McCullough Robertson Lawyers

Fifth Edition

Recommendations and considerations for you and your business in the recovery from COVID-19

Welcome

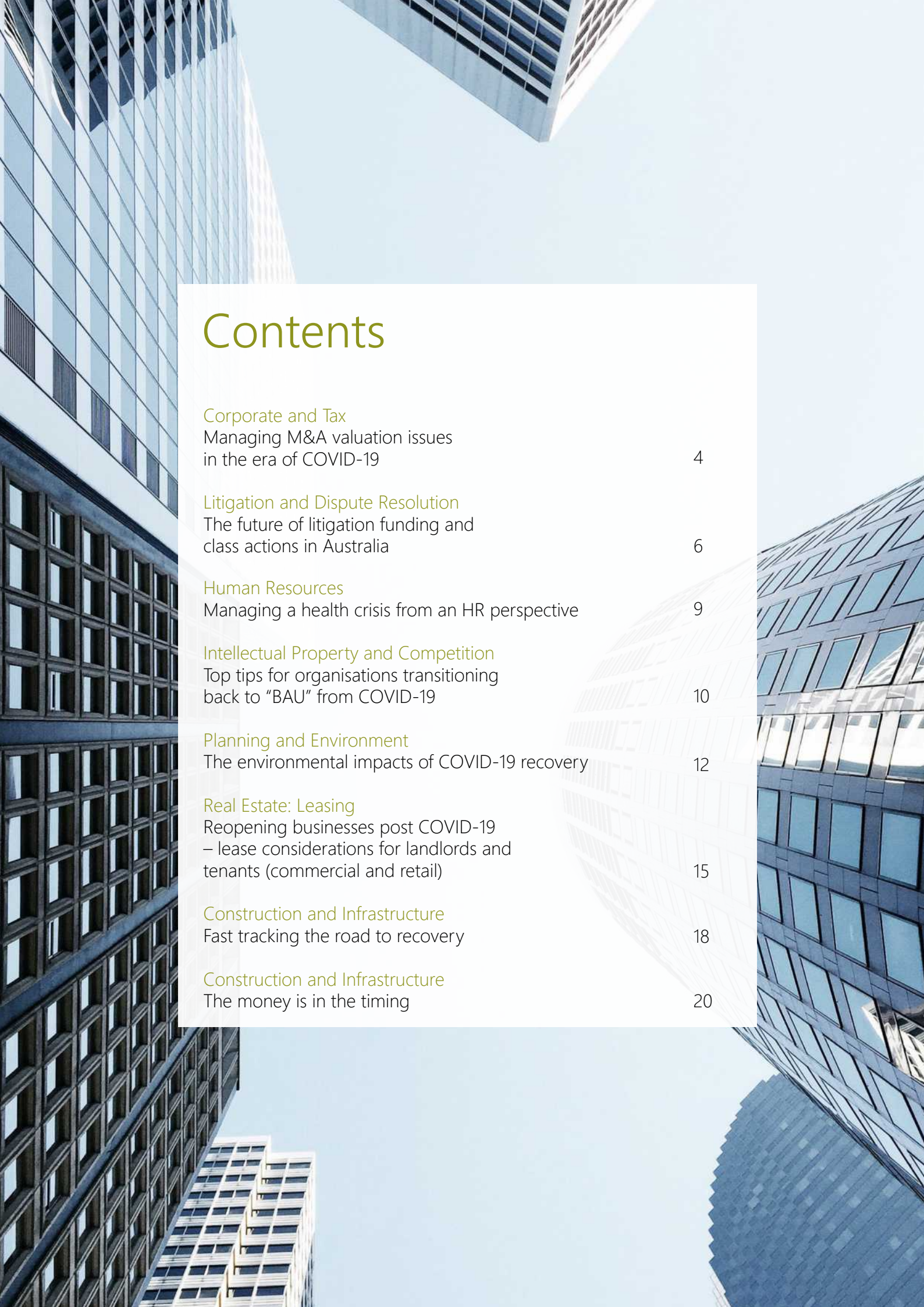
As the nation slowly begins to come out the other side of the COVID-19 pandemic, we recognise that there is still a lot of uncertainty surrounding what the future might hold – both for you and your business.

This next edition of our COVID-19 guide seeks to provide some practical insight into how best to manage your return to the office and things to be aware of as business looks to return to normality.

With insights including HR tips on bringing workforces back to the office, considerations for landlords and tenants when reopening businesses, and the environmental impacts of COVID-19 recovery, this guide outlines some key considerations for you and your business in ensuring the transition from pandemic to post-pandemic is as smooth as possible.

Please feel free to reach out to any of the listed key contacts (or your regular McCullough Robertson contact) should you have any questions or concerns. We are here to support you in any way we can.

Please note that the information contained in this guide is correct as of 9 June 2020.



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Managing M&A valuation issues in the era of COVID-19

The COVID-19 pandemic has had a profound impact on businesses, both immediate and in terms of their long-term outlook. Whilst hospitality, retail and travel businesses have suffered obvious and acute impacts, there are hidden complexities in the valuation of longer-term assets in the infrastructure, property and agribusiness sectors. Tech-focused company valuations have risen sharply, as illustrated by the NASDAQ Composite Index's sudden return to pre-COVID-19 levels.

