



The Importance of Establishing a Due Diligence Defence During a Pandemic

How to protect your organisation against liability and reputation risk arising from exposure to COVID-19 outbreaks.

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An emerging risk

The challenges facing organisations today is much altered from what it was only a few weeks ago. An emerging risk we have been keeping a watch on is the risk of reputation damage and liability arising as a result of employees or customers falling ill or being exposed to COVID-19 (**pandemic management risk**). This risk is likely to be heightened where there is a failure to ensure that an organisation's Pandemic Plan and associated frameworks, systems and controls (**pandemic measures**) are implemented effectively and performing. This will be a critical risk for any organisation operating during the pandemic crisis, but particularly for those organisations who have staff operating on the 'frontline' in industries such as health care, education, child care, aged care, essential retailers, cleaning, delivery businesses, transport and utilities.

The experience to date

Lawyers in Australia are already looking at potential class actions against the government and businesses due to customers and the general public facing increased health risk, illness or death as a result of an alleged breakdown in controls with respect to the Ruby Princess.¹ The recent outbreak of infection for Qantas baggage handling also attracted early criticism that the company had not done enough to protect workers from the virus.² As other outbreaks begin to emerge (such as those in the north-west region Tasmanian hospitals and aged care facilities), there is no doubt, the adequacy of the organisation's pandemic measures will be called into question. If they are found to be inadequate, the organisation and its directors and officers are exposed to both criminal and civil liability and serious reputational damage.

Many organisations have scrambled to implement existing Pandemic Plans or develop a new plan if one did not already exist. Some would have dusted off their plan for the first time and may have performed limited testing on the effectiveness of the plan. Due to the urgency in which a response to the crisis has been required and other competing priorities such as the financial distress many of

¹ <https://www.lawyersweekly.com.au/biglaw/27833-ruby-princess-coronavirus-crisis-could-ignite-class-action-as-furious-passengers-seek-legal-advice>

² <https://www.msn.com/en-au/news/australia/union-slams-qantas-over-sa-airport-covid-19-outbreak/ar-BB11ZEEM>

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organisations are also concurrently facing, pandemic measures may not initially have been designed as robust as they could have been or implemented effectively. This is, however, only the tip of the iceberg.

Pandemic Plans, frameworks, systems and controls will need to be maintained and continually improved on an ongoing basis for the duration of the crisis. It is not a set and forget control framework in this type of situation. If organisations operating on the frontline are going to be successful in establishing a due diligence defence and maintain their reputations after the immediate crisis has passed, they will need to do more now to effectively mitigate legal and reputation risks.

Relevance of a due diligence defence

The primary purpose of an organisation's Pandemic Plan is of course to manage the health crisis and protect employees and customers. However, it is also a critical control to ensure compliance not only with specific legal obligations which apply during the crisis (such as pandemic directions issued by the Government) but also existing legal obligations such as those set out under corporations laws, employment laws and workplace health and safety laws. Embedded within these existing obligations is the duty for directors and officers of the company to act with 'due diligence', 'due care and skill' and the obligation to take 'reasonable steps' or 'reasonable care' when implementing systems and controls.

How to establish a due diligence defence

Organisations operating during the pandemic crisis need to be asking themselves:

How comfortable are senior management and the board with the adequacy of their Pandemic Plan, frameworks, systems and controls?

Are there any potential areas of exposure/weakness that need to be addressed?

What reporting are senior management and the board receiving about how effectively these measures are operating and performing in practice?

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Some of the key controls which will need to be put in place to mitigate pandemic management risk and successfully establish a due diligence defence, are:

- detailed identification of the specific risks which apply to your organisation as a result of the pandemic;
- identification and evaluation of legal obligations which apply in the management of a pandemic such as employment, workplace health and safety, corporate duties and pandemic directives;
- a well-designed Pandemic Plan and pandemic measures to manage and mitigate each risk and comply with applicable legal obligations;
- a robust monitoring and supervision program to ensure pandemic measures continue to work effectively and perform as intended;
- innovative and effective communication and training for employees;
- continual improvement and adjustment of pandemic measures, to ensure ongoing performance and relevance of pandemic measures;
- ongoing reporting to senior management and the board on the effectiveness and performance of pandemic measures.

