

BRIEFING NOTE: COVID-19

COMMONWEALTH AND NSW GOVERNMENT MEASURES, REGULATORY RESPONSE AND IMPLICATIONS FOR BUSINESSES

1 April 2020

Summary

The COVID-19 outbreak and government and legislative responses in Australia are rapidly evolving. New legislative amendments and government measures are being announced in each Australian jurisdiction on a daily basis and can cause wide-ranging commercial impacts on businesses and legal rights.

On 30 March 2020, the federal government announced additional financial measures, including a \$130 billion JobKeeper Payment package to help subsidise employee wages to incentivise employers to retain jobs (see here).

What legal measures are in place?

At both the federal and NSW state level, there are several key legislative amendments and governments measures in response to COVID-19, which include:

- measures directed towards business, employment and property;
- measures allowing temporary relief for financially distressed businesses and individuals;
- measures affecting litigation and dispute resolution;
- measures relating to police powers, freedom of movement and government powers;
- public health orders prohibiting and restricting certain gatherings, places and acts; and
- measures allowing the collection and sharing of information between certain government agencies.

What does it mean for my business?

The recent legal developments and government responses to COVID-19 may have unexpected and extensive commercial impacts on businesses and individuals, which include:

- managing risk and any challenge arising from COVID-19 which may impact on commercial operations, contractual agreements and dispute resolution;
- maintaining business continuity, such as cash flow and solvent trading;
- meeting employment obligations;
- understanding privacy obligations;
- disputes about the scope of increasingly severe government restrictions in response to COVID-19; and
- disputes about the validity of exercises of power by public officials that impact businesses.

While it is tempting, with new measures and restrictions being introduced on a daily basis, to do nothing, many of the above issues should not be left until the “dust settles” and it is too late to take appropriate steps, or you are forced to join the queue of other businesses and creditors dealing with the fallout of COVID-19.

What does it mean for employers?

A significant number of business are shifting their staff to working from home arrangements and/or considering other options including scaling back their workforce or staff hours.

The Commonwealth and NSW governments have passed or announced legislation and other measures to provide support and additional options to employers and employees, including a \$130 billion JobKeeper wage subsidy package designed to incentivise employers and employees to retain jobs, amendments to long service leave provisions, payroll and other employment-related tax provisions, as well as financial stimulus packages.

Employers' obligations, and employees' rights, under statute and general law, including in relation to redundancy, unfair dismissal, sham contracting, work health and safety, discrimination and bullying continue to apply and should be considered by employers when making decisions in respect of their workforce. The new measures give rise to novel questions, such as what implications the announced JobKeeper Payment package may have on workplace rights and obligations.

What does it mean for regulatory compliance?

Regulators such as ASIC and APRA have publicly announced that there may be temporary adjustments to certain regulatory requirements to accommodate businesses and companies managing the impacts of COVID-19. Regulators may consider granting relief, waivers or extension of time where warranted.

Important disclaimer: The circumstances of the COVID-19 pandemic and government and businesses responses to them are rapidly evolving on a daily basis. This document should not be treated as an exhaustive statement of legal issues arising out of COVID-19 or your legal rights and obligations, and should not be taken as legal or professional advice. If you are in doubt about your rights and obligations, we recommend you seek legal or professional advice.

Overview of current legislative and government measures, and regulatory responses

Below is a summary of key measures and amendments in force as at 1 April 2020.

1. Commonwealth government response

On 23 March 2020, the Commonwealth Parliament passed the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) which contain a number of amendments to implement the Federal Government's economic response to the spread of COVID-19.

Some of the key amendments in the legislative package include:

- temporary relief for financially distressed businesses and individuals, such as temporary relief for directors from personal liability for debts incurred while the company is trading insolvent;
- temporary flexibility under the *Corporations Act 2001* (Cth) (**Corporations Act**) allowing the Minister to grant exemptions from, or modify the operation of provisions of the Corporations Act to mitigate the economic impact of COVID-19;
- temporary increase to the minimum statutory threshold at which creditors can issue a statutory demand on a company, from \$2,000 to \$20,000, and companies will have 6 months to respond to statutory demands rather than 21 days;
- cash flow boost payments to eligible entities; and
- government guarantees to financial lending institutions on behalf of SMEs to assist with the economic impacts of COVID-19.

On 30 March 2020, the federal government launched the JobKeeper Payment package to support businesses and employees significantly impacted by COVID-19 by subsidising costs of employees' wages, to encourage employers and employees to retain jobs. Under the JobKeeper Payment package as announced, eligible businesses will be able to receive a subsidy of \$1,500 per fortnight per eligible employee for up to 6 months, where that business has:

- a turnover of less than \$1 billion that has been reduced by more than 30% relative to a comparable period a year ago (of at least a month); or
- a turnover of \$1 billion or more that has been reduced by more than 50% relative to a comparable period a year ago (of at least a month); and
- the business is not subject to the Major Bank Levy.

