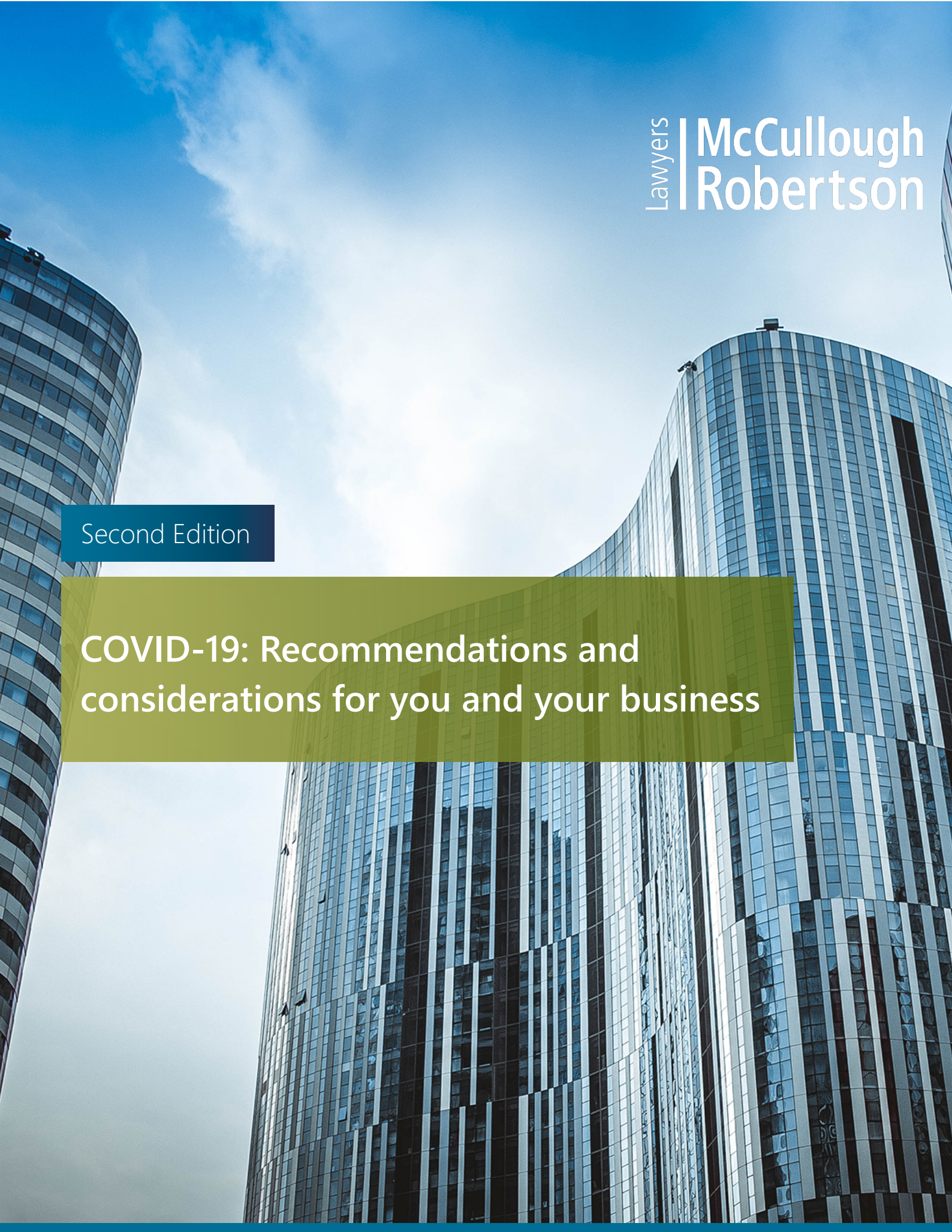

McCullough Robertson Lawyers

Second Edition

COVID-19: Recommendations and considerations for you and your business

Welcome

In the second *COVID-19 Recommendations and considerations for you and your business guide*, our experts provide you with more practical advice on what recent changes might mean and the impacts they may have on you and your business.

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 1 April 2020.

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Corporate

The Treasurer announces significant changes to the FIRB regime in response to the COVID-19 pandemic

With effect from 10.30pm on 29 March 2020, the Treasurer has announced drastic changes to the Foreign Investment Review Board (**FIRB**) regime.

All monetary thresholds have been reduced to $0. FIRB's standard approval timeframe of 40 days will be extended to 6 months. Priority will be given to applications that protect and support Australian business and Australian jobs.

See a copy of the Treasurer's press release **here**.

Generally, foreign investors require FIRB approval before they can invest into Australia unless a specific exemption applies, or the proposed investment falls below a specified monetary threshold. These thresholds differ depending on the type of investment and the identity of the investor. For example:

- the acquisition of an interest in non-sensitive developed commercial real estate (including for example, entering into a lease for a term of 5 years or more, including extensions); or
- the acquisition of an interest of 20% or more in the shares in an Australian company,

would usually only be subject to FIRB approval if the investment is valued in excess of $275 million. Under the new rules, any proposed acquisition by a foreign investor of any interest in land (regardless of the type or value of the land) or any acquisition of 20% or more of the shares in an Australian company (regardless of value) will require FIRB approval.

There has been no suggestion that any of the exemptions from the FIRB approval requirements will be amended and these will be more important than ever in the current context.

It should be noted that significant FIRB application fees are payable before FIRB will start reviewing an application. No announcement has been made in relation to the fees that will be payable for these smaller transactions that are now subject to FIRB approval, but it should be assumed for the time being that the standard fees will be payable
(for example, for acquisitions of developed commercial real estate, these range from $2,000 to $105,200).

For transactions that are currently being negotiated, a full re-evaluation of the possible impact of these FIRB rules needs to be undertaken. For transactions currently on foot that are subject to FIRB approval, the likely extended processing timeframes need to be considered and, where possible, extensions of time for the satisfaction of the condition may need to be negotiated.

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Tax

Stage Two - Cushioning the economic impact of COVID-19

On 22 March 2020, the Federal Government announced the second stage of its economic plan to support Australian businesses and their workers through the unchartered waters created by the spread of the Coronavirus. The stimulus package extends a number of the key measures announced in the first package on 12 March 2020 (see our recent publication on stage one of the package **here**). Both stage one and stage two of the stimulus package were passed by Parliament on 23 March 2020, and received Royal Assent on 24 March 2020. The Federal Government has also now announced that a third stage to the stimulus package will follow shortly.

From a tax perspective, stage two of the stimulus package contains key measures aimed at providing:

- assistance to businesses to keep their workers employed; and
- support for workers and their households.

In addition to the Federal Government measures, the States and Territories have each announced stimulus packages to assist both businesses and individuals.

The table below provides a summary of the measures now available to businesses under the first and second stimulus packages. The new stimulus package announced by the Federal Government comprises one key taxation component aimed at providing relief to businesses. These packages are also complemented by various administrative concessions announced by the Australian Taxation Office (**ATO**).

	INCREASED INSTANT ASSET WRITE-OFF 1ST PACKAGE	ACCELERATED DEPRECIATION 1ST PACKAGE	WAGE SUBSIDY FOR TRAINEES 1ST PACKAGE	CASH FLOW BOOST VIA ACTIVITY STATE-MENTS 1ST & 2ND PACKAGE	JOBKEEPER PAYMENT 30 MARCH 2020
Small Businesses (up to 20 employees)	N/A	N/A	YES	N/A	N/A
SMEs (no employees, aggregated turnover < $50m)	YES	YES	N/A	NO	YES
SMEs (with staff, aggregated turnover < $50m)	YES	YES	N/A	YES	YES
Businesses (with aggregated turnover > $50m, but < $500m)	YES	YES	N/A	NO	YES
Not-for-profit (with staff, aggregated turnover < $50m)	N/A	N/A	N/A	YES	YES

BOOSTING CASH FLOW FOR EMPLOYERS

Both small to medium businesses (SME's) and not for profit entities, with aggregated (group) annual turnover under $50 million, will be eligible to receive a cash flow boost aimed at keeping their employees engaged.

In effect, the cash flow boost introduced under stage one of the stimulus package has now been enhanced under stage two such that eligible businesses can receive a total credit equal to either 100% of their liability for PAYG-withholding in relation to salaries and wages paid to their employees (increased from 50%). The Government also announced that a second round of credits will be introduced for tax periods from July to September 2020.

As a result of these measures:

- the minimum credit for PAYG-withholding has been increased from $2,000 to $10,000; and
- the maximum credit for PAYG-withholding has increased from $25,000 to $50,000 for the 2020 financial year.

This means that eligible employers will receive payments of at least $20,000 and up to a total of $100,000. However, to qualify for the additional payments, businesses must continue to be active into the 2020-21 financial year.

Practically, for those businesses lodging quarterly business activity statements:

- 100% of the March quarter payment, and 100% of June quarter payment is credited upon lodgment (up to $50,000); and
- an additional 50% of the total credit for the 2020 financial year will be credited in June 2020, and 50% credited in September (again, up to $50,000).

For those businesses lodging monthly business activity statements:

- 300% of the March monthly payment is credited, and 100% of the April, May and June monthly statements will be automatically credited, up to the limit of $50,000; and
- 25% of the total amount due for the 2020 financial year will be automatically credited in June, July, August and September upon lodgment (again, up to the $50,000 limit).

