



## WHITE PAPER

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### Coronavirus: Potential Implications for Major Construction and Infrastructure Projects in Australia

The novel coronavirus (COVID-19) outbreak has spread to dozens of countries, infecting tens of thousands of people (with a mounting number of deaths) and causing significant disruption to public life and business. On 11 March 2020, the Director-General of the World Health Organization declared COVID-19 a pandemic, recognized the alarming levels of spread and severity of COVID-19 around the world and called on countries to take urgent and aggressive action. In addition to the humanitarian and public health dimensions of the outbreak, COVID-19 imposes a further layer of risk on major construction and infrastructure projects in Australia that will inevitably impact contractors and principals alike.

Participants in projects in Australia should carefully consider the types of risks posed by COVID-19, the legal and regulatory framework, including the provisions of their major contracts, and implement strategies to mitigate or minimise the potential of COVID-19 to cause significant delay, disruption and cost overrun to their project. This needs to be done on a continuous basis given the escalating impact of COVID-19 and the evolving nature of the responses from the Australian Commonwealth and State governments.

This *White Paper* provides an overview of some of the COVID-19-related risks that major projects in Australia face, legal and regulatory considerations and key steps that participants should consider in order to proactively manage the risks to protect their commercial positions and the success of their projects.

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There are already many risks that need to be managed on projects in Australia, but the onset of the coronavirus (COVID-19) adds an additional layer of risk that will inevitably impact contractors and principals alike. In addition to the obvious human impacts, it has the potential to cause significant delay, disruption and cost overrun in a number of ways.

This *White Paper* provides an overview of some of the COVID-19-related risks that major projects in Australia face and key steps that participants should consider. In particular, it addresses:

1. Identifying and understanding the types of risks involved so that the project can manage those risks and prevent or mitigate any associated delay, disruption and costs;
2. Understanding the legal framework involved, including the contractual provisions and allocation of risk, as well as other applicable principles of law and regulatory frameworks, so that parties can comply with contract requirements and protect their commercial position; and
3. Steps that participants can consider in order to proactively manage the risks.

## **RISKS AND EVENTS THAT MAY AFFECT YOUR PROJECT**

There are a variety of ways in which COVID-19 may affect projects in Australia. Some examples include:

- shortages of project staff and labour arising as a result of quarantine, self-isolation or company- or government-imposed restrictions on movement (both within Australia and internationally) to minimise the risk of contracting or spreading COVID-19 during flights or in airports. Strict travel restrictions and mandatory self-isolation periods have already been implemented by the Australian and State governments, including:
  - restricting entry into Australia to Australian citizens and permanent residents;
  - mandatory 14-day self-isolation for all international travelers to Australia; and
  - mandatory 14-day self-isolation for all domestic travelers to the states/territories of Western Australia, Tasmania, Northern Territory and South Australia;

- delay in design or the inspection of materials or equipment caused by the impact of COVID-19 on engineering and quality assurance teams having been quarantined or placed in self-isolation to minimise the risk of contracting or spreading COVID-19 or following outbreaks;
- access to site or the project's home office being closed or restricted as a result of measures to contain COVID-19 (this will affect projects more than other businesses with the ability to work 'remotely'). The Australian and State governments have imposed restrictions on the opening of "non-essential" social facilities, including pubs, hotels, gyms, entertainment venues, restaurants and cafes and places of worship. It is possible that additional restrictions may be imposed on other businesses, including construction or construction-related services, in the coming weeks and months;
- delay of the importation or transportation of plant, equipment and materials due to supply chain interruption caused by the direct impact of COVID-19 or consequential restrictions imposed by a government;
- the insolvency of contractors, suppliers, designers or others in the procurement chain caused by COVID-19-related business disruption; and
- being prevented from undertaking the work because of action by a government in response to COVID-19.

