



Governance Materials

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Assumptions

The Governance Materials have been drafted on the basis that your organisation:

- Is a company limited by guarantee;
- Is a registered charity; and
- Holds deductible gift recipient (**DGR**) status

References to "company" and "companies" in these Governance Materials refer only to not-for-profit companies satisfying each of these criteria.

The Governance Materials are limited to topics expressly set out in them and do not cover, for example:

- Taxation (including both State and Commonwealth taxes);
- Intellectual property; and
- Real property

Financial problems or insolvency

1. **What is insolvency?** If a company is "unable to pay its debts as and when they fall due "then it will be insolvent. See: https://www.comlaw.gov.au/Details/C2015C00336/Html/Volume_1#_Toc424813175
2. **Duty to avoid insolvent trading:** Directors are responsible for ensuring their company does not trade and incur a debt while insolvent. See: https://www.comlaw.gov.au/Details/C2015C00336/Html/Volume_2#_Toc424812936
3. **Liability:** If a director allows a company to incur a debt while insolvent, the director may be held liable if the company is ultimately unable to pay the debt.
4. **Defences:** There are a number of defences available to directors who may have acted in contravention of the duty to avoid insolvent trading. See: https://www.comlaw.gov.au/Details/C2015C00336/Html/Volume_2#_Toc424812939
5. **What should you do if your company may be insolvent?** If you suspect that your company is facing insolvency, you should:
 - a) confirm the financial position of the company;
 - b) take positive steps to realistically assess all options;
 - c) seek specific legal advice on the issues at hand; and
 - d) act in a timely and responsible manner to address the solvency concerns.

See: http://www.nfplaw.org.au/sites/default/files/Financial_problems_or_insolvency_0_0_0.pdf

Employees

1. **Minimum employment standards:** All employees employed in NSW are entitled to 10 minimum standards of employment (also known as the National Employment Standards) which are set out in the *Fair Work Act 2009* (Cth) (**Fair Work Act**). See: <http://www.fairwork.gov.au/employee-entitlements/national-employment-standards>
2. **Industrial instruments:** Employees and employers in certain industries and occupations may be bound by an industrial instrument such as a modern award, enterprise agreement or determination of Fair Work Australia. See: <http://www.fairwork.gov.au/awards-and-agreements>
3. **Superannuation:** Your company is required to make superannuation contributions for all employees (whether full time, part time or casual) who are aged between 18 and 69 and paid \$450 or more (before tax) in a calendar month. Your company may also be required to make superannuation contributions for employees under the age of 18 who work more than 30 hours per week. See: <https://www.ato.gov.au/Business/Super-for-employers/>
4. **PAYG withholding:** If your company is an employer, it is required to withhold income tax from wage payments to employees (**PAYG withholding**) each pay period. The company must then provide this tax to the Australian Taxation Office. See: <https://www.ato.gov.au/Business/PAYG-withholding/>
5. **Other taxes:** Other taxes, such as fringe benefits tax, may also apply to employees. Depending on the size of your company and the total remuneration paid by it in its payroll, it may also be liable to pay payroll tax to the NSW Office State Revenue Office. See: [https://www.ato.gov.au/General/Fringe-benefits-tax-\(FBT\)/](https://www.ato.gov.au/General/Fringe-benefits-tax-(FBT)/) and <http://www.osr.nsw.gov.au/taxes/payroll>
6. **Notice period for termination:** Most full-time and part-time employees are entitled to a minimum notice period (or pay in lieu of such a notice period) if their employment is terminated. If the employee is covered by a modern award or enterprise agreement or has a written contract of employment, that award, agreement or contract may specify a greater period of notice. See: <http://www.fairwork.gov.au/ending-employment/notice-and-final-pay>
7. **Unfair dismissal:** If your company dismisses an employee for an unlawful (e.g. discriminatory) reason or the termination is "harsh, unjust or unreasonable", the employee may be able to make a claim against your company on the basis of unlawful termination or unfair dismissal. If your company has fewer than 15 employees, it must comply with the Small Business Fair Dismissal Code when dismissing employees. See: <http://www.fairwork.gov.au/ending-employment/unfair-dismissal>
8. **Redundancy:** An employee may be entitled to redundancy pay under the National Employment Standards if that employee is dismissed because your company:
 - a) no longer requires that employee's job to be done by anyone; or
 - b) has become insolvent or bankrupt.

