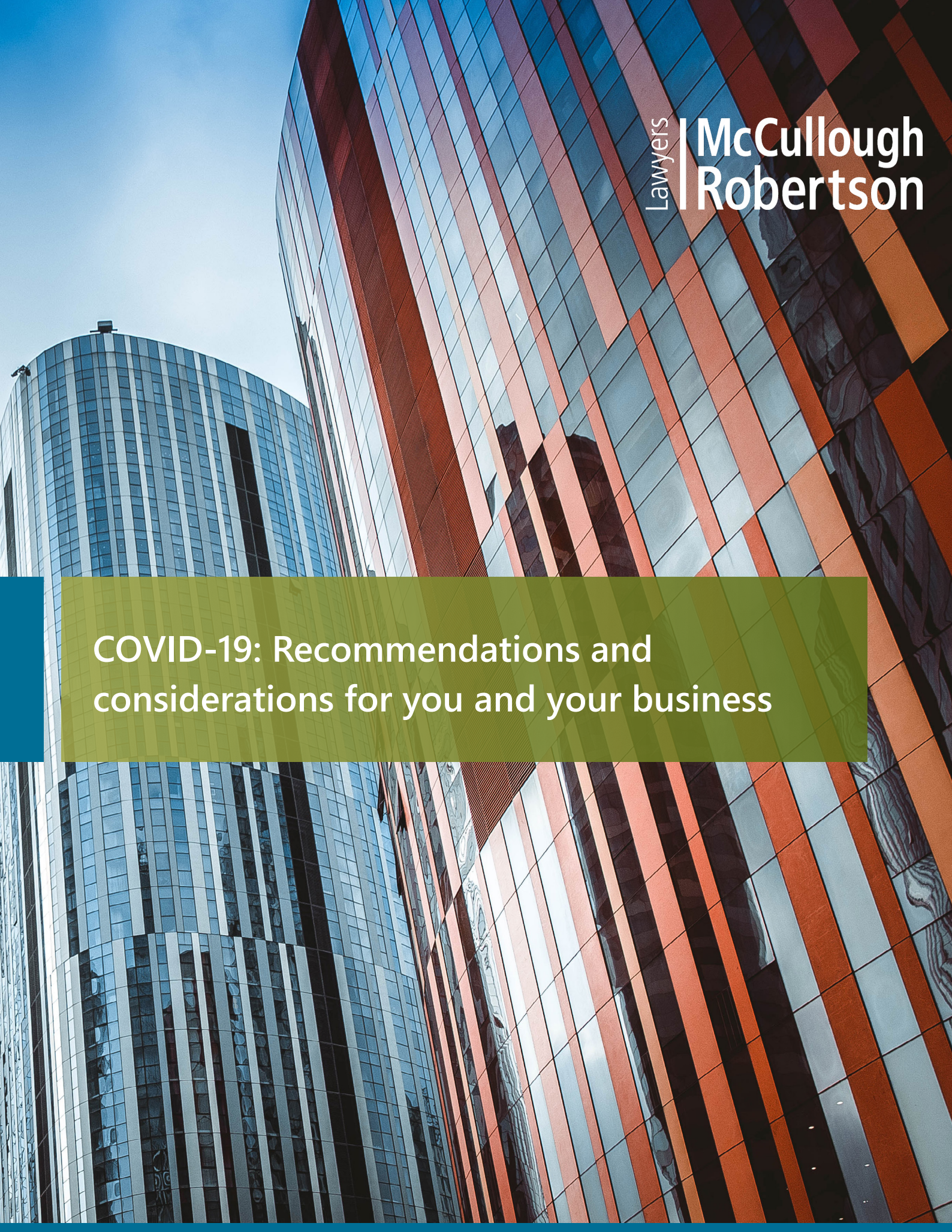

McCullough Robertson Lawyers

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

Welcome

The outbreak of COVID-19 is unprecedented, and while the long-term impacts of the pandemic are still unknown, we have put together some practical advice on what it might mean for you and your business.

Ranging from individual impacts to best practice for your business, our experts have put together some expected implications of COVID-19 and what you can do.

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 19 March 2020.

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TERMINATION OF CONTRACTS

A contract will often expressly outline the circumstances in which one or more parties to the contract may terminate it. Sometimes termination rights are conditional upon particular events or actions (such as notice requirements), so it is imperative the relevant clauses are reviewed in detail and complied with in order to avoid the risk of claims arising out of repudiation/wrongful termination. Parties may also need to prove they have taken reasonable steps to mitigate their losses.

Notwithstanding the risk of repudiation and the consequent damages, 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.

Before terminating a contract, a party entitled to enforce their strict legal rights should carefully consider the commercial consequences and think strategically about the impact of doing so.

This may include the impact on the ongoing business relationship with the counterparty, the flow-on effects from the counterparty becoming insolvent, or wider reputational damage. It may be that an alternative option can be negotiated that is mutually acceptable to both parties.

