

IMPACTS OF THE CORONAVIRUS

REMEDIES FOR CONSTRUCTION
& COMMERCE

Words by
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INTRODUCTION

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We have been fielding a number of calls from clients in the commercial and construction fields, who are anxious about their business in light of the COVID-19 pandemic. They are seeking to protect their own commercial interests and maintain a viable business "so they can come out at the other end."

At the same time, they are mindful of trying to maintain their business relationships. Increasingly, for those with employment and businesses, Australia is working in new ways including remotely, where this is feasible.

For those clients with existing supply lines and current financial responsibilities, in most cases they have agreed a series of commercial contracts. The comfort of these contracts is that they help establish and develop the business.

This helps the business owner develop a regular cash flow, hire staff and establish business credibility with financiers and clients. In more normal times, the usual pattern of daily life is sometimes complicated and creates its own anxieties. That said, the current situation has only worsened our commercial and personal anxieties and has made a nonsense of how we understand these relationships.

THE GOVERNMENT'S RESPONSE

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The Federal and State Governments around Australia have passed legislation designed to protect our population.

They have also introduced a number of initiatives both fiscal and personal that seek to minimize the effects of the virus. And as our government leaders often remind us, "it is also about protecting the economy."

A number of measures have been introduced by the State and Federal Governments to ameliorate the effects of COVID 19 from a macro and micro economic perspective and a societal viewpoint. On 24 March 2020 the NSW Government introduced *COVID 19 COVID-19 Legislation Amendment (Emergency Measures) Act 2020** (commenced 25 March 2020) which has amended a number of Acts to implement emergency measures as a result of the COVID 19 pandemic.

*For the full Act, [click here](#)

The amendments are:

- Emergency measures - introduced to protect the health, safety of members of the public; and
- Temporary - for a period commencing on the date of commencement or a date 6 months after the commencement.

For example, the Environmental Planning and Assessment Act 1979 No 203 has been amended to provide the planning system with the unfettered ability to construct COVID 19 clinics. In particular Schedule 2.8 permits the Minister for Planning and Public Spaces to make an order that authorises development to be carried out on land without any approval under the Act or consent from any person.

The Minister may make the order only if he/she is reasonably satisfied that the making of the order is necessary to protect the health, safety and welfare of members of the public during the COVID-19 pandemic

The provisions apply for a minimum period of 6 months and may apply for a total of 12 months if the regulations prescribe a longer period.



WHAT OPTIONS ARE OPEN TO OUR CLIENTS?

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So what options are open to contractors and commercial clients faced with site closures, difficulties performing a contract delivering services in the current climate due to labour or supply shortages?

How can they protect their own interests?

Can they legitimately defer providing a service or attending to their contractual commitments?

The answer, if any is known is complicated and impacted by a number of factors most of which are beyond our control.

We have set out a series of commonly asked questions and our views using examples from well - known contracts to illustrate the relevant issues.

DELAYS - CAN WE CLAIM AN EXTENSION OF TIME?

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It depends on the wording of the contract.

Check whether the contract refers to a change of law and Government requirements which impacts a contractor's ability to perform its obligations. These obligations typically allow the contractor to claim an extension of time and compensation for additional costs incurred as a result of the change.

EXTENSION OF TIME

This is where the Contractor is delayed in performing works by a specified event of delay. The contractor may be entitled to an extension equivalent to that delay. Usually the Contractor will need to comply with a prescribed process set out in the contract to claim an extension.

DELAY COSTS

Delay costs arise where extra costs incurred by the contractor as a result of an extension to the period for performing work. These are recoverable if allowed by the contract or at common law, for example, this may include such things as the hire of plant or loss of profit.



CAN WE AVOID THE WORK AND DO IT LATER?

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Consider this scenario:

A client responsible for making and installing cladding products on large scale residential and commercial sites, is concerned that his workforce will come into contact with other workers on building sites. His company has been trading for more than 20 years.

He does not wish to jeopardize his relationship and service with his head contractor. He is also mindful that he and his workforce may become infected. This may lead to his workforce of skilled labour having to self-isolate. Finding alternate qualified workers will be difficult.

The current situation arising from COVID 19 means it is almost impossible for the parties to assess the length of the delay and whether they can grant an extension of time or seek to take over the work.

Depending on the terms of the contract, a claim for delay may be made.

Consider:

- Prompt notice of the delay,
- Maintain the commercial relationship: reaching an agreement that you can live with,
- Appoint an alternative supplier; The principal/head contractor may take the work out of the hands of the head contractor/subcontractor respectively,

Delay or lessen the supply obligations.

WE DO NOT WANT TO END OUR AGREEMENT. WHAT ARE THE ALTERNATIVES?

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Suspension of the contract/ force majeure.

This will depend on your contract or agreement.

SUSPENSION

This means temporarily ceasing or stopping of a person's rights and / or obligations.

The contract/agreement remains in place until the circumstances leading to the suspension cease. Usually contracts provide a right to suspend the contract, where one party is in breach. However, there are some situations where the contract may be regarded as incapable of being performed for events beyond their control.

On 31 March 2020, The Age* reported that Multiplex's \$2.8 billion Melbourne Square worksite at Southbank was closed on Monday evening and will be re-opened after cleaning. Twenty colleagues are self- isolating after a worker tested positive for coronavirus.

*For the full Article, [click here](#)

While the site is shut, the contract cannot be performed. Neither party can perform its part of the agreement. The rights of the parties will remain suspended until the event that lead to the event ceases, for example, the site re-opens after it has been cleaned and certified as safe.

FORCE MAJEURE

This means an event which is beyond the control of the contracting parties and which prevents the works from being carried out or which prevents or makes performance of the parties' obligations impossible.

