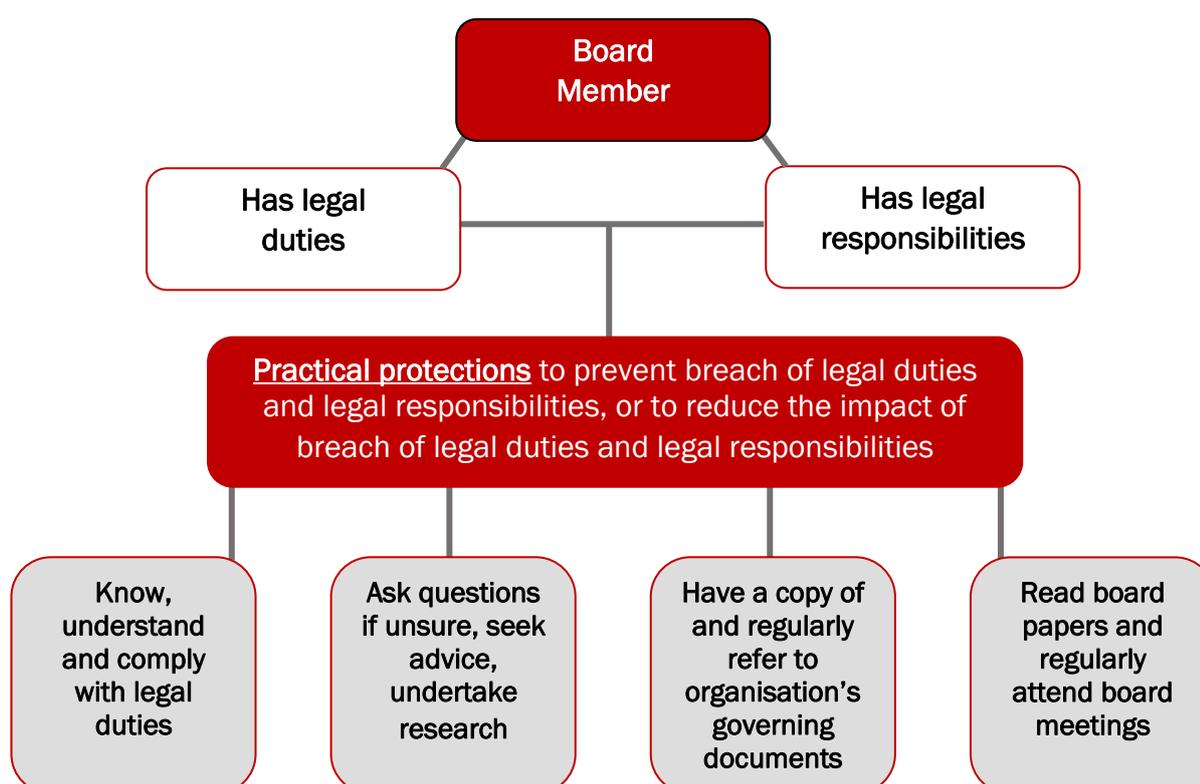
NOTE: REIMBURSEMENT OF BOARD MEMBERS

There is a difference between paying a board member for their service and reimbursing a board member for costs that are reasonably incurred, for example reimbursement for travel costs to a board meeting. Volunteer board members that receive reimbursement for expenses, are not ‘paid board members’ for the purposes of this factsheet (and in general).



3. Practical protections available to board members

Protections provided by law are only some of the ways that board members are protected. Board members can take proactive and practical steps to protect themselves. Organisations may wish to consider including some of these practical steps in the board induction material.



The practical steps can include:

- Knowing and understanding duties and responsibilities as a board member and complying with them.
- Researching the organisation before becoming a board member, talking to other board members and accessing publicly available information about the organisation, such as via the ACNC charity register (for registered charities).
- Familiarising themselves with, having a copy of, and complying with the organisation's governing documentation (including constitution, by-laws, sub-committee charters and policies and procedures); knowing the rights and obligations of the board members under that documentation.
- Satisfying themselves that there are effective corporate governance policies and procedures, ensuring that the organisation and its management are adhering to those policies and procedures and if necessary implementing changes.