FORCE MAJEURE CLAUSES

An effectively enlivened force majeure clause can have the effect of excusing a party from performing its contractual obligations. However, 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.

Broad terms such as 'illness' or 'disease' may well include COVID-19, however this remains judicially untested at the present time. Similarly, clauses that refer to 'acts of government' or 'impacts from the exercise of governmental powers' may also qualify as force majeure events.

Interestingly, the Chinese government is said to be liberally issuing 'Force Majeure' certificates to certify COVID-19 as a force majeure event for Chinese companies. This is likely to mean that if the governing law and place of performance of a contract is China, COVID-19 will be validly considered a force majeure event. However, it would seem that the efficacy of these 'certificates' is doubtful in terms of contracts with jurisdiction clauses elsewhere in the world.

INSOLVENT TRADING

As the COVID-19 pandemic evolves, so do the cash flow and liquidity issues for businesses – resulting in widespread concern about solvency.

It is paramount for directors to remember their duty to prevent a company trading while it is insolvent or where there are reasonable grounds for suspecting that a company is insolvent or will become insolvent if the company incurs a particular debt.

The applicable test is whether a company is 'unable to pay its debts as and when they fall due'. A breach of this duty can result in personal liability for debts being imposed on directors.

SAFE HARBOUR PROVISIONS

Directors should familiarise themselves with the 'safe harbour' provisions in the *Corporations Act 2001* (Cth). If, upon suspecting that a company may become insolvent, a director starts developing a course of action which is reasonably likely to lead to a better outcome for the company than entering administration or liquidation, a director can use the safe harbour provisions in defence to a claim by a liquidator that they traded the company whilst insolvent.

One of the requirements for relying on the safe harbour provisions is to obtain advice from an appropriately qualified entity. For larger companies, an appropriately qualified adviser would be a turnaround/restructuring professional skilled in the turnaround of large businesses. For a smaller company, the company accountant may suffice as an appropriately qualified adviser. Whoever is chosen, the person should be experienced enough to assist in working out whether the course of action contemplated or adopted would lead to a better outcome for creditors than an immediate appointment of an administrator or liquidator.

However, in order to invoke the protection offered by the safe harbour provisions, a company must continue to pay employee entitlements and lodge all tax related documents when they fall due.

The safe harbour applies to insolvent trading only. A failure to meet other obligations, including a superannuation guarantee or PAYG and GST liabilities, can also result in personal liability for directors and possible disqualification from acting as a director (more information on this can be found here).

SECURING YOUR INTERESTS

To secure a payment or other obligation that might not occur in light of COVID-19, business owners should consider negotiating security such as a mortgage or a general security agreement (GSA) over the real or personal property of those with whom they are in business. Although this may provide some level of comfort, if a company is placed into administration or liquidation within six months of a security interest being registered on the Personal Property Securities Register, the security interest will vest in the company and not the 'secured' party.

Businesses relying on retention of title security arrangements (that is, businesses who supply goods on the understanding that customers will pay for those goods at a later date) should review the arrangements and ensure their interests are adequately protected. In particular, depending on the agreement terms, businesses which carry out multiple purchase orders may be required to register their security each time an order is executed.

Finally, don't panic. Liquidation or bankruptcy are not the only options for struggling companies and individuals running businesses to survive the economic disruption of COVID-19.

Struggling companies and individuals should consider negotiating payment plans with suppliers or customers, undertaking a business restructure, entering into a Part IX or X agreement, or appointing a voluntary administrator.

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COVID-19: Mitigating the risks

WHAT ARE MY WORKPLACE HEALTH AND SAFETY (WHS) OBLIGATIONS?

Employers, as a Person Conducting a Business or Undertaking (**PCBU**) under the WHS laws, have a primary duty of care to ensure, so far as is reasonably practicable, the health and safety of workers and relevant other persons. WHS controls may include encouraging increased personal hygiene and providing hand sanitiser.

WILL MY BUSINESS CONTINUITY INSURANCE RESPOND?

Maybe. Some insurance policies provide for pandemic cover. Others may include a pandemic within the definition of 'force majeure'.

Before any decisions, which have a significant impact on the bottom line, are made, you should consult your insurance policy, broker or a specialist insurance lawyer.

CAN I CLOSE THE WORKPLACE OR ASK PEOPLE TO WORK FROM HOME?

Yes. As the occupier or owner of a workplace, an employer has the right to control who enters the workplace and the conditions of entry.

Employers also have the right to issue reasonable and lawful directions to their employees, for example, disclosing recent travel or not attending the workplace.

The key is making sure each direction is *reasonable* and *lawful*.

WHAT ABOUT ANTI-DISCRIMINATION LAW?

Employers risk discrimination claims if they base decisions about work on the grounds of a protected attribute, like race. In some cases, seeking unnecessary information may be unlawful. However, a range of exceptions can apply. Decisions should be sensible, and based on expert data.

IF WE CLOSE, OR NEED TO ISOLATE OUR WORKFORCE, DO WE NEED TO PAY?

