

## **COVID-19: Legal Issues for Charities and Not-for-Profits**

**Updated 19 May 2020**

**(Originally published 23 March 2020 and updated 25 March 2020, 7 April 2020 and 10 May 2020)**



In this document we have gathered together issues that, in our view, charities and not-for-profits should consider in the context of COVID-19.

We will update this document as we have further information.

The topics covered in this document are:

- Government's economic response
- Governance
- Meetings
- Notifications and reporting to regulators
- Tax
- Tax deductibility of donations
- COVID-19 Disaster Funds – DGR
- Deductible Gift Recipient (DGR) Reform
- Grant making by ancillary funds
- Employment, alternative working arrangements and return to office
- COVIDSafe App
- Modern Slavery Act
- Contractual obligations
- Insurance
- Financial considerations including solvency
- Property: facilities and leases
- People and events
- Privacy and confidentiality
- Intellectual Property – copyright
- Fundraising
- Scams

## Governments' economic response

- We have [previously written](#) about what may be available to charities and not-for-profits under the Australian Government's economic response.

A second package was announced on Sunday, 22 March 2020 and we have written about this.

- On Sunday, 5 April 2020, the Treasurer announced changes to the Government's JobKeeper package, including special measures for charities registered with the ACNC. Legislation was assented to on 9 April 2020 and the [Coronavirus Economic Response Package \(Payments and Benefits\) Rules 2020](#) were published.

On 24 April 2020, the Treasurer announced further changes to the Rules addressing matters such as the treatment of Government revenue in the eligibility criteria, overseas aid and development charities who are deductible gift recipients, and the treatment of religious practitioners who are officeholders and may not be employees at law. In relation to these issues, the ATO has published the following:

- Information on the election to be made to exclude government grants from their JobKeeper turnover test (published on 18 May 2020); and
- information about [how JobKeeper applies to religious institutions](#) (published on 7 May 2020).

On 18 May 2020, the ATO also released a FAQ on JobKeeper Payments, the content of which will be merged into a webpage for not-for-profit organisations soon. We have included this FAQ with this document.

- On 15 May 2020, the National COVID-19 Coordination Commission [announced](#) the establishment of a not-for-profit working group to support recovering in the sector.
- State governments have also announced economic stimulus packages:
  - New South Wales government's announcements are available on the [website of the NSW government](#).
  - The Victorian government's have made various announcements which are available on the [website of the Victorian Premier](#). It has also established a [hotline for businesses](#) dealing with significant challenges.
- Social Ventures Australia in collaboration with the Paul Ramsay Foundation has published "[COVID-19 Government Support for Charities and Not-For-Profits](#)" which it updates from time to time.

## Governance

- For registered charities, on 19 March 2020, the ACNC made available information on "[Charity Operations and COVID-19](#)". An update to this is that the ACNC ran a webinar on 30 March 2020 titled "Charities, the ACNC and COVID-19" and it has released the recording of this webinar.

The ACNC has also [changed its approach](#) to breaches of certain governance standards and external conduct standards that occur between 25 March 2020 and 25 September 2020. This does not mean that the ACNC will overlook significant breaches.

- At this time, if you are a responsible person (e.g. director) of a registered charity or a director, management committee member or trustee for other forms of charities and not-for-profits, we suggest that you be particularly mindful about the following:
  - The purpose of your organisation (in the case of a charity, its charitable purpose). Resources of a charity and not-for-profit must generally be applied for the purposes for which the organisation have been established. A registered charity has to "comply with its purposes and its character as a not-for-profit entity" (ACNC governance

standard 1) and its responsible persons have the duty act in good faith *in the charity's best interest and to further the purposes of the charity* (ACNC governance standard 5).

