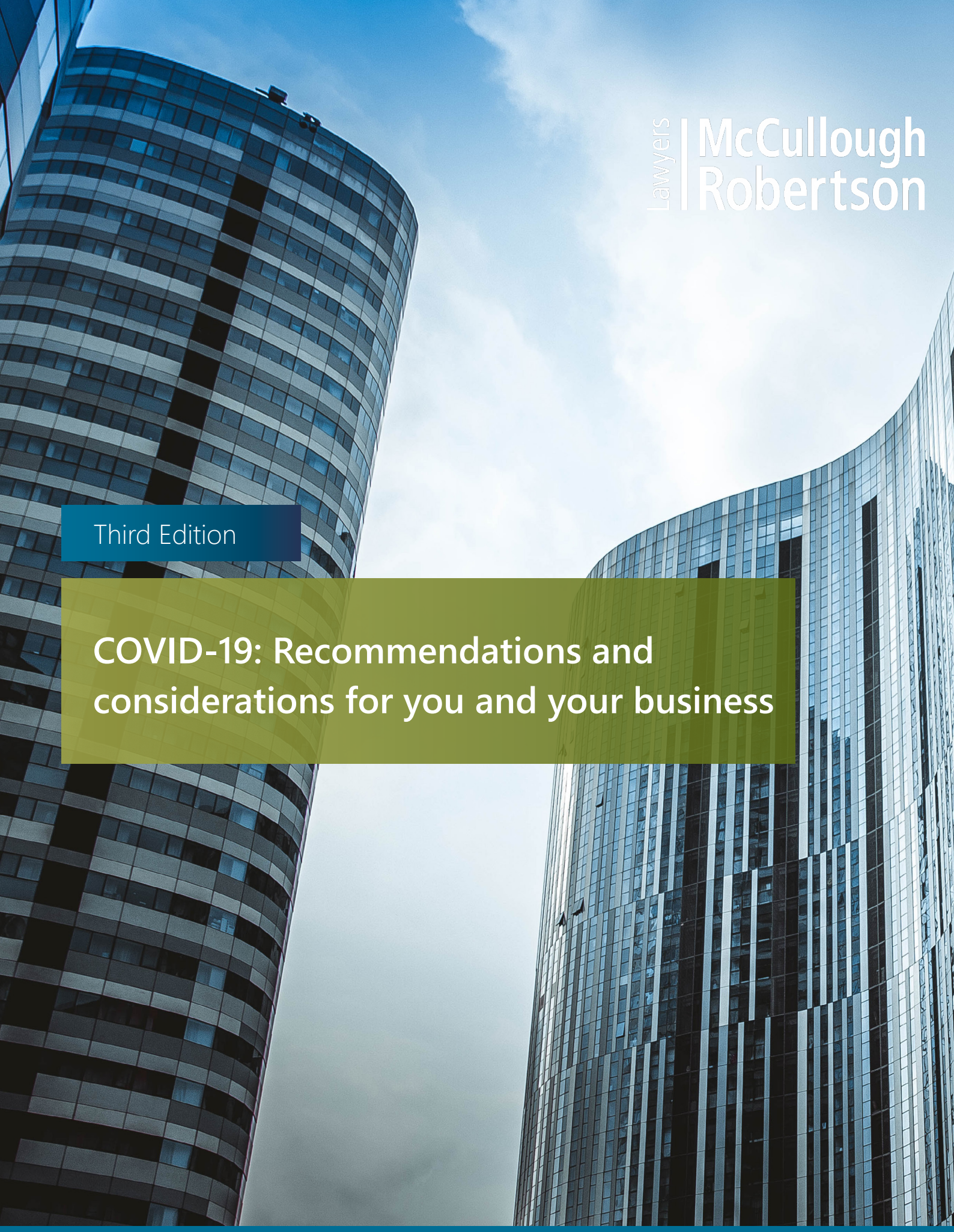

McCullough Robertson Lawyers

Third Edition

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

Welcome

As the COVID-19 pandemic continues, the true impact of the outbreak on you and your business still remains to be seen.

In this third edition of our COVID-19 guide, we bring you more insight into the potential implications of the virus and what you and your business might need to consider at the current time.

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 15 April 2020

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Corporate

ASX and ASIC announce regulatory relief and clarification for listed entities

Both ASIC and the ASX have introduced a range of temporary measures to assist listed companies in response to COVID-19. Some of the key measures are summarised here.

CONTINUOUS DISCLOSURE

ASX does not expect listed entities to make disclosures seeking to predict the impact of COVID-19, noting that entities can continue to rely on the usual carve out for matters of supposition or those that are insufficiently definite. Entities are reminded that they must otherwise continue to observe their usual continuous disclosure obligations.

ASX has offered some practical guidance, including that entities should:

- Review any earnings guidance issued prior to the COVID-19 outbreak and either update or withdraw the guidance if it is no longer current;
- Update the market in respect of material operating decisions;
- For entities in financial difficulty, strictly observe continuous disclosure obligations and promptly announce any material developments (e.g. a resolution of the board to appoint an administrator);
- Announce any decision not to pay a dividend or distribution either previously announced or that had been paid or distributed in the prior corresponding period; and
- Carefully consider whether it is appropriate to request a trading halt or voluntary suspension upon becoming aware of material information requiring disclosure but before an announcement is released to the market.

EMERGENCY CAPITAL RAISING

ASX has put in place several short term Class Waivers to assist entities that may need to raise emergency capital. The Class Waivers will expire on 31 July 2020, unless ASX decides to remove or extend them.

The key measure is the temporary uplift in the 15% placement capacity under Listing Rule 7.1 to 25%, subject to the following conditions:

- The extra capacity is limited to one placement of fully paid ordinary securities;
- An entity taking advantage of the extra capacity must also undertake a follow on pro rata entitlement offer or SPP at the same or a lower price than the placement;

- Entities that have the extra 10% placement capacity under Listing Rule 7.1A must elect to utilise either that capacity or the temporary extra capacity, not both; and
- For entities undertaking a follow on SPP, the sizing and pricing requirements for SPPs have been relaxed, but the $30,000 cap per security holder continues to apply.

Other temporary measures announced by ASX include:

- The Class Waiver includes the normal 'supersize' waiver ASX grants to entities undertaking a placement followed by an accelerated pro rata entitlement offer without the need to apply for a separate waiver;
- The ability to request two consecutive trading halts (2+2) to consider, plan for and execute a capital raising; and
- A waiver of the one-for-one cap on accelerated and standard non-renounceable entitlement offers.

UPCOMING AGMS AND FINANCIAL REPORTING

ASIC will be taking a 'no action' approach in respect of public entities with a 31 December balance sheet that do no hold their AGM by the 31 May 2020 deadline, allowing these entities until 31 July 2020 to comply.

