

# **BRIEFING NOTE**

## **COVID-19 RESPONSE**

*9 March 2020*

CLAYTON UTZ

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# 1 INTRODUCTION

With over 100,000 confirmed cases of the novel coronavirus COVID-19 so far globally – and major disruptions to supply chains and people's lives – COVID-19 is shaping up to be the most significant challenge of 2020.

Whatever the final size of the outbreak is, businesses are grappling now with its impact, and need a more certain way forward. While employees' health and safety will be an obvious priority, what else should you be considering now?

Our COVID-19 Response Briefing Note helps you chart your course through these early days of the outbreak in Australia. Our experts across the firm identify the key concerns they are advising on right now – including workplace law, healthcare and safety, privacy, contractual compliance, insurance, tax and finance – so you can set your own priorities within your organisation and ensure your business continuity plan is implemented as smoothly as possible.

If you would like to understand the impact of COVID-19 on your business more deeply, please contact your usual Clayton Utz partner.

## 2 CONSUMER LAW

If you are in retail and your products are unexpectedly in high demand due to the spread of the coronavirus, you may want to adjust your pricing upwards to reflect increased demand. Ordinarily businesses are free to set their prices, and pricing for market conditions is the norm. However there are also risks for suppliers who take advantage when, in a natural disaster or emergency, demand outstrips supply, or where supply is deliberately withheld in order to provide a foundation for increased pricing.

The Australian Competition and Consumer Commission (**ACCC**) is likely to be interested in significantly increased pricing, colloquially known as "price gouging" where:

- ▶ a single, or small number of suppliers, are in the market. In circumstances where a supplier already has market power by reason of its market position and pricing is increased unilaterally in response to the market circumstances, or production reduced in order to increase price, the ACCC may be concerned about a misuse of market power;
- ▶ suppliers appear to be withholding products in concert in order to facilitate an increase in demand and therefore an increase in pricing due to scarcity of goods. Should it appear that suppliers are cooperating, whether tacitly or overtly, the ACCC may be concerned about:
  - a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition; or
  - more significantly, where those suppliers are competitors, a cartel that has the purpose of restricting output, and therefore increasing price;
- ▶ pricing is excessive to the point where it not just unfair but is "against conscience" as judged against the norms of society, recognising that those norms may change in circumstances of emergency; and
- ▶ suppliers mislead consumers about the availability of goods in order to encourage a belief of scarce supply and a willingness to pay higher prices.

These forms of conduct are prohibited under our competition and consumers laws and significant penalties may be sought by the ACCC.

### 3 CONTRACTUAL DEFAULT, FORCE MAJEURE, FRUSTRATION AND TERMINATION

The impact of COVID-19 may mean that a party is prevented or delayed from performing or complying with its contractual obligations. It may also mean that compliance with its contractual obligations will become more expensive.

Businesses should analyse their supply chains and contracts to spot vulnerabilities and whether their suppliers, or they themselves, can comply with their contractual obligations and whether they can (or should):

- ▶ suspend performance of contractual obligations;
- ▶ terminate the contract entirely;
- ▶ seek to vary the terms of the contract, including price.

Each contract and the potential course of action should be evaluated on a case-by-case base, taking into account the potential operational, financial and reputational impacts on the business. As noted in Section 7 (Insolvency) below, specialist legal advice should be sought before precipitously relying on a Force Majeure or termination for default clause, or for any alleged contractual frustration in reliance on COVID-19 related default or delay.

#### 3.1 Force majeure

There are already reports that parties to resources contracts (particularly, timber, LNG and copper) have sought force majeure relief in recent weeks. Businesses should assess their contracts to determine whether they contain force majeure provisions providing relief from the consequences of non-performance, or delayed performance, in the circumstances. Typically, a force majeure provision will relieve an affected party:

- ▶ that is prevented or delayed from performing its contractual obligations;
- ▶ due to an event or circumstance that is not within the reasonable control of the affected party;
- ▶ where the affected party is not reasonably able to prevent or overcome the event or circumstance by the exercise of due diligence.

However, a party's ability to rely on a force majeure provision depends on the terms of the relevant contract. Businesses should consider the following when reviewing force majeure provisions:

- ▶ **Is it force majeure?:** Whether COVID-19 constitutes an event of "force majeure" will depend on the definition of "force majeure" in the contract. Definitions can range from a list of specified events, which often include "epidemics", "quarantine" and "acts of God", but typically they relate to events that are beyond a party's reasonable control, cannot be prevented or overcome by the exercise of due diligence and actually cause a delay in or failure or inability to comply with contractual obligations. In most cases a lack of finances, lack of funds or the inability to borrow funds will not constitute force majeure.
- ▶ **Notices:** If COVID-19 is an event of force majeure, the party seeking relief should ensure that it complies with the terms of the contract in claiming relief. Typically, force majeure provisions require notice to be given specifying (to the extent practicable) details of the relevant event, the extent to which relevant obligations are affected and, potentially, the anticipated length of delay that will arise from it. There may also be obligations to continue to provide updated information.

- ▶ **Mitigation:** The party affected by the force majeure event is usually expressly required to use its reasonable endeavours to mitigate the effect of that event on its ability to continue to perform its obligations under the agreement.
- ▶ **Relief and termination:** Relief is typically only available for the duration of the actual delay arising out of the event of the force majeure, with termination rights able to be invoked where the affected party is prevented from performing its obligations due to a force majeure event subsisting for an "extended" period of time (that time period being dependant on the circumstances relevant to the contract).