It depends.

If an employee *can work* from home, they remain at work and will need to be paid.

If an employee *cannot work* from home, the *Fair Work Act 2009* (Cth) and some enterprise agreements allow for the unpaid stand-down of employees. An employee may be able to access their leave during a proposed stand-down.

WHAT ABOUT AN EMPLOYEE'S PRIVACY?

Under privacy laws and state based human rights legislation, employers should understand the extent of the personal health data an employee might be obligated to disclose if they contract coronavirus or are symptomatic of it.

PRACTICALLY, WHAT SHOULD I BE DOING?

COVID-19 presents employers with a range of risks (legal, economic, reputational, and cultural).

Risk management tools should be applied.

An employer can consider a holistic risk assessment, considering the likelihood of an outbreak (based on current expert information), against the degree of harm that might result (such as the economic risk of closing the workplace, interruptions to the supply chain, impact on clients/customers).

The risk assessment will need to be updated regularly, and involve the organisation's top decision makers.

A risk assessment commissioned by a lawyer, for a specific purpose, may be subject to legal professional privilege. To discuss this, please reach out to our team.

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Insurance and Corporate Risk

ISR and COVID-19: Will your policy respond?

The rapid spread around the world of COVID-19 has no doubt caused significant disruption to businesses of all sizes and scales. Despite this significant disturbance, it is highly unlikely that any Industrial Special Risk (**ISR**) policy, and in particular the business interruption section of the policy, will respond to the COVID-19 pandemic.

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 you review your policy before proceeding with any action that will result in a potential business interruption claim.

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 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 closed 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.

Please contact our team if you would like us to consider your specific ISR policies and cover.

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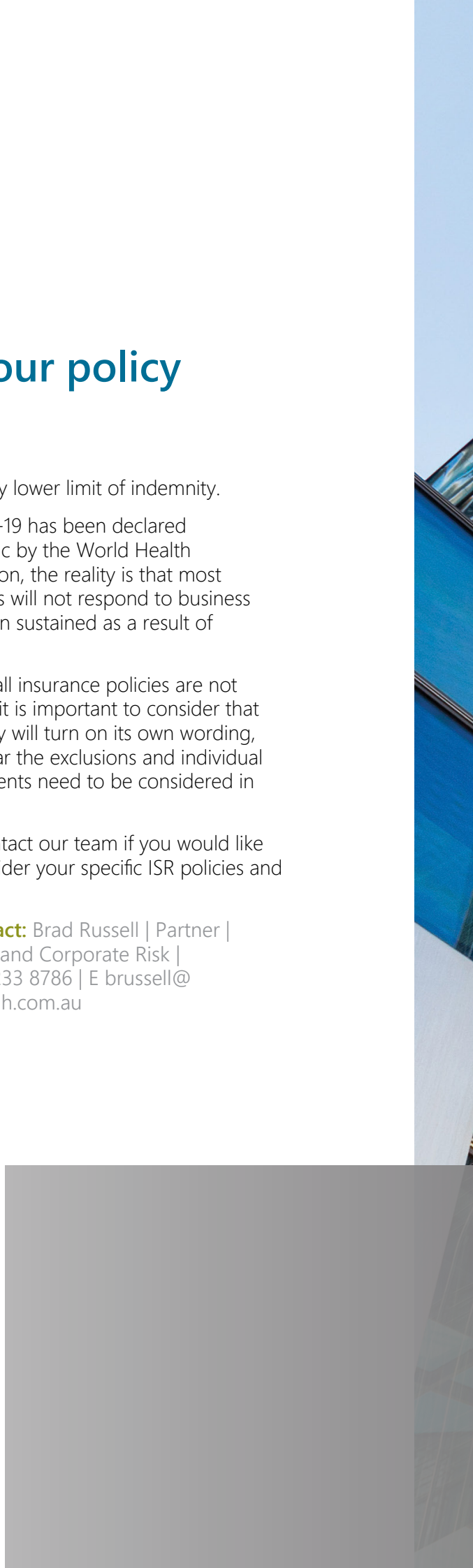

Allegiant IRS

COVID-19: Travel insurers' positions

To date, there has not been a unified approach between all travel insurers with respect to a response to the COVID-19 pandemic. It is therefore advisable that, before booking any travel or proceeding with any travel that has previously been booked, you read your travel insurance policy wording to determine if COVID-19 related events are claimable under the policy.

In that regard, we have noticed that a number of insurers are now refusing to honour claims in circumstances where the loss is either directly or indirectly caused by COVID-19. This is because, as a result of the World Health Organisation declaring the COVID-19 outbreak a pandemic, any loss caused by the virus can no longer be classed as 'unforeseen' or 'unforeseeable'.

Generally, a travel insurance claim will only be triggered in circumstances where the events are 'unforeseen' or 'unforeseeable' and in circumstances where COVID-19 is now a known issue worldwide, many policies will no longer respond to that event.