Decisions by parties to mitigate the risk posed by COVID-19 to its employees may be an area of controversy and uncertainty for principals, contractors and subcontractors. By way of hypothetical example, a contractor for an infrastructure project in a major city may decide to stand down the entire workforce because a worker is exposed to a person with COVID-19. Whether such a decision amounts to an event that entitles the contractor to relief under the contract will depend on the terms of the contract and the particular factual circumstances. The terms of the contract may leave it open for the principal to argue that the decision was unreasonable having regard to the impact of the decision to the project. Conversely, the contractor will likely say that its workplace health and safety obligations necessitated that it make the decision. This example demonstrates that subcontractors, contractors and principals should carefully identify the true cause of the impact in respect of the relevant project in assessing the various commercial risks posed by COVID-19 to the project.

The causes could be:

- unavailability of labour generally, or unavailability of key personnel due to quarantine;
- the introduction of new laws or government policies in Australia or elsewhere;
- insolvency of other parties;
- the need to comply with work health safety laws in Australia or elsewhere;
- the introduction of good practices to avoid the spread of COVID-19;
- shortage of supply or delay in supply from others, or increase in cost of supply (which is a second order effect of one or more of the above); and
- termination of lower order contracts.

## POSSIBLE ENTITLEMENT TO RELIEF UNDER YOUR CONTRACT

The rights and obligations relating to COVID-19 will turn on the facts in question, the terms of the relevant contract and the true cause of the impact of the relevant event.

### *Force Majeure*

A key provision that we suggest principals and contractors review is any *force majeure* clause (if the contract contains such a clause). In Australia, *force majeure* is not recognised at common law or in statute and therefore the words of the contract are paramount and govern the scope and effect of *force majeure*.

*Force majeure* clauses usually capture events that arise after the contract comes into effect that are beyond a party's control and could not reasonably have been avoided or overcome. The interpretation and effect of *force majeure* clauses should be assessed on a fact-specific and contract-specific basis. Relevantly, any assessment should include careful consideration of the following:

- the requirements of the definition of *force majeure* in the contract;
- a clear identification of the nature of the event or circumstance that applies;
- the relief that flows from a *force majeure* event, as prescribed by the contractual provisions;

- any requirements for the timing and content of notices of *force majeure* in the contract;
- the party that bears the onus to prove that the event or circumstance caused the delay and additional costs;
- any provisions that require a party to give notice to the other when it ceases to be affected by the *force majeure* event; and
- any jurisdiction specific government measures, industry or project specific measures or considerations that may be relevant.

### *Variation, Extension of Time and Other Clauses That May Apply*

There are likely to be other provisions in contracts on major projects that may be enlivened by the circumstances and risks posed by COVID-19, these including variation and extension of time clauses. Consideration of the particular clause and the type of COVID-19-related event, delay or disruption will be necessary to determine whether such clauses may grant an entitlement for additional time or money to a contractor. For example, it is common for extension of time and/or variation clauses in construction contracts to include "Change in Law" as an event that gives rise to an entitlement for the contractor. A "Change in Law" will usually apply to changes to legislation, regulations or policies of the Commonwealth or State government or governmental authorities in the jurisdiction where the work on the project is to be performed that occur after the contract has come into effect. Many possible delay or disruption events relating to COVID-19 may arise due to the impact of legislative changes and government policy (e.g., biosecurity regulations, restrictions on the movement of people or embargos on materials from certain countries), making it important to consider and assess whether any such changes may, depending on the fact-specific and contract-specific basis of the relevant contract, fall within the ambit of any extension of time, variation or change in law clause in the relevant contract. Each of these types of clauses will usually include provisions relating to the giving of notices to the other party. Parties should carefully consider these provisions because failure to comply with these requirements may result in consequential disputes regarding the validity of the notice and/or the consequences of alleged non-compliance with these provisions on the availability of relief.