*"Each contract and the potential course of action should be evaluated on a case-by-case base, taking into account the potential operational, financial and reputational impacts on the business."*

### 3.2 Termination, frustration and variation

If a contract does not contain a force majeure provision, or the definition of "force majeure" is not sufficiently broad to capture COVID-19, businesses should:

- ▶ review other provisions of the contract, such as any termination or variation provision, that could respond to the event or circumstances. Some contracts will include:
  - a "hardship" provision that will allow a party to terminate the contract if performance has become excessively burdensome;
  - a "termination for convenience" provision that will allow a party to terminate the contract for any reason, or no reason at all; or
  - a "variation" provision that will set out a process under which the price or other contractual terms can be varied. Variation provisions are typically found in construction contracts; and
- ▶ consider whether the contractual doctrine of frustration could apply to relieve compliance. At its most extreme, the parties may argue that the contract is frustrated altogether – that is, that without the fault of a party, the contract is incapable of being performed due to an unforeseen event (or events), resulting in the obligations under the contract being radically different from those contemplated by the parties. Establishing frustration, however, can be difficult as it does not apply to hardship. The fact that the method for performance contemplated by a contract has been affected, or the burden of performance has been increased, by an event or events occurring without fault, does not amount to frustration unless performance in accordance with the contract has become practically impossible. The doctrine of frustration is also applied within very narrow limits. For a party to succeed in claiming frustration, it must show that the parties never agreed to be bound in the fundamentally different situation that has unexpectedly emerged.

### 3.3 Non-contractual solutions

If the terms of a business' contracts and contractual doctrines are of no assistance then businesses should consider whether non-contractual commercial solutions are appropriate.

## 4 EMPLOYMENT

Businesses must undertake their own risk assessment and get specific advice on their individual circumstances, operational needs, responsibilities and legal obligations. The following is not advice but a list of issues for consideration

### 4.1 Work health and safety

#### Workers' health and safety

##### *Issue*

- ▶ Ensuring, so far as reasonably practicable the health and safety of workers.
- ▶ Managing and understanding operational impacts and balancing competing needs (for example it is not feasible to send everyone home when workers are required to provide critical services or ensure safety).
- ▶ Consideration of perception of risk, reputation, culture and mental health impacts contrasted with evidence of genuine risk of infection.

##### *Possible solutions*

#### **Management responsibilities**

- ▶ Monitor the World Health Organisation (**WHO**) and Department of Health (**DoH**) websites for updates and guidelines.
- ▶ Review risk assessment to ensure it accurately reflects what is known (or ought reasonably be known) about the hazard and assessment of risk to workers. The consequences are catastrophic, however likelihood of harm will vary significantly from workplace to workplace and needs to be continually reviewed as information changes.
- ▶ Review controls and test whether they remain effective – for example, are workers trained in PPE, is it fit for purpose? Where controls are administrative (eg. good personal hygiene), ensure that there are multiple controls such as increased cleaning services, suspension of certain activities, reducing number of people physically in the workplace etc.
- ▶ Ensure the company has a Pandemic or Infectious Diseases Plan (which may draw on an existing business continuity or crisis management plan) that is consistent with the WHO and DoH guidelines as they develop.
- ▶ Confirm the plan is disseminated to various levels of management to ensure a consistent approach is taken across the company.
- ▶ Consult with workers and unions as required.
- ▶ Consider appointing a COVID-19 risk manager who can be the point of contact for workers to report to if they or someone they are in frequent contact with is diagnosed with, or exposed to, COVID-19.
- ▶ Brief and educate workplace health and safety officers on each floor of what to look out for and

## Workers' health and safety

what to report to the risk officer.

- ▶ Support supervisors and remind them of the importance of not overreacting to situations in the workplace in order to prevent panic among the workforce.
- ▶ Review business continuity insurance and any other relevant insurance policies and know your reporting obligations.

### Communications with workers

- ▶ Provide workers with regular updates (through various forms of communication eg. email, SMS, signs around the office).
- ▶ Educate workers on the measures and updates issued by authorities (particularly the WHO and DoH).
- ▶ Make sure workers know that they are required to report any increased risk of infection eg. if they have been in contact with a person diagnosed, if they have travelled to a country identified as high risk etc.
- ▶ Ensure communications are designed to encourage a calm and supportive environment rather than encouraging panic or discrimination.
- ▶ Contact any workers who are on secondment and ensure their safety conditions are up to standard.
- ▶ Where workers are working from home ensure that they have a safe place to work and clearly communicate expectations regarding application of workplace policies and procedures during flexible working arrangements, including the obligation not to put themselves at risk.
- ▶ Regularly liaise with other companies who share a workplace with you / building management to ensure relevant information is shared accordingly.

### Work arrangements

- ▶ If possible, encourage workers to work flexibly (eg. workers can work from home and still dial in for meetings or send work to be reviewed via email). As part of this, employers should ensure that workers are equipped to work remotely and have a safe environment in which to do so.
- ▶ Encourage workers to self-report and self-isolate for the recommended 14 days if required.

### Travel / group interaction arrangements

- ▶ Consider the need to suspend unnecessary work-related interstate and international business trips, particularly in relation to virus hotspots.
- ▶ Facilitate the avoidance of public transport, especially during peak travel times (eg. allow workers to arrive late or leave early to avoid rush hour and/or allow workers to utilise spare carparks).
- ▶ Replace face-to-face meetings with clients with videoconferences to reduce the number of visitors coming through the office.
- ▶ Postpone any large gatherings, meetings or conferences, especially if external visitors are invited. If you do assess the risks and decide to hold the event, ensure that hand sanitiser is readily available to everyone and that attendees are encouraged to not shake hands.