ADMINISTRATIVE RELIEF MEASURES

To date, the ATO has also announced that they are willing to work with taxpayers affected by the pandemic. The ATO website details a number of measures that a taxpayer can seek to access. Importantly, these include:

- an ability to defer income tax, FBT and excise payments due in the period leading up to 12 September 2020. Businesses should contact the ATO directly when experiencing difficulty meeting these obligations;
- an option to change over GST reporting from quarterly to monthly reporting from the start of a new quarter (for example, 1 April 2020) in order to obtain faster access to GST refunds;
- an option to vary PAYG-Instalments, and the ATO have stated that they will not apply interest or penalties for varied instalments for the 2020 financial year;
- the ATO will also consider remitting interest and penalties from 23 January 2020 for those affected by COVID-19.

Low interest payment plans will also be available; and

- the ATO have stated that the residency status of temporary or non-residents visiting Australia should not be affected if they are required to remain in Australia due to COVID-19.

STATES AND TERRITORIES

Payroll Tax relief

To date, every state and territory (except South Australia) has announced payroll tax relief packages for eligible businesses. Each state has offered a slightly different form of payroll tax relief – with a focus largely on refunds, referrals and even the waiver of payroll tax liabilities for a certain period.

In Queensland, the State Government has already expanded the relief we outlined on 19 March 2020, such that employers that pay less than $6.5 million in Australian taxable wages can now apply:

- for a refund of two months' of recently paid payroll tax;
- for a three month 'holiday' from paying any payroll tax; and
- to defer all payroll tax liability for the 2020 calendar year, with payment not due until 14 January 2021.

Employers that pay more than $6.5 million in Australian taxable wages can also access the two month refund and payroll tax deferral, but will not be eligible for the three month payroll tax 'holiday'.

Applications for the deferral and 'holiday' must be lodged by 31 May 2020.

A table outlining the payroll tax relief offered by each State and the Australian Capital Territory can be found **here**. In addition, the Northern Territory has extended its ongoing payroll tax exemption for those who employ Northern Territory residents to 30 June 2021.

Additional relief

In addition to the payroll tax measures, the States and territories have each announced other relief measures for businesses. In Queensland, these measures include:

- rent relief for commercial tenants in government buildings;
- offering a $500 rebate on electricity bills for small and medium sized businesses that consume less than 100,000 kilowatt hours (automatically applied to eligible electricity bills); and
- waiving liquor licensing fees for businesses impacted by the enforced shutdowns.

FUTURE FEDERAL, STATE AND TERRITORY INCENTIVES

The federal, state and territory governments continue to announce additional stimulus packages aimed at providing tax relief and other incentives for businesses. For up to date information on incentives that might be available to you and your business, please contact us.

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Employment

JobKeeper payments - wage relief support for employers

The Australian Government is offering wage subsidies to help employers retain their employees during the COVID-19 pandemic, and keep employees engaged until the inevitable rebound.

WAGE RELIEF

Eligible businesses (including not-for-profits) who elect to participate in the scheme can expect a wage subsidy of $1,500 per fortnight per eligible employee. The JobKeeper payment is a flat rate regardless of a person's salary. An employer will continue to receive the JobKeeper payment for each employee while they remain employed. Eligible sole traders will also receive a single payment of $1,500 per fortnight.

HOW IT WILL WORK

Eligible employees whose wages are at least $1,500 per fortnight before tax, will continue to receive their pay as normal. The JobKeeper payment will assist the employer to subsidise all or part of the employee's income.

If an employee usually receives less than $1,500 in income per fortnight before tax, their employer must pay their employee at least $1,500 per fortnight, before tax (regardless of whether the person is working or stood down). Superannuation on the amount that is the difference between an employee's usual fortnightly income, and the JobKeeper payment, is a discretionary matter for the employer.

The JobKeeper payments will also apply in relation to those employees who were employed on 1 March 2020, subsequently ceased employment, and then were re-employed by the same employer.

ELIGIBLE BUSINESSES

Under the proposed fiscal package, businesses will be eligible for the subsidy if their:

- turnover is less than $1 billion and will be reduced by more than 30% relative to a comparable period a year ago (of at least a month); or
- turnover is $1 billion or more and will be reduced by more than 50% relative to a comparable period a year ago (of at least a month); and
- business is not subject to the 'Major Bank Levy' (currently ANZ, Commonwealth, NAB, Macquarie and Westpac only).

ELIGIBILITY FOR EMPLOYEES

Employees will be eligible if they are:

- at least 16 years of age and were employed by the employer as of 1 March 2020;
- full-time, part-time, or a long-term casual (a casual employed on a regular basis for over 12 months as at 1 March 2020);
- not receiving the JobKeeper payment

from another employer; and

- an Australian citizen, the holder of a permanent visa, or any other relevant visa (Subclass 444 visa holder, protected special category visa holder, or a non-protected special category visa holder residing continually in Australia for 10 years or more).

WHAT'S NEXT?

Employers should familiarise themselves with these new measures as well as the relevant legislation, once it has been passed by the Federal Parliament, likely early next month.

In the interim, businesses can register their interest in the scheme via the ATO's website, or wait to apply online. Information required by the ATO will include revenue information (declaration of recent business activity), ABN and eligible employee details.

For further information on any of the issues in this article, and other workforce measures available to employers because of the effects of COVID-19, please contact our team below.

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Modern award changes to COVID-19 Pandemic

On 24 and 28 March 2020, the Fair Work Commission (**FWC**) made its first determinations to vary two modern awards *(Hospitality Industry (General) Award 2010* (**Hospitality Award)** and *Clerks – Private Sector 2010* (**Clerks Award**)) in response to the coronavirus (COVID-19) pandemic and the challenges employers are currently facing. It is likely that similar flexibility changes will follow for a range of awards given the extensive reach of the pandemic across industries.

HOSPITALITY AWARD CHANGES IN RESPONSE TO COVID-19

On 24 March 2020, the FWC granted an application by the Australian Hotels Association, and supported by the United Workers Union, to vary the Hospitality Award. The application sought to insert a new schedule to provide for award flexibility on a temporary basis.

The FWC acknowledged that the recent Government announcements in response to COVID-19 would likely have a substantial impact on employers and employees in the hospitality sector. The FWC determined that the variation was necessary to achieve the modern award objective and to ensure the retention of as many employees as practicable in the current crisis.

The determination varies the Hospitality Award to insert 'Schedule L – Award flexibility during the COVID-19 Pandemic.' The award variation commenced on 24 March 2020 and will operate until 30 June 2020. The Schedule allows employers to make the following directions:

- For employees to perform duties outside the scope of their classification subject to the duties being within their skill and competency, being safe and the employee being licensed and qualified to perform them, and the Higher Duties provision in the Hospitality Award;
- For full-time employees to work fewer hours (an average of between 22.8 and 38 ordinary hours per week) and the employer will pay the employee on a pro rata basis;
- For part-time employees to work fewer hours (an average of between 60% and 100% of their guaranteed hours per week or the guaranteed hours per week over the roster cycle); and
- For employees to take annual leave with 24 hours' notice, subject to the employer considering the employee's personal circumstances.

Employees that are directed to work fewer hours will continue to accrue annual and personal leave based on the employee's ordinary hours of work prior to the commencement of the Schedule. Employees that take annual or personal leave will also be paid leave based on their ordinary hours of work prior to the commencement of the Schedule.

While employers can direct employees to take annual leave, this does not prevent an employer and employee agreeing to

the employee taking annual leave. By agreement between the employer and employee, during the operation of the Schedule, an employee may take twice as much leave at half the rate of pay for the period of annual leave.

Access the FWC's determination and Schedule L **here**.

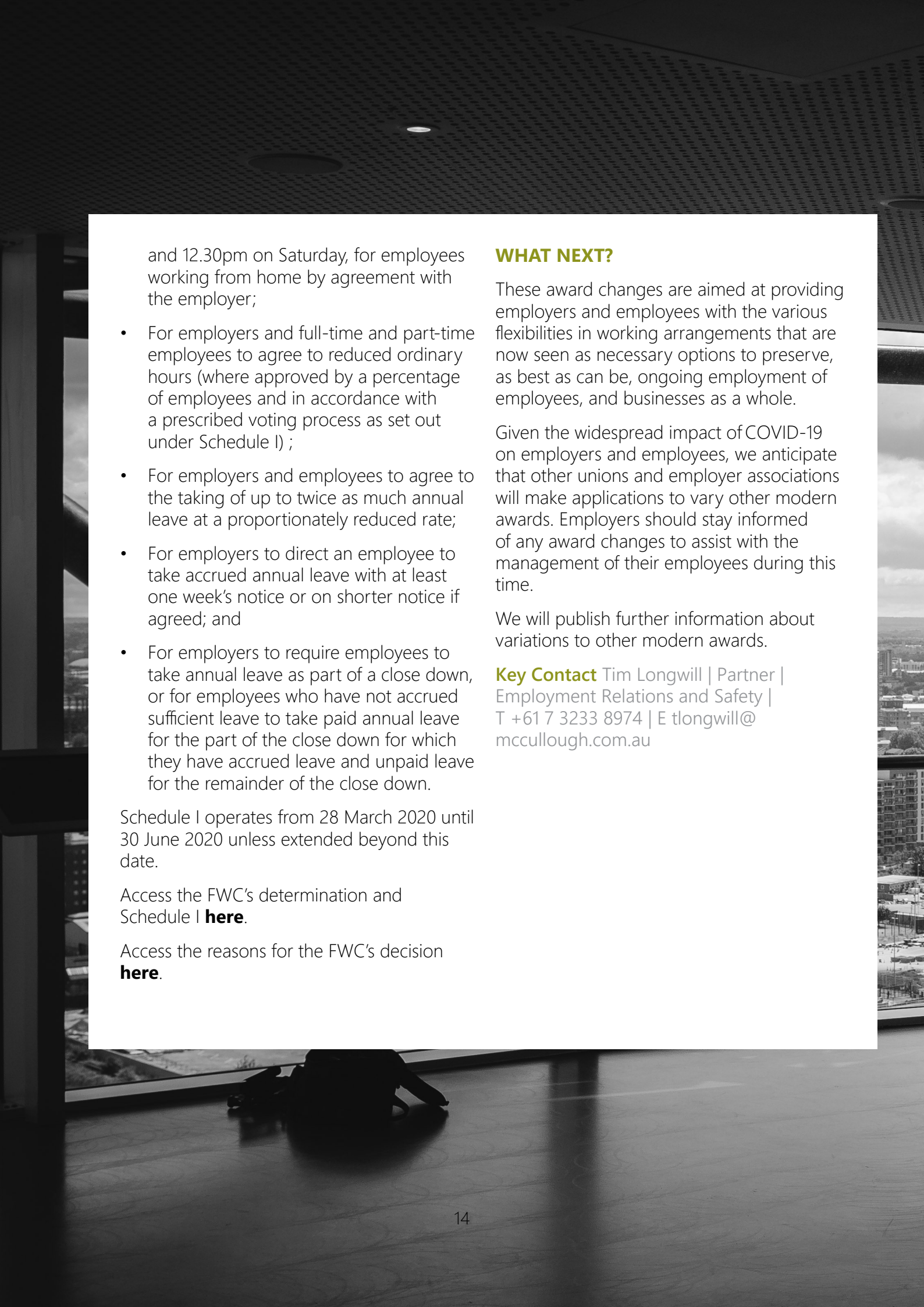
Access the reasons for the FWC's decision **here**.

