Lawyers McCullough Robertson

Fourth Edition

COVID-19: Recommendations and considerations for you and your business

Welcome

While Australia is hopefully over the worst of the COVID-19 pandemic, the lasting impacts of the outbreak on you and your business are still unknown.

In our fourth edition of our COVID-19 guide, we continue to bring you insight into the potential impacts of the virus on you and your business, and provide guidance on things to consider at the current time.

We are also pleased to be able to showcase our *In Practice | A McCullough Robertson podcast* that features some of our leading lawyers as they discuss implications of the pandemic on your legal rights and responsibilities.

Please feel free to reach out to any of the listed key contacts (or your regular McCullough Robertson contact) should you have any questions or concerns. We are here to support you in any way we can.

Please note that the information contained in this guide is correct as of 13 May 2020.

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Tax and Employment Relations

JobKeeper summary

The Federal Government has introduced the JobKeeper scheme to assist employers to keep their employees on during the COVID-19 outbreak despite its economic consequences.

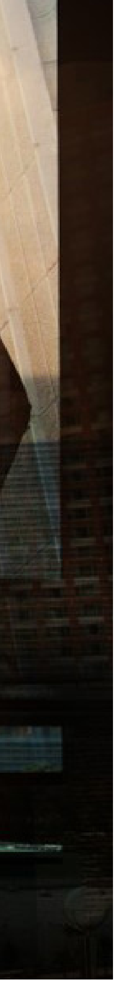
In short, the scheme entitles eligible entities who have suffered a specified substantial decline in turnover to a payment of $1,500 per fortnight (before tax) for salary or wages paid to eligible employees. The wage subsidy is available to eligible entities for 13 fortnights, from the fortnight commencing 30 March 2020 to the fortnight ending 27 September 2020, with applications to participate in the scheme open from 20 April 2020.

The legislative scheme for the JobKeeper payment is unusual in that the main act only sets out a skeleton framework, and then provides for the Treasurer to make rules for the operation of the scheme to be administered by the ATO. In this circumstance, there are a number of provisions, including the eligibility rules, which are yet to be clarified.

Please note that the information below is based on the rules, statements and fact sheets that Treasury and the Commissioner of Taxation have already released.

It is certain that these rules will be updated from time to time by legislative instrument (or changes), which will likely materially affect some of the comments we have made below. This is an unfortunate, but necessary consequence of the speed with which the Federal Government is attending to this unprecedented stimulus package.

We will keep updating this information on our website as Treasury and the Commissioner release more details.



AVAILABILITY OF JOBKEEPER PAYMENT

Since 30 March 2020, employers have been able to register their interest to participate in the scheme and subscribe to receive JobKeeper payment updates.

To receive the JobKeeper payment, an entity must:

1. be an eligible entity, which includes meeting the requisite decline in projected or actual turnover;
2. have eligible employees, with respect to whom the wage subsidy will be paid; and
3. follow the correct application and reporting processes.

We have summarised these points below.

ELIGIBLE ENTITY

Eligibility requirements	Description
Type of entity	Eligible entities include those that: a. carry on a business in Australia, or a not-for-profit body that pursues its objectives principally in Australia; b. are either companies, partnerships, trusts or sole traders (as detailed below); and c. had at least one eligible employee or eligible business participant on 1 March 2020 (as detailed below).
Ineligible entities	Entities that will not be eligible for the JobKeeper payments include: a. banks (or member of a consolidated group including a bank) that are subject to the major bank levy; b. an Australian government agency, local government body (including wholly owned entities) or sovereign entity (e.g. foreign government owned entities); and c. companies that are in liquidation, or individuals who have entered bankruptcy.
Decline in turnover	As at the date of enrolment in the scheme, an entity must have had, or be likely to have, a decline in GST turnover as follows: a. entities with an aggregated annual turnover of $1 billion or less – 30% fall in GST turnover; b. entities with an aggregated turnover of more than $1 billion – 50% fall in GST turnover; and c. ACNC registered charities (other than universities and schools) – 15% fall in GST turnover. in comparison to the same month or quarterly period 12 months' prior (as detailed below).

Eligibility requirements	Description
Turnover test	**Comparison period** To determine if there has been a sufficient fall in turnover, an entity must compare their actual (if available) or projected turnover for: a. a calendar month from March 2020 to September 2020 (inclusive); or b. either the June 2020 or September 2020 quarter against the actual GST turnover of the same month or quarter in 2019. For example, an entity can compare: a. projected GST turnover for April 2020 with the actual GST turnover for April 2019; or b. projected GST turnover for the April - June quarter 2020 with the actual GST turnover for the April - June quarter 2019. In circumstances where there is not a reliable comparison period, the Commissioner may determine an alternative decline in turnover test. **Projected Turnover** The turnover test requires determination of an entity's projected or actual turnover for a period, based on the formula set out in the *A New Tax System (Goods and Services) Act 1999* (Cth) (**GST Act**), with slight modifications, including to account for the JobKeeper fortnight period (as opposed to a 12 month period). The amended turnover test provides for the calculation of: *Sum of the values of all the supplies that you have made, or are likely to make, during that JobKeeper period (i.e. fortnight), other than:* *i. supplies that are input taxed; or* *ii. supplies that are not for consideration (and are not taxable supplies under section 72-5 GST Act); or* *iii. supplies that are not made in connection with an enterprise that you carry on.* The ATO has provided a brief description of how to calculate turnover, which can be found here. In short, the ATO has advised that projected turnover should be calculated with reference to invoices issued or anticipated, on a cash or accruals basis (using either the cash or accrual basis as in previous business activity statements). As detailed below, it is critical that entities reasonably calculate any projected turnover and that all records, associated documentation and calculations are kept for at least five years after the lodgment of the 2021 income tax return. Employers should seek advice when making these calculations.
Group entities	If an entity is part of a group, the group's aggregated turnover will be considered to determine whether each entity within the group needs to show a decline in revenue of 30% or 50%, but only for this purpose. For example, if an entity is part of a group that has a total aggregated turnover of more than $1 billion, each individual employer entity will have to show a drop in revenue of more than 50% (as opposed to 30%), despite the individual entity achieving aggregated turnover less than $1 billion. This may result in some entities within the group being eligible while some will not be eligible.

Eligibility requirements	Description
Service entities	A shortcoming of the JobKeeper legislation and rules is that they do not address the common structure where a service entity is responsible for paying employees from management fees paid by a practice entity. It is expected that a service entity that employs staff will be required to justify that a management fee has been reduced as a direct result of a substantial reduction in turnover of the practice entity. Substantial records should be kept documenting the commercial reasons why management fees have been reduced, to ensure that it does not trigger the JobKeeper anti-avoidance provisions. Service entities should seek advice before applying for the JobKeeper payment.

