Article Information

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Construction activity pause and EOTs

From 12:01am on Monday 19 July 2021 the NSW Government has, by way of Public Health Order prohibited the carrying out of works at construction sites in Greater Sydney including the Blue Mountains, Central Coast, Wollongong and Shellharbour (Construction Pause).

The only work permitted that is urgently required:

- to ensure the safety or security of the construction site;
- to deal with environmental risks;
- to maintain and ensure the integrity of critical plant, equipment or assets, including partially completed works, that would otherwise deteriorate;
- to receive deliveries of supplies that would otherwise deteriorate;
- to maintain public utilities;
- to ensure the safe operation of existing transport infrastructure;
- by or on behalf of NSW Health in response to the COVID-19 pandemic;
- because of an emergency.

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

The police may issue on the spot fines to individuals in a sum of $1,000. Breaches considered more serious may be referred to the court, presenting exposure to a maximum fine of $11,000 or imprisonment for 6 months for individuals. Corporations are exposed to a maximum penalty of $55,000 and a further $27,500 penalty may apply for each day the offence continues.

In addition to avoiding fines and managing the immense inconvenience and expense of a snap shut-down, contractors and subcontractors need, to the extent possible, to protect themselves from the financial consequences the construction pause will have upon their ability to complete their works by the time required under their contracts. The NSW Government has not given any indication that it will legislate an automatic extension of time to contractors and subcontractors for the Construction Pause. Force majeure only applies if and to the extent that the contract provides for it. The vast majority of construction contracts do not do so at all.

It is of course always open to a principal to agree to grant an extension of time. Contractors should write to their principals advising of the delay and requesting that the principal confirm that the time for completion will be extended by the duration of the lockdown. In many cases such an extension of time will be a matter for the principal's discretion, sometimes absolute discretion, so contractors also need to take such other action as is available to protect their interests.

Contractors must immediately understand what is required to compel an extension of time. Does their contract entitle them to an EOT in this circumstance and does it require them to provide formal notice of the delay caused by the Construction Pause to the principal or head contractor to protect their interests?

There is a huge variety of building and procurement contracts in NSW. Each has different provisions in respect of the contractor's entitlement to an extension of time and what the contractor must do to access that entitlement. Not addressing this in a timely manner firmly runs the risk of a claim for an extension of time 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.

Many contracts only permit 2 business days in which to provide the first notice. They often go on to provide that if that notice is not given within that extremely short period, then the right to claim an extension of time claim will be time-barred. Time-bars are enforceable in NSW. It is imperative that you review your current contracts as a matter of urgency to identify whether you are entitled to an extension of time and if so, what you need to do to access or preserve your right to that.

Should you have any doubt as to whether you are entitled to an extension of time for this *Construction Pause* or unsure as to what you need to do or how to protect your interests, please contact us as soon as possible, as failure to take timely action may see rights forgone.