Given the uncertainty of revenue, expense impacts and timing in the current environment, can valuation issues be successfully managed in mergers and acquisitions? Some buyers have taken a conservative approach and suspended their acquisition programs, but experience suggests that stronger players will emerge to take advantage of opportunistic acquisitions. Domestic acquirers may also have a period of competitive advantage under the current 'zero threshold' FIRB regime (see our previous publications). From a seller's viewpoint, certainty around the purchase price and de-risking completion are key.

So what are some of the tools that buyers and sellers need to consider to manage valuation issues and deal risk?

Terms Sheet – often terms sheets or letters of intent (LOI) are cursory. It is in the interests of both buyers and sellers to have a common understanding of the purchase price and key valuation drivers on which a deal can be consummated.

Due diligence – additional focus is required on key liabilities and risks arising from COVID-19, including employment, insurance and key contracts (including any force majeure triggers). It is vital for accounting and legal advisers to work collaboratively to inform the due diligence exercise and identify any potential valuation impacts.

Conditions precedent – conditions precedent allow the benefitting party to walk away from the transaction if certain events do not occur prior to completion. In the current environment, focus needs to be given to the specific wording of conditions regarding 'material adverse change' (also known as a 'MAC' clause), assignment of contracts and key regulatory issues, such as FIRB.

Payment mechanisms – there are a range of adjustment and deferred payment mechanisms which may suit particular transactions. In a COVID-19 environment, these may include:

- Earn-outs – these form part of the purchase price but only become payable if the target company achieves one or more defined goals. Whilst often in the form of general financial targets, such as achieving a particular EBIT, earn-outs can be tailored towards key valuation drivers such as retention of particular client volumes or contracts. Importantly, the timing of the earn-out can be matched or paid in tranches to reflect the key valuation drivers, especially where the valuation involves a forward financial year forecast.
- Retention amount – this is a portion of the purchase price that is retained until a fixed point in time (such as delivery of audited financial results or the warranty expiry period) or upon the occurrence of a specific event. The retention amount may be a 'pool' or may involve specific retention amounts for issues of concern (such as customer claims, employee liabilities or tax matters).

Innovative deal structures – value may be captured using innovative scrip consideration structures. For example, a mechanism like price-protected shares (as used in the Wesfarmers-Coles transaction) or contingent value rights provides the parties with some comfort with known 'caps' and 'floors' on price.

The above tools can provide certainty for buyers and sellers, assist in breaking pricing deadlocks, and minimise execution risk.

Key Contact Reece Walker | Chair of Partners | Corporate & Tax | T +61 7 3233 8654 | E rwalker@mccullough.com.au

Litigation and Dispute Resolution

The future of litigation funding and class actions in Australia

The Federal Government has announced a range of measures in the last few last weeks to deal with the criticisms surrounding the litigation funding and class action regimes in Australia.

Firstly, it gave the green light for a parliamentary inquiry, first foreshadowed in December 2019, to proceed. Secondly, it determined that litigation funders should be subject to scrutiny by ASIC in requiring them to hold an Australian Financial Services Licence (**AFSL**) and, if necessary, to comply with managed investment scheme rules. Thirdly, it provided company directors and executives with a six-month reprieve by making adjustments to the continuous disclosure obligations under the Corporations Act.

While criticisms relating to whether litigation funding gives rise to unmeritorious claims and the proportion of compensation shared with plaintiffs in class actions existed long before COVID-19, the ensuing economic crisis and the risk of an increase in the number of class actions have seen the debates intensify.

The government's actions have certainly raised many important questions which need to be addressed.

AN INQUIRY INTO AUSTRALIA'S CLASS ACTION REGIME

Some of the key terms of reference in the inquiry (see the full list here) include:

- the likely future impact on the broader economy if class action cases continue to grow at their current rate;
- the impact of litigation funding on the damages and other compensation received by class members in class actions funded by litigation funders;

- the consequences of allowing Australian lawyers to enter into contingency fee agreements or a court to make a costs order based on the percentage of any judgment or settlement; and
- the application of common fund orders and similar arrangements in class actions funded by litigation funders.

This is Australia's third inquiry into litigation funding and class actions in six years. Should we expect this inquiry to solve all of the perceived problems in these two industries? Either way, we will be waiting a considerable period of time for any recommended changes to be implemented.

REGULATING THE LITIGATION FUNDING INDUSTRY

The litigation funding industry has continued to grow in Australia at unprecedented levels, with funding now readily available not only for class action proceedings, but for more standard civil litigation or arbitration claims with quantum as low as $500,000.

When the inquiry was announced last month, one of the terms of reference was *'the Australian financial services regulatory regime and its application to litigation funding'*.

Notwithstanding this, new regulatory reporting and disclosure requirements for litigation funders to hold an AFSL and, if necessary, comply with managed investment scheme rules, were announced shortly thereafter.

The regime will, among other things, require funders to hold adequate capital to manage their financial obligations.

It is unclear whether the requirements will extend beyond traditional litigation funders to other entities who technically 'fund' litigation. That category includes law firms who provide no-win no-fee services, and creditors or other entities that fund liquidators such as the Attorney-General's Department (FEG) or the Australian Tax Office.

What is clear is that imposing further governmental red tape on litigation funders is likely to see interest from international funders wane and an overall decrease in the breadth of funding currently available in the Australian market.