- Seeking advice and asking questions if unsure about a particular area of governance.
- Completing appropriate training for necessary knowledge and skills to properly perform the responsibilities.
- Reading all board papers, requesting further information and asking questions to satisfy themselves that they have all the information they need in order to make a decision.
- Ensuring board minutes are correct and complete.

RELATED RESOURCES

For more information about preparing to become a new board member and understanding more about the role, see Not-for-profit Law's factsheet 'Introduction to the board member role for new board members' at <https://www.nfplaw.org.au/governance>

For more information about the process for inducting people to the governing body of a community organisation see Not-for-profit Law's factsheet 'Board inductions – bringing on a new board member' at <https://www.nfplaw.org.au/governance>



4. Legal duties and legal responsibilities of board members

Before understanding the legal protections afforded to board members, it is important to understand the legal duties and legal responsibilities that board members must comply with. By legal duties and legal responsibilities we mean:

- legal duties of board members associated with the governance of the organisation (sometimes referred to as directors duties or governance standards), and
- the legal responsibility to ensure that the organisation is complying with laws and regulations that impact the day-to-day operation of the organisation, such as employment law and work health and safety laws.

CASE STUDY: JENNY THE VOLUNTEER BOARD MEMBER OF YOUTH INC



Part 1: There is a lot of pressure on the board of Youth Inc. to start on the new project that they have just received funding for. During a recent board meeting it was decided to hire a full time project manager, but in the meantime use existing volunteers to get the project running. The board decided that it would be fair to pay the volunteers \$15 an hour for the 8 weeks it was going to take to hire someone suitable. This would also ensure they didn't have to go through the formal process of employing someone for 2 months.

Jenny is a bit unsure about whether Youth Inc. can pay volunteers – it seems like more of an employment relationship to her. But given that she missed the previous two meetings, didn't have a lot of time to prepare for the recent meeting and hasn't read the board papers, she isn't across the detail.

Jenny consoles herself by thinking 'I am just a volunteer!' Plus, the president is a smart person and thought that this would be a low cost, effective way of starting the project without any on-going obligations - so she thinks the decision of the board is probably fine.

4.1 Legal duties of board members (compliance with directors duties or governance standards)

As discussed above, by becoming a board member of an organisation, the board member agrees to act in the best interests of the organisation and is accountable for the decisions they make (in their capacity as a board member of the organisation). Over time, the law has formed these notions into 'legal duties' – they are linked with the governance of an organisation.

NOTE: THE FOUR MAIN LEGAL DUTIES OF BOARD MEMBERS



A legal duty is an action that you are required by law to take. While legal duties differ slightly depending on the legal structure of the organisation, where the organisation operates and whether or not the organisation is a charity registered with the Australian Charities and Not-for-profits Commission (ACNC), they can be summarised into the following four main legal duties:

- 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, skill and diligence (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.

If a board member of a not-for-profit organisation fails to comply with their legal duties (in a way that is reckless or intentional – see below for more information), they may be personally liable. If a board member is found to be personally liable, they will be required to pay any debts or costs of the organisation from their own money or assets. The board member may also be subject to fines, subject to disqualification from acting as a board member or, in extreme cases, be imprisoned. This will be the case **regardless of whether the board member is a paid board member or a volunteer board member of the not-for-profit community organisation.**

CASE: VICTORIAN MULTIETHNIC SLAVIC WELFARES ASSOCIATION INC (IN LIQ) & ANOR V TRAJKOV & ANOR [2017] VCC 1433



The County Court of Victoria has recently found that an Order of Australia recipient, Boris Trajkov, used hundreds of thousands of dollars from a Melbourne not-for-profit childcare centre he helped found, to pay for his private expenses. Trajkov was a founding member of the Victorian Multiethnic Slavic Welfare Association (**the Association**), which provided support to elderly migrants from the former Yugoslavia. The Association also operated a childcare centre in Lalor, in Melbourne's north. The County Court heard that between 2013 and 2016, parents made cash payments of \$1,609,841 for childcare services, but just \$56,107 cash was deposited into the Association's bank account. Trajkov's spending of the Association's money included the purchase of \$44,890 worth of alcohol for his daughter's restaurant, and \$152,594 on fashion and jewellery expenses.