## Workers' health and safety

### Some options for practical safety tips

- ▶ Remove unpackaged food from the office kitchens.
- ▶ Place antibacterial gel throughout the office for workers to use, for example at the entry so workers can use before entering the building/floor and in common areas (eg. kitchens, reception, bathrooms).
- ▶ Display posters encouraging workers to regularly wash their hands throughout the office in line with the WHO guidelines.
- ▶ Reiterate good coughing and sneezing etiquette/hygiene.
- ▶ Provide ample supply of soap, paper towels and tissues for workers to use.
- ▶ Provide closed bins so workers can hygienically dispose of tissues.
- ▶ Implement a more frequent cleaning schedule for common areas and utilise strong cleaning agents.
- ▶ Regularly disinfect desks, tables, telephones, keyboards and other surfaces.
- ▶ Encourage workers not to shake hands.
- ▶ Isolate areas of the workplace where a worker who potentially has COVID-19 has been and ensure the area is thoroughly disinfected.

### Sick workers and leave

- ▶ Encourage workers who have mild respiratory symptoms (coughing, sneezing, shortness of breath) and/or a mild temperature to stay home (or work from home).
- ▶ Educate workers on their leave entitlements and ability access personal leave balances if they are ill, self-isolating, concerned they have been exposed or will, or are caring for an ill family member.
- ▶ Ensure workers who have returned from a virus hotspot self-isolate and take further leave or work from home if possible.

## Worker's health and safety when working from home

### *Issue*

- ▶ Balancing the obligations to workers health with business demands

### *Possible solutions*

- ▶ If working from home is not a usual or accepted practice undertake an assessment of risks arising from work from home.
- ▶ If not appropriate consider use of special leave.
- ▶ Pre-emptively provide workers with the appropriate equipment so they can safely and effectively work from home.

## Worker's health and safety when working from home

- ▶ Ensure workers are educated about proper ergonomic practices.
- ▶ Provide frequent updates and communications regarding the status and impact of COVID-19.
- ▶ Communicate expectations regarding application of policies and procedures.

## Health and safety of others

### *Issue*

- ▶ Ensuring, so far as reasonably practicable, the health and safety of other persons

### *Possible solutions*

- ▶ Monitor the World Health Organisation (**WHO**) and Department of Health (**DoH**) websites for updates and guidelines.
- ▶ Review your risk assessment to ensure it accurately reflects what is known (or ought reasonably be known) about the hazard and assessment of risk to other persons who may be put at risk by your business or undertaking. The consequences are catastrophic, however likelihood of harm will vary significantly for each business and the level of interaction they have with the public. Needs to be continually reviewed as information changes.
- ▶ Review controls and test whether they remain effective – for example can you continue to offer all services? are workers complying with controls? what steps are other businesses taking and are they putting your business at increased risk?
- ▶ Ensure the company has a Pandemic or Infectious Diseases Plan (which may draw on an existing business continuity or crisis management plan) that is consistent with the WHO and DoH guidelines as they develop and considers risks to persons outside the workplace.
- ▶ Confirm the plan is disseminated to various levels of management to ensure a consistent approach is taken across the company.
- ▶ Consult, co-operate and co-ordinate where practicable with customers, suppliers, workplaces with shared areas, building management, service providers (eg. cleaners, security, deliveries etc).

## Health directives

### *Issue*

- ▶ Ensure compliance with any health directives issued

### *Possible solutions*

- ▶ Ensure compliance with each State's Health Department directions and reporting obligations. For

## Health directives

example, in Queensland this means that all individuals must self-quarantine for 14 days from the date they have had close contact with someone who has a confirmed case of COVID-19 or travelling from China or Iran. If they experience any COVID-19 symptoms they must seek immediate attention.

- ▶ Ensure compliance with each State's Workplace Health and Safety Department's directions and guidelines. In Queensland, this means ensuring employees do not attend the workplace for 14 days if they have had close contact with someone who has a confirmed case of COVID-19 or has travelled from an overseas destination considered high risk by Queensland Health. In either case, employees should notify their employers and stay away from work. In such cases, employers can direct employees to do so.

## Mental health

### *Issue*

- ▶ Significant potential for increased risk to mental health of workers including those exposed, those working with risk of exposure and isolated workers.

### *Possible solutions*

- ▶ Review risk assessment and consider appropriate controls for mental health risks.
- ▶ Engage with an Employee Assistance Provider (**EAP**) and seek advice on available assistance.
- ▶ Increase access to EAP and communicate options – think about onsite visits, phone access, supervisor support.
- ▶ Remind employees of codes of conduct and enforce compliance.
- ▶ Consider increased risk of mental health issues arising from workers working from home and increased isolation from workplace.
- ▶ Where employees are required to stand down or work from home for an extended period, consider high risk and vulnerable individuals and develop management plans.