- If your organisation is a registered charity operating outside Australia, there is also the requirement to take reasonable steps to ensure that its activities outside Australia are carried out in a way that is consistent with its purpose and character as a not-for-profit entity, maintain reasonable internal control procedures to ensure resources (including those given to third parties outside Australia) are used outside Australia in a way that is consistent with its purpose and character as a not-for-profit entity (ACNC external conduct standard 1).
- Directors' duties and in the case of registered charities, the ACNC governance standard 5 include the duties to exercise powers and discharge duties with care and diligence, act in good faith as described above, to ensure that the registered charity's financial affairs are managed in a responsible manner and not allow it to operate while insolvent. See also our further comments about "Financial considerations including solvency" below.
- It will be important that good corporate governance practices are continued. Consider if you are being provided with sufficient and quality information to make decisions quickly in a rapidly changing context, if you need expert advice, how your decisions and meetings are minuted and recorded, etc.

## Meetings

- Social distancing requirements and the probable bans on gatherings of people will impact how you hold meetings (for example, annual general meetings) etc.
- We suggest that you should consult your organisation's Constitution in the first instance as to whether meetings may proceed via phone or video conferencing or other technology, and make sure that the meetings proceed in a manner that meets requirements.
- If your organisation is a company, note that:
  - on 20 March 2020, ASIC published [new Guidelines](#) about annual general meetings and financial reporting requirements. If yours is a registered charity, the requirements under the Corporations Act as to annual general meetings and lodging financial reports with ASIC do not apply; rather reporting is to the ACNC.
  - On 5 May 2020, the Treasurer announced that temporary changes have been implemented to enable companies to convene AGMs and other meetings entirely online. These changes apply until 5 November 2020.
- While previously, the ACNC urged registered charities who expect to experience delays in lodging their Annual Information Statements to request an AIS extension in advance of the deadline, the ACNC has now provided a blanket extension until 31 August 2020 for AISs due between 12 March 2020 and 30 August 2020.
- State regulators (generally of incorporated associations) have published some guidance about meetings. As at 30 April 2020:
  - [NSW Fair Trading's statement](#) is that "[c]urrent legislative requirements remain in force however if you are unable to meet your regulatory obligations because of COVID-19 then we will take a reasonable and proportionate response. Note that new requirements may come into force and these will be announced publicly".
  - [Queensland's Office of Fair Trading's statement](#) is, "Normal practice is that an individual association must apply to OFT, outlining the special circumstances as to why the extension should be granted. However, in the current circumstances, we will allow a grace period of a further 6 months to hold your AGM, if required, without the need for you to make a written application. In effect, this may result in a management committee's term being longer than is described in the rules, but, given the current circumstances, we hope members will be accepting of this."

- Consumer Affairs Victoria has now given instructions for teleconferencing, proxy voting and applications for extension of time to hold AGMs can be found on the Consumer Affairs Victoria website. The CAV web page also gives instructions for how to request an extension if it is difficult to engage an independent accountant or auditor to review your financial statements under sub-heading 'Financial Statements'..
- Tasmania's [Consumer, Building and Occupational Services statement](#) is:

“New rules in place due to COVID-19 (coronavirus) mean there may be delays relating to associations. An association may need to delay an AGM. In this situation the committee should:

  - discuss the possible delay with their members while considering their constitution's requirements
  - complete the annual return form (to keep information up-to-date)
  - pay the lodgement fee (to keep the association registered).

The association can then agree on a time to meet again and hold a special general meeting to deal with any outstanding business.”
- South Australia's [Consumer and Business Services statement](#) is:

“Where technology can be used, associations may wish to consider holding a 'virtual' AGM (either online, or via teleconference).

Associations should remain mindful of good governance practices - including appropriate record-keeping and giving members reasonable notice of meetings - regardless of the form an Annual General Meeting takes. If associations are unable to hold an AGM within the legislated timeframe, Consumer and Business Services will take no action where AGMs are postponed for up to 6 months.

In addition, no action will be taken where a 'virtual' AGM is held, but does not comply with the association's rules due to requirements that meetings are held in person.

...

While Consumer and Business Services will not take action in related to non-compliance involving actions in response to COVID-19, this doesn't protect the association against any third party claim that the action contravened the legislation.”
- Western Australia's Commissioner for Consumer Protection has issued the [general information](#) to guide incorporated associations and clubs and its [Department of Mines, Industry Regulation and Safety's statement](#) concerning AGMs is:

“If the association finds that it is necessary to delay or postpone its AGM more than six months after the end of its financial year, the Commissioner can grant an extension. The association must apply for an extension of the timeframe using Form 3- Application requesting further time to hold the AGM. Applications can be lodged using our AssociationsOnline service. The fee to apply for an extension of time to hold the AGM has been waived.”