In circumstances where the Australian Department of Foreign Affairs and Trade has issued Level 4 Alert, or 'Do Not Travel' advice in respect of a particular country, each policy may respond differently as to whether you will be able to be refunded for travel expenses that you have cancelled.

Again, it varies from policy to policy, though it may depend on when the travel was booked as to whether you receive a refund or not.

Certain insurers are now refusing claims for travel that was booked after the Australian Department of Foreign Affairs issued 'Do Not Travel' advice. We recommend that you review your travel insurance policy if you have recently had to cancel travel due to the advice of the Australian Government.

Those travel insurance policies that no longer respond to COVID-19 related claims, will still respond to all other claims, so long as the damage sustained was not as a direct or indirect result of COVID-19.

Again, we recommend that you review your travel insurance policy to determine if your policy will respond before proceeding with any travel.

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Allegiant IRS

A McCullough Robertson Company

www.allegiantirs.com.au

Intellectual Property: Cybersecurity

Cybersecurity a must as scammers spread infection

While Coronavirus threatens the health of people around the world, computer hackers have launched a series of attacks threatening our cybersecurity too. Coronavirus-themed scams have been reported, with hackers taking advantage of public fear associated with the virus, and workers' decreased security due to working from home, to access personal data on victims' computers.

KNOW THE SYMPTOMS

Cyber-criminals have become creative in capitalising on Coronavirus to corrupt users' computers, so knowing the signs of a potential attack is key. Many attempts take advantage of users' increased interest in finding information about the virus and what they can do to protect themselves. Some recent examples include:

- phishing emails which contain attachments claiming to offer Coronavirus safety information, that install destructive files on users' devices when downloaded;
- phishing emails which appear to have come from trusted advisors such as government departments and health authorities, with links that take users to generic looking Microsoft login pages and ask them to enter their user credentials; and
- websites which lure users in with Coronavirus-related domain names and then encourage them to click on malicious links or download unsafe documents.

PREVENT THE SPREAD

We recommend providing comprehensive staff training on how to recognise these potential threats, and how to respond if one arises. This will be particularly important if the situation escalates so that more employees are working from home, sometimes without access to secure networks and on devices with weaker security settings. Those devices might lack the data encryption, firewall and web-filtering measures that many workplaces use.

Strategies that employees can use to identify cyber-threats include:

- checking the URL of websites they access for incorrect spelling or unusual domain names;
- being cautious about emails or websites which encourage them to click on links to new pages; and
- monitoring email and website content for indicators that it may be illegitimate, including spelling or grammatical errors, incorrect language translations, and the use of low resolution images or graphics.

Businesses can also take the following overarching measures to protect against a cyber-attack. We recommend:

- instituting a data breach response plan, which includes what might constitute a data breach, who should be notified, and how to respond to any media attention;
- mapping what data your business stores, its location, and how it flows from one place to the next;
- encrypting and de-identifying any data stored by the business if possible; and
- ensuring that your company privacy policy complies with the standards in the *Privacy Act 1988* if the business collects and stores data containing customer information.

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Intellectual Property: Advertising

Therapeutic goods ads gone bad: Rules for industry

Facebook, Google, and other online platforms are racing to curb advertising content that inappropriately capitalises off the Coronavirus pandemic.

With an influx of misinformation hitting social media, the companies are scrambling to stop advertising which exploits the public health emergency. Facebook recently prohibited advertisements that claim to prevent or cure Coronavirus, and those that generate hysteria by advertising 'limited supplies' of therapeutic goods like face masks. Google also issued a statement claiming to have blocked tens of thousands of advertisements attempting to capitalise on the Coronavirus situation.

In Australia, publishing incorrect and inappropriate advertising content about therapeutic goods in relation to Coronavirus potentially contravenes the *Therapeutic Goods Act 1989* and the Therapeutic Goods Advertising Code. The Therapeutic Goods Administration (**TGA**) can impose a range of penalties and sanctions upon advertisers that do not comply with these rules, including imprisonment and severe financial penalties.

On 10 March 2020, the TGA released an update on the key points advertisers should know about the making of therapeutic use claims about therapeutic goods in relation to Coronavirus.

COMPANIES SHOULD BE PARTICULARLY AWARE OF THE FOLLOWING:

- 'therapeutic use claim' includes claims, for example, about a particular product preventing the spread of Coronavirus, or increasing one's immunity to the virus;
- any advertisement for therapeutic goods which refers to Coronavirus either explicitly or implicitly must be approved by the TGA prior to use because it is classified as a 'restricted representation';
- clinical evidence must support any therapeutic use claims made in relation to Coronavirus;
- advertisements cannot be inconsistent with any current public health campaigns, such as the advice provided on the Department of Health Coronavirus webpage and state and territory health department websites; and
- products such as face masks, disinfectants, supplements, medications and other medical devices all fall under these rules.

Additionally, advertisers that intend to explicitly promote a disinfectant as killing Coronavirus, must have conducted studies with Coronavirus to prove this. Merely complying with the Therapeutic Goods Orders which relate to disinfectants is insufficient.

