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COVID-19 –The Power to issue Directions Impose requirements and Implement laws by Regulation

Australia's response to the COVID-19 pandemic has required State, Territory and Commonwealth Governments to pass legislation, make directions and impose requirements on every day Australians that impact on all aspects of life.

Legislation has been passed by the states, territories and the Commonwealth to permit changes to laws by making Regulations rather than passing legislation.

Directions and orders are being issued by the various Ministers responsible for Health in the states and territories as well as at a National level.

At the National level the director of human biosecurity, in consultation with chief health officers in the states and territories, has power to determine that a disease is a "listed human disease" under the Biosecurity Act 2015.

On 21 January 2020, 'human coronavirus with pandemic potential' was added to the Biosecurity (Listed Human Diseases) Determination 2016 naming it as a listed human disease.

People with listed diseases may be subject to "human biosecurity control orders". Control orders can require people, among other things, to:

- provide their contact information and health details (including body samples for diagnosis)
- restrict their behaviour
- undergo risk-minimisation interventions (including decontamination) and/or medical treatment
- accept isolation from the community for specified periods.

The Biosecurity Act lists specific diseases (Listed Human Diseases, or LHDs) which are contagious and can cause significant harm to human health. These include:

- human influenza with pandemic potential;
- plague;
- severe acute respiratory syndrome (SARS);

- Middle East respiratory syndrome (MERS);
- smallpox;
- viral haemorrhagic fevers;
- yellow fever;
- Human coronavirus with pandemic potential

The diseases listed above were declared as human listed diseases by the Biosecurity (Listed Human Diseases) Determination 2016 except for 'human coronavirus with pandemic potential' which was added on 21 January 2020.

The Biosecurity Act gives power to the Minister for Health to declare a human biosecurity emergency exists. That was done on 18 March 2020 for the COVID-19 pandemic.

During the human biosecurity emergency period, the Health Minister may:

- issue any direction to any person (section 478)
- determine any requirement (section 477)

that the Minister considers is necessary to:

- prevent or control the entry to, emergence, establishment, or spread of COVID-19 in Australia
- prevent or control the spread of COVID-19 to another country or
- implement a WHO Recommendation under the International Health Regulations.

Before making a direction or imposing a requirement the Minister for Health must be satisfied that the direction/requirement is:

- likely to be effective in, or contribute to, achieving the purpose for which it is to be given
- appropriate and adapted to achieve the purpose for which it is to be given
- no more restrictive or intrusive than is required in the circumstances
- if a requirement, that the manner in which the requirement is to be applied is no more restrictive or intrusive than required in the circumstances and
- if the direction/requirement is to apply during a period—that period is only as long as is necessary.

A direction imposing a requirement is lodged for registration on the Federal Register of Legislation. Directions are not required to be published.

The current human biosecurity emergency is in force for 3 months however that period can be extended by a further Declaration.

At a state level the NSW Government has moved by enacting emergency legislation and the Minister for Health and Medical Research has made orders that restrict certain businesses from opening to the public and impose limitations on the movement of people in NSW.

The COVID-19 Legislation Amendment (Emergency Measures) Act 2020 which will apply for 6 months (or up to 12 months if extended by Regulations made under the emergency legislation amends a multitude Acts including the following:

- Child Protection (Working with Children) Act 2012,
- Children (Detention Centres) Act 1987,
- Civil and Administrative Tribunal Act 2013,
- Constitution Act 1902,
- Crimes (Administration of Sentences) Act 1999,
- Crimes (Domestic and Personal Violence) Act 2007,
- Criminal Procedure Act 1986,
- Electronic Transactions Act 2000,
- Environmental Planning and Assessment Act 1979,
- Evidence (Audio and Audio Visual Links) Act 1998,
- Health Practitioner Regulation (Adoption of National Law) Act 2009,
- Jury Act 1977,
- Local Government Act 1993,
- Mental Health Act 2007,
- Motor Accident Injuries Act 2017,
- Private Health Facilities Act 2007,
- Public Health Act 2010,
- Retail Trading Act 2008,
- Subordinate Legislation Act 1989,
- Workers Compensation Act 1987.

In many cases the amendments will permit laws to amended or introduced by Regulations made under the existing Acts. This will deliver flexibility to allow laws to be adjusted without returning to Parliament. Keeping up with the changes will be a challenge.

On 30 March 2020 the NSW Minister for Health and Medical Research issued the Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020 imposing restrictions on all residents and persons visiting NSW.

The Minister has directed that a person must not, without reasonable excuse, leave the person's place of residence. The reasonable excuses are defined as:

- obtaining food or other goods or services for the personal needs of the household or other household purposes (including for pets) and for vulnerable persons
- travelling for the purposes of work if the person cannot work from the person's place of residence
- travelling for the purposes of attending childcare

(including picking up or dropping another person at childcare)

- travelling for the purposes of facilitating attendance at a school or other educational institution if the person attending the school or institution cannot learn from the person's place of residence
- exercising
- obtaining medical care or supplies or health supplies or fulfilling carer's responsibilities
- attending a wedding or a funeral (subject to limitations on numbers)
- moving to a new place of residence (including a business moving to new premises) or between different places of residence of the person or inspecting a potential new place of residence
- providing care or assistance (including personal care) to a vulnerable person or providing emergency assistance
- donating blood
- undertaking any legal obligations
- accessing public services (whether provided by Government, a private provider or a non-Government organisation), including—
  - social services, and
  - employment services, and
  - domestic violence services, and
  - mental health services, and
  - services provided to victims (including as victims of crime)
- for children who do not live in the same household as their parents or siblings or one of their parents or siblings—continuing existing arrangements for access to, and contact between, parents and children or siblings
- for a person who is a priest, minister of religion or member of a religious order— going to the person's place of worship or providing pastoral care to another person
- avoiding injury or illness or to escape a risk of harm
- for emergencies or compassionate reasons

The Minister has also directed that a person must not participate in a gathering in a public place of more than 2 persons except as follows:

- a gathering at an airport that is necessary for the normal business of the airport
- a gathering for the purposes of or related to transportation, including in vehicles or at stations, platforms or stops or other public transportation facilities
- a gathering at a hospital or other medical or health service facility that is necessary for the normal business of the facility
- a gathering for the purposes of emergency services
- a gathering at a prison, correctional facility, youth justice centre or other place of custody
- a gathering at a disability or aged care facility that is necessary for the normal business of the facility
- a gathering at a court or tribunal
- a gathering at Parliament for the purpose of its normal operations
- a gathering at a supermarket, market that predominately sells food, grocery store or shopping centre (but not a retail store in a shopping centre other than a supermarket, market that predominately sells food or grocery store) that is necessary for the normal business of the supermarket, market, store or centre
- a gathering at a retail store (other than a supermarket, market that predominately sells food or grocery store) that is necessary for the normal business of the store
- a gathering at an office building, farm, factory, warehouse or mining or construction site that is necessary for the normal operation of the tenants within the building, farm, warehouse, factory or site
- a gathering at a school, university or other educational institution or child care facility that is necessary for the normal business of the school, university, institution or facility but does not include a school event that involves members of the community in addition to staff and students
- a gathering at a hotel, motel or other accommodation facility that is necessary for the normal operation of accommodation services at that hotel, motel or other facility
- a gathering at an outdoor space where 2 or more persons may be present for the purposes of transiting through the place

In addition the Minister has directed that certain businesses must not be open to members of the public.

The legislative changes and directions that have been issued by the state, territory and federal governments will have a profound effect on the lives of all Australians over the next 3 to 6 months. Directions will continue to be issued to deal with the consequences of the COVID-19 pandemic, the risks to the health of all Australians and the impact on businesses that will flow.

As Australia grapples with the effects of the pandemic further legislative change is inevitable. We will keep our readers abreast of developments as they arise.

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ISR insurance and COVID-19 claims – What Lies Ahead

Industrial Special Risk insurance policies, also known as ISR policies provide cover for damage to property (business premises and stock in trade) and business interruption for businesses. The trigger for claims is damage to property not otherwise excluded by the policy. There are also excluded events specified in ISR policies.

Whilst business interruption protection in an ISR policy generally covers losses that arise in consequence of property damage it is common to find additional cover for loss or damage as a result of the closure or evacuation of the whole or part of the premises insured by order of a competent government, public or statutory authority as a result of:

- infectious or contagious human disease occurring at the premises;
- vermin or pests or defects in drains or other sanitary arrangements in the premises;
- poisoning of customers directly caused by consumption of food or drink provided on the premises;
- the outbreak of notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises;
- murder or suicide occurring at the premises.

This might seem to provide a glimmer of hope for businesses that insurance cover may be available where businesses are forced to shut consequent to the COVID-19 pandemic.

Perhaps there is business interruption cover if a business shuts down after a person who has contracted COVID-19 attends the premises or there is a lock down and there is a hot spot of persons who have contracted COVID-19 within 20 kilometres of the premises.

It is necessary to look at the proximate cause of the loss to determine whether cover is available.

In Robert Caine - v - Lumley General Insurance Limited the NSW Court of Appeal noted that when considering the proximate cause of the loss in the insurance context, the Court has regard to the reality, predominance and efficiency of a cause rather than proximity in time. It was noted the Court applies common sense standards in determining the proximate cause, approaching the question by reference to the understanding of the man in the street and not as either the scientist or metaphysician would understand it.

The Courts have observed that when identifying the cause of a loss "*The choice of the real or efficient cause from out of the whole complex of the facts must be made by applying commonsense standards.*

Was COVID-19 truly the cause of the business interruption and was the interruption attributable to the business closure. In order to determine whether there is cover it is necessary to determine the proximate cause of the loss.

So see some arguments that will be made out and some potential claims that can be pursued.

However the terms in an ISR policy that give cover can also contain provisions that take cover away.

For example modern ISR policies contain an exclusion in the following terms:

> *"We will not pay any claim that is directly or indirectly caused by or arises from, or is in consequence of or contributed by: (a) cleaning, repairing or checking your premises; or (b) highly pathogenic Avian Influenza or any biosecurity emergency or human biosecurity emergency declared under the Biosecurity Act 2015 (Cth) its subsequent amendments or successor, irrespective of whether discovered at the premises or out-breaking elsewhere."*

A human biosecurity emergency has been declared in relation to "human coronavirus with pandemic potential". That seems to put to bed claims for business interruption arising from COVID-19.

