



Managing Contracts in the ever changing Coronavirus landscape

Presented by: **Neca Legal**

Introduction

- 1. Key contract clauses**
- 2. Lockdown of sites and exemptions for Essential Services**
- 3. Foreshadowed changes to relax the Insolvency Laws and directors' liabilities to assist business to survive the coronavirus pandemic**

Changes in Legislation

Example of a contract clause that may allow contractors to claim additional costs due to reduced working hours, delays or other changes to the works

11.2 Changes in Legislative Requirements

If a legislative requirement:

(a) necessitates a change:

(i) to *the Works*;

(ii) to so much of WUC as is identified in Item 20(b);

(iii) being the provision of services by a municipal, public or other statutory authority in connection with WUC; or

(iv) in a fee or charge or payment of a new fee or charge;

(b) comes into effect after the 14th day before the closing of tenders but could not reasonably then have been anticipated by a competent contractor; and

(c) causes the *Contractor* to incur more or less cost than otherwise would have been incurred,

the difference shall be assessed by the *Superintendent* and added to or deducted from the *contract sum*.

What is Force Majeure?

- Usually defined in contracts to mean:
 - “Fire, flood, explosion, riot, war, invasion, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection or military or usurped powers, martial law or confiscation by order of any authority, ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, which is beyond the reasonable control of the affected party”
- Recommended Amendment – add “pandemic”
- Only beneficial if provides entitlement to EOT or is an Excepted Risk (that is Principal’s liability)

Excepted Risk clauses that may assist:

The following *excepted risks* causing loss or damage, for which the *Principal* is liable, are:

- (a) any negligent act or omission of the *Superintendent*, the *Principal* or its consultants, agents, employees or other contractors (not being employed by the *Contractor*);
- (b) defects in the design of the Works, other than design provided by the *Contractor*;
- (c) in respect of the Works:
 - (i) war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, martial law or confiscation by order of any government or public authority; and
 - (ii) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel not caused by the *Contractor* or its subcontractors or either's employees or agents.

Dictionary meaning of “War” also – “serious struggle or effort against crime, disease and poverty”



Delay Costs and Extension of Time

- **Majority of contracts allow time only, not costs**
- **Entitlement to EOTs - Qualifying cause of delay**

Example:

- “any act, default or omission of the Superintendent, the Principal, its consultants, agents or other contractors (not being employed by the Contractor)”
- Add Excepted Risks or Force Majeure as qualifying cause of delay

Example:

18.1 Superintendent's suspension

The *Superintendent* may direct the *Contractor* to suspend the carrying out of the whole or part of the Works for such time as the *Superintendent* thinks fit, if the *Superintendent* is of the opinion that it is necessary:

(a) because of an act, default or omission of:

(i) the *Superintendent*, the *Purchaser* or its employees, consultants, agents or other contractors (not being employed by the *Contractor*); or

(ii) the *Contractor*, a subcontractor or either's employees or agents;

(b) **for the protection or safety of any person or property;** or

(c) to comply with a court order.

- Entitlement to claim additional costs depends on allocation of risk of suspension.

Termination and Frustration

- **Termination for convenience or breach**
- **Frustration of contracts – common law remedy**
 - Parties excused from further performance of contract by unforeseen event
 - Frustrating event not caused by either party
 - Contract makes no provision for the frustrating event
 - Further performance of the contract is impossible
 - Vary narrow scope of application - Frustration will not apply if contract is only more difficult or more expensive to perform
 - **Examples:**
 - New law makes contract illegal
 - Site is flooded permanently or destroyed

Lockdown of sites and Essential Services

Essential Services Act 1988 (NSW)

- Production, supply of distribution of any energy;
- Transportation of persons or freight
- Fire-Fighting services
- Public health services and ambulance services
- Production, supply and distribution of pharmaceutical products
- Provision of garbage, sanitary, cleaning or sewage services
- Welfare institutions and prisons
- Any service declared to be an essential service under Act

Proposed new Insolvency Laws

Schedule 12 of *Coronavirus Economic Response Package Omnibus Act 2020 (Cth) (the Act)* passed on 24 March 2020

- 1. No personal liability for Directors for insolvent trading – debts incurred from 24 March 2020 in ordinary course of business due to COVID – 19 financial challenges**
- 2. Threshold for Statutory Demands increased to \$20,000**
- 3. Threshold for individual bankruptcy increased from \$5,000 to \$20,000**
- 4. Allowing companies and individuals 6 months to respond (instead of 21 days)**
- 5. Government announced on 22 March - the ATO will tailor solutions for businesses struggling due to COVID-19, including temporary reduction of payments or deferrals, and withholding enforcement actions**

Conclusion



- **Terms of contracts remain valid and apply**
- **Consider negotiating amendments to contracts**
- **Statutory Demands shelved**

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