CLERKS AWARD CHANGES IN RESPONSE TO COVID-19

On 28 March 2020, the Fair Work Commission granted an application by the Australian Chamber of Commerce and Industry (**ACCI)** and the Australian Industry Group (**Al Group**), with support of the Australian Council of Trade Unions and the Australian Services Union, to vary the Clerks Award. These changes provide greater flexibility for employment arrangments for clerical and administrative workers in response to COVID-19.

The determination varies the Clerks Award by inserting 'Schedule I – Award flexibility during the COVID-19 Pandemic.' The Schedule includes the following flexibility changes:

- For employees to perform duties within their skill and competency regardless of their classification, provided the duties are safe and the employee is licensed and qualified to perform them;
- For employers to roster part-time employees working from home by agreement for a minimum of two consecutive hours on any shift, and for casual employees working from home by agreement to be entitled to a minimum payment of two hours' work at the appropriate rate;
- For the spread of ordinary hours for day workers to be between 6.00am and 11.00pm, Monday to Friday, and between 7.00am



and 12.30pm on Saturday, for employees working from home by agreement with the employer;

- For employers and full-time and part-time employees to agree to reduced ordinary hours (where approved by a percentage of employees and in accordance with a prescribed voting process as set out under Schedule I) ;
- For employers and employees to agree to the taking of up to twice as much annual leave at a proportionately reduced rate;
- For employers to direct an employee to take accrued annual leave with at least one week's notice or on shorter notice if agreed; and
- For employers to require employees to take annual leave as part of a close down, or for employees who have not accrued sufficient leave to take paid annual leave for the part of the close down for which they have accrued leave and unpaid leave for the remainder of the close down.

Schedule I operates from 28 March 2020 until 30 June 2020 unless extended beyond this date.

Access the FWC's determination and Schedule I **here**.

Access the reasons for the FWC's decision **here**.

WHAT NEXT?

These award changes are aimed at providing employers and employees with the various flexibilities in working arrangements that are now seen as necessary options to preserve, as best as can be, ongoing employment of employees, and businesses as a whole.

Given the widespread impact of COVID-19 on employers and employees, we anticipate that other unions and employer associations will make applications to vary other modern awards. Employers should stay informed of any award changes to assist with the management of their employees during this time.

We will publish further information about variations to other modern awards.

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Estates

Your personal affairs

As critical as your business considerations are your personal affairs. It is an important time to take stock of your succession planning so that you and your families can feel confident that they are protected if the worst happens.

Wills and business succession planning

Some of our clients are feeling anxious wondering whether their estate planning and business succession is appropriate and up to date. We encourage our clients to contact our team to discuss your documents to ensure that they still meet your objectives.

All of our teams have measures in place that allow us to take instructions and have meetings (whether in person or by video or teleconference) while complying with social distancing guidelines or allowing our clients to remain self-isolated where necessary. If any of our clients are in a position where they require estate planning documents but are self-isolated, we can work you to achieve the best outcome in the circumstances.

Power of attorney

There are two main types of power of attorney document: enduring powers of attorney; and general powers of attorney.

A general power of attorney operates only to give the appointed power to deal with financial matters on a person's behalf (the principal). A general power of attorney ceases to operate if the principal dies or loses capacity to make their own decisions. A general power of attorney does not allow the attorney to make any health or lifestyle decisions for the principal.

An enduring power of attorney allows the appointment of an attorney for both financial matters and personal and health matters. An enduring power of attorney also terminates on death, but it endures in the event that a principal loses capacity to make decisions.

For those clients who are choosing to (or are required to) self-isolate due to illness or because of compromised immune systems, it may be necessary or beneficial to have a power of attorney (of either type) in place to appoint someone to act on their behalf in relation to financial matters. A power of attorney for financial matters allows your appointed attorney to act for the principal in relation to any matters relating to financial or property affairs, including legal matters relating to financial or property affairs. Examples of financial matters include:

- Paying rates, taxes and other property expenses;
- Carrying on a trade or business on behalf of the principal;
- Dealing with banks, including depositing and withdrawing money for the principal; and
- Dealing with real property, including signing contracts and transfer documents.

A power of attorney for financial matters may allow you to continue your day to day operations through a trusted friend or family member, while allowing at risk individuals to remain isolated.

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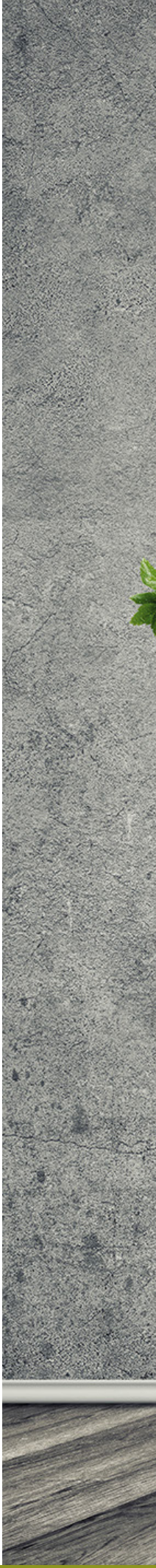

Litigation and Dispute Resolution

Courts open for business

The Federal and State Courts have announced adjustments to their usual procedures going forward, but importantly the Courts remain open and are continuing to hear and progress matters. Procedures are in place to minimise face-to-face contact, including remote hearings (by phone or video) wherever possible.

There has been some relaxation in relation to signing of documents and affidavits, given the practical difficulties posed by remote working arrangements and isolation requirements. Where remote hearings aren't possible, the Courts are continuing to hear matters face to face, but only if the circumstances really warrant it.

Crucially, all courts are encouraging parties to take active steps to resolve matters and reach agreement where possible, in the hopes of limiting the frequency of appearances. In light of these measures, delays may be expected in the progression of ongoing litigation, but it is clear that we must all respond sensibly to these changes, and be flexible and innovative in the way we pursue or defend litigation in the coming months.

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Restructuring and Insolvency

Revolutionary variation of Australia's insolvency system for coronavirus era - novel times certainly do lead to novel measures

With the prospect of huge numbers of businesses becoming insolvent and collapsing in the coming weeks and months due to the effects of Government-enforced travel bans and business 'lock-downs', the Australian Government has implemented a number of important measures to protect directors from Australia's harsh insolvent trading laws, and to prevent creditors from bankrupting individuals or winding up companies over unpaid debts.

The measures announced yesterday include the following changes to the law which will last for six months, unless extended further:

- a moratorium against personal liability for 'insolvent trading', i.e. failing to prevent a company incurring debts while insolvent, for debts incurred in the ordinary course of business;
- an increase in the debt required for creditors to be able to issue a statutory demand on a company from $2,000 to $20,000 (a company's failure to satisfy a statutory demand allows a creditor to apply to wind up the company in insolvency);
- an increase in the time to satisfy a statutory demand from 21 days to six months;
- an increase in the threshold for a creditor to serve a bankruptcy notice from a judgment debt of $5,000 to a judgment debt of $20,000 (an individual debtor's failure to satisfy a bankruptcy notice allows a creditor to apply to bankrupt the individual); and
- an increase in the time period for individual debtors to respond to a bankruptcy notice from 21 days to six months.

In addition, the Australian Taxation Office has announced that it will enter into arrangements with taxpayers as necessary, including temporary reduction of payments or deferrals, or withholding enforcement actions.

Whilst these measures will give breathing space for the next six months, businesses and directors will need to start planning now how they will meet their obligations when the temporary measures come to an end.

Further details are included in the fact sheet issued by the Australian Government – available **here**.

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Allegiant IRS

Management liability, Directors and Officers liability insurance – Insolvency and premium increases

Key financial lines insurers have recently advised that they are placing an insolvency exclusion on all Management Liability and Directors and Officers Liability policies moving forward. They are also intending to increase premiums.

Such an exclusion in the policy wording precludes cover for claims made against an insured whilst trading insolvently.

Often, such an exclusion reads, "any claim arising from or in any way whatsoever connected with the insolvency, liquidation, bankruptcy, receivership or administration of the company, any subsidiary or any associated company, its actual or alleged inability to meet any or all of its debts as and when they fall due".