However the Biosecurity Act was enacted in 2015 and it repealed its predecessor, the Quarantine Act 1908 and despite the repeal of the Quarantine Act in 2015 some ISR policies have continued to refer to the Quarantine Act which is no longer in effect. Some exclusions refer to the Quarantine Act as amended but there has been no amendment of it as it has been repealed.

The failure to update policies to reference the Biosecurity Act rather than the Quarantine Act could have significant consequences for insurers with arguments arising that there is no longer any quarantinable diseases under the Quarantine Act as that Act doesn't exist and therefore COVID -19 cannot be a quarantinable disease. Arguments of this nature have some force. The policy is prepared by an insurer without any input from an insured and why should it not be construed strictly in accordance with it terms.

The older form of exclusion which are still found in some ISR policies is usually in the following terms:

> *"Provided that we will not indemnify loss resulting from interruption of or interference with the Business directly or indirectly arising from or in connection with Highly Pathogenic Avian Influenza in Humans or any other diseases declared to be a quarantinable diseases under the Quarantine Act 1908.*

The Quarantine Act 1908 is no longer in effect and was repealed on 16 June 2016 and the Biosecurity Act 2015 replaced most of the provisions in the Quarantine Act 1908.

The Biosecurity Act requires declarations of listed human disease whereas the Quarantine Act required declarations of quarantinable diseases.

Under the Biosecurity Act there is a declaration of a human biosecurity emergency. Under section 2 of the Quarantine Act the Minister for Health if satisfied that an epidemic caused by a quarantinable disease or quarantinable pest or danger of such an epidemic exists in a part of the Commonwealth, could declare the existence in that part of the Commonwealth of that epidemic or of the danger of that epidemic. A pandemic is a form of epidemic.

When the Biosecurity Act was introduced it was accompanied by the *Biosecurity (Consequential Amendments and Transitional Provisions) Act 2015* which relevantly provides that declarations made in respect of quarantinable diseases under section 2 of Quarantine Act remained in force. However the saving and transitional provisions did not alter the description of the proclamations and they remained proclamations under the old legislation but with continuing effect.

It is clear that the Biosecurity Act has taken over where the Quarantine Act left off and there are similar forms of declarations and powers made under both Acts. However the Acts have their differences.

In *McCann v Switzerland Insurance Australia* the High Court confirmed that a policy of insurance is a commercial contract and should be given a businesslike interpretation having regard to the language used by the parties, the commercial circumstances the documents address and the objects which it is intended to secure.

The High Court in Selected Seeds Pty Limited v QBE MM Pty Limited & Ors noted:

> *"According to general rules of construction, whilst regard must be had to the language used in an exclusion clause, such a clause must be read in light of the contract of insurance as a whole, "thereby giving due weight to the context in which the clause appears."_*

The High Court's decision in Darlington Futures Limited V Delco Australia Pty Limited noted that:

> *"The interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause contra proferentem in the case of ambiguity."*

The principles to apply when interpreting an insurance policy established by case law in Australia include the following:

- A policy of insurance is a commercial contract and must be given a business like interpretation.
- Interpreting a commercial document requires attention to the language used, the commercial circumstances which the document addresses and the objects which it is intended to secure.
- An exclusion clause will be construed in the context of the Policy as a whole, including the relevant insuring clause.
- The Policy will not be interpreted in such a way as to render it practically illusory.
- An interpretation will be adopted which gives a reasonable rather than an absurd result.
- The Court will adopt a liberal or broad approach to the interpretation of the insuring clause and a more limited approach to any exclusion.
- The words in a policy must be given a businesslike interpretation and their ordinary meaning should prevail unless the context requires otherwise.
- The onus rests on the insured to bring the claim within the insuring clause and the insurer to establish an entitlement to rely on any exclusion.
- It is necessary to first consider whether the claim falls within the insuring clause and then determine whether it may be excluded.

There is little doubt we will see claims advocated under ISR policies seeking to recoup business interruption losses for business closures due to the COVID-19 pandemic.

It is equally certain insurers will push back on claims and seek to rely on exclusions that may referenced the Quarantine Act arguing the intent of the policy is to exclude claims that would have been proclaimed under the Quarantine Act and are now proclaimed under the Biosecurity Act.

The commercial purpose of an insurance policy is an important consideration when a Court is called on to analyse the terms of an insurance policy and particularly exclusions.

It is said "if the words used are unambiguous, the court must give effect to them, notwithstanding the result may appear unreasonable, unless the literal meaning would lead to an absurd result."

The High Court's decision in *Legal & General Insurance Australia Limited v Ether*, noted when interpreting an insurance policy that:

> *"If one construction strikes fundamentally at the purpose of the policy, which is to spread the risk insured against, whilst another construction that is reasonably available would affect that purpose, the later will be preferred."*

In that case it was also noted by McHugh JA:

> *"It would defeat the commercial purpose of the contract of indemnity if the wording of the condition operated so as to take away an important part of the basis of the indemnity itself."*

So what really was the intent of the insurer and the insured and should an insurer be able to rely on an outdated exclusion referring to repealed legislation replaced by an entirely different Act to exclude cover.

These issues will certainly be tested and we speculate that insurers should look forward to receiving a multitude of COVID-19 business interruptions claims where their ISR policies reference the Quarantine Act rather than the Biosecurity Act in their exclusions.

The risk of class actions cannot be ignored by insurers.

However small businesses will not have access to AFCA to deal with complaints over insurance coverage in ISR policies as the AFCA Complaint Resolution Scheme Rules provide that ISR policies are not Small Business Insurance Products and AFCA has power to deal with complaints for small business in respect of Small Business Insurance Products only.

It seems like it is off to the Court some insureds. However insureds must be mindful that they must establish the proximate cause of their business interruption loss was the business shut down after a person who has contracted COVID-19 attends the premises or there is a lock down and there is a hot spot of persons who have contracted COVID-19 within 20 kilometres of the premises loss was a COVID.

But that's not all. We will also see a rush to amend ISR policies and add endorsements to ensure that claims directly or indirectly caused by or arises from, or is in consequence of or contributed by a listed human disease or human biosecurity emergency are excluded in the future:

Perhaps we will also see insurance brokers being pursued for damages for failing to arrange insurance that provided cover for the losses arising from the COVID-19 pandemic or failing to inform insureds about the limitations of cover that is provided by ISR policies that provide some cover for business close downs due to infectious or contagious human diseases.

Interesting times lie ahead.

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Issues Arising from the COVID-19 Pandemic for Suppliers of Goods on Credit

The COVID-19 pandemic is likely to have significant and far-reaching impacts on most (if not all) industry sectors. Businesses who supply goods on credit and whose customers have or may be required to cease trading as a result of recent lockdown measures or are otherwise experiencing financial difficulties should carefully review their business supply contacts to ensure that their interests are sufficiently protected.

Personal Property Securities Act (PPSA)

The Personal Property Securities Act 2009 (Cth) (the "PPSA") commenced on 30 January 2012 and introduced significant effects on security over almost types of property other than land. The impact of the PPSA on goods which are supplied on credit has been to fundamentally alter the rights of suppliers under their retention of title terms. A retention of title term is a provision which provides that the supplier retains legal ownership of the goods until certain obligations are met by the buyer, usually the payment of the purchase price.

A retention of title ("ROT") clause can take the form of either a specific goods clause which provides that ownership of particular goods does not pass until the buyer has paid for those goods or an all monies clause which provides that legal ownership of all goods does not pass until the buyer has paid all outstanding invoices to the supplier.

The effect of the PPSA is to effectively disregard the supplier's ownership of the goods and treat the ROT as if it were a secured loan. Because the ROT is treated as a loan, if the supplier does not comply with the provisions of the PPSA, it may lose its rights to the goods either in the event of insolvency of the buyer or to another party to whom the buyer has granted a security interest. This outcome may occur notwithstanding that title to the goods has not passed to the buyer.

The PPSA imposes strict enforcement rules which prescribe what steps the supplier must comply with in the event the goods have not been paid for. Unless these rules are excluded, a supplier may not be able to enforce the ROT clause by reclaiming goods from a defaulting buyer. Additionally, the PPSA introduces extinguishment rules which may permit a customer of the buyer to take the goods free of the security interest of the supplier.

Critically, the PPSA established the Personal Property Securities Register ("PPSR") to provide for a system of registration of security interests. A failure to register the security interest may mean that the rights of the supplier to enforce its security and recover its goods may rank behind another party which has registered a security interest in the personal property of the buyer (for example, a bank to which a buyer has granted an all assets security). Additionally, the supplier's rights in the goods may be lost in the event that the buyer is wound up or has a voluntary administrator appointed to it.

Steps suppliers should be taking now

The critical step for suppliers is to ensure that their security interests have been registered on the PPSR. In order to obtain the benefit of protection by registration, the supplier must ensure that a written agreement exists between the buyer and the supplier which contains the ROT clause. The best way to achieve this is to ensure that the ROT clause is incorporated in the terms of trade which are signed by

the buyer when it accepts the credit account application and to ensure that the ROT applies to all supplies made by the supplier. In this way, the supplier can make a single registration on the PPSR which will protect all supplies made to the buyer. If the terms of trade do not include an ROT but the ROT exists on each tax invoice, the supplier will need to undertake a separate registration for each tax invoice.

Additionally, the timing of registration is important. Where the goods supplied are inventory (i.e. goods held by the buyer for resale or raw materials), the ROT needs to be registered before the next delivery of the goods. If delivery is made after registration, the supplier will not obtain priority over the goods over any party which already has a security interest registered against the buyer (for example, the buyer's bank).

Consequently, suppliers should:

- review their supply contracts, invoices, credit account applications and terms of trade to ensure that they incorporate properly drafted ROT clauses;
- review existing contracts and terms of trade to ensure that the prescribed PPSA enforcement rules are excluded, that they limit the extinguishment rules and to preclude terms in the buyer's purchase order which may override the ROT clause;
- ensure the supplier holds written evidence of all signed contracts and credit application forms;
- ensure registration of the ROT clause on the PPSR which properly describes the goods prior to delivery of the goods; and
- undertake a review of those buyer accounts which are overdue and arrange and formalise a payment plan with those buyers as soon as possible. Where buyers seek a discount or other relief on overdue accounts, suppliers should, as far as possible, insist on reclaiming goods which have not been paid for in full in consideration for granting any concessions.

Unfair Contract Terms

Businesses should however be aware that if they amend certain supply contracts or enter into new supply contracts, those contacts may be caught by the Unfair Contracts Terms regime.

