



# **VIETNAM VETERANS ASSOCIATION OF AUSTRALIA**

## **VICTORIAN BRANCH (INCORPORATED)**

### **ADMINISTRATION INSTRUCTION NUMBER 2**

#### **INCORPORATION OF STATE BRANCH & SUB-BRANCHES**

##### **Introduction**

1. The purpose of this AI is to provide advice to Sub-Branches about the incorporation and the State Branch and Sub-Branches.
2. In the State of Victoria, a “not for profit” that collects public monies through fundraising and like activities is required to be registered under the Associations Incorporation Act 1981 (the Act)
3. An incorporated organisation is seen at law as a single entity managed by a committee and as such, protects the members of their management committee from personal legal liability whereas an unincorporated organisation is not a legal entity and every member could be seen to be partly responsible for injury or damage caused by a member of the committee.

##### **Detail**

3. The Victorian Branch is an incorporated organisation in its own right.
4. Some Sub-Branches, because of their size and their involvement in the community, have also chosen to become incorporated in its own right. The incorporation of a Sub-Branch is not affected by the incorporation of the Victorian Branch and vice versa.
5. Being a member of an incorporated body does not provide committee members with immunity from the law and as such, each individual is liable for negligent or individual criminal behavior.
6. Enclosed is the information produced (October 1991) by the Victorian Council of Social Services Management Support and Training Unit which explains in detail the type of personal liability protection offered by incorporation and the responsibilities of members to ensure this protection is maintained.
7. Following an enquiry regarding the personal liability of the Executive members of unincorporated Sub-Branches, Consumer Affairs Victoria has advised that the Executive members of an unincorporated Sub-Branch do have the same personal liability protection under the Incorporations Association Act 1981 as does the State Executive of the Victorian Branch.

**Conclusion**

9. All State Executive and Sub-Branches Executive must read and understand the attachment to this AI and understand that any advice provided on any matter must be given in good faith.

## DON'T BE A TOKEN DIRECTOR

### Personal Liability in Community Organisations

A recent court case involving the Victorian Division of the National Safety Council highlights the fears many people have about their legal liability as members of a community organisation or its management group (or directors, according to company law). In this case, the Chief Executive (John Friedrich) was held to be legally liable for the debts incurred by the organisation. The court found that the Chairman was also responsible for the debts resulting from the fraud of the Chief Executive because he had failed in his duties as a director. Claims against the other directors were settled privately. As the court found that there was dereliction of duty by the directors, it is an important reminder that all members of management groups should exercise their responsibilities with care.

This article tries to cover some of the main areas of concern for community organisations.

**(1) It is not legal advice**, and cannot cover the specific situation of any individual organisation. There are also few examples of court decisions about the liabilities of non-profit organisations so it is difficult to provide specific information. You should seek legal advice before taking any action, which could leave you liable. Refer to your local Community Legal Service (contact the Federation of Victorian Community Legal Centres) or the Legal Aid Commission for names of legal workers who can advise on personal liability.

#### Who might sue you?

Legal action against the management group could be taken by employees, creditors, consumers or clients, members, government departments e.g. Corporate Affairs, funders.

#### What can you be liable for?

Individual management group members are of course liable for any criminal behaviour they carry out as individuals. Being a member of an incorporated body does not make you immune to the laws of the land!

It is difficult to give a clear and simple summary of liability because it depends on two sorts of laws. One comes from Acts passed by government (statutes), and the other from individual decisions made by courts throughout the history of Australia (common law).

Under **statutes** it may not be necessary to prove negligence: it is enough that the person or organisation is shown to have not complied with the requirements. These statutes include responsibilities under the Associations Incorporation Act, Occupational Health and Safety Act, Industrial Relations laws, Equal Opportunities Act and other anti discrimination laws.

Australian common law also establishes liability resulting from damage to property or to persons. The law sees that people are responsible for the consequences of their actions. This responsibility may include compensation to the injured/damaged person or body.

