



WEBINAR

# Construction & Infrastructure, Real Estate and Workplace Relations Post-COVID-19

Wednesday, 29 April 2020 12:30-14:00 AEST

# AGENDA



## **PART A – Construction & Infrastructure Issues**

**Keith Redenbach, Partner at Redenbach Lee Lawyers**



## **PART B – Real Estate Issues**

**Greg Lee, Partner at Redenbach Lee Lawyers**



## **PART C – Workplace Health and Safety & Business Continuity**

**Michael Harmer, Chairman & Senior Team Leader  
at Harmers Workplace Lawyers**

PART  
A

# Construction & Infrastructure Issues



# **PRE-COVID-19 CONTRACTING**

**Orderly tendering process**

**Relying on contracting,  
procurement,  
representations**

**Timeframe: 6 – 18 months**

**Unamended  
Australian Standard  
Forms**

**Low government  
regulation**

**No social distancing**



# POST-COVID-19 CONTRACTING



**Unreliable procurement,  
especially internationally**

**Government bringing  
forward timeframes: 3 - 6  
months**

**Heavy government  
regulation, including  
social distancing and PPE**

**Heavily amended  
standard form contracts**



# NEW GOVERNMENT REGULATIONS

## NSW

April 2

*Environmental Planning  
and Assessment (COVID-19  
Development –  
Construction Work Days  
Order 2020 (NSW)*

April 9

*Environmental Planning and  
Assessment (COVID-19  
Development – Infrastructure  
Construction Work Days)  
Order 2020 (NSW)*

Building works and demolition can take place on  
**Saturdays, Sundays and Public Holidays** in addition to weekdays.

→ For the duration of the pandemic

# SHOULD WE WORK ON WEEKENDS?

## ISSUES

- Unintended consequences of more hours
- Clash with other obligations and rules
- Higher labour costs

## CONSEQUENCES

Variations

Reduction in scope  
and suspension

Step-in rights and  
alternative contractors

# CONTRACT AMENDMENTS

- 1** **Change in Law**
- 2** ***Force majeure***
- 3** **Frustration**
- 4** **Extension of Time**
- 5** **Suspension**
- 6** **Termination for Convenience**



# EXAMPLE: STANDARD CONTRACTS – AS4000

## 1 Change in Law

### “ 11 Legislative requirements

#### 11.1 Compliance

The *Contractor* shall satisfy all *legislative requirements* except those in *Item 19 (a)* or directed by the *Superintendent* to be satisfied by or on behalf of the *Principal*.

The *Contractor*, upon finding that a *legislative requirement* is at variance with the *Contract*, shall promptly give the *Superintendent* written notice thereof. ”

...

(Item)

### “ 19 Legislative requirements

a) Those excepted  
(subclause 11.1) ”

→ prompt written notice needed

→ applied in contract sum

# EXAMPLE: STANDARD CONTRACTS – AS4000

## 1 Change in Law

### “11.2 Changes

If a *legislative requirement*:

- a) necessitates a change:
  - i) to *the Works*;
  - ii) to so much of *WUC* as is identified in *Item 19(b)*;
  - iii) being the provision of services by a municipal, public or other statutory authority in connection with *WUC*; or
  - iv) in a fee or charge or payment of a new fee or charge;
- b) comes into effect after the 14th day before the closing of tenders but could not reasonably then have been anticipated by a competent *Contractor*; and
- c) causes the *Contractor* to incur more or less cost than otherwise would have been incurred,

the difference shall be assessed by the *Superintendent* and added to or deducted from the *contract sum*”

# EXAMPLE: STANDARD CONTRACTS – AS4000

## 1 Change in Law

“Schedule 1

### 19 Legislative requirements

- a) Those excepted  
(subclause 11.1)
- b) Identified *WUC* (subclause 11.2(a)(ii))”



# EXAMPLE: STANDARD CONTRACTS – AS4000

2

## *Force majeure*

### “14 Care of the work and reinstatement of damage

#### 14.1 Care of WUC

Except as provided in subclause 14.3, the *Contractor* shall be responsible for care of:

- a) the whole of *WUC* from and including the date of commencement of *WUC* to 4:00 pm on the *date of practical completion*, at which time responsibility for the care of the *Works* (except to the extent provided in paragraph (b)) shall pass to the *Principal*; and
- b) outstanding *work* and items to be removed from the *site* by the *Contractor* after 4:00 pm on the *date of practical completion* until completion of outstanding *work* or compliance with clauses 29, 30 and 35.

Without limiting the generality of paragraph (a), the *Contractor* shall be responsible for the care of unfixed items accounted for in a *progress certificate* and the care and preservation of things entrusted to the *Contractor* by the *Principal* or brought onto the *site* by subcontractors for carrying out *WUC*.”

## EXAMPLE: STANDARD CONTRACTS – AS4000

2

### *Force majeure*

#### “14.2 Reinstatement

If loss or damage, other than that caused by an *excepted risk*, occurs to *WUC* during the period of the *Contractor's* care, the *Contractor* shall, at its cost, rectify such loss or damage.

In the event of loss or damage being caused by any of the *excepted risks* (whether or not in combination with other risks), the *Contractor* shall to the extent directed by the *Superintendent*, rectify the loss or damage and such rectification shall be a deemed *variation*. If loss or damage is caused by a combination of *excepted risks* and other risks, the *Superintendent* in pricing the *variation* shall assess the proportional responsibility of the parties. ”

# EXAMPLE: STANDARD CONTRACTS – AS4000

## 2 *Force majeure*

### “ 14.3 Excepted Risks

The *excepted risks* causing loss or damage, for which the *Principal* is liable, are:

- a) any negligent act or omission of the *Superintendent*, the *Principal* or its consultants, agents, employees or other contractors (not being employed by the *Contractor*);
- b) any risk specifically excepted elsewhere in the *Contract*;
- e) war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power. martial law or confiscation by order of any Government or public authority;
- d) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel not caused by the *Contractor* or its subcontractors or either's employees or agents;
- e) use or occupation of any part of *WUC* by the *Principal* or its consultants, agents or other contractors (not being employed by the *Contractor*); and
- f) defects in the design of *UC*. other than design provided by the *Contractor*. ”



## EXAMPLE: STANDARD CONTRACTS – AS4000

### **2** *Force majeure*

→ a pandemic not in the exhaustive list

→ consider varying, or amending for future contracts

## EXAMPLE: STANDARD CONTRACTS – AS4000

### 3 Frustration

#### “40 Termination by frustration

If the *Contract* is frustrated:

- a) the *Superintendent* shall issue a *progress certificate* for *WUC* carried out to the date of frustration, evidencing the amount which would have been payable had the *Contract* not been frustrated and had the *Contractor* been entitled to and made a progress claim on the date of frustration;
- b) the *Principal* shall pay the *Contractor*:
  - i) the amount due to the *Contractor* evidenced by all unpaid certificates;
  - ii) the cost of materials and equipment reasonably ordered by the *Contractor* for *WUC* and which the *Contractor* is liable to accept, but only if they will become the *Principal's* property upon payment; and

## EXAMPLE: STANDARD CONTRACTS – AS4000

### 3 Frustration

iii) the costs reasonably incurred:

- A) removing *temporary* works and *construction plant*;
  - B) returning to their place of engagement the *Contractor*, subcontractors and their respective employees engaged in *WUC* at the date of frustration; and
  - C) by the *Contractor* in expectation of completing *WUC* and not included in any other payment; and
- c) each party shall promptly release and return all *security* provided by the other.”



## EXAMPLE: STANDARD CONTRACTS – AS4000

### 4 Extension of Time

#### “34 Time and progress