We strongly encourage businesses and directors to take this time to review their Management Liability and Directors and Officers Liability policies and to contact the insurance advisory team at Allegiant IRS to discuss what this means for you in the event of a claim.

The intention to increase the premiums for Management Liability and Directors and Officers Liability Insurance is unfair at this time considering the insurers have been increasing their premiums and reducing Directors and Officers Liability capacity for some years now.

At a time when businesses need some premium relief, we also received news today that the section of the Management Liability policy which covers crime, will also see premium increases starting as of 23 March 2020.

Crime Cover is a comprehensive crime section that sits under a Management Liability policy. It provides cover to the company for loss arising from dishonest acts such as theft and fraud by employees including theft of stock. Claim examples are theft by employee or theft by a contractor or a consultant.

Sadly, insurers project that such claims will be on the increase and in anticipation of this, they will be putting the premiums up for all new renewals as of 24 March 2020.

If you would like to further discuss the insolvency exclusion update, including a claims scenario for your Business Continuity plan, please do not hesitate to contact Brad Russell from Allegiant IRS.

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Allegiant IRS

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Corporate: Insolvency

Register your security interests on the PPSR

The current climate should serve as a good reminder for secured parties to ensure security interests have been correctly registered on the Personal Property Securities Register (**PPSR**).

There are strict time frames for registration of security interests on the PPSR. As a general rule, registrations must occur within 20 business days of the date of a security agreement, however there are shorter timeframes for purchase money security interests (**PMSIs**) which include interests under retention of title clauses and certain bailments and leases. Even with the proposed insolvency law changes, there are adverse consequences in terms of priorities and enforceability of security interests on the insolvency of a grantor if these timeframes are not met, or registrations contain defects.

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State Government urgently amends key legislation and practices in response to COVID-19

Since COVID-19 became a public health emergency in late January 2020, the continued growth of the pandemic and the associated uncertainty that it generates has impacted upon standard practices and procedures in the planning, environment and local government sectors, much like other areas of life.

In response to the economic impacts and social distancing requirements associated with COVID-19 the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (**QLD COVID-19 Act**) was urgently passed by the Queensland Parliament without amendment on 18 March 2020.

Similarly, in NSW the COVID-19 *Legislation Amendment (Emergency Measures) Act 2020* (**NSW COVID-19 Act**) commenced on 25 March 2020.

WHAT YOU NEED TO KNOW

Applicable event

Amendments to the *Planning Act 2016* (Qld) (**PA**) and the *Economic Development Act 2012* (Qld) (**EDA**), allow the Minister to declare an 'applicable event' in which a raft of temporary measures will be allowed.

The Minister has subsequently declared COVID-19 to be an applicable event that has effect from 20 March 2020 until 20 June 2020.

During this period further amendments to the PA and the EDA, which have all now taken effect, will result in the following changes.

Temporary use licences

Any person may now apply for a temporary use licence which will have effect for the duration of the applicable event. Temporary use licences are designed to allow increased flexibility for existing land uses and allow an applicant to:

- change the conditions of an existing development approval;
- provide that the use of a premises is not required to comply with requirements that would constrain its operation; or
- increase that intensity or scale of an existing use by, among other things, including a new use.

Temporary use licences will be essential to ensuring important services can effectively operate to meet the community's needs during the applicable event.

Extending and suspending statutory periods

Where the Minister is satisfied that, because of the applicable event, it is

necessary to do so, the Minister may allow for increased flexibility by issuing notices to either extend or suspend the period for the doing of a thing.

This power will be essential to appropriately managing development assessment timeframes during the applicable event so that developers and assessment managers avoid any prejudice.

Despite the seriousness of the ongoing public health emergency the Minister is yet to provide any such notices as at the date of this article.

Relaxation of hours of operation

The Minister may now, by notice published on the Department's website (**link**) declare that provisions of the PA, requirements of a designation or a condition of a development approval that would otherwise restrict the movement of goods does not apply during the applicable event.

The intent of this amendment is to immediately assist with the management of supply chains and to allow business such as supermarkets to operate 24 hours per day, seven days per week.

Development in NSW

The NSW COVID-19 Act authorises the NSW Planning Minister, after consultation with the Minister for Health, to make orders enabling certain developments to occur without any development consent or compliance with the *Environmental Planning and Assessment Act 1979 (NSW)*.

It also removes requirements to have a physical copy of relevant environmental assessment documents on public exhibition for inspection so long as exhibition copies are made available electronically.

Local government elections

The QLD COVID-19 Act included further emergency amendments to the following acts:

- *Electoral Act 1992* (Qld);
- *Local Government Act 2009* (Qld);
- *Local Government Electoral Act 2011* (Qld); and
- *City of Brisbane Act 2010* (Qld).

These amendments were designed to maximise public health and safety and facilitate possible suspension or termination of the 2020 quadrennial local government elections.

Similarly, the NSW COVID-19 Act enables the Local Government Minister to postpone local

government elections in NSW, which are currently scheduled to be held in September 2020. It is anticipated that these elections will be postponed until September 2021.

With respect to local council meetings, the obligations under the *Local Government Act 1993* (NSW) will be satisfied if:

- Council meetings are held remotely, in whole or in part using audio visual technology; and
- If practicable, members of the public can attend council meetings via Webex, or if not practicable the members of the public are informed of what occurred at the meeting through an appropriate channel approved by the Minister.

OTHER PRACTICAL IMPLICATIONS

Court appearances

Queensland Courts, like the rest of society, have had to adapt to the ongoing impacts of the COVID-19 pandemic. With the exception of jury trials, all proceedings in Queensland are to continue.

To achieve this while protecting public health and safety, the Planning and Environment Court has notified practitioners and parties that in order to avoid significant congregations of people in the court room all hearings of directions hearings, reviews, mentions, applications, pre-callover reviews and callovers listed prior to 10am in Brisbane are to be conducted by telephone.

While the Planning and Environment Court is continuing to provide practitioners with the opportunity to participate in without prejudice meetings charged by the ADR Registrar, all such conferences in Brisbane are to take place via teleconference or video conference. If for any reason the parties must appear in person they will be required to observe strict social distancing requirements.

Telephone appearances are to be requested by sending an email to P&E List Manager.

Filing and signing

While the Planning and Environment Court's Brisbane registry is still open at the date of this article, those wishing to provide draft orders to the Planning and Environment Court should forward them by email to the relevant Judge's Associate by 4.00pm the day before appearing.

At this stage electronic filing has not been permitted for other Court documents.

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COVID-19: Property acquisition and disposal

The real estate market is rapidly changing as a result of the current COVID-19 pandemic. Consideration of potential disruptions that may be caused by the pandemic should be made for any new property contracts entered into.

For buyers or sellers who have entered into contracts for the sale and purchase of land, the uncertainty caused by the COVID-19 pandemic and government responses has raised questions regarding the ability of the parties to comply with their contractual obligations and to complete contracts.

It is important the terms of each individual contract are reviewed, especially if the settlement date on your contract is within the next six months, or if you have any concerns about your or another party's ability to complete. Below are a number of matters that both sellers and buyers should consider.

MEASURES TO MITIGATE RISK

There are a number of risk management measures both sellers and buyers can implement to mitigate the impact of COVID-19:

- Work together during any due diligence processes, including the sharing of any relevant searches, rates certificates and expert reports in relation to the property.
- Obtain any clearance certificates or rates certificates required for settlement as soon as possible.
- Review any termination or delay provisions in your contract now and adapt as appropriate.

Buyers should also consider:

- If finance is required, obtain any required approval as soon as possible and, ideally, prior to entering into the contract or well in advance of the settlement date.
- Engage in discussions with sellers if any extensions to the settlement date may be required.
- If new contracts are being negotiated, request a tailored force majeure clause be inserted which includes public health pandemics.

NEW CONTRACTS

Before entering into any new contracts, please consider inserting special conditions governing delay or termination of contract as a consequence of the COVID-19 pandemic. Consideration should be given to circumstances where mortgagees shut down or suspend services, or any relevant local government or other authority shuts down or suspends service.

FOREIGN BUYERS

All foreign buyers will now require Foreign Investment Review Board (**FIRB**) approval. Thresholds for all property classes have been reduced to $0. All contracts entered into with foreign buyers after 29 March 2020 will need to include an appropriate

FIRB approval condition. These reduced thresholds are intended to be a temporary measure and are anticipated to return to normal once the economic situation stabilises. Expected approval times for FIRB applications have increased from 30 days to up to 6 months.

SETTLEMENT

As most settlements in Australia can now occur electronically via the PEXA platform, property settlements, for the most part, are not currently affected by government responses to the COVID-19 pandemic. However, going forward it would be prudent to ensure that you can settle on PEXA if required.

As further restrictions are put in place, settlements may be affected by the shut down or suspension of service of bodies such as the land title offices in each State and Territory. At this stage these bodies are functioning, if only by post in some States. If a land title office was to completely close or its electronic systems were to fail, it may be prudent to ensure that settlement can still be undertaken in the traditional manner (where possible), rather than electronically.

TERMINATION AND RESCISSION

Generally, property contracts do not allow for termination or rescission except for material and detrimental changes to the property between entry into the contract and settlement.

Most contracts only contain clauses allowing one or either party to terminate for the other party's death, insolvency or lack of capacity.

Where contracts contain force majeure provisions, the ability of a party to rely on such a clause depends on how the force majeure event is defined and the specific circumstances it is expressed to cover. The burden of proving its application rests with the party wishing to rely on the clause, and any ambiguity in this respect will be read against that party.