The above actions represent key elements of an effective governance, risk and compliance management system. There are a number of cases where courts have formed the view that the organisation exercised 'due diligence' by having a proper management system, training and adequate monitoring and supervision.

Risk management alone is not due diligence and a higher standard is needed to establish a due diligence defence. For example, a well-designed monitoring and supervision program tests, on an ongoing basis, the effectiveness and performance of the management system. To effectively establish a due diligence defence, the monitoring and supervision program would need to be designed with a deep understanding of what 'good' looks like. It needs to be put in place as early as possible, to ensure any potential areas which are not operating effectively or performing as expected, are identified early and proactively addressed.

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How we can help

Our team have been closely monitoring and researching COVID-19. Our governance, risk, compliance and legal skills are unique in the market and could be of great assistance to organisations during this time. Combined with our top tier legal and in-house experience delivered in a boutique manner, we are able to step in and support in an agile way that is both flexible and economical.

Some of the key actions we recommend all organisations operating during the pandemic crisis consider are:

- 1. Performing a risk assessment** – identifying and documenting key legal, compliance and operational risks arising from the pandemic, the consequences of the risks and controls in place to manage the risks.
- 2. Identification and evaluation of legal obligations** relating to management of a Pandemic Plan.
- 3. Developing and documenting a comprehensive Pandemic Plan including supporting frameworks and controls** to effectively implement the Pandemic Plan such as policies/procedures/processes, quality assurance checking, training and communication.
- 4. Developing a pandemic compliance monitoring and supervision program** - to monitor and supervise the performance and effectiveness of the Pandemic Plan and create a mechanism to continually improve the Pandemic Plan, where needed.
- 5. Performing or assisting in the performance of ongoing monitoring and supervision** of the implementation of pandemic measures (such as control reviews, onsite spot checks, employee surveys/interviews, data monitoring and analysis).
- 6. Performing an independent review of the adequacy and effectiveness of pandemic measures.**
- 7. Designing effective senior management and board reporting** on the effectiveness and performance of pandemic measures.

Important to note:

This communication is intended to provide commentary and general information only. It is not intended to be a comprehensive review of all aspects of the matter referred to. It should not be relied upon as legal advice as to specific issues or transactions.

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Our Team

The Ash St. Governance, Compliance and Regulation Team (GCR) is a blended legal, compliance and governance practice that draws on the private practice and in-house experience of our Practice Director, Samantha Carroll and Special Counsel, Michelle Bradshaw. Their approach is to listen, understand and then provide our clients with quality advice informed by their experience of what works in the real world.

Consistent with the Ash St. approach, the GCR team leverage the complementary skill sets of our Corporate/M&A, Finance, Projects & Infrastructure, IT, IP, Real Property and Employment Legal Practices and Advisory Services to ensure that the right people are involved in our client's Governance, Compliance and Regulatory matters. This translates into achieving the best results and high quality outcomes, for our clients.

About Ash St.

We are an independent professional services firm that provides you with integrated legal, compliance and other advisory services.

Established in 2013, we were founded to offer clients "The New Way" in professional services – one of the first of its kind. With this foresight and the application of our respective disciplines, high capability talent and agile commercial models we ensure our clients' complex business problems are solved.

Our senior lawyers have been trained by some of Australia's top-tier law firms and have assisted our domestic and international clients, from start-ups and sole traders through to globals, with their matters. They have in-depth experience in Mergers & Acquisitions; Corporate and Commercial Law; Governance, Compliance and Regulation; Finance; IT; IP; Real Property; Contracting; Projects and Infrastructure; Employment Law and Litigation.

Our mission is to help you convert the complex into opportunities. Visit ashstreet.com.au



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