In the judgment, the Registrar noted:

"I would be satisfied this conduct amounted to a significant breach of the fiduciary and statutory duties imposed upon Boris. It shows, at best, a complete lack of understanding of the significant duties imposed upon Boris as an office holder, a preferring of his own interests to those of the Association, and a wilful blindness to the damage his conduct caused to the Association at the very least in terms of dishonour fees and loss of reputation."

Trajkov was ordered to pay \$1,999,801.21 in damages to the Association, which is now in liquidation.

CASE STUDY: JENNY THE VOLUNTEER BOARD MEMBER OF YOUTH INC



In Part 1, Jenny the volunteer board member, Jenny admits that she has not attended the previous two board meetings, she is unsure about the background to the decision made at a meeting and she has not read the board papers.

Jenny has 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 board, could be indicators of a breach of this duty.

Should anything go wrong in the organisation (e.g. it gets into financial trouble and starts to trade while insolvent, or the organisation is operating in breach of work health and safety, or employment law, or someone starts to defraud the finances) Jenny could be legally responsible. It will not be a defence for Jenny to say 'I wasn't at the meeting when they made that decision' or 'I'm just a volunteer'.

RELATED RESOURCES



For a comprehensive summary of the legal duties of not-for-profit board members, please refer to the following guides available on the Not-for-profit Law website:

- **Duties Guide** available at <https://www.nfplaw.org.au/governance>
- The **Guide to running a CLG** available at <https://www.nfplaw.org.au/toolkits>
- The **Guide to running a Charitable CLG** available at <https://www.nfplaw.org.au/toolkits>
- The **Insurance and Risk Management for Community Organisations** guide available at <https://www.nfplaw.org.au/insurance> which summarises the liability for board members of incorporated associations

You may also be interested in the ACNC Governance Standards Guide, available on the ACNC website at <https://www.acnc.gov.au/for-charities/manage-your-charity/governance-standards>

4.2 Legal responsibility of board members (compliance with laws and regulations)

Board members of not-for-profit organisations are also responsible for ensuring that their organisation complies with applicable laws and regulations. For example, board members may be found personally liable for the debts and actions of their organisation if the following laws and regulations are not complied with:

- Breach of employment laws (such as the *Fair Work Act 2009* (Cth))
- Breach of anti-discrimination legislation

- Breach of taxation law such as failure to pay PAYG income tax instalments or compulsory superannuation contributions
- Trading (or operating) whilst insolvent
- Breaching work health and safety laws (or occupational health and safety laws)
- Breach of environmental protection laws
- Contravening Australian Consumer Law

Please note this is not a comprehensive list and that the law may differ in each state and territory.

CASE STUDY: JENNY THE VOLUNTEER BOARD MEMBER OF YOUTH INC



In Part 1 of the case study of Jenny the volunteer board member, Jenny is a bit unsure about whether the organisation can pay volunteers – she is pretty sure that the volunteers should be treated as employees. But given that she missed the previous two meetings, didn't have a lot of time to prepare for the recent meeting and hasn't read the board papers she isn't across the detail so decides to go along with the decision.

Paying volunteers is one indicator of an employment relationship. If it is found that the volunteers should be treated as employees, Youth Inc. may be breaching employment law. If Jenny is found to be 'involved' in that breach, that is, she is found to have aided, abetted, induced, was knowingly concerned in, or conspired to give effect to the breach she may be found personally liable.