Usually a court would need to find that there was a 'duty of care', which was breached. Duty of care means the responsibility any 'reasonable' person could be expected to have to the other person. This breach is often defined as negligence (failure to take due care).

Anyone who directs or authorises someone else may be equally responsible if that behaviour causes injury or damage. But the personal liability of individuals involved with community organisations may be limited if the organisation is incorporated.

#### Liability in organisations

Unincorporated bodies are not a separate legal 'person' or entity. In this situation, every member of the organisation could be seen as being partly responsible for injury or damage caused by a member. Management group members are likely to be seen to have a greater responsibility because the committee, board or collective is responsible for the management of the organisation.

## Notice board lift-out

The best way to limit liability for individual members is to become incorporated. Incorporated bodies are recognised as a legal 'person' separate to the individuals involved.

Ordinary members have their liability limited to the amount of unpaid subscription or fees they owe the organisation. They would not normally be seen as being personally responsible for any injury or damage caused through negligence of the organisation. However, courts have viewed the management group (committee, board or collective) as responsible for the actions of the organisation. Those responsible for managing the organisation are seen to be legally responsible for the actions taken by the organisation. They have a greater duty of care'.

## Who Is Liable?

Both managers and directors may be held liable for debts incurred by an organisation where it is clearly not able to meet those debts. The National Safety Council case reinforces this. If management group members do not carry out the duties as discussed below, you may be seen as personally responsible.

## Who cannot manage?

The organisation's rules (constitution) define who is eligible and ineligible to manage the affairs of the organisation e.g. you must be a member and stand for election. Company laws also exclude people from being 'directors' if they have been found guilty of offences against the Corporations Law or are insolvent (bankrupt).

Directors may be disqualified for up to five years if they have been found guilty of any offences in promoting forming or managing a company. This includes publishing false information about a company of which they were director, bribery or falsification of the books or statements, or general dishonesty relating to the company. Not keeping accounting records, incurring debts which cannot be paid and fraud punished by imprisonment have similar penalties.

Where someone has been involved in breaches of the Corporations Law with two or more other companies' on two or more

- membership of other organisations

previous occasions can have similar penalties imposed. This would cover directors who do not carry out their day to day obligations such as holding meetings, and keeping minutes. Someone who has been a director of two or more companies which were managed so badly that they went bankrupt, can also be barred from acting as a director in the future.

## Duties of management group members

Australian law regards non-profit incorporated bodies as equivalent to companies, and uses the same principles to assess negligence. The six general principles are discussed below.

### 1. ACT HONESTLY & IN GOOD FAITH

All laws require management group members to act honestly at all times. Company law has penalties if directors are found guilty of dishonest behaviour. The penalty is much higher if it can be shown that the director deliberately intended to defraud the organisation, its members or creditors, or anyone else.

Common law also expects directors to act honestly, with reasonable skill, in good faith, and in the best interests of the organisation.

### 2. ACT WITH CARE & DILIGENCE

Management group members are expected to do their job with reasonable care. Allowing the organisation to carry out activities outside its purposes, ignoring the organisation's rules, or selling property at a lower than market price (even if money was needed urgently) might be seen as not exercising care.

### 3. ACT LOYALLY & AVOID CONFLICTS OF INTEREST

Common law requires management group members to disclose potential conflicts of interest as soon as they arise. This includes financial, political or personal benefit from:

- other business or professional activities
- employment or accountability to other people or organisations

For example, a representative of consumers

- ownership of property or other assets.

If management group members enter into an agreement which benefits them personally, or results from a position of conflict and the organisation suffers, damages may be recovered from them.

Conflicts of interest may apply to management group members who are government employees, especially where they also grant funds to the organisation.

Paid staff who are members of the management group are also in a position of conflict when they act as employer as well as employee. A conflict may also be seen to exist where the management group member or their family receives services from the organisation and they are involved with decisions about these services.

In cases of conflict, the person may need to do more than declare their conflict. They may also need to remove themselves from particular discussions, decisions or votes, or resign altogether from the management group. Lobbying other management group members about the issue would also be regarded as acting improperly.