### 4.3 Employee entitlements

#### Legislation and contracts

##### Issue

- ▶ Need to comply with contractual and statutory minimums

##### Possible solutions

- ▶ Review entitlements to pay including leave policies, Modern Awards, Fair Work Act and contracts of employment and, in particular, provisions relating to paid time off and sick leave and any other custom and practice.
- ▶ The Fair Work Act includes an ability to cease making payments to an employee during a period of stand down as a result of (amongst other things) "a stoppage of work for any cause for which the employer cannot reasonably be held responsible".
- ▶ Care will need to be taken interpreting the application of this provision to each business and the circumstances of their stand down (eg. a Health Directive to isolate workers compared with decision made out of an abundance of caution).
- ▶ Modern Awards and Enterprise Agreement may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example notice, consultation, time and pay)

#### Making ex-gratia payments

##### Issue

- ▶ Company may decide to provide special leave or other payments
- ▶ Policies should reflect the current social and economic climate and provide practical response mechanisms

##### Possible solutions

- ▶ Where a decision is made to pay workers if a business is shut down on an ex-gratia basis – make clear the basis on which workers are to be paid, including whether this will be base pay, full pay or some combination and the period of time. Reassess ongoing pay after period of time identified.
- ▶ Be cautious of the potential for escalation – eg. what is viable for a small number of employees for a short period of time may set a precedent for all workers which could extend to the entire workforce for lengthy periods.
- ▶ Communicate clearly entitlements and, where payments are ex-gratia, the support provided.
- ▶ The decision to provide pay while stood down will obviously vary based on position and ability to perform tasks remotely and any legal obligations.
- ▶ Policies that give workers confidence that they will not be penalised and can afford to take sick

## Making ex-gratia payments

leave are an important tool in encouraging self-reporting and reducing potential exposure.

- ▶ Decide and circulate clear policies on this now and communicate about these with workers – communications regarding policies should make clear that it is a complex and evolving situation and that conditions will continue to be reviewed.
- ▶ Review and promote your flexible work policies that permit workers to stay home to care for a sick family member. Be aware that more workers may need to stay at home to care for sick children or other sick family members than is usual.

## Governance of employment relationships

### *Issue*

- ▶ Consider impact on financial performance to which managers' bonuses are linked
- ▶ Effects on fixed-term contracts if business is suspended

### *Possible solutions*

#### **Review documentation**

- ▶ Review leave / work from home policies to ensure that they are appropriate and consistent with the company's approach. Ensure that workers are aware of their options in relation to personal leave or carer's leave.
- ▶ Review contracts in place to determine employer/worker rights in standing down workers.

#### **Rights and responsibilities**

- ▶ Employers can issue lawful directions to workers, directing them not to attend work if they have been exposed to or someone they are in regular/close contact with has been exposed to COVID-19. In such instances, workers are likely entitled to remuneration, however, all relevant documentation should be reviewed.
- ▶ Employers are likely also to be able to direct workers to attend medical examinations and obtain health clearances from their doctors. However, again, all relevant documentation should be reviewed before doing this.
- ▶ Ensure workers are aware of the different leave options open to them including sick leave, carer's leave and annual leave. Consider whether the company is prepared to offer advanced leave if workers do not have any accrued sick leave available.
- ▶ Ensure that leave entitlements are consistent with company policy across different departments and teams. As part of this, regular leave application and approval processes should be used.
- ▶ Encourage casual workers to self-report when they are ill but manage carefully as they will not have entitlements to use, and this lack may discourage them from wanting to take precautions following exposure to COVID-19.
- ▶ If child care centres / schools are closed down (as they have been internationally) consider the leave / work from home options available to caregivers. If such individuals consider that they are

## Governance of employment relationships

treated unfairly or there are unfair requirements in light of their caregiving responsibilities, this may lead to the risk of a discrimination claim.

### Privacy

- ▶ Consider whether there are any concerns / additional obligations with respect to privacy law given companies may be holding sensitive information.
- ▶ Avoid disclosing personal information beyond what is necessary.
- ▶ Avoid disclosing information including names of infected workers or those that may have been exposed / are self-isolating.
- ▶ Take steps to ensure health data remains anonymous.
- ▶ Obtain any relevant worker's consent before circulating any personal information.
- ▶ Ensure personal information is stored safely and correctly.
  - See Section 5 (Privacy) below for more information

### Business as usual

- ▶ Consider freezing performance indicators (if linked to business performance or sales) for period of time where performance will be significantly impacted by COVID-19

## Discrimination

### Issue

- ▶ Risk of adverse action and discrimination claims arising from perception of management actions

### Possible solutions

- ▶ Ensure mandated isolation decisions are medically required and supported by expert advice
- ▶ **Document all decision-making** processes and ensure proper processes and company policy is complied with
- ▶ Take particular care and **seek advice** where decision may be perceived to be because of **race, age, disability, ethnic origin, parental responsibility** or some other prohibited reason.
- ▶ Ensure **workers are treated consistently** and with parity where appropriate.
- ▶ Ensure workers who access rights – including the taking of sick leave, reporting of workplace risks and complaints – are protected from reprisal action.
- ▶ Consider increased risks of bullying, harassment, reprisal action and victimisation and ensure management is supported in dealing with it proactively.

## Workers' compensation<sup>1, 2</sup>

### *Issue*

- ▶ Are employees entitled to workers' compensation entitlements?