### Notifications and reporting to regulators

- If your organisation is a registered charity, it must notify the ACNC if it has not complied with a governance standard or external conduct standard and the non-compliance is significant and as a result it is no longer entitled to be a registered charity. But note the ACNC has [changed](#)

[its approach](#) to certain breaches of the governance standards and external conduct standards that occur between 25 March 2020 and 25 September 2020.

- The ACNC has now provided a blanket extension until 31 August 2020 for Annual Information Statements due between 12 March 2020 and 30 August 2020.
- The Department of Home Affairs has temporarily extended by 3 months the deadline for all reporting entities – those who are required to submit modern slavery statements.

## Tax

- There are some tax measures the Australian government's economic response to COVID-19 – see [our previous article](#).
- On 12 March 2020, the Australian Taxation Office (ATO) announced that it will implement [administrative measures to assist those affected](#). The ATO has also set up a [COVID-19 webpage](#).

## Tax deductibility of donations

- For those charities and not-for-profits who are deductible gift recipients (DGR), this may be a time when donors may want to donate resources or property other than money. While generally the DGR would not be responsible to ensure that the right tax deductions are claimed by the donor, the DGR should be aware that there are different requirements applicable for different forms of gifts and there are also different valuation rules that are applicable as to what quantum of tax deduction may be claimed. This can be complex. The ATO has a webpage with [generalised information](#) about this.

## COVID-19 Disaster Funds - DGR

- On 6 May 2020, the Assistant Minister for Finance, Charities and Electoral Matters declared the COVID-19 pandemic as a disaster for the purpose of allowing disaster relief funds to receive tax deductible donations. Funds that are established for the relief of people affected by the COVID-19 pandemic (**COVID-19 Disaster Funds**) will be eligible for endorsement as DGRs, subject to registration with the ACNC and donations to such funds between 18 March 2020-18 March 2022 will be tax deductible.

## Deductible Gift Recipient (DGR) Reform

- On 13 May 2020 the Assistant Minister for Finance, Charities and Electoral Matters [announced](#) that the Commonwealth Government will delay the implementation of the following reforms to the DGR regime which were scheduled for 1 July 2020:
  - Requiring all NGOs wishing to be endorsed as DGRs to registered as a charity with the ACNC
  - Removal of the public fund requirements for DGRs; and
  - Transferring the administration of the following DGR registers to the ATO and the ACNC.

(We have [previously written](#) about these DGR Reforms which were announced in August 2018).

## Grant making by ancillary funds

- Many charities and not-for-profits will be turning to funding organisations, such as public and private ancillary funds to seek grants. In addition to governance considerations (see above),

trustees of such funds should remind themselves that they may only make distributions to “item 1 DGRs”.

- On 6 May 2020, the Assistant Minister for Finance, Charities and Electoral Matters announced that the Federal Government would create an incentive for ancillary funds to increase their distributions to charities over 2019-20 and 2020-21. Amendments to the guidelines to public and private ancillary funds will be made to provide them with a credit where their total distributions in those two year are at least four percentage points above the minimum required distributions (4% of the value of net assets for public ancillary funds and 5% for private ancillary funds). The credit may be used to reduce the required minimum distribution in future years.
- Remember to consider all aspects of grant making such as when the funds will be provided (in instalments?), if GST is applicable, the purposes to which the funds should be applied, etc as well as how the grant should be documented (Grant Agreement) overall.
- Additionally, it is timely to re-familiarise yourself with the purpose of your fund – see our comments “Governance” above.

### Employment, alternative working arrangements and return to office

- The Fair Work Ombudsman has published guidance on [the implications of Australian workplace laws](#) in the context of COVID-19.