Evidently, the aim of the government's regime is to provide protection for legal consumers commensurate to the protection currently afforded to consumers of all other financial services and products which seek to provide investment returns.

However, access to litigation funding is viewed by many as synonymous with access to justice, as it can result in a levelling of the playing field for litigants in dispute against more experienced and well-resourced parties.

It is therefore crucial that Parliament gets the balance of regulation in this industry correct.

COVID-19 – THE IMPACTS AND ASSOCIATED RISKS

Many reports indicate that litigation funders are preparing war chests to hit businesses with class actions in the aftermath of COVID-19, and that it is litigation funders who will drive a new era of class actions relating to disclosure obligations, directors' duties and insolvent trading.

This has had an effect not only on the cost of the premiums of directors' and officers' liability insurance and financial services professional indemnity insurance, but their availability, which is more important than ever now for those navigating businesses through these economically uncertain times.

Another one of the terms of reference in the inquiry is *'the potential impact of Australia's current class action industry on a vulnerable Australian business already suffering the impacts of the COVID-19 pandemic'*, so there is no doubt that these issues contributed to the government's recent actions.

Evidently, the temporary protections previously provided by the executive and the legislature to assist companies to navigate the COVID-19 crisis, including a 6 month moratorium on insolvent trading and a relaxation of the rules relating to continuous disclosure, AGMs and financial reporting obligations, were deemed inadequate to protect businesses and directors, both now and in the long-term.

CONTINUOUS DISCLOSURE OBLIGATIONS

Some of the early criticism, rightly or wrongly, of the Treasurer's determination to modify continuous disclosure obligations relates to its narrow scope of protection.

In particular, no similar modifications have been made to section 1041H of the Corporations Act which has an historically wide application and could be used to capture a range of conduct involving the disclosure (or non-disclosure) of forward-looking statements and earnings guidance that could quite possibly end up the subject of a class action due to COVID-19.

The protection provided is also considerably limited due to the particular language used to implement the changes. As it stands, an entity will still be liable for continuous disclosure breaches if it is *negligent* with respect to market updates on price sensitive information. Negligence, especially during the untested period of COVID-19, may prove a relatively low hurdle for litigants to jump.

However, the government's actions may alternatively be viewed as an attack on market integrity, as continuous disclosure is fundamental and should not be diminished. Unfortunately, this is likely to be the view adopted by many international investors who play an important role in Australia's capital markets.

Only time will tell whether the correct balance of regulation for the litigation funding and class action industries has been achieved.

Key Contact Tim Case | Partner |
Litigation and Dispute Resolution |
T +61 7 3233 8960 |
E tcase@mccullough.com.au

Human Resources

Managing a health crisis from an HR perspective

COVID-19 has been a steep learning curve for those within the HR industry.

The key focus of protecting the health and wellbeing of our employees, clients and visitors has remained paramount. However, the challenge for HR teams is to manage both the health and wellbeing of employees, whilst also managing the economic crisis faced by businesses.

The changes to the way we work and the remoteness of team connection has meant that the employee experience has been challenged like never before. However, it is where the safety and economic challenges collide that HR professionals need to focus their efforts at this point in time.

RELOCATION TO THE OFFICE

As companies begin to start relocating back into the office, it is crucial that HR teams have a comprehensive plan in place that focuses on both safety and utility. Managing health and safety is paramount, and providing employees with a workplace where they feel both physically and psychologically safe will enhance the engagement and productivity of employees.

Equally, the return to the office will be about providing employees with the opportunity to be busy and to contribute to the overall efforts of the company. The impact on utility will differ for each employee. Some have faced a stand down; others have had project priorities change; and those in the early stages of their career may have seen their development impacted as a result of not receiving the full benefit of delegation and supervision from working closely with seniors. All of these are aspects that HR teams must take into account and manage where possible.

Ongoing efforts of leaders to allay concerns and communicate important messages around safety and the individual's contribution to the bigger picture is now the most important thing a leader can do.

BACK TO WORK PLAN

In line with government guidelines, every employer must ensure that health and safety requirements are included in their back to work plan.

We have listed below some practical considerations for you and your business:

- **Social distancing** – have markings in place in areas such as reception to ensure both employees and visitors comply with 1.5 metre distancing rules.
- **Personal hygiene** – staff need to adhere to all the requirements in respect to personal hygiene including regular washing of hands and physical distancing.
- **Meeting rooms** – enforce maximum person restrictions to comply with social distancing, clearly marking this in the entrance will help employees comply with the restrictions.
- **Shared equipment** – supply disinfectant wipes next to all shared equipment. Encourage staff to wipe equipment clean in readiness for the next person.
- **Kitchens and shared areas** – enforce maximum person limits in all shared areas and kitchens. Encourage staff to clean areas they have used in readiness for the next person.

Enforcing an effective health and safety plan as well as regular virtual meetings, one on one check-ins and showing a genuine interest in staff and their wellbeing will be vital in ensuring staff feel safe in the work place and will transition smoothly as we return to some type of normality in such an uncertain time.

Key Contact Louise Ferris | Chief People Officer | Human Resources | T +61 7 3233 8957 | E lferris@mccullough.com.au

Intellectual Property and Competition

Top tips for organisations transitioning back to 'BAU' from COVID-19

Key strategies that organisations can implement to help transition back to 'business as usual' are outlined below.