### *Possible solutions*

- ▶ An employee who has an illness arising from COVID19 may be entitled to workers' compensation, depending on how they contracted the virus.
- ▶ The test is different from State to State but generally, to be covered, the employee's employment must have significantly contributed to the employee contracting the virus.
- ▶ This may be difficult to establish and may be difficult to evidence which is why clear records need to be kept of any investigations and actions into people with identified exposure arising from or at the workplace.
- ▶ Where an employee's employment puts them at greater risk of contracting the virus the significant contribution test may be easier to meet which is why risk measures should be adopted as identified above.
- ▶ These types of situations include:
  - work related travel to an area with a known viral outbreak;
  - work activities that require engagement or interaction with people who have contracted the virus; and
  - work activities that contravene Department of Health recommendations.
- ▶ In addition, employees may claim illness or injury to their mental health arising from stressors caused by the risk of exposure to the virus or management action taken in relation to the virus. A psychological illness or injury arising from reasonable management action taken in a reasonable way will not generally form a basis for a valid claim.
- ▶ Every matter will need to be considered on its individual merits, having regard to the individual circumstances and evidence in relation to the claim.
- ▶ An employer may have notification obligations in relation to identified claims.

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<sup>1</sup> This section deals with workers compensation claims by employees, note in some circumstances contractors may also have access to workers compensation claims.

<sup>2</sup> Workers' compensation laws vary significantly from State to State.

## 5 PRIVACY

This section considers the key privacy issues arising from COVID-19 risks for private sector organisations regulated under the Privacy Act 1988 (Cth).<sup>3</sup>

COVID-19 raises a host of privacy issues that organisations will need to consider in managing their response to it. Those issues primarily concern the organisation's collection, use and disclosure of personal information (including sensitive information such as health information) of its employees, other staff members and their family members. In particular, issues will arise when organisations seek information from staff (and subsequently use / disclose that information) to address COVID-19 concerns, such as information about their travel plans and health status. Organisations will need to ensure that they comply with their obligations under the Privacy Act (including the Australian Privacy Principles (**APPs**)) in relation to the handling of such information.

Key privacy considerations regarding an organisation's response to COVID-19 include those set out below.

### 5.1 What is personal information and sensitive information?

The Privacy Act regulates the handling of "personal information", which is "information or an opinion about an identified individual, or an individual who is reasonably identifiable". The Privacy Act imposes stronger protections for "sensitive information", which includes "health information" about an individual (ie. information, or an opinion, about the health – including an illness, disability or injury – of an individual).

These provisions mean that information about, for example, whether an individual is or may be infected with COVID-19 will be sensitive information. Related information about the individual's symptoms, treatment or general health status will usually also be sensitive information.

### 5.2 What special provisions are there for employers?

The Privacy Act contains an exemption in relation to "employee records". The exemption applies to an act done, or a practice engaged in, by an organisation that is directly related to:

- ▶ a current or former employment relationship between the employer and the individual; and
- ▶ an employee record held by the organisation and relating to the individual.

An "employee record" is "a record of personal information relating to the employment of [an] employee" and specifically includes "health information about the employee".

The exemption applies only in respect of an employment relationship; it does not apply to independent contractors or other third parties. Where the employee records exemption applies, organisations are not required to comply with the requirements of the Privacy Act in respect of an act or practice regarding the information. The consequences of information collected being an "employee record" is that the organisation would be exempt from complying with the obligations contained in the APPs, such that, there will be no privacy implications as a result of it collecting, using and disclosing the personal information for purposes associated with the organisation's COVID-19 response.

### 5.3 Collection of personal information, including sensitive information

An organisation generally must not collect personal information unless the information is "reasonably necessary" for one or more of its functions or activities. In relation to sensitive information (such as health information) an organisation must not (unless an exception applies) collect such information unless it has

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<sup>3</sup> Broadly similar provisions apply to Commonwealth Government agencies under the Privacy Act and to State and Territory Government agencies under State and Territory laws, neither of which are considered in this section.

This section also does not discuss those provisions that specifically concern organisations and agencies that provide health services.

the consent of the individual. An organisation may also collect sensitive information in circumstances including:

- ▶ where the collection is required or authorised under Australian law; or
- ▶ where a "permitted general situation" exists in relation to the collection of the information. Relevantly, a permitted general situation will exist where:
  - it is unreasonable or impracticable for an organisation to obtain an individual's consent to the collection, use or disclosure; and
  - the organisation reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety.

If an organisation is unable to obtain an individual's consent to collect their sensitive information, it will likely want to consider whether one of the above circumstances applies.

#### **5.4 Use and disclosure of personal information collected**

Organisations may seek to use and/or disclose personal information (including sensitive information) collected in relation to a COVID-19 response for a number of reasons, including to devise and/or manage an appropriate response to an outbreak or possible outbreak; to disclose information to other staff members, to health authorities and/or other third parties. In so doing, organisations will need to be aware of the circumstances in which it can legitimately use or disclose the information collected.

Relevantly, if the purpose of collection of an individual's personal information is to manage an appropriate response to the risk of COVID-19 exposure within the organisation, then use / disclosure of the information for that purpose would be a "primary purpose" of collection and therefore is permitted. Organisations will not be able to use or disclose the personal information (including sensitive information) for another purpose (the secondary purpose), unless:

- ▶ the individual has consented to the use or disclosure;
- ▶ the individual would reasonably expect the entity to use or disclose the information for the secondary purpose, and the secondary purpose is related to the primary purpose (and for sensitive information, "directly related" to the primary purpose);
- ▶ the use or disclosure is required or authorised by Australian law; or
- ▶ a "permitted general situation" exists in relation to the use or disclosure of the information (as discussed above).