ASIC has encouraged entities to adopt processes for hybrid and virtual AGMs to ensure all security holders can still participate in meetings. ASX has endorsed this position and advised those entities that have already dispatched a notice of meeting to consider providing supplementary information to security holders on electronic meeting and voting procedures.

ASX will consider applications for an extension of the deadlines for filing financial statements on a case-by-case basis. Any such requests will generally only be granted where there has been an unavoidable delay in having financial statements audited or reviewed.

Further details of these measures can be found here.

Key Contact Ben Wood | Partner | Corporate & Tax | T +61 7 3233 8913 | E bwood@mccullough.com.au

Employment Relations and Safety

JobKeeper scheme rules come into effect

Businesses finally have clarity for the JobKeeper payment scheme, with the Federal Government prescribing new rules for the $1,500 JobKeeper payment. The *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (**Rules**) helpfully detail eligibility requirements and conditions of the scheme.

The scheme took effect on 9 April 2020 under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (**Act**). The JobKeeper payment will be available for a period of 26 weeks for the fortnight beginning 30 March 2020 up to the fortnight ending on 27 September 2020.

Eligible businesses will receive a fixed payment of $1,500 per fortnight per eligible individual as long as the business has satisfied the wage condition of having already made payments to the eligible person equal to or greater than the amount of the JobKeeper payment (less PAYG withholding and salary packaging) during the relevant fortnight.

Eligibility requirements

To be eligible, a business must be able to demonstrate:

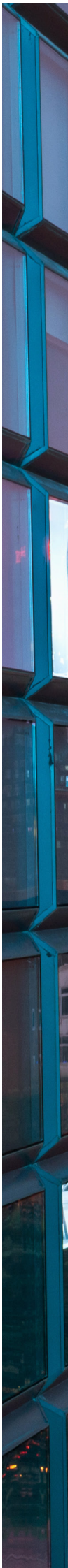
- on 1 March 2020, it was a business in Australia that was not a bank subject to the Major Bank Levy Act, an Australian or State government agency, a local governing body, or a government wholly-owned subsidiary;
- at any time a liquidator or a trustee in bankruptcy has not been appointed; and
- before the end of any JobKeeper fortnight, it met the decline in turnover test (either 15%, 30% or 50% depending upon the type and size of the business).

The Rules identify two ways in which a business can satisfy the decline in turnover test. For the basic test, the business compares their projected GST turnover for the relevant month of the scheme e.g. April 2020 against the GST turnover of the business for the relevant comparison period e.g April 2019. Alernatively, the Commissioner for Taxation may determine a different test where no relevant comparison period exists.

To be eligible, an individual as of 1 March 2020 must be:

- an Australian resident (or New Zealander with a special category visa), and be over 16 years of age; and
- for an individual who is an employee, full-time or part-time employee or a casual who has been employed on a regular and systematic basis for 12 months or more; or
- for an individual who is an 'eligible business participant', they have a particular role within a business that is a sole trader, partnership, trust (adult beneficiary) or a director/shareholder of a company.

An employee is not eligible for the JobKeeper payment if, during the relevant fortnight, the person was:



- paid parental leave pay under the *Paid Parental Leave Act 2010*;
- paid day and partner pay; or
- totally incapacitated for work receiving payments under workers' compensation legislation.

Importantly, the Scheme operates on the basis that an individual must have elected in writing to receive the JobKeeper payment, and nominated the business to receive the payment. You can access the prescribed JobKeeper Employee Nomination Notice here. The business must also have notified the Commissioner of Taxation that the entity wishes to participate in the Scheme in relation to the eligible individual at or before the end of the relevant fortnight.

On a monthly basis, a business participating in the scheme must notify the Commissioner of their current GST turnover for the reporting month and their projected GST turnover for the following month.

JOBKEEPER DIRECTIONS

Under the Scheme, employers may now give three types of directions to eligible employees under the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*, which amends the *Fair Work Act 2009* (Cth):

- stand down direction not to work on a day or days, or reduced number of hours, than the employee would normally work;
- direction to perform any duties that are within the employee's skill and competency; and
- direction to perform duties at an alternate location.

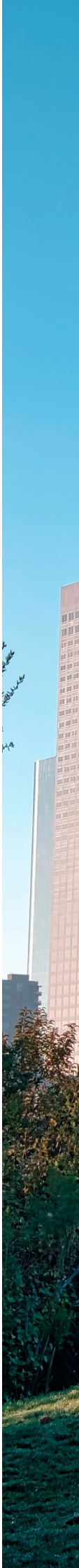
To be effective, the employer must first consult with the employee about the proposed direction, and give at least three days' notice before the direction takes effect. The direction must be reasonable and safe, and in relation to stand down direction only, the employee cannot be usefully employed for 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.

Although the Federal Government has now prescribed the Rules, much complexity with the scheme remains. Businesses should seek advice, specifically before issuing any directions to employees, to ensure they are acting lawfully.

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



Litigation and Dispute Resolution

Beware of opportunistic (employee) fraud

It is axiomatic that the risk of fraud increases in challenging economic times. Approximately 75% of all frauds perpetuated within a business are committed by its own employees or officers.

FRAUD

Employees or officers may be inflating or falsifying a company's financial results or their own productivity in order to appease shareholders, secure financing or retain their positions. Or, they may be misappropriating goods in the current supply chain chaos, or inventing reimbursement claims.

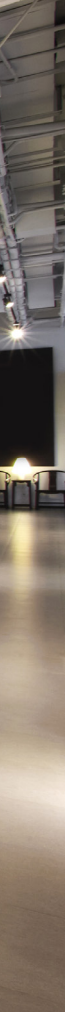
The fraud triangle is a commonly accepted model which identifies three factors which lead an employee to commit fraud, those being financial pressure, opportunity and rationalisation.

This economic downturn has created new opportunities to commit fraud through the weakening of internal controls due to staff cutbacks or working remotely. It has also created financial pressures in the shape of decreased work hours and falling sales which can be the catalyst for such fraud.

MITIGATING THE RISKS

Some prudent measures to implement may include:

- Establishing a fraud policy to communicate behaviours that are not tolerated and a whistleblower policy to



provide protection for employees who suspect others of fraud;

- Regular training and education to assist employees to identify red flags within both the company and other organisations with which the company transacts;
- Investing in software allowing the tracking of computer, email and internet use to secure the company's finances, data and accounts;
- Appropriate fraud or fidelity insurance policies (our firm's internal insurance broker and risk specialists, Allegiant IRS can assist with this);
- Conducting background checks before hiring staff, looking out for unusual behaviours and performance (e.g. results inconsistent with industry trends or a reluctance to allow others to help with their work), and providing a positive work environment; and
- Multiple level sign-offs and monetary purchasing limits, and regular audits and reconciliations of payroll, financial statements and inventory.