Stand down provisions may be able to be used by employers impacted by COVID-19 but only in limited circumstances (e.g. organisation shut down by a state government public health order). For a stand down to be lawful under the Fair Work Act (Act), the employee must not be able to be usefully employed (so employers should first consider redeployment or whether the employee can work from home) because of a stoppage of work for which the employer cannot reasonably be held responsible. Where an employer has a reduction in trade or where it is uneconomical to continue to employ staff it is unlikely this will be considered a "stoppage" of work justifying standing down employees without pay. In these cases employers may have to consider other options such as agreeing reduced working hours, using accrued leave, leave without pay, or redundancies. Possible consequences of issuing an unlawful stand down are penalties for a breach of the Act and employees who are wrongfully stood down (who were otherwise ready, willing and able to work) could obtain an order for back pay of wages owed to employees for the stand down period. Finally, in deciding on a stand down the provisions of relevant awards, any enterprise agreements, and employment contracts need to be considered and so we recommend employers seek legal advice before standing down any employees.

In considering other cost saving measures such as reductions in hours of work or pay employees should be consulted and generally agreement of an employee is required to a reduction in pay or working hours and awards/enterprise agreements may have other requirements that need to be met. It is prudent to seek legal advice before implementing these types of measures as there are significant risks if such measures are unlawfully implemented. In relation to leave for employees the general principle is that taking leave should be by agreement and please note that award employees can temporarily extend the amount of annual leave they take by applying for annual leave at half pay.

- Awards have just been varied to temporarily allow all employees (casuals included) access to up to 2 weeks unpaid pandemic leave where the employee has to self-isolate or is otherwise prevented from working due to state government public health orders.
- Workplace safety obligations should be considered as alternative work arrangements for your personnel are planned and continue. If the place of work has changed (for example, work from home or personnel being deployed to work at different premises), some questions to consider are:





- Is the new work place (for example, home or perhaps even a vehicle) a safe workplace?
- How can confidentiality and privacy of business information or sensitive client case management data be protected (including those that may now be placed on personal devices of employees)?
- If employees are engaging in video conferencing from home, what guidelines would you put in place to ensure that the employee's own privacy is protected?
- You should also consider what you should/could do if alternative work arrangements are not possible.
- The lockdown arrangements introduced in many jurisdictions in the week of 30 March 2020 should be considered as you consider changes to the workplace. It is generally necessary in the workplace, to not only promote but to direct social distancing. While the Prime Minister has announced a three-step plan to reopen Australia on 8 May 2020, it is up to the State and Territory governments to decide when their respective jurisdictions will enter each phase so it will be important to keep a watch on announcements and the directives/gazettes.
- If yours is a registered charity operating outside Australia, we encourage you to consider if there may now be additional reasonable steps that are required to ensure the safety of vulnerable individuals outside Australia who are engaged by you or a third party in collaboration to provide services or benefits to others (ACNC external conduct standard 3). Some of the individuals engaged by your organisation or third parties in collaboration may become vulnerable individuals because of COVID-19.. "Vulnerable individual" is defined to include an individual who is or may be unable to take care of themselves, or is unable to protect themselves against harm.
- The Department of Home Affairs has published an information guide, "[Modern Slavery Act: Information for reporting entities about the impacts of coronavirus](#)" which addresses the issue of how organisations can make sure their workers and supply chains are not exposed to modern slavery as a result of COVID-19.
- As an employer your organisation will have duty of care to personnel. It may be necessary to issue directives to employees about self-isolation (for example, because they have just returned from a designated country or has had close contact with a person who has become infected by COVID – 19), notifications of cases, improved hygiene, etc
- Safe Work Australia has published [general information for employers](#) in responding to COVID-19 and also practical material relevant to guide organisations on how to safely work with the ongoing threat and returning to normal operations. Topics include [physical distancing](#), [hygiene](#), [cleaning](#) and [personal protective equipment \(PPE\)](#).
- As lockdown restrictions are gradually lifted in the various states and territories, it will be essential to give attention to when and the extent of restrictions being lifted. Each State and Territory is proceeding at a different pace. It is important to read the actual directives, notices and gazettes rather than relying on news reports.

