



# QMCA Virtual Breakfast

Wednesday 8 April 2020





# Agenda

- How does a virtual breakfast work?
- Ted Williams – Partner at Piper Alderman
  - Contractual Implications of COVID 19
- Matt Smith – Principal Lawyer at DWF
  - HR / IR Implications of COVID 19
- Industry News



# Rules of a Virtual Breakfast

- Make yourself comfortable
- Keep microphones on mute
- Submit questions through chat



Ted Williams – Partner, Piper Alderman

## COVID-19 Construction Contract Responses & Strategies





PiperAlderman

# COVID-19 Construction Contract

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Response & Strategies

Wednesday, 8 April 2020

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# What We Will Cover

## Outline



### **Key Legal Concepts**

How effectively do they respond?



### **Practical Responses**

Key actions for now



### **“Hibernation Plan”?**

Why and how to achieve it?



**PiperAlderman**

# CV-19: An Unforeseeable Risk, (Largely) Unforeseen by Contracts

The boilerplate didn't see this coming

Contractual relief (if it exists) is likely to be narrow, conditional and ineffective

Force majeure relief

A creature of contract rather than a universal concept. Dependent on contract terms and causation

Frustration

An absolute relief, ill-suited to uncertainty circumstances

Change of law

Limited by contract and causation

Delay and extensions of time

Limited by contract and causation

Suspension and termination

Not independent rights and risky

# “They Declared Force Majeure”

**Force Majeure: is a creature of contract, not a universal relief**

**FM / Act of God / Material Adverse Change, “event beyond the control of the Contractor”:**

No relief absent contractual recognition (i.e. no term = no relief)

Relief for unforeseen circumstances, beyond the parties' control

Usually defined by limited type/list of events

Relief often confined to limited circumstances (and may exclude affects on supply chain)

Subject to notice and form requirements

“Causation” must still be established

Typical Relief:

- Extension of Time
- Suspension
- Termination



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# Frustration

A narrow concept of common law and statute\*

## Through no fault of the parties, an intervening event

- Makes contractual performance impossible
- Transforms contract obligations into something fundamentally different

## Frustration will not arise

- Where there is an operating Force Majeure clause
- For mere change in circumstances making performance more onerous, expensive or delayed
- Change is temporary
- Term is long

## Frustration may arise

- Change in law renders performance illegal
- Subject of the contract is destroyed
- Performance is restrained

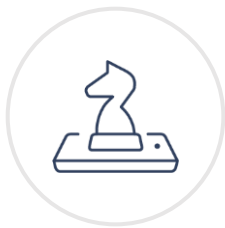


# Change of Law

Also a creature of contract only (and subject to the contract terms)

## Typically

- Contemplate unforeseen legal requirements affecting ability to perform
- Relate to changed requirements of “government authorities” (may extend to overseas governments)
- May provide for additional costs, extensions, suspension or termination
- 326B Public Health Act 2005 (Qld):



Non-  
essential  
business,  
activity  
direction



Home  
confinem  
ent  
direction



Border  
restrictio  
n  
direction

# Suspension and Termination

Not independent rights, but reliefs arising from qualifying events

Essential to follow contract terms



Notwithstanding an apparent contractual "right" to suspend or terminate, the remedy should not be applied (or even suggested) without careful consideration of its consequences and risks



Failure to properly apply the contract could give rise to a repudiation and constitute "willful default"



"Willful default" is a common exception to exclusion or limitation of loss (including consequential loss)

# Delay and Extension of Time

Contract reliefs for which FM, Change of Law etc.

## **Typically:**

- Terms will identify qualifying events
- Causation of delay must be established
- "Concurrency" may disentitle claim
- Strict requirements of notice and form (including update notices)
- Failure to give timely notice may disentitle right to claim

## **Identify:**

- "Hard" completion requirements/dates
- Delay damages
- Time of essence provisions
- "Look forward" tests/rights

# Standard Contracts' “Response”

## TMR- TIC

- No Force Majeure
- “Delay beyond reasonable control”
- Change in Law: change/increase/decrease:
  - ◆ Valued as variation
  - ◆ No time relief
- Frustration:
  - ◆ Limits payment to work performed/ordered/reasonably incurred;
  - ◆ Demobilisation

## AS4902

- No Force Majeure
- Not a qualifying cause of delay
- Change in Legislative Requirements:
  - ◆ Valued as variation
  - ◆ No time relief
- Frustration:
  - ◆ Work performed etc
  - ◆ Demobilisation

# Key Actions: Now

How do I manage my risks?

## Review Contracts Now

→ Identify existence (or otherwise) and effect of terms responding to:



FM



Frustration



Material Adverse  
Events



Change in Law



Delay, Extension and  
Time and delay  
damages terms



Notice requirements

- Check limits of relief eg. Effects on site V. Effects on supply chain
- Identify downstream contract terms and equivalent rights / reliefs
- Are your subcontracts back to back?