ELIGIBLE EMPLOYEES

Eligibility requirements	Description
Eligible employees	The JobKeeper payment is available for employees who satisfy the following criteria: a. employed as at 1 March 2020; b. over the age of 16 years as at 1 March 2020; c. Australian citizen, holder of a permanent visa, holder of a protected special category visa and residue usual place of residence was in Australia or a New Zealand citizen holding a Special Category (subclass 444) visa and resident of Australia for tax purposes; d. employed as: *i. permanent full-time,* *ii. permanent part-time, or* *iii. casual on a regular and systematic basis for at least 12 months before 1 March 2020 (unless employed full-time or part-time elsewhere); and* e. not ineligible (detailed below).
Ineligible employees	Ineligible employees include those who: a. have claimed the JobKeeper payment from another employer; or b. are in receipt of workers compensation, paid government parental, or dad and partner pay.
Employees terminated after 1 March 2020	Entities can re-engage individuals who were eligible employees of the entity on 1 March 2020 before being terminated, and the JobKeeper payment will be available for them.
Eligible business participants	The JobKeeper payment also extends to non-employees who are actively engaged in a business – i.e. sole traders, a partner in a partnership, an adult beneficiary of a trust or a shareholder or director of a company. However, that person cannot be an employee of any other business (unless casual) and must meet the relevant criteria that also relates to employees – i.e. must be 16 years of age, Australian resident or holds special category visa, etc. Critically, the JobKeeper payment is only available to one 'eligible business participant' within the entity. This means, for example, that within a partnership, only one Partner can claim the payment, or if a company has multiple directors, only one director can claim the payment.

APPLICATION, MANAGEMENT AND REPORTING

<table>
<tr><th>Steps</th><th>Action</th></tr>
<tr><td>Application and eligibility</td><td>To receive all 13 JobKeeper payments, an entity must enrol in the scheme by 26 April 2020 and establish the requisite decline in turnover (detailed above) on one of the following three periods:
a. actual turnover in March 2020 vs. actual turnover in March 2019;
b. projected turnover in April 2020 vs. actual turnover in April 2020;
c. projected turnover in June quarter 2020 vs actual turnover in June quarter; or
d. under the alternative turnover test through liaising with the ATO.
If an entity does not or cannot apply from the start of the scheme, it can apply in any subsequent fortnight. The employer must have applied to participate in the scheme by the end of the relevant fortnight, where payments are not retrospective if an entity could have applied earlier.
Once an entity has met the eligibility criteria and enrolled in the JobKeeper scheme, it will be automatically enrolled from that point forward until the end of the scheme, with monthly reporting requirements.
As part of the application process, entities have to:
a. confirm that their turnover has fallen by the relevant percentage;
b. declare the month from which their business experienced the fall in turnover (or month it expects to) (even if the business is projecting turnover on a quarterly basis, the entity only has to declare that there was/is expected to be a decline in turnover for a month);
c. declare the number of employees it expects will be eligible for JobKeeper each fortnight;
d. advise whether it intends to register any eligible business participants (and if so, details of that business participant); and
e. provide its bank details.
The entity or its registered tax or BAS agent will then identify the employees the entity will claim the JobKeeper for, and maintain those details each month.
If reporting through STP, detailed instructions are provided on the ATO website, here.</td></tr>
<tr><td>Notification to eligible employees</td><td>An employer must notify nominated employees within 7 days of notifying the Commissioner.
The JobKeeper Employee Nomination Notice (included here) will have to be completed by employees and returned to employers. Employers are not required to provide this form to the ATO however, the form must be kept with the employees records for five years (per standard record keeping requirements).</td></tr>
</table>

Steps	Action
Payment of employees	Employers must continue to pay their employees in line with the existing pay cycle, through their existing payroll solution. If an employer has not kept up with their normal pay cycle for April, wages must be paid by 30 April to be eligible to receive the JobKeeper payment. If an employee's usual wage and entitlements is less than $1,500 per fortnight, the employer must effectively top up their wage to meet the minimum $1,500 (before tax) threshold. The $1,500 payment may be made by: a. salary, wages, commission, bonus or allowances although, it is not compulsory to make a contribution to superannuation with respect to any *top up* amount (rules will likely be introduced to confirm and expand on this); b. pay as you go withholding; c. contributions made by the employer to a superannuation fund or a Retirement Savings Account for the benefit of the individual (if made under a salary sacrifice arrangement); or d. other amounts that, in the fortnight, are applied or dealt with in any way if the individual agrees. If an employer is paying an employee in a way other than standard wages, we recommend they seek legal advice.
Commissioner's payment	The Commissioner of Taxation will pay the $1,500 per employee per fortnight in arrears – he will make a payment one months' worth of the JobKeeper 14 days after the end of the calendar month. The JobKeeper payment is **assessable income** in the hands of the employer entity. The fact that the entity has applied for the JobKeeper payment and the Commissioner has made a payment, does not mean that the Commissioner is satisfied that the entity is eligible to receive the payment. The Commissioner may subsequently review eligibility and if he determines that an overpayment has been made, the entity is required to repay the overpayment (see below) unless the Commissioner exercises a discretion and determines this is not required.

Steps	Action
Ongoing reporting requirements	An entity who has qualified must notify the Commissioner of their current GST turnover and projected GST turnover *monthly* (being projected turnover for the following month) within 7 days of the end of each calendar month if they are entitled to the JobKeeper payment for a fortnight that ends in that month. This is not a retest of eligibility, but rather an indication of how the business is progressing under the JobKeeper scheme. Critically, an entity becomes eligible for the JobKeeper payment on the basis of the projected turnover test. The Explanatory Statement to the Rules expressly provides that an entity will be eligible based on the projected turnover test. Information regarding the actual turnover provided as part of reporting requirements, will not affect an entity's eligibility. It is simply a means of verifying whether the projection given as part of the decline in turnover test was accurate, and further, to ensure that there is good information to assess the economic impact of the Coronavirus on a monthly basis across Australia. However, it would be expected that if the projection given was completely unreasonable, the Commissioner would be able to request repayment.
Directions to employees	Under amendments made to fair work legislation through the JobKeeper scheme, employers can give three types of directions to eligible employees: a. stand down direction not to work on a day or days, or reduced number of hours, than the employee would normally work; b. direction to perform any duties that are within the employee's skill and competency; and c. direction to perform duties at an alternate location. To be effective, the employer must first consult with the employee about the proposed direction, and give at least three days' notice before the direction takes effect. The direction must be reasonable and safe, and in relation to stand down direction only, the employee cannot be usefully employed for the period of the stand down. Alternatively, an employer can seek agreement of an employee to either change their days or times of work, or require the employee to take annual leave at half pay (as long as the employee's resulting balance is not fewer than two weeks). An employee cannot unreasonably refuse this variation to their employment. Any JobKeeper directions issued, or agreements reached, will remain in place until either revoked by the employer, replaced by a new JobKeeper direction, or 28 September 2020, whichever occurs first.
Record keeping	An entity must keep records that enable the entity to substantiate any information provided to the Commissioner in relation to the payment (i.e. how fall in turnover was calculated) for a period of five years. The Commissioner may required those records to be produced. Failure to keep adequate records may result in criminal charges.

FREQUENTLY ASKED QUESTIONS

Q: What if my projected turnover does not align with my actual turnover?

A: As detailed above, an entity can become eligible and start to receive the JobKeeper payment based on a projection of their GST turnover for a period, and will subsequently be required to report their actual turnover.

In the event that the projected turnover does not align with the actual turnover (whether by a close margin or significant margin), this will not affect the entity's eligibility to be in the scheme provided that the initial projection was correctly calculated and is reasonable. It is therefore critical to maintain detailed and accurate records setting out how the projected turnover was calculated and any associated documentation. To date, the ATO has only briefly outlined relevant consideration to calculate projected turnover (see here), which makes detailed record keeping which can establish the reasonableness of a calculation even more important.

Where possible, we recommend that the assistance of a third party be obtained to calculate projected turnover.

Q: What if the ATO finds that I was not eligible or overpaid?

A: The JobKeeper legislation and rules, and the taxation administration legislation set out consequences for the wrongful payment or overpayment of JobKeeper.

