

Whether a business will succeed or fail following a major crisis such as a bushfire is often dependent upon the planning and direction of boards and management. It is a time of great pressure for directors and employers who have much to consider in a short time. This article aims to provide an overview of some key legal considerations for directors and employers in a time of crisis.

Directors' Considerations

A directors' role to govern a company on behalf of its members has never been tougher from a compliance perspective. Increased shareholder activism coupled with an increase in regulator intervention contributes to the pressures. A director's role is complex enough without adding to the heat in the case of a major disaster such as a bushfire. Set out below are some high level considerations for directors.

Directors Duties and Insurance

- In responding to the crisis, every director must have at the forefront of his/her mind the statutory and common law duties applicable to the role. At a minimum, each director must act with reasonable care and diligence, in good faith in the best interests of the company and for a proper purpose, and must not improperly use their position to gain advantage or cause detriment to the company (sections 180-184 of the Corporations Act). However, what this means practically is becoming increasingly complex.
- A number of cases have made it clear that a short-term focus on financial returns to shareholders is not enough. Honesty and integrity are also not enough. Directors are judged by the objective standard of the reasonable company director in the same circumstances as the director.
- In recent times, ASIC has increased the number of prosecutions of directors for alleged breaches of the Corporations Act, increasing the risk of pecuniary penalties and disqualification from acting as a director for a period of time. In the 2019 case of *ASIC v Vocation*¹, ASIC commenced civil penalty proceedings against some, but not all, of a company's former executive and non-executive directors and officers illustrating that even collective board decisions do not absolve individual director liability.

- There has also been a significant increase in the discourse on climate change and whether Australian directors are required to consider climate change in discharging their duties. ASIC and APRA have continued to emphasise the need for companies to address climate change risk as part of their governance and risk management frameworks. Bushfires will be a foreseeable risk for many companies and directors will need to consider their duties to take account of, and report publicly on, this risk and other climate-related risks and issues.
- In light of the above, directors should be mindful to check that existing insurance and indemnity policies, particularly D&O insurance, are both adequate and up to date.

Insolvency and the Safe-Harbour Regime

- The Corporations Act imposes a duty on directors to prevent a company from incurring a debt when the director has reasonable grounds to suspect the company is, or may become, insolvent (i.e. unable to pay its debts as and when they fall due and payable). Liability for insolvent trading under Australian insolvency laws can expose a director to a range of civil and criminal penalties.
- The bushfires have had catastrophic financial effects on some companies. Directors need to carefully consider the requirements of their duties to prevent insolvent trading, and their ability to access the safe harbour provisions of section 588GA(1) of the Corporations Act. In particular, directors need to consider:
 - Outstanding employee entitlements and the ability for these to be paid
 - Tax liabilities
 - Whether appointing an administrator or liquidator is warranted and a restructuring plan is needed
 - Whether further advice needs to be obtained

Disaster Recovery Plans

Directors will have a role to oversee the quick implementation of an appropriate disaster recovery plan, which usually involves seeking specialist legal advice. On an ongoing basis, directors will need to ensure these plans are robust, tested and up to date.

ASX Disclosure

Directors of listed companies will need to ensure continued compliance with the continuous disclosure requirements of the Listing Rules. Disclosures need to be timely, accurate and not misleading. They also need to have been the subject of a robust review process.

¹ *Australian Securities and Investments Commission v Vocation Limited (In Liquidation)* [2019] FCA 807 (31 May 2019).

Employers' Considerations

While a crisis such as a bushfire can be harrowing on a business, it is important for employers to remember the various workplace rights and obligations that may come into play. Below are some key issues employers may have to consider during, and in the aftermath of, a disaster.

Health and Safety Obligations

- Under state workplace health and safety (WHS) legislation, employers have an obligation to provide a safe workplace, so far as is reasonably practicable. Disasters may pose risks employers do not consider in the day-to-day running of the workplace, highlighting the importance of having effective and well-known safety policies and procedures in place before a crisis hits.
- If a workplace is affected by a disaster such as bushfire, employers must consider whether it is safe for employees to travel to and attend work, and should regularly communicate with employees about managing safety risks.
- If employees are required to perform tasks outside their usual scope of work (including helping to restore the workplace in the aftermath of a disaster) employers must first ensure employees have adequate skills and experience to do so.
- Employers should also be conscious of the potential psychological impacts of a disaster on employees and take steps to manage this, including by offering support services where appropriate.

Forced Closure of a Workplace

- Where a disaster forces a business to shut up shop, employers need to consider their employees' entitlements. Generally, under the *Fair Work Act 2009* (Cth) (FW Act) an employer can stand down employees without pay if they cannot usefully be employed, and the employer cannot reasonably be held responsible for a stoppage of work. However, employers must consider whether an applicable enterprise agreement or employment contract contains specific stand-down provisions that impact the ability to stand down employees.
- Alternatively, employers may be able to ask or direct employees to take annual leave while the workplace is closed. Under the FW Act, an employer can direct an employee to take annual leave if the direction is reasonable and complies with the terms of any applicable modern award or enterprise agreement. A number of modern awards require employers to provide several weeks' notice of a direction to take annual leave, which may not be appropriate in a disaster situation.
- Employers may be able to ask or direct employees to work from an alternative location while the workplace is closed. However, employers should consider that their WHS obligations will continue to apply, and an alternative workplace (such as at home) may pose risks that are difficult to manage.

- Down the track, businesses badly affected by disaster may need to consider implementing redundancies. Many redundancies trigger obligations to consult with affected employees, reconsider redeployment opportunities and, in the event of termination, provide notice pay and redundancy pay.

Employees Affected by Crisis

- Where full-time and part-time employees are personally affected by a crisis, they may seek access to their accrued annual leave entitlement. Under the National Employment Standards (NES) contained in the FW Act, an employer must not unreasonably refuse a request for annual leave.
- An employee entitled to long service leave (LSL) may want to use their LSL during a crisis. LSL entitlements differ from state to state, and employers should be aware of their obligations if an employee requests LSL at short notice. For example, in Victoria, an employer may only refuse a request to take LSL on reasonable business grounds. In WA, an employee is required to give their employer two weeks' notice before taking LSL.
- Under the FW Act, full-time and part-time employees are entitled to access their paid personal/carer's leave entitlement not only if they or a family member are sick or injured as a result of a disaster, but to care for or support a family member because of an "unexpected emergency".
- Certain employees (including parents and carers) may be eligible under the FW Act to request flexible working arrangements (such as working from home), and may utilise this right if they have been affected by a disaster. Employers must respond to a written request for flexible working arrangements within 21 days and can only refuse the request on reasonable business grounds.

Employees Assisting in Disaster Relief or Recovery (Community Service Leave)

Under the NES, employers are required to provide members of a recognised emergency management body (such as a fire-fighting body) with reasonable unpaid leave to take part in emergency management activities. Employers must also allow Defence Reservists called to assist with disaster relief to be released from their employment to undertake Defence service, and to continue to be employed when they return.

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