2. NSW government response

Amendments to legislation

The NSW Parliament has enacted several key legislative amendments in response to COVID-19. These include:

Measures directed towards business, employment and property

- allowing regulations to be made for alternative arrangements to sign and witness documents under the *Electronic Transactions Act 2000* (NSW) (including requirements for identity verification);
- allowing regulations to be made under the *Retail Leases Act 1994* (NSW) prohibiting or regulating recovery of possession, termination of retail leases or tenancies and exemptions in favour of tenants from the operation of legislation and agreements;
- permitting supermarkets to trade on Good Friday, Easter Sunday and before 1 pm on Anzac Day 2020;
- reducing the minimum amount of long service leave an employee may agree to receive in advance¹ and the minimum amount of notice that must be given to the employee, requiring them to take long service leave²;
- reducing the employer's obligation to payroll tax to 75% of the full amount in certain circumstances;³
- permitting the extension of working with children check clearances by the Children's Guardian;
- amending the requirements for a certificate of capacity under the *Workers Compensation Act 1987* (NSW) s 44B(3);
- Ministerial power to authorise developments under the *Environmental Planning and Assessment Act 1979* (NSW) without the need for approval under that Act.

Measures affecting litigation / dispute resolution

- allowing certain witness and other appearances in court hearings to occur by audio visual links if a court so directs under the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW);

¹ See *Long Service Leave Act 1955* (NSW) s 4(3A) (**Long Service Leave Act**).

² See *Long Service Leave Act* s 4(10).

³ *Payroll Tax Act 2007* (NSW) s 99A (inserted by NSW Amending Act section 1.2 of Schedule 1).

- extending the period of time for doing anything in the jurisdiction of the NSW Civil and Administrative Tribunal (**NCAT**), including applications for reviews or appeals from decisions, and the Tribunal's obligation to deliver written reasons;
- reducing the minimum number of NCAT members required to exercise a public health function to two members (from three);

Measures relating to Police, freedom of movement, and government powers

- introducing broader powers for NSW police in respect of public health orders;
- restrictions on visits to correctional premises and child detention centres; and
- amendment to the way in which legislation that has been passed by Parliament may be presented for royal assent, and in which the Executive Council may meet.

NSW public health orders – restrictions on gatherings and places of business

The NSW Minister for Health and Medical Research has made public health orders under section 7 of the *Public Health Act 2020* (NSW) which prohibit or restrict certain gatherings and places of business from being open to the public.

The most recent order, made by the Minister on 30 March 2020, the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (**Gathering and Movement Order**), updates and replaces previous restriction on gatherings and places of business.

Under the Gathering and Movement Order (which remains in force until the end of 29 June 2020 unless revoked sooner), the following restrictions apply:

Restrictions on movement

- A person must not leave their place of residence, without a reasonable excuse. A reasonable excuse includes:
 - obtaining food or other goods and services for personal household needs, or other household purposes (including for pets) and for vulnerable persons;
 - travelling for the purposes of work or education if it is not possible to do it from home;
 - travelling for the purposes of attending childcare (including picking up or dropping another person at childcare);
 - exercising;
 - obtaining medical care or supplies or health supplies or fulfilling carer's responsibilities;
 - attending a wedding or a funeral (subject to restrictions outlined below);
 - moving to a new place of residence (including business moving to new premises) or between different places of residence of the person or inspecting a potential new place of residence;
 - providing care or assistance (including personal care) to a vulnerable person or providing emergency assistance;
 - donating blood;

- undertaking any legal obligations;
- accessing public services (whether provided by Government, a private provider or a non-Government organisation), including social services, employment services, domestic violence services, mental health services, and services provided to victims (including as victims of crime);
- continuing existing arrangements for access to, and contact between, parents and children or siblings who do not live in the same household;
- for a person who is a priest, minister of religion or member of a religious order – going to their place of worship or providing pastoral care;
- avoiding injury or illness or to escape risk of harm; or
- for emergencies or compassionate reasons.

Prohibited gatherings

- A person must not participate in a gathering in a public place of more than 2 persons. However, this restriction does not apply to the following gatherings:
 - an “essential gathering” (see section below on “essential gatherings”);
 - a gathering for work purposes;
 - a gathering of members of the same household;
 - weddings with no more than 5 persons attending or funerals with no more than 10 persons attending (in either case including the person conducting the wedding or funeral service);
 - a gathering to move to a new place of residence (including a business moving to new premises);
 - a gathering to provide care or assistance to a vulnerable person;
 - a gathering to provide emergency assistance; or
 - a gathering to fulfil a legal obligation (including attending a court or tribunal, satisfying bail requirements or participating in legal proceedings).
- Having a reasonable excuse does not permit a person to participate in a gathering of more than 2 persons in a public place.