RELATED RESOURCES

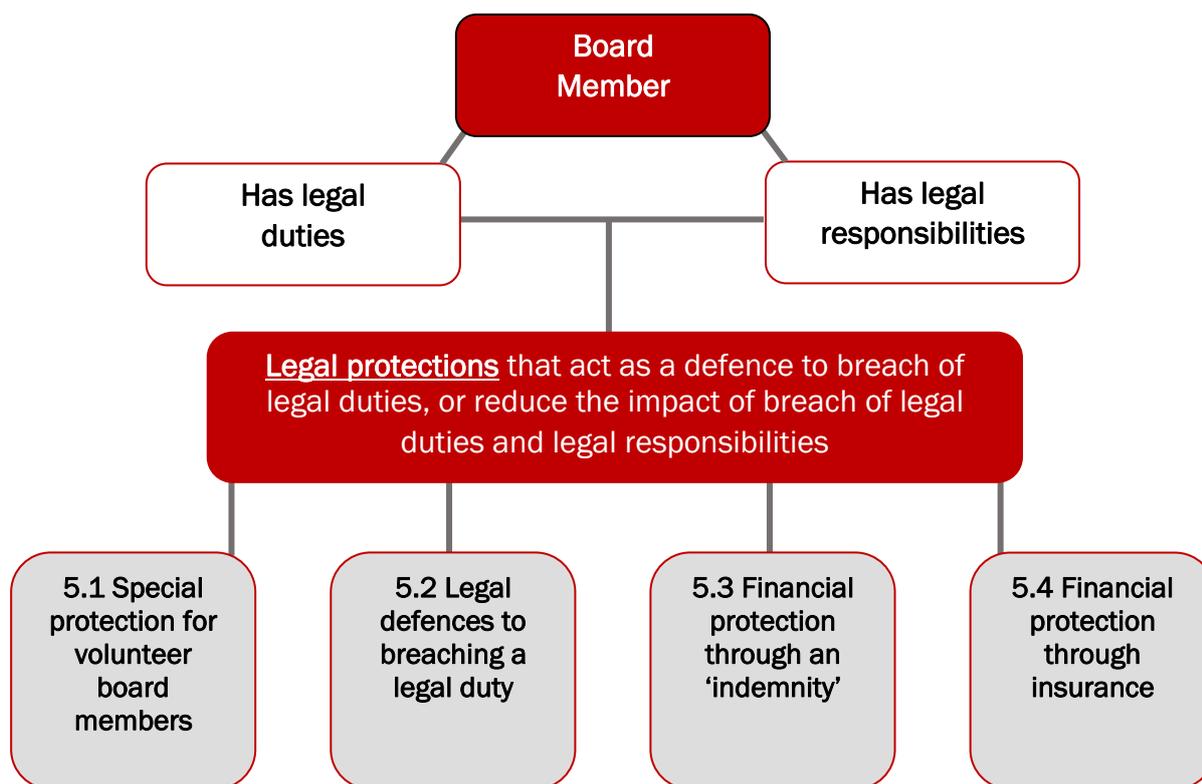


More detailed information on the potential personal liabilities of not-for-profit board members is set out in our **Introduction to the board member role for new board members** factsheet available on our Not-for-profit Law website at <https://www.nfplaw.org.au/whoruns>

5. Legal protections available to board members

As discussed above, board members of not-for-profit organisations are subject to a broad range of duties and responsibilities and failure to comply with those duties and responsibilities may expose the board members to personal liability and penalties. There are, however, certain protections available to board members which can serve as a defence to, or mitigate personal liability (that is, reduce the risk or obligation to pay any debts or costs of the organisation from their own money or assets) in respect of, a breach of those duties and responsibilities.

Below we cover off on four key types of legal protections.



5.1 Special protection available to volunteer board members

In some circumstances there is a difference in the protection afforded to volunteer board members and paid board members.

5.1.1 Workplace health and safety laws

Under workplace health and safety laws across Australia, if an organisation has failed, so far as is reasonably practicable, to eliminate or minimise the risk of harm to the health and safety of its employees, volunteers and others such as clients, customers, tradespeople, and suppliers who visit the workplace, the board members of that organisation may also be guilty of an offence under the applicable laws if they have failed to take reasonable care to ensure compliance.