On 12 November 2016, the law which provided protections for consumers against unfair contract terms was extended to apply to small business contracts which are entered into or renewed on or after 12 November 2016. While existing contracts will still stand, if the contract is amended on or after 12 November 2016, the new law will apply to the varied terms.

Contracts will be affected where:

- the contract is for the supply of goods;
- at least one party is a small business, being a business that employs less than 20 people; and
- the upfront price payable under the contract is no more than $300,000, or $1 million if the contract is for a term of more than 12 months.

A standard form contract is one that has been prepared by one party to the contract and the other party has little or no opportunity to negotiate the terms – that is, contracts offered on a "take it or leave it" basis. Many business supply agreements are likely to fall into this category.

Under the Australian Consumer Law ("ACL"), a term is unfair if it:

- causes a significant imbalance in the parties' rights and obligations;
- is not reasonably necessary to protect the interests of the party who would be advantaged by the term; and
- causes detriment (financial or otherwise) to a party if it were to be relied upon.

In order for the term to be unfair, it must satisfy all three criteria. The court will look at the contract as a whole to determine whether the term is unfair.

The following terms may be unfair:

- enables one party (but not another) to avoid or limit their obligations under the contract;
- enables one party (but not another) to terminate the contract;
- penalises one party (but not another) for breaching or terminating the contract;
- enables one party (but not another) to vary the terms of the contract; or
- enables one party (but not another) to assign the contract without consent.

If a party to the contract considers a term to the contract is unfair, they can apply to the Federal Court for a declaration that to that effect. If the term is found to be unfair, then the unfair term will be void. This means the term will be unenforceable and treated as if it did not exist. The contract will only continue to bind the parties if it can operate without the unfair term.

If suppliers intend to vary their standard supply agreements, they should therefore consider and if in doubt, obtain advice as regarding provisions such as indemnities, abilities to vary, releases from liability and termination clauses.

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COVID-19 and Emergency Measures for Practice and Procedure in NSW Courts & Tribunals

The COVID-19 pandemic has had a substantial impact on the way in which our society currently operates with changes happening dramatically and rapidly.

Courts and Tribunals play an essential role in providing access to justice and ensuring the continuity of our domestic and economic livelihoods.

The NSW Government has acted swiftly to ensure the Courts and Tribunals of our State can continue to function while at the same time adopting and practising the public health restrictions to minimise the spread of COVID-19.

On 25 March 2020 the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) received royal assent with immediate effect. Various Acts were amended across the health, justice, corrections, planning, local government and community services sectors with the new laws to remain in place for a minimum of six months and a maximum of 12 months.

It is therefore anticipated these amendments will remain in force until at least 25 September 2020 and possibly until 25 March 2021 if necessary.

Relevantly, the following Acts were amended with respect to the NSW Courts and Tribunals:

- *Criminal Procedure Act 1986*
- *Evidence (Audio and Audio Visual Links) Act 1998*
- *Jury Act 1977*
- *Civil and Administrative Tribunal Act 2013*

In relation to criminal trials, the NSW Supreme and District Courts now have a greater discretion to order judge-alone trials thereby reducing the need to summon large numbers of potential jurors to attend Court. The measures also exempt vulnerable persons from a jury summons.

In relation to civil matters perhaps the most sweeping amendments are those contained in the new Section 22C of the *Evidence (Audio and Audio Visual Links) Act 1998* which relevantly states:

> *"(4) The appearance in any proceedings (other than proceedings prescribed by the regulations) of a witness (including a government agency witness) or legal practitioner representing a party may take place by way of audio visual link if the court directs.*
>
> *(5) A direction under subsection … (4) may be made on the court's own motion or following the application of a party but only after the parties have had an opportunity to be heard on the matter.*
>
> *(6) A direction under this section can be given only if it is in the interests of justice and it is not inconsistent with advice given by the Chief Health Officer of the Ministry of Health relating to the COVID-19 pandemic.*
>
> *(7) If an audio visual link is used the court must be satisfied that a party is able to have private communication with the legal representative of the party and has had a reasonable opportunity to do so.*
>
> *(8) Nothing in this section requires or permits the use of an audio visual link if the necessary audio visual facilities are unavailable or cannot reasonably be made available.*

The following is a summary of how each Court and Tribunal has implemented these new procedures:

Supreme Court

From 24 March 2020 the Court stopped all personal appearances in any matter save in exceptional circumstances with the leave of the Chief Justice or head of jurisdiction. This also applied to unrepresented litigants.

The registry was also closed to the public on the above date. Face-to-face duty registrar and court appointed mediation services were suspended.

All court documents are to be provided through the online court, online registry or e-subpoena process.

Telephone appearances are now conducted in the following matters:

- Monday Motions List in the Corporations List
- Monday Directions List in the Corporations List
- Directions Hearings in the Real Property List where consent orders have not been agreed and entered in chambers
- Directions Hearings in the Common Law Registrar's List

Otherwise all matters listed for Directions, Motion or Hearing proceed by way of audio or audio visual link.

District Court

The Judicial Registrar continues to conduct cases in the online court.

For all other matters listed for directions, motions or hearings the Court will, as of 30 March 2020, endeavour to limit as much as possible personal appearances in court rooms by use of its AVL system (Virtual Courtroom).

Contact details for the Virtual Courtroom are to be provided by the Court to the parties or their legal representatives prior to the listing date. The Virtual Courtroom can be accessed either through video conferencing via a dedicated web link or by using a dedicated video conferencing service or device.

Legal practitioners are now expected to appear by use of the Virtual Courtroom. Witnesses will also give evidence in the virtual court room.

Local Court

In civil claims legal practitioners are permitted to appear via telephone for small claims hearings, review lists, directions lists and motions lists. Where parties have not made prior arrangements to appear by telephone the matter is vacated and listed at a later date.

All matters listed for hearing in the civil jurisdiction general division at the Downing Centre (Sydney) between 30 March 2020 and 30 September 2020 have been abandoned. All such matters are returned to the online court for case management. Subject to a normal return to activity these matters will be listed for review in October 2020 to allocate new hearing dates.

All matters listed for review or directions in Court 7B of John Maddison Tower are vacated and returned to the online court for case management.

Motions are to be conducted by telephone before a magistrate.

All court documents are to be filed using the online registry.

In other locations, all matters listed for hearing in the criminal, civil and special jurisdictions between 23 March 2020 and 1 May 2020 are vacated and listed for mention in the week commencing 4 May 2020.

NCAT

From 30 March 2020 all divisions of the tribunal and appeal panel will be conducting all stages of its hearings by telephone, audio visual link or on the papers.

No face-to-face hearings will be conducted without prior approval of the President.

It is not possible for the tribunal to continue hearing cases within its usual time standards. Priority will be given to urgent cases and less urgent cases will be listed in the last quarter of 2020.

Documents may now be filed by email where a party is unable to post an application or other documentation.

The emergency measures legislation also amended the CAT Act in relation to the following:

- The regulations may make provision to modify the existing any time periods for the filing of any applications or appeals at the tribunal during the period of the amendments (ie 6 months or 12 months from assent).
- The time for the tribunal to provide written reasons under Section 62 of the CAT Act is extended from 28 days to 90 days.
- The tribunal (or a Court to which an appeal from the tribunal is made) can by its own motion extend any time period regarding the filing of an application or appeal during the period of the amendments (ie 6 months or 12 months from assent).

Workers Compensation Commission

Commencing 23 March 2020 and until further notice all conciliations, arbitrations and mediations will be conducted by telephone.

Face-to-face arbitrations and conciliation, arbitration and mediation will only be held if approved by the President.

SIRA Dispute Resolution Services

For all claims and merit review disputes SIRA DRS has ceased all in-person hearings. Decision makers will determine how a matter should proceed and whether matters should be adjourned, or proceed to be determined on the papers, via teleconferencing or video conferencing.

For medical disputes, SIRA DRS has implemented pre-appointment telephone screening to confirm whether it is appropriate and safe for a person to attend a scheduled medical assessment. Where appropriate, medical assessors and review panel members will avoid in-person contact by assessing matters based on the papers or via video conference. Where circumstances allow, DRS will determine whether an in-person assessment should proceed. DRS has asked medical decision makers to follow the advice of the Australian Government Department of Health and NSW Health in relation to the prevention of the possible spread of COVID-19.

DRS is requesting that all parties to a dispute in the *Motor Accidents Compensation Act 1999* scheme file material electronically. This includes lodgement of applications, replies, submissions and all other correspondence. Matters lodged in the *Motor Accident Injuries Act 2017* scheme will continue to be lodged electronically.

Final Comment

Whether we were ready for it or not the COVID-19 pandemic has created the circumstances necessary to bring access to justice sprinting into the 21st century.

The use of online registries and the online courts in the past 12-36 months gave us a glimpse into the future of how our Courts and Tribunals would deliver justice to litigants in NSW and their legal representatives.

As we entered this new decade only a few weeks ago, it would have been unimaginable to predict that we would end up where we are now. The use of AVL and audio technologies to conduct hearings and other Court events seemed like they were still a few years away.

COVID-19 has certainly fast-tracked a new era for our Courts and Tribunals and those who practise within

them. Doubtless, these changes may bring valuable lessons for the future administration of justice in NSW.

May we all stay safe and healthy during these challenging times.

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Temporary Amendments to Aspects of Corporate & Personal Insolvency in Response to COVID-19

The Coronavirus Economic Response Package Omnibus Act 2020 (Cth) ("Act"), which became law on 25 March 2020, makes temporary changes to certain aspects of corporate and personal insolvency. The objective is to provide extra time for individual and corporate debtors to pay their creditors. Creditors' rights are affected and deferred. Additionally, if a corporate debtor is ultimately wound up despite the economic stimulus and the additional time to pay under the Act, the ability of a Liquidator or a creditor to seek compensation for losses from the directors which resulted from insolvent trading is diminished.

Here we examine the amendments, their limitations and some practical steps which creditors and directors can still take to minimise adverse effects on their financial position.

The amendments which began on 25 March 2020, and will operate until 24 September 2020, give extra time to pay to individuals who are debtors. Schedule 12, Part 1 of the Act makes these amendments to parts of the Bankruptcy Act 1966 (Cth) and the Bankruptcy Regulations 1996 (Cth), with the following effect:

- increase the minimum amount of a judgment debt which a creditor can rely on as the basis for issuing a Bankruptcy Notice from $5,000 to $20,000;
- increase the minimum amount of debt or debts which found a valid Creditor's Petition under s44(1)(a) of the Bankruptcy Act from $5,000 to $20,000;
- extend the time for compliance with a Bankruptcy Notice from 21 days to 6 months after the date of service, thus giving a debtor much more time in which to pay the debt, compromise with the creditor or apply to the Court to have the notice set aside; and
- extend the stay period for the benefit of a debtor who presents to the Official Receiver at the Australian Financial Security Authority a Declaration of Intention to Present a Debtor's Petition and a Statement of Affairs. The stay is extended from 21 days to 6 months, and in that 6 months a creditor cannot commence or continue recovery proceedings or enforce a judgment against the debtor, even though that debtor is not a Bankrupt because they are yet to present a Debtor's Petition. There is no change to the rights of secured creditors against the debtor.