OBTAINING THE CORRECT ADVICE AND GUIDANCE

Understanding legal ramifications (such as admissibility of evidence) around the surveillance of employees, dealing with their electronic devices, and validly terminating their employment can be crucial. Asking the right questions in an interview can result in benefits such as admissions from the employee and maintaining the morale of other employees.

It may also be that you have a legal obligation to disclose or report the fraud to the police or a regulatory body such as ASIC or the ASX. Concealing a serious indictable offence or not making the requisite disclosures could result in personal liability for directors of a company.

Our team can provide you with strategic advice and assistance relating to the investigation of the fraud, dealing with an insurer who might reject your claim, and instituting civil proceedings to seek recovery of losses sustained as a result of fraud.

We can also assist with obtaining urgent injunctive relief such as freezing orders or search orders from the court if you suspect an employee may destroy evidence, dispose of assets or abscond from Australia. We can also engage experts such as forensic accountants, IT specialists or communication strategists while maintaining your confidentiality and legal professional privilege.

Key Contact Peter Stokes | Partner | Litigation and Dispute Resolution | T +61 7 3233 8714 | E pstokes@mccullough.com.au

Mediation

COVID-19 and effective dispute resolution via mediation

Courts are making fast, adaptive changes to civil litigation processes to accommodate social distancing restrictions and protect the health of public workers and the public at large. Notwithstanding the temporary measures in place that allow court processes to continue, parties are being increasingly encouraged to resolve their disputes between themselves where possible.

In this climate, and where listed court matters have been adjourned to dates to be determined in the future, there has never been a more critical time to resolve disputes as expeditiously and inexpensively as possible through mediation. Parties must be agile and adaptive in the current climate to ensure mediation processes happen as safely and smoothly as possible.

VIRTUAL MEDIATION SERVICES

Due to the impacts of COVID-19 and the enforced social distancing restrictions, McCullough Robertson Mediation Services are offering virtual mediation services over this period. It is important that parties are provided the opportunity to safely resolve disputes via mediation. To that end, we have outlined the following steps for consideration to aid mediation occurring with limited disruption in the current climate:

1. Utilise video- and teleconferencing tools

Parties are encouraged to utilise videoconferencing tools, such as Cisco Webex, Zoom or Microsoft Teams to conduct the mediation. McCullough Robertson Mediation Services are already successfully utilising Cisco Webex to conduct video-conferences with clients. Supreme and District Courts are also seeking to maximise use of this technology, with a preference for hearing matters via telephone, and only using videoconferencing for contentious matters or where there is a special need to do so. Parties should be conscious of the terms of use of each of these platforms, however, particularly with respect to confidentiality.

2. Consider practical arrangements

Prior to mediation, parties should set up a preliminary conference with the mediator to discuss the practical arrangements that will allow the most efficient conduct of the mediation, such as location, timing, and mode of communication. The preliminary conference will be conducted by video conference or teleconference. The preliminary conference will allow clients the opportunity to familiarise themselves with the mediator, ask questions about the mediation process, or raise any particular safety concerns they have.

3. Utilise position papers

Discussions via video- or teleconferencing, whilst useful, do not allow the free-flowing discussion that most parties can expect in a physical mediation. As such, parties are encouraged to utilise position papers as a tool to clearly set out their respective claims, the key facts and law in dispute, and the parties' expectations of the

mediation process. Although not standard practice under normal circumstances, parties should consider providing their position papers to one another and the mediator well in advance of the mediation, to aid the mediation occurring as smoothly as possible.

4. Location of each party

On the day of mediation, it may not be preferable to have all parties together in one room, or for lawyers and their clients to be together in one room due to social distancing requirements. However, appropriate arrangements should be put in place if this is preferable to ensure proper spacing amongst individuals. For example, it may be appropriate for parties and their legal representatives to conduct the mediation in a separate room in the same or even different buildings, where the mediator is able to visit as necessary, or exchange documents where appropriate.

As each mediation is different depending on the number of parties involved, their location, and unique issues to be addressed, McCullough Robertson's mediators will work with clients to tailor the most effective virtual mediation service.

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

Estates

Implications of COVID-19 on succession planning

Do you need to review your will in this COVID-19 climate?

It is not surprising that the financial uncertainty and personal anxiety caused by COVID-19 have resulted in many people undertaking a review of their estate planning arrangements. Generally, lawyers recommend that clients should review their wills when there is a significant change to their assets or personal circumstances. For some, this may have occurred recently as a result of COVID-19.

The primary objective of clients and lawyers in succession planning is to develop a strategy to ensure that a client's final wishes can be carried out, both practically and effectively. However, the recent COVID-19 related market falls may have had such a significant impact on the value of assets that the intended distributions to the beneficiaries are no longer appropriate. For example, a will that gifts real estate to one child and a share portfolio to another child may no longer achieve the intended equality in distributions desired by the client.

In times of market volatility and significant changes in asset values, we find that wills that contain gifts of particular assets or sums of money and wills that are particularly prescriptive may be problematic. Without careful succession planning, gifts of specific assets that may be more susceptible to external market forces could lead to inadvertent outcomes for beneficiaries. Often, it is usually preferable to give executors and the beneficiaries a degree of flexibility in order to deal with unforeseen events and the consequences that these may bring.

In a world where there are ever-changing restrictions on travel and personal interactions, clients should consider: *Who is of an appropriate age, health and ability to assume the responsibility of administering my estate and is that person located in a place that will enable them easily to administer my estate?*

As with all estate planning exercises, it is important that clients obtain considered legal advice and, if necessary, financial advice about the best strategies to adopt to ensure their intended outcomes are achieved - even if there is a change in asset values. Proper estate planning takes into account not only the wishes of the client and the assets that will pass to the beneficiaries but also the personal and financial circumstances of the beneficiaries, the risk of claims against the estate by disappointed family members and the possible taxation consequences for the estate or the beneficiaries. For example, an estate might lose the benefit of the capital gains tax exemption that attaches to a principal place of residence if the property is not sold within two years of death.

As we grapple with the uncertainty of how long COVID-19 and its impacts will last, it is prudent for clients to reflect on their wills, the gifts that they have made and who they have appointed as executors and trustees. These are important questions whenever a client is considering their estate planning but they are especially so now.

If you are concerned about the effect that COVID-19 may have had on your estate planning arrangements including your personal and financial circumstances, please contact the Estates team at McCullough Robertson Lawyers for professional advice.

Key Contact: Phillip McGowan | Partner | Estates | T +61 2 8241 5684 | E pmcgowan@mccullough.com.au

Allegiant IRS

Continuing to monitor the latest developments of the evolving COVID-19 situation

We recommend that consideration is given to urgently reviewing your current insurance arrangements as it is essential that cover is updated in conjunction with changes in risk profile.

