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COVID-19 Webinar Q&As: Coronavirus cesilience and recovery – Legal responses to COVID-19

Piper Alderman provides the Answers in response to the Questions received during our COVID-19 Webinar on 2 April: 'Coronavirus Resilience and Recovery – Legal Responses to COVID-19'

Employment & Workplace Issues

Stand down

Q: Where a client has requested we cease working on their account, are we able to stand down that particular project team, or do we need to stand down the entire team or site? and **Q: Can you stand an employee down due to a reduction in their workload (as a result of COVID-19), as opposed to where they are unable to perform their work or where that work no longer exists?**

A: A traditional stand-down is a blunt instrument which is either available or not depending on whether there is a stoppage of work (not merely a reduction).

Think of it in terms of employee functions. If a particular function has ceased, a stand-down would be available of all the employees performing that function – it would not need to be a stoppage of the entire site if other functions could continue.

At the same time, if a function is reduced, even severely reduced, then the work of that function has not stopped and a traditional stand-down would not be available. In a very extreme case if the work could physically continue but has ceased to provide any benefit or value to the employer, or actively harms the employer (such as putting it at risk of insolvent trading) a stand-down might be available, but only where other alternatives such as redundancy are not.

A new variation on this is the "JobKeeper enabling stand-down" introduced as part of the Fair Work Act amendments passed on 8 April 2020. Those will allow a direction to be given reducing the level of attendance at work because of changes attributable to the CV19 measures or government responses, within limits and only where the employer qualifies for the JobKeeper subsidy.

Q: How were Qantas and other businesses that are still operating able to stand down employees?

A: Qantas will have made its own calculation of whether a stand-down of some functions was available, even though the business as a whole continues to operate in a limited way (without those particular functions) where it considered work has stopped due to the external factors.

I would expect a business in the position of Qantas might well now explore the new "JobKeeper enabling stand-down" capacity as well.

Q: Where can I find information in the public domain dealing with stand down (particularly confirming the position that individual and targeted stand downs are not permitted)?

A: The best place to go is the Fair Work Act itself (see sections 524 to 527).

The Fair Work Ombudsman has also published some guidance on the operation of those sections.

WHS and working from home

Q: Can working from home assessments be undertaken by a questionnaire type approach? and **Q: When undertaking workplace assessments, including photos, of employees home office set ups what are the minimum considerations you need to assess?**

A: Go back to the basics on this – the key obligation is to take all reasonably practicable steps to provide a safe system of work. That means reasonably practicable steps to identify risks and then to reduce or remove the hazards you have identified, including in the home working environment.

There is a 'gold standard' of physical inspection of a home office, but with mass work-from-home that will probably not be reasonably practicable.

It will still be practicable to take some steps, and a comprehensive self-assessment likely will be reasonably practicable (as a guided assessment of what information is important). Some evidence that the assessment returns has been scrutinised and any questionable issues have been followed up is part of the key obligation (if necessary, following up in person on an exception basis).

Q: When an employee is working from home and is undertaking work over flexible hours (i.e around parenting commitments etc), do we still need to comply with the new obligations under annualised salary provisions in some modern awards which require employers to record employee hours worked, including breaks, overtime etc.

A: Yes, as unrealistic as that may sound. This demonstrates the relatively unworkable nature of the new obligations. Unfortunately, moves to temporarily amend those awards to enable greater flexibility have not yet extended to relaxing the annualised salary record-keeping mechanisms. Keep in mind that the new annualised salary mechanisms do not apply to part-time employees and as a result of agreed temporary changes you may well have more part-time employees.

Also keep in mind that the Commission considers a less secure but still available way to manage the complexity is to have a common-law offset provision in a contract of employment. Ordinary records are still required to be kept and controlling when work is "authorised or required" remains an important workforce management step even in a mass work-from-home scenario.

Q: We have had a number of requests for the details of the workers' compensation case where an employer had to pay compensation to the family of a worker who was a victim of domestic violence while working from home.

A: *Workers Compensation Nominal Insurer v Hill* [2020] NSWCA 54 (31 March 2020)

Award/EA/Contract changes that introduce flexibility

Q: If an enterprise agreement does not allow for any variation of its terms and conditions then what does the law say about making individual variation/agreements to those terms and conditions?

A: Any enterprise agreement approved by the Commission must include a "flexibility term" that at least meets the model flexibility term. That model term allows individual flexibility agreements to be reached dealing with arrangements about when work is performed. However, any IFA must also meet the better-off-overall test which limits its utility in a significant downturn.