DOCTRINE OF FRUSTRATION

Absent any specific provisions in contracts, it is possible in the current COVID-19 environment that parties may attempt to rely on the doctrine of frustration to terminate a contract and renegotiate more favourable terms. Under the common law, frustration may be relied upon to discharge the obligations of the parties where unforeseen circumstances arise, through no fault of the parties, which make performance of the contract impossible.

However, this remedy has a very narrow scope, and importantly, will not apply where the change is only temporary, the circumstances were foreseen, or the event is expressly addressed in a force majeure clause. At this stage, it is unlikely most property contacts will be able to rely on this remedy.

DELAY

Whether a party can refer to the COVID-19 pandemic to delay the fulfilment of its obligations will depend on the contract and will differ in each State and Territory.

For example, under the Queensland Law Society standard contract conditions, time is generally of the essence for settlement and there is limited ability to terminate. In particular, the COVID-19 pandemic does not fall directly within the list of events that would entitle delay. The only relevant event refers to compliance with any lawful direction or order by a government agency. We also note that the standard contract provisions expressly excludes the operation of the delay event provisions where the inability to settle is due to 'diminution in value of the Property or other property of the Seller or Buyer' or 'termination of any agreement between a party and another person … relating to the provisions of finance…'.

Time is not of the essence under New South Wales contracts. Conversely, there are also no delay events allowing any postponement of settlement in the Law Society standard contract conditions. Small delays to settlement can be accommodated under the notice to complete period (generally 14 days from the date the notice is issued), which is required before a party that is ready, willing and able to complete can terminate the contract.

Buyers should note that default interest for late settlement may be payable depending on how the default provisions are drafted in the contract (generally payable for any delays other than delays caused by the seller). When entering into new contracts, buyers should carefully consider default provisions and aim to update them to exclude delays caused by COVID-19 related matters.

OFF THE PLAN CONTRACTS

If you are currently a party to an off-the-plan contract, you should consider whether any potential interruptions to the normal operation of government agencies and other authorities, as well as the construction industry, will result in any delays to your settlement period, or allow the extension of any sunset dates under the contract.

NEED HELP?

If you require assistance with understanding your rights and obligations during these precarious times, whether you are preparing for settlement, or considering entering into a new contract, please contact us.

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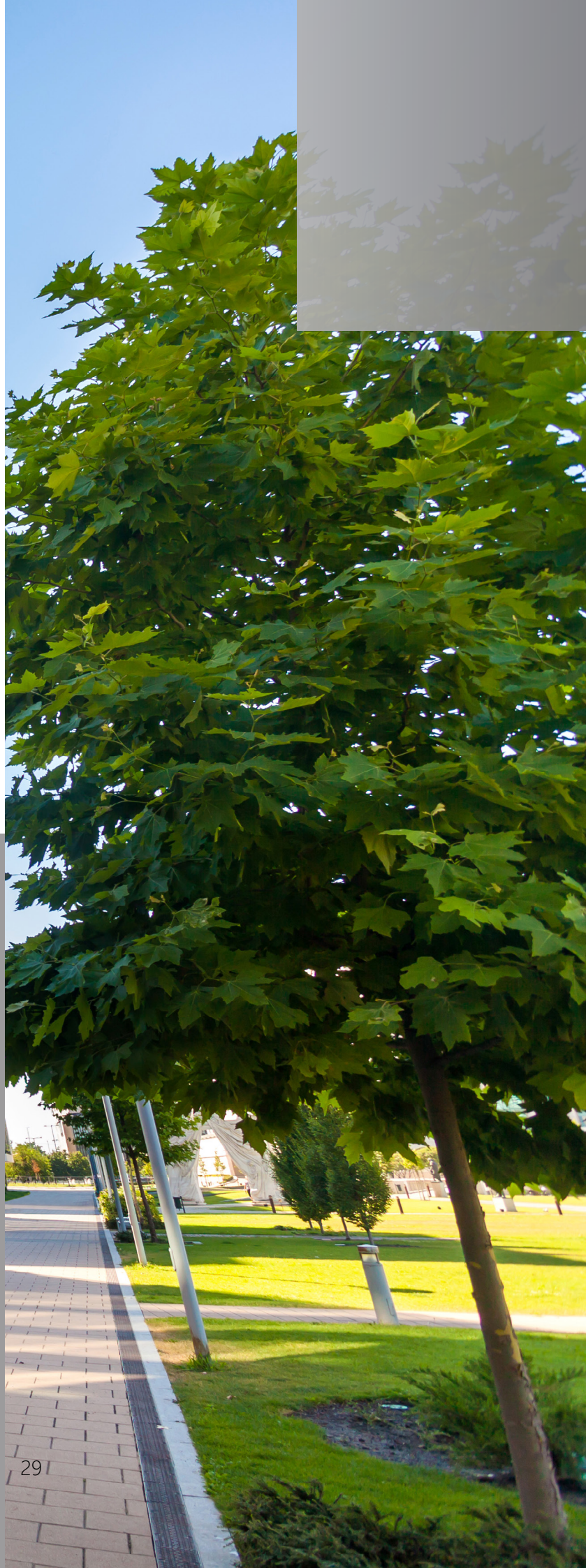

Real Estate: Leasing

COVID-19: Leasing in precarious times

During these precarious times, landlords and tenants alike should be aware of a number of risk management measures that can be implemented to mitigate the impact of the COVID-19 pandemic on their leasing arrangements.

Below are a number of items which both landlords and tenants should consider in relation to their leases. Given that each lease is usually subject to bespoke negotiations, it is important that the terms of each individual lease are reviewed.

MEASURES TO MITIGATE RISK

ISSUE	LANDLORDS	TENANTS
Incentive arrangements	Bring incentives forward (noting the risk if any tenants become insolvent the incentive cannot be recouped).	Review incentive arrangements to ensure that any closure of the building which amounts to a breach under the terms of the lease does not result in forfeiture of any incentive.
Payment of rent	Consider providing temporary rent relief or entering into an arrangement with tenants agreeing to cash in any security (if any) provided under the terms of lease. Consider abatement/deferral rather than rent free, noting that insurance payouts in the event of damage could be compromised where rental has been reduced rather than deferred.	Engage in discussions with landlords if paying rent becomes difficult. Some options include: • entering a moratorium to delay the payment of rent; • requesting a rent free period in exchange for agreement to extend the term of the lease by a period equal to the rent free requested; • temporary utilisation of some or all security; or • requesting a temporary conversion to turn-over rent.

ISSUE	LANDLORDS	TENANTS
Insurance	Focus on Business Pack and Industrial Special Risk (ISR) policies as these are most likely to provide cover for lost revenue or lost profits arising from shutdowns or customer or supply chain disruptions. There has not been a unified approach by insurers. Review insurance policies to determine whether loss of rent income is recoverable.	As for landlords.
Other measures in respect of mitigating the effects of COVID-19	Issue correspondence to tenants in relation to: • proactive measures being adopted; • notification requirements of any suspected cases of COVID-19; and • compliance with all laws that impact use and possession of the premises (such as health and safety related laws).	If new leases are being negotiated or leases extended, request a force majeure clause be inserted which includes public health pandemics.

SOME OTHER CONSIDERATIONS

Can the tenant stop trading?

Payment of rent is an essential term under any lease. In the absence of an express provision allowing a tenant to cease trading in the event of a disease pandemic, it is unlikely tenants can simply stop trading or paying rent during any closure period. Most leases do not have an express provision that can be relied on.

Retail shop leases usually require tenants to continue trading, as well as requiring tenants to be fully stocked and staffed. Accordingly, a tenant's decision (without the landlord's approval) to close the premises could amount to a breach of the lease. If a tenant pays turnover rent, the lease should be reviewed to consider the consequences of a closure.

Commercial leases do not necessarily contain a positive obligation on tenants to continue trading. In essence, provided the tenant keeps paying rent in accordance with the terms of the lease, there is no requirement to keep the premises open.

Building closure

Most leases require the parties to comply with all laws affecting the use of the premises, and to comply with any order by a government authority.

However, if the closure of the building is based merely on a government recommendation and not an order, the closure could amount to a breach by the landlord.

Rent reduction

Unless the lease contains a specific rent reduction clause, the tenant does not have legal grounds to request a rent reduction if

the building is closed or access is restricted.

The parties should also consider the specific wording of any rent reduction clause as it may or may not cover a public health pandemic. Whether the landlord takes the commercial view in the prevailing circumstances to reduce rent is at the landlord's sole discretion.

Force majeure

Some leases may contain a force majeure clause. These clauses have the effect of relieving a party of its obligations if circumstances outside its control make it impossible to perform them.

Ultimately, the consequences of such a clause depends on how the force majeure event is defined. Terms such as 'pandemic' or 'disease' could cover COVID-19. Similarly, clauses referring to 'acts of government' or 'impacts from the exercise of governmental powers' could qualify as force majeure events and permit a party to the lease to be excused from performing their obligations under the lease.

If the lease does not contain a force majeure clause, it is unlikely that there are grounds for either party to be excused from their leasing obligations.

Further insurance considerations

For the business interruption section of an ISR or Business Pack to respond, usually there first needs to be 'damage' to insured property. There are limited extensions of this requirement for damage and two of those are closure by regulatory authority and closure by infectious diseases.

The closure of your business by a public authority can constitute 'damage' under certain ISR policy wordings. However, many ISR policies will go on to exclude damage caused by pandemics or communicable diseases from business interruption cover, regardless of the fact that the business has been ordered to close by a public authority.

If your business does have infectious diseases cover there are usually significant restrictions of this cover, including a significantly lower limit of indemnity.

As COVID-19 has been declared a pandemic by the World Health Organisation, the reality is that most ISR policies will not respond to business interruption sustained as a result of COVID-19.

