



# Governance in Not-For-Profits during COVID-19

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# Topics

1. Setting the context – ACNC Governance Standards, directors duties and the recent High Court case on the interpretation of “officer”
2. Key considerations for NFPs re insolvent trading and directors’ liabilities (safe harbour) during the economic turmoil
3. Duty to employees re WHS during Covid-19 and looking at return to work
4. Considerations re privacy and data for employees, members and customers of NFPs in an increasingly digital world
5. Q&A – current issues and future considerations



# ACNC Governance Standards

Standard 1: Purposes and not-for-profit nature

Standard 2: Accountability to members

Standard 3: Compliance with Australian laws

Standard 4: Suitability of Responsible Persons

Standard 5: Duties of Responsible Persons



# Standard 5: Duties of Responsible Persons

In essence, Responsible Persons (Directors/Committee Members) must comply with 6 duties:

1. To act with reasonable care and diligence
2. To act honestly and fairly in the best interests of the charity and for its charitable purposes
3. To not misuse their position or information they gain
4. To disclose conflicts of interest
5. To ensure that the financial affairs of the charity are managed responsibly
6. To not to allow the charity to operate while it is insolvent



# To act with reasonable care and diligence

- A degree of care, skill and diligence that a reasonable person in their circumstances would exercise
- Background knowledge, expertise, speciality and experience are all relevant
- Familiarise / understand the organisation's activities, operations and finances in the Covid-19 environment
- Should be actively involved in board meetings (and take advice where required) and consider risk committees - no one size fits all approach
- Not blindly follow or rely on others (such as other directors, employees or advisors) but must inform themselves and make an independent assessment
- Interests of all stakeholders (the charitable purpose, its members, employees, creditors, the community) in making decisions and document reasons



If it looks like a duck, swims like a duck and quacks like a duck...



# Australian Securities and Investments Commission v King [2020] HCA 4

On 11 March 2020, the High Court gave a broad interpretation to the definition of “officer” confirming that persons who participate substantially in decision making and have the capacity to affect the financial standing of the company can be held liable even if they are not formal directors.



# Facts

- MFS Ltd was a listed Investment Management business
- A number of directors of MFS Ltd (including Mr King)
- MFS had a Premium Income Fund (PIF) with c.\$700M fees under management
- Responsible Authority of the PIF was a subsidiary company of MFS Ltd – called MFSIM Pty Ltd
- Mr King was not a director of the subsidiary, MFSIM Pty Ltd
- MFSIM Pty Ltd borrowed \$200M from a bank and used \$130M to pay (unrelated) MFS Group debts
- The MFS Group subsequently collapsed leaving hundreds of retirees without their life savings and owing in excess of \$2.5bn



# Decision(s)

- Supreme Court QLD (2016/2017) – Held Mr King was an “officer” of MFSIM even though he wasn’t a specified / named director.
- Court of Appeal (QLD) (2018) – Held Mr King did not hold the office / position as a director (he was not a director of MFSIM and was only the CEO and a director of MFS Ltd).
- High Court (11 March 2020) – Unanimously upheld first decision and confirmed that an “officer” can extend to those who take part in the management of the company being someone who has “the capacity to affect significantly the corporation’s financial standing” – it is not only the named directors who can be held liable.



# Relevant Factors

- The Court also identified some factors to determine whether a person is deemed to be an officer.
- Relevant factors include:
  - (a) the identification of the role of a person in relation to the corporation;
  - (b) what they did or not do to fulfil that role; and
  - (c) the relationship between their actions or inaction and the financial standing of the corporation
- This may vary significantly depending on a company's size, structure and circumstance – take advice if concerned.
- Check D&O insurance policies as to whether it contains a broad definition of “officer” and who is covered / not covered
- It's common for Officers to have the benefit of a Deed of Access, Indemnity & Insurance.



# Key Take Aways

- Act with integrity, diligence and to a large extent, common sense (in a totally uncommon environment).
- Increase the amount of communication and hold regular meetings (and ensure you attend them and prepare for them) and consider risk committees
- Remain actively involved in the activities, operations and finances of the organisation (don't follow advice blindly without forming an independent assessment taking into account the interests of the organisation)
- Plan various scenarios around budgets, forecasts and other elements of financial management (in the immediate, short term and longer term)
- Take specialised advice (where required) and make an informed decision
- Document the basis for the decision
- Check your D&O policy and execute a Deed of Access, Indemnity & Insurance
- Organisations that get “good governance” right will flourish



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# Insolvency

- Insolvent trading
- Temporary relief
- NFPs and charities
- Safe harbour beyond COVID-19



# Director's duty not to trade while insolvent

s 588G Corporations Act 2001 (Cth):

**A director can be personally liable for debts incurred by the company if, at the time the debts were incurred, there were “reasonable grounds” to suspect that the company was either insolvent or would become insolvent by incurring the debt**