See: <http://www.fairwork.gov.au/ending-employment/redundancy>

9. **More information:** For more information, please see: http://www.nfplaw.org.au/sites/default/files/Employee_contractor_or_volunteer_0_0_0_0.pdf

Work, Health and Safety

1. **NSW WHS Laws:** Companies are required by law to ensure they provide a safe workplace for their employees and volunteers. In NSW, the government body responsible for work health and safety (**WHS**) is Workcover NSW. See: <http://www.workcover.nsw.gov.au/>
2. **Compliance:** If your company does not comply with the WHS laws, it risks substantial fines and directors and officers risk further fines and imprisonment if they do not exercise due diligence in relation to WHS matters. See: <http://www.workcover.nsw.gov.au/law-and-policy/enforcement>
3. **Primary duty:** Companies must ensure, as far as is reasonably practical, the health and safety of:
 - a) workers engaged, or caused to be engaged by the company;
 - b) workers whose activities in carrying out work are influenced or directed by the company; and
 - c) other persons in relation to work carried out as part of the conduct of the company.

See: <http://www.workcover.nsw.gov.au/health-and-safety/manage-workplace-safety/your-responsibilities>

4. **Workplace:** All companies with management or control, in whole or part, of a workplace have a duty to ensure, so far as is reasonably practicable, that:
 - a) the workplace;
 - b) means of entering or exiting the workplace; and
 - c) anything arising from the workplace,

are without risks to the health and safety of any person. See: <http://www.workcover.nsw.gov.au/health-and-safety/manage-workplace-safety/work-facilities>

5. **Consultation:** Companies must, so far as is reasonably practicable, consult, cooperate and co-ordinate activities with all other persons who have a duty in relation to the same WHS matter and with their workers who are directly affected by WHS matters. This duty is owed not only to employees but also volunteers. See: <http://www.workcover.nsw.gov.au/health-and-safety/safety-representation/consultation>
6. **Health and safety representative and committee:** The employees or volunteers of a company may request that the company facilitate the election of one or more persons as health and safety representative to represent the employees and volunteers of that company in respect of WHS matters and/or that the company establish a health and safety committee. See: <http://www.workcover.nsw.gov.au/health-and-safety/safety-representation/health-and-safety-representatives> and <http://www.workcover.nsw.gov.au/health-and-safety/safety-representation/safety-committees>
7. **Register of injuries:** NSW laws require an employer to keep a Register of Injuries in which employees should record any workplace incidents or injuries, no matter how serious they appear to be at the time. See: <http://www.workcover.nsw.gov.au/workers-compensation-claims/report-an-incident-or-injury/register-of-injuries>
8. **Notice to WorkCover:** WorkCover NSW requires immediate notification of the following incidents:
 - a) the death of a person;
 - b) a serious injury or illness of a person; or
 - c) a dangerous incident.

See: <http://www.workcover.nsw.gov.au/workers-compensation-claims/report-an-incident-or-injury/notifying-and-recording-an-incident-or-injury>

More information: For more information, please see:

http://www.nfplaw.org.au/sites/default/files/Work_health_and_safety_laws_1_0_0.pdf

Insurance

1. **Workers' compensation:** If your company's annual financial payroll is expected to be more than \$7500 a year, you must take out workers' compensation insurance to cover the company's employees. See: <http://www.workcover.nsw.gov.au/insurance/workers-compensation-insurance-for-your-business/do-i-need-insurance>
2. **Public liability and professional indemnity:** Your company may need to take out public liability and professional indemnity insurance to cover its own liability and that of its employees to other people. Public liability insurance protects the company against the financial risk of being found liable for negligence. Professional indemnity insurance is a variety of insurance products that help professionals cover the cost of litigation.
3. **Directors' and officers' insurance:** Directors' and officers' liability insurance covers the cost of compensation claims made against your company's directors and officers for alleged wrongful acts during the course of the directors and officers performing their duties. See: <http://www.companydirectors.com.au/Director-Resource-Centre/Governance-and-Director-Issues/Directors-and-officers-insurance>
4. **Volunteer protection:** It is a good idea for your company to take out personal accident insurance to cover your volunteers for out of pocket medical expenses if they are injured whilst performing work on behalf of your company.