## 6 FINANCE

Material adverse change clauses (**MAC clauses**) are frequently used in public and private company finance transactions. They are contractual attempts to allocate the risks to a lender arising from unexpected events that may significantly impact on a borrower's business and, consequently, its ability to repay the loan. Whether an event such as COVID-19 could be considered to result in a material adverse change (**MAC**) for a particular borrower would require an analysis of the financial impact of that event on the borrower, and an analysis of the particular MAC clause.

A sample definition of a MAC might be:

“a material adverse effect on:

- (a) the business, operation, property, condition (financial or otherwise) or prospects of any Obligor;
- (b) the ability of any Obligor to perform its obligations under the Finance Documents”

Depending on the transaction in question and the nature and form of the clause, MAC clauses may be structured:

- ▶ so as to result in a default, which triggers an obligation to repay the financial accommodation; or
- ▶ so as to entitle the lender to refuse to make the initial advance or further advances.

Reliance by a lender on a MAC clause can be difficult for lenders and create risk for the lender. MAC clauses are generally construed quite strictly because of the potential for damage that may result from calling a MAC event without proper justification, potentially resulting in a borrower being unable to meet its obligations for which the financing was required or even sending a borrower into insolvency.

*“What is “materially adverse”, and when it is justified to call such an event, can vary greatly from borrower to borrower and will depend greatly on the circumstances in which each individual borrower finds itself.”*

By way of example, in *Grupo Hotelero Urvasco SA v Carey Value Added SL* [2013] EWHC 1039, the English High Court held that in order to be “materially adverse”, the change needs to “significantly” affect the borrower's ability to perform its obligations under the loan documents, in particular its ability to repay the loan. The Court emphasised “significantly”, stating that any other interpretation may allow the lender to call a default or suspend lending when the borrower's financial condition does not fully justify it, propelling the borrower into insolvency.

What is “materially adverse”, and when it is justified to call such an event, can vary greatly from borrower to borrower and will depend greatly on the circumstances in which each individual borrower finds itself. It also depends on the content of the MAC clause, which must be individually considered in each case. Looking at the above clause, for example, the word “prospects” is not always included. If it is included, then it would be easier for a lender to look to the impact of the event in future periods; without it, a lender would typically need to focus on the impact the event had already had. In each case though, a lender which had already advanced money might adopt the less risky position of waiting to see whether the actual outcome of the event is a breach of an obligation under the financing. A lender which only had a future commitment to lend money (for example for a transaction) might adopt a view that there had been a sufficient adverse change so as to warrant refusing to risk any new money with the borrower.

As an aside, it is worth noting that “force majeure” is not typically a defence for a borrower failing to satisfy its obligations or meet its financial covenants under its financing arrangements.

## 7 INSOLVENCY

Given the impact of COVID-19 on supply chains, the workforce, the operations of Government, and the economy as a whole, the casualties will inevitably include businesses as well as individuals. While the full impact has yet to be felt, there are already reported cases of businesses citing COVID-19 as the cause of, or a significant contributing factor to, their insolvency (eg. Flybe Limited, which entered administration in the UK on 5 March 2020, and Valeritas Holdings Inc. which filed for Chapter 11 in the US on 9 February 2020).

Some of the issues which lenders will need to consider are addressed above in Finance.

For borrowers COVID-19 may have implications in relation to financial and information covenants in loan facility documentation, as well as (as discussed above in Section 6 (Finance)) potential MAC triggers. Early engagement and transparency with lenders and key contractual counterparties will be essential. While the duration of financial distress and interruption may be difficult to gauge, refinance or further funds may be necessary, forbearances and/or standstills on enforcement may need to be negotiated and a conservative but achievable recovery plan established. For directors of Australian companies, the "safe harbour" regime established under recent amendments to the Corporations Act may protect them from exposure to personal liability for insolvent trading by the company. To obtain such protection, the company must be eligible for safe harbour (in the sense of having satisfied the statutory prerequisites) and its directors must develop "one or more courses of action that are reasonably likely to lead to a better outcome for the company" than an immediate insolvency appointment, ideally with the assistance of a qualified restructuring or turnaround adviser.

For contractual counterparties, there is, as identified, the counterparty's inability to perform contractual obligations and the risk of default. Rights and notice periods under existing contracts should be assessed and rights reserved where appropriate. Commercial contracts will generally include "ipso facto" clauses, being clauses which give a party a right to immediately terminate the contract upon the occurrence of an "event of default" or an "insolvency event" of their contractual counterparty. The impact of the Commonwealth Government's 2018 ipso facto reforms also needs to be considered, as, for certain contracts entered into on or after 1 July 2018, a stay may operate on the termination of a contract by reason (only) of a counterparty's external administration or receivership (or scheme proposal) or in substance, the financial condition of the counterparty. Specialist legal advice should be sought before precipitously relying on a force majeure or termination for default clause, or for any alleged contractual frustration in reliance on COVID-19 related default or delay.

## 8 INSURANCE

### 8.1 Potential cover

The virus will impact different industries in different ways, and there will be a range of insurance issues to consider.

