

CONSTRUCTION RESTARTS IN NSW: CAUTION STILL REQUIRED TO SAFEGUARD YOUR BUSINESS

The NSW Government has permitted the construction industry to restart from Monday 2 August 2021. However, ongoing restrictions will significantly inhibit the restart of many construction sites.

Whilst the NSW Government has authorised the restart of the construction industry following a two week shutdown, there are a number of restrictions that will continue to have a substantial impact on the industry.

First, construction cannot resume in any of the high risk zones, these being the following 8 local government areas (LGAs): Fairfield, Canterbury-Bankstown, Liverpool, Blacktown, Cumberland, Parramatta, Campbelltown and Georges River. Some of the State's major infrastructure projects (such as the Western Sydney Airport), as well as major commercial developments (such as Parramatta Square), are in these LGAs. Work cannot recommence on these projects.

Second, workers resident in the 8 LGAs are not permitted to leave their LGA to resume work. It is estimated that this will impact approximately 75,000 workers in the construction industry. Many construction sites will struggle to recommence operations without these workers.

Businesses in the construction supply chain that operate in the 8 LGAs are permitted to recommence operations. Workers in these businesses have been added to the authorised workers list and thus, may resume work. This includes workers involved in the manufacturing of construction materials, plants and components.

Third, construction sites must comply with the NSW Government's Covid-19 safety plan for the construction industry. This plan requires businesses to take certain measures to prevent the spread of Covid-19, which include controls on the movement of workers between sites, reduced contact between workers on site, improved tracing capability, regular testing and encouraging workers to get vaccinated. Each business must complete a Covid-19 safety plan before construction can recommence.

Given the ongoing restrictions, it is imperative that businesses continue to take steps to maximise any legal protection that may be available. It is also essential to continue carefully managing your workforce as well as your cashflow and finances.

In this note we focus on legal protection that may be obtained through contractual frameworks. We briefly consider relevant contractual provisions to look for and provide some tips for preparing and managing a claim to maximise the ability to claim if required to do so down the track.

Key contractual provisions

The contractual provisions relevant to your business will depend on its role in the project, whether it is as owner or developer, main contractor, subcontractor or consultant or supplier.

First, review the terms of the contract carefully. The terms of each contract will be different. Each contract is interpreted on the basis of the actual words used. Those words are given their plain and ordinary meaning (unless the result of that meaning is absurd). The meaning is to be determined by what a reasonable business person would understand those terms to mean. When interpreting a contract, a court will seek to give effect to the objective intention of the parties.

Second, identify provisions that address the allocation of risk in the event that there is an unforeseen or unexpected event. There may be relief where works cannot be performed or where works are suspended. There may also be rights to time or costs due to delays resulting from a suspension. Some key examples to look for:

- **Suspension of works:** the contract may permit the Principal or the Contractor to suspend works and then for the resumption of works following the industry restart. Some parts of the work, or certain obligations, may continue to be suspended depending upon the availability of the appropriate workers, construction materials

and equipment. The parties should carefully review the status of works at the time of suspension and at the time of the resumption of works (as discussed below). Time and costs consequences may also be addressed in the contract. For example, the Principal may be required to pay delay costs reasonably incurred by the Contractor as a result of the suspension and the Completion Dates may be extended.

- **Extension of time:** the contract may permit an extension of time in certain circumstances such as when works have been suspended or delays have occurred that are beyond the reasonable control of the contractor.
- **Change in law:** the contract may provide a mechanism to grant variations to the works as a result of a change in law. It may be that the Public Health Orders relating to the shutdown and/or the additional restrictions being imposed during the restart will require a variation to the performance of the works. This variation may take into account time and costs consequences of the shutdown and/or the additional restrictions.
- **Force majeure:** a force majeure clause may temporarily suspend or relieve performance of the contract in certain circumstances. The circumstances in which a force majeure event may arise will depend on the terms of the contract. Often the event must be beyond the reasonable control of the party and be unforeseeable, unavoidable and must make performance impossible. There may be a list of possible force majeure events, such as a pandemic or an act of government which may cover the NSW government's public health orders. If there is a force majeure event, time for completion of the works may be extended accordingly.

The suspension of works or the grant of an extension of time will usually prevent delay liquidated damages from being imposed as a result of the shutdown and/or the additional restrictions now being imposed. The contractor may have an obligation to review and submit a revised program to take into account the shutdown period and the impact of the additional restrictions on the progress of the works. Again, this will depend on the terms of the contract.

Third, ensure that any notices to be submitted to invoke the provisions referred to above (or other relevant provisions) are valid. An invalid notice is likely to prevent a claim from succeeding. The notice must comply with requirements relating to time (e.g. submitted "promptly" or within a specific number of days), content (such as reasons for the extension of time or the force majeure) and the recipients and delivery method (as set out in the notice provisions).

Preparing and managing a claim

In the event that it is necessary to bring a claim, the claimant will be required to provide supporting evidence of the claim. The claim may be supported by written evidence such as contemporaneous reports and communications, and digital records such as videos and photos. It may also be supported by evidence from persons involved in the project (as witness statements) as well as reports from experts. It is critical that preparatory steps are taken now in order to preserve any claims (or any defence to a claim).

Contemporaneous documentary records are often the most credible form of evidence for demonstrating a claim. Hence, it is very important that written records are maintained for all aspects of the work, including:

- the status of works at the time of the shutdown and the resumption of work;
- any deterioration or other impacts on the works during the shutdown;
- the time and costs relating to demobilisation and remobilisation of the workforce and equipment;
- the types of work that can be restarted given the workforce, materials and equipment available on site;
- the anticipated progress of the works given the resources available; and
- works that are completed during the time of the ongoing restrictions.

These records must provide sufficient detail of the matters referred to above.

Daily, weekly and/or monthly progress reports may contain this information. If so, ensure it provides details about the state of progress each day or week and the delays or challenges that arise due to the limited availability of the workforce, materials or equipment. These reports may include photographs and videos of the status of works. If so, they should be clearly dated and described to ensure their accuracy and reliability.

Maintaining a sufficiently and appropriately detailed record of the problems arising due to the Covid-19 lockdown may also assist with the valuation of damages for a claim.

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Next steps

If you would like further information on the impact of the shutdown or the restart of the industry on your business, please contact one of our industry specialists. We can assist on a myriad of issues relevant to your business regardless of the role or stage of the project lifecycle.

For more information, please contact the author of this alert



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