# Giving Notice:

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Failure to give “proper” might be fatal, not giving notice at all will be fatal

- Strict time and content requirements for notices and claims are effective to preclude claims that are otherwise valid; *CMA Assets Pty Ltd v John Holland Pty Ltd [No 6] [2015] WASC217*
- Typically, notice is required to be given:
  - ◆ “As soon as... becomes aware or ought to have become aware of delay or likely delay”;
  - ◆ “must [separately] notify:
    - ... of the delay;
    - particulars of the Extension Event;
    - Particulars of consequences and likely consequences... and how the Contractor will be delayed;
    - Number days EOT claimed;
    - Details of costs claimed;
  - ◆ Repeat every [7] days event continues

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# “Hibernation” Option?

The “Hibernation Plan” is a key Federal Government economic response to COVID-19

Why might principles of “hibernation” be applied to construction contracts?

- Uncertainty abounds
- “Scalable” contagion mitigation measures will continue
- “Essential services” continue
- Business should be incentivized to work together to mitigate economic impacts
- Continued “Knock-on” effects in supply chain and in business mean that losses and rights cannot be properly measured
- Commercial outcomes should be promoted, and disputation discouraged
- Contracts:
  - ◆ not “fit for purpose” as a management tool this unprecedented scale;
  - ◆ Onerous notice clauses are antithetical to achieving commercial resolution



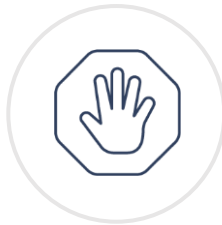
# “Standstill” ~~Agreement~~ Deed

Gives breathing space and preserve rights but must be binding

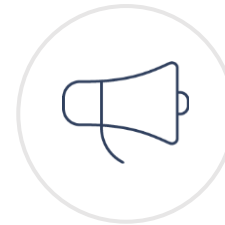
Agreement to perform (as best as possible) avoid dispute and manage risks



Recogniz  
e mutual  
difficultie  
s



Suspend  
notices  
and  
avoid  
laying  
blame



Promote  
practical  
solutions



Preserve  
rights



For a defined  
period with rights  
to suspend by  
agreement

# Please contact us for advice tailored to your situation

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Matthew Smith – Principal Lawyer, DWF

COVID 19 – HSE IR Update



The background of the slide is a composite image. It features a view of Earth from space, showing the curvature of the planet and the blue glow of the atmosphere. Overlaid on this is a network of white lines connecting various points, resembling a global communication or data network. The points are represented by small white circles, some of which are larger and more prominent than others. The overall color palette is dominated by deep blues, blacks, and whites, with some orange and yellow highlights from the Earth's surface and atmosphere.

DWF Webinar

# COVID-19 Update

Matthew Smith, Principal Lawyer  
Head of Employment, Safety & Regulatory

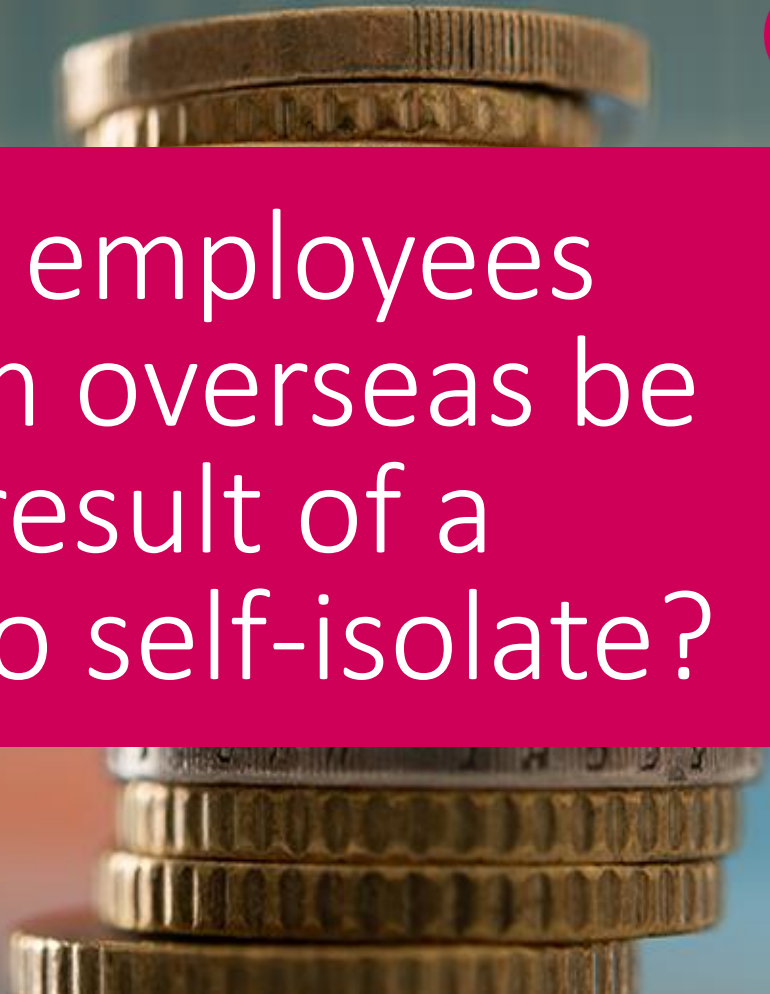
How should an employer respond if an employee is diagnosed with the virus?