Again, as all insurance policies are not the same, it is important to consider that each policy will turn on its own wording. In particular, the exclusions and individual endorsements need to be considered in detail.

Changes in legislation / updates

At the date of this article, NSW had passed amendments which gives the NSW Minister wide ranging powers in relation to leasing. These powers include the capacity to issue regulations to prevent landlords terminating leases in particular circumstances. Further details are yet to be disclosed and the other States are expected to follow suit.

In addition to this, Scott Morrison announced on 29 March 2020 that the National Cabinet had agreed on a set of principles relating to leases, both commercial and residential, to protect renters during the COVID-19 pandemic. These included a moratorium on evictions for

unpaid rent if it was a result of severe financial distress due to the coronavirus.

We recognise that things are moving quickly and we encourage you to keep following our updates as we will share further information when known.

NEED HELP?

We are advising a number of landlords and tenants in relation to COVID-19 and its impact on their leasing arrangements. If you would like us to give your lease a review so you can better understand your rights and obligations during these precarious times, please contact us.

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Banking and Finance

COVID-19: Update

OVERVIEW

Australia saw its first case of COVID-19 on 25 January 2020. Since then, Australia's interest rate has been cut twice to 0.25%, the lowest in Australia's history. The AUD has sunk to a 17-year low. The ASX has seen its largest daily percentage fall on record. Australia's unemployment rate is expected to soar in the coming weeks. Notwithstanding the promise of emergency packages to be injected into the economy, the impacts of COVID-19 have created unprecedented challenges for financiers and their borrowers arising from the disruption being caused to workforces, service providers, supply chains and customers.

For corporate borrowers, it is prudent to manage and mitigate the potential impacts of COVID-19 on your existing financing arrangements by revisiting the terms of the relevant finance documents, identifying any areas of potential non-compliance and engaging with your lenders and advisers early to agree how to deal with the relevant issues.

Identify any potential defaults

If you are a borrower, anticipate where the challenges will lie for your particular business, revisit the terms of your existing loan documents and underlying material documents – the terms of which are critical to your financing arrangements – and determine which provisions are at risk of non-compliance. Engage your lawyers and other advisers early if you require assistance in reviewing and assessing the terms and your legal and financial position.

Generally, the key areas to consider are as follows:

- Payment defaults – the most obvious effect is that the disruption of payment flows arising from the business interruption events (such as forced closure of business, disruption of supply to the business and reduced revenue (such as sales or rental income)) will lead to cash flow issues for borrowers, impacting their ability to make scheduled repayments of principal and / or interest. Payments may also be missed simply because staff making or authorising payments are absent due to illness or required self isolation.
- Financial covenants:
  - which rely on earnings such as interest cover and debt service cover or minimum EBITDA tests – as the business of a borrower is disrupted, its earnings are likely to decline in the short to medium term. This means that its ability to comply with look back and look forward financial covenants based on those earnings may begin to come under pressure; and
  - which rely on equity values such as net worth or funds under management tests – as share values plummet in the wake of the economic

uncertainty caused by the outbreak, the value of portfolios will have decreased and it will be harder for borrowers to comply with financial covenants tested by reference to the value of those equities. On the other hand, the volatility of the markets will be attractive for speculators, notwithstanding the risk the current market position poses for potential margin calls.

- Project delays – the real estate sector relies heavily on imported goods and materials for use in the construction of large scale commercial and residential projects. Developers and builders are already experiencing delays in this supply chain and are concerned about the impact that this will have on their ability to deliver construction works on time and on budget. Both of these factors are tested in construction finance agreements and we expect that developers are already speaking to financiers about requests for extensions of time for the completion of separable portions due to complete shortly. In the longer term, 'Sunset Dates' in contracts with purchasers of the finished product – again the subject of tests in construction financing agreements - may also soon be tested.
- Material adverse change – aside from payment defaults and financial covenant breaches, the economic impacts of the disruption may lead to material adverse impacts on a borrower's business or prospects and / or its ability to comply with its obligations under its financing arrangements. In the current circumstances, we expect that financiers will be reluctant to rely on a material adverse effect (MAE) to be able to enforce rights against particular borrowers – however, if they do decide to go down that route, they will need to consider the drafting of the relevant MAE provisions in their facility agreements to determine whether the circumstances are such that they are able to do so.
- Cessation of business clauses – the majority of financing arrangements include undertakings and defaults regarding a borrower ceasing to carry on its business or a material part of it. Government mandated closures of types of businesses will mean some businesses, particularly in service industries, may face prolonged or undefined periods of closure.
- Cross defaults and breach of material documents – even if a borrower is able to comply with its obligations to its financiers, business and / or cash flow disruption may lead to defaults under its obligations to other counterparties. For example, a supply agreement to supply certain goods to China may be unable to be fulfilled due to a ban on entry with no defined end date.
- Others provisions – consider any facility specific provisions. For example, 'key person' review events may be triggered if a named key person falls ill and is forced to resign.
- Maturity of facility – if your facility matures or is due for renewal in the near future, consider your ability to extend or refinance that debt with the same or a different lender.

Engage with your counterparts early

Having identified the potential breaches under the financing documents, engage and discuss them with your lender as soon as possible.

Banks will likely experience a higher volume of enquiries, so it may take time for enquiries to be processed and any proposals to be approved (especially those requiring credit approval).

Any amendments to the terms of a facility, and any waivers, standstill or other arrangements may need to be documented, which may require lawyers to be involved. Lenders and borrowers will also need to consider any potential logistical issues associated with re-documentation, such as the availability and capacity of the board of directors to meet, review and discuss the draft documentation, and the availability of signatories to execute the documentation.

WHERE TO FROM HERE?

The economic impacts of the virus are now certain to be longer lasting than the health ones. The government has announced an unprecedented series of stimulus and assistance packages designed to assist businesses and individuals through the crisis with the explicit intention of bridging the gap to recovery. Banks are also leaning in and have voluntarily launched assistance packages including payment holidays and covenant relief, amongst other measures, to assist their customers. Please contact us if you would like assistance in understanding your obligations under your loan documents, engaging with your counterparts or ascertaining whether you are eligible for any of the relief being offered by government or your bank.

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Finance

Practical considerations for electronic execution

COVID-19 has brought many challenges to the commercial landscape, including the execution of documents when parties may not, because of the requirement to self isolate, be able to receive, sign and exchange hard copy documents. Electronic execution can be used in many cases so that transactions may progress, however not all documents can be executed electronically.

This article sets out what kind of documents can be electronically executed and what to consider to minimise risks. For further information on the law underlying electronic execution, see our earlier Insight **here**.

Documents that can be executed electronically:

- an agreement (by an individual). Generally, an agreement by an individual can be executed electronically, as any witness requirement is only to minimise risk of fraud.
- an agreement or a deed (by a company). However, a counterparty to a document electronically executed by directors of a company is unable to rely on the assumptions about valid execution under *129 Corporations Act 2001* (Cth). To minimise risks:
    - make further enquiries about the signatories' authority (i.e. check a current company search);
    - obtain 'personal authentication' from the signatories (i.e. an email and ideally verbal confirmation that they applied or consented to the application of their signature); and
    - review a resolution of the director(s) and the company's constitution.

All signatories should sign on the same document or, if the type of document and circumstances permit, by 'split execution' (where the first signatory signs and sends to the second, who then prints and signs), provided that the first signatory confirms that they intended their signature on the second printed copy (signed by the second signatory) to be treated as their signature.

Documents that cannot be executed electronically:

- a deed (by an individual). A deed executed by an individual must be witnessed to be effective, and case law is unclear on whether witnessing electronically is effective. If the *Conveyancing Act 1919* (NSW) applies, execution of a deed electronically may be permissible, however as these provisions are untested by courts specific advice should be obtained.
- a power of attorney. In virtually all cases, powers of attorney (whether granted by a company or an individual) should be prepared as a deed, executed and witnessed in 'wet ink'. Electronic execution of these documents should be avoided without specific advice.
- a document for which one fully executed

original is required. Certain agencies such as land registries, ASIC, ASX and Courts may have specific requirements for 'wet ink' or original execution, and may not accept counterparts. Specific advice should be obtained about whether electronic execution is appropriate for these documents.

PRACTICAL STEPS TO TAKE

If you are considering executing electronically, or accepting any document executed electronically, you should:

- engage early. Discuss with all parties (including any party who will be reviewing or relying on the document, such as a financier) as soon as possible, to ensure that all parties are comfortable with the proposed manner of execution and that any risks are understood and, if possible, minimised.
- obtain consent. If information is required by law to be given (for example, a disclosure statement), obtain express written consent from the party to whom the information is being given to the electronic communication before the giving of that information.
- minimise fraud. Sign documents electronically using a platform with inbuilt identification verification (there are many on the market today), rather than the insertion of a scanned signature or image, to minimise the risk of fraud.
- reconsider deeds. If possible, convert any deed to an agreement, noting that this may not always be achievable or desired, and will depend on the nature of the transaction and the document involved.
- appoint attorneys. Consider appointing an attorney (either for an individual or company) as soon as possible.
- appoint alternate directors. For companies if directors may be unavailable, consider appointing alternate or additional directors so that more signatories will be available.
- obtain personal authentication. Whenever electronic execution is used, but particularly for companies, obtain evidence that the signatory has affixed their electronic signature themselves, or has specifically authorised another person to do it for them. This should ideally be both email and verbal confirmation with that signatory.

We are seeing a greater level of acceptance of electronic execution to assist the continuation of business operations, with parties and their advisors making genuine efforts to permit electronic execution wherever possible. However, this is a rapidly evolving area of law, and until now has been a matter of convenience and efficiency rather than one of commercial imperative, and parties should ensure that risk positions are effectively managed.