This failure to comply may give rise to personal liability on the part of the board members **except in the case of board members acting as volunteer board members.**

5.1.2 Civil liability laws

Civil liability laws, in general, allow a person who is injured, suffers damage to property or experiences financial loss to take legal action and be compensated by the person who caused or contributed to that injury, damage or loss. This right to take legal action would potentially extend to any board member who has failed to comply with their duties and responsibilities under applicable laws. Civil liability laws across Australian states and territories do, however, exempt volunteer board members from personal liability in certain circumstances. **This exemption is not available to paid board members** - if a board member is being remunerated for their services, they are not deemed to be 'volunteers' under the applicable legislation.

RELATED RESOURCES

Civil liability laws vary in scope across Australian states and territories so please see our **Payment of board members** factsheet available on our Not-for-profit Law website at <https://www.nfplaw.org.au/governance> for a more detailed analysis of civil liability laws and the exemptions available to volunteer board members under those laws.



5.2 Legal defences to breaching a legal duty

The law recognises that a board member could find themselves in a situation of a possible breach of a legal duty even though they acted in good faith (that is, they acted honestly, fairly and loyally) and took all reasonable steps to comply with their duties.

CASE STUDY: JENNY THE VOLUNTEER BOARD MEMBER OF YOUTH INC



Part 2: Jenny proposes to the board that they bring in an expert to help the board find the right NFP partner organisation and a suitable location to run the new project from. The board thinks this is an excellent idea and they hire a business consultant named Tony to help them out. Tony is a business partner of Jenny., Jenny discloses this 'conflict of interest' to the board of Youth Inc., removes herself from the room when the decision to hire Tony is made and ensures that this is all recorded accurately in the minutes of the board meeting.

After receiving advice from Tony, Youth Inc. decides to partner with a not-for-profit organisation that runs youth camps in the local area.

Tony assures the board of Youth Inc. that the partner organisation is a well-run and financially stable organisation and that it would be a good cultural fit.

A few months in to the partnership things start going wrong. There have been several requests made by the partner organisation for money, and the partner organisation has not paid their share of the lease in several weeks. They soon find out that their partner organisation has been trading whilst insolvent, and that Youth Inc. is potentially liable to pay some outstanding bills.

The board of Youth Inc. relied on the professional advice of Tony to help them find a suitable partner organisation. If the board member made a decision based on advice, and relied on that advice in good faith and after making independent assessment of the information having regard to their own knowledge of the organisation and the complexity of the structure and the operation of the organisation, then this might form part of a defence to a claim that the board member has breached a duty.

If however, the board relied on the advice without undertaking any of their own assessment, they may be in breach of their duty to exercise reasonable care, skill and diligence.

RELATED RESOURCES

There are a range of other defences that a board member could use to argue that they did not breach their legal duty. Please refer to the following guides available on the Not-for-profit Law website for more information:

- **Duties Guide** available at <https://www.nfplaw.org.au/governance> (for incorporated associations and companies limited by guarantee)
- **The Guide to running a CLG** available at <https://www.nfplaw.org.au/toolkits> (for companies limited by guarantee)
- **The Guide to running a Charitable CLG** available at <https://www.nfplaw.org.au/toolkits> (for companies limited by guarantee that are also registered charities)



5.3 Financial protection through an ‘indemnity’

An indemnity is an obligation contained in a document (such as an agreement, deed or an organisation’s constitution) or legislation whereby a person or organisation agrees to pay for the penalty or legal fees of another person if something goes wrong.

This means that an organisation may indemnify a board member for liabilities that they may incur in the performance of their duties or responsibilities as a board member.

There are many reasons why an organisation may be legally required to indemnify a board member:

1. In some circumstances it is required by legislation.
2. The organisation’s constitution may expressly require that the organisation indemnifies board members.
3. The organisation may enter into a special agreement (often in the form of a deed) which expressly requires the organisation to indemnify the board member.