Importantly, acts of bankruptcy in s40(1) of the Bankruptcy Act which are unrelated to a creditor serving a Bankruptcy Notice on a debtor or a debtor presenting a Debtor's Petition are unaltered. That gives a creditor the opportunity to force a debtor into bankruptcy within less than 6 months of obtaining a judgment or judgments totalling $20,000 or more, if the following occurs:

- the judgment is not stayed; and
- the court in which that judgment is given or entered in favour of the creditor issues a writ of execution; and
- the Sheriff executes the writ and as result holds the personal property of the debtor seized under the writ for 21 days or more; or
- the Sheriff executes the writ, seizes and removes the personal property of the debtor under the writ and then sells that property; or
- the Sheriff unsuccessfully attempts to execute the writ and returns it to the court unsatisfied.

Those events comprise an act of bankruptcy in s40(1)(d) of the Bankruptcy Act which a judgment creditor can rely upon to issue, serve and proceed upon a Creditor's Petition against the debtor.

Commencing 25 March 2020 and operating until 24 September 2020 are amendments under the Act which give companies extra time to pay creditors. Schedule 12, Part 2 of the Act makes these amendments to parts of the Corporations Act 2001 (Cth) and the Corporations Regulations 2001 (Cth), with the following effect:

- increase the minimum amount of debt which a creditor can rely upon as the basis for issuing a creditor's statutory demand for payment of debt under s459E of the Corporations Act from $2,000 to $20,000; and
- extend the time for compliance with a creditor's statutory demand from 21 days to 6 months after the date of service of that demand, thus giving a debtor company much more time in which to pay the debt, compromise with the creditor or apply to the Court to have the statutory demand set aside before a deemed event of insolvency occurs (ie non-compliance with the statutory demand), which would ground a Court application to wind up the company and have a Liquidator appointed.

Despite the increased time for compliance, creditors should consider serving statutory demands now where there is no genuine dispute about the existence or amount of the debt: time for compliance begins to run and the creditor maximises the chance to file a winding up at the end of September 2020. At that time, pressure on the debtor to pay will peak.

Operating from 25 March 2020 to 24 September 2020 are amendments under the Act which, in limited circumstances, relieve directors and holding companies of liability to pay compensation for losses which creditors of the company/subsidiary suffer if the company/subsidiary has traded while insolvent. Schedule 12, Part 3 of the Act creates exceptions to s588G(2) and s588V of the Corporations Act. To rely on the exceptions, the directors and the holding company must prove:

- the company incurred the debt or debts in the ordinary course of business;
- it incurred such debts in the period from 25 March 2020 to 24 September 2020; and
- the actions of the directors and holding company are not fraudulent.

In these abnormal economic conditions, there is scope for disputes to develop in future with a Liquidator as to whether the company incurred the particular debts in the ordinary course of business.

Criminal sanctions for insolvent trading in s588G(3) remain, and so there is a possibility that directors could still face prosecution for insolvent trading, even if relying on these new, temporary exceptions.

Directors and holding companies must proceed cautiously and prudence dictates that they avoid continued trading if the company/subsidiary is clearly insolvent and has no realistic prospect of recovering. The appointment of an Administrator would be a better option, because that presents an opportunity to protect the company's and directors' assets during the s440F and s440J moratoriums, and to propose a Deed of Company Arrangement ("DOCA") to restructure the business. The announcements in the past days concerning the 6 month moratorium against landlords evicting tenants, and the possibility of striking arrangements with banks and the ATO suggest that the flexibility of a DOCA could in some instances be more beneficial than attempting to trade on in reliance on these limited exceptions to insolvent trading liability.

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Will the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) Balance the Interests of Tenants and Owners?

In response to the COVID-19 pandemic, the NSW Parliament has passed legislation giving the Government power to place a moratorium on evictions for a period of 6 (six) months.

The COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW) empowers the NSW Government to make regulations with respect to residential and retail tenancies affected by the COVID-19 pandemic.

Residential Tenancies

Amendments to the Residential Tenancies Act 2010 (NSW) will enable the NSW Government to make regulations which:

- prohibit the repossession of a premises by a landlord;
- prohibit a landlord from terminating a tenancy agreement;
- regulate or prevent the exercise or enforcement of another right of a landlord; and
- exempt a tenant, resident or home owner from complying with the relevant Act or tenancy agreement.

Retail Leases

Similar to the amendments to the Residential Tenancies Act, the changes to the Retail Leases Act 1994 (NSW) will empower the NSW Government to make regulations which:

- prohibit the repossession of a premises by a landlord;
- prohibit a landlord from terminating a tenancy agreement;
- regulate or prevent the exercise or enforcement of another right of a landlord; and
- exempt a lessee or tenant from complying with the relevant Act.

Interestingly, "the relevant Act" is defined as including "any other Act relating to the leasing of premises or land for commercial purposes".

The broad reference to "any other Act relating to the leasing of premises or land for commercial purposes" has generated discussion as to whether this will extend to commercial leases.

It is anticipated that further legislative amendments dealing with the broader commercial property market will be made in due course.

What's next and issues landlords should consider

It remains to be seen which rights and obligations will be affected by the changes, but it is likely that the regulations will focus on rent, access and break fees.

Importantly, any regulations must be reasonable to protect the health, safety and welfare of persons.

Until regulations are passed by the NSW Parliament, parties should continue to rely on the provisions of their lease and the overarching legislation.

That being said, the amendments should signal the intentions of the NSW Government, which will have significant implications for both tenants and landlords.

Once the regulations are passed, the amendments will expire either:

- within 6 (six) months from the commencement of

any regulations; or

- an earlier day decided by the NSW Parliament by resolution of either house.

In the meantime, landlords should review and if uncertain, obtain advice on the terms of their leases to understand how they will apply in light of the impacts of COVID-19.

In particular, the following issues should be considered:

- landlords who hold cash security deposits for performance of their tenant's obligations should register their security interest in the deposits on the Personal Property Securities Register as a failure to do so may result in the landlord's interest in those deposits vesting if the tenant is placed into liquidation;
- landlords and tenants should carefully consider whether they assert frustration or a force majeure event as incorrectly doing so, could constitute repudiation entitling the other party to compensation; and
- it is likely that discussions between landlords and tenants will take place regarding payment of rent and other obligations. Landlords should be cautious and ensure they do not make any representations that rent reduction or leniency will be granted which may be relied upon by the tenant at a later stage. Furthermore, any agreed concessions on rent and other obligations should be formalised and documented in writing to minimise the risks of disputes arising in respect of these matters.

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Builder Vicariously Liable for Negligence of Site Supervisor Employed by Labour Hirer

A person is vicariously liable for the negligent acts or omissions of another if there is a relationship between the two persons in which the first person exercised some degree of control over the other person's ability to conduct themself.

The classic relationship in which vicarious liability often applies is that of master and servant or, in the modern context, employer and employee. The principle is that the employer is vicariously liable for loss or damage caused by the negligent acts or omissions of an employee during the course of employment.

However, the workplace has changed significantly over the past two to three decades. The concept of an "employee" is somewhat fluid with the advent of labour hire employees being seconded to work on construction sites and other workplaces, and the increasing role of independent contractors.

Is an employer to be held vicariously liable for the negligent acts or omissions of persons who are not an employee, such as labour hire employees or independent contractors?

In 1998, Justice McHugh made the following observations in the High Court decision of *Northern Sandblasting Pty Ltd v Harris*:

> *"Nearly thirty years ago Professor Atiyah marshalled the arguments which would justify imposing liability on employers for the acts of independent contractors as well as employees. Those arguments seem as convincing to me today as they did when his work was first published in 1967…The question whether the common law should continue to draw a distinction between liability for the acts of employees and those of independent contractors must wait for another day.*

In 2001, the High Court considered (*Hollis v Vabu Pty Ltd*) whether a courier company was vicariously liable to pay damages to a person who was injured by a bicycle courier in circumstances where the courier company engaged its couriers as contractors, not employees. The Court considered the factors to establish the true character of the relationship between the courier company and the courier. It was held the courier was in fact an employee and the courier company was found vicariously liable.

However, labour hire employees are in a different category to those who are truly independent contractors. The labour hire employee has an employer and is usually seconded to another person or company to perform work. At all times, the employment contract is between the labour hire employer and the labour hire employee.

What if that labour hire employee, as part of their secondment to work as a site supervisor for another company ("host employer"), exercises authority or control to direct the work and safety of others on behalf of the host employer?

Who is vicariously liable for the negligent acts or omissions of the labour hire employee in that scenario? The labour hire employer? The host employer? Both?

Can a host employer be vicariously liable for the negligence of a labour hire employee?

These issues were recently considered by the NSW Court of Appeal in *Hallmark Construction Pty Ltd v Brett Harford; Copeland Building Services Pty Ltd v Hallmark Construction Pty Ltd; Hallmark Construction Pty Ltd v Harford Transport Pty Ltd.*

Hallmark Construction Pty Ltd ("Hallmark") was the principal contractor on a construction site in Homebush West involving the construction of high rise and townhouse residential buildings.

Hallmark contracted with Copeland Building Services Pty Ltd ("Copeland") to carry out brick and block laying works for both internal and external walls including

scaffolding up to three metres. Relevantly, Copeland entered into two subcontracts:

- ANM Building Services Pty Ltd ("ANM"), a labour hire company that lent workers to Copeland including Mr Giosofatto Isaia; and
- Austral Masonry (NSW) Pty Ltd ("Austral Masonry") to supply concrete blocks and bricks to be used at the site.

Mr Isaia worked as a site supervisor on the site under the direction of Copeland. He received no direction or supervision from ANM. Up until three months before the accident, Isaia was employed by Copeland but then became an employee of ANM. However, his role at the site did not change.

Austral Masonry subcontracted with Harford Transport Pty Ltd ("HTPL") to deliver the supply of concrete blocks and bricks to Copeland. Brett Harford was the principal of HTPL and was also its sole employee who drove a delivery truck containing the concrete supplies to the site, arriving in the dark shortly before 6.00am.

