

TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

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UPDATE 13 | COVID-19 Contract Law

COVID-19 contract law is just normal contract law. The law hasn't changed – just the circumstances – if you put insolvencies aside.

COVID-19 Contract Law

As a small business you usually have 4 main expenses: your staff – your lease – tax – and your suppliers.

You got wages and salaries – at least to some extent – covered by the Jobkeeper payments. You got your lease payments – at least to some extent – covered by the Commercial Tenancies Code and resulting rent reductions. And you got the ATO's time extensions and reductions of GIC and more.

But what about your suppliers? What happens if you no longer need the goods you ordered or can't pay? Or your clients cancel or can't pay? How does contract law handle the COVID-19 crisis?

This is the question Geoff Stein of [Brown Wright Stein](#) in Sydney will discuss with you in this episode.

Here is what we learned but please listen in as Geoff explains this much better than we ever could.

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COVID-19 Contract Law

Finding a solution that works for both sides is always the best option. You want to come out of this crisis with the loyal customers or clients you had when you went in. But if it really comes hard on hard, what is your legal position in a contract to supply or receive goods or services?

Force Majeure

Force majeure is a popular concept when one or all of the parties to a contract can't perform. Think of a natural disaster, lockout or civil unrest.

There is no implied force majeure concept in Australia. So unless it is specifically stated in your contract, you have no legal backup on this one as long as the place of performance is within Australia. If it is overseas, then their laws usually apply.

If your contract does include a force majeure clause or similar, check that the contract provides a specific relief for that particular trigger.

Can you show a casual nexus between the event and the impact on your business? A general decline in business probably isn't enough. You usually need to give notice and show you tried to mitigate the damage.

Claiming a force majeure is likely to lead to disputes. The other side will probably argue that you didn't give notice in time or that you must have known about COVID-19 coming. And on this basis they will probably try to claim damages for wrongful termination (repudiation) from you.

Frustration

If your contract has no force majeure clause, there is the common law doctrine of frustration. Common law means what has been decided in past court cases.

Frustration brings a contract to an end where an event, through no fault of the parties, makes it impossible to perform a contractual obligation as agreed.

The doctrine of frustration has a very narrow scope and doesn't apply in cases of mere hardship, foreseeable events or a temporary or transient change in circumstances.

Insurance

Business interruption insurance (BII) or contingent business interruption insurance (CBII) often exclude epidemics or pandemics such as the COVID-19 crisis and hence will not cover you. But read the policy. Maybe they do cover you.

BII covers loss of income when your operations are interrupted as a result of damage to your business premises.

CBII covers you when your suppliers are unable to deliver and hence you can't deliver.

Insolvency

If you performed your side of the contract, but now the other side doesn't pay, then you can serve a statutory demand to the recipient's registered office and then after 21 days apply to the courts to force a wind up.

This period of 21 days has now been extended to 6 months during COVID-19. And there is more protection of directors if trading while insolvent during the crisis. So it will be much harder to get your money while these amended rules apply.

MORE

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[JobKeeper Alternative Test](#)

[COVID-19 Employment Law](#)

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