

Article Information

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Construction Pause - Do you have an ETO claim?

From 6.00pm on Tuesday, 20 July 2021 the whole of South Australia was placed under level 5 restrictions pursuant to the *Emergency Management (Activities—Associated Direction No 3) (COVID-19) Direction 2021* (the Direction).

The Direction

The Direction, in association with the *Emergency Management (Activities-General No. 2) (COVID-19) Direction 2021* put a pause on, amongst other things, the carrying out of works at construction sites in the whole of South Australia (**Construction Pause**). Work is only permitted if it is urgently required for:

- the construction, maintenance and repair of:
 - Schools;
 - Road; and
 - Other essential infrastructure to ensure the safety or security of the construction site;
- critical repairs or works to any facility, site or premises for emergency or safety reasons or to maintain and ensure the integrity of critical plant, equipment or assets (including partially completed works) that would deteriorate (including insurance, engineering or other expert assessments or inspections);
- “Essential Infrastructure”, as defined in the *Planning, Development and Infrastructure Act 2016*;
- “Essential Services”, as defined in the *Essential Services Act 1981*;
- services required to maintain and protect human health, safety and wellbeing (where provided by commercial contractors), which includes:
 - Electricity;
 - Gas;
 - Water;
 - Sewerage;
 - Drainage and liquid fuels;
 - Refinery operations;
 - Waste and recycling services; and
- because of an emergency.

The prohibition applies to all construction including residential, commercial, public, infrastructure and civil works.

Breach of the Direction

Under the *Emergency Management Act 2004*, the police may issue on the spot fines to individuals in the sum of \$1,000, or to corporations in the sum of \$5,000, for failure to comply with a requirement or direction given under the Act (including the Direction). Breaches considered more serious may be referred to the court, presenting exposure to a maximum fine of \$20,000 or imprisonment for 2 years for individuals. Corporations are exposed to a maximum penalty of \$75,000 and directors and managers of that corporation may also be exposed to the same maximum penalty prescribed for individuals.

Force Majeure and EOT Claims

In addition to avoiding fines and managing the immense inconvenience and expense of a snap shut-down, contractors and subcontractors need, to the fullest extent possible, to protect themselves from the financial consequences the Construction

Pause will have on their ability to complete works on time. The South Australian Government has not given any indication that it will legislate an automatic extension of time to contractors and subcontractors for the Construction Pause.

In most circumstances Force Majeure clauses would only give relief for the Construction Pause if the clause was specifically drafted to contemplate a declared pandemic, COVID-19 or any associated Public Health Directions. Most Force Majeure clauses are not drafted this way. Further, in most circumstances a Force Majeure clause would not be triggered by the relatively short expected length of the Construction Pause (seven days).

While it is of course always open to a principal to agree to grant an EOT, in most circumstances it will be up to the Contractor and Subcontractor to seek an EOT. In these circumstances, Contractors and Subcontractors should provide notice of the delay and request that the time for completion be extended by the duration of the Construction Pause. In many cases such an EOT will be a matter of discretion, sometimes absolute discretion, so Contractors and Subcontractors also need to take such other action as is available to protect their interests.

It is important to understand what is required to compel an EOT under the contract and to ensure that the contractual provisions are strictly complied with. Does the contract entitle you to an EOT in the circumstances? How, when and to whom must the notice of delay for the Construction Pause be provided? Under a residential contract, what notice must be provided to the owner?

There are many different building and procurement contracts in South Australia. Each has different provisions in respect of the entitlement to an EOT and what must be done to access that entitlement. Not addressing this in a timely manner firmly runs the risk of a claim for an EOT for the Construction Pause being time-barred, which in turn runs the risk of you losing your float, if any, and may expose you to a claim for liquidated damages if you are late in achieving practical completion.

Key Takeaways

- Most contracts contain a specific notification process for EOT events and contain a time bar on claims if notice is not provided strictly in accordance with the contract. You need to review your current contracts urgently to identify whether you are entitled to an EOT and if so, what you need to do to access or preserve your rights.
- If you have any doubt as to whether you are entitled to an EOT for the Construction Pause, or if you are unsure as to what you need to do to lodge a claim, please contact one of our team. Remember that a failure to take timely action might mean that your right to an EOT is lost.