He entered through an open and unattended gate and stopped at a point where he thought the blocks would be required. He got out of the truck and proceeded to the site office where he found Mr Isaia, who directed him where to put the blocks.

Harford returned to his vehicle and scanned the area to ensure there was space to unload all the contents, leaving his headlights on to illuminate the area. He observed a single empty wooden pallet on the ground that he thought could unbalance the blocks if they were unloaded onto it. He therefore lifted the pallet, intending to flip it over and move it, unaware it was covering an opening into a retention tank which had a four metre drop into which Harford fell, sustaining serious injury.

Harford brought proceedings in negligence against Hallmark at the NSW Supreme Court.

Hallmark issued a cross claim for indemnity and/or contribution from Copeland, HTPL and the insurers of ANM which had been deregistered ("ANM Insurers").

Separate proceedings were also brought by HTPL against Hallmark, seeking indemnity under s151Z of the *Workers Compensation Act 1987* (NSW) for workers compensation paid by HTPL to Harford. In that proceeding, Hallmark also issued a cross claim against Copeland, HTPL and the ANM Insurers seeking indemnity and/or contribution.

Both proceedings were heard together at first instance by his Honour Justice Fagan. Damages were agreed at $1.6 million. The only issues for the Court's determination were liability (including contributory negligence) and apportionment.

Fagan J found Hallmark and Copeland were equally responsible for Harford's injury and apportioned liability 50 / 50. The cross claims against HTPL and the ANM Insurers were dismissed on the basis that HTPL and ANM were not liable. His Honour also rejected the contributory negligence defence.

In the s151Z proceeding, Fagan J found in favour of HTPL against Hallmark and also found Hallmark succeeded on its cross claim against Copeland, but dismissed the cross claims against HTPL and the ANM Insurers.

Hallmark and Copeland each appealed to the NSW Court of Appeal against the findings of liability and apportionment in both proceedings.

One of the central issues was the role of Mr Isaia relevant to his employment with ANM and his secondment with Copeland. At first instance the primary judge held that Isaia, when giving directions to others at the site including Harford, acted as agent of Copeland such that Copeland was directly liable as principal for the acts of its agent, Isaia.

Alternatively, Justice Fagan held that Isaia, as a seconded employee, was part of Copeland's workforce such that Copeland was vicariously liable for Isaia's tortious conduct that caused Harford's injury.

Fagan J determined that ANM could not also be vicariously liable for Isaia's conduct due to the principle enunciated by the NSW Court of Appeal in *Day v Ocean Beach Hotel* (2013) in which it was held the common law of Australia does not recognise "dual" vicarious liability where two different persons have legal control over a tortfeasor.

The NSW Court of Appeal held Justice Fagan was wrong to find that Isaia acted as Copeland's agent as he did not have authority to bind Copeland for his conduct. However, the Court accepted that Fagan J was correct to find Copeland was vicariously liable for Isaia's negligence, despite the fact that ANM was Isaia's employer, not Copeland.

Basten JA wrote the leading judgment with which Meagher JA agreed (Emmett AJA disagreeing on the agency point but agreeing in the outcome). His Honour highlighted that Isaia was not an independent contractor to Copeland but rather was a *"…seconded employee of another company."*

His Honour went onto say:

> *"There was no evidence of any relationship between ANM and Mr Isaia other than the existence of a contract of employment…Although it may be accepted that ANM had the power to terminate his contract of employment, there was no evidence that if it had done so in circumstances where Copeland wished him to continue to carry out his role, Copeland would not have made other arrangements to ensure that he stayed as part of its workforce."*

Basten JA concluded that the circumstances by which Isaia operated as Copeland's supervisor demonstrated both the capacity and actuality of Copeland's conferral of authority on Isaia and its control over the manner in which his work was undertaken. Accordingly, the

primary judge was correct to find that Copeland was vicariously liable for Isaia's negligence. It followed that ANM could not also be vicariously liable.

However, on apportionment, the Court of Appeal unanimously found that Copeland exercised a greater degree of control over the site. Accordingly, the primary judge's assessment at 50 / 50 was overturned with Copeland found to be 75% liable and Hallmark 25% liable for the injury.

Consequential orders were made in all appeals concerning the new apportionment findings.

This interesting case illustrates how it can be possible for a non-employer to be held vicariously liable for the negligent conduct of a labour hire employee.

The key element remains the degree of control exercised by the host employer over the conduct of the labour hire employee during the course of their work for the host employer.

More importantly, once a host employer is vicariously liable, the labour hire employer cannot be!

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More than Labour Services means Exclusion Does Not Apply in Liability Insurance Policy

The NSW Court of Appeal has recently determined that a liability insurer could not rely on an exclusion clause in an insurance contract relating to the provision of labour provided pursuant to a labour hire contract in circumstances where the exclusion carved out claims arising from supplied labour only services. The terms of the labour hire agreement and the exclusion in the policy were such that where the labour hirer provided services in addition to the supply of labour the exclusion did not apply.

In *Marketform Managing Agency Ltd for and on behalf of the Underwriting Members of Syndicate 2468 for the 2009 Year of Account v Ashcroft Supa IGA Orange Pty Limited* [2020], Mr Paul sustained injury on 10 October 2012 whilst working as an apprentice butcher. Paul was an employee of Skillset Limited but had been placed on hire with the Ashcroft IGA store in Orange.

On the day of the accident Paul was instructed to work on the sausage filling machine. It was not in dispute that Paul had undergone a work induction with his employer and Ashcroft IGA had agreed to host Paul whilst he was undertaking TAFE studies in meat retailing. There was a signed written agreement in place between Ashcroft IGA and Skillset pursuant to which Ashcroft IGA agreed to host Paul. It was also not in dispute that pursuant to the contract between Skillset and Ashcroft IGA, Ashcroft IGA was required to support structured training for Paul as an apprentice.

The accident occurred at around 4.00 am when Paul was standing next to a tray on top of a mobile trolley. The wheels at the foot of each leg of the trolley had no braking or rocking mechanism. Paul had been directed to link sausages. The sausages were in the tray on top of the mobile trolley. After Paul started linking the sausages, another employee in the meat room placed a tray of meat on a lower level of the trolley which caused the trolley to move away from Paul and roll down the gradient of the meat room floor. As a consequence sausages started to fall off the back of the trolley. Paul stepped forward towards the trolley to catch both the trolley and sausages and when he did so he stepped on a piece of sausage mince that was underneath the trolley whilst it was stationary. He slipped on the mince, fell against the wall and injured his back.

The matter proceeded to hearing in the District Court at Orange. Paul was successful in establishing liability on the part of Ashcroft IGA. The trial judge determined that Paul was contributorily negligent on the basis of 10% and found a 10% liability on the part of the employer, Skillset. Damages were calculated at $578,689.11.

A complication however arose as Ashcroft IGA's public liability insurer had declined to indemnify Ashcroft IGA as a consequence of Clause 16.5 of the public liability insurance policy.

That clause provided that:

> *"This Policy does not cover…*
>
> *16.5 Employers' Liability*
>
> *Liability for injury to any person under a contract of employment, service or apprenticeship with or for the provision of labour only services to the Insured where such injury arises out of the execution of such contract."*

Clause 14.3 of the policy was also relevant which provided that:

> *"The indemnity granted extends to:*
>
> *14.3 at the request of the Insured, any person or firm for their liability arising out of the performance of a contract to provide labour only services to the Insured."*

At trial the trial judge found the exclusion clause did not apply.

Marketform, the insurer of Skillset and the appellant in the Court of Appeal did not accept the determination on insurance coverage and appealed in relation to the issue of the application of the exclusion clause, contributory negligence and the extent of employer liability.

On appeal, the NSW Court of Appeal noted Marketform bore the onus of proving the exclusion clause applied and determined the exclusion clause did not apply however for different reasons than those of the trial judge.

Payne JA, who delivered the leading judgment in the Court of Appeal stated:

> *"I respectfully disagree with the conclusion of the primary judge that the contract between Skillset and the first respondent was a contract "for the provision of labour only services to the Insured" within the meaning of cl 16.5.*
>
> *It is true, as the appellant submitted, that the contract between Skillset and the first respondent made it plain that Skillset took responsibility for discharging the relevant statutory obligations for apprentices and for arranging relevant supervision of the apprenticeship. It is also correct that a Skillset supervisor regularly attended the first respondent's IGA store "to see what was being done and whether the person was progressing to further its agreement with the worker to ensure that he was getting appropriate on the job training."*
>
> *It does not follow, however that the contract between Skillset and the first respondent supplied "manual labour only services to IGA."*
>
> *The policy does not define "labour only services". The only other use of the term in the policy is in Clause 14.3 which provides for an extension of cover:*
>
> *"at the request of the Insured, [for] any person or firm for their liability arising out of the performance of a contract to provide labour only services to the Insured."*
>
> *"I am prepared to assume that, in context, the language of the contract "for the provision of labour only services to the Insured" should be understood as intended to capture many of what the appellant described in submissions as "labour hire" arrangements.*
>
> *That assumption, however, does not answer the critical question in this case. The phrase the parties have chosen to use is "labour only services". The language used captures a narrower class of contractual arrangements than all "labour hire" arrangements. Whatever the limits of the expression labour only services, the contract between Skillset and the first respondent was not a contract for the supply of "labour only services" because a number of other important services were supplied under the contract.*
>
> *The terms of the contract between Skillset and the first respondent set out above make plain that a range of services in addition to the provision of "labour" were provided by Skillset. Skillset was paid a service fee for providing recruitment, vocational training management, payroll and administration services and support to the first respondent. Skillset was required to provide access to the first respondent to training programs conducted by Skillset. Skillset was obliged to arrange occupational health and safety site inspections of the first respondent's premises.*
>
> *These services were in addition to the provision of labour. On the correct construction of Clause 16.5, the contract between Skillset and the first respondent was not "a contract ... for the provision of labour only services."".*

Therefore, Justice Payne concluded that the exclusion clause did not apply and Ashcroft IGA was entitled to indemnity pursuant to the policy. Skillset was providing more than labour only services to Ashcroft IGA and therefore the exclusion clause was not enlivened.

The allowance for 10% for contributory negligence and 10% for employer liability were also maintained and the appeal was therefore dismissed.