Essential gatherings

- “Essential gatherings” are exempt from gathering prohibitions (but not place of business prohibitions) and include certain gatherings at airports, mass transit stations and stops, hospital and medical facilities, emergency services, prisons etc, disability and aged care facilities, courts and tribunals, Parliament, supermarkets and food stores, retail stores, office buildings, farms, factories and mining/construction sites, schools, universities etc, hotels and other accommodation, and gatherings at an outdoor space where 2 or more persons are “transiting”.

Obligations of owners and occupiers of premises to prohibit gatherings

- Owners and occupiers of premises (ie landlords, lessors, tenants and lessees) must not allow:
 - 500 or more persons to enter or stay in an outdoor space at the same time;

- 100 or more persons to enter or stay in an indoor space at the same time; and
- persons to enter or stay on the premises in any place that cannot accommodate 4 square metres of space for each person (however, this does not apply to a person's place of residence or "essential gatherings" outlined above).

Prohibited places

- The following places of business cannot be opened to the public (subject to certain exemptions for "essential services"), or are subject to restrictions. These include:
 - pubs, registered clubs (holding a liquor licence) and food and drink premises and certain micro-breweries and small distilleries, except for consumption off-premises⁴ (or certain places relating to hotel or motel accommodation);
 - markets except for markets that predominantly sell food;
 - entertainment facilities (defined to mean a "theatre, cinema, music hall, concert hall, dance hall and the like") – but only from being open to the public, ie this does not prevent streaming of a live performance;
 - amusement centres;
 - casinos;
 - recreation facilities (indoor);
 - places of worship (except for weddings with no more than 5 persons attending or funerals with no more than 10 persons attending, in either case including the person conducting the wedding or funeral service);
 - spas, nail salons, beauty salons, waxing salons, tanning salons, tattoo parlours and massage parlours;
 - auction houses and betting agencies;
 - information and education facilities (including visitor information centres, exhibition centres, art galleries, museums, libraries and the like);
 - caravan parks and camping grounds (except for permanent residents and their visitors, and does not include persons staying in a caravan park or camping ground immediately before 26 March 2020 and continuing to stay under a booking made before 26 March 2020 and no extension of the booking was made after 26 March 2020);
 - community facilities;
 - sex services premises, and strip clubs;
 - public swimming pools;
 - property (other than retail shops) operated by the National Trust or Historic Houses Trust;
 - gaming lounges;

⁴ In the case of premises within shopping centres, consumption outside of the shopping centre, rather than simply "off-premises".

- any public outdoor playground equipment;
 - any public outdoor gym equipment; and
 - skate park.
- Hairdressers and barber shops were previously restricted to 30 minute sessions, but this restriction is was lifted on 27 March 2020.

Prohibited acts

- The Gathering and Movement Order also prohibits:
 - open inspections of real property; and
 - auctions in person.

Collection and sharing of information by government agencies and Ministers

- In addition, Ministers and certain government sector agencies (in NSW and other Australian jurisdictions) are authorised to collect and exchange information with each other if it considers necessary to protect the health and welfare of the public during the COVID-19 pandemic.

3. Commercial impact

The above legislative amendments and public health orders have wide-ranging potential effects on businesses, such as:

- whether certain businesses may continue to operate (at all) or under restrictions;
- the execution of contractual agreements and court documents;
- the ability of parties to terminate contracts;
- liability for insolvent trading;
- cash flow and meeting the demands of creditors;
- implications for debt collection and enforcing commercial contracts and agreements;
- changes to court and tribunal procedures which may affect dispute resolution processes and timing;
- employment and work health and safety obligations;
- property transactions; and
- privacy obligations.

4. Regulators' response

The Australian Securities and Investments Commission (**ASIC**) has publicly announced that, at least until 30 September 2020, ASIC will prioritise matters that involve:

- risk of significant consumer harm;
- serious breaches of law;
- risks to market integrity; and

- time-critical matters.

ASIC has indicated that it will suspend non time-critical activities, such as consultations, regulatory reports and reviews and on-site supervisory work.

ASIC may consider granting relief or waivers from regulatory requirements where warranted, including:

- requirements on listed companies associated with secondary capital raisings and audits;
- annual general meeting (**AGM**) requirements - ASIC has already indicated a “take no action” stance in relation to the timing of AGMs until 31 July 2020 and the conduct of AGMs by electronic means; and
- financial reporting requirements.

ASIC will maintain key business as usual functions, registry operations and services, receipt of whistleblower, breach and misconduct reports and general contact points for industry.