Immediate considerations:

- ISR policy wording review to determine if there is potential for making a Business Interruption claim.
- Review of policy coverage and/or sub-limits on the ISR policy. Removing cover and/or reducing sub-limits will potentially provide a return premium.
- Whether Vehicles and/or Plant & Equipment are currently not being utilised. Insurers may apply reduced rating for items considered as "Laid-Up".
- Investigation of whether premium payments can be deferred or spread over additional instalments.
- In the alternate, increases in limits to be reviewed where sales and/or stock limits have increased which may require an additional premium outcome and where disclosure to the insurer is required due to a change in circumstances.

Renewal considerations:

- Review of Business Interruption Sums Insured and this should include a review of Gross Profit, Gross Rental Income and Payroll Sums Insured.
- Adjusting estimated Turnover according to the impact COVID-19 will have on forward estimates for the next 12 months as turnover is a primary rating factor for Public Liability, Professional Indemnity and Directors & Officers policies.
- Review of policy coverage and/or sub-limits on the ISR policy. Removing cover and/or reducing sub-limits which should have an impact on premium.
- Consider the need for travel insurance for the next 12 months given travel restrictions are likely to be in place until June 2020.
- Investigation of whether premium payments can be deferred or spread over additional instalments.

If you would like to further discuss your insurance arrangements, please contact a member of the Allegiant IRS team.

Key Contact Brad Russell | Partner | Insurance and Corporate Risk | T +61 7 3233 8786 | E brussell@mccullough.com.au | www.allegiantirs.com.au

Allegiant IRS

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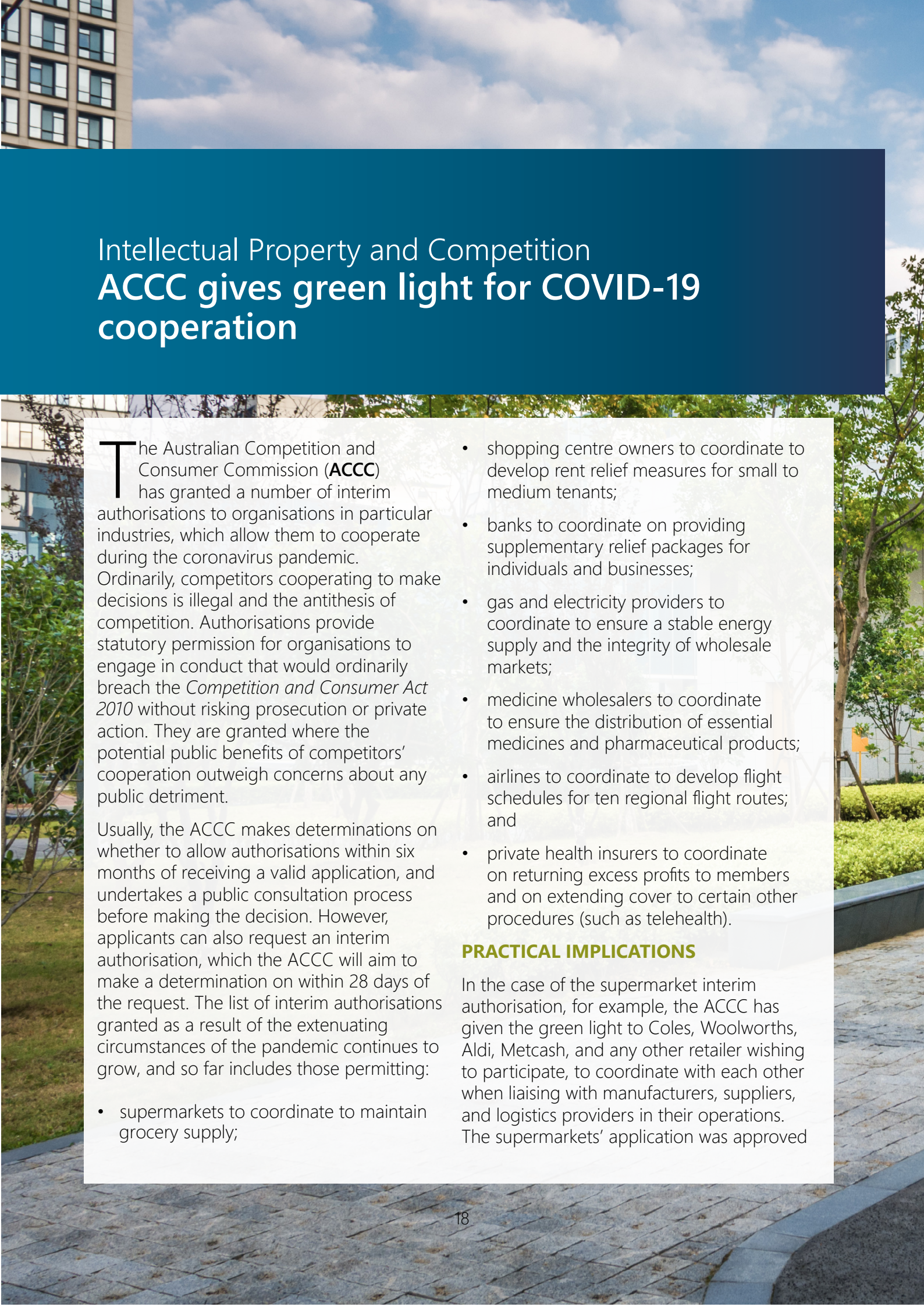


Intellectual Property and Competition

ACCC gives green light for COVID-19 cooperation

The Australian Competition and Consumer Commission (**ACCC**) has granted a number of interim authorisations to organisations in particular industries, which allow them to cooperate during the coronavirus pandemic. Ordinarily, competitors cooperating to make decisions is illegal and the antithesis of competition. Authorisations provide statutory permission for organisations to engage in conduct that would ordinarily breach the *Competition and Consumer Act 2010* without risking prosecution or private action. They are granted where the potential public benefits of competitors' cooperation outweigh concerns about any public detriment.

Usually, the ACCC makes determinations on whether to allow authorisations within six months of receiving a valid application, and undertakes a public consultation process before making the decision. However, applicants can also request an interim authorisation, which the ACCC will aim to make a determination on within 28 days of the request. The list of interim authorisations granted as a result of the extenuating circumstances of the pandemic continues to grow, and so far includes those permitting:

- supermarkets to coordinate to maintain grocery supply;
- shopping centre owners to coordinate to develop rent relief measures for small to medium tenants;
- banks to coordinate on providing supplementary relief packages for individuals and businesses;
- gas and electricity providers to coordinate to ensure a stable energy supply and the integrity of wholesale markets;
- medicine wholesalers to coordinate to ensure the distribution of essential medicines and pharmaceutical products;
- airlines to coordinate to develop flight schedules for ten regional flight routes; and
- private health insurers to coordinate on returning excess profits to members and on extending cover to certain other procedures (such as telehealth).