! CAUTION

When indemnifying a board member, or considering whether to do so, make sure your organisation considers the limitations on indemnities, some of which are discussed in further detail below.

5.3.1 Indemnities under legislation

In some circumstances the law requires an organisation to indemnify its board members. In other circumstances the law limits the scope of the indemnity an organisation can provide, or prohibits it all together.

Whether or not an indemnity is required, allowed, limited or prohibited depends on the legal structure of the organisation, and the law that has given rise to the the board members’s liability.

NOTE – INDEMNITY FOR LEGAL COSTS

Legislation will very often distinguish between indemnifying a board member for the costs associated with the liability incurred by the board member and the legal costs incurred by a board member in defending an action for a liability.



Indemnities and organisations which have adopted an ‘incorporated association’ legal structure

RELATED RESOURCES

See **Indemnity for office holders of incorporated associations**

(Victoria) available on our Not-for-profit Law website at <https://www.nfplaw.org.au/toolkits> for further information.

Not-for-profit organisations incorporated in Victoria under the *Associations Incorporation Reform Act 2012* (Vic) are required to indemnify their board members against any liability incurred in good faith by the board member in the course of performing their duties as a board member.

Not-for-profit organisations that are incorporated associations in other Australian states and territories are not legally required

to indemnify their board members under the applicable legislation. In the Australian Capital Territory, New South Wales, Tasmania, Victoria and Western Australia, there is no restriction on electing to indemnify board members under the organisation’s constitution or pursuant to a separate deed of indemnity. There are however, limitations on this for incorporated associations in South Australia and the Northern Territory.

Under the legislation that governs incorporated associations in South Australia and the Northern Territory (*Associations Incorporations Act 1985* (SA) and the *Associations Act* (NT)), incorporated associations are **prohibited** from indemnifying a board member for liability (except under a contract of insurance) that by law would otherwise attach to that board member due to the negligence, default, breach of duty or breach of trust of that board member in relation to the incorporated association. The organisation can, however, indemnify a board member against any liability incurred in defending any legal proceedings, if they are successful (i.e. judgment is given in the board member’s favour or they are acquitted).

Seek legal advice if your organisation is in doubt over whether or not it is allowed to indemnify board members, or has appropriately done so.

Indemnities and organisations which have adopted a ‘company limited by guarantee’ legal structure

Not-for-profit organisations which have adopted a ‘company limited by guarantee’ (**CLG**) legal structure are not legally required to indemnify their board members under the Corporations Act, and could elect to indemnify board members under the organisation’s constitution or pursuant to a separate deed of indemnity. The Corporations Act does however place some restrictions on when a CLG (including CLGs that are registered with the ACNC) can indemnify its board members.

CLGs, are prohibited under the Corporations Act from indemnifying directors against any of the following liabilities (other than for legal costs):

- a liability owed by the board member to the organisation, for example failing to comply with their legal duties
- a liability for monetary or compensation orders that is imposed under the Corporations Act, or
- a liability owed to someone other than the organisation because the board member failed to act in good faith (that is, they failed to act honestly, fairly and loyally when making decisions for the organisation).

A CLG may indemnify a board member against legal costs incurred in defending an action for a liability incurred as a board member. However, the organisation **must not** indemnify a person against legal costs incurred in defending an action for a liability incurred as a board member for the situations in which the court:

- finds that the board member is liable for any of the situations listed above
- finds that the board member is guilty in criminal proceedings
- finds that there are grounds for an order made by ASIC or a liquidator, or
- denies the board member relief (a remedy) in connection with proceedings under the Corporations Act.

Indemnities under other laws

There are other laws that may restrict an organisation's ability to indemnify a board member in full or in part. For example under the *Competition and Consumer Act 2010* (Cth) an organisation may be prohibited from indemnifying a board member against liability for contravention of that Act, or the legal costs incurred in defending or resisting proceedings. There are also certain provisions in state and territory workplace health and safety and environmental legislation that prohibits organisations from indemnifying a board member.