# Temporary relief from director's duty not to trade while insolvent

- Relief from personal liability
- If debt incurred:
  - in the ordinary course of business
  - during the period of 25 March until 25 September 2020, and
  - before any appointment of an administrator or liquidator



# What is ordinary?



Debt incurred in the “ordinary course of the business” if it is necessary to facilitate the continuation of the business during the six-month period



# Applicability

- Directors of charities and NFPs that are Corporations Act entities can rely on temporary insolvency relief
- Registered charities are also relieved of ACNC Governance Standard obligations not to operate while insolvent provided charities:
  - (i) have an achievable aim to return to viability once the crisis has passed; and
  - (ii) inform members and the ACNC if trading insolvent
- Committee members of incorporated associations



# Sailing to safe harbour beyond the temporary relief period

- No personal liability where course of action reasonably likely to lead to a better outcome, than immediately appointing an administrator or liquidator
- Information about financial position
- Take steps to prevent misconduct by officers and employees
- Take appropriate steps to ensure accurate financial records maintained
- Obtain advice from appropriately qualified insolvency advisers
- Take appropriate steps to develop and implement a plan to restructure to improve financial position



# Key Take Aways

- Temporary relief from personal liability for insolvent trading expires 25 September 2020
- Director's duties still apply
- Safe harbour 2017 laws: opportunity to restructure and re-invent



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# WORK HEALTH & SAFETY DURING COVID-19



# Legislative framework

- Harmonised laws throughout Australia
- Victoria – *Occupational Health and Safety Act 2004*



# Employer duties to employees

An employer so far as is reasonably practicable must ensure the health and safety of its employees by:

- Providing and maintaining a safe working environment
- Providing and maintaining safe systems of work
- Providing and maintaining plant and substances in a safe condition
- Providing necessary information, instruction, training and supervision
- Providing adequate welfare facilities



# Officer liability – Victoria

- If a body corporate is found to have committed an offence and it is attributable to the officer failing to take care, then the officer is also guilty of an offence
- When assessing whether an officer has taken reasonable care, the Court will consider:
  - what the officer knew about the matter
  - the extent of the officer's ability to make decisions that affect the company in relation to the matter
  - whether the offence is also attributable to an act or omission of any other person
  - any other relevant matter
- Maximum fine of approx \$3m for corporations, \$280k for individuals, and 5 years imprisonment



# Officer Liability – Harmonised Jurisdictions

- No need to prove a breach by the entity
- Officers must exercise **due diligence** at all times to ensure the entity complies with its work health and safety duties
- This is a positive duty
- In practice, the officer must be able to show that meaningful steps were taken
- Maximum fine of approx \$3m for corporations, \$500k for individuals, and 5 years imprisonment



# What is due diligence?

Officers must take reasonable steps to:

- Acquire and keep up-to-date knowledge of safety matters
- Gain an understanding of the nature of the operations of the organisation and generally the hazards and risks
- Ensure that the organisation has available for use and does use appropriate resources and processes to eliminate or minimise risks
- Ensure that the organisation has appropriate resources for receiving and considering information regarding incidents, hazards and risks and for responding in a timely way
- Verifying the organisation has, and implements, processes for complying with safety duties



# What does safety to employees mean during COVID-19?



Maintain clean and hygienic workspaces, such as by regularly wiping surfaces, phones and keyboards with disinfectant



Provide employees with PPE, hand sanitizer, disposable tissues, face masks and closed bins



Ensure hand-washing facilities are easily accessible to everyone in the workplace



Direct any employee who experiences or displays flu-like symptoms, or who has been in contact with anyone who has the virus, to stay self-isolate and obtain medical clearance before returning to work



Ensure social distancing requirements are met. Develop a plan of what to do if there is an outbreak of the virus in the workplace



Display signs or posters promoting regular hand-washing with soap and good respiratory hygiene



# What about staff working from home?

## Employers should consider the following:

- provide guidance on what is a safe home office environment, including a safe workstation
- allow workers to borrow any necessary work station equipment from the office to take to the home as agreed
- require workers to familiarise themselves and comply with good ergonomic practices, consistent with any workplace policies and procedures, for example requiring workers to complete a workstation self-assessment checklist and provide their responses to you
- maintain regular communication with workers
- provide access to information and support for mental health and wellbeing services, e.g. an existing employee assistance program (EAP)
- respond appropriately to signs a worker may be struggling at home
- appoint a contact person in the business who workers can talk to about any concerns related to working from home.



# Is it ok to ask employees to return to the office or work site?

If employers are considering asking employees to return to work, they should:

- consider which employees (if any) really need to return to the physical workplace
- undertake a risk assessment for the risk of exposure of workers to infection of COVID-19 and control measures to eliminate or minimise that risk.
- consider imposing pre-requisites which must be satisfied before employees return to work, such as encouraging employees to get tested , carrying out temperature screening, or heat sensitive cameras at workplace entry points
- implement measures for social distancing, hygiene, cleaning and interactions
- ongoing monitoring and review of control measures, including ongoing consultation with employees and having a pandemic plan in place



# Domestic violence

An employee's exposure to family and domestic violence may increase during periods where the employee is required to work from home or self-isolate.