PRACTICAL IMPLICATIONS

In the case of the supermarket interim authorisation, for example, the ACCC has given the green light to Coles, Woolworths, Aldi, Metcash, and any other retailer wishing to participate, to coordinate with each other when liaising with manufacturers, suppliers, and logistics providers in their operations. The supermarkets' application was approved

within a few days, and is directed at the steady distribution of and equitable access to groceries following unprecedented consumer demand stemming from the pandemic. It allows the supermarkets to coordinate to introduce measures designed to curb grocery stockpiling and reduce strain on supply chains without risking enforcement action. The authorisation does not permit supermarkets to agree on product pricing.

MAKING AN APPLICATION

If you wish to liaise with your competitors for any reason during the pandemic (or are approached by a competitor to do so), you must be aware that this may still be illegal and even criminal conduct. You should seriously consider seeking ACCC authorisation before engaging in any discussions or joint initiatives with your competitors. If your business requires ACCC authorisation to cooperate with competitors during the pandemic in a way that might ordinarily breach the Competition and Consumer Act 2010, you can submit an application for an interim authorisation to the ACCC using the specified form, and pay the application fee. McCullough Robertson can assist you to prepare an application quickly and advise upon your likelihood of success.

Key Contact Paul McLachlan | Strategic Adviser | Intellectual Property and Competition | T +61 2 8241 5606 | E pmclachlan@mccullough.com.au

Intellectual Property and Competition: Consumer Law

Pandemic price gouging a prime consumer concern

Public concern over coronavirus 'price gouging' has continued to grow, with the pandemic creating shortages of essential groceries and medical supplies. Generally, the law allows prices to be set based on market forces of supply and demand, and normally competitive pressure would keep prices down. But even though price gouging is not specifically dealt with under Australian competition law, the Australian Competition and Consumer Commission (**ACCC**) has responded to the public's concerns by warning that excessive pricing may indirectly breach particular provisions of the Australian Consumer Law. For example, those who engage in price gouging may contravene:

- the misleading and deceptive conduct laws, where a business makes misleading claims about the reason for excessive pricing of a product; and
- the provisions relating to unconscionable conduct, where extreme product pricing is deliberately dishonest and affects vulnerable consumers.

The ACCC has also indicated that it will focus its efforts on ensuring the affordability of essential goods and services during this time, so businesses in essential industries should expect increased attention from the regulator and consider whether their products and services are fairly priced.

Furthermore, the Federal Government recently invoked its powers to prevent price gouging on medical products like face masks and hand sanitiser under biosecurity laws. This means that anyone who on-sells essential products at more than 120% of the price for which they were purchased can face fines of up to $63,000 or five years' imprisonment. Online marketplaces like eBay and Gumtree are likely to be the subject of closer monitoring by law enforcement authorities, given that these platforms tend to be a key marketplace for on-selling products. These measures do not apply to manufacturers or legitimate business activities.

If you are increasing prices for any of your products or services as a result of the higher demand experienced during the pandemic, be careful not to make false or misleading statements about why the price had to increase (e.g. because of increases in supplier costs) where they do not account for the whole increase. Similar to fears of overcharging at the time the GST was introduced, and related to credit card surcharges, the ACCC will actively take action against companies that blame their price increases on factors that only account for part of the price hike.

Key Contact Paul McLachlan | Strategic Adviser | Intellectual Property and Competition | T +61 2 8241 5606 | E pmclachlan@mccullough.com.au

Intellectual Property and Competition: Consumer Law

COVID-19, demands for payment and the Australian Consumer Law

The social isolation and social distancing policies implemented by various levels of Australian governments have had direct impacts on the ability of both customers and suppliers to perform under their contracts. For instance, venues are now unable to open at all, or are unable to accommodate large crowds, and equally, customers are unable to travel. Similarly, under long-term contracts, there might be annual instalments to be paid, and while performance in previous years was properly completed, performance may not be possible in the current environment.

In those circumstances, many parties are considering whether the terms of their contract expressly address the issue (for instance, through a force majeure clause) or whether other legal principles might apply, like frustration (and if that applies, whether restitution or one of the several *Frustrated Contracts Acts* in different jurisdictions may apply to offset any 'unfairness' that results).

When considering demands for payment in particular, it is also important to consider the potential application of the Australian Consumer Law (**ACL**), under the *Competition and Consumer Act 2010* (Cth).

In substance, section 36 of the ACL provides that a person must not, in trade or commerce, accept payment for goods or services if at the time of the acceptance:

- the person intends not to supply the goods or services; or
- there are reasonable grounds for believing that the person will not be able to supply the goods or services at the agreed time, and the person ought reasonably to be aware of those grounds.

There are some limited exceptions, but this provision is potentially very powerful in circumstances where payment is being demanded by a supplier, but their ability to perform is inhibited.

One of the key reasons this provision is so important is that many parties would not be aware it is there. Unlike its counterpart under section 18 of the ACL, which prohibits misleading or deceptive conduct in trade or commerce and is familiar to every commercial lawyer, this provision is not as widely known. Its effect is equally as broad, though. Unlike many provisions in the ACL which are limited in their application to transactions involving consumers, this provision relates to a person acting in trade or commerce. That is, it applies wherever misleading or deceptive conduct claims could arise.

The potential sanctions are the same too – the maximum potential penalty for breach of this provision is the greater of $10 million, three times the benefit received from the impugned conduct, and 10% of global turnover. That is, this is potentially much more serious than many claims for breach, repudiation or restitution following frustration.

Given all of these factors, it is important to be alert to the potential application of this provision, both when deciding whether or not to seek payments, and when deciding whether to make payments. As commercial negotiations extend and cashflows are further compromised through a potentially protracted downturn, we expect this provision will have increasing relevance and importance.

Key Contact Alex Hutchens | Partner | Intellectual Property and Competition | T +61 2 8241 5609 | E ahutchens@mccullough.com.au

Privacy Act exceptions

In the context of the COVID-19 pandemic, many organisations are trying to implement policies and practices that involve the collection of health information of their staff and visitors to their sites to ensure the ongoing monitoring and maintenance of healthy workplaces.

This is an important approach to a public health crisis. However, there are also naturally concerns about individual privacy in the collection and subsequent use of that information. Where can the records be shared? Can individuals who are infected with COVID-19 be identified? What can staff be told about infection rates across the organisation?

While the *Privacy Act 1988* (Cth) is relevant to many organisations' approach to this issue, it is important to note that these sorts of policies and practices can often be accommodated within lawful data handling regimes.