1. EMBED CONTRACT MANAGEMENT

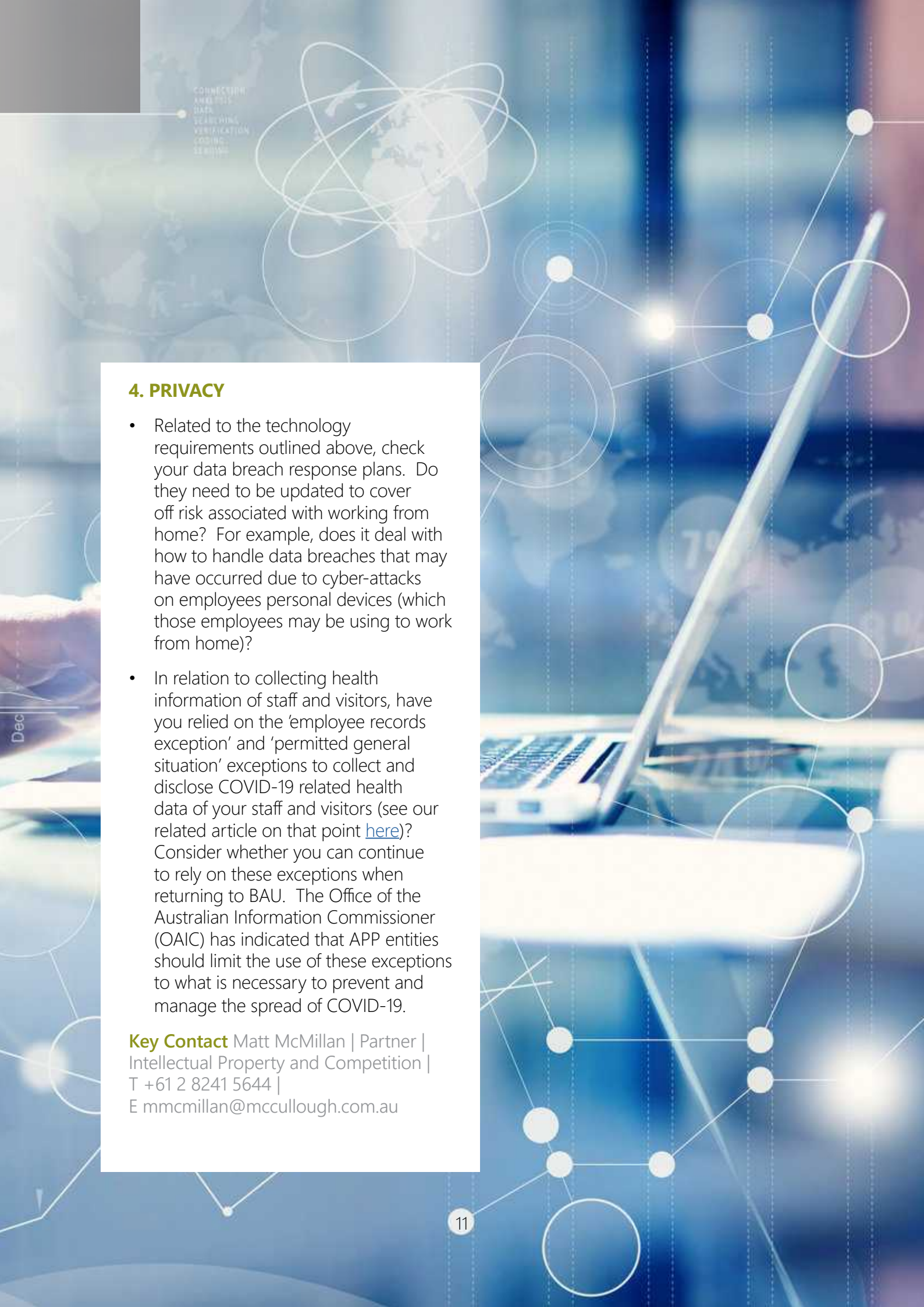
- Avoid the temptation to put key supply contracts back on the shelf now they have been assessed for the immediate impacts of COVID-19. Now is the time to embed the lessons of contract management that COVID-19 forced on us. For example, check whether these contracts are still fit for purpose or whether the terms that need to be reassessed in a post COVID-19 world (such as service levels and credits, performance requirements, termination events, flexibility to address ongoing supply-chain issues). Have you pivoted into online trading without terms and a privacy policy in place? Now is the time to check these things and kick off any change processes or start broadening your supply options to build further resilience for your organisation.
- If you haven't pulled any contracts off the shelf, it's not too late to do it. In particular, check whether any contracts have been left to expire or non-performance has otherwise been left unchecked. If you don't, there is a real risk of waiving hard won rights you thought you had (and paid for). On the flipside, if you have made concessions on performance, assess the current status of the impact on performance and get written clarification, if you haven't already, on an appropriate time frame for those concessions to be lifted.

2. BUSINESS CONTINUITY ARRANGEMENTS

- Are your own business continuity arrangements sufficient? Have you updated them to reflect COVID-19? Should you conduct further testing given the current environment may help detect further issues?
- Related to the contract management points outlined above, check if you should update your business continuity and disaster recovery requirements in your services agreements. Also, consider exercising any testing / audit rights with key suppliers.

