

CONSTRUCTION | JULY 2021

5 KEY ISSUES TO CONSIDER IN THE WAKE OF THE NSW COVID-19 CONSTRUCTION SHUTDOWN: HOW TO SAFEGUARD YOUR BUSINESS WHILE YOU STILL CAN

The NSW Government has prohibited all construction from Monday 19 July 2021 to 30 July 2021. The prohibition applies to residential, commercial, public, infrastructure and civil works.

Exceptions to the prohibition are limited to urgent work required to:

- ensure the safety and security of the construction site;
- deal with environmental risks;
- maintain critical plant or equipment that would otherwise deteriorate;
- receive deliveries of supplies that would otherwise deteriorate;
- maintain public utilities; and
- ensure the safe operation of existing transport infrastructure.

Urgent works by or on behalf of the NSW government in response to the Covid-19 pandemic or because of an emergency are also permitted.

Severe penalties may be imposed on individuals and businesses who do not comply with the prohibition. Notably, the presence of compliance inspectors across Greater Sydney has also been increased.

By now immediate steps will have been taken to ensure construction sites are safe and secure, deliveries are cancelled or diverted (where possible) and employees are notified of the shutdown.

We address five issues you may need to consider to maximise the legal protection available for your business during and after the shutdown.

1. Review contracts

Maintaining contractual relationships at this difficult time is imperative. At the same time, it is also critical to review contracts to identify provisions that may provide you with legal protections or assistance as a result of the shutdown and ensure that those legal protections are properly invoked.

Give careful consideration to provisions relating to:

- the suspension of works;
- force majeure events;
- a change in law (due to the Public Health Order);
- delays or extensions of time;
- liquidated damages and when they may be imposed or excused; and
- grounds for termination of the contract.

Most importantly, carefully review the notice provisions as there are often strict requirements that need to be complied with for a notice to be valid. Often notices must be issued within 2, 3 or 5 Business Days and/or must be issued to specified recipients and delivered in a specified manner. An invalid notice may prevent a force majeure, delay or extension of time claim.

It is also important to review the contract to ensure compliance with obligations to, for example, submit a revised program of works or an acceleration or rectification plan to address delays resulting from the shutdown.

2. Review insurance policies

As with contracts, it is important to review the terms of any insurance policies that may apply. Whilst many policies may not provide much assistance, if they do apply there may be time limits or other requirements for making a claim which need to be complied with. If you consider that you have a policy which might respond, it is recommended that you obtain advice sooner rather than later.

3. Managing employees

Managing employees during the shutdown is one of the most complex issues to be addressed. Where it is not possible for employees to carry out useful paid work from home, other options may need to be considered. While an employer may have a right to stand down employees without pay, the employer may be obliged legally to consider a variety of other options before doing this.

Our specialist employment team offers advice around the individual circumstances for each of your employees, contact our team to discuss your options.

4. Consider financial and solvency issues

In circumstances where the construction industry remains the hardest-hit industry across Australia, the shutdown period may cause many businesses financial stress and affect supply chains across the sector.

Bear in mind any notice or disclosure obligations in financial arrangements, which may require disclosure of this change in circumstance, particularly where the timetable or budgets for delivering projects may place the business in breach of its financial arrangements.

It is also important to consider business interruption insurance policies, force majeure provisions or provisions relating to material adverse change that may provide some assistance or relief.

If there are insolvency concerns, directors ought to consider the potential application of the safe harbour regime to provide directors with some protection whilst engaging with experts with a view to saving the business. It is important to note that the moratorium on insolvent trading liability was lifted earlier this year, so directors who are concerned about the business' solvency position should act early and proactively.

5. Managing and documenting the status quo

Ensuring the safety and security of the construction site is imperative. It is also important to ensure contemporaneous records of the status of work are prepared and maintained as at the time of the shutdown and during the shutdown period.

Updating progress reports, taking photographs and videos and ensuring other records are maintained may be essential for the preparation of a claim in the event that any dispute arises following the shutdown. Such records may also assist with the valuation of damages for a claim.

Next steps

If you would like further information on the impact of the shutdown on your business, please contact one of our industry specialists through this link <https://www.hfw.com/Construction> or the author Jo below who 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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