As a starting point, if the Commissioner determines that an entity has been wrongfully paid or an overpayment has been made, the entity will be required to repay the amount – this will be due to the ATO on the date that the payment was first made. The taxation general interest charge (**GIC**) will compound daily on the overpaid/wrongfully paid amount until it is repaid to the ATO.

In addition, any overpayment will be treated as a *tax-related liability* under the taxation administration legislation, which effectively allows the ATO to use its extensive debt recovery powers to recoup the amount, including (for example) issuing a garnishee notice to recoup the amount from a third party.

Finally, the JobKeeper legislation explicitly includes anti-avoidance provisions addressing the event that an entity enters into a scheme for the dominant purpose of claiming the JobKeeper payment (or increasing the available payment). In this circumstance, the Commissioner may determine that the entity was never entitled to the payment such that the whole amount must be repaid, and may establish that the entity is liable to either civil or criminal penalties.

The civil and criminal penalties which might be applied by with respect to the JobKeeper payment were set out by the Treasury in its JobKeeper Payment – Protecting Integrity Fact Sheet, as shown below.

Key Contact David Hughes | Partner | Tax | T +61 7 3233 8695 | E dhughes@mccullough.com.au

Provision	Description	Penalty
Section 284-75 in Schedule 1 to the *Taxation Administration Act 1953*	Administrative penalties for false and misleading statements	A financial penalty of up to 75 per cent of the amount of any overpayment
Section 8C of the *Taxation Administration Act 1953*	Criminal offence for a failure tocomply with requirements under the taxation law	Imprisonment for up to 12 months and a fine of up to 50 penalty units (250 penalty units for corporate entities)
Sections 8K and 8N of the *Taxation Administration Act 1953*	Criminal offences for making false or misleading statements to taxation officers	Imprisonment for up to 12 months and a fine of up to 50 penalty units (250 penalty units for corporate entities)
Section 135.2 of the Criminal Code	Obtaining financial advantage	Imprisonment for up to 12 months
Section 134.2 of the Criminal Code	Obtaining financial advantage by deception	Imprisonment for up to 10 years
Section 135.4 of the Criminal Code	Conspiracy to defraud	Imprisonment for up to 10 years

Corporate

Sign here... or insert signature here

Temporary changes for electronic execution of documents, and further updates for virtual and hybrid meetings.

THE HIGH LEVEL

What has changed? Documents can temporarily be signed under the Corporations Act electronically.

Who does it apply to? Companies only.

When does it apply? Now, until 5 November 2020.

THE DETAIL

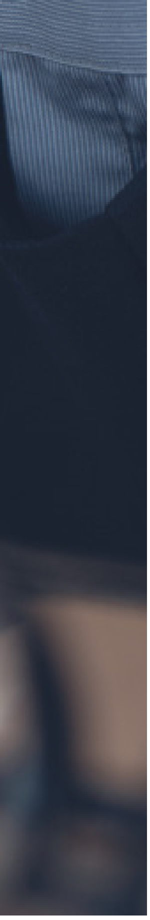
On Tuesday, 5 May 2020, the Federal Treasurer issued an important determination which changes the way companies can hold meetings and execute documents during the COVID-19 pandemic. The *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020* (**Determination**) modifies requirements for physical attendance at meetings and amends section 127 of the *Corporations Act 2001* (Cth) (**Corporations Act**) by allowing companies to execute documents electronically (that is, by applying the relevant officeholders' electronic signatures to the document) in particular circumstances.

These are welcome changes as the social distancing requirements brought about by COVID-19 have made it challenging to hold meetings that require physical attendance or to obtain wet-ink signatures on physical documents.

CHANGES TO EXECUTING DOCUMENTS

Electronic execution under s.127(1)

The Determination modifies section 127 of the Corporations Act to make it clear that companies may execute documents electronically. The *Electronic Transactions Act 1999* (Cth) (**ETA**) does not apply to the



Corporations Act and therefore there has been serious doubt whether electronic execution of a document satisfies the requirements of section 127(1) of the Corporations Act.

In order to rely on execution in accordance with the Determination, you will need to be satisfied from the electronic communication method that:

- the person signing can be reliably identified;
- it indicates that person's intention about the contents of the document (i.e. the intention to be bound by the document); and
- it is as reliable as appropriate for the purpose for which the company is signing.

Unfortunately, what constitutes 'as reliable as appropriate' has not been specified, although this is a concept drawn from the ETA, which facilitates the use of electronic transactions and communications in business dealings. The concept has not been tested extensively in the Courts so some care needs to be taken to ensure the first two limbs have clearly been met.

Provided a party is satisfied with the above, they can rely on the statutory assumption that the document has been validly executed (under section 129 of the Corporations Act).

Split execution

The Determination also provides for company officeholders to execute different counterparts of the same document. This change means two directors signing on behalf of one company do not need to sign the same physical document. Instead, a document could be signed and scanned by the first signatory and then printed and signed by the second signatory, or separate electronic signatures could be applied to fully electronic versions of the document.

Prior to the Determination, the prevailing view had been that such method of execution would not satisfy the requirements of section 127(1). Importantly, the counterparts must contain the entire contents of the document in question, not just the execution pages.

Do these changes apply to deeds?

There remains some uncertainty as to whether the Determination modifies the common law position for deeds (requiring a deed to be on paper), so that they may also be signed electronically. While the Determination makes no explicit reference to deeds, the Explanatory Statement states that section 127 of the Corporations Act is modified (for companies, directors, company secretaries and other persons that have dealings with companies) 'to allow use of an electronic signature to meet requirements for a signature' with no express limitation as to the type of document to which this modified rule applies.

In any case, the modified rules in the Determination have not been tested in practice. Therefore, the electronic execution of deeds should be approached with great caution. Where possible, it is recommended that the current course of practice for dealing with deeds (i.e. wet-ink signatures) should remain. If the pressures presented by the COVID-19 pandemic make it necessary for a deed to be electronically executed, extra care should be taken to ensure that all the formalities of the Determination are satisfied. A typed or pasted image of a signature to a document and subsequently printing the whole document may also be sufficient to satisfy the paper rule. We note that the *Electronic Transactions Act 2000* (NSW) already allows for the electronic execution of deeds governed by New South Wales law, but that other states are yet to follow NSW's lead, so the Corporations Act and common law position remains relevant for all other states and territories.

The importance and context of the deed being executed should also be taken into consideration when deciding whether to rely on the Determination to execute electronically. Documents such as guarantees present particular risks which should be taken into account when considering such issues.

It is important to note that the Determination only applies to companies registered under the Corporations Act. As such, for example, the changes do not apply to individuals, foreign companies (not registered under the Corporations Act), partnerships, statutory corporations and governments signing documents. The ETA, as well as various state-based legislation, should be consulted in relation to the guidelines for execution by any of these entities.

What does this mean?

The Explanatory Statement to the Determination refers to a wide variety of means by which officers of a company might sign a document electronically in accordance with the Determination. These include:

- pasting a copy of a signature into a document;
- signing a PDF on a tablet, smartphone or laptop using a stylus or finger;
- cloud-based signature platforms like DocuSign.

This means that the majority of contracts signed during the period covered by the Determination will obtain the benefits of the assumptions set out in section 129(5). The Determination is expressed to be repealed 6 months from the date after it was made – so is currently set to expire on 5 November 2020.

The COVID-19 pandemic has changed many aspects of how we go about our every day lives. It would be beneficial for all companies if the changes made by the Determination extended beyond November 2020 and were also extended to expressly provide for the electronic execution of deeds. These changes will play a small role in helping the law to catch up with the practicalities of modern business.