- ▶ **Operations:** An organisation may be impacted by disruption in supply chains, employee absenteeism and operational impacts. This may result in loss of revenue. It is common to have business interruption cover as part of a property insurance policy. However, that is usually only available where there has been loss or damage to physical assets. It is possible that loss of revenue due to these impacts will not be covered under the business interruption insurance. It will be important to closely review policy wordings; there are sometimes extensions of cover which pick up closure of a property location on the order of a public authority due to infectious disease.
- ▶ **Events:** If an event is cancelled, the organisation may have taken out event insurance. Those bespoke policies should be considered for cover in circumstances of this nature.
- ▶ **Travel:** There may be impact on travel plans, including cancellation of intended travel and associated loss of bookings. While cancellation costs can be covered under travel insurance policies, care should be taken to understand whether there are exclusions that might be triggered by the impact of a virus. The policy is unlikely to provide cover where a trip has been cancelled voluntarily and out of precaution only, rather than due to official restrictions on travel. Furthermore, some insurers may already have given notice that they will not cover losses arising from travel impacted by the virus on the basis that it is a known risk.
- ▶ **Debts:** The risk of non-payment of a debt may be covered under credit insurance. If supply chains are disrupted and payments not made, organisations with credit insurance policies may want to consider their insurance position. However the cover may not be available if the debtor is excused from payment by, for example, a force majeure clause.

### 8.2 Practical steps

The first step is to identify the impact on the business – in particular, what loss may be suffered or liability may arise from claims against the organisation – and review your insurance policies to understand whether they might cover those impacts.

If there may be cover available, you should notify the relevant insurers and, where appropriate, make formal claims. There may also be obligations in insurance policies to take steps to mitigate loss.

Policy terms and conditions should be carefully reviewed.

The six priorities for an insured are:

- ▶ **Review:** Review your insurance policy to confirm your insurance cover and the policy conditions; your broker will be able to provide you with a copy of your policy if you do not have access to this document.
- ▶ **Notify:** Inform your insurer (or broker) that you will be making a claim, although do not be pressured into estimating the amount of your claim at this stage rather ask your insurer to waive any requirement that the finalised claim be lodged within an allotted period of time, as claims with a business interruption element can be complicated and quantum figures often cannot be finalised for a number of months.
- ▶ **Record:** Keep a diary with a chronology of events: what happened; what you did in respect of stabilising the impact and what you did to reopen your business. Keep a diary note of the time

spent by you and any staff, as a consequence of the event showing hours spent, the date incurred along with a description of what was done.

- ▶ **Mitigate:** You are entitled to obtain compensation for your loss in accordance with the terms of your insurance policy, although insurers will expect you to mitigate your loss where possible (act as the “prudent uninsured”).
- ▶ **Cash:** Determine the amount of cash required to finance the business during any shutdown period. Consider negotiating an interim payment in respect of non-contentious items, ensuring you reserve the right to make further claims and/or adjust existing claims at a later date.
- ▶ **Costs:** Consider how your operations have changed since the event and collate all costs as a consequence of the event (ie. open a separate general ledger code) and keep scanned copies of the relevant invoices.

## 9 ENVIRONMENTAL MANAGEMENT AND COMPLIANCE PREPAREDNESS

When COVID-19 impacts and operations may be disrupted by illness and/or self-isolation, steps should be taken to ensure that there is a continuity plan for meeting any environmental and compliance obligations. As part of preparedness for disruptions, contingency plans should consider the ability of a company to:

- ▶ comply with any environmental conditions;
- ▶ meet environmental monitoring obligations;
- ▶ meet environmental reporting obligations (whether because of conditions or statute); and
- ▶ ensure that sites can continue to operate in compliance with environmental conditions and so as to not cause environmental harm, in the event that staff numbers are either reduced or entirely depleted.

Contingency measures that should be considered include:

- ▶ automation of monitoring systems where possible;
- ▶ testing of automated systems to ensure reliability;
- ▶ training of additional staff on roles that may have significant environmental performance functions;
- ▶ remote monitoring and management of site controls;
- ▶ ensuring that sites are left in a safe and shut down condition where possible, in the event that staff are unable to attend at site with little or no notice;
- ▶ clear roles and responsibilities for the Contingency Response Team;
- ▶ a timeline for internal responses and accountability;
- ▶ a communication protocol, including internal reporting obligations;
- ▶ procedures to ensure the environmental monitoring and reporting obligations of the organisation are met; and
- ▶ procedures for environmental incident response (including statutory notification obligations and clean-up) in the absence of employees responsible for implementing environmental management and incident response plans.

## 10 EDUCATION – SCHOOLS & UNIVERSITIES

Given the close proximity in which students at schools and universities spend the majority of their time (eg. in lectures/tutorials, lessons, sporting fixtures), schools and universities should put in place policies and guidance of how to prevent the potential spread of COVID-19 amongst its students and staff in advance of any suspected cases (similar guidance (where relevant) also applies to early childhood centres).

Such guidance should be provided as soon as possible and should include:

- ▶ **Travel:** requirements that students and staff who have travelled through China or Iran (since 1 March 2020) or South Korea (5 March 2020) self-isolate themselves for 14 days after they left those countries.
- ▶ **Contact:** requirements that students and staff who have been in close contact with a confirmed (and ideally suspected) case of COVID-19 also self-isolate.
- ▶ **Self-isolation:** information for the students and staff about what self-isolation means and should include the need not to attend public places or see any visitors in their own place of residence (other than people they live with). It is preferable that anyone in self-isolation arrange for friends or family members that are not required to self-isolate to shop for food and necessities. If this is not possible, a surgical mask should be worn when outside of their place of residence. For schools in particular, guidance should also include a suggestion parents also self-isolate if the travel or contact requirements applies to them.
- ▶ **Notification:** guidance from the school or university about what the preferred means of notification of self-isolation to the relevant person at the school or university should be and timeframes for that notification.
- ▶ **Alternative methods of learning:** given the importance of self-isolation and the fact that the majority of people who are self-isolating may not actually be unwell, it is very important that schools and universities arrange for their students to be able to access the necessary educational material that they would have been able to obtain if they were able to go to school or university (eg. online lecture recordings, soft copies of lecture materials, lectures or lessons available to be accessed by video or audio conferencing facilities).
- ▶ **Prevention:** the standard information about preventing the spread of COVID-19 by practising good hygiene.