3. CHECK YOUR TECHNOLOGY REQUIREMENTS

- Are your policies around use of technology robust enough for the new remote working norm? Make sure your cybersecurity and privacy policies have been updated to help deal with the increased cyber-risk profile of employees working from home.
- Do your software licensing arrangements allow for the use currently being made / which you expect to be made going forward (e.g. are they linked to use at a certain site / on a specified number of devices, etc.) Do a self-audit before your software suppliers do. Also, do you need to conduct additional testing of your security systems (e.g. penetration testing)? Now is a good opportunity while people are in a range of home environments.



4. PRIVACY

- Related to the technology requirements outlined above, check your data breach response plans. Do they need to be updated to cover off risk associated with working from home? For example, does it deal with how to handle data breaches that may have occurred due to cyber-attacks on employees personal devices (which those employees may be using to work from home)?
- In relation to collecting health information of staff and visitors, have you relied on the 'employee records exception' and 'permitted general situation' exceptions to collect and disclose COVID-19 related health data of your staff and visitors (see our related article on that point here)? Consider whether you can continue to rely on these exceptions when returning to BAU. The Office of the Australian Information Commissioner (OAIC) has indicated that APP entities should limit the use of these exceptions to what is necessary to prevent and manage the spread of COVID-19.

Key Contact Matt McMillan | Partner | Intellectual Property and Competition |
T +61 2 8241 5644 |
E mmcmillan@mccullough.com.au

Planning and Environment

The environmental impacts of COVID-19 recovery

The planning system has been identified as having a critical role to play in supporting the economy during this time. To ensure that the planning system is able to adapt to the challenges presented by COVID-19, a number of amendments have been made to planning legislation in each jurisdiction in an effort to stimulate economic activity. Whilst there are many economic benefits associated with these amendments, it is inevitable that these changes to the planning system will create some tension with maintaining high levels of environmental protection and standards of planning practice. The question for government and industry is how we will collectively respond to these challenges. Time will tell whether and how the new changes to the planning system will impact the quality of the projects being delivered.

The environmental Kuznets curve is an environmental economics theory that predicts that periods of economic development will initially result in environmental decline, however after a level of economic growth has occurred, this reduces as society improves its response to environmental degradation through targeted policies and directing investment towards cleaner sources of energy and environmentally sustainable development solutions. The environmental Kuznets curve might predict that the downward pressure on the economy as a result of COVID-19 will result in a corresponding regression in environmental and planning performance in society.

WAIVING COMPLIANCE WITH CONDITIONS OF AN APPROVAL

The recent Queensland omnibus legislative changes have given the Minister the power to make declarations waiving the requirement to comply with certain conditions of an environmental approval and to allow temporary environmental authorities where these actions are reasonable as a result of the COVID-19 emergency.

Similarly, earlier legislative amendments allowed the Planning Minister to authorise temporary use licences and vary conditions of a development approval during the COVID-19 emergency. We have seen this power utilised to enable places to produce hand sanitiser, change operating hours and vehicle and pedestrian access requirements. These changes are understandable during the pandemic but will bring with them new impacts on surrounding land uses and infrastructure networks.

Legislative change in NSW has instead focused on fast tracking development assessment, and also extending periods for lapsing and the abandonment of uses.

Despite these changes, it is important to recognise that in the absence of any express legislative exemptions, in general COVID-19 cannot be relied upon to justify a non-compliance with development consent conditions or environmental requirements.

Practically, we are seeing that some regulators will take a more flexible approach to environmental enforcement and compliance action in recognition of the challenges businesses face due to COVID-19, but others will still expect strict compliance with licence conditions.

FAST-TRACKED DEVELOPMENT ASSESSMENT – WILL THE ECONOMIC BENEFITS OUTWEIGH THE ENVIRONMENTAL OUTCOMES?

The NSW government has already made a number of changes to the planning system which are hoped to support the economy now and into the post-COVID-19 future. The fast-tracking of certain project assessments across the state under the Department of Planning, Industry and Environment's 'Planning System Acceleration Program' is one of the key strategies being implemented to deliver jobs and boost the economy. For those projects selected to be fast-tracked, the Department has committed to assessing and determining these developments within just four weeks. By accelerating the assessment of select projects, which will keep the construction industry moving, the government expects that more than 30,000 jobs will be created by the end of September 2020.

Whilst the economic benefits associated with the Acceleration Program may be clear, it raises the question of whether the Department will be able to deliver on its commitment to ensuring the same level of rigorous environmental assessment is applied to those projects that are set to be fast-tracked. Ultimately, only projects that are already in the Department's system that are able to demonstrate compliance with specific criteria, including the following 'essential' criteria, will be considered:

- Jobs – does the project create jobs during construction and ongoing?
- Timing
  - can a decision on the project be made quickly?
  - for development applications – can the project commence within six months?
  - for planning proposals – can the project proceed to development application stage within six months?
- Public benefit – can the project deliver or support public benefits (e.g. affordable housing or new public space and parklands)?

To ensure that the NSW Department is able to determine projects identified for fast-tracked assessment in four weeks, a new 'one-stop-shop' comprised of all key State government agencies has been created within the Department. This one-stop-shop will operate in a similar way to Queensland's State Assessment and Referral Agency which was successfully established nearly 10 years ago. Coupled with additional resources, the NSW Department is confident that whilst the assessment process may be accelerated for selected projects, the process and level of

assessment that these projects are subjected to under the NSW *Environmental Planning and Assessment Act 1979 (NSW)* will not change. With this in mind, it remains critical that developers strictly comply with the statutory processes that apply to such developments to minimise the risk of any judicial review proceedings being commenced which may undermine an approval.