5.3.2 Indemnities under constitution or a 'deed of indemnity'

Board members may be indemnified by their organisation pursuant to the provisions of the organisation's constitution. They may also enter into a separate arrangement between the organisation and the board member, often referred to as a deed of indemnity.

Board members should review their organisation's constitution to determine if there is an indemnity provided and if so, whether there are any limitations or conditions applying to that indemnity.

If a separate deed of indemnity is entered into, board members should make sure it is consistent with the organisation's constitution and check whether there are any limitations or conditions applying to that indemnity

5.3.3 Limitations on indemnities

It is important to be aware of the limitations of indemnities:

- as mentioned above, the ability to provide an indemnity is sometimes prohibited, or limited in an organisation's constitution, or prohibited or restricted by law
- the indemnity only works if the organisation has the funds to cover the indemnity it has provided, or if the organisation has an insurance policy that covers the indemnity
- it usually does not cover board members that have acted with deliberate recklessness or fraudulently or without good faith, and
- it will often only cover board members after a court action has been finalised (e.g. the board member will have to cover their own costs and then later seek reimbursement).

5.4 Financial protection through insurance

Insurance coverage can be important for organisations as a way of managing risk associated with board members governing an organisation—regardless of whether an organisation agrees to indemnify or not indemnify its board members.

If your organisation does indemnify its board members, insurance helps to make sure your

organisation can afford to cover the cost of the indemnity – as mentioned above, the indemnity only works if the organisation has the funds to cover the indemnity it has provided. If your organisation does not indemnify its board members, insurance helps to make sure that the costs of any liability incurred by the actions of its board members, or the costs associated with legal proceedings are covered.

Some not-for-profit organisations may take out directors and officers liability insurance (often called 'D&O' insurance), to provide board members with protection against personal liability if they are sued for certain 'wrongful acts' (to the extent allowed under the law). Some of these acts can include negligently giving wrong advice, requesting someone to perform a dangerous task, dismissing staff without proper authority or process, discriminatory conduct and misleading or deceiving the public in some way.

Generally, board members will only be covered if the 'wrongful act' committed was within the scope of their position in the community organisation, and the wrongful act was not a wilful (that is, intentional) breach of duty to the organisation or an improper use of position or information.

Limitations on insurance for not-for-profit organisations which have adopted a 'company limited by guarantee' legal structure

The Corporations Act contains limitations on when a CLG can insure its board members:

- CLGs (and CLGs that are registered charities with the ACNC) cannot pay an insurance premium against a liability (other than one for legal costs) arising out of conduct involving a wilful (that is, intentional) breach of duty in relation to the organisation, and
- CLGs (but **not** CLGs that are registered charities with the ACNC) cannot pay an insurance premium against a liability (other than one for legal costs) arising out of the board member's improper use of position or information (that is, to gain an advantage for themselves or someone else or cause detriment to the organisation).

! CAUTION

Remember there are two aspects to this coverage – coverage for the board member personally, and cover for the organisation against any liability incurred as a result of the board members actions – speak to an insurer for more information.

RELATED RESOURCES

For more information about D&O insurance, see Not-for-profit Law's Insurance and Risk Management for Community Organisations guide available at <https://www.nfplaw.org.au/insurance>



6. The thing you can't protect against – reputational damage

Despite the legal protections available to board members, there are certain situations that you can't protect yourself from, namely damage to your own personal reputation as a board member and the reputation of the organisation. The best way to prevent this from occurring is to take practical steps to protect yourself as a board member.

CASE STUDY: JENNY THE VOLUNTEER BOARD MEMBER OF YOUTH INC



In Part 2 of the case study it is also revealed that Tony is the business partner of Jenny. The decision to hire Tony is a potential conflict of interest situation for Jenny. 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 someone else, such a relative or another organisation).

If Jenny was ever accused of a conflict of interest she could argue that she managed the conflict of interest by disclosing the interest, removing herself from the room when the decision to hire Tony was made and has this all recorded in the minutes. Because of this she may be afforded legal protection from a breach of duty, but given that Tony is a business partner of Jenny and that Tony's advice ended badly for Youth Inc. it would be difficult for Jenny to protect herself, and the organisation from the reputational damage of being so closely associated with Tony and the bad decision.