CHANGES TO MEETING REQUIREMENTS

Under the Determination, companies are now permitted to hold meetings entirely through the use of technology, doing away with the requirement to hold face-to-face meetings. While ASIC has already advised that, due to the COVID-19 pandemic, it would not take action against public companies with a 31 December 2019 financial year end from holding an AGM conducted entirely online, (which you can read about here), the Determination provides greater certainty to all other companies seeking to hold shareholder meetings during the coming months.

An entity seeking to hold a meeting electronically must, when giving notice of the meeting to participants, give notice of information that outlines how people who are entitled to attend and participate at the meeting can do so.

The Determination also enables the following to be facilitated electronically:

- *voting* – votes must be taken on a poll and participants should have the option to cast a vote in real time during the meeting (in the same way that they would if they attended in person), as well as prior to the meeting (e.g. by proxy)
- *notices* – instead of notices being sent in hardcopy (by post), a notice can be sent using technology, such as via email (where a shareholder has provided their email address)
- *quorum* – all shareholders participating in a meeting virtually will be taken to be present at the meeting. This may have inadvertent consequences for persons that lodge a proxy and subsequently attend (or listen in to) the meeting virtually (as attendance at a meeting would typically act to revoke a proxy appointment)
- *asking questions* – shareholders must still be able to put questions to the board and the company should ensure its virtual meeting enables appropriate Q&A processes
- *appointing proxies* – a proxy may be appointed electronically

If a company has already given notice of an AGM, or other shareholder meeting, before the date of the Determination, that entity must issue another notice at least 7 days before the applicable meeting with any new information that informs the participant about how they can attend the meeting electronically.

Key Contact Peter Williams | Partner | Corporate | T +61 7 3233 8825 | E pwilliams@mccullough.com.au

Corporate

COVID-19 FIRB Response: Foreign Investment amending regulations and further guidance

It has been a big few weeks in the foreign investment space, particularly in light of the drastic changes to the Foreign Investment Review Board (**FIRB**) regime announced by the Treasurer on 29 March 2020. The changes imposed a $0 monetary screening threshold on all inbound foreign investment and have increased the processing times for foreign investment applications.

The *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* (**Amending Regulations**) provide that the changes will take effect from the announcement time, being 10.30pm Sunday, 29 March 2020.

Further, on 24 April, FIRB released Guidance Note 53 to provide some much needed clarity on the review process in these uncertain times. We have summarised some of the key elements of the guidance below.

THE AMENDING REGULATIONS

The Amending Regulations bring about the announced changes by repealing the entirety of Part 4 of the *Foreign Acquisitions and Takeovers Regulations 2015* (**FATR**). Part 4 of the FATR provided the applicable threshold for each type of investment regulated by the Foreign Acquisitions and Takeovers Act 1975 (**FATA**). Now, as a result of the Amending Regulations, Part 4 provides a $0 threshold across the board.

PROCESSING FACTORS

Application timing

As announced by the Treasurer on 29 March 2020, the standard processing time for applications will be increased from 30 days to six months. FIRB will use its current powers to extend the assessment timetable rather than amending the FATR. In the new guidance note, FIRB has provided reassurance that it will prioritise urgent applications for investments that protect and support Australian businesses and jobs. Specifically, the Treasury and the ATO will employ additional staff to triage cases using a 'risk-based approach'.

FIRB has again stressed the importance of early applications – the earlier an application is submitted (and the correct fee paid), the earlier the screening process will commence and the earlier the applicant may receive a no-objection notification.

Fees

Fees are payable for all investment applications that are required to be screened by FIRB, except where the fee payable is prescribed as nil. However, the Treasurer has confirmed that it may be open to considering a refund of fees where the impact of the pandemic has resulted in delays to, or deferrals of, investment decisions that are currently the subject of a FIRB application where the applicant wishes to withdraw the application.

FIRB has also advised that a fee concession may be granted to non-government foreign investors in respect of the acquisition of certain developed commercial land. Generally, the FIRB application fee is $26,200 for a non-government foreign investor who proposes to acquire an interest in commercial land for consideration between $10 million and $1 billion. Prior to the recent COVID-19 changes, this fee only applied to acquisitions of non-sensitive developed commercial land in excess of $275 million because acquisitions below this threshold did not require FIRB approval. Foreign government investors (**FGIs**) have always required FIRB approval for all land acquisitions, regardless of value, but there is a specific fee concession for FGIs for acquisitions of developed commercial land below $55 million. As this fee concession does not technically apply to non-government foreign investors (who now also require FIRB approval regardless of value) there is a disparity in the fees payable, with FGIs getting favourable treatment.

To rectify this disparity in fees, FIRB has stated it will consider and process fee waivers on a per-application basis with a view to putting private foreign investors in line with the fee concessions afforded to FGIs.

Importantly, in all other cases, fee concessions will generally not be granted.

Conditions

When foreign investment applications are assessed against the national interest test, conditions on the investment may be imposed to address any risks raised by the Treasurer. In Guidance Note 53, FIRB confirmed that any conditions imposed on investments that are now required to be screened under the temporary changes to the rules will remain for as long as the Treasurer considers necessary to protect Australia's national interest. In other words, conditions imposed on an investment during these uncertain times could potentially remain in place even after the expiry of the temporary changes to the FATR.

AGREEMENTS AND OPTIONS EXISTING PRIOR TO ANNOUNCEMENT

Pre-existing agreements

We noted in a previous article (which you can find here) that the changes to the monetary screening threshold would not apply to actions taken under agreements that were entered into before 29 March 2020.

FIRB has now clarified that it considers an agreement to have been entered into before the announcement date if negotiations in relation to the agreement were completed and the parties reached a mutual understanding of all essential elements of their bargain.

Importantly, this means that an 'agreement' does not include preliminary negotiations falling short of such a mutual understanding.

Pre-existing options

In regards to the exercise of options that exist within agreements entered into prior to the announcement date, FIRB has confirmed that such an action would not itself give rise to a new significant and/or notifiable action. Importantly, and as is usually the case, the FATA considers the granting of an option itself the acquisition of an interest, not just the exercise of that option.

STUDENT ACCOMMODATION, RETIREMENT VILLAGES AND SOLAR FARMS

Prior to the amendments, the FATR expressly excluded premises that provide residential care, retirement villages or student accommodation from the strict rules applicable to 'residential land'. Being excluded from the residential land provisions generally meant that these types of properties were classed as developed commercial land, therefore obtaining the higher monetary threshold mentioned above. Despite developed commercial land now also being subject to the $0 threshold, the Amending Regulations removed this section from the FATR entirely.

A second similar amendment has been the removal of the regulations which provide a concession for operating solar and wind farms. The FATR previously provided that where land had an operating wind or solar farm on it, a purchaser could disregard the fact the land may also have been classified as agricultural land. Again, this regulation gave access to the higher threshold of $275 million rather than the lower $15 million cumulative threshold that would apply to agricultural land.

It is unclear why the Government has made these amendments given the fact the overarching impact of the Amending Regulations is reducing all thresholds to $0. The supporting material released by the Government states these sections were removed because they had no relevance given the removal of Part 4 as a whole. However this approach has not been taken with similar, now irrelevant, sections in the regulations which leads to questions as to why these provisions have been specifically removed. It is possible that they may not be reinstated when circumstances return to normal.