STUNTING OR STIMULATING THE GROWTH OF THE RENEWABLE ENERGY INDUSTRY?

It is anticipated that the significant growth experienced by the renewable energy industry in recent years will be affected by COVID-19, due to the global financial contraction which has resulted from the pandemic, as well as the marked reduction in oil prices. Whilst the pressure for planning changes to be implemented which further support the growth in renewable energy projects has been high on the agenda for State and Commonwealth governments for some time, the reduction in economic activity, which in turn leads to reductions in power demand, may slow the shift towards renewable energy targets for a period of time.

Despite this, we note that the recent amendments to the *State Environmental Planning Policy (Infrastructure) 2007* which have been implemented to encourage further investment in innovative renewable energy projects in NSW (focusing on particular solar energy systems) reflects one of the recent steps being taken to stimulate the growth of the renewable energy industry.

With a number of studies suggesting that renewable energy projects create more jobs on a per dollar basis compared to investments in fossil fuel projects, despite the economic impacts of COVID-19, the long-term trend towards renewable energy is expected to continue even if for a period of time it may be slowed. This trend would support the hypothesis of the environmental Kuznets curve, which suggests that if investment is directed towards renewable energy projects, then economic growth and environmental protection can be compatible.

OTHER STEPS ALREADY TAKEN IN RESPONSE TO COVID-19

A number of temporary changes to legislation have recently been introduced including the following:

- the declaration of certain shop uses in Queensland that can operate 24-7 during the COVID-19 emergency, and the opportunity for further use declarations if needed;
- the power for the Queensland Minister to extend or suspend periods in the *Planning Act 2016* (Qld);
- the lapsing period for certain development consents in NSW has been extended;
- the 12 month assumption of abandonment in relation to existing use rights has been extended in NSW;
- the NSW Minister has been given the ability to issue additional directions to consent authorities in relation to the pooling of development contributions and the timing of when contributions must be paid; and
- increasing the period in which applicants or objectors may commence an appeal to the Land and Environment Court of NSW.

Many of these changes have been made in recognition of the fact that, as the economic impacts of COVID-19 continue, developers are likely to need more time than usual to obtain finance for projects and physically commence construction work and trigger the operation of their development consent.

Keeping up to speed with the latest changes being made and guidance documents being issued by regulatory authorities is essential to successfully being able to assess compliance risks for businesses during COVID-19.

Key Contact Kate Swain | Partner | Planning and Environment | T +61 2 4914 6914 | E kswain@mccullough.com.au

Real Estate: Leasing

Reopening businesses post COVID-19 – lease considerations for landlords and tenants (commercial and retail)

The easing of lockdown restrictions in all states and territories across Australia is seeing a gradual return to the workplace, both in commercial office buildings, and retail shopping centres. As landlords, building managers and tenants prepare for this, it is undeniable that how leases will be negotiated and administered has changed forever.

LEGISLATIVE CHANGES

The National Cabinet Mandatory Code of Conduct (**Code**) was announced on 7 April 2020. Following this, all states and territories have separately introduced legislation implementing the Code. The period to which these changes apply vary across the jurisdictions, ranging from September 2020 to until the government declares that no COVID-19 emergency is in force.

Although these Code-based provisions are generally only applicable where the tenant is a small to medium size business affected by the current COVID-19 pandemic, the principles of negotiation in good faith and compromise are encouraged in dealings between all landlords and tenants affected by the pandemic.

BACK TO THE OFFICE

It is anticipated a majority of workers will be back to the office by August 2020. The work environment, however, will be drastically different to what it was before the lockdown. Now more than ever, landlords and tenants should know what their rights and obligations are under their leases.

Some relevant considerations in conjunction with back to work plans, for both landlords and tenants, are set out below:

- Does the lease contain service interruptions provisions? If so, what impact may delays in accessing premises, associated with social distancing and lift restrictions, have? Could they amount to service interruptions and trigger rent abatement provisions under the lease? Should new provisions regarding rent abatement for service interruptions be considered as landlords and tenants look to re-negotiate their current leases and enter into new leases?
- As remote working becomes part of the norm, there will be a reduced need for office space which may lead to lower rents in the market. This is relevant for leases with upcoming market rent reviews. Market rent review provisions should be carefully considered, including in relation to any provisions preventing a reduction in rent. There may also be a greater trend of market rent reviews being used more frequently than fixed rent reviews during the life of a lease and not just at lease renewals.
- What are each party's cleaning obligations under the lease?
    - Where a lease requires cleaning to a 'reasonable standard', landlords and tenants should seek to agree, as soon as possible, what it means in the current environment.