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Intellectual Property

COVID-19 updates for intellectual property right holders, applicants and opponents

Governments around the world have implemented a wide range of protocols to control the spread of COVID-19 throughout their jurisdictions. The various intellectual property offices have recognised this is an unprecedented situation that may have an impact on the ability of right holders, applicants, opponents and their representatives to meet deadlines associated with their intellectual property rights.

Below is a short summary of the current position taken by the intellectual property offices in the following key markets:

AUSTRALIA

All services of the intellectual property office of Australia are currently operating as usual and all deadlines are not automatically extended. Where an applicant cannot carry out an action within time due to the COVID-19 outbreak an extension of time may be available.

Requests for extensions of time will need to be made in the normal way, accompanied where required by a declaration setting out how the COVID-19 outbreak interfered with responding in time. Requests for waiver or refund of the fee for the extension of time will be considered on a case by case basis.

Applicants should note that by law, some time periods cannot be extended. Applicants should seek advice if they are uncertain whether an extension of time is possible, and not assume that an extension will automatically be granted due to the outbreak.

NEW ZEALAND

All services of the intellectual property office of New Zealand are currently operating as usual and all deadlines are not automatically extended. If circumstances related to the COVID-19 outbreak have affected or are affecting a right holder, applicant or opponent's ability to respond by a deadline, they may request an extension of time to meet that deadline. The intellectual property office of New Zealand will assess extension of time requests on a case-by-case basis and no fees for extensions of time apply.

UNITED STATES OF AMERICA

All United States Patent and Trademark Office (**USPTO**) offices are closed to the public until further notice. However, operations will continue without interruption and all deadlines are not automatically extended.

Where an applicant cannot carry out an action within time due to the COVID-19 outbreak an extension of time may be available. The USPTO is waiving extension petition fees in certain situations, where parties have been affected by the COVID-19 outbreak.

UNITED KINGDOM

All services of the intellectual property office of the United Kingdom are currently operating as usual and all deadlines are not automatically extended. Where

an applicant cannot carry out an action within time due to the COVID-19 outbreak an extension of time may be available. Requests for extensions will be considered as favourably as possible and fees may be waived at the Office's discretion.

IRELAND

The intellectual property office of Ireland is closed from 13 March until 29 March 2020 (inclusive). Any deadlines falling within that time will be extended to 30 March 2020.

EUROPEAN UNION

The intellectual property office of the European Union is closed to the public. All deadlines falling between 9 March and 30 April 2020 are automatically extended until 1 May 2020 (in practice, 4 May 2020 as 1 May is a Friday and a public holiday in Spain).

WORLD INTELLECTUAL PROPERTY OFFICE (WIPO)

All services of WIPO are currently operating as usual and all deadlines are not automatically extended. Applications filed through the PCT, Madrid System and Hague System and administer other IP and related systems (such as the WIPO Arbitration and Mediation Centre) will be processed as normal.

If you have any questions regarding this update, your intellectual property, or any other aspect of your business, please do not hesitate to reach out to any of our team.

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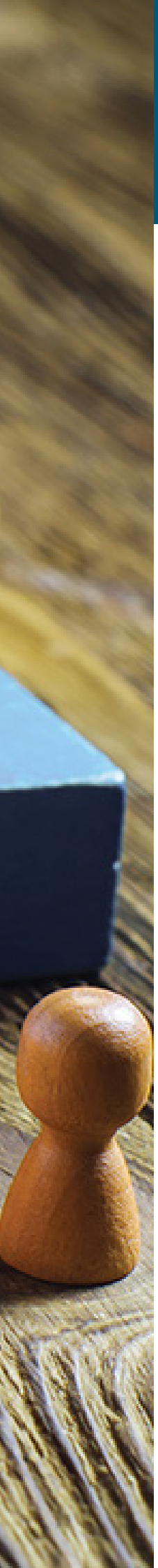

Litigation and Dispute Resolution: Aged Care industry

Protecting against COVID-19 class actions

As Australia grapples with the COVID-19 pandemic, the Aged Care industry is particularly susceptible to its impact, including class actions. COVID-19 class action activity has already commenced with plaintiff law firms circling potential targets. In this article, we explore why such class actions are likely to arise and what you can do to protect your organisation against a COVID-19 class action.

THE RISE OF THE CLASS ACTION INDUSTRY

Over the last 30 years we have seen a steady rise in the number of class actions commenced in Australia.

The class action industry in Australia is now mature and it generates scores of new class actions every year, supported by domestic and international litigation funders. Across Australia, our courts have gradually adopted unique court procedures to manage class actions.

Most class actions are opportunistic in nature. They commonly follow events that cause widespread damage, such as natural disasters (including bushfires or floods), and corporate collapses or sharp declines in the share price of a listed company. Class actions have also arisen as a result of products that have caused mass loss, including firefighting retardants (e.g. PFAS), medical products (e.g. breast implants and vaginal mesh) and "faulty" cars (e.g. the fuel emissions "scandals").

THE EXPOSURE OF THE AGED CARE INDUSTRY

The international response to the COVID-19 pandemic has mostly involved the implementation of social distancing and lock down measures, while allowing the continued delivery of "essential services". The

Aged Care industry provides an essential service, so most participants in the industry must continue providing the necessary essential services. By so doing, participants in the industry are exposed to

the virus, both in terms of contracting and transmitting the virus.

It is widely known that elderly persons are significantly more susceptible to COVID-19, with notably higher rates of hospitalisation and death, and longer recovery times, when compared to younger members of the community. Where multiple people are infected (including residents, workers and their families) a class action could be commenced on behalf of all impacted persons. It only takes seven people to form a class action.

MINIMISE THE RISKS OF AN OUTBREAK

Obviously, the first step for participants in the industry is to take all reasonable steps to eliminate the risk of contracting or transmitting COVID-19. This reduces exposure to potential civil liability as well as any criminal liability under work health and safety legislation. There are extensive Government resources providing guidance to industry participants on the steps that can be taken to minimise the risks associated with COVID-19.

In the event of an outbreak of COVID-19, a focus of class action lawyers will be whether well-publicised guidance and protocols have been followed. A failure to strictly adhere to such guidance or protocols will inevitably form part of the elements of a class action.

HOW TO RESPOND IF THERE IS AN OUTBREAK

Even with strict adherence to relevant guidelines and protocols, it is inevitable that at least some participants in the Aged Care industry will fall victim to an outbreak of the COVID-19 virus. If the outbreak affects a wide enough group of people, there is a real risk of a class action forming. In our experience, with this kind of an outbreak the courts will start with a presumption that victims ought to be fairly compensated for their loss, and technical legal or complex expert arguments have limited success in shifting this presumption.

From the claimants' perspective, there can be very good reasons for not joining a class action. It will be many years before any form of compensation is paid-out. There are usually significant differences between members of the class (or cohorts within the class action) which typically results in more meritorious claims being compromised due to the inclusion of weaker claims forming part of the cohort.

Finally, even though the Court has oversight of settlement payments, once the plaintiff law firm is paid and the litigation funder takes its cut, there is a substantial reduction in the compensation flowing through to claimants. In a recent study, the Australian Law Reform Commission found that the average commission taken from the value of class action settlements by third-party litigation funders between 2013 and 2018 was 30%.

These realities for members of a class action give defendants the opportunity to engage directly with members in relation to their potential claims. A number of proactive strategies can be adopted which result in legitimate claimants receiving fair compensation in a cost effective and timely manner. Those strategies can include:

- establishing a forum (such as a webpage) for claimants to register and provide critical information in relation to their potential claims and loss;

- establishing truly fair and independent processes for the assessment of individual claims, particularly for the assessment of loss;
- potentially offering to fund the provision of independent legal advice for claimants (where that law firm does not have a vested interest in pursuing the class action); and
- making unilateral payments for meritorious claims, even without releases or settlement deeds being entered into.

Properly executed, we have found that such measures and strategies can be very effective in managing legitimate claims for compensation. At the same time, the strategies can undermine or eliminate the economics of a class action for plaintiff class action lawyers and litigation funders. The outcome is better for defendants and claimants, which should be our priority in the current environment.

To learn more about the measures and strategies your organisation can adopt to respond to a potential class action, please contact our team.

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Technology, Media and Telecommunications: Entertainment industry

Legal impact of COVID-19 on the entertainment industry

COVID-19 is significantly impacting industries across Australia, and the nation's arts and entertainment industry is no exception. In response to this crisis, public gatherings have been prohibited and theatres, cinemas, music festivals, shows and tours have been closed or cancelled indefinitely. Australian film productions are also being postponed.

SO WHERE DOES THIS LEAVE THE INDUSTRY LEGALLY?

For stakeholders in the arts, film, music and media worlds, COVID-19 is fast presenting myriad legal issues to understand and address to navigate the pandemic.

These legal issues include:

- Contractual considerations;
- Consumer law considerations around event cancellations;
- Insurance law considerations; and
- Employment law considerations.

CONTRACTUAL CONSIDERATIONS

The entertainment industry is built on a series of contracts between venues, sponsors, promoters, distributors, vendors, investors, production companies, broadcasters, ticketing agencies, manufacturers and licensors (to name a few).

With the disruptive impact of a global pandemic resulting in the standing down of workforces, closure of borders, and enforced work from home arrangements, the risk of non-performance, poor performance, delay and non-payment is heightened. Some contracts address these issues expressly in their terms, in other cases, contractual principles like frustration will govern the parties' respective rights.

Our recommendation: All parties involved in entertainment industry supply chains should be reviewing contracts for force majeure clauses, termination rights and assessing whether performance milestones can be revised or negotiated. In the film industry, for example, this might include revising production milestones and release dates to reduce the impact of compromised crew members or reduced audience numbers.

