

# Responding to the COVID-19 Crisis: SMEs

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# Contracts

## Frustration

Frustration of contract is a concept which assists parties to a contract avoid their obligations when an event occurs that is beyond control of the parties and has a substantial impact on their ability to carry out contract contractual obligations, whether this is a written contract or not. The impact must be so substantial that the parties would effectively be required to perform a radically different contract than the one originally contemplated.

Not every change in circumstances will give rise to an issue of frustration of contract so it is important to consider each contract on a case-by-case basis.

There are three essential elements considered by the courts in assessing frustration of contract and those are:

1. an event, or events, subsequent to the formation of the contract;
2. a radical effect on that event, or events, on the performance of the contract; and
3. a decision that the parties to the contract did not intend to be bound in the changed circumstances.

Unlike force majeure clauses (explained below), where frustration does apply, the contract is automatically terminated by operation of law. The frustrating event does not create an election for either party to terminate - it creates a set of circumstances where the contract cannot be completed so it is automatically terminated.

In that event the common law provides that parties can claim some relief for a frustrated contract under restitution. Restitution claims arise from common law protections for the parties from unjust enrichment at the expense of another. In the context of frustrated contracts this may apply when a party has made a pre-payment to the other party in return for their performance of the contract.

## Force Majeure Clauses

A force majeure clause is the contractual version of 'frustration' mentioned above. In a contract the parties seek to clarify in writing the mutual understanding of how they would handle circumstances where an event beyond their control impacts their obligations under the contract.

Force majeure clauses can take many different forms and it is essential to consider each contract and the wording of a clause on a case-by-case basis.



## Insolvency Changes

### Insolvent Trading

You should stay in close contact with your accountant and your bank and seek their advice on the best steps to take to minimise the impact of cash flow interruptions in your business. You should also seek advice from solicitors with experience in insolvency and bankruptcy at an early stage and before circumstances get out of control.

The Federal Government has announced some relief for businesses, proposing to change the debt threshold to force a debtor company into insolvency from \$2,000 to \$20,000. There is also proposal to change the period of time an individual can be made bankrupt or company made insolvent from the usual 21 days from an insolvency event to 6 months.

### Safe Harbour

The Federal Government has made changes to safe harbour legislation to introduce temporary relief for directors from any personal liability for trading while insolvent. This is targeted relief for directors of companies from the penalty provisions of the *Corporations Act* and to deal with unforeseen events that face us as a result of the Coronavirus health crisis.

Directors are personally liable if a company trades while insolvent, often directors will feel under pressure to make quick decisions to enter into an insolvency process such as voluntary liquidation if there is a risk the company will experience periods where it will be trading while insolvent.

To make sure companies have confidence to continue to trade through the current health crisis and with the aim of returning to viability when the crisis has passed, directors will be temporarily relieved of their duty to prevent insolvent trading with respect to any debts incurred in the ordinary course of the company's business. This will relieve the director of personal liability that would otherwise be associated with the insolvent trading. It is proposed this will be a 6-month time period.

Temporary relief from personal liability for insolvent trading will apply with respect to debts incurred in the ordinary course of the company's business. Egregious cases of dishonesty and fraud will remain subject to criminal penalties. Any debts incurred by the company will still be payable by the company.

## Employment Law & Industrial Relations

### Employer's Obligations

Where an employer directs a full-time or part-time employee not to work due to workplace health and safety risks but the employee is ready, willing and able to work, the employee is *generally* entitled to be paid while the direction applies.

However, if:

1. an employee cannot work because they are subject to a government order requiring them to self-quarantine (i.e. returning from holidays); or



2. an employee cannot be usefully employed because of equipment break down, industrial action or a stoppage of work for which the employer cannot be held responsible (while the most common scenarios are severe and inclement weather or natural disasters, a pandemic or a direction from government to close your business may apply),

the employee is **not** ordinarily entitled to be paid (unless they use leave entitlements). The ability to use leave entitlements is subject to agreement by both employee & employer.

Employers should consider whether their obligations are impacted by any applicable enterprise agreement, award, employees' employment contracts or workplace policies, which may be more generous.

Standing down employees without pay is not generally available due to a deterioration of business conditions (*considering redundancy options is more appropriate*) or because an employee has the coronavirus (*they would be entitled to use sick leave*). Enterprise agreements and employment contracts can have different or extra rules about when an employer can stand down an employee without pay. Employers are not required to make payments to employees for the period of a stand down, but may choose to pay their employees.

### Leave When Caring for Dependents

Paid carer's leave is available to full-time or part-time employees where the employee needs to look after a person who is dependent on them (elderly or children) who requires care or support because of a personal illness or unexpected emergency affecting the member. A school closing on short notice and for a short period due to concerns about coronavirus (for example, because someone at the school has tested positive) is an unexpected emergency for this purpose.