- Where the tenant must pay a separate premises cleaning charge and building cleaning charge, can the landlord add additional cleaning charges incurred as a result of the current environment to the amount payable by the tenant?
- Does the lease allow a tenant to request additional cleaning from the landlord, or allow the landlord to require the tenant to perform additional cleaning where the tenant is responsible for the cleaning of its own premises? A failure to appropriately clean premises may be a breach of a tenant's obligation not to cause a nuisance to other occupiers of a building.
- Leases, especially those in high rise commercial office buildings or shopping centres, often contain tenant or centre guidelines, which can be changed by the landlord from time to time. Would updating these guidelines assist in the current environment?
- As businesses bring back their workforce, it is anticipated that the most common approach will be to stagger the times at

which employees travel to and from work, which will affect the hours of business of a tenant. Many leases generally contain provisions for 'core hours' in relation to building services – do these need to be extended, and if so, how is the increase in cost to be shared?

RETAIL CONSIDERATIONS

As well as the above, retail landlords and tenants should also consider the below in any current and future lease negotiations:

- Retail rents are often a combination of a fixed amount and additional turnover rent. As retail tenants around Australia are fighting to survive, it should be expected that more and more retail tenants will seek to negotiate rental payments to be predominantly based on the gross income generated by the tenant at the premises.
- As consumers move towards online shopping, does the lease capture online sales in the tenant's reporting requirements and the calculation of turnover rent? This could be especially pertinent to those businesses that did not traditionally have an online presence, but have diversified as a result of changing consumer habits as a result of the COVID-19 lockdown.
- 'Core trading hour' provisions are likely to become more heavily negotiated, and parties should consider what trading would be expected at a minimum, as well as the circumstances which would relieve a tenant of those obligations.

Key Contact Eva Vicic | Partner | Real Estate | T +61 2 8241 5634 | E evicic@mccullough.com.au

Construction and Infrastructure

Fast tracking the road to recovery

BACKGROUND

From 1 July 2020, local councils will be able to access funding to support delivery of priority local road and community infrastructure projects, under the 'LRCI Program'.

LOCAL ROADS AND COMMUNITY INFRASTRUCTURE PROGRAM

As part of the Federal government's $1.8 billion boost for road and community projects through local governments across Australia, on 22 May 2020, the Australian government announced a new $500 million Local Roads and Community Infrastructure Program (**LRCI Program**).

Prime Minister Scott Morrison said:

'Local governments were playing a critical role in responding to the impacts of COVID-19. Our funding boost will help councils accelerate priority projects that will employ locally and support local business and also stimulating our economy. These projects will cut travel times, make our communities safer and upgrade the facilities we all enjoy while also getting more people into jobs. We know this is going to be vital support, particularly for councils that have faced the combined impacts of drought, bushfires and now COVID-19.'

Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development Michael McCormack said:

'Supporting councils to improve local roads and community infrastructure would have lasting economic and social benefits for communities, particularly those in the regions.'

The LRCI Program will support local councils to deliver priority local road and community infrastructure projects across Australia, supporting jobs and the resilience of local economies to help communities bounce back from the COVID-19 pandemic.

The government will also be bringing forward the $1.3 billion 2020-21 Financial Assistance Grant program. The package takes Comonwealth investment in local governments through the Financial Assistance Grant program to $2.5 billion this financial year, with a further $1.2 billion being distributed through other programs to deliver infrastructure, and provide much needed relief from drought and bushfires.

The funding allocations for the LRCI Program is calculated using a formula to take into consideration the road length and population and is based on recommendations of Local Government Grants Commissions. The funding allocations can be found here.

Allocations for Financial Assistance Grants for local councils has been brought forward and can be found here.

PROJECTS ELIGIBLE FOR FUNDING

Funding is available for local road and community infrastructure projects that involve the construction, maintenance and/or improvements to council owned assets, including natural assets, that are generally accessible to the public. The projects will need to deliver benefits to the community.

Eligible local road projects include any of the following works associated with a road:

- traffic signs;
- traffic control equipment;
- street lighting equipment;
- a bridge or tunnel;
- a facility off the road used by heavy vehicles in connection with travel on the road (e.g. a rest stop or weigh station);
- facilities off the road that support the visitor economy; and
- road and sidewalk maintenance.

Eligible community infrastructure projects could include works involving:

- CCTV;
- bicycle and walking paths;
- painting or improvements to community facilities;
- repairing and replacing fencing;
- improved accessibility of community facilities and areas;
- landscaping improvements, such as tree planting and beautifications of roundabouts;
- picnic shelters or barbeque facilities at community parks;
- playgrounds and skateparks (including all ability playgrounds);
- noise and vibration mitigation measures; and
- off road car parks (such as those at sporting grounds or parks).

Each State government has also announced stimulus packages for the infrastructure space to aid in supercharging the economy through the COVID-19 recovery.

For further information on each State's stimulus packages, please click on the links below:

- Queensland
- New South Wales
- Victoria
- South Australia
- Western Australia
- Northern Territory
- Australian Capital Territory
- Tasmania

Key Contact Matt Bradbury | Partner | Construction and Infrastructure |
T +61 7 3233 8972 |
E mbradbury@mccullough.com.au

Construction and Infrastructure

The money is in the timing

BACKGROUND

With cashflow more important than ever for businesses within the construction industry, it is crucial to plan ahead to determine the best approach to recover money owed to you under your construction contract. There are various forums which can be considered, whether that be commercial negotiation, litigation, arbitration, the statutory demand process under the Commonwealth corporations law or the commonly utilised statutory adjudication under the Security of Payment legislation in each state or territory.