Stakeholders should also review insolvency provisions within relevant contracts and seek advice on whether the recently-introduced safe harbour provisions apply. For more information on Australia's safe harbour laws please see our articles on this.

CONSUMER LAW CONSIDERATIONS

Consumer law rights for cancelling live events may also change depending on the escalating nature of government-imposed crowd restrictions and social distancing policies. The ACCC has advised it expects ticket refunds or other remedies (such as

credit note or voucher) for cancelled events. However, where live entertainment events are cancelled due to government restrictions, this may impact consumers' rights to consumer guarantees under the Australian Consumer Law (**ACL**), which typically include guarantees to have services provided within a reasonable time and in the manner expected. The ACCC is imploring consumers to be patient with suppliers, but scrutiny on suppliers' behaviour will be equally high.

Our recommendation: Stakeholders in live entertainment events should be reviewing ticket terms and conditions, their own policies and their obligations in relation to providing services under the ACL to understand their position regarding event cancellations and refunds.

INSURANCE LAW CONSIDERATIONS

Despite this significant disturbance of COVID-19, it is highly unlikely that any Industrial Special Risk (I**SR**) policy, and in particular the business interruption section of the policy, will respond to the COVID-19 pandemic.

For the business interruption section of an ISR to respond, usually there first needs to be 'damage' to insured property. There are limited extensions of this requirement for damage and two of those are closure by regulatory authority and closure by infectious diseases.

The closure of business by a public authority can constitute 'damage' under certain ISR policy wordings. However, many ISR policies will go on to exclude damage caused by pandemics or communicable diseases from business interruption cover, regardless of the fact that the business has been ordered to close by a public authority.

If your business does have infectious diseases cover, there are usually significant restrictions of this cover including a significantly lower limit of indemnity.

As COVID-19 has been declared a pandemic by the World Health Organisation, the reality is that most ISR policies will not respond to business interruption sustained as a result of COVID-19.

As all insurance policies are not the same, it is important to consider that each policy will turn on its own wording, in particular the exclusions and individual endorsements need to be considered in detail.

Our recommendation: We have been monitoring the situation regarding the insurance response to the COVID-19 pandemic and there has not been a unified approach between all insurers. It is advisable that entertainment industry stakeholders review their policy before proceeding with any action that will result in a potential business interruption claim.

EMPLOYMENT LAW CONSIDERATIONS

The entertainment and arts industry workforce is largely comprised of casual workers or contractors. With COVID-19 leading to the cancellation of productions and live events, the flow-on effects to entertainment industry staff will be significant. At law, casual employees and independent contractors who miss work aren't entitled

to paid sick leave or carer's leave under the National Employment Standards in the Fair Work Act 2009. Employees can be stood down if they cannot be usefully employed for reasons beyond the employer's control. However, these are difficult decisions that affect people's very livelihood, and can involve careful consideration of factual circumstances to determine the true nature of an employment relationship. Despite the pandemic, the usual rules of procedural fairness in the employment relationship continue to apply. To avoid unfair dismissal claims or potential underpayments, stakeholders should exercise caution before suspending staff payments, giving stand-down orders or terminating employment arrangements.

Our recommendation: entertainment industry stakeholders should seek employment law advice before taking significant actions relating to staff during the COVID-19 outbreak, particularly staff stand down orders or dismissals.

UPDATES

COVID-19 is presenting a constantly changing economic and legal landscape. Our recommendations may change or be updated as the COVID-19 pandemic develops in Australia. Please contact our team if you would like to discuss any of the issues raised in this update.

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Technology, Media and Telecommunications: Data Security

Data Security Checklist

ENSURING BUSINESS CONTINUITY IN THE TIME OF COVID-19 PANDEMIC: DATA SECURITY RISKS

As Governments implement severe measures to fight the COVID-19 pandemic, businesses are increasingly reliant on remote Internet-connected workforces in order to ensure business continuity. With this shift to remote working, comes heightened data sensitivity risks, including an increase in the likelihood of cyber attacks and privacy breaches.

Businesses must be vigilant of this heightened risk environment. Despite the extraordinary environment in which we find ourselves, data security and privacy obligations continue to apply.

This means that you should:

GET YOUR REMOTE SECURITY MEASURES IN PLACE

- evaluate all SaaS applications that your staff use while remote working to ensure adequate levels of protection and security;
- ensure your systems capacity is adequate given the increased usage;
- ensure adequate encryption levels are applied to the data at rest and in transit;
- implement virtual private networks and multi-factor authentication measures;
- undertake data back-ups regularly to prevent against data loss;
- maintain logs of equipment being used by staff at home;
- provide information security refreshers to your staff working from home;
- insist that staff only communicate through your official systems, not through publicly-available social media channels; and
- remind staff of their confidentiality obligations, including the need to store and dispose of hard-copy records securely.

CAREFULLY MANAGE YOUR SUPPLIERS THAT HAVE ACCESS TO YOUR DATA

- get sufficient comfort that the IT controls that your suppliers implement work and that they are effective in terms of protecting your data;
- manage contractual liability with your suppliers around cyber incident and data breach issues – this includes having clear protocols in your contractual arrangements which deal with:
  - the communication of suspected breaches by your supplier;
  - the processes for conducting assessments into those breaches; and
  - the allocation of responsibility for the

containment, remediation and notification of the breach; and

- ensure that you control any notifications to your customers and any regulators, including the Office of the Australian Information Commissioner (**OAIC**) – this will help to manage any reputational fall-out.

KNOW WHAT TO DO IN THE EVENT YOU ARE HACKED

- have your crisis management team ready for immediate mobilisation and response – a team of multi-disciplinary specialists (including, as appropriate, IT, legal, risk and compliance, PR/ communications, corporate affairs, HR) which is known in advance and has full authority to act without permission;
- ensure you have a robust data breach response plan which can be implemented immediately – a plan which sets out:
    - your strategy for containing, assessing and managing a data breach from start to finish - with clear reporting lines, escalation paths and criteria for when to mobilise the crisis management team;
    - your strategy for dealing with the communication of the data breach internally and externally - including to affected individuals, the OAIC and other regulators that may be relevant to your business;
    - the roles and responsibilities of staff members; and
    - processes for dealing with a data breach involving another entity, such as your IT supplier;
- make sure you get the facts of the data breach – don't just rely on assumptions;
- carefully manage communications to internal and external stakeholders – including setting the correct narrative for the data breach and your response from the outset;
- build a stakeholder map, and consider the legal relationship you have with each stakeholder so as to ultimately guide you to a prioritised work plan for responding to the incident;
- seek the protection that can be gained through legal professional privilege by engaging with your internal or external legal advisers – otherwise sensitive internal communications and documents about the breach (including forensics reports) could be exposed to regulators or those pursuing civil damages claims against you;
- determine your notification obligations at law – to affected individuals, to the OAIC and to any other regulators relevant to your business – see below for further details; and
- consider your contracts that may be impacted by the cyber incident, including rights and obligations that may be triggered.

COMPLY WITH YOUR LEGAL OBLIGATIONS TO REPORT PRIVACY BREACHES

You have obligations under the *Privacy Act 1988* (Cth) to report certain data breaches (known as "eligible data breaches") if you are a:

- Commonwealth Government agency;
- Private sector organisation (including not-for-profit) with annual turnover in excess of $3 million; or
- A small business earning $3 million or less that provides health services, is involved in trading in personal information, provides services under a Commonwealth contract or a credit reporting body.

An "eligible data breach" occurs if:

- There is unauthorised access to, or disclosure of, information, or information is lost in circumstances where such unauthorised access or disclosure is likely to occur;
- A reasonable person would conclude that access or disclosure would be likely to result in "serious harm" to any of the individuals to whom that information relates; and
- You have not been able to prevent the likely risk of serious harm with remedial action.

ASSESS

In the case of a suspected data breach, you must undertake a reasonable and expeditious assessment (and, in any event, within 30 days) to determine whether there are reasonable grounds to believe that an "eligible data breach" has occurred.

NOTIFY

If you have reasonable grounds to believe that an "eligible data breach" has occurred, you must as soon as practicable:

- prepare a statement setting out:
  - your contact details;
  - a description of the data breach;
  - the kinds of information concerned; and
  - the steps you recommend individuals take to mitigate the harm that may arise from the data breach;
- give a copy of the statement to the OAIC; and
- take such steps as are reasonable in the circumstances to notify affected individuals of the contents of the statement.

SERIOUS HARM?

The key test for notification is whether the actual or suspected data breach is "likely to result in serious harm" to individuals.

You should have regard to the following, among other relevant matters, when assessing whether individuals are likely to suffer "serious harm":

- the kind and sensitivity of the information involved in the breach;
- whether the information is protected by security measures(s) and the likelihood of overcoming that protection;
- the persons, or kinds of persons who have obtained, or could obtain, the information;
- if a security technology or methodology was used to make the information unintelligible or meaningless – the information or knowledge that would be required to circumvent the technology or methodology; and
- the nature of the harm – whether that harm be physical, psychological, emotional, reputational, economic or financial.

It is not just the likelihood of the harm occurring, but also the anticipated

consequences for individuals if the harm was to materialise (e.g. risk of identity theft).

As the notifiable data breaches scheme is relatively new, the meaning of "serious harm" is still somewhat nebulous. From a reputational perspective, it is often best to err on the side of caution and to make the required notifications if there is doubt as to whether the threshold of "serious harm" has been reached.

PENALTIES

A failure to notify an "eligible data breach" is considered an interference with the privacy of an individual affected by the breach. Serious or repeated interferences with the privacy of an individual can give **rise to civil penalties of up to $2.1 million.**

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