WHERE TO FROM HERE?

The TGA has indicated that it is actively supervising the inappropriate advertisement of therapeutic goods in relation to Coronavirus, so advertisers should expect to see increased compliance and enforcement action.

McCullough Robertson will monitor further updates from the TGA and communicate these accordingly. In the meantime, advertisers should be particularly cautious about the content they publish, ensuring that they obtain prior TGA approval for any therapeutic goods advertisements referring to Coronavirus.

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Corporate

COVID-19: Issues for consideration

ISSUE	WHAT TO CONSIDER
Proper disclosure by public companies of the impact of the outbreak on the company	Listed companies and their boards should carefully consider the impact or potential impacts of the outbreak (and action being taken in response to the outbreak) on their business. Where there is an expectation or reasonable likelihood that the outbreak will affect the financial performance of the company, boards should consider keeping the market updated, in particular, in circumstances where forecasts are not expected to be met. Updated guidance should be considered if and when there is an appropriate level of certainty to ensure the updated guidance is meaningful.
Upcoming meetings (including AGMs)	Companies with upcoming meetings of shareholders, including AGMs for those companies with a 31 December (or other recent) year end, should consider the logistics for such meetings. While shareholders will still be able to vote by traditional means (including by proxy), a company may wish to consider further voting processes (such as direct voting and other electronic voting processes) to accommodate shareholders that may ordinarily attend a meeting in person, as well as encourage participation generally. The company constitution will need to be checked to ensure that such processes can be used. Companies may also wish to consider whether a meeting that has already been called needs to be postponed, adjourned or potentially cancelled, and, in the case of an AGM, if an extension is required beyond deadline allowed to hold an AGM (within five months of the end of the relevant financial year) - noting ASIC will typically only grant such an extension in exceptional circumstances. Companies may also wish to provide a facility to livestream a meeting of shareholders (including an AGM). We recommend engaging with your share registry (and other service providers) as soon as possible on the above considerations and other logistics for the meeting.

ISSUE	WHAT TO CONSIDER
Proactive and appropriate allocation of risk in sale agreements that are currently under negotiation	For those clients who find themselves in the midst of negotiating M&A transactions or equity investments, we recommend a close consideration of the levers which affect risk allocation between buyer and seller. In particular: • due diligence – thorough and robust due diligence on target companies and businesses will become more important than ever. The economic conditions which are predicted to be brought about by the onset of the virus may eventually lead to M&A opportunities but buyers will need to be vigilant about properly understanding target businesses and the risks that arise as a result of the pandemic. • conditions precedent – consider what impact the pandemic may have on the time it takes to obtain regulatory and third party approvals. Authorities are under pressure making decisions to protect the health and safety of the public and we expect this will lead to a delay in approvals being given by the Foreign Investment Review Board and other regulatory bodies. • termination rights – the parties should carefully consider any proposed termination rights in a sale agreement exercisable in the period between signing and completion. Sellers should be arguing against the inclusion of any material adverse change provisions. Although the true impacts of the virus are not yet known it is still a known risk and sellers should avoid taking any risk of the buyer attempting to rely on the impacts of the virus as a means to terminate the agreement. Buyers should seek rights to terminate the agreement in circumstances where the sellers have not properly disclosed the existing impact of the pandemic on their business. • warranties and indemnities – as a seller, closely consider the impact of the COVID-19 virus on your business and make full disclosure of any existing or potential impacts. Consider limiting the scope of warranties and indemnities given and avoid giving any assurances regarding the impact of the virus on your business. For buyers, seek specific warranties relating to the impact of the virus on the target to date to ensure you have all available information in making a decision whether to proceed with the transaction. • warranty and indemnity insurance – W&I insurance has become an increasingly common part of the deal landscape in Australia. Insurers in all sectors are already scrambling to understand the impact of claims on their liability to insured parties. It will likely be very difficult to obtain W&I coverage during this period and we understand insurers are likely to require a specific exclusion in relation to the impacts of COVID-19.

ISSUE

Impact on completion of deals that are currently conditional

WHAT TO CONSIDER

For clients who have entered into a sale agreement to buy or sell a target company or business which is subject to conditions which are yet to be satisfied, there are several key issues which may become relevant in the circumstances:

- material adverse change – as a buyer you may have negotiated a material adverse change or "MAC" clause which enables you to terminate the sale agreement and walk away from the deal in certain circumstances. These circumstances wouldn't generally expressly include types of events such as the COVID-19 pandemic but rather address the impact of external events on the assets and liabilities or earnings of the target company or business.
- disclosure – to the extent sellers have the right to provide additional disclosure against warranties and representations following execution of the sale agreement they should do so. Even in circumstances where the sale agreement doesn't provide an express right to deliver an additional disclosure letter or otherwise provide additional disclosure, sellers should still consider making formal disclosure of circumstances affecting the target to give themselves the best chance of defending any potential warranty claims following completion. In these circumstances sellers may be able to form an argument that any losses claimed by the buyer could have been avoided or mitigated given the disclosures made by the seller.

