



Surviving and Thriving as a Safe, Effective Board Member:

The essential facts you need to know before, during
and after joining a community organisation's Board





**Surviving and Thriving as a Safe, Effective Board Member –
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Foreword

One of the scariest things about people taking the decision to sit on the Board of a community organisation is the sudden realisation of all their responsibilities and duties.

Suddenly you go from being concerned about helping a favourite community organisation to coming to terms with words like compliance, performance and governance – words that can make even the most common-sense community leader unsure of their actions.

The reality is that serving on the Board of a community organisation is mostly about common sense mixed with a liberal sprinkling of common decency and common values for good measure. It's about acting morally, ethically and always within the law and in the best interests of the organisation.

This book provides you with a practical guide to your duties and responsibilities. It's not meant to frighten or scare prospective or current Board members but to provide you with the confidence to know what is expected of both you as an individual Board member and the Board as a group.

This book and other guides produced by Our Community are about empowering community group Board members with the knowledge that can make their contribution even more effective. It's about being prepared, recognising when there are issues and working your way through them.

This book concentrates on the need for Board members to understand what it is that's actually required of them. We've split the book into three phases – addressing issues you should be aware of before you join a Board, the responsibilities, legal requirements and duties while you're on the Board, and what you need to do when you leave a Board.

We thank Waleed Aly for the many hours he spent researching the first draft of this book, and Tanya Coleman Costello for her expertise and advice during the editing of the first edition.

Thanks also to experienced Board members Keran Howe, John Dalziel, Lindsay Gaze, Peter Duncan, Kathryn Greiner AO, Janine Kirk, Ann Byrne,





Darren Godwell, Pat Turner, Dr Terry Cutler, Sylvia Falzon, Elizabeth Proust, and Gordon Gregory for sharing their experiences and insights into the most important issues, challenges, benefits and questions facing the not-for-profit Board member. Their invaluable experience and guidance has helped to make this book a practical document that will be of assistance to everyone who has the pleasure and commitment to sit on the Board of one of Australia's 700,000 community organisations.

OUR COMMUNITY TEAM
www.ourcommunity.com.au





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Introduction

Anyone involved in a community organisation will testify as to how much the community landscape has changed over the past few years – and how much it continues to change. Nowhere has that been demonstrated more than in the complexity now facing those who have the responsibility of governing a community organisation.

There was a time when community group Board members were seen more as “time donors” who were required to know about the group and its activities but not necessarily to be as knowledgeable or skilful – or accountable – as company directors in the private sector.

That is no longer the case, and hasn't been since 1991 when Mr Justice Tadjell in the Victorian Supreme Court found the non-executive honorary Chair of the National Safety Council, Mr Max Eise, personally liable for \$97 million of losses sustained as a result of a failure to exercise sufficient diligence and care in his role of overseeing operations.

This was despite the fact that Mr Eise had himself been a victim of fraud and had been misled by the Council's Managing Director. In the case, known as the National Safety Council of Australia case, Justice Tadjell found:

“There is nothing in the Code [now Corporations Act] to suggest that the standard to be expected of a part-time non-executive director of a company not for profit is different from the standard expected of any other director of a profit-making company: both are required... to exercise a reasonable degree of care and diligence in the exercise of their powers and the discharge of their duties.”

The decision and subsequent changes to the law mean that it's crucial that community organisations are run effectively, efficiently, sustainably, and to the same standards as for-profit companies.

The inescapable conclusion is that community group Board members need to be aware of and to understand fully their legal and financial responsibilities, as well as their moral obligations to their group and their community.

Having said this, though, it's also important to remember that the National Safety Council case is the only similar one to emerge over the past 20 years. It was in many respects an unusual case, if only because it involved enormous amounts of money. You need to act responsibly, but you don't have to spend an inordinate amount of time looking over your shoulder as you do.





Being on a Board isn't an easy task, certainly. Good Board members are much like tightrope walkers, able to navigate over a narrow wire of legal, financial and ethical responsibilities, perhaps wobbling a little but never falling off. They have excellent judgement and are able to finely balance the needs of the different stakeholders and to withstand the scrutiny of a demanding audience – and, of course, they are expected to do all of this with smiles on their faces!

This book should not be seen as an alternative to legal advice; the list of the duties facing a Board member and the different situations where they might be tested is vast, and in no way can a book such as this hope to be exhaustive. Our aim is to provide a guide that can serve as a safety net – to make you aware of the risks, and let you know when you may be on shaky territory and in need of some expert advice.

Life as a Board member has three phases – a beginning, a middle, and an end. The process starts from the moment you're approached to join the Board, continues during your tenure on the Board, and can finish long after you've tendered your resignation. We've structured the book to reflect this lifecycle.



A Note on Terms

The community sector has to operate in all Australian states and has to cope with a number of different legal formats. In consequence, there are a number of names for what are functionally much the same thing. For ease of reading we've settled on one common set of terms.

| | | | |
|-------------|---------------------------------|---------|--|
| When we say | Board | we mean | 'Board' or Council' or 'Committee of Management' |
| When we say | 'community sector' | we mean | 'not-for-profit sector' or 'non-profit sector' or 'community sector' or 'third sector' or 'voluntary sector' |
| When we say | 'community organisation' | we mean | 'Incorporated Association' or 'Company Limited by Guarantee' or 'Cooperative' |
| When we say | 'Board member' | we mean | 'Board member' or 'Committee member' or 'Trustee' or 'Director' or 'Councillor' |
| When we say | 'Chief Executive Officer (CEO)' | we mean | 'CEO' or 'Executive Director' or 'Manager' or 'Executive Officer' or 'Coordinator' |
| When we say | 'clients' | we mean | 'clients' or 'customers' or 'users' or 'consumers' |
| When we say | 'constitution' | we mean | 'constitution' or 'rules' or 'articles of association' or 'articles of incorporation' |
| When we say | 'Chair' | we mean | 'Chair' or 'Chairperson' or 'President' |



PHASE I:

Before you take the Plunge





I. Understanding the legal structure of your community group

At its most basic, a community group will initially be known, legally, as an **unincorporated not-for-profit association**. An unincorporated association is really no more than a collection of people who have come together to work for a particular cause or aim that does not involve making a profit for members.