#### **4. AVOID ABUSE OF OPPORTUNITY & INFORMATION**

This is similar to the idea of conflict of interest. Management group members should not use their position and information to personal benefit or advantage at the expense of the organisation. Members are able to sue to recover any profits made by that person, or any losses suffered by the organisation.

Using 'inside' information about the organisation to obtain a job, or spreading information about consumers gained as a management group member are examples of where this duty was not being applied.

#### **5. ACT IN THE BEST INTERESTS OF THE ORGANISATION**

Where there are conflicts of interest, common law requires management group members to put the interests of the organisation first. The interests of the organisation are regarded as being the members as a whole, not any particular member or group of members.

**What can be done to reduce liability?**

or staff on the management group should act for all members, not just those they represent.

This duty also includes a requirement to look after the interests of creditors when the organisation has become unable to pay its debts.

Management group members are also expected to use their position and power for the benefit of the organisation. It could be seen that changing the aims of the organisation and redirecting resources away from the existing purposes would not be seen as in the interests of the organisation. Knowingly approving membership for people who aim to totally change the organisation might be seen as not acting with honesty.

#### **6. EXERCISE POWERS FOR THEIR PROPER USE**

Management group members can delegate their duties to paid staff, but cannot remove their responsibility for the duties being carried out properly by competent people. The National Safety Council case is an example of the directors failing to carry out their critical financial duties.

These included examining the financial reports, ensuring that they were accurate, and ensuring that the organisation was capable of paying debts. Management group members have a clear responsibility to maintain the organisation as solvent (financial viable).

The general responsibilities of management group members include legal issues, finances, employing, planning & policy promotion & marketing, and reporting & accountability. These are detailed in the "VCOSS publications.

#### **LEGALITIES VICTORIA and COMMUNITY MANAGEMENT HANDBOOK.**

In all cases, management group members are required to act within the aims and purpose of the organisation.

#### **3. MINIMISE THE RISKS**

Don't have 'token' management group members on your management group. All members should be aware of their responsibilities and know their jobs. The suggestions below may help.

### **1. BE AWARE OF & RECORD DECISIONS**

Assess the risks in your organisation. Being aware of the risks increases awareness of ways to deal with them. Recording decisions also makes it clear that the whole management group made the decision rather than any one individual.

### **2. RATIFY DECISIONS**

Neither the courts nor members of the organisation can ratify the actions of directors if they do not follow company and other statutory laws. However, it can be possible for the members to ratify or 'forgive' actions of the management group which might be seen as breaching common law.

For example, the chairperson may decide not to sign a service funding agreement which they saw as unjust. A special general meeting might inform members and ask them to ratify this decision.

Similarly, members can approve actions in advance if it is suspected that it might breach common law duties. For example, a general meeting might be called to ask for the membership to approve certain plans which are outside the current activities of the organisation.

It is also possible for a court to remove liability if it can be shown that the management group members acted honestly and 'having regard to all the circumstances of the case'. Having raised the issue and placed the facts before the membership beforehand will support this case.

It is not possible to remove liability in this way when the issue is fraud or money owed to creditors.

Several types of action can be taken to reduce risks of liability:

- develop written policies and procedures
- produce a policy manual for all staff and management group members.
- provide orientation and training on management responsibilities for management group members
- provide reference books and guides for management group members e.g. Community Management Handbook, Legalities Victoria Law Handbook
- use community support and resource organisations
- obtain legal advice if you are unsure.

### **4. SHARE THE RISKS**

Some organisations are covered by laws which indemnify the management group against their personal liabilities e.g. Community Health Centres are covered under the Health Services Act. Other organisations can buy 'Directors and Officers Liability' insurance to cover some of the areas of concern. Note that this insurance does not cover illegal behaviour e.g. fraud, it is also quite expensive.

Contact the Department of Community Affairs for information about directors and officers' liability insurance and companies which provide this coverage.