NOTIFICATIONS AND EXEMPTIONS EXISTING PRIOR TO ANNOUNCEMENT

Pre-existing no-objection notifications

If a foreign investor was granted a no-objection notification from the Treasurer prior to the announcement date, they do not need to apply to FIRB again before taking the proposed action (or executing the agreement in respect of that action). This is the case so long as the action (or execution) occurs within the timeframe prescribed by the Treasurer in its no-objection notification.

Pre-existing exemption certificates

FIRB has confirmed that the temporary changes do not affect exemption certificates granted prior to the announcement date. These certificates remain valid, provided the conditions (if any) contained in them continue to be met.

TREATMENT OF LEASES

Acquisitions of leasehold interests in Australian land by foreign investors require FIRB approval where the term of the lease (including renewals) is reasonably likely to be more than 5 years. Any foreign investor entering into a lease agreement after 29 March 2020 (where the lease term is reasonably likely to be over 5 years) is now subject to a $0 monetary screening threshold.

Accordingly, a large number of routine lease agreements will now require FIRB approval. As noted above, FIRB has confirmed that the Treasury and the ATO will work on triaging and applying its risk-based approach to ensure non-sensitive lease applications can be efficiently renegotiated to enable businesses to remain open.

Lease terms and rent amounts

Where an agreement is subject to FIRB approval, FIRB requires parties to notify it of any material variation to the agreement (which, of course, attracts a fee). The new guidance note, however, expressly states that where an adjustment is made to lower, defer, or otherwise delay rental payments under an existing lease, made in relation to the COVID-19, and is temporary in nature, it would not of itself be considered a 'material' variation and further notification is not required.

This however is not necessarily the case where the lease is extended as part of the lease parties' response to COVID-19 impacts. A change to the term of a lease is a material variation to the lease agreement. If the lease with the amended term exceeds five years, foreign lessees will likely need to seek FIRB approval.

Agreements for lease

In Guidance Note 53, FIRB sets out a view that an agreement for lease (**AFL**) is different from a lease itself. FIRB considers leases and AFLs as two separate actions under the FATA. This is a concerning approach that is inconsistent with agreements to acquire any other interest in land, and it is also inconsistent with FIRB's approach to lease options (which it confirms in Guidance Note 53). We consider that the correct interpretation of the legislation means that a lease entered into pursuant to an AFL, which was agreed before the announcement date, will not be subject to the new lower thresholds. However, this is contrary to FIRB's published view and until or unless FIRB updates its guidance, specific advice should be taken on this issue.

ESTABLISHING NEW ENTITIES

Historically foreign investors have not required FIRB approval for the incorporation of Australian subsidiaries. However with the lowering of the monetary thresholds to nil, there were concerns that the incorporation of a subsidiary may be captured. The new guidance note has confirmed that the incorporation of a new subsidiary company by a foreign investor does not require FIRB approval. However, this does not (at the moment at least) extend to the establishment of new subsidiary trusts.

In respect of starting new Australian businesses, only FGIs are required to obtain FIRB approval. This rule remains unaffected by the new temporary rules.

KEY RECOMMENDATIONS AND OBSERVATIONS

The Amending Regulations largely bring into effect the COVID-19 induced policy changes as announced by the Morrison Government. How long these temporary heightened restrictions will be in effect for, and whether the Government takes this opportunity to bring about broader changes to the foreign investment regime in areas such as retirement villages, student accommodation and renewable energy developments are now the key questions.

In light of FIRB's new guidance, there are a few factors that are key for foreign investors to successfully navigate the current foreign investment landscape in light of COVID-19.

Foreign investors should seek to engage with FIRB early – early applications are key in facilitating a potential earlier approval, and ensuring that the correct fee is calculated and paid to facilitate an effective FIRB application.

It is also important to remember that, in some cases, one transaction may yield more than one notifiable action which requires the FIRB application to account for more than one event.

Key Contact Duncan Bedford | Partner | Corporate and Tax | T +61 7 3233 8706 | E dbedford@mccullough.com.au

Employment Relations and Safety

Managing liability in planning a resumption of business operations

On Friday, 8 May 2020, the Commonwealth Government announced a three-step plan for the easing of COVID-19 related restrictions. Each of these stages will, subject to the ongoing application of social distancing restrictions and State and Territory requirements, permit businesses in different industries to resume operations, with some of the first businesses to open being those in the hospitality and retail sectors.

WHAT WILL THIS MEAN FOR EMPLOYERS' WORKPLACE HEALTH AND SAFETY (WHS) OBLIGATIONS?

Businesses and their officers have duties under work health and safety law that extend to eliminating or otherwise minimising the risk of COVID-19 in the workplace, so far as reasonably practicable.

The scope of these duties and how they are likely to be viewed by safety regulators such as SafeWork NSW, Workplace Health and Safety QLD and Comcare is determined by, among other things, what is known about the risks of COVID-19 and how to manage them in a particular businesses industry. The guidance provided by various Governments is relevant in this regard.

THE IMPORTANCE OF COVID-19 SPECIFIC RISK ASSESSMENTS

In *Rowson v Department of Justice & Ors* [2020] VSC 236, a recent case concerning the risk of COVID-19 to inmates and workers at a prison, the Court found that, the evidence of a lack of appropriate hygiene in the prison together with the absence of a risk assessment being conducted in relation to the risk of COVID-19 to workers and inmates, meant there was a *prima facie* case that the Department of Justice had breached its duty of care to take reasonable care for the Plaintiff, exposing him to a risk of significant injury.

This case is an important reminder that, even where policies are developed by businesses to address the risks posed by COVID-19, that may not be sufficient to meet the strict duties imposed by WHS law.

Accordingly, businesses need to ensure that they assess the risks of COVID-19 in the workplace, identify controls and implement those controls. This is particularly important not only for businesses that have continued to operate through the recent Government enforced restrictions, but also for any business planning the return to the workplace of workers who have been working from home.

WHAT SHOULD BUSINESSES BE CONSIDERING?

As a helpful starting point, both SafeWork NSW and Workplace Health and Safety QLD have issued brief guides (see the NSW guide here and QLD guide here) that provide general advice to businesses on the types of risks to safety that they can consider in risk assessments to minimise the spread of COVID-19 in the workplace, and also how they can be managed.

Likewise, SafeWork Australia has issued some general guidance on how businesses in specific industries can approach managing the risks posed by COVID-19 in the workplace.

While the guidance provided by SafeWork Australia, SafeWork NSW and Workplace Health and Safety QLD is helpful, it is not specific to the nuances of employers' individual operations. Even in a single industry, the way that businesses operate can differ. As a result, a 'one-size fits all' approach to managing WHS risks can be of limited effectiveness.

Key Contact Scarlet Reid | Partner | Employment Relations and Safety | T +61 2 8241 5688 | E sreid@mccullough.com.au

Debt recovery during COVID-19

In addition to its overall negative impact on the Australian economy, the COVID-19 crisis has also seen opportunistic individuals disingenuously attempting to rely on the current environment to avoid their legal obligations in circumstances which do not genuinely warrant them doing so.

This type of conduct has in part been facilitated by the unprecedented nature of many of the temporary relief measures recommended by government or mandated by State and Federal Parliaments, together with the urgency with which they were announced or introduced. People have sought to take advantage of the confusion surrounding entitlements to relief measures, the processes associated with implementing them, and the many untested loopholes.

The most notable example of this has been seen in the commercial leasing sector, where the news has been dominated by commercial tenants arbitrarily refusing or failing to pay rent, seeking rental extensions, or demanding rent relief without making adequate disclosure of their financial records.