The association will usually have a name, and rules, but the group itself still won't have any separate legal identity distinct from its members. This can cause problems for the group. It restricts the activities the group can undertake and, perhaps more worrying, allows committee members (and sometimes even general members) to be sued for the debts of the group or the negligence of its members.

For these reasons, and others, many community organisations become **incorporated** or **companies limited by guarantee**.

Incorporation is a voluntary system of state or territory government registration. The relevant legislation in each state is, at the time of writing,

- ACT – Associations Incorporation Act 1991
- NSW – Associations Incorporation Act 2009
- NT – Associations Act
- Qld – Associations Incorporation Act 1981
- SA – Associations Incorporation Act 1985
- Tas – Associations Incorporation Act 1964
- Vic – Associations Incorporation Act 1981
- WA – Associations Incorporation Act 1987

The texts of all of these Acts, and the accompanying regulations, can be found online at the very useful website of the **Australasian Legal Information Institute** at <http://www.austlii.edu.au>.

Incorporation enables a registered group to be recognised as a separate entity to its members, conferring on it legal rights and responsibilities. It can sue, and be sued; it can contract others and be contracted; it even has its own equivalent of marriage (a merger)!

Another alternative format for a group that operates in more than one state is becoming a Registered Australian Body. This requires you to go through ASIC (<http://www.asic.gov.au/>). Strictly speaking, there is no option – ASIC says that “If a registrable Australian body wishes to carry





on business in one or more states or territories other than its home jurisdiction, it must be registered under Part 5B.2 of the Corporations Act 2001 (the Corporations Act).”

And

“An association which is registered under a state law not recognised in other states [that is, an incorporated association] will generally be a registrable Australian body.”

In theory, all incorporated associations with any interstate operations are compelled to become RABs; in practice, hardly any of them have. However, becoming an RAB is much simpler and more straightforward than becoming incorporated in several separate states – that’s why RABs were invented – and almost all Australian associations should check this out.

It’s also possible for a not-for-profit group to become a Company Limited by Guarantee or a Cooperative. Explanations of all of these terms can be found on the Our Community website.

All of what follows applies pretty well to all these legal forms.

Broadly speaking, in law there are three components to an incorporated organisation:

1. The **community organisation** itself;
2. The **Board members and officers** of the organisation – these constitute the “mind” of the organisation; and
3. The **members** of the community organisation – these people *own* the organisation.

To be protected as an incorporated association the organisation must not make a profit for its members – a surplus is allowable, but it must be held or invested back into the organisation.

Each incorporated organisation must be governed by a Board (whether you call it that or not is up to you, but you have to have some sort of governing body in place) and must have its own constitution which spells out the make-up of the Board, as well as its procedures and duties.

Becoming a **company limited by guarantee** (denoted by the word “limited” or “Ltd” as part of the group’s name) has the effect of protecting the group’s members and decision-makers (directors and officers) from being held liable for the group’s debts and liabilities. They are also protected from paying for the costs, charges and expenses of winding up the association.





Other structures

In some circumstances, a community group may undertake a **joint venture** (sometimes referred to as a “partnership” in the community sector). Joint ventures exist where two legal entities combine for a particular, commercially-based project. The temporary nature of this arrangement makes it distinct from a merger (where two organisations join forces permanently to become one). Joint ventures are usually created by a contract. It is unusual for community groups to embark on joint ventures, because these are usually about profit-making. However, they do sometimes embark upon a joint venture for fundraising purposes, service delivery or advocacy, for example.

There is no specific law governing joint ventures, since ‘joint ventures’ isn’t a technical legal term. It is important to note, however, that parties to a joint venture may be “jointly and severably liable” – that is, liability attaches to both parties as a team, and as individual groups. This has the effect that a creditor may obtain payment from either of the parties, or from both.

Subsidiary companies are companies under the control of another. A community group might control another when it owns more than half the shares in, or constitutes more than half the members of, the subsidiary, and can therefore unilaterally make decisions for the subsidiary. An example of this could be a church (the “parent company”) that owns and runs a private nursing home (the “subsidiary”). Subsidiaries are separate legal entities, which have independent Boards. However, the court may, under certain circumstances, hold the parent organisation liable for the actions of the subsidiary.

It’s important to note, though, that whatever the legal form of the organisation, an individual Board member who acts *illegally* or *negligently* can still be personally sued for losses and damages.

2. What is a Board?

In most cases a Board will be compulsory: any Australian organisation incorporated under state law is required to appoint one.

The Board is the collective name given to an organisation’s Board members. The Board of a not-for-profit organisation is the highest authority in the organisation. Ultimately, what the Board says goes.

The Board has to provide purpose, leadership and overall strategy, and it has the responsibility of assuring the public that the community group’s finances are sound, its operations are legal, and its procedures work. Aside from this, a Board is really defined by what it does. In a small community group with no staff or volunteers, the Board might be responsible for