Transfers from full-time to part time (and the allocation of a part-time pattern of work) can occur by agreement, subject to ensuring the EA or award requirements for part-time work are met.

There are other mechanisms as well, but it gets quite technical and unfriendly at around this point, with more than a few opportunities to be tripped up.

Q: Can an employer temporarily move some employees to a 9 day fortnight or 4 day week?

A: By agreement, yes, so long as the industrial instrument that applies allows for part-time work.

Best done in writing with clear end dates identified, noting that most industrial instruments will require a written part-time pattern of work (days, hours, start and finish times) to have been set.

Q: What are the options available to extend parental leave for staff due to return from parental leave at the

height of COVID-19?

A: Complicated, and what is realistic is going to be situation-specific – best get specific advice.

Q: Can shares be offered instead of salary by agreement – what are the key risks and things to consider?

A: Yes, shares can be offered in place of **part of** a salary by agreement, but only that part of the remuneration that is over and above the minimum award or minimum wage (which will continue to be required to be paid in money).

If a comprehensive equity participation scheme has not already been established, take the time to do so properly and take advice on what will suit your circumstances as there are a range of issues including tax implications.

Q: If currently negotiating an enterprise agreement what would you recommend to future proof for this type of scenario?

A: Enterprise agreements (new ones or variations) are about what you can achieve at a particular point in time by agreement with a valid majority of employees voting (50% plus one).

A workforce will have had a deeply unsettling picture of the future painted by the current circumstances, and will have seen that conditions need to be set without an expectation that conditions will always increase in the next enterprise agreement. At the same time, if flexibility is introduced to enable situations like this to be managed in future, safeguards to give employees certainty that flexibility will be used appropriately will need to be in play.

Future-proofing EAs is a great aim, but there are limits on what can be achieved even with agreement. Any EA will be open to re-negotiation in a maximum of four years, and people have short memories. My suggestion would be to use the experience to ensure direct trusted relationships with the workforce are established and maintained, where even difficult news can be delivered – those relationships are what will deliver an EA fit for the times.

Legislative changes and JobKeeper

A: JobKeeper and enhanced flexibility under the Fair Work Act to meet the impacts of CV19 on a business are summarised in our 8 April 2020 note at this link: Breaking news – The JobKeeper legislation: What it does and doesn't say

Keep in mind that access to most of the new measures requires eligibility for the JobKeeper subsidy (to be determined according to rules issued by the Federal Treasurer, which may change).

This does not remove the capacity to rely on temporary changes to awards that are rolling out through the Fair Work Commission, or the ability to reach agreement with a workforce on a variation to an existing enterprise agreement.

Contract Responses & Strategies

Q: If force majeure notice requirements in a contract are drafted as conditions precedent to the Affected Party being able to claim relief under the force majeure clause, how strictly does the Affected Party need to comply with those notice provisions?

A: Recent Australian case law makes it clear that a party is required to comply with notice requirements as a condition precedent to a right to claim relief for a force majeure event, the party must comply strictly with those notice requirements. The courts do give effect to time bars contained in contracts and deny relief based on a failure to comply with notice requirements, even in circumstances where the time bar is considered "harsh".[i] However, in limited circumstances, a party may be able to abrogate the effect of a time bar by relying on common law or equitable principles, such as the doctrine of estoppel or waiver.

From a risk management perspective, even where it seems that notice may be out of time, it should still be given.

Q: If strict compliance with the notice provisions are required under a force majeure clause and the Affected Party fails to include all the information required in their FM notice, is the counterparty required to notify the Affected Party that it does not comply or can they remain silent?

A: No. Generally, a counterparty will not be under an obligation to notify the Affected Party that the Affected Party has failed to comply with notice requirements.

Q: What is the best way to verify force majeure events relating to foreign countries, such as foreign government travel restrictions, in circumstances where it is difficult to locate the relevant gazettes, orders or decrees?

A: It can be difficult to locate legislative instruments, gazettes, orders and decrees of foreign countries, particularly where the official language of that country is not English. Generally, the only way to find such instruments is through the official government website. In some cases, the official government media statements might also provide insight as to the relevant rules in that jurisdiction. Whether or not it is necessary to identify an individual country's own declaration of the case of a pandemic will depend on the requirements of the particular clause of the contract. In the case of COVID-19 it may be enough to refer to the WHO declaration of pandemic of 11 March 2020.