## COVIDSafe App

- The COVIDSafe contact tracing app is now available for downloading and use. The app is intended to increase the speed and accuracy with which persons who may be at risk of contracting COVID-19 can be contacted by State and Territory health authorities.
- It is intended that use of the app is voluntary: it is up to individuals to decide whether to download and use the app. If a user tests positive for the virus, the user can then choose whether to upload information collected on the app on their phone to the COVIDSafe data store maintained by the Commonwealth Department of Health to be used by State and Territory health authorities for contact tracing purposes. The user can also delete the





COVIDSafe app from their phone at any time which will delete all COVIDSafe app information stored on the phone. To the extent the information has been uploaded to the national information storage system, the user can make a request for the information to be deleted.

- If you are considering use of the app by your employees, you need to be aware that the new [Biosecurity Determination](#), made under the *Biosecurity Act 2015* (Cth) which commenced on 25 April 2020 makes it an offence to pressure anyone to use the app, to take any other adverse action against someone because they have or have not installed the app or to make use of the app a condition of an employment contract. It is also an offence to make use of the app a condition of access to premises or for the giving or receiving of goods and services.
- While you cannot require compulsory use of the app you can however stop a person from entering your premises for work health and safety reasons. For example, you can bar a person (including an employee) who is required to self-isolate or self-quarantine from entering your premises.
- Further legislation is expected to be introduced by the Commonwealth later this month.

### Modern Slavery Act

- The Department of Home Affairs has [temporarily extended by 3 months](#) the deadline for all reporting entities – those who are required to submit modern slavery statements. The extensions are as follows:

<i>Reporting Period</i>	<i>Original deadline for statement:</i>	<i>Extended deadline for statement:</i>
1 April 2019 – 31 March 2020	30 September 2020	31 December 2020
1 July 2019-30 June 2020	31 December 2020	31 March 2021
Periods ending after 30 June 2020	The deadline which is 6 months after the end of the reporting period remains unchanged.	

- This extension only changes the deadline for submission of modern slavery statements and does not alter the reporting periods for entities, which remain unchanged. In other words, if your reporting period is 1 April 2019 - 31 March 2020, you now have until 31 December 2020 to submit your statement but your statement is still to relate to the 1 April 2019 - 31 March 2020 period.
- The Department of Home Affairs’ information guide, [“Modern Slavery Act: Information for reporting entities about the impacts of coronavirus”](#) contains information about how to address COVID-10 in your statement.

### Contractual obligations

- Like all businesses, meeting its obligations under its contracts and agreements (and requiring your counterparty to do so) may already have become more challenging for your organisation. In some cases, meeting ongoing obligations may be becoming more costly.

Conversely, it may be becoming more challenging for a counterparty to a contract (for example, a supplier, a funder, etc) to meet its obligations under a contract with your organisation.

- Here are some key questions to consider:
  - How will you ensure that your organisation will continue to meet its legal obligations under contracts with funders and suppliers? or will you need to suspend performance? or terminate the contract? or seek to vary the terms of the contract, including the price?



- How will you ensure that your counterparty will honour their contractual obligations to you? on what terms could they suspend performance? or terminate? or vary the terms including the price?
- If you reach agreement to vary or waive these contractual obligations, how would you ensure that these are properly documented?

## Insurance

- We suggest that you should review your insurance cover (for example, public liability and workers' compensation) to understand:
  - What coverage you currently have (standard policies are unlikely to cover specialised or unlikely risks such as COVID-19)?
  - Do you have business continuity/interruption cover?
  - What exclusions apply (some policies expressly exclude diseases)?
  - Do you need to take out extended cover?
  - If you believe you have a claim, what do you need to do now? Including what records should you be keeping?
- The Australian Financial Complaints Authority (AFCA) has activated its significant event response plan following the Insurance Council of Australia [declaring COVID-19 as an insurance catastrophe](#) from 12 March 2020. AFCA has published how it will provide [support around financial issues](#).