ISSUE	WHAT TO CONSIDER
Directors duties	All company directors will need to carefully consider the impacts of COVID-19 on their business and develop contingency plans where necessary, including in relation to the following areas:

- insolvent trading – companies whose trade is significantly impacted by the pandemic will have cause to consider the impact of economic conditions on their ability to continue trading: Insolvency occurs when a company is unable to pay its debts as and when they fall due. Directors have a duty to prevent a company trading while it is insolvent or where there are reasonable grounds for suspecting that a company is insolvent or will become insolvent if the company incurs a particular debt. A director who breaches this duty can be held personally liable to pay compensation to the company.
- safe harbour – the safe harbour laws (found in sections 588GA and 588GB of the *Corporations Act*) operate to protect a director from liability associated with insolvent trading during the 'safe harbour' period. A director can use the safe harbour provisions in defence to a claim by a liquidator that they traded the company whilst insolvent. The safe harbour will start to apply from the time a director, after beginning to suspect that the company may become insolvent, starts developing one or more courses of action which are reasonably likely to lead to a better outcome for the company than the immediate appointment of an administrator or liquidator. In the context of an insolvent company, a better outcome for the company equates to a better return for its creditors. One of the requirements for relying on the safe harbour provisions is to obtain advice from an appropriate qualified entity. For larger companies, an appropriately qualified adviser would be a turnaround/restructuring professional skilled in turnaround of large businesses. For a smaller company, the company accountant may suffice as an appropriately qualified adviser. Whoever is chosen, the person should be experienced enough to assist in working out whether the course of action contemplated or adopted would lead to a better outcome for creditors than an immediate appointment of an administrator or liquidator.
- compliance with health and safety regulations – boards will need to consider the health and wellbeing of their employees, clients and customers during the crisis. This will include developing contingency plans which meet the requirements of all health and safety laws.

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Construction and Infrastructure

Your project and COVID-19

The impact of COVID-19 is being felt across projects of all sizes, with strain being placed on supply chains, availability of labour and the impacts of the already numerous Government driven restrictions and other directions across the globe.

Undoubtedly the recent disruptions caused by COVID-19 will have effects on the ability of projects to be completed on time and also the commercial aspects may leave impressions on project budgets. The industry is quickly becoming cognisant of these risks for new projects, and we are seeing many questions from those conducting tenders and those that are on the bid side.

In particular, with fixed price tenders for projects, we have seen the advent of caveats for COVID-19 impacts being included by tenderers. Project proponents equally need to have an understanding of these issues, and where necessary, undertake further due diligence around the contractor's proposed methodology for project delivery. Many project proponents also need to ensure the contract going to market has enough flexibility to insulate them in such volatile times.

RISK ALLOCATION AND FRUSTRATION

For those already bound by contracts, the situation is now one of review and understanding. Most sophisticated construction and infrastructure contracts will have already assigned the risk of COVID-19 to one party or the other. This is usually done in a myriad of different ways, although often this will have occurred without a specific reference to 'virus' or 'pandemic'. Clauses of broader import can assign the risk and it is always important the contract is understood and read as a whole.

To fully understand the risk allocation, it is often critical to review a number of provisions, such as force majeure, extension of time, variation, change in law, direction of Government and responsibility for subcontractors and suppliers, provision of labour, industrial relations, termination for fault, termination for convenience

and suspension (including lifting thereof). Where the contract has not assigned the risk sufficiently (which will be a relatively rare occurrence in a detailed contract), then the possibility of 'frustration' at law remains.

However, traditionally the Courts in Australia have set quite a high threshold test for a party to establish its obligations ought to be discharged by application of the doctrine of 'frustration'.

INTERPRETING RELIEF PROVISIONS

One should be conscious of reoccurring themes that are often found in provisions designed to relieve a party of its obligations. For example, often these provisions require that an event or circumstance must be something that is '*not reasonably foreseen*'. With respect to COVID-19, this may now be different when comparing a contract entered into today and a contract which was entered into many months ago. In addition, clauses often require (whether expressly or implicitly) that certain events must be '*beyond the party's control*'.

This raises particular questions as to the extent a contractor ought to be able to 'control' its own supply chain and labour resources to complete a project (e.g. if necessary, can it control this by sourcing materials or labour from elsewhere?).

Another aspect is whether or not a provision requires an impossibility to occur (e.g. performance needs to become impossible) or that there is a mere disruption or impact (e.g. performance need only become more difficult) as the trigger for a party seeking to rely on the provision. This warrants a more nuanced examination of both the contract and means of performance (often both the intended means of performance and other possible means of performance need to be reviewed).

Provisions may also provide specific obligations for notification (including time bars, if those periods are missed), as well as obligations for mitigation or overcoming events. As such, astute project management is vital in the circumstances. A detailed understanding of what any particular contract might say on these issues, and how it impacts the project, has become a high priority for many of our clients.