Importantly, while 'APP entities' are required to comply with the personal information handling requirements in the APPs, there are certain exceptions to complying with these requirements. APP entities can rely on two key exceptions in order to manage and stop of the spread of COVID-19; the 'permitted general situation' exception and the 'employee records' exception.

EXCEPTIONS

The collection of information from individuals relating to COVID-19 will often involve the collection of health information, which is treated as 'sensitive information' under the Privacy Act. It can also involve the collection of government identifiers such as Medicare card details.

In short, APP entities often do not need to comply with certain obligations around the collection of sensitive information and the use and disclosure of personal information and government related identifiers (such as Medicare numbers) if:

- it is unreasonable or impractical to obtain the individual's consent to that collection, use or disclosure; and
- the APP entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety.

This exception is designed to address public health situations like the outbreak of COVID-19.

Given how broad this exception is, the Office of the Australian Information Commissioner has indicated in its APP Guidelines and its recent guidance on COVID-19 that before relying on it, APP entities must:

- be able to justify their belief that use or disclosure of personal information is actually necessary (and not just convenient or desirable) to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety; and
- be able to point to a clear reason why it is

unreasonable or impracticable to obtain the relevant individual's consent to the propose collection, use or disclosure of their personal information. In making this assessment, APP entities will need to balance relevant considerations, including the urgency of the situation and the potential adverse consequences for the individual concerned if their consent is not obtained before the collection use or disclosure.

Additionally, APP entities may be able to rely on the 'employee record' exception in collecting, using and disclosing the personal information of their employees in connection with their response to COVID-19.

This exception provides that employee records relating to current or former employment relationships are expressly excluded from the application of the Privacy Act so long as those records are handled in the context of the current or former employment relationship. It is important to note that its key limitation is that it only applies to 'employees', and so it does not apply to non-employee staff like contractors, and does not apply to the collection of information from site visitors. We would expect this to be relied on less commonly.

So, while there are clear mechanisms that allow COVID-19 responses to be conducted lawfully, APP entities should ensure that they limit the use of these exceptions to what is necessary to prevent and manage the spread of COVID-19. In this regard, organisations should always seek to minimise the collection of information to begin with, and minimise the level of detail used in subsequent disclosures. For example, it may be necessary to test the temperature of all visitors to site, but it may not be necessary to record that information against their name (or to only record the exceptions). Similarly, it may be necessary to notify staff that an employee has tested COVID-19 positive, but it might not be necessary to name the particular individual.

Using a common sense approach that seeks to minimise the collection, publication and dissemination of personal information will help ensure that important social welfare outcomes are achieved while still respecting ongoing privacy obligations.

Key Contact Alex Hutchens | Partner | Intellectual Property and Competition | T +61 2 8241 5609 | E ahutchens@mccullough.com.au

Property, Planning and Finance

COVID-19 changes to commercial and retail leases

A significant number of stimulus packages have been announced by Federal, State and Territory governments collectively offering $billions through various schemes and programs. In support of this, the National Cabinet have been meeting and agreeing on principles to regulate commercial and retail leases during the COVID-19 emergency period.

These meetings have culminated in announcements of various principles that seek to regulate commercial and retail leases to ensure small and medium sized businesses ($50 million annual turnover or less) remain viable.

Significantly, on Tuesday 7 April 2020, The National Cabinet, industry stakeholders and special interest groups have agreed on a national code of conduct (**Code**) for the States and Territories to enact to regulate commercial leases during the COVID-19 pandemic 'emergency period'.

The States and Territories are still yet to implement legislation and regulations on this Code, however we expect this to occur very soon now that the Code has been released. It has been suggested that Queensland parliament will meet week commencing 20 April, and it is anticipated that this will be on the agenda.

A summary of the final agreement is set out below:

THE NATIONAL CODE

1. The Code will operate to form part of the Prime Minister's 'business hibernation' plan. It gives relief and protection to small and medium sized businesses that:

- have an annual turnover of $50 million or less;
- are experiencing at least a 30% reduction in turnover; and
- are eligible for the JobKeeper program.

2. The Code includes the following principles:

- rent relief must be given to eligible small and medium businesses in proportion to their reduced turnover;
- the amount of relief will comprise two elements:
  - a rent waiver equivalent to at least 50% of the relief amount (calculated proportionally to the reduction in turnover); and
  - the balance of the relief amount provided by deferred rent payments, with the following terms:

- the deferred rent becomes repayable after the 6 month emergency period ends and is repayable over the remaining term of the lease; and
- if the remaining term is less than 24 months, the deferred rent is payable over 24 months.

  Practically, where leases have less than 30 months remaining from the date the new legislation is implemented, a landlord may need to consider their security from the tenant for any deferred rent that remains payable after the lease expiry.

3. Good faith negotiations to be observed;

4. State and Territory mediation and conciliation dispute resolution mechanisms will create legally binding resolutions;

5. if a tenant and landlord reach an agreement to vary or amend their lease under the protection of the Code, the tenant loses their extraordinary right to terminate the lease that was previously announced on 29 March 2020;

6. landlords may not increase rent during the emergency period; and

7. landlords may not evict tenants for non-payment of rent during the period.

PROPORTIONAL RELIEF

The Prime Minister has made it abundantly clear he expects Australian landlords and tenants to sit together at the table and negotiate a mutually agreeable variation to their commercial leases. For all intents and purposes, this also appears to be his message to those businesses who do not fall under the protection of the Code.

Where the parties are negotiating an amendment or variation under the Code, they will be required to do so in contemplation of the 'proportionality principle'.

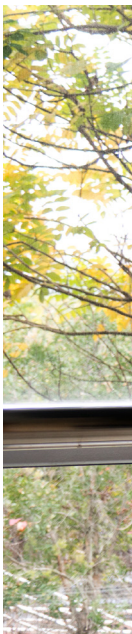
As outlined at 2(b) above, the Code is prescriptive in how landlords must provide relief to eligible businesses.

LAND TAX AND OTHER RELIEF FOR LANDLORDS

To assist ease the burden that compliance with the Code will place on landlords, the States and Territories have agreed to consider providing land tax relief to retail and commercial landlords who provide relief to tenants in the terms provided for by the Code.

Queensland has announced a three month land tax rebate for the 2019-20 period and a three month deferral for 2020-21 for landowners who meet certain criteria. The Queensland announcement provides that businesses will be eligible for the land tax relief even if the lease is not subject to the Code but proportional relief is provided to the tenant regardless.

New South Wales announced $440m in land tax relief split evenly across residential and commercial sectors. Similarly to Queensland, the relief will be provided to landlords who apply and meet certain criteria including that they are providing relief to tenants in the terms provided for by the Code. The New South Wales policy will only apply to those business tenants who meet the eligibility requirements of the Code (<$50 million annual turnover and 30% or greater reduction in turnover).