The significant insolvency protection measures afforded to companies and individuals during COVID-19 may also have exacerbated this type of behaviour.

It seems that numerous entities which are yet to see their cash flow or profitability significantly impacted are taking advantage of the significantly increased thresholds for serving statutory demands, and the extended timeframes in which to satisfy them, in order to shift bargaining power in negotiations or to avoid payment of their debts entirely.

If you are owed money by a debtor who is unreasonably taking advantage of the COVID-19 crisis, and there is *no substantial factual dispute*, there are other debt recovery methods that can assist – e.g. an **originating application** in the Queensland Courts[1] to obtain a simple judgment for that debt. This can often be a much quicker and less expensive process than filing a **claim**, which is only filed in circumstances where there is a factual dispute and the debt is likely to be disputed.

If the debtor still refuses to satisfy a judgment, there are a number of enforcement measures available, including:

- requiring the debtor to provide a statement of the debtor's financial position;
- a warrant for the redirection of the debtor's earnings (from an employer, or another third party) to you;
- a warrant for the seizure and sale of real or personal property owned by the debtor;

[1] Similar procedures are available in each of the other States and Territories within Australia.

- a garnishee order, which directs a third party who owes money to the debtor to instead pay you;
- a warrant requiring a financial institution to redirect the debtor's regular payments (such as annuities or commissions) to you; and
- a Mareva order, which freezes the debtor's assets to prevent them from dealing with them.

The Queensland Courts are still open for business as usual and they have implemented an array of new technological measures to progress both new and existing matters.

Key Contact Tim Case | Partner | Litigation and Dispute Resolution | T +61 7 3233 8960 | E tcase@mccullough.com.au

Insolvency

Changes to convening and holding creditor's meetings

Corporations (Coronavirus Economic Response Determination) No. 1 2020

On 5 May 2020, Treasurer Josh Frydenberg announced changes to the *Corporations Act 2001* (Cth) (**Corporations Act**) and related legislation that allows for companies to have entirely virtual meetings and to issue electronic notice of meetings. The changes have been made to give companies, responsible entities, external administrators and other classes of people governed by the Corporations Act certainty about how they can meet their legal obligations whilst abiding by social distancing measures for the next six months.

The Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 (**Determination**) modifies provisions of the Corporations Act, the *Corporations Regulations 2001* (Cth), the Insolvency Practice Rules (Corporations) 2016 (Cth) and the Corporations (Passport) Rules 2018 (Cth) that deal with how meetings are held and how notice of meetings are given. It also affects any clauses in the constitution of a company or registered scheme which deals with these things.

The Determination makes the following changes, effective from 6 May 2020 to 5 November 2020.

MEETINGS

- A creditor's meeting may be held using 'one or more technologies' to allow individuals to attend a meeting without being physically present.
- All individuals participating in a meeting are taken to be present if participating using such technologies.
- A vote taken at the meeting must be taken on a poll, and not a show of hands.
- Each individual at a meeting must be given an opportunity to speak and ask questions.
- A proxy may be appointed for virtual meetings.

NOTICE OF MEETINGS

- A notice of a meeting may be given use 'one or more technologies' to communicate to individuals the contents of the notice, other material relating to the meeting, or providing a link to where the notice can be viewed or downloaded.
- A notice which advises individuals that a virtual meeting will be held must communicate how they can participate in the meeting, including how they can vote and speak at the meeting.
- For notices given before the commencement of the Determination, the person giving the notice must give a fresh notice of meeting at least 7 days before the meeting is held, which sets out how individuals can vote and speak at the electronic meeting.

Key Contact Scott Butler | Partner | Restructuring and Insolvency | T +61 7 3233 8653 | E sbutler@mccullough.com.au

Real Estate: Leasing

Residential tenancy changes in Queensland during the COVID-19 pandemic

WHAT YOU NEED TO KNOW

- Queensland Parliament has passed the *COVID-19 Emergency Response Act 2020*, which amends the *Residential Tenancies and Rooming Accommodation Act 2008* (**Act**) and allows regulations to be made to respond to the COVID-19 emergency.
- The *Residential Tenancies and Rooming Accommodation (COVID-19 Emergency Response) Regulation 2020* (**RTRA Regulations**) significantly alters the status quo in respect to the rights of both parties in a residential tenancy.
- The RTA have released a Practice Guide for Residential Tenancies, which helps guide landlords and tenants through the impacts of the COVID-19 pandemic.

BACKGROUND

On 9 April 2020, Mick de Brenni MP announced the Palaszczuk Government was going to implement a retrospective moratorium on evictions due to rent arrears for Queensland tenants impacted by COVID-19. He also announced that landlords would be required to offer a six month extension to the tenant if their lease expired during the COVID-19 public health crisis. Finally, Minister de Brenni announced that, where a tenant could not pay rent due to the impacts of coronavirus and wanted to end their lease early, they would be empowered to legally do so.

In response to concerns tenants could and would be able to unfairly take advantage of the proposed regulations, the Palaszczuk Government consulted widely with peak industry bodies. This resulted in thresholds being put in place to limit the scope and application of the extraordinary protections, requiring additional transparency from tenants when claiming hardship and, importantly, enshrining protections for victims of domestic violence.

WHO IS PROTECTED UNDER THE RTRA REGULATIONS?

The protections granted by the RTRA Regulations only apply if the person suffers *excessive hardship because of the COVID-19 emergency*, which is limited to circumstances where:

- the person, or another person under the person's care, suffers from COVID-19;
- the person is subject to a quarantine direction;
- the person's place of employment is closed, or the trade or business conducted by the person's employer is restricted, because of a public health direction, including for example, because a public health direction has

closed a major supplier or customer of the person's employer;

- the person is self-isolating because the person is a vulnerable person, lives with a vulnerable person or is the primary carer for a vulnerable person;
- a restriction on travel, imposed under a public health direction or other law, prevents the person working or returning home;
- the COVID-19 emergency prevents the person leaving or returning to Australia; **and**
- the person –
  - suffers a loss of income of 25% or more; or
  - the rent payable by the person under a residential tenancy agreement or rooming accommodation agreement is 30% or more of the person's income.
- However, if there is more than one (1) tenant or resident under the residential tenancy agreement or rooming accommodation agreement the threshold is for all tenants or residents.

Please refer to the table below to find out more about both landlord and tenant rights.

