

## Article Information

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## COVID-19 and construction contracts: Time for urgent contract review

**COVID-19 will have a profound effect on the world. Preventative and responsive measures will leave no construction project untouched. The legacy of these effects will sorely test the robustness of construction contracts and relationships.**

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Here are some key issues that construction industry participants should consider.

### DELAY AND EXTENSION OF TIME

Project delays will arise from a variety of different causes, including:

- reduced workforce, due to illness or preventative measures;
- site closures;
- road closures and travel restrictions;
- government, principal or contractor imposed temporary shutdowns; and
- delayed or cancelled orders for materials and equipment.

### When does EOT entitlement arise?

EOT entitlement typically arises only for certain delay events (sometimes referred to as 'qualifying causes', 'delay events' or 'extension events'). Typical relevant qualifying causes include the following:

- force majeure events;
- changes of law or government requirements;
- variations;
- acts or omissions of the principal;
- industrial relations events (this generally excludes events limited to the site or which are caused by the contractor or its employees or subcontractors);
- delay in access to the site; and/or
- latent conditions.

### Contracts should be reviewed to consider:

- What delays give rise to an EOT entitlement;
- What are the notification requirements, including:
  - Time bars;
  - Estimates to time and costs; and
  - Updates for ongoing delay;
- Exclusion of "concurrent" delay; and
- Ensuring that accurate information flows from subcontractors or suppliers.

### FORCE MAJEURE

There is no 'standard' force majeure clause. It is a creature of contract rather than a universal principle of law. Whether COVID-19 classifies as a force majeure event (and the consequences that flow) will be depend on the terms of a particular contract.

Force majeure is commonly defined as an exhaustive list of specific events or as reference to a broader set of circumstances (e.g. "an event beyond the reasonable control of the parties").

### **Limitations to force majeure**

In many cases (including in some government contracts), the 11 March 2020 WHO declaration that COVID-19 is a pandemic will qualify as a force majeure event. The extent to which this triggers relief is often further limited such as to effects on the site where works are being performed (as opposed to effects on the supply chain, which are likely to arise far off site).

### **Suspension and termination: not to be taken lightly**

Many force majeure clauses provide for a right of suspension and, where the effect (or suspension) endures beyond a specified period, a right to terminate may arise.

Again, the existence of such rights will be dependent on the terms of contract. No suspension or termination should be undertaken lightly: taking a step which is inconsistent with the terms of the contract may be taken as a repudiation of the contract, exposing the party in breach to serious consequences. An attempt to suspend or terminate other than in accordance with the terms of the contract can carry catastrophic consequences, particularly in circumstances where the contract provides that caps on liability for damages do not apply for acts of "wilful default".

Our previous [article](#) discusses in detail the operation of force majeure in relation to COVID-19.

### **CHANGE OF LAW & GOVERNMENT REQUIREMENTS**

Change in law provisions may apply where a change in a legal or government requirement affects a contractor's ability to perform its obligations. These changes typically entitle the contractor to claim an EOT and compensation for additional costs incurred as a result of the change. In the context of COVID-19, where a delay is caused by legal requirement imposed by a government, this may qualify as a change of law.

Some government responses will qualify as a change in law. Our previous [article](#) discusses the issue in detail.

### **INSURANCES - DO THEY RESPOND?**

Insurance policies typically do not cover project delays. To the extent that policies do cover delays, they generally only cover delays caused by damage to the works or materials. In any case, parties should review their insurance policies to assess whether the relevant event will be covered by the terms of the policy.

### **DOCTRINE OF FRUSTRATION**

A contract may become 'frustrated' when an event outside of the control of the parties makes a contractual obligation *"incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract"*.<sup>[1]</sup> The doctrine of frustration will apply regardless of whether or not the contract expressly provides for its application.

Parties are not required to wait for an effect to happen to their contract, but as with COVID-19, they may rely on the fair assumption that a particular event will give rise to a particular impact on the performance of their obligations. The determination of the length and effect of the delay is to be made at the time of the interruption to the contract, without the benefit of hindsight.

For more discussion regarding the operation of the doctrine of frustration on contracts in the age of COVID-19, please refer to our previous [article](#).

### **LOOK FORWARD TESTS**

Parties should also be conscious of contracts which contain a 'look forward' provision which provides for an early assessment of whether completion will be achieved by the completion date (or another date). Where this test is not satisfied, the principal may have a right to terminate the contract.

Such terms should be carefully considered, in particular as to termination and show cause rights.

Look forward test provisions are more commonly included in PPP and other Project Financing arrangements.

#### **WHAT ABOUT CONTRACTS THAT HAVE NOT BEEN SIGNED**

For those contracts that have not yet been entered into, consider what amendments need to be made to reflect the current COVID-19 or indeed, whether the contract should be entered into at this time.

*Piper Alderman is assisting clients on the spectrum of legal issue arising from the pandemic. Please see our [COVID-19 webpage](#) for more information on areas including **employment, industrial relations, construction law, insolvency and property**.*

[1] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.