

SYDNEY LOCKDOWN

CRITICAL QUESTIONS + WHAT TO DO

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Today's Talking Points

- **What the latest public health order actually says**
(We're speaking at 10am in case it changes at 11am)
- **Critical claims**
What to think about and what to cover
- **Insurance**
A quick overview
- **What's hidden in the gaps?**
Problems raised over the weekend
- **Q & A**

[The necessary footnote | disclaimer: Obviously, this isn't legal advice but a guide to what can be considered!
If you'd like some legal advice, please reach out – we're here to help.]

The Orders... for now

Key Definitions:

- construction site means a place at which work, including related excavation, is being carried out to erect, demolish, extend or alter a building or structure but not work carried out in relation to a dwelling in which a person is residing
- 'Hardware and Building Supplies' and 'Landscaping Material Supplies' fit under the definition for 'Retail Premises'

Public Health (Covid-19 Temporary Movement and Gathering Restrictions) Amendment (No 8) Order 2021 – 17 July 2021

The Orders... for now

24AB Directions of Minister concerning closure of construction sites

1. The Minister directs that work is not to be carried out on a construction site in Greater Sydney, unless the work is urgently required for the following purposes—
 - a. to ensure the safety or security of the construction site,
 - b. to deal with environmental risks,
 - c. to maintain critical plant or equipment that would otherwise deteriorate,
 - d. to receive deliveries of supplies that would otherwise deteriorate,
 - e. to maintain public utilities,
 - f. to ensure the safe operation of existing transport infrastructure,
 - g. by or on behalf of NSW Health in response to the COVID-19 pandemic,
 - h. because of an emergency.

2. The Minister directs that an employee or other person is not to enter or remain on a construction site in Greater Sydney, other than to carry out work required under subclause (1).

Immediate Action...

What can we do?

(A non-exhaustive list)

- Secure your site.
- Identify, and attend to all urgent work.
- Identify if what you need to do falls outside out of the lockdown (more on this later).
- Notify your employees, contractors, and subcontractors of what action is being taken – this should be done on an ongoing basis.
- Make plans around delivery of ordered materials and equipment.
- Secure all materials and equipment – including where appropriate and possible – in secure offsite storage.
- Start working through your contracts and the claims you may have or need to respond to.
- Communication systems + protocols.

**CONTRACT
CLAIMS:
Where should I
be looking?**

CRITICAL: This will be different contract to contract

- Covid-19 clauses (common in contracts >April 2020)
- EOT and programming clauses (incl re methodology)
- Variation clauses
- Payment rights (SOP will be covered later in the week)
- Change in legislation provisions
- Suspension rights
- Rights around scope reduction – incl termination for convenience
- Site risk + insurance
- Related agreements
- Frustration – is it truly now a bridge too far?

What's the trigger...

- Before working through various rights, you need to identify the trigger:
 - a) From the event;
 - b) From awareness of the event (likely to be similar here);
 - c) When you could or should have been aware.
- The triggers are going to vary contract to contract
- Need to assume that the trigger has already been pressed
- Got catch 'em all – get each and every claim in ASAP
- Be aware of all ongoing notice obligations to keep claims alive

Covid-19
Clauses:
Something New
From 2020

- Vary significantly from contract to contract.
- Generally based around the contractor taking risk for Covid-19 and related delays.
- Some clauses may kill any claim for time, costs, changes in methodology, etc.
- Need to be considered very carefully against the drafting. In particular, where based around what should have been reasonably anticipated.
- If there is an entitlement, how does the entitlement link into the other provisions of the contract?
- The big question will be:
**COULD AN ORDERED INDUSTRY SHUTDOWN
HAVE BEEN REASONABLY ANTICIPATED?!?**

Some of the critical claims to consider....

Getting into the Notices

Time

- Can EOTs be claimed?
- Find the gap – the pathway to EOTs may be unclear
- How often does notice need to be provided – ie. Ongoing notices
- Acceleration?
- Link between time and cost – if it
- Get your programming updated and right

Variations

- What changes will need to occur to the works?
- Who is responsible for the risk around
- Is legislative change a trigger for cost or any other entitlements?
- Demob and remob – where does the cost rest?

Payment

- Be wary of unfriendly force majeure provisions (obligations suspended on all parties)
- Notices to go to financiers?
- If you claim payment and it's unpaid, will SOP give you entitlements that otherwise might not exist under the Contract?

INSURANCE

What needs to be done...

- Check your policies to see if you have cover for any loss you may suffer. This is likely to be under a Business Interruption policy, but check any policy that covers first party loss.
- Collect evidence to support your claims. This should be clear from your policy but will generally include evidence of income and expenses, however you should also keep an open mind about other evidence relevant to the loss and your particular circumstances.
- Speak with your broker to check your coverage options, and work with them to lodge your claim as soon as it is ready.
- If your claim is denied, seek legal advice. The test cases on COVID-19 cover under BI policies have found in favour of insureds.

***Some curly
questions
we've already
had...***

- We're not based in Sydney or the related regions.
What does this mean for us?
- Quarrying and related material manufacture – in or out?
- What would be 'urgent' and 'non-urgent' work?
How do you determine if it is necessary?
- What if you've reached PC and no further construction work is required – do the rules prevent you from settling the property?

Questions?



**Keep an
eye out...**

- **How to draft successful claims**
- **Employment Law Issues**
Changes, options, risks - including working from home, the new penalties, and standing down teams.
- **Payment Essentials**
Looking at payment clauses, getting paid during the lockdown, and using the SOP Regime.
- **Insurance**
A deep-dive on what options may be available and the current case law on business interruption claims.
- **Director Duties**
- **Insolvency Risk**
Managing your business, including using safe harbour provisions.

WE'RE HERE TO SUPPORT

As always, specific legal advice should be sought in any circumstance.

Please reach out to us, or your preferred legal service provider, to discuss any and all concerns around the construction industry shutdown.

You can reach us directly here:

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