## Frustration

In Australia, the common law doctrine of frustration operates where performance of a contract has become radically different from that which, construed in light of surrounding circumstances, was contemplated in the contract. The doctrine requires that a change makes performance of the contract substantially different or deprives a party of substantially the whole benefit, which was the intention of the parties as expressed in the contract that it should obtain: *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 66, per Diplock LJ, CA.

Whether a contract is frustrated will turn on the interpretation of the contract and analysis of the facts as to which party bore the risk of the event that has occurred. In *Codelfa Construction Pty Ltd v State Rail Authority for NSW* (1982) 149 CLR 337, the High Court found that the construction contract in that case had been frustrated by injunctions that restricted Codelfa's workable hours and were 'fundamentally different' from that contemplated by the contract. Although frustration is usually of a higher standard than what is needed to establish *force majeure*, Codelfa provides an example of a case that frustration may be made out if governmental restrictions imposed on a contractor in response to COVID-19 results in 'fundamentally different' circumstances to those contemplated when the relevant construction contract was created. A contract will not generally be frustrated if there is an operative *force majeure* clause that relates to the relevant frustrating event.

The consequence of frustration at common law is to discharge the parties from their future obligations under the contract. The states of New South Wales, Victoria and South Australia have enacted legislation to adjust the parties' entitlements on the frustration of the contract: e.g., *Frustrated Contracts Act 1978* (NSW); *Australian Consumer Law and Fair Trading Act 2012* (VIC), ss 35 to 44; *Frustrated Contracts Act 1988* (SA). The contract may also include provisions that set out the parties obligations in the event that it is frustrated.

A party needs to be careful in asserting that a contract is frustrated and then not continuing to perform their obligations. If they are wrong in this assertion, then the non-performance could be treated as repudiatory conduct by the counterparty. Accordingly, advice should be taken before asserting frustration and a party not continuing to perform its obligations.

Strictly speaking, there is no need to provide any notice that the contract has been frustrated, but it makes good sense for a party to notify the other party if its position is that the contract has been frustrated.

## OTHER LEGAL AND REGULATORY CONSIDERATIONS

There are a number of other legal and regulatory considerations that industry participants should also take into account when assessing their risk profile in relation to the impacts of COVID-19, including:

- compliance with existing health and safety laws in Australia (as well as any other jurisdictions where project staff are located);
- compliance with new or updated health and safety regulations, directives or guidance released by government agencies relating to managing and preventing the spread of COVID-19 in your workplace;
- consideration of specific employee and industrial relations issues in Australia, including the possibility of engaging with trade unions or the payment of leave and compensation entitlements to employees;
- for listed entities, ongoing disclosure obligations in accordance with the listing rules for that entity;
- project financing issues, including disclosures or notices that may be required by relevant covenants or notice provisions in associated project finance documents;
- insurance issues, including considering whether insurance coverage applies to disruption or losses arising as a result of COVID-19-related risks and considering whether appropriate to issue notices under existing insurance policies; and
- any additional government relief or funding that may be eligible for through Commonwealth or state/territory government initiatives. For example, the Commonwealth government has recently announced COVID-19 stimulus packages totalling approximately \$189bn, including temporary relief for directors from any personal liability for trading while insolvent, cash flow payments of up to \$100,000 to small- and medium-sized enterprises ("SME") and a loan guarantee scheme for SME to support \$40bn of loans issued by eligible lenders. Similar packages may become available for larger businesses impacted by COVID-19.



## KEY STEPS

Given the outbreak of COVID-19, participants in construction or infrastructure projects may consider taking additional steps proactively to manage risks:

1. Conduct a comprehensive and critical review to identify all applicable risks, such as the examples discussed further above, and ensure that plans are in place to manage those risks. The range of risks may be complex and involve balancing competing interests and obligations. For example, project execution, cost and schedule obligations under the contract may need to be balanced with employee welfare concerns and public health interests, including by reference to Australia's health and safety legislation, industrial relations considerations and COVID-19-related government directives.