Privacy, Spam and the Do Not Call Register

1. **Privacy Act:** The Australian Privacy Principles (**APPs**) in the *Privacy Act 1988* (Cth) outline how all companies with an annual turnover of more than \$3 million must handle, use and manage "personal information". The APPs may also apply to non-for-profit companies which have contractual arrangements with the Commonwealth government. See: <http://www.oaic.gov.au/privacy/privacy-act/the-privacy-act>
2. **Spam Act:** The *Spam Act 2003* (Cth) (**Spam Act**) prohibits the sending of unsolicited commercial electronic messages (known as spam) with an Australian link and sets out certain requirements for commercial electronic messages. Registered charities are exempt from certain parts of the Spam Act. See: <http://www.acma.gov.au/Industry/Marketers/Anti-Spam>
3. **Do Not Call Register:** The *Do Not Call Register Act 2006* (Cth) prohibits telemarketers and fax marketers from calling or faxing registered numbers but allows certain telemarketing calls and marketing faxes where the contact is authorised by a registered charity. See: <http://www.acma.gov.au/Home/Citizen/Stay%20protected/My%20privacy%20world/Reduce%20unwanted%20calls>

Fundraising

1. **Fundraising:** When an organisation or person collects money for a cause this may be considered “charitable fundraising” and will be subject to specific laws and regulations. In New South Wales, the government body responsible for regulating charitable fundraising is the NSW Office of Fair Trading (**Fair Trading**). See:
http://www.fairtrading.nsw.gov.au/ftw/Cooperatives_and_associations/Charitable_fundraising.page
2. **Requirement for fundraising:** If your organisation is raising funds for a charitable purpose in NSW (unless your organisation is exempt), it will need to:
 - a) apply to, and be granted an authority and a licence to fundraise from, Fair Trading; and
 - b) comply with the *Charitable Fundraising Act 1991* (NSW) and the *Charitable Fundraising Regulations 2008* (NSW).

See:

http://www.fairtrading.nsw.gov.au/ftw/Cooperatives_and_associations/Charitable_fundraising/Intention_to_fundraise.page?#Authorisation_to_fundraise and
http://www.fairtrading.nsw.gov.au/ftw/Cooperatives_and_associations/Charitable_fundraising/Intention_to_fundraise.page?#How_is_a_licence_to_fundraise_obtained

3. **People fundraising on your behalf:** When an organisation or individual seeks to fundraise on behalf of your charity, you need to authorise them in writing to collect any donations. See:
http://www.fairtrading.nsw.gov.au/ftw/Cooperatives_and_associations/Charitable_fundraising/Intention_to_fundraise.page?#What_do_we_do_if_someone_wants_to_raise_funds_on_behalf_of_our_charity
4. **Other states and territories:** If your fundraising will be conducted in more than one state or territory or targets residents from another state or territory, then you will need to ensure that you are complying with legislation in each of the other States or Territories. See:
http://www.fairtrading.nsw.gov.au/ftw/Cooperatives_and_associations/Charitable_fundraising/Intention_to_fundraise.page?#Fundraising_in_other_states_and_territories

Directors' Duties

1. **Directors' duties:** The four key legal duties of a director are:

- a) to act in good faith in the best interests of the company and for a proper purpose;
- b) to act with reasonable care and skill (including the duty to prevent insolvent trading);
- c) not to improperly use information or position; and
- d) to disclose and manage conflicts of interest.

See: http://www.nfplaw.org.au/sites/default/files/Duties_Guide_0_0_0.pdf

2. **Business judgement rule:** Every decision ultimately requires exercise of judgement. It is *how* the decision was made that is important. See:

https://www.comlaw.gov.au/Details/C2015C00336/Html/Volume_1#_Toc424813342

3. **Reliance on others:** Directors may rely on information, or professional or expert advice where such reliance is reasonable. See:

https://www.comlaw.gov.au/Details/C2015C00336/Html/Volume_1#_Toc424813351

4. **Delegation:** Directors may delegate their powers to others but remain responsible for the exercise of those powers by the delegate. See:

https://www.comlaw.gov.au/Details/C2015C00336/Html/Volume_1#_Toc424813352

5. **Practical application:** Complying with your duties as a director includes:

- a) making sure you are familiar with the aims and purpose of your company;
- b) monitoring and understanding the affairs, activities, strategic direction and financial position of your company; and
- c) dedicating sufficient time, thought and energy to any tasks and decisions you are required to undertake.