Q: Can you please provide details relating to the 'frustration' legislation and the 'SARS frustration' case?

A: The doctrine of frustration is a common law concept which discharges parties from performance of their obligations under a contract where performance of their obligations becomes impossible and radically different from the circumstances contemplated in the contract.

One of the key cases which deals with the doctrine of frustration in the context of an epidemic is *Li Ching Wing v. Xuan Yi Xiong* [2004] 1 HKLRD 754. In that case, the court found that a temporary interruption will not render a contract to be frustrated.

In Australia, the following jurisdictions have enacted legislation with respect to frustration:

1. New South Wales: *Frustrated Contracts Act 1978* (NSW)
2. Victoria: Australian *Consumer Law and Fair Trading Act 2012* (VIC)
3. South Australia: *Frustrated Contracts Act 1988* (SA)

Q: Can harsh and unreasonable actions of landlords or contract counterparties (which are actions based on government directives) constitute harsh and unconscionable conduct?

A: Pursuant to section 20 of the Australian Consumer Law,[1] a person must not, in trade or commerce, engage in conduct that is unconscionable conduct. Unconscionable conduct involves consideration of whether a party in a stronger position seeks to enforce or obtain a benefit of a vulnerable party in a manner which is unjust or not in good conscience.[ii]

Whilst some government directives are merely provided to the public as guidance or recommended practices, others directives are orders which persons are required to comply pursuant to the States or Federal Governments' emergency powers under their respective legislation. Accordingly, it is unlikely that the actions of a landlord or another party to a contract in compliance with a government direction which they are legally obliged to comply with will constitute harsh or unconscionable conduct. In respect of government directives which are not enforceable, parties might nevertheless insist on compliance with such directives in order so that they might comply with separate legal obligations, for example, work health and safety obligations.

In a landlord / tenant relationship, the mere fact that a tenant may be in a more vulnerable position and that a landlord may conduct itself in a manner to take advantage of its improved bargaining position will not necessarily signify that the landlord has engaged in unconscionable conduct. However, this will depend on the circumstances of the case.[iii]

[1] *Competition and Consumer Act 2010* (Cth) sch 2.

[i] *CMA Assets Pty Ltd formerly known as CMA Contracting Pty Ltd v John Holland [No 6]* [2015] WASC 217.

[ii] *Kakavas v Crown Melbourne Ltd* [2013] HCA 25.

[iii] *ACCC v CG Berbatis Holdings Pty Ltd* [2000] FCA 1376.

Insolvency and Director Responsibilities

Q: If a business is owed a significant sum that is overdue, with no attempted payment, causing severe financial hardship and recovery action began before the legislation was introduced, will they need to wait 6 months for any practical action to occur?

A: Under the new winding up/liquidation laws the debtor will have 6 months to respond to a statutory demand for payment of a debt issued and served on or after 25 March 2020. The new law will apply to all statutory demands served on or after the commencement.

That said, and as noted, if a debtor owes money and you as a creditor can prove the debtor is insolvent then you can still bring (threaten to bring) winding up proceedings but must prove insolvency at the hearing. Do not be surprised though if the Court puts timing hurdles in the way of a hearing to reflect the Government position. Equally, in the current climate

"cash is king" and if the debtor has no cash the old adage about extracting blood from a stone may well be apt. There has no doubt been a shift in the balance of power between debtor and creditor where the debtor, facing numerous such claims, will likely be more open in threatening to call in the liquidators.

Issues with Public Companies

Q: Is a small company (less than $2 million market cap) that is seeking equity investment from a foreign entity subject to the new FIRB rules and, if so, does it make a difference if the foreign investor will acquire less than 20% of the issued capital in the company?

A: This equity investment will require FIRB approval, regardless of the percentage shareholding being acquired in the company, its dollar value or the country of origin of the foreign entity. The money screening thresholds for approvals under the Foreign Acquisitions and Takeovers Act 1975 have been reduced to $0 for all foreign investments as from 29 March 2020. It does not matter that the acquisition will be below the 20% takeover threshold.

Q: What happens if we have already given notice of our AGM before the government's restrictions on indoor gatherings took effect?

A: Even if a company has already sent a notice of meeting, it may send shareholders supplementary instructions for online participation at the meeting. ASIC will take no action in respect of any breach of the Corporations Act which arises where a company has sent notice of meeting to be held before 31 May 2020 and at least 48 hours before the meeting is to be held, the company sends shareholders instructions for online participation at the meeting.

To view the on demand webinar, please register here.