RELATED RESOURCES



For more information about risk management, and adequately meeting the obligations of being a board member, see the following available on our Not-for-profit Law website:

- **Duties Guide** available at <https://www.nfplaw.org.au/governance>
- The **Guide to running a CLG** available at <https://www.nfplaw.org.au/toolkits>
- The **Guide to running a Charitable CLG** available at <https://www.nfplaw.org.au/toolkits>
- The **Insurance and Risk Management for Community Organisations** guide available at <https://www.nfplaw.org.au/insurance> which summarises the liability for board members of incorporated associations, and
- **Introduction to the board member role for new board members** factsheet at <https://www.nfplaw.org.au/whoruns>

Resources

Related Not-for-profit Law Resources

The Not-for-profit Law Information Hub at www.nfplaw.org.au contains many resources on different topics. The following topics contain relevant further information:

Running the organisation

This section of the website features resources on positions in companies limited by guarantee and incorporated associations, governance, rules or constitutions, holding meetings and keeping documents and records.

Duties Guide

This guide covers the key legal duties of the people who hold a position on the governing body of an Australian not-for-profit community organisation.

Insurance and risk

This section of the website contains information to help your organisation identify and address risks.

Legislation:

Civil liability

- [Civil Law \(Wrongs\) Act 2002 \(ACT\)](#)
- [Civil Liability Act 2002 \(NSW\)](#)
- [Personal Injuries \(Liabilities and Damages\) Act 2003 \(NT\)](#)
- [Personal Injuries \(Liabilities and Damages\) Regulations 2003 \(NT\)](#)
- [Civil Liability Act 2003 \(QLD\)](#)
- [Civil Liability Act 1936 \(SA\)](#)
- [Civil Liability Act 2002 \(TAS\)](#)
- [Volunteers and Food and Other Donors \(Protection from Liability\) Act 2002 \(WA\)](#)
- [Wrongs Act 1958 \(Vic\)](#)

Governance

- [Corporations Act 2001 \(Cth\)](#)
- [Australian Charities and Not-for-profits Commission Act 2012 \(Cth\)](#)
- [Associations Incorporation Act 1991 \(ACT\)](#)
- [Associations Incorporation Act 2009 \(NSW\)](#)
- [Associations Act \(NT\)](#)
- [Associations Incorporation Act 1981 \(Qld\)](#)
- [Associations Incorporation Act 1985 \(SA\)](#)
- [Associations Incorporation Act 1964 \(Tas\)](#)

- [Associations Incorporation Reform Act 2012 \(Vic\)](#)
- [Associations Incorporation Act 2015 \(WA\)](#)

▀ Employment law

[Fair Work Act 2009 \(Cth\)](#) covers the rights and responsibilities of employers and employees in the workplace.

▀ Work health and safety laws

Each state and territory has its own legislation governing workplace safety, which place obligations of board members (and employees and employers) to maintain a hazard-free workplace. See for example:

- [Work Health and Safety Act 2011 \(ACT\)](#)
- [Work Health and Safety Act 2011 \(NSW\)](#)
- [Work Health and Safety \(National Uniform Legislation\) Act 2011 \(NT\)](#)
- [Work Health and Safety Act 2011 \(QLD\)](#)
- [Work Health and Safety Act 2012 \(SA\)](#)
- [Work Health and Safety Act 2012 \(TAS\)](#)
- [Occupational Health and Safety Act 2004 \(Vic\)](#)
- [Occupational Safety and Health Act 1984 \(WA\)](#)

▀ Environmental protection

There are a large number of environmental protection laws that operate at both a state and Commonwealth level. See for example:

- [Environmental Protection and Biodiversity Conservation Act 1999 \(Cth\)](#)

▀ Competition law

This law regulates organisations' conduct in order to promote a competitive market through the following legislation:

- [Competition and Consumer Act 2010 \(Cth\)](#)

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