6. **Conflict of interest:** Conflicts of interest often arise and are not prohibited but must be disclosed and managed. To manage conflicts:

- a) you must not assume a role which would be inconsistent with the proper, free and independent discharge of your duties as a director;
- b) you should make full and frank disclosure of any actual or potential conflicts to the board; and
- c) once you have disclosed your conflict, you should not participate in discussions or voting on the matter nor discuss or try to influence the outcome of the decision.

7. **Penalties:** Breaches of directors' duties can attract both civil and criminal penalties See:

https://www.comlaw.gov.au/Details/C2015C00336/Html/Volume_1#_Toc424813346

Governance

1. **Role of the board and directors:** Each director must ensure that they understand the role and composition of the board (including governance structure) and their individual director responsibilities. See: <http://www.companydirectors.com.au/~/-/media/b42bd5b5ca1445f582bb96adac752325.ashx>
2. **ACNC Governance Standards:** Directors of a registered charity must ensure that it complies with Australian Charities and Not-for-profits Commission minimum governance standards. See: http://www.nfplaw.org.au/sites/default/files/ACNC_governance_standards_guidance_PDF_554KB_0_0.pdf
3. **Governing documents:** Incoming directors should obtain a copy of, and become familiar with, the Constitution and any other governance documents of the company (e.g. code of ethics and any policy documents).
4. **Budget:** The board is responsible for finalising and approving the annual budget, and must approve any items of expenditure outside the budget.
5. **Legal requirements:** The board is responsible for ensuring that the company meets all legal requirements and remains accountable to its donors and other stakeholders.
6. **Risk management:** Each director must ensure there is an appropriate system for determining risk appetite, oversight, recognition, management, treatment and control. See: http://www.finance.gov.au/sites/default/files/COV_216905_Risk_Management_Fact_Sheet_FA3_2308201_0_0.pdf and <http://www.communitydirectors.com.au/icda/tools/?articleId=1363>
7. **Purpose and strategy:** Each director should ensure that the vision, objects and purpose of the company have been clearly articulated and communicated to stakeholders, and that the company's actions and activities are consistent with its objects.
8. **Strategic direction:** Each director must ensure that the resources available to the company are effectively utilised to achieve the company's objects and that the board regularly measures the company's performance in achieving its strategy and fulfilling its objects.
9. **Relationship with management:** Directors should ensure there is an effective working relationship between the board, the chief executive officer and other senior management, including receipt by the board of regular, current and relevant reports from management.
10. **Stakeholder engagement:** The board should identify, and develop policies and practices to effectively engage with its stakeholders.