When does the WHS  
Regulator have to be  
notified?

Is it a reasonable lawful direction  
to require employees to work in  
the office in the current  
environment?





How should employees  
returning from overseas be  
paid as a result of a  
requirement to self-isolate?

Can employees required to  
look after children due to  
school closures take personal /  
carer's leave?

# Questions?

# Thank you



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## Beyond borders, sectors and expectations

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DWF is a global legal business, connecting expert services with innovative thinkers across diverse sectors. Like us, our clients recognise that the world is changing fast and the old rules no longer apply.

That's why we're always finding agile ways to tackle new challenges together. But we don't simply claim to be different. We prove it through every detail of our work, across every level. We go beyond conventions and expectations.

Join us on the journey.

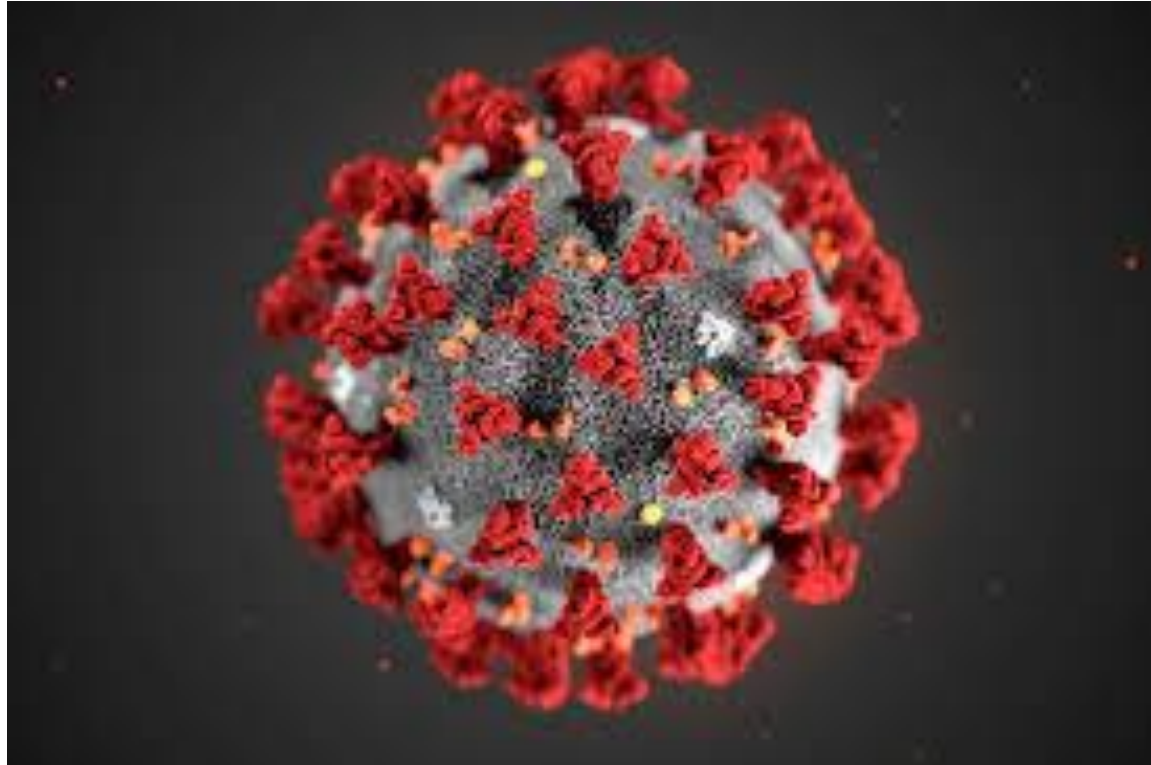
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# QMCA News





# New Members





# QMPPR

[www.qldmpp.com.au](http://www.qldmpp.com.au)







# What is QMCA Doing?



**KEEP  
CALM  
AND  
CARRY  
ON\***

\* at least 2 meters away from each other



# Projects Update



# COVID 19 - Silver Lining



# Building Bridges





# QMCA Brains Trust



## INTRODUCING THE CONSTRUCTION BRAINS TRUST

WE'VE PUT TOGETHER A PANEL OF EXPERTS  
FROM OUR MEMBERSHIP WHO CAN HELP  
ANSWER QUESTIONS YOU HAVE ABOUT  
YOUR BUSINESS IN UNCERTAIN TIMES.





# Questions?



# Thank You!