CONTRACTUAL FLEXIBILITY

Project proponents may also need to review the flexibility their contract provides to overcome operational issues arising out of COVID-19.

Typically unilateral rights of variation, suspension and termination will warrant particular analysis, along with the ability of the proponent to rely on any force majeure style provision to impose its own suspension or even ultimately terminate (e.g. should the force majeure persist for an extended period). When it comes to proponents seeking to rely on force majeure, the provision requires careful analysis, as drafting allowing relief if an event or circumstance impacts the proponent's contractual obligations may be distinct from drafting which covers an event or circumstance impacting the proponent's broader business operations.

This is in light of the fact that the contractual obligations of the proponent are often quite limited to issues such as making a site available, ensuring some approvals are in place and making payment, and it may be more difficult for COVID-19 to be directly impacting performance of those obligations. A link between COVID-19 and broader business operations of a proponent would be much easier to establish in most circumstances. Contractors ought to understand the implications of the exercise of these unilateral rights by project proponents, with their typical focus being ensuring they are kept whole in the circumstances and not left out of pocket.

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Tax

COVID-19 stimulus package – keeping your business healthy

Late last week the Federal Government announced a targeted stimulus package to address the financial challenges which result from the national and international spread of COVID-19.

The stimulus package has been broken into four parts:

- supporting business investment;
- providing cash flow assistance to help SMEs keep business and employees;
- targeted support for the most affected areas; and
- household stimulus payments.

The package provides a mix of tax related concessions available to the end of the 2020 or 2021 financial years, and cash payments or subsidies to both individuals and businesses. Legislation will be introduced to Parliament to cover the below provisions, which is expected to be passed by 26 March 2020.

HERE'S WHAT YOU AND YOUR BUSINESS NEED TO KNOW

TAX-RELATED CONCESSIONS

Support business investment: Instant asset write off – section 40-82, *Income Tax Assessment Act 1997 (Cth)* (**ITAA97**)

The 2020 Federal Budget announced that the instant asset write off available to small business entities (section 328-180 ITAA97) would be extended to depreciating assets acquired and first used/installed by medium sized businesses on 2 April 2019 and before 30 June 2020 (section 40-82). A medium sized business was defined as having an aggregated annual turnover between $10 million and $50 million, and the instant write off was available for any number of new depreciating assets that cost less than $30,000.

The stimulus package has increased the instant asset write off threshold from $30,000 per asset to $150,000 per asset, and extended access to the write off to all businesses with an aggregated annual turnover of less than $500 million.

The increased threshold and access are available with respect to all purchases made from 12 March 2020 to 30 June 2020.

For the 2021 financial year, the availability of instant asset write-offs of this nature will revert to small businesses only as anticipated in the 2020 Federal Budget.

This is estimated to be worth approximately $700 million across Australia.

Support business investment: Accelerated depreciation deductions – division 40 ITAA97

For depreciating asset purchases that are not eligible under the above instant asset write off provisions, an additional 50 percent of the asset cost will be deductible in the year of purchase. Any business with an aggregated annual turnover of less than $500 million will also be able to access this investment incentive.

The increased access and depreciation will be available from 12 March 2020 to 30 June 2021, covering the next financial year.

This is expected to be worth $3.2 billion to businesses across Australia.

Cash flow assistance for business: Pay As You Go (**PAYGW**) for SMEs

An SME with an annual aggregated turnover of less than $50 million which employs workers will have access to a tax credit equal to 50 percent of the PAYGW withholding declared in the April and June 2020 activity statements. A minimum credit of $2,000 is available regardless of the amount of PAYGW, and the maximum credit available is $25,000 across the two activity statements.