Record-keeping and Reporting

1. **Directors' obligations:** Directors are ultimately responsible for managing and complying with the record keeping and reporting obligations of the company.
2. **Record keeping under ACNC Act:** Companies must maintain financial and operational records for at least 7 years after the transactions, operations or acts covered by the records are completed. See: http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CBwQFjAAahUKEwjzbzLBSYnIAhXjN6YKHfOwC9Q&url=http%3A%2F%2Fwww.charteredaccountants.com.au%2F~%2Fmedia%2FFiles%2FIndustry%2520topics%2FReporting%2FNot%2520for%2520profit%2FGuide%2520for%2520charities_FINAL.ashx&usq=AFQjCNE79uj-JvnXwXTEBHksMbvM2Er7_Q&sig2=awBLXJR7MYp2rllJUK2-Tg&bvm=bv.103073922,d.dGY
3. **Record keeping under the Corporations Act:** Not-for profit companies must maintain certain records under the *Corporations Act 2001* (Cth) including, maintaining a members' register and records of all directors' and members' minutes and resolutions. See: <http://asic.gov.au/for-business/starting-a-company/how-to-start-a-company/registering-not-for-profit-or-charitable-organisations/> and <http://asic.gov.au/regulatory-resources/financial-reporting-and-audit/preparers-of-financial-reports/companies-limited-by-guarantee/>
4. **Exemptions from financial reporting requirements:** Charities are exempted from the requirement to maintain financial records under the *Corporations Act 2001* (Cth). See: http://www.nfplaw.org.au/sites/default/files/Record_keeping_for_charities_0_0.pdf
5. **Format:** Records must be in English and may be kept in any format so long as they can be easily recalled on request. See: http://www.acnc.gov.au/ACNC/Manage/Record_keeping/ACNC/Edu/Record_Information.aspx?hkey=5f579f6a-6b9e-49f0-aa70-de27abdd5efd
6. **ACNC register:** Directors must understand the information on the Australian Charities and Not-for-profits Commission (**ACNC**) register and ensure that their company's details on the ACNC register are up to date. See: http://www.acnc.gov.au/ACNC/FTS/Fact_Board.aspx
7. **Ongoing reporting obligations of registered charity:** Charities have ongoing obligations to the ACNC. They must notify the ACNC and/or Australian Securities and Investments Commission (**ASIC**) of changes to their details, but do not have to report annually to ASIC or notify ASIC of most changes. See: http://www.acnc.gov.au/ACNC/Manage/ASIC_and_other_regulators/CLG/ACNC/Edu/CLG.aspx, <http://www.acnc.gov.au/ACNC/Manage/UpdateDetails/ACNC/Edu/UpdateNotify.aspx> and <http://asic.gov.au/for-business/running-a-company/company-officeholder-duties/charities-registered-with-the-acnc/reporting-obligations-of-companies-and-registered-bodies-also-registered-with-the-acnc/>
8. **Annual Information Statement:** Charities must submit an Annual Information Statement for each reporting period to ACNC. See: http://www.acnc.gov.au/ACNC/Manage/Reporting/SubmitAIS/ACNC/Report/2014AIS_Landing.aspx
9. **Charity size:** A company's size will affect its annual reporting obligations. See: <http://asic.gov.au/regulatory-resources/financial-reporting-and-audit/preparers-of-financial-reports/companies-limited-by-guarantee/>
10. **Other reporting:** A company may be required to report on other matters including fundraising, tax and employment matters, as well as any other industry specific matters.

Members' Rights and Meetings

1. **Consent:** A company must obtain consent for a member to become a member of the company.
2. **Constitution:** The rights and obligations of members are set out in the company's constitution.
3. **Exemption from Corporations Act rules:** The rules in the *Corporations Act 2001* (Cth) regarding company meetings and voting do not apply to charities.
4. **Accountability:** A company must take reasonable steps to ensure it is accountable to members and that its members have an adequate opportunity to raise concerns about its governance. See: http://www.nfplaw.org.au/sites/default/files/Member_rights_and_obligations_for_CLGs_0_0.pdf
5. **Meetings:** A company may be required to hold meetings of members to comply with its accountability obligations under Australian Charities and Not-for-profits Commission Governance Standard 2. See: http://www.acnc.gov.au/ACNC/Manage/Governance/GovStds_2/ACNC/Edu/GovStandard_2.aspx
6. **Rules for meetings:** The rules for meetings are set out in the company's constitution, and should include information regarding notice, quorum, procedures, voting rights, resolutions and keeping and retaining minutes.
7. **Access to information:** Members are entitled to access minutes of members' meetings and other information that enables accountability of the company to its members.
8. **Voting:** Members with voting rights may vote on appointment and removal of directors and remuneration (if any) to be paid to directors.

About us

Kemp Strang is a commercial law firm with offices in Sydney, Melbourne and Brisbane. Established over 40 years ago, we provide high quality legal service to commerce, industry and government.

The legal services we provide to our clients include:

- Banking & Finance;
- Corporate and M&A;
- Dispute Resolution & Litigation;
- Employment Law;
- Insolvency;
- Intellectual Property;
- Property;
- Regulatory & Compliance;
- Charity and Not-For-Profit.

We work to develop long-term relationships with our clients and to become and remain their trusted business partner. Our commitment to our relationships with clients is reflected in the long-standing relationships we share with them.

Our Corporate Team

Our Corporate Advisory team has extensive experience in providing advice across all aspects of corporate and commercial law to public and private companies, financial institutions, SME's, start-ups and not-for-profit organisations. Our clients operate in a broad range of sectors including retail, telecommunications, media and entertainment, technology, mining and resources and financial services.

Our partners are recognised for their experience and expertise in the corporate and commercial sector, and have been involved in a number of significant and strategic transactions.

Contact Us

If you would like any further information regarding the Governance Materials or our other legal services, please do not hesitate to contact either David Nolan or Sarah Johnson, details below:



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