There are a number of factors that will inform your options such as the type and terms of the relevant contract and the amount and nature of the payment sought. This includes whether there is a genuine dispute about the amount owed (and the nature and complexity of that dispute). In this article, we focus on the practical implications of the recent reforms to the insolvency and corporations laws and how those changes should be factored in to your thinking when formulating a debt recovery strategy.

CREDITOR'S STATUTORY DEMAND

In what was a significant change to the insolvency laws in Australia, on 22 March 2020, the Australian Federal Government passed temporary amendments to insolvency and corporations laws due to the COVID-19 pandemic causing challenging times to many otherwise profitable businesses. The changes were made in order to avoid any unnecessary insolvencies and bankruptcies.

The amendments mean that directors will be temporarily relieved from the risk of personal liability for insolvent trading, where the debts are incurred in the ordinary course of business. The temporary relief will operate for six months from 25 March 2020. Further to this, and over the same six-month period, the minimum thereshold which creditors can issue a statutory demand

has increased to $20,000 (previously $2,000). Companies will also have six months to respond to a statutory demand (previously 21 days).

This temporary regime significantly limits the utility of the statutory demand process as a means to recover overdue payments. A number of industry participants in the construction and infrastructure sector have already voiced their concerns with respect to the impact that this will have on projects, particularly given the hierarchical contractual chain that is commonly encountered, and the impact of non-payment by any one party in that chain.

Given we are at now in June 2020, and the fact that the legislation will not revert back to the 21-day response time until 25 September 2020, it makes little sense for anyone to issue a creditor's statutory demand under the temporary regime (where a company will have six months to respond). At this juncture, the response period would extend to December 2020, as opposed to issuing a creditor's statutory demand on 28 September 2020 (which would require a response by 19 October 2020).

We have set out a graphical representation of the two scenarios below:

Scenario one – issue statutory demand now:

Scenario two – issue statutory demand on 28 September 2020:

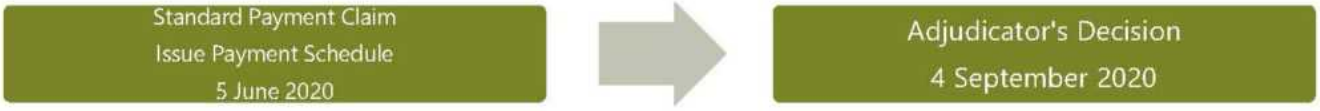
SECURITY OF PAYMENTS LEGISLATION

One alternative to issuing a creditor's statutory demand, particularly if there is a genuine dispute to be resolved, creating the potential for the creditor's statutory demand to be set aside, is to utilise the security of payment regime in your respective state or territory.

Queensland

In Queensland, the *Building Industry Fairness (Security of Payment) Act 2017* (QLD) (**BIF Act**) applies if you have a contract, agreement or other arrangement (whether written or oral) under which one party undertakes to carry out construction work for, or supply related goods or services to, another party for construction work in Queensland.

The timing of the process under the BIF Act from the issuing of a payment claim to receiving the adjudicator's decision is approximately 65 business days[1] for a standard payment claim ($750,000 or less) or 75 business days[2] for a complex payment claim (over $750,000). For example:

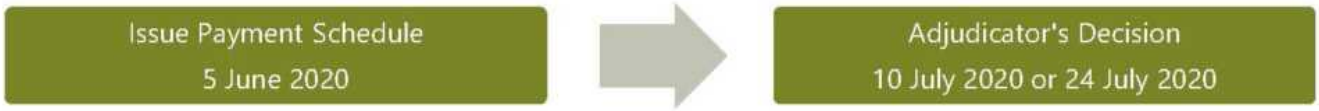


both being earlier than any expected response if a creditor's statutory demand is issued on 28 September 2020 once the legislation reverts to the old regime.

New South Wales

In New South Wales, the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOPA**) applies if you have a construction contract, (written or oral or partly written and partly oral), even if the Contract is expressed to be governed by the law of a jurisdiction other than New South Wales.

The timing of the process under SOPA from issuing the payment claim to receiving the adjudicator's decision is, generally, approximately 25 – 35 business days.[3] See the graphical example below[4]:



CONCLUSION

If you are seeking prompt resolution of a payment dispute and are formulating a strategy in relation to potential payment recovery options, you should consider the material impacts of the temporary legislative amendments to statutory demand process.

The security of payment regimes in each state and territory remain a viable alternative option for the (relatively) quick and cheap resolution of payment disputes. Of course, many factors will be relevant in determining the suitability and appropriateness of engaging applicable security of payment regimes, including whether the legislation applies to your particular circumstances and whether the interim nature of the relief provided by the legislation is likely to result in a suitable resolution of the issues in dispute (as opposed to further escalating those disputed issues).

Key Contact Matt Bradbury | Partner |
Construction and Infrastructure |
T +61 7 3233 8972 |
E mbradbury@mccullough.com.au

[1]Unless a shorter period is prescribed in the contract for how long a respondent has to issue a payment schedule in response to a payment claim.

[2]Ibid.

[3]This timing may vary depending on the timing of service of the payment schedule (including where the contract provides a shorter time-period that the 'default' position in the legislation), whether or not a payment schedule is issued at all and whether the parties agree to extend the time for the adjudicator to issue the adjudication determination.

[4]Ibid.

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www.mccullough.com.au | info@mccullough.com.au | +61 7 3233 8888