An employee must give their employer reasonable evidence of the unexpected emergency if their employer asks for it. This will also apply to situations relating to coronavirus.

### Workplace Policies – COVID-19

Employers have obligations under Work Health and Safety (WHS) laws to ensure, so far as is reasonably practicable, the health and safety of their workers and others at the workplace.

To comply with the WHS laws, you must identify risks at the workplace, and do what is reasonably practicable to eliminate those risks, or where this is not reasonably practicable, to minimise those risks.

Whether a control measure is reasonably practicable to implement involves considering what can be done to control a risk and whether it is reasonable in the circumstances to do so. Key considerations in determining what measures are reasonable include:

- the likelihood of the risk occurring;
- the degree of harm that might result; and
- the availability and suitability of a control measure.



Simple control measures can include communicating clearly to employees and giving guidance about what is expected.

These can include:

- staying away from the workplace if unwell;
- what action to take if they are unwell; and
- what symptoms to be concerned about.

What do employers need to do?

- continually monitor relevant information sources and update control measures when and if necessary;
- continue to provide information to workers including changes to control measures, as the situation develops;
- provide workers with continued access to official government sources for current information and advice;
- provide workers with appropriate personal protective equipment and facilities, and information and training on how and why they are required to use them;
- require workers to practice good hygiene, including frequent hand washing, limiting contact with others, including through shaking hands and covering their mouths while coughing or sneezing;
- seek advice from health authorities immediately if there has been a confirmed case of COVID-19 in your workplace;
- limit access to the workplace by other people, unless necessary;
- reconsider work-related travel and implement other methods of communication;
- for example, rather than requiring employees to undertake air travel to attend face to face meetings, facilitate attendance by tele or videoconference;
- remind workers that they have a duty to take reasonable care for their own health and safety and to not adversely affect the health and safety of others; and
- provide workers with a point of contact to discuss their concerns, and access to support services, including employee assistance programs.

### Workplace Policies – Working from Home

If you have workplace policy regarding your employees' ability to work from home, you should provide all employees with a refresher of that policy and provide a clarification in respect of the current circumstances. If you don't have a work from home policy, you should develop one as soon as possible which covers employee's obligations to maintain a safe workplace at their home.

See below example:

*"If you would like to work from home in the event you are required to self-isolate or become sick you **MUST** undertake the below items immediately.*

*If you don't provide the below you are not able to work from home and therefore will be required to use your leave entitlements.*

1. All staff to re-read and acknowledge the working from home policy – **attached**;



2. *Check your computer at home isn't running Windows 7;*
3. *Provide management with updated photos of the below;*
  - a. *Photo of working area at home*
  - b. *Photo/s of all serial numbers of all devices to be used*
  - c. *Photo of safety switch power board*
4. *Log in at home and make sure everything is working."*

Consider advice from the Australian Cyber Security Centre on protecting personal information when staff are working from home: <https://www.cyber.gov.au/advice>.

## Reasonable Directions & Staff Travel

It is not likely that an employer will be entitled to restrict their employees' personal holiday travel. However, it would be a reasonable and lawful direction to an employee to stay away from their usual place of work for a quarantine period after returning from holidays.

Employers can, and should, restrict all business-related travel.

If an employer has identified that an employee has been in contact with a confirmed case of COVID-19 or has recently travelled, they will likely be able to reasonably and lawfully direct the employee to stay away from their usual place of work. However, note our comments above regarding an employer's obligation to pay an employee during this period.

## Privacy Obligations

The obligations contained in the Privacy Act will not prevent employers sharing critical information in emergent situations. While managing their response to the pandemic, employers should be respectful of the privacy of your employees and customers.

Employers should aim to collect the minimum amount of personal information reasonably necessary to enable them to maintain a safe workplace for staff and visitors.

The information you can collect is that which the Department of Health says is needed to identify risk and implement controls in your workplace, including:

1. whether the person or a close contact has been exposed to a confirmed case of COVID-19; and
2. whether the person has recently travelled overseas and to which countries.

While you are entitled to disclose to staff that a colleague or visitor may have contracted COVID-19, you should only disclose the information necessary to implement your controls. It will usually not be necessary, and not advisable, to disclose the name of the person. However, this may be necessary to a select number of people you have identified may have come into contact with that individual.



## Business Succession

Is your business set up to continue functioning if the essential, controlling roles cannot be performed? Whether you conduct business via a company, family trust or as a sole trader it is critical to plan properly for the possible extended absences of key personnel. This is equally important for self-managed superannuation and family trusts.

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*The material contained in this publication is of a general nature only and is based on the law as of the date of publication. It is not, nor is intended to be legal advice. If you wish to take any action based on the content of this publication we recommend that you seek professional advice from Greenhalgh Pickard's experienced team of commercial & employment solicitors.*

If your business requires assistance with any of the above, please contact us today.

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