TROUBLESHOOTING – QUESTIONS AND ANSWERS

Can a tenant who is not paying rent be evicted?	The RTRA Regulation applies retrospectively from 29 March 2020, to prevent landlords from evicting tenants *for failure to pay rent as required under the residential tenancy agreement if the failure relates to the tenant suffering excessive hardship because of the COVID-19 emergency*. Importantly, you can evict tenants: • for any reason other than failure to pay rent as required under the agreement; or • for a failure to pay rent as required under the agreement if the failure was not related to the tenant suffering excessive hardship because of the COVID-19 emergency; or • as a consequence of having given a notice to leave, or applying to the tribunal for an order terminating the agreement, before 29 March 2020. Non-compliance carries a maximum penalty of 50 penalty units (currently $6,672.50).
Can a tenant just terminate a tenancy agreement?	A tenant who is suffering excessive hardship because of the COVID-19 emergency may only apply to the tribunal to terminate their tenancy agreement if: • the tenant has made a dispute resolution request to the authority; and • the parties are unable to reach a conciliation agreement as a result of the dispute resolution request. The tribunal may only make an order to terminate the tenancy agreement if they are satisfied the tenant has established the ground of the application including, because the tenant is or has been suffering excessive hardship because of the COVID-19 emergency.
What about reletting costs?	If a tenant terminates the tenancy agreement in a way other than permitted in the Act and the agreement provides that the tenant is liable to pay the reasonable costs incurred by the landlord in reletting the premises, the reletting costs recoverable by the landlord are now restricted to an amount equivalent to one weeks rent only, in circumstances where: • there is 1 tenant who has suffered a loss of income equivalent to 75% or more and has less than $5,000 in savings (whether cash or in a bank account); • there is more than 1 tenant and there has been a loss of income equivalent to 75% or more and the tenants have a combined $5,000 in savings (whether cash or in a bank account).
Does a landlord have to offer a tenant an extension to the lease?	If a tenant is suffering excessive hardship because of the COVID-19 emergency, a landlord must, before the term of the agreement ends, offer the tenant an extension of the term to **30 September 2020** or an earlier date as requested by the tenant. Non-compliance carries a maximum penalty of 50 penalty units (currently $6,672.50). The extension must be under the same terms as the existing tenancy agreement.
What about conciliation, disputes and tenancy variation agreements?	Either party may make a dispute resolution request in relation to a tenancy dispute related to unpaid rent if: • a show cause notice has been issued; and • the landlord has requested a tenancy variation agreement be entered into; and • the landlord and the tenant are unable to agree to a tenancy variation agreement. Separately, a landlord and tenant can enter into a tenancy variation agreement at any time.

How does a landlord deal with unpaid rent?	1. A landlord may not give a notice to remedy breach under the *Residential Tenancies and Rooming Accommodation Act 2008* if: • the tenant has not paid rent and the breach subsists for at least 7 days, **and** • the landlord knows, or reasonably ought to know, the tenant is or has been suffering excessive hardship because of the COVID-19 emergency. 2. Instead, the RTRA Regulations provide a new mechanism, the **show cause notice**, which is issued in place of the breach notice. Once issued, the tenant has 14 days to either: • pay the rent; or • inform the landlord the rent is unpaid because the tenant is or has been suffering excessive hardship because of the COVID-19 emergency. 3. If the tenant fails to comply with the requirements of the show cause notice, the landlord may then issue a breach notice. 4. Alternatively, if after receiving the show cause notice, the tenant either: • informs the landlord they have been suffering excessive hardship because of the COVID-19 emergency; or • fails to pay the unpaid rent amount, then the landlord may request that the tenant enter into an agreement for a rent reduction for a stated period of time, or a payment plan for the unpaid rent (each a **tenancy variation agreement**).
Can a tenant refuse entry for inspections and repairs?	The landlord or the landlord's agent must not enter the premises for inspection, routine repairs and maintenance, showing the premises to a prospective buyer or tenant, valuation purposes, to see if the premises have been abandoned or following up on a breach notice if: • either the landlord, the tenant or anyone at the premises is subject to a quarantine direction; or • entry contravenes a public health direction; or • the tenant refuses entry as the tenant, or another person staying at the premises is a vulnerable person. If the tenant refuses entry for routine inspections because the tenant or another person at the premises is a vulnerable person, the tenant must allow the agent to carry out the inspection by: • virtual inspection; or • video conferencing; or • the tenant giving video or photographs of the premises and its inclusions, of sufficient quality to enable to landlord or agent to judge the condition of the premises and inclusions. Landlords are released from their obligations under sections 185 – 187 of the Act in respect of repairs and maintenance if the obligation is inconsistent with a public health direction or social distancing requirements. This does not apply to a emergency repairs and maintenance. If a tenant gives a landlord a notice to remedy breach in respect of routine repairs and maintenance, the allowed remedy period for the notice is extended until the earlier of: • the day the obligation is no longer inconsistent with a public health direction of social distancing; or • the day the COVID-19 emergency period ends.

Key Contact Kristan Conlon | Partner | Real Estate | T +61 7 3233 8848 | E kconlon@mccullough.com.au

Intellectual Property and Competition

IP Australia introduces new streamlined extension of time requests in response to COVID-19 disruptions

In response to the current COVID-19 pandemic and its impact on businesses operating in Australia, IP Australia has introduced a streamlined extension of time request process to assist customers who have been adversely impacted by COVID-19.

Up until at least **31 May 2020** rights holders and applicants can apply for extensions of time for up to three months. For elible requests, IP Australia will waive the normal official extension of time fees. Importantly, the streamlined process also means that COVID-19 extensions can be requested without the need for an individualised supporting declaration, cutting costs for Australian businesses.

Streamlined extension of time requests and official fee waivers do not apply to all extensions of time available through IP Australia. If you have a pending application with an impending deadline, please get in touch with one of our specialist Intellectual Property team members and we can discuss your specific circumstances and whether a COVID-19 extension is available.

FURTHER UPDATES

We will provide further updates on IP Australia's response to COVID-19 as they come to hand.

Key Contact Belinda Breakspear | Partner | Intellectual Property and Competition | T +61 7 3233 8968 | E bbreakspear@mccullough.com.au

Technology, Media & Telecommunications: Financial Services

Be cyber-safe, don't hibernate

As Scott Morrison implements strict social distancing measures and puts our Australian economy into hibernation, businesses in the financial services sector must remain extra vigilant of the increase in cyber-threats facing them, their suppliers and their customers from the digital space.

Although we are all busily practising social distancing, it is crucial for businesses in the financial services sector not to distance themselves from their privacy obligations, including under the *Privacy Act 1988* (Cth) (**Privacy Act**) as well as any additional commitments made under their privacy policies and other customer facing arrangements. There is no relief from these obligations during the COVID-19 outbreak and, in fact, with so many people glued to their TVs and online news sources, the damage flowing from data breaches during the pandemic (including reputational damage) has the potential to be higher than ever before.

PARTICULAR CHALLENGES FOR THE FINANCIAL SERVICES SECTOR

Scammers are attempting to exploit Australian businesses and individuals that are impacted by the COVID-19 crisis, and the ACCC's cyber monitor, ScamWatch, has reported a significant increase in cyber security incidents since the global pandemic evolved, with over 1,000 COVID-19 related scams reported already. This is of particular concern for the financial services industry, which was already the second highest reporting sector for data breaches, with 64% of all notifiable data breaches consisting of malicious or criminal attacks.