An insurer bears the onus of establishing the facts that trigger an exclusion clause. When it comes to exclusions in liability insurance policies aimed at restricting cover for labour hire arrangements the wording of an exclusion clause, the terms of the labour hire agreement and the suite of services being provided must be carefully examined to determine the impact of any labour only service exclusion.

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Split Execution and Electronic Signatures Throughout the COVID-19 Pandemic and Beyond

In the current climate, public health measures (such as physical separation) are making it increasingly difficult and inconvenient for contracting parties to apply their wet signatures to a single document. As a result, it is likely that when executing a document, parties will either apply:

(a) wet signatures; or
(b) electronic signatures,

to different counterparts and then circulate those counterparts via electronic transmission.

The position with respect to electronic execution of documents by individuals (for example, sole traders or individual guarantors) is relatively settled and will generally be protected against claims of invalidity by the Electronic Transactions Act 2000 (NSW) (the "NSW ETA"). The NSW ETA provides that a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications and furthermore, provided certain requirements are met, a signature may be taken to have been given in electronic communications. Additionally, if the document is in the form of a deed and is to be signed in NSW, it may be validly signed and witnessed electronically provided that this occurs in accordance with the requirements of the NSW ETA.

However, the position is less clear with respect to

execution by corporations because execution under the Corporations Act 2001 (Cth) (the "Corporations Act") is expressly excluded from the NSW ETA and is consequently, not protected by it.

What is split execution and what has changed?

Section 127(1) of the Corporations Act provides that a company can execute a document if it is signed by two directors, or a director and a company secretary.

As a result of physical separation, company officers tend to sign different copies of the same document (commonly referred to as 'split execution'). The question is whether split execution complies with section 127(1) of the Corporations Act.

Until recently, judicial comment on split execution was limited to the decision in Re CCI Holdings [2007] FCA 1283 ("Re CCI Holdings"). In Re CCI Holdings, Emmet J explained that section 127(1) of the Corporations Act "may be construed as requiring a single document to be signed by the two directors or the director and secretary. In principle, however, I can see no reason why that should be, so long as the two counterparts are treated as a single instrument and that instrument is delivered". Arguably, this sentiment has been reflected in commercial practice, but not without legal discussion.

The most recent decision on split execution is a decision of the South Australian Supreme Court in Bendigo and Adelaide Bank Limited & Ors v Kenneth Ross & Anor [2019] SASC 123 ("Pickard").

Pickard considered the validity of signing a deed of guarantee electronically. The deed was "signed" by office staff attaching electronic signatures of certain officers of a company. In proceedings to enforce the deed, Bendigo argued that its execution was in accordance with section 127(1) of the Corporations Act.

Although the deed was approved by signed resolutions of the board of the guarantor, there were no resolutions or authorisations from the officers to place their electronic signatures on the deed, rendering the form of signing invalid and the deed unenforceable.

The Court also ruled that section 127(1) of the Corporations Act contemplates a document being executed by two officers signing it and so the single document must be signed by both officers. The Court noted that it is insufficient that two signatures appear on different counterparts because no one counterpart would be properly executed by the company.

While not expressly dealing with the issue, the implication of Pickard is that a deed which is signed by one officer and then sent electronically to another officer may be invalid. This is because the transmission of a deed via electronic means creates a counterpart which is inconsistent with that decision. Although Pickard is a decision of the South Australian Supreme Court (and therefore not binding in New South Wales), it is a significant decision which may persuade a Court in New South Wales to adopt the same approach.

Where a document is executed electronically, a counterparty is not entitled to rely on the statutory assumptions in the Corporations Act as to due execution. Additionally, because the Courts have held that an electronic signature may be invalid if it is applied by someone other than the signatory (for example, another person in their office or who has access to their email) without the knowledge of the signatory, there is a risk that electronic execution by corporations without further evidence that the signatories have authenticated their signatures, will render the document invalid and unenforceable.

Lessons from Pickard

In order for a deed or agreement to be binding:

- all signatories should apply wet signatures to the same physical document; or
- in the case of corporations, one company officer should sign and email or send by facsimile a copy of the signed counterpart to the other company who then signs the same document; or
- if company officers use electronic signatures, the counterparty should take additional steps to authenticate the electronic signatures. For example, having the signatory confirm through a telephone call with an accompanying file note and follow-up email that they either personally applied their signature or that it was applied by someone else with their authority.

In light of Pickard, it would be prudent for contracting parties to ensure that documents are executed in accordance with the methods sets out above. A failure to do so may render legal documents invalid and unenforceable.

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CONSTRUCTION ROUNDUP

Options for Addressing the Effect of COVID-19 on Construction Projects

As countries around the world go into lockdown and their borders close, it is inevitable that ongoing construction projects will be impacted by shortages of materials and labour.

We examine below some of the options open to participants in construction projects to minimise the negative effects of the current situation.

Extensions of time

Modern construction contracts invariably include a

mechanism whereby the contractual date for completion of the project can be extended to account for delays to the critical path of the project.

The contract will identify those causes of delay which will entitle the contractor to an extension of time; any causes of delays that do not fall within these categories will be entirely at the contractor's risk.

The contract may also entitle the contractor to delay costs if the delay is caused by the principal (such as being due to a direction issued by the principal) rather than a neutral cause (such as inclement weather).

Since the contract also usually provides that the contractor is at risk of liquidated damages being payable to the principal for every day that the project runs late, a major delay without an entitlement to an extension of time can be disastrous for the contractor.

At this stage, it is expected that COVID-19 will have an impact on trade and labour for a number of months.

So the important question is whether the change in world circumstances caused by COVID-19 will be likely to entitle the contractor to an extension of time, or even delay costs.

Usually the causes of delay that result in the contractor being entitled to an extension of time include:

- An act or omission by the principal
- A variation to the scope of work
- Inclement weather.

A further common qualifying cause of delay is a delay caused by a direction given by a public body or agency or authority. If the Commonwealth or NSW Government issues an order for self-isolation due to actual or potential exposure to the virus (or a more general lock down order), then arguably the contractor may be entitled to an extension of time for the duration of this governmental direction. Similarly, an official closure of borders may be deemed to be a direction by authority.

Some contracts go further and allow an extension of time for any cause of delay that is outside the contractor's control. A mere disruption to supply chains and resources as a consequence of the pandemic arguably falls within this definition.

Even if the contract does not expressly entitle the contractor to an extension of time, many contracts provide the contract administrator with the power to unilaterally extend the time for completion, if to do so would be fair and reasonable in the circumstances.

There is also the question of the costs of the delay. A lengthy delay to completion due to COVID-19 will result in the contractor incurring increased overheads and being required to service insurance, financing and site establishment obligations for a longer period of time. Similarly, the principal will be denied the benefit of its project until a future date, and may be exposed to extended finance charges. The inability to recover delay costs or liquidated damages is likely to cause financial hardship to at least one of the parties, and it is very likely that this will cause many construction companies to become insolvent.

Suspension of the work

Whether or not the contractor is entitled to an extension of time or delay costs, while the project is still ongoing the contractor remains obliged to mitigate the delay and to work with due expedition and without delay to complete the project. This can be impractical in the current circumstances.

There is also the issue of whether the principal wants to be obliged to pay monthly progress claims, when its own business may be adversely impacted by the pandemic.

Therefore, the answer may be to take the pressure off all parties by putting the project on hold until the pandemic is no longer affecting Australia.

Most contracts will entitle the principal to issue a formal direction that the work be suspended for a period of time. These contractual provisions usually also entitle the contractor to be paid its additional costs incurred by reason of the suspension. These additional costs may include the cost of maintaining insurance and site security during the suspension and of remobilising at the end of the suspension period; however while the project is not actively being worked on there should be minimal head office overheads.

It should also be anticipated that when the work is resumed, there will be a significant global demand for material and labour which will cause additional cost to the project. The deterioration of the $AUD against $USD is also likely to lead to increased material costs and additional costs for projects.

Staging of the work

Similarly, many contracts allow the principal to rearrange the work into stages or separable portions.

One creative option may be to deem the work carried out to date as one stage or separable portion which has reached completion, and not require the second stage or separable portion to be undertaken until the effect of the pandemic has ended.

The downside to this approach is that the contractor should be entitled to renegotiate its price and program to address the change in the way the work is arranged, and this may lead to increased costs.

It would also be important to ensure that the parties are agreed as to who bears the risk of the site and all works carried out to date (as well as any materials left on site), and all insurance obligations.

Termination of the contract

Another option may simply be to terminate the contract and restart the project when things return to normal. Most contracts allow the principal to terminate for convenience, with a small payment often being allowed

to the contractor to compensate for the loss of profit as a consequence of the early termination.

Further, many contracts allow a termination for "force majeure" (or act of God). The question of whether COVID-19 would be considered as an act of God would be most likely determined by the precise words used in the contract to define the term "force majeure".

However, an early termination of the contract now may lead to problems down the track in obtaining warranties with respect to the work when it is being resumed, particularly if a different contractor is engaged to complete the project.

If your project is being impacted by COVID-19, the expert construction lawyers at Gillis Delaney Lawyers can advise you about your rights and options under the construction contract and generally at law.

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Contracting Out of Security of Payment Obligations

The *Building and Construction Industry Security of Payment Act 1999* (NSW) created a mechanism to ensure swift payments to contractors. This was particularly important to support those lower down the contractual chain who are unlikely to have the financial resources to maintain operations if there is a delay in payment for their work or materials.

Whilst small contractors might struggle to maintain a steady cash flow and enforce their rights, other contracting parties may attempt to limit those small contractors' entitlements through the terms of the contract.

The security of payments legislation ensures the rights conferred by the Act cannot be subverted or infringed upon by the terms of the contract between the parties through the *"no contracting out"* provision. Section 34 of the Act provides:

> *"(1) The provisions of this Act have effect despite any provision to the contrary in any contract.*
>
> *(2) A provision of any agreement (whether in writing or not):*
>
> *(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or*
>
> *(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,*
>
> *is void."*

Section 34 has been interpreted by the Courts in several judgments. More recently, its application was considered by his Honour Justice Ball in *Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd*.

On 6 October 2017, Parrwood engaged Trinity to design and construct 59 residential apartments across two buildings in a development known as the Affinity Project in Caringbah, NSW. The contract price was just under $19 million.

The Contract was based on the Australian Standard form of general conditions of contract for design and construct. Clause 37.1 of the Contract provided that Trinity would *"claim payment progressively in accordance with Item 33".*

Item 33 provided for progress claims to be made on the 10th day of each month for work done to the date of the claim. However, it was common ground that the parties varied that date to the 25th of each month.