Other issues that schools and universities should consider are:

- ▶ **Deadlines:** universities and schools should act reasonably when receiving requests for submission deadlines to be extended by anyone in self-isolation.
- ▶ **Assessments:** universities and schools should start thinking of alternative methods of holding assessments (eg. exams) to avoid the need for lots of students and staff to gather in the same place.
- ▶ **Prevention:** the standard information about preventing the spread of COVID-19 by practising good hygiene should be displayed around the buildings which make up the schools and universities. In order to prevent further spread, schools and universities should consider postponing or cancelling events where there will be lots of people present.

- ▶ **Support:** it is recommended that schools and universities set up a contact number or email address to provide support to the friends and families of people affected by the virus and also for those who are self-isolating.

Schools and universities are required to notify NSW Health and Education if they have a confirmed case of COVID-19 amongst their staff or students.

## 11 AIRPORTS

As with all ports, airports are obviously a key risk point in relation to the spread of the COVID-19 – through the virus' initial transmission via international services, through its further spread via domestic services and simply because a significant number of people pass through and use airport facilities each day.

In addition to clear issues around border control at airports (including what sort of screening should be implemented at border control points and the interaction with relevant Commonwealth border control agencies), other matters to consider in an airport context include, amongst others:

- ▶ what obligations arise, and what practical arrangements can be put in place, in relation to public-facing employees and contractors engaged in work at the airport (including security screening authorities, ground handlers and agents);
- ▶ whether there is a need to discuss arrangements and proposed measures with relevant airlines, and if so where responsibilities sit as between airlines and the airport in these circumstances;
- ▶ how the ban on certain flights, and the reduction in passenger numbers, can affect airline pricing arrangements and future impacts on capital investment in airports;
- ▶ what rights, liabilities and obligations arise in relation to the various commercial, retail and other tenants of the airport;
- ▶ what is the scope of any liability the airport may have to third parties (if any) who use airport facilities, and perhaps more importantly what proactive steps should the airport take to advise the public on risks associated with potential transmission;
- ▶ whether are there heightened obligations on airport operators to maintain various facilities within the terminal or to provide additional facilities (such as hand sanitising facilities or additional health facilities);
- ▶ the impact on airport operations as a result of key staff being potentially increasingly absent from workplaces as a result of the virus or as a precautionary measure;
- ▶ the effect that business disruption may have on current and proposed airport developments;
- ▶ the application of State Work Health and Safety laws, requirements and enforcement agencies in relation to airports on Commonwealth land;
- ▶ the role of, and the co-ordination of, the Department of Home Affairs, CASA, the AFP and other relevant agencies at airports during this period; and
- ▶ the effectiveness of previous border control measures at ports during both the bird flu and SARS epidemics and the key lessons learned from these events.

## **12 TAXATION**

Businesses should monitor whether they are eligible for any relief or deferral measures afforded by revenue authorities — for example, the Queensland Government has provided the opportunity for payroll tax payment and filing deferrals (subject to successful application) for certain businesses that have been affected by the COVID-19 deferrals. The deferral will be backdated to when the travel ban started on 1 February 2020. Businesses with an annual Australian wage bill of up to \$6.5m will be able to self-assess if they have been impacted. The measure will be made available to small and medium business across all sectors.

In the absence of COVID-19 specific tax deferral measures, businesses may also consider approaching revenue authorities with individual requests for discretionary tax deferrals on the basis of hardship.

On the back of a recent interest rate cut (0.25%) by the Reserve Bank of Australia, it is anticipated that in the next few weeks the Federal Government will release details of a COVID-19 stimulus package which will likely include tax related measures designed to stimulate investment and growth. Businesses should monitor announcements in this regard to determine whether they are eligible for any tax concessions which might be introduced.

## 13 DATA

Following any crisis event, boards, executives and steering committees alike will need to obtain as much timely information as possible. Information data sources are often decentralised and data may be located in legacy systems or at various physical sites. It is important to determine not only where the information is located, but also how various data sources reconcile and interact with each other. In response organisations should locate, catalogue, preserve and quarantine that information in a timely manner.

Steps you can undertake to map your data include:

- ▶ **Briefing meetings:** meet with senior management to understand the facts and identify at a high level, the systems that will need to be mapped and the nominated experts and end users who are to be interviewed for each system.
- ▶ **Conduct interviews:** meeting with your nominated experts and end users to gain an understanding of your core systems, processes and procedures as well as data points. If you staff or systems are highly decentralised you may have to send out a questionnaire to a wider group of staff and contractors.
- ▶ **Preserve:** if data has been identified as critical and may be required to be used in a litigious matter in the future you should take an electronic snapshot of that data at a point in time.
- ▶ **Reporting:** prepare a Data Mapping Audit Report including a summary of core systems, ranking system importance, outlining risks and providing a recommendation of the next steps to be taken regarding collection methodology, and undertake follow-up meeting to discuss findings and recommended next steps set out in the report.

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