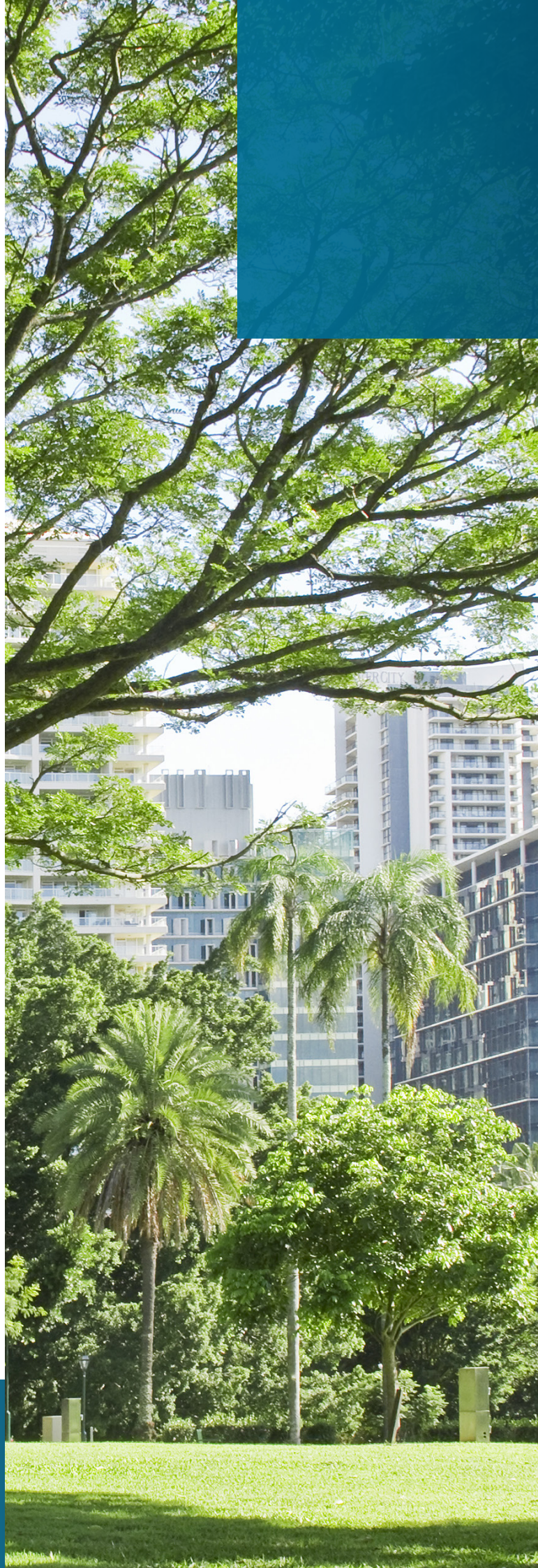
These credits will be automatically applied to the business or instalment activity statement, and any refund will reportedly be paid within 14 days.

This incentive is expected to be worth $6.7 billion across Australia, and affect approximately 690,000 businesses.

CASH INCENTIVES

Cash flow assistance: subsidy for small business

Small businesses with less than 20 full-time employees that employ apprentices or trainees will be able to access a subsidy to cover 50 percent of the apprentice's/trainee's wage for up to nine months. The subsidy will be available from 1 January 2020 to 20 September 2020, covering the March, June and September quarters.



If an employer is unable to retain an apprentice or trainee, the subsidy will be available to any new employer.

The employer will need to register a claim for the subsidy before 31 December 2020, and satisfy an assessment by an Australian Apprenticeship Support Network provider.

This incentive is expected to be worth $1.3 billion across Australia, and support approximately 120,000 apprentices and trainees.

Household stimulus: $750 payments

A one-off tax-free payment of $750 will be available to specified members of the community, including pensioners, those on social security, veterans, and other income support recipients and eligible concession card holders.

The payments will not be included in any relevant income tests for the above people, and each person can only receive one payment regardless of whether they qualify under multiple categories.

The payments will be made progressively from 31 March 2020, and are expected to be complete in April.

These payments are expected to be worth $4.8 billion to the Australian community.

Targeted assistance: support package

At present, $1 billion is being held to support areas that are expected to be disproportionately affected by COVID-19, including various sectors and communities, particularly those heavily reliant on industries such as tourism, agriculture and education.

ADMINISTRATIVE RELIEF

The Federal Government has also confirmed that administrative relief will be available on a case by case basis. To date, the ATO has identified the following as areas for potential relief:

- Deferring by up to four months the payment date of amounts due through the business activity statement (including Pay As You Go (**PAYG**) instalments), income tax assessments, fringe benefits tax assessments and excise.
- Allowing businesses on a quarterly reporting cycle to opt into monthly GST reporting in order to get quicker access to GST refunds they may be entitled to.
- Allowing businesses to vary PAYG instalment amounts to zero for the March 2020 quarter. Businesses that vary their PAYG instalment to zero can also claim a refund for any instalments made for the September 2019 and December 2019 quarters.
- Remitting any interest and penalties, incurred on or after 23 January 2020, that have been applied to tax liabilities.
- Working with affected businesses to help them pay their existing and ongoing tax liabilities by allowing them to enter into low interest payment plans.

You can access the full ATO media release here.

In addition to the Federal Government provisions, the Queensland Government

announced earlier last week that employees that pay $6.5 million or less in Australian taxable wages, and have their business either directly or indirectly affected by COVID-19 may be able to access payroll tax relief.

Eligible entities can apply any time for the relief through an online payroll tax deferral application, with the available relief to defer all payroll tax payment due dates from the February return period, up to and including the May return period and 2020 annual return, to 3 August 2020.

Within a week of making the above announcement, the Queensland Government has since advised that the relief will be extended to all businesses, not just those that pay $6.5 million or less in Australian taxable wage.

The situation is fluid in all states and territories in Australia, and like the response to the virus itself, announcements and updates on tax and stimulus packages are occurring constantly as similar approaches are adopted.

If you or your clients have been affected either directly or indirectly by the COVID-19, or expect that you will be, please contact us and we will be able to assist. Once the legislation is released, we will be able to provide more specific advice on the application of the above relief.

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