Clause 39.4 of the Contract provided that:

> ***"Principal's Right***
>
> *If the Contractor fails to show reasonable cause by the stated date and time, the Principal may by written notice to the Contractor.*
>
> *(a) take out of the Contractor's hands the whole or part of the work remaining to be completed and suspend payment until it becomes due and payable pursuant to subclause 39.6; or*
>
> *(b) terminate the Contract."*

On 23 July 2019 and 5 August 2019, Parrwood served on Trinity notices to show reasonable cause under clause 39.2 of the Contract.

On 3 September 2019, following what was alleged to have been a failure by Trinity to show cause, Parrwood exercised its right under clause 39.4 to take the work out of Trinity's hands. It did not purport to terminate the Contract.

On 6 September 2019, Trinity served a payment claim.

On 20 September 2019 Parrwood served a payment schedule in response recording the scheduled amount as $Nil.

On 4 October 2019, Trinity made an adjudication application to Adjudicate Today. The adjudicator determined that the amount owing to Trinity was "No amount". He did so on the basis that, at the time the payment claim was made, Parrwood had validly exercised its right under clause 39.4 to take the work out of Trinity's hands, with the result that payments under the Contract were suspended until they became due and payable under clause 39.6.

The adjudicator did not make a determination as to whether Trinity was entitled to delay damages as claimed in the payment claim or whether Parrwood was entitled to liquidated damages as claimed in its payment schedule.

In reaching his determination, the adjudicator considered whether that interpretation of clause 39.4 attracted the operation of s.34 of the Act. He concluded that it did not.

In the adjudicator's opinion clause 39.4 and clause 39.6 did not operate so as to prevent or restrict Trinity's rights to make a progress payment claim under the Act or under the Contract. They operated to *suspend* Trinity's entitlement to payment in the event of Parrwood having elected to take the remaining work out of Trinity's hands for *"substantial breach"* of the Contract.

On 22 November 2019, Trinity purported to withdraw the adjudication application by notice served on the first adjudicator and Adjudicate Today and made a new adjudication application to the third defendant, AAE Nominations Pty Ltd.

The second adjudicator took the view that the first adjudicator had failed to perform his statutory function because he had declined to determine the payment claim. It followed that the determination of the first adjudicator was void with nothing preventing her from determining the claim herself, which she did.

The issues for determination by Justice Ball could therefore be narrowed to the following:

- Whether it was open to Trinity to submit that the first determination was void.
- Whether the first determination was void; and
- Whether the payment claim was invalid because it was accompanied by a supporting statement which Trinity knew was false or misleading in contravention of s 13(8) of the Act.

Parrwood submitted that Trinity was not entitled to claim the first determination was void since it had not sought or obtained the Court's leave to raise this issue at a late stage. Secondly, it submitted that Trinity had made an election when it chose not to challenge the first determination shortly after it had been made.

Ball J did not accept either of those submissions and found that, since Trinity had purported to withdraw the adjudication application, it was clear that its position was that the first determination was void. Trinity was thus entitled to seek a formal order since its Cross Summons merely formalised the position of Trinity as it existed before the pleading had been filed.

Justice Ball stated that, after the first adjudicator handed down his determination, both parties were faced with a choice. It was neither necessary nor sufficient for Trinity to commence proceedings at that time. It was not necessary because it was open to Trinity to take the view that the determination was void and proceed on that basis – that is, on the basis that it had no effect at law - and that is what it chose to do by purporting to withdraw its adjudication application.

Ball J formed the view that the first determination was void. His Honour held that *"on and from"* 25 August 2019 Trinity had become entitled to a progress payment under s.8 of the Act. As a result Trinity had become entitled to serve a payment claim in respect of that progress payment in accordance with s.13 of the Act and to apply for adjudication of that claim in accordance with s.17 of the Act.

Under s.22, the adjudicator appointed to adjudicate that claim was required to determine the amount of the progress payment (if any) to be paid to the claimant and the date on which any such amount became or would become payable.

The first adjudicator had not determined the amount of the progress payment and in reaching his conclusion had failed to comply with his statutory duty. Instead the first adjudicator had sought to interpret the provisions of the Contract and Trinity's right to make a progress payment.

Whilst the adjudicator formed the view that clause 39.4 merely suspended Trinity's entitlement until a final adjustment of the parties' rights under clause 39.6, Ball J determined that a suspension of a right conferred by the Act is plainly a modification of that right.

Finally, in relation to the third issue, Parrwood submitted the supporting statement served with the Payment Claim contained a false statement because, as the form of the statement required, it included a statement that all amounts due and payable to the subcontractor had been paid when in fact, three subcontractors were each owed substantial sums of money by Trinity. Ball J rejected this submission on the basis that Parrwood had failed to sufficiently prove the supporting statement was knowingly false.

Thus, Ball J gave leave for Trinity to file the Cross Summons and ordered that the first adjudication determination was null and void.

Many construction contracts include a right to suspend payment if the work is taken out of the contractor's hands. The intention is that a reconciliation can be performed once the work has been completed by an alternative contractor allowing for any extra costs incurred by the principal to be set off against any moneys that would otherwise have been payable to the contractor.

However, Ball J's decision confirms that this approach is not consistent with the purpose of the security of payments legislation and particularly the express prohibition in s.34 to restrict or otherwise modify the processes of the Act.

It would be prudent for principals and head contractors to review the terms of their contracts and subcontracts to ensure they do not offend the prohibition in s.34 and to consider alternatives for protecting their position if the contractor or subcontractor defaults on their obligations.

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EMPLOYMENT ROUNDUP

JobSeeker- Government Help for Employers?

The Federal Government on 30 March announced that businesses will receive a fortnightly wage subsidy of up to $1,500 per employee as part of a bid to prevent millions of people from losing their jobs to the Coronavirus pandemic.

The wage subsidy will include not-for-profit employees and New Zealanders who work in Australia but are typically unable to access welfare programs.

Part-time workers and casuals with at least one year in their job can receive the payment, which is slated to start flowing in early May.

It will also be backdated to include anyone who has been stood down due to coronavirus. However, a person cannot receive both the JobSeeker and JobKeeper payments.

NB: The current information concerning JobSeeker is taken from Treasury publications. Details may change once the legislation is enacted.

OUTLINE

Under the JobKeeper Payment, businesses impacted by the Coronavirus will be able to access a subsidy from the Government to continue paying their employees. Affected employers will be able to claim a fortnightly payment of $1,500 per eligible employee from 30 March 2020, for a maximum period of 6 months.

ELIGIBLE EMPLOYERS

Employers will be eligible for the subsidy if:

- their business has a turnover of less than $1 billion and their turnover will be reduced by more than 30 per cent relative to a comparable period a year ago (of at least a month); or
- their business has a turnover of $1 billion or more and their turnover will be reduced by more than 50 per cent relative to a comparable period a year ago (of at least a month); and
- the business is not subject to the Major Bank Levy.

The employer must have been in an employment relationship with eligible employees as at 1 March 2020, and confirm that each eligible employee is currently engaged in order to receive JobKeeper Payments.

Not-for-profit entities (including charities) and self-employed individuals (businesses without employees) that meet the turnover tests that apply for businesses are eligible to apply for JobKeeper Payments.

ELIGIBLE EMPLOYEES

Eligible employees are employees who are at least 16 years of age and:

- are currently employed by the eligible employer (including those stood down or re-hired);
- were employed by the employer at 1 March 2020;
- are full-time, part-time, or long-term casuals (a casual employed on a regular basis for longer than 12 months as at 1 March 2020);
- are an Australian citizen, the holder of a permanent visa, a Protected Special Category Visa Holder, a non-protected Special Category Visa Holder who has been residing continually in Australia for 10 years or more, or a Special Category (Subclass 444) Visa Holder; and
- are not in receipt of a JobKeeper Payment from another employer.

If your employees receive the JobKeeper Payment, this may affect their eligibility for payments from Services Australia as they must report their JobKeeper Payment as income.

OBLIGATIONS FOR EMPLOYERS

To receive the JobKeeper Payment, employers must:

- Register an intention to apply on the ATO website and assess that they have or will experience the required turnover decline.
- Provide information to the ATO on eligible employees. This includes information on the number of eligible employees engaged as at 1 March 2020 and those currently employed by the business (including those stood down or rehired). For most businesses, the ATO will use Single Touch Payroll data to pre-populate the employee details for the business.
- Ensure that each eligible employee receives at least $1,500 per fortnight (before tax). For employees that were already receiving this amount from the employer then their income will not change. For employees that have been receiving less than this amount, the employer will need to top up the payment to the employee up to $1,500, before tax. And for those employees earning more than this amount, the employer is able to provide them with a top-up.
- Notify all eligible employees that they are receiving the JobKeeper Payment.
- Continue to provide information to the ATO on a monthly basis, including the number of eligible employees employed by the business.

APPLICATION PROCESS

Employers must register with the ATO to obtain JobSeeker payments.

Businesses with employees

Initially, employers can register their interest in applying for the JobKeeper Payment via ato.gov.au from 30 March 2020.

Subsequently, eligible employers will be able to apply for the scheme by means of an online application. The first payment will be received by employers from the ATO in the first week of May.

Eligible employers will need to identify eligible employees for JobKeeper Payments and must provide monthly updates to the ATO.

Participating employers will be required to ensure eligible employees will receive, at a minimum, $1,500 per fortnight, before tax.

It will be up to the employer if they want to pay superannuation on any additional wage paid because of the JobKeeper Payment.

Further details for businesses for employees will be provided on ato.gov.au.

Businesses without employees

Businesses without employees, such as the self-employed, can register their interest in applying for JobKeeper Payment via ato.gov.au from 30 March 2020.

Businesses without employees will need to provide an ABN for their business, nominate an individual to receive the payment and provide that individual's Tax File Number and provide a declaration as to recent business activity.

People who are self-employed will need to provide a monthly update to the ATO to declare their continued eligibility for the payments. Payment will be made monthly to the individual's bank account.

Further details for the self-employed will be provided on ato.gov.au.

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Standing Employees Down as a Result of COVID-19

The impact of COVID-19, on the economy and the consequences for employers and employees, has been substantial.

The State and Federal Governments' restrictions on the rights of businesses to operate, employees' ability to travel and the shutting down of some essential services such as schools, has led to the need for many employers either to shut their business or significantly reduce the number of employees required to conduct the business.

Employers must be aware of their rights and obligations in dealing fairly and legally with employees during this uncertain time.