## Financial considerations including solvency

- From the governance perspective, directors' duties and in the case of registered charities, ACNC governance standard 5 includes the duties to ensure that the organisation's financial affairs are managed in a responsible manner and not allow it to operate while insolvent.
- If your organisation is a borrower, we suggest that you review the terms of the loan or finance facility: consider if the organisation can continue to meet financial ratios, if a material adverse change has or may be arising that may result in a default triggering an obligation to repay immediately or entitle the lender to refuse to provide further funding.
- If your organisation is a company under the Corporations Act, the "safe harbour" regime may protect your directors from personal liability for insolvent trading by the company but there are certain requirements which must be met for such protection to be available. The Commonwealth government has passed temporary amendments to insolvency and corporations laws to provide a safety net for directors and businesses.

The regime is technical and our recommendation is that you should seek specific legal advice if your organisation is facing illiquidity.

For registered charities, the ACNC has stated that "The Commissioner's approach to this issue will follow the amendments made to the Corporations Act 2001 (Cth) by the Coronavirus Economic Response Package Omnibus Act 2020 (Cth), except that it will apply to all charities and not just those that operate as companies limited by guarantee". This is part of the ACNC's [changes to its regulatory approach](#) to certain breaches of the governance standards and external conduct standards that occur between 25 March 2020 and 25 September 2020

## Property: facilities and leases

- Landlords have obligations to their tenants. For example, generally, they may not force closure of premises or unreasonably disrupt the tenant's business or use. However, a government directed closure may override those obligations.
- If you are a tenant, you may wish to consider at this time if you may be able to seek rent relief from your landlord. We have now published ["COVID-19 Rent Relief Update"](#) about the National Cabinet's mandatory code of conduct – 'SME Commercial Leasing Principles During COVID-19'– released on 7 April 2020. In that article, we write on the status of the implementation of the Code on a State-by-State basis as at 5 May 2020.
- Many leases require the tenant to keep the premises open for trade during normal business hours. Typically, a lease will also require the tenant to comply with all laws, notices and orders with respect to the property. Both landlords and tenants should consider how these clauses interact with each other and apply to the present circumstances. As a matter of practice, one would hope that common sense would apply; however, the contract law implications of such provisions may not be straightforward.
- If you are closing a facility, you should consider risk management. For example, you will continue to have occupier's duty of care even if there is no person present at the premises.
- Overall, as the occupier of premises, your charity or not-for-profit has a duty of care to all who use those premises. This can include personnel (employees, contractors, volunteers) but also the people who are cared/served by your organisation.

## People and events

- The requirements of health authorities in your jurisdiction should be followed as you consider events where people will gather. It will be necessary to not only promote but to direct social distancing.
- For charities and organisations who care for or engage children and vulnerable people (including the disabled and aged), we suggest that your policies and procedures around safeguarding (for example, your child safety policy) should be reviewed to ensure that they are fit for purpose taking into account your organisation's changed circumstances.
- While your organisation may need to rapidly employ more employees or engage more contractors to be able to deliver services, the same due diligence (reference checks, criminal record checks, working with children checks, etc) should be applied.

## Privacy and confidentiality

- Your organisation may be gathering more private or sensitive information at this time about its personnel and the people it serves. We suggest that you review your policy and procedures around privacy and confidentiality to ensure that additional safeguards are put in place to protect information and its use.
- It is also timely to consider where the information is stored and whether that is secure especially where your personnel are working outside their usual office environment.
- The Office of the Australian Information Commissioner (OAIC) has published a [useful guidance](#) regarding privacy of obligations to staff.

## Intellectual Property – copyright

- Where your organisation is producing videos or livestreaming events, care should be taken about the materials (images (still or moving), music, etc) that may be incorporated in the videos or livestream. Consider the following:



- Has the consent of people in images you intend to use been obtained?
- What rights do you have to use the materials in the way you intend? Do you have a licence to perform the music for broadcast in this way? What copyright restrictions and requirements apply?
- The Australian Copyright Council has published two information sheets:
  - [Video, Livestreams & Copyright](#)
  - [Frequently asked questions and links to relevant resources](#).