Identifying the specific risk events that COVID-19 may give rise to on the project may assist to manage the risk and determine whether any contractual or other legal relief is available (for example, whether it qualifies a contractor for an extension of time or variation). For each COVID-19-related risk identified, a good starting point is to describe the potential event in detail and look at the specific employee, cost, schedule and legal risks and implications posed.

2. Carefully review the primary contracts for the project (such as development agreements, design contracts and construction contracts) and consider:
  - the allocation of relevant risks between the parties, including the potential application of variation and extension of time mechanisms, *force majeure* and change of law provisions, or any other clauses or legal doctrines (including frustration);
  - the notices, pre-conditions and supporting records required under the contract to qualify for any contractual relief or otherwise protect a party's commercial position, and in this regard:
    - parties should take the notice requirements in the contract into account, including any time or content requirements, because failure to do so may invalidate the notice

or bar the party from any entitlement (depending on the proper assessment of the conditions of the contract and the facts on the ground);

- the party affected might be required to mitigate or overcome the delay or disruption as best as possible. The contract will likely impose a best endeavours obligation on the parties to minimise delay in the performance of the contract as a result of the event, and the principal may instruct the contractor to re-sequence its work, engage additional manpower or reduce its scope of work to further mitigate delay, disruption or the resultant additional costs; and
  - any potentially applicable events of default or 'sunset' clauses that may apply, including, for example, any time limits on commencement or completion of construction that may apply to development rights granted to a principal, any contractual events of default specified in a development agreement or construction contract.
3. Also consider other contracts relevant to the project, such as associated project finance agreements and insurance policies. Given the significant impacts that COVID-19-related risks could have on the project, it is well-worth reviewing any insurance in place, including identifying whether there is any applicable business interruption coverage in place. There may also be events of default that could be triggered in associated financing contracts, as well as other obligations such as reporting or notice requirements.
  4. Any relevant risk event should be documented carefully. Also consider whether any other specific records, analyses and documentation can be prepared to assist in managing the impact of any delay and/or disruption, support any claims for contractual relief or provide helpful evidence in the event of any subsequent dispute. For example, this may include records of preventative/mitigation measures taken, and an updated or revised construction programme that accounts for the expected/actual impact of the delay and/or disruption or any mitigation actions taken by the contractor (or instructed by the principal).

While it is important for each party to consider the above steps and considerations to protect their individual positions, it may also be helpful to proactively engage with the other parties on

the project in respect of many of these matters—rather than awaiting any later dispute or sudden need to interface when a risk event occurs. For example, contractors and principals may be able to work together to review risk allocations and to agree on and jointly implement measures for prevention and management. Taking the initiative to engage and work collaboratively in this way now is likely to manage the risks with greater success than if each party acts alone, and will also likely reduce the risk of future disputes.

Legal advice on all of the matters above will be both prudent and of great practical assistance. Additional legal advice should particularly be obtained, and particular caution exercised, where any complete project shutdown occurs or is anticipated/contemplated (for example, due to practical necessity or any contemplated assertion of a *force majeure* clause or the doctrine of frustration to end performance).

The impact of COVID-19 is evolving and difficult to predict. However, it is almost inevitable that certain parties will contend that COVID-19 had some impact on their project. Due to the quickly evolving situation, prudence may dictate that steps be taken by all participants across the mining, construction, infrastructure and property development sectors to proactively manage the impacts of COVID-19 and implement strategies to protect the position of these participants as well as the projects.

You may also be interested to read Jones Day's other publications in relation to the impacts of COVID-19, including the following *White Papers* which touch on these and other issues, many of which are equally applicable to project participants:

- [“Steps Companies Should Take to Protect Themselves from the Legal Fallout of the Coronavirus”](#);
- [“Coronavirus: The Impact on Employers Throughout Europe”](#); and
- [“Coronavirus: Critical Considerations for the Energy Industry.”](#)

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