This may include natural disasters such as flooding, earthquake, cyclone, and war, industrial disputes.

For example, consider the following clause:

"For the purposes of this clause "Force Majeure" means act of foreign enemies, war, blockade or insurrection, act of terrorism, riot or civil disturbance, landslide, earthquake, flood, epidemic or any other serious, disruptive matter of similar character to the extent that any such events or circumstances did not arise directly or indirectly as a result of any act or omission of the Subcontractor."

This clause specifically refers to an "epidemic" which is not related to the acts of the subcontractor.

So this clause could be used as a basis to suspend that party's rights under its contract. Check your contract to see if it contains a similar clause.

Consider this further example of a specific contract on point: MW 21 General conditions of contract NSW:

1.11 Force Majeure Event

- (a) an act of God, lightning strikes, earthquakes, droughts, tempests, mudslides, washaways or other natural disaster;*
- (b) acts of war, acts of public enemies, terrorism, riots, civil commotions, malicious damage, sabotage, blockade or revolution; or*
- (c) strikes, stoppages, restraints of labour and other industrial disturbances which affect a State or Territory of Australia or Australia generally and is not directed at the affected party or its contractors, or*
- (d) epidemics or pandemics*

in each case, which:

- (a) is beyond the reasonable control of the Contractor or its personnel (where the Contractor is the affected party) or the Principal (where the Principal is the affected party); and*
- (b) could not have been avoided or overcome by the Contractor or its personnel (where the Contractor is the affected party) or the Principal (where the Principal is the affected party) taking all reasonable steps."*

Clause 1.11 (d) above specifically refers to "epidemics or pandemics" beyond the control of the contractor or principal and which could not have been avoided or overcome by the parties taking all reasonable steps.

So if you plan to rely on your Force Majeure rights you should consider the following:

- what the contract says about the notice requirements,
- the events that should occur before notice,
- the consequences, and
- what reasonable action has been taken to lessen or mitigate the loss or overcome the effects of the force majeure event in terms of a party's own contractual obligations.

If the fundamental objective of the contract simply cannot be completed at all because of the impact of COVID-19, it may be time to exercise the force majeure clause, if you have one, or notify the other party that the contract is entirely frustrated.

Again consider the impact of this course of action before pressing the trigger for making such a claim under your contract.

WHAT IF THE DISPUTE KEEPS GOING: WILL THE CONTRACT END? WHAT HAPPENS THEN?

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Key events which provide for an end to the agreement: these should be carefully considered. This is because their effect may be to end the contract or agreement. A party that seeks to end a contract without proper justification may be liable to the other party for damages.

FRUSTRATION

This is when an unforeseen uncontrollable event (with no party at fault) which renders the parties under the contract incapable of performing their obligations.

Some of the key principles of frustration include the following:

- Frustration occurs where the Contract is rendered pointless, is illegal or the foundation of the contract no longer exist.
- The frustrated party is entitled to rescind the contract without being liable for or to any damages.

- The parties are not required to wait until an event or effect will happen to their contract.
- Determining the length and the effect of the delay is to be made at the time of the interruption of the contract.

The Australian Standard contracts provide for the works completion and take care of the works and insurance cover to cover damage to the works and damage to other people. Unless specifically amended in the special conditions, there is no specific protection for risks of loss or damage arising as a result of an epidemic.

Instead, the contractor shall issue progress certificates as the work progresses. If the contract obligations cannot be performed, the contract may be seen as being frustrated.

Consider the following:

- Claims evidencing the amount which would have been payable had the contract not been frustrated,
- The cost of materials and equipment reasonably ordered by the contractor for the construction work, and
- Costs reasonably incurred.

TERMINATION

This means to end the Contract or contractual obligation in question. A Contract will usually specify the basis on which the Contract will terminate. There are also common law rights to terminate.

Care is required when contemplating such a course of action as a wrongful termination can have serious consequences.



WHAT IF MY CONTRACT IS WITH A PERSON OR COMPANY OUTSIDE AUSTRALIA?

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If so, check what the governing law of the contract is. This will determine what laws will apply to the parties rights and obligations. For example, from GC 21:

"Clause 10. Governing law of the Contract

The Contract is governed by the laws of New South Wales, and the parties submit to the non-exclusive jurisdiction of the courts of New South Wales."

So if you are dealing with a company based overseas check your contract to determine what is the governing law and jurisdiction. This will assist in understanding the process for enforcing rights under the agreement.

INSURANCE: WILL MY INSURANCE POLICY(IES) RESPOND?

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This will depend on the policy concerned. A call to your broker is often a useful starting point to understand whether the policy will respond. They will also be able to offer guidance as to the specific notice required under the policy, applicable excesses, the limits of cover and relevant policy exclusions.

In the construction and commercial business fields, where no damage has occurred consider whether your business has a business interruption cover and the terms under which a claim may be made. So for example, you are having difficulty or experiencing delays in obtaining goods from overseas.

At the very least, prompt notification is required of any occurrence of a claim under a policy of insurance which relates to or is in any way related to the works.

CONCLUSION

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The current situation facing contractors and suppliers is complex and unprecedented. It presents challenges to what we have until very recently regarded as normal, as to how parties in the commercial and construction sectors deal with each other to complete their part of a project and deliver their supply and service requirements.

This will involve parties respecting existing obligations and working collaboratively with our counter parts to work out solutions that avoid unnecessary costs and disputes and maintain viable and sustaining commercial relationships.

SEEKING GUIDANCE?

If you have been impacted by the recent measures or are unsure of your rights and obligations under your present agreements, please call or email us for further advice.

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