



PiperAlderman

# COVID-19 Construction Contract

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Response & Strategies

Wednesday, 8 April 2020

# What We Will Cover

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## Outline



### **Key Legal Concepts**

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How effectively do they  
respond?



### **Practical Responses**

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Key actions for now



### **“Hibernation Plan”?**

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Why and how to  
achieve it?



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

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## 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”

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**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

Typical Relief:  
→ Extension of Time  
→ Suspension  
→ Termination

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

Subject to notice and form requirements

“Causation” must still be established

# Frustration

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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

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

## Typically

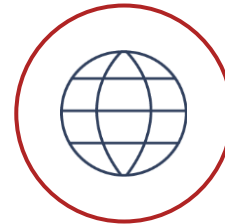
- Contemplate unforeseen legal requirements affecting ability to perform
- Relate to changed requirements of “government authorities” (may extend to overseas governments)
- May provide for additional costs, extensions, suspension or termination
- 326B Public Health Act 2005 (Qld):



Non-essential  
business,  
activity  
direction



Home  
confinement  
direction



Border  
restriction  
direction



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# Suspension and Termination

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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

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## 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*



# “Hibernation” Option?

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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

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Gives breathing space and preserve rights but must be binding

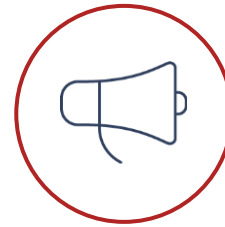
Agreement to perform (as best as possible) avoid dispute and manage risks



Recognize  
mutual  
difficulties



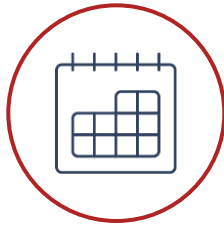
Suspend  
notices and  
avoid laying  
blame



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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## Ted Williams

Partner, Head of Brisbane

+61 7 3220 7740

+61 402 500 066

[twilliams@piperalderman.com.au](mailto:twilliams@piperalderman.com.au)



[piperalderman.com.au](http://piperalderman.com.au)

Adelaide | Brisbane | Melbourne | Sydney