FINAL TAKEAWAY

The Code requires landlords and tenants to negotiate in good faith to achieve a mutually acceptable outcome. Where an outcome cannot be mutually agreed, the State and Territory legislation will utilise legally binding mediation to assist the parties in forming an agreement. Failing a successful mediation, the tenant will have the extraordinary right to terminate the lease.

Ultimately, we are still waiting for the State and Territory legislatures to pass legislation giving legal affect to the Code. More clarity will be provided once the legislation has passed.

PROACTIVE STEPS

Our team has been working with clients to assess what their unique position is, and what the following days may hold for them.

Our primary recommendations are:

- know your finances well, you will be asked to make concessions and will need to know how far you can actually yield;
- if you are the landlord, ask to see the tenant's application to the JobKeeper program and their turnover records to ascertain their true financial position (this is required to implement the proportionality principle for a rent reduction regardless);
- be willing to give something in return for what you are asking for, e.g. sign an extension, give a rent free month. The aim of the game is ensuring tenants can open the doors in six months' time;
- negotiate in good faith;
- if you are the tenant, use best endeavours to mitigate losses. Otherwise, you may not be afforded protection under the Code; and
- make sure any concession, variation, amendment or agreement is contemporaneously recorded in writing. Although this sounds obvious, sleepless nights and high anxiety levels in the retail and commercial space can mean people are making quick handshake deals to relieve the stress.

As each lease and circumstance is unique, it is important to review and consider the terms of each individual lease.

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

Construction and Employment Relations and Safety

COVID-19: urgent update for the building and construction sector - border closures and FIFO workers

The impact of COVID-19 continues to be felt across the construction industry with new legal and regulatory measures impacting contractual obligations, the availability of labour, project financing and supply chain reliability. This article addresses the key changes around State border closures and how this impacts upon FIFO and DIDO workers in particular.

BORDER CLOSURES IN QUEENSLAND

The Queensland Government implemented restricted entry into Queensland on 26 March 2020. Anyone who arrives in Queensland from another State or Territory is required to self-quarantine for 14 days unless they are exempt. Building and construction workers fall within the definition of exempt persons.

Workers who live in New South Wales but work in Queensland are permitted to cross the border if they have an entry pass. Obtaining an entry pass is a simple process and can be done through the Queensland Government website here.

A border pass will be sent by email and must be printed and displayed on the vehicle's passenger side visor, windscreen or dashboard. These border measures do not apply to workers who live within Queensland and travel to New South Wales for work. Companies and individuals should be mindful of how these requirements will impact their work force. For example, workers who regularly cross the border may experience delays in getting to site due to police checks at the border.

BORDER EXEMPTIONS FOR FIFO WORKERS COMING INTO QUEENSLAND

Queensland closed its borders to workers who are not working on essential projects on Saturday, 4 April 2020. A worker must be classified as an exempt person in order to cross the border to work on essential projects. An exempt person includes a FIFO worker. Further, the FIFO worker must also be a critical resources sector employee. A comprehensive list of critical sector employees can be found here. In short, this includes:

- site senior executives of a coal mine, mineral mine or quarry;
- open cut examiner of surface mines;
- underground mine managers;
- ventilation officers in underground mines;
- explosion risk zone controllers in underground mines;
- mechanical engineering managers in underground mines;
- electrical engineering managers in

underground mines;

- underground fire offices in underground mines;
- persons in control of electrical work on mineral mines and quarries;
- persons in control of winding operations where the winder is at least 30kW; and
- site safety manager of an operating plant.

Upon arrival at the border, the FIFO worker must provide the following information:

- the name of their employer;
- evidence that they are a fly in / fly out worker;
- evidence that they are entering Queensland to go directly to work;
- evidence of the location of the worksite or work camp; and
- if they are a resources sector employee, evidence that they are a critical resources sector employee.

These changes do not affect FIFO or DIDO workers travelling from within Queensland. The Queensland Government has also requested companies reduce FIFO and DIDO workers to minimise the mass movement of people. Companies and individuals involved in FIFO projects will need to consider the impact of these changes to their current workforce.

The Chief Health Officer has already sought extra precautions in camps and those on the move, whether FIFO or DIDO. These being:

- In camps:
  - infection control in kitchens and food preparation areas;
  - suitable accommodation for self-quarantine;
  - maintaining social distancing in camps, including for recreational activities, including outdoor sport;
  - limiting movement of workers from camps and into the broader community;
  - no more 'hot bedding' to limit contact between employees; and
  - cleaning each room thoroughly between uses, including changing and washing linen.
- On transport:
  - avoiding close contact during transport, including reducing the numbers of people travelling on buses and aircraft;
  - thorough cleans between passenger loads getting off, and those getting on;
  - temperature testing at airports for passengers boarding aircraft;
  - people with symptoms not travelling, and to immediately isolate, and seek medical advice; and
  - reducing FIFO and DIDO during the COVID-19 to minimise the mass movement of people.

- there are many other areas of projects that are being impacted by COVID-19.If you require further advice on how COVID-19 is or will impact your project, please get in touch with us for an initial discussion so that we can address issues specific to your situation.

The Fair Work Commission has recently changed a number of federal modern awards to give employers greater flexibility for managing their workforce as a result of the pandemic. Currently, no COVID-19 related amendments have been made to mining and building and construction-related awards however this could change. Employers who are considering temporarily standing down employees, or implementing changes to days/hours or employee wages, should seek legal advice before doing so to ensure compliance with the *Fair Work Act 2009* (Cth), JobKeeper Scheme provisions (as relevant), and other legal requirements.

Key Contact: Matt Bradbury | Partner | Construction and Infrastructure | T +61 7 3233 8972 | E mbradbury@mccullough.com.au

Closing retirement villages to visitors – a no go zone?

CAN A RETIREMENT VILLAGE BE 'CLOSED OFF' TO ACCESS?

The short answer is no. While an Operator is entitled to control the land and facilities it operates, residents have the right to 'quiet enjoyment' of their residence, including the right to lawful access.

However, residents of all Queensland retirement villages are subject to the Home Confinement, Movement and Gathering Direction issued by Queensland Health on 2 April 2020 (**Home Confinement Direction**).

The effect of the Home Confinement Direction is to require, on threat of penalty, all people to stay in their homes except for a permitted purpose, which includes the following:

- to obtain food or other essential goods or services;
- medical or health care needs, including compassionate requirements;
- to engage in physical exercise;
- to perform work or volunteering or to carry out or conduct an essential business activity or undertaking, which cannot reasonably be performed from the person's residence;
- to visit another person's residence, noting that:
    - a person may allow up to two visitors who are not ordinarily members of the person's household, for example, family member or close friends (this was recently revised from the original restriction of one visitor); and
    - the resident must take reasonable steps to encourage occupants of, and visitors to, the premises to practise social distancing to the extent reasonably practicable;
- providing care or assistance to an immediate family member; or
- to avoid injury or illness or to escape a risk of harm.