To manage any risk, employers should consider:

- developing or amending any workplace policy on family and domestic violence to address issues related to working from home
- providing an alternative workspace for employees who are subject to family and domestic violence, if possible
- providing employees with a comfortable and safe environment to disclose any instances of family and domestic violence, including assuring confidentiality and support
- communicating availability of entitlements, including paid/unpaid family domestic violence leave, personal leave and flexible working arrangements
- providing information about counselling, health and legal services



# What if there is no longer a role available for an employee?

Three requirements to avoid unfair dismissal:

- The employer no longer requires the person's job to be performed by anyone because of changes in the operational requirements of the business;
- The employer has complied with any obligation in a modern award or enterprise agreement to consult about the redundancy; and
- It would have been reasonable in all the circumstances for the person to be redeployed within the employer's business or the business of an associated entity of the employer

Also may be specific obligations in enterprise agreements, employment contracts or policies.



# Is it ok to offer full-time employees roles as casuals?

- *Deeny & Ors v Patrick Projects Pty Ltd* [2019] FWC 1772
- The Company retrenched more than 40 employees following voluntary redundancies
- Four of the workers argued their redundancies were not genuine as they had been offered employment as casuals
- They argued this meant the Company still needed their jobs to be performed
- The FWC found in favour of the Company
- *“The fact that casual opportunities still remained does not detract from the need to reduce the full-time permanent workforce”*



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# Privacy laws in a nutshell

- Privacy Act 1988 (Commonwealth)
- State and Territory public sector privacy laws (eg the Vic Privacy and Data Protection Act which applies to the public sector including bodies established for a public purpose under an Act)
- State and Territory health privacy laws with private sector coverage
- Public sector privacy laws are relevant to grant recipients and private sector contractors to the public sector



# Privacy laws – collection

- Don't collect personal unless reasonably necessary for, or directly related to, one or more of your functions/activities
- Only collect by lawful and fair means, and not in an unreasonably intrusive way
- Take reasonable steps to make the individual aware of certain matters (including the your identity, individual's access to rights, how to complain about privacy, the purposes for collection, etc) at or before the time or, if that is not practicable, as soon as practicable after, you collect the personal information from the individual
- Don't collect sensitive information (like health information) without consent (exemptions apply)



# Privacy laws – other

- Restrictions on your use disclosure of personal information
- Restrictions on the adoption, use or disclosure of government-related identifiers
- Obligations about data quality
- Security of personal information
- Obligations to give access to personal information
- Obligations to correct personal information on request
- Obligations about transfer of personal information to someone else overseas



# Key Privacy & Data Issues Post-COVID-19

- Striking the right balance: implementing COVID-19 health and safety measures while complying with the privacy laws with your clients and with your workforce
- Alert but not alarmed: managing data and cyber risk when delivering services remotely or managing a remote workforce



# Striking the right balance: public health v privacy

- Can you collect information from employees or visitors in relation to COVID-19?
- Can you tell staff that a colleague or visitor has or may have contracted COVID-19?
- Managing privacy implications for your clients when your employees work from home



# Striking the right balance: the COVIDSafe App

**JUST BECAUSE THEY DON'T DOWNLOAD THE APP, OR HAVE IT OPERATING, OR UPLOAD DATA TO THE NATIONAL DATA STORE:**

- you cannot take adverse action against an employee
- you cannot refuse to enter into, or continue a contract with, a person (including an employment contract)
- you cannot bar a person from entering public premises or premises they have a right to enter



# Delivering your services remotely

- Determine appropriateness
- Management of the physical space that is used
- Guidance on choosing your technology - Teams, Skype, Zoom (??), other
- Consent to recording (if done)
- Reliance on guidance provided by professional associations, peak bodies



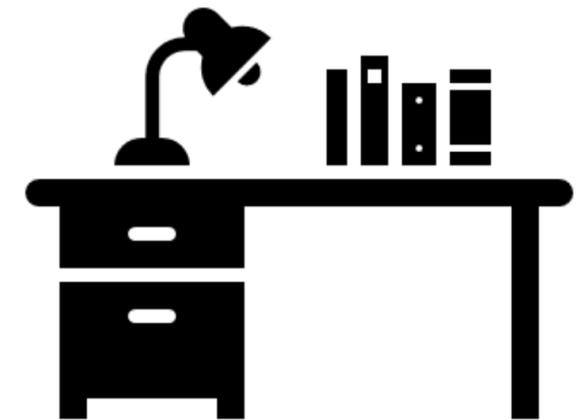
# Managing your employees working from home

## GOVERNANCE

- Education on physical security and handling of personal information and confidential data at home
- Education on ICT and cyber security practices like identifying phishing and spear phishing emails
- Policy covering information security when working offsite

## ICT security

- Access security
- Data breach guidelines



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# Questions & Answers

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