

# Legally speaking



Before seeking nomination or election it is important to acquaint yourself with the legal status of the organisation. The three main organisational arrangements are described briefly below. However, it is important to be aware that these are not the exclusive sources of legal identity. For example, some organisations gain their legal identity from their own Acts of Parliament. Other organisations are incorporated as a cooperative under the *Cooperatives Act 1992* (NSW). Each form of legal identity carries particular implications in terms of duties, liabilities and responsibilities.

## Unincorporated association

This simple organisation has no separate legal identity from its individual members. Committee members act in their own name on the association's behalf and may also be liable for legal obligations including debts. Thus, each committee member could be sued personally.

## Incorporated association

Groups incorporated under the *Associations Incorporation Act 1984* (NSW) have a legal identity separate from their members. The organisation can take legal action, sign contracts, open bank accounts and own property. It can also have legal action taken against it.

Members have 'limited liability' only. If legal action is taken against the organisation, the amount individual members would have to pay is limited, and this would be specified in the constitution. If members of the committee or board are personally negligent in their duties or

act in a negligent way, then limited liability does not apply.

Committee members must act in accordance with the association's rules and the *Associations Incorporation Act 1984* (NSW), and are also responsible for making sure that the organisation meets its obligations under its rules.

## Company limited by guarantee

An organisation can also be incorporated as a company limited by guarantee under the *Corporations Law*. A company limited by guarantee means that members guarantee to contribute an amount, up to the specified maximum, if the company needs to be liquidated and its assets are not sufficient to pay out its liabilities.

The rules of the company are found in the company's memorandum and articles of association. These rules deal with similar sorts of matters covered by the rules of association of an incorporated association.

Directors of a company limited by guarantee have a number of duties imposed upon them by the *Corporations Law*. The principal duties are:

- the duty of care, diligence and skill;
- the duty to act honestly and in good faith for the benefit of the company as a whole;
- the duty to use their powers for proper purposes and avoid the possibility of any conflict of interests.

These duties place a legal obligation on directors to acquaint themselves with, and take

responsibility for, the running of the company. A director is expected to understand the company's affairs and have a reasonably informed knowledge of its financial position.

## Further information

### General

- Sripathy and Ogle (Eds), *The Law Handbook: The easy to use practical guide to the law in NSW*, 6th Edition, Redfern Legal Centre Publishing, Redfern, 1997.

### Incorporation

- Graham Wheeler, *Legalities*, 4th Edition, NCOSS, Surry Hills, 1994.
- Department of Fair Trading, phone: (02) 9286 0007.

### Cooperatives

- Registry of Cooperatives, a division of the Department of Fair Trading, phone: (02) 9793 0557.

### Companies

- Courses: The Australian Institute of Company Directors, phone: (02) 9299 8788.
- The Company Directors Survival Kit, the Australian Securities and Investments Commission, phone: 1300 300 630.



## The responsibilities of a Board of Management

### Plain English rules

- Be honest and act in good faith.
- Take care to understand what is going on and to understand your responsibilities.
- Don't let any gain for yourself, or your friends or family, affect decisions you make for the organisation.
- Don't rip the organisation off in any way.
- Don't let the organisation get into debt it cannot manage, or go broke.
- Make sure that the organisation, and its staff, obey laws that affect the organisation, and honour the contracts that the organisation signs.
- Do what the constitution says to do (or change the constitution).

Members of boards of management therefore need to:

- Have ways of making sure each other is behaving honestly.
- Know about their roles and responsibilities.
- Be committed to the organisation.
- Be able to read and understand the financial reports.
- Know what laws affect the organisation.
- Be aware of all contracts that are signed.
- Know and understand the constitution of the organisation.

*Reproduced with kind permission from Bradfield Nyland Group/NSW Federation of Housing Associations: Housing Association Management Committee Training Kit, 1997.*