## Fundraising

- If your organisation intends to engage in fundraising from the public or to change how it is fundraising from the public, requirements under fundraising regulation needs to be considered.
- If your organisation intends to obtain services from a commercial fundraiser, there are several matters you should consider. We recommend that rather than considering the business aspects (such as fees payable) and simply accepting a proposal, good procurement practices be followed and the engagement be documented comprehensively in an agreement. The ACNC has published a [useful general guide](#) on this.

## Scams

Scams can hurt the reputation of charities and not-for-profits; they are usually newsworthy because the prominence of the relevant charity or not-for-profit innocently entangled. On 18 March 2020, the Australian Competition and Consumer Commission (ACCC) issued a warning about [“COVID-19 \(coronavirus\) scams”](#).

For updates follow us on Twitter ([@ProlegisLaw](#)) and LinkedIn ([prolegis-lawyers](#)).

For any inquiries, please contact either Alex Milner ([amilner@prolegis.com.au](mailto:amilner@prolegis.com.au)) or Seak-King Huang ([shuang@prolegis.com.au](mailto:shuang@prolegis.com.au)).

Prolegis Pty Limited ABN 61 076 415 882

SYDNEY: Level 4, 107 Mount Street, North Sydney NSW 2060, Australia | +61 2 9466 5222

MELBOURNE: Suite 349-350, Level 3, 1 Queens Road, Melbourne VIC 3004, Australia | +61 3 8672 2920

Liability limited by a scheme approved under Professional Standards Legislation



# JobKeeper Payments

## Frequently asked questions May 2020

### Not-for-profits

#### General

##### ***When is a not-for-profit (NFP) entity pursuing its objectives principally in Australia?***

An NFP entity pursues its objectives where it undertakes the activities that achieve its purpose. Principally means 'mainly' or 'chiefly'. An NFP entity will generally pursue its objectives principally in Australia when the activities which achieve its purpose mainly occur in Australia.

For more information on when an entity is pursuing its objectives principally in Australia, refer to [TR 2019/6](#) *Income tax: the 'in Australia' requirement for certain deductible gift recipients and income tax exempt entities* (see paragraphs 63 to 69).

##### ***Can NFP entities established before 1 March 2020 but registered with the Australian Charities and Not-for-profits Commission (ACNC) after 1 March 2020 qualify for JobKeeper?***

Yes, they don't need to be registered with the ACNC to qualify for JobKeeper but they must meet the eligibility requirements. See [Eligible employers](#)

##### ***Can NFP entities established after 1 March 2020 qualify for JobKeeper?***

No, they need to be established on or before 1 March 2020.

##### ***Can a non-profit sub-entity choose to participate in the JobKeeper scheme and assess its eligibility for JobKeeper payments based on the sub-entity's turnover?***

No. The JobKeeper scheme does not recognise non-profit sub-entities and the decline in turnover test applies to an entity as a whole. The entity must include the turnover of all its branches and non-profit sub-entities.

#### *Nominations and eligible employees*

The following questions relate to an ACNC-registered charity that is not a university or a school and has elected to exclude government grants from its turnover (the charity).

##### ***Can the charity receive JobKeeper payments for its fully government funded employees?***

Yes. The charity can receive JobKeeper payments for its fully government funded employees if they meet the requirements of an eligible employee. See [Your eligible employees](#)

##### ***Does the charity have to notify its fully government funded employees of its enrolment in JobKeeper?***

No. It is not compulsory for the charity to notify any of its fully government funded employees. If the charity does not notify fully government funded employees and those employees are not nominated, it cannot receive JobKeeper payments for those employees.

The charity must notify all relevant employees and any of the fully government funded employees it chooses within 7 days of enrolling for the JobKeeper payment.

## Turnover

***When must an ACNC-registered charity other than a university or a school give the Commissioner its election to exclude government grants from its turnover if it has enrolled for the JobKeeper Payment Scheme on or before 13 June 2020?***

The charity has until 20 June 2020 to give its [election to exclude government grants](#) to the Commissioner. The charity can calculate its turnover to exclude government grants on the basis that the election will be given to Commissioner by that date.

***If an ACNC-registered charity receives a government grant and in return, makes a GST-free supply, is the grant included in the charity's turnover?***

Yes. Government grants that require the charity to make supplies (whether the supply is taxable or GST-free) are included in the charity's turnover, unless the charity makes an election not to include the consideration for all supplies from government grants.