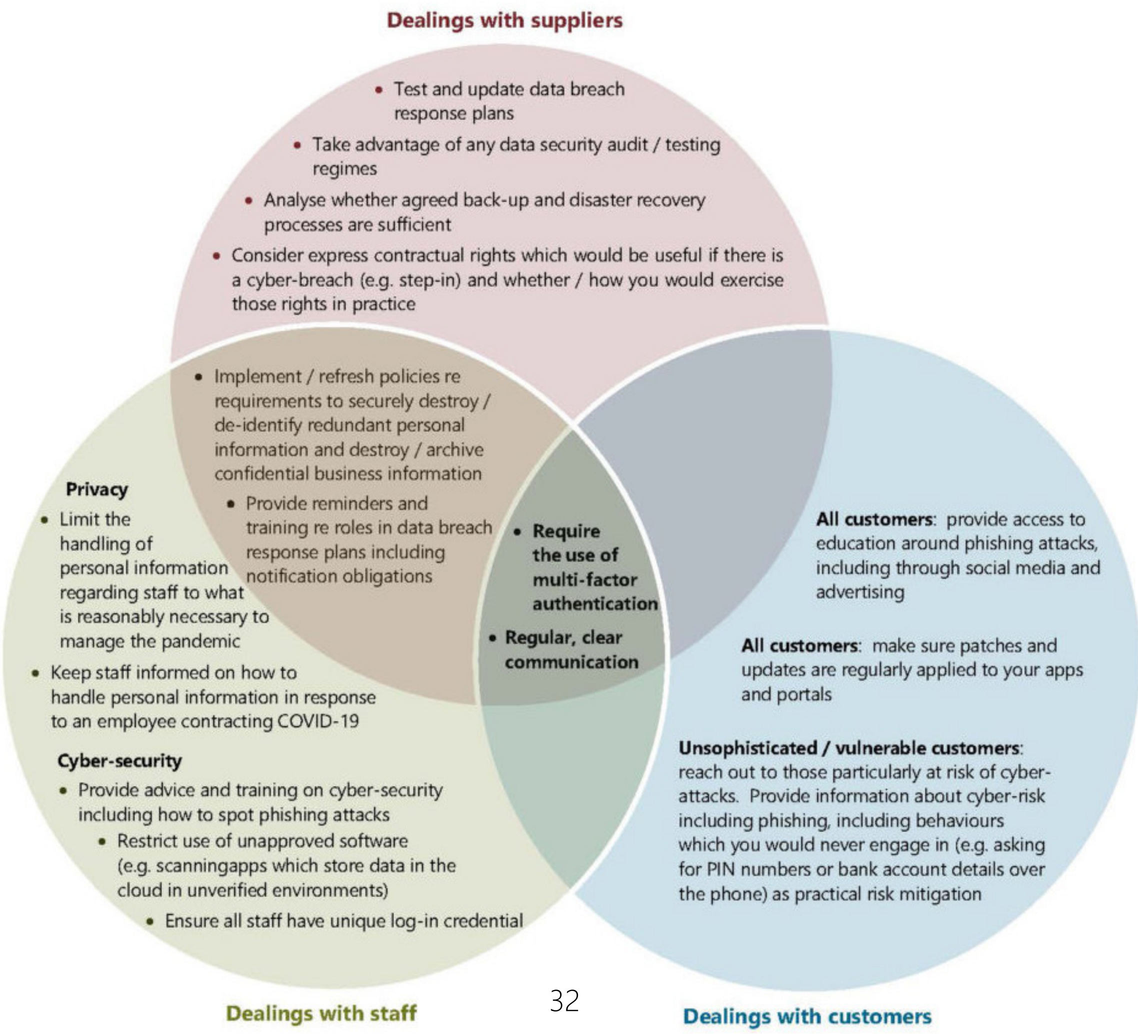
As the use of remote access technology increases (in terms of the applications, frequency and even types of people using technology), so, too, do the risks of malicious and criminal cyber security incidents. From credential phishing (attempts to steal log-in and password details including by pretending to be banks, payment facilitators, Centrelink, MyGov, the ATO, etc.) to sham fundraising, fradusters are ramping up cyber activity to take advantage of the global pandemic.

As the personal information that financial services businesses (and their suppliers) hold in respect of their customers is particularly valuable for fraudsters (such as credit card and bank account information), there is an increased risk that:

- customers will be successfully targeted through spam, phishing or targeted spear-phishing attacks;
- suppliers will be successfully targeted, leading to a breach of their privacy and data security obligations; and
- financial services companies themselves will breach their privacy obligations.

PRACTICAL MEASURES

As the financial services industry is facing an even higher threat of cyber attacks due to COVID-19, it is crucial for businesses to enhance security measures and technology practices to align with that increase. This is particularly crucial while financial services businesses are, for example, encouraging more of their customers to engage in internet and online banking, with some of those customers being unsophisticated or vulnerable when it comes to the use of technology and protecting themselves from cyber-threats. In addition to the general security measures which Australian businesses should implement (see our earlier article here) we recommend financial services businesses consider implementing the following additional security measures:



WHAT TO DO IF THERE IS A CYBER-INCIDENT

If you do become aware of a cyber-incident, including one which could result in a data breach, it is important to act methodically and quickly to assess the incident, mitigate the impacts of the incident and, if appropriate, report the breach. Additional guidance on what to do, including for compliance with the Privacy Act, is set out here.

If you are an Australian Prudential Regulation Authority (**APRA**) regulated entity, and the breach has, or has the potential to, materially affect you, the interests of your depositors, policyholders, beneficiaries or other customers, then there is an additional obligation to notify APRA as soon as possible (and within 72 hours after becoming aware of the breach).

KEY TAKEAWAY

The COVID-19 outbreak poses an array of cyber security challenges for financial services businesses in Australia. Despite the government's economic hibernation approach, Australian businesses cannot (and their privacy obligations do not) freeze at this point in time. Now is the time for financial services businesses to prepare methodically – by assessing and, where appropriate, increasing cyber-security measures they have in place; maintaining clear and regular lines of communication with personnel, suppliers and customers; and reviewing, testing and updating their business continuity and data breach response plans – so that they are well placed to act rapidly and effectively to external threats and to minimise the impact of any successful attacks.

Key Contact Matthew McMillan | Partner | Technology, Media and Telecommunications | T +61 2 8241 5644 |
E mmcmillan@mccullough.com.au

IN PRACTICE

A McCullough Robertson Podcast

From our legal experts direct to you, '*In Practice | A McCullough Robertson Podcast*' cuts through the noise to provide practical insights into how COVID-19 may affect your legal rights and responsibilities.

Delivering short episodes on the topics that matter most to you and your business, this series profiles some of McCullough Robertson's leading lawyers as they answer the most pressing questions.

Join us as we tackle everything from cyber risk and employment, to property and tax.

Lydia Daly, Senior Associate, takes us through the realities of managing a workforce in challenging economic conditions.

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Key Contact Lydia Daly | Special Counsel | Employment Relations | T +61 7 3233 8697 | E ldaly@mccullough.com.au

Tax Partner David Hughes unpacks the Federal Government's stimulus packages and outlines how businesses can make the most of the tax benefits.

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Key Contact David Hughes | Partner | Corporate & Tax | T +61 7 3233 8695 | E dhughes@mccullough.com.au

Kristan Conlon, Real Estate Partner, discusses some of the key issues facing landlords, tenants, developers and others operating within the property industry.

Please click on the links below to hear from Kristan:

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Key Contact Kristan Conlon | Partner | Real Estate | T +61 7 3233 8848 | E kconlon@mccullough.com.au

Matt McMillan discusses the cybersecurity issues that have emerged since the outbreak of COVID-19.

Please click on the links below to hear from Matt:

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Key Contact Matthew McMillan | Partner | Technology, Media and Telecommunications | T +61 2 8241 5644 | E mmcmillan@mccullough.com.au

IN PRACTICE

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Emile McPhee talks through the legal position on electronic signatures versus their 'wet ink' counterparts.

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Key Contact Emile McPhee | Senior Associate | Finance | T +61 7 3233 8761 | E emcphee@mccullough.com.au

Litigation expert Guy Humble unpacks the rapid changes to litigation processes and the move to 'virtual' dispute resolution.

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Key Contact Guy Humble | Partner | Litigation and Dispute Resolution | T +61 7 3233 8844 | E ghumble@mccullough.com.au

For additional audiovisual insights into the potential impacts of COVID-19 on you and your business (including recorded webinars), please visit our website: COVID-19 Audiovisual library.

BRISBANE | SYDNEY | CANBERRA | NEWCASTLE | MELBOURNE

www.mccullough.com.au | info@mccullough.com.au | +61 7 3233 8888