If a resident's family attends a village for any of these purposes, it will be difficult for an Operator to deny entry.

DUTY OF CARE

An Operator has a duty of care to residents in the village, which is to take reasonable care to avoid or minimise foreseeable risks. This duty of care most likely does not extend to a requirement to exclude visitors altogether.

Operators must balance any action they take, against their obligation to respect the rights of residents and not to interfere with residents' reasonable peace, comfort or privacy.

Operators should:

- close down shared facilities such as community halls, gyms, pools, barbeque areas, cafes (apart from

takeaway services), cinemas, games rooms and playgrounds, consistent with Non-essential business, activity and undertaking Closure Direction (No.4) issued by Queensland Health (and further supported by a communique issued by the Department of Housing and Public Works to Operators on 1 April 2020);

- host village meetings via distance such as video or teleconferencing; and
- take steps to remind residents about their obligations under state and federal directives and, to the extent that it is in an Operator's control, to act within those directives (e.g. limit the number of people who can use elevators, and inform residents that there is a limit of two people in a resident's room).

Operators can also encourage their staff to complete the Australian Government's online training module for COVID-19 infection control. The Department of Health is developing a specific training program for aged care workers. This program may also help support workers in retirement villages to understand how to prevent the spread of COVID-19 and measures to take if a resident or worker becomes infected. The training module can be accessed here.

DELIVERIES

Operators may continue to allow deliveries (e.g. groceries, chemist, etc.) and essential services such as in-home care as these are authorised by or otherwise consistent with the directives.

VISITORS

Residents may want to continue to receive visitors. An Operator may take reasonable steps in relation to this process, such as the following:

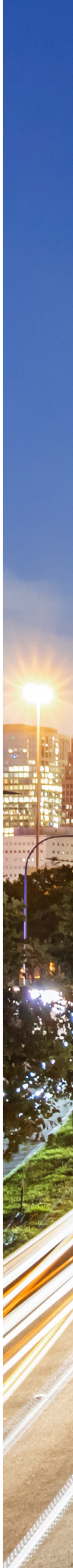
- inform the visitors that by visiting in numbers greater than two, they may be in breach of the Home Confinement Direction (and that the fine is up to a maximum of $13,345);
- remind the residents of their obligations under state and federal directives and that any visitors may put other residents and staff at risk; and
- screen visitors by requiring them to complete a declaration form about their recent health and travel (for instance, refer to the DCM Institute's COVID-19 Declaration Visitor Screening form as an example).

CAN WE HELP?

The COVID-19 pandemic has impacted retirement villages in ways that are unique and profound due to many residents being in a vulnerable age group, living in close proximity to one another and sharing common facilities.

We are able to assist Operators by drafting warnings and notices for circulation to residents about closures of facilities and restrictions on movement in and around the village. We are also able to advise on specific matters in relation to state and federal directives, or any other aspect of village or scheme operations that has been impacted by the pandemic.

Key Contact Tim Longwill | Partner | Employment Relations and Safety | T +61 7 3233 8974 | E tlongwill@mccullough.com.au

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Technology, Media and Telecommunications: Arts industry

Copyright Agency to provide an additional $375,000 in funding to Australian artists and writers, with more funding to follow

The Copyright Agency has announced it will be releasing $375,000 in grants and bringing forward to the first quarter of the next financial year (July – September 2020) $1.8 million worth of grants under the Copyright Agency Cultural Fund.

The move to support writers, visual artists and publishers will provide relief to individual artists in the nation's arts industry, particularly amid recent national and state government funding announcements largely geared towards supporting small to medium arts enterprises. The Copyright Agency will aim its funding toward moving arts events and festivals online, supporting emerging literary and artistic works focused on early 2020 Australian crises and supporting artists and writers affected by the global pandemic.

FOCUS ON SHIFTING ARTS ONLINE

Along with many of the nation's industries, the arts industry is looking to shift certain activities online during the COVID-19 pandemic. Three of the Copyright Agency funding program's core elements support this move online.

Facilitating virtual writers' festivals: The Copyright Agency will support scheduled writers' festivals to help make their programs digitally available. To do this the Copyright Agency will pay Australian participants the participation fees they would have received if the program had proceeded. The funding will also cover over a hundred writers and interviewers in festivals including the Sydney Writers' Festival, Byron Writers Festival and

other festivals that may not proceed as normal.

Funding for innovative online projects: The Copyright Agency will support innovative projects that are helping the arts industry to respond to the COVID-19 shutdown. This includes projects using out-of-the-box thinking to put Australian writers in front of audiences. The Copyright Agency will also support making payments to writers who participate in such online projects.

Funding for visual arts events and virtual launches: The funding program will also support virtual launches for events that the Copyright Agency already supports, such as the John Fries Awards.

COMMISSIONING NEW WORKS RELATING TO COVID-19 AND 2020 AUSTRALIAN CRISES

Trending amongst the arts industry during the COVID-19 pandemic is investment into developing projects and new works while events and productions are on hiatus. The Copyright Agency is particularly interested in commissioning new works related to Australian crises faced in 2020, with this making up two core pillars in its funding strategy.

New commissioned literary works: Copyright Agency's program will support the publication of between 20-30 works by Australian writers responding to disasters Australia has faced in early 2020, including the bushfires and COVID-19 pandemic. The working title for this is *Our Year of Fire, Flood and Plague: Australian writers respond to the challenges of 2020*. Pieces from this series will be published in *The Guardian*. The Copyright Agency will also set money aside to facilitate a book publication of these pieces.

New commissioned visual arts work: Copyright Agency's program will provide $25,000 to support photographic and other visual documentation of the crisis for publication in journals, magazines and exhibition in a major gallery, and to possibly tour when the COVID-19 events are resolved.

EMERGENCY SUPPORT FOR WRITING AND VISUAL ARTS PROJECTS AFFECTED BY COVID-19

As its last core element of its funding program, Copyright Agency has developed an emergency action fund to support writing and visual arts projects affected by the global pandemic.

Emergency action fund: This fund will be comprised of $150,000 to be allocated in grants between $5,000 - $20,000 to writing and visual arts projects affected by COVID-19. To spread the funding more widely, Copyright Agency anticipates most grants will be around $5,000. Applicants should ideally demonstrate they already have matched funding.

FURTHER FUNDING ANNOUNCEMENTS

The arts and media industries are being updated with new funding announcements weekly in response to the COVID-19 pandemic. We may update our website page to reflect additional funding support being provided to the nation's art, media and entertainment industries.

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

Lawyers | McCullough Robertson

BRISBANE | SYDNEY | CANBERRA | NEWCASTLE | MELBOURNE

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