For more information on when a government grant is consideration for a supply, refer to [GSTR 2012/2 Goods and services tax: financial assistance payments](#).

***Can an ACNC-registered charity exclude payments received for providing National Disability Insurance Scheme (NDIS) services from its turnover?***

No. Payments received for providing NDIS services are not consideration provided by an Australian government agency even if an NDIS participant selects the National Disability Insurance Agency (NDIA) to manage their plan and pay the charity. The payments are made from the NDIS participant's funds.

***Can a charity (that is not a university or a school) that registers with the ACNC after 1 March 2020 with a date of effect that is on or before 1 March 2020 apply the 15% decline in turnover threshold to receive JobKeeper payments for the first JobKeeper fortnight beginning 30 March 2020?***

Yes. The charity can apply the 15% decline in turnover threshold to receive JobKeeper payments for the first JobKeeper fortnight if it has received a notification of its ACNC registration and enrolled for the JobKeeper payment before 31 May 2020, and met [other requirements](#) including [paying their eligible employees](#) by a [certain date](#).

***Is an ACNC-registered charity a deductible gift recipient (DGR) for the modification to the turnover calculation if it is endorsed for only operating a particular fund, authority or institution?***

Yes. An ACNC-registered charity is a DGR for the modification to the turnover calculation even if it is not endorsed as a DGR as a whole but operates a fund, authority or institution that is endorsed as a DGR.

***What gifts must a DGR include in its turnover?***

A DGR must include gifts (other than from an associate) whether they are tax deductible to the donor or not. This includes testamentary gifts or gifts from an overseas donor. A gift is a voluntary transfer of property by way of benefaction with no material benefit or advantage received by the donor.

For more information on what are gifts, refer to [TR 2005/13 Income tax: deductible gifts - what is a gift](#).

***What gifts must an ACNC-registered charity that is not a DGR include in its turnover?***

An ACNC-registered charity that is not a DGR must include gifts of money, property with a market value of more than \$5,000 or listed Australian shares that are not from an associate. A gift is a voluntary transfer of property by way of benefaction with no material benefit or advantage received by the donor.

For more information on what are gifts, refer to [TR 2005/13 Income tax: deductible gifts - what is a gift](#).

## *NDIS Providers*

### ***Can charities disregard NDIS payments received?***

ACNC registered charities (except schools and universities) are able to elect to disregard from their JobKeeper turnover, supplies they make where the consideration for the supply is provided by Australian government agencies (or a local governing body, the United Nations, or an agency of the United Nations).

When an NDIS participant selects the National Disability Insurance Agency (NDIA) to manage their plan and pay for their support, these payments are made from the participant's NDIS funds to the provider. These payments are not payments provided by an Australian government agency. This means that these payments cannot be disregarded from the JobKeeper turnover because the consideration for the supplies made by the provider (an ACNC registered charity) to participants is not provided by an Australian government agency.

Similarly, when an NDIS participant chooses to self-manage their own funding or chooses another Plan Manager (other than the NDIA) to pay a provider (an ACNC registered charity), on their behalf, these payments cannot be disregarded from the JobKeeper turnover.

If the provider isn't an ACNC registered charity then no amounts can be disregarded.

### ***NDIS providers with multiple operations***

Eligibility to access the JobKeeper payments is assessed by considering a legal entity as a whole. That is, if you operate multiple business units within the same legal entity and under the one ABN, activities from all these business units must be taken into account as part of the overall legal entity's GST turnover. Separate sites operating under the one ABN should also be assessed as part of the overall entity's activities to assess eligibility for the JobKeeper payments.

### ***Commissioner discretion***

The Commissioner cannot provide an alternative test for decline in turnover unless the Commissioner is satisfied there is not an appropriate relevant comparison period. The discretion cannot be made for other circumstances or for an individual entity.

The Commissioner issued a legislative instrument to provide alternative tests addressing various circumstances where there was not an appropriate relevant comparison period. More information on these [alternative tests](#) is available on the ATO website.