

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

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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 article as we have further information.

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.

The legislation enacting these measures passed Parliament on 23 March 2020. We will publish an update to our previous piece shortly.

- State governments have also announced economic stimulus packages:
 - New South Wales government's announcement made on [17 March 2020](#).
 - The Victorian government's announcement [21 March 2020](#). It has also established a [hotline for businesses](#) dealing with significant challenges.

Governance

- On 19 March 2020, the ACNC made available information on ["Charity Operations and COVID-19"](#). Notably, the ACNC is urging registered charities who expect to experience delays in lodging their Annual Information Statements to request an AIS extension in advance of the deadline.
- On 20 March 2020, [ASIC published new Guidelines](#) about annual general meetings and financial reporting requirements. See also our further comments about "Meetings" below.
- At this time, if you are a responsible person (e.g. director) for 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 at this time:
 - 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.
- The ACNC has stated that if a registered charity is unable to meet its obligation to lodge an Annual Information Statement (AIS), [it may request an extension](#).
- State regulators (generally of incorporated associations) have not published much guidance about meetings. As at 25 March 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, “we understand that businesses, licensees and not-for-profits may need special consideration during the novel coronavirus outbreak. If you are having difficulty meeting an OFT lodgement due date because of an impact from COVID-19, email us to let us know. We are deciding applications for special consideration on a case-by-case basis and one of our officers will contact you as soon as possible.”

Notifications to regulator

- 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.

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.

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”.
- 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 and alternative working arrangements

- The Fair Work Ombudsman has published guidance on [the implications of Australian workplace laws](#) in the context of COVID-19.
- Save Work Australia has published [general information for employers](#) in responding to COVID-19.
- Workplace safety obligations should be considered as you plan alternative work arrangements for your personnel. 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:
 - 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.
- Even if there is no change to the workplace, it will be necessary to not only promote but to direct social distancing.
- 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.

- 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

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, the 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 we 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.

Property: facilities and leases

- Landlords have obligations to their tenants. For example, generally, they may not end tenancies where closures that may disrupt businesses unreasonably. However, a government directed closure may override those obligations.
- Further 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.
- 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.

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?

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](#)".

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