Stand Down

As a general rule, an employer is obliged to pay an employee who is ready, willing and able to work, even if the employer has no tasks or work to provide the employee.

It is accepted, for example, that an employer does have a right to direct an employee not to attend the workplace, carry out any duties or speak to other employees or customers where the employer is conducting an investigation into the employee's conduct and allowing the employee to remain at work and/or undertaking his or her duties could undermine the investigation or expose other employees to a risk to their health and safety. However in those circumstances an employee following a lawful and reasonable direction not to attend the workplace is entitled to their normal wage during that period they are directed not to attend the workplace or their duties.

Some Modern Awards, Enterprise Agreements and contracts of employment contain provisions authorising an employer to stand down an employee. Knowing whether such applies will ensure employers do not expose themselves to a liability for wrongful termination or breach of an employment contract.

A contract of employment must contain an express specific provision entitling the employer to stand an employee down. If such a provision does exist in a contract of employment, the rights of an employee to continue to either be paid or not paid during the stand down period are as found in the contract. However where there is a downturn of work or a Government imposed restriction on the business carrying out its activities, there is no implied term that permits the employer to direct the employee not to attend work. Further if an employer does direct an employee not to attend work or carry out duties, the employer's obligation to pay the person their wage or salary is not suspended.

Section 524 of the *Fair Work Act 2009* permits an employer to stand down an employee during any period in which the employee cannot be usefully employed in the following limited circumstances:

- industrial action (other than industrial action organised or engaged in by the employer);
- a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;
- a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

Section 524(3) of FWA provides that if an employer stands down an employee during a period under sub section (1) the employer is not required to make payments to the employee for that period. The

employee is able to take annual leave and long service leave during that period.

However, some employers may take the view that their business will not be able to recover and as such some positions may need to be made redundant which results in some employees being terminated.

The Fair Work Commission has considered the requirements of Section 524(3) of FWA and in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia & Anor v FMP Group (Australia) Pty Limited*, Deputy President Gostencnik observed that the consequences of a stand down can be severe for an employee as the employee may be deprived of wages for a lengthy period. The Deputy President also observed the structure and language of Section 524(1) shows that there needs to be a temporal connection between the circumstances leading to the stand down and reason why the employee cannot be usefully employed.

In the *FMP Group case* Deputy President Gostencnik found the employer had stood down employees in anticipation of industrial action and that the industrial action had not commenced, and Section 524(1) did not operate in anticipation of an employer not being able to usefully employ a particular employee.

Whether Section 524 of the FWA authorises an employer to stand down an employee as a result of the current COVID-19 pandemic is untested territory.

Employers that are standing employees down without a contractual right to do so are likely to be relying on section 524(1)(c) of FWA that permits a stand down for a stoppage of work for any cause for which the employer cannot reasonably be held responsible, namely the consequences on their businesses flowing from the COVID-19 pandemic and the need to ensure the health and safety of their workers. Such arguments are not without merit.

The key to being able to rely on Section 524(1)(c) is the phrase "**stoppage of work".** That clearly covers a situation where a government order prohibits a business from operating; but it would not extend to situations where there is just a downturn in business (however severe) brought about by the general condition of the economy.

Employers must review their employment arrangements carefully before standing down employees because of COVID-19.

If an employee is stood down by an employer, they remain an employee. Employees will continue to accrue leave entitlements whilst they are stood down. Personal leave and annual holiday leave entitlements continue to accrue.

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Working From Home - What Are The Implications?

COVID-19 has given rise to many catchphrases, and one of the most frequently heard is "working from home". What exactly does that mean for employers?

Can I make employees work from home?

Generally, an employer is able to direct an employee as to the location at which work duties are to be performed. Assuming that the employee can perform work tasks from home, then the employer can direct the employee to do so.

If an employer wishes an employee to work from home, it will generally be the employer's responsibility to provide the employee with the necessary tools and equipment to perform their tasks. This would include things like computer equipment, and the provision of (or at least bearing the cost of) internet data connections.

What are the WHS implications?

In Australia, the model WHS laws still apply if workers are required to work somewhere other than their usual workplace, for example, from home. In addition, the common law duty of care of all employers extends to their workers, whatever the location is at which they do their work.

An employer has the primary duty of care and must do what is reasonably practicable to ensure the health and safety of their workers, including when allowing workers to work from their home.

The steps an employer can take to minimise risks at a worker's home will be different to what can be done in the usual workplace. However, if practicable, employers should:

- provide guidance on what is a safe home office environment, including what a good work station set up looks like and how to keep physically active,
- require workers to familiarise themselves and comply with good ergonomic practices, for example by referring to a self-assessment checklist,
- maintain daily communication with workers,
- provide continued access to an employee assistance program, and
- appoint a contact person in the business that workers can talk to about any concerns.

You should also think about how your existing policies and procedures apply when working from home, including:

- notification of incidents, injuries, hazards and changes in circumstances,

- consultation and review of work health and safety processes, and
- attendance, timesheets, leave and other entitlements and arrangements.

Working from home can also present new risks or increased risks for workers. Employers should seek to understand these, and consult with workers about:

- physical risks from poor work environment, such as workstation set up, heat, cold, lighting, electrical safety, home hygiene and home renovations, and
- psychosocial risks such as isolation, high or low job demands, reduced social support from managers and colleagues, fatigue, online harassment and family and domestic violence.

Regular monitoring of workers through phone calls or periodic visits is essential. Have a check-in process whereby workers are required to contact 'home base' at a nominated time and have an emergency response plan when workers fail to report in at allotted times.

The bottom line for employers is that they are obliged to do what is reasonably necessary to manage the risks to a worker who works from home.

Employee obligations

A worker also has an obligation to take care of their own health and safety and follow health and safety policies, procedures and instructions put in place by their employer. Employees need to follow any reasonable policies or directions the employer has put in place in response to COVID-19. This includes working from another location, such as working from home.

An employee should:

- follow procedures about how the work is performed
- follow instructions on how to use the equipment provided by the workplace
- maintain a safe work environment (for example moving furniture to allow adequate workspace and providing adequate lighting, repairing broken steps)
- keep their equipment safe, well maintained and in good order

These are all uncharted waters for many employers. Like always, a methodical, documented approach should be followed. If you need advice, ask for it.

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WORKERS COMPENSATION ROUNDUP

Workers Compensation & COVID-19: A Brave New World

The COVID-19 pandemic has created unprecedented challenges for people in all walks of life all around the world. All aspects of people's lives have been significantly affected, including their employment. New issues arise that must be considered every day.

One such issue that must be considered is what if an employee contracts COVID-19 at work? Is an employee entitled to payments of compensation under the *Worker's Compensation Act* 1987?

Section 4 of the legislation provides that compensation is payable for personal injury arising out of the course of employment and includes a "disease injury", but only if the employment was the main contributing factor to contracting the disease.

Therefore, in order for an employee to be entitled to receive compensation for contracting COVID-19, COVID-19 must have been contracted in the course of an employee's employment and employment must have been the main contributing factor to contracting the disease.

Each particular case must therefore be carefully considered on its facts. Expert medical evidence will be relevant.

A case that may give some guidance involved the contraction of H1N1 Swine Flu, a virus that was also declared a pandemic by the World Health Organisation in 2009.

In *Secretary, Department of Family & Community Services v Bee* [2014] NSWWCCPD 66, the applicant was a registered foster carer. Between 22 and 28 August 2010 she had cared for two children in an emergency when another foster carer became sick. She alleged she had contracted H1N1 Swine Flu from the children and as a consequence was unfit for work from 25 August 2010 to 7 May 2012. At first instance the arbitrator determined the applicant had contracted H1N1 Swine Flu from the children and employment was a substantial contributing factor (the relevant test at that time). The medical evidence supported the contraction of H1N1 Swine Flu from the children.

The applicant was unsuccessful in her compensation claim but only as she was found not to be a deemed worker as there was no "contract" to "perform any work" as required by the *Workplace Injury Management and Workers Compensation Act* 1998.

To consider whether or not a claim for compensation as a consequence of contraction of COVID-19 is compensable it will be necessary to consider issues

such as whether or not there was interaction with a person who had a known case of COVID-19 in the course of employment or whether there has been travel to a known COVID-19 area (which should be far less common now if at all).

This area, like all areas, will no doubt continue to evolve.

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Appeals Under Section 352 WIM Act 1998 – Will Two "Wrongs" Make a Right?

In the February issue of GD News we considered the outcome of an appeal against a decision of an arbitrator of the Workers Compensation Commission pursuant to Section 352 of the *Workplace Injury Management and Workers Compensation Act 1998* ("1998 Act").

In *Cruceanu v Vix Technology (Australia) Limited* [2020] NSWWCCPD 7, President Judge Phillips in dismissing the worker's appeal reviewed the principles identified by DP Roche in *Raulston v Toll Pty Limited* [2011] MSWCCPD 25, before confirming the party aggrieved by the decision must identify the relevant error and establish that the arbitrator was actually wrong.

On 17 March 2020 the appellant worker filed a Notice of Appeal in the NSW Court of Appeal pursuant to Section 353(1) of the 1998 Act.

Section 353(1) provides:

> *"(1) If a party to any proceedings before the Commission constituted by a Presidential Member is aggrieved by a decision of the Presidential Member in point of law, the party may appeal to the Court of Appeal.*
>
> *(2) The Court of Appeal may, on hearing of any appeal under this section, remit the matter to the Commission constituted by a Presidential Member for determination by the Commission in accordance with any decision of the Court and may make such order in relation to the appeal as the Court thinks fit.*
>
> *(3) A decision of the Court of Appeal on appeal under this section is binding on the Commission and on all the parties to the proceedings in respect of which the appeal was made."*

The challenge to the decision of the President of the Commission now filed in the Court of Appeal proceeds on the basis the President erred in law in the same way as the arbitrator below, causing the decision to miscarry.

The appellant continues to assert the findings of both the President and the arbitrator concerning the specialist medical evidence before the Commission were not reasonably available on the evidence, thereby constituting errors of law and resulting in miscarriage of justice.

Central to the issue now before the Court of Appeal is the Commission's function as a specialist Tribunal to interpret competing and at times, complex medical evidence and whether such interpretation can, in certain circumstances, give rise to an error of fact, law or discretion in accordance with Section 352(5) of the 1998 Act.

The outcome of the appeal may serve to shed further light not only on the principles to which the Commission must have regard on appeal but also in its daily function as a form for the determination of disputes involving diagnosis and causation.

Further developments in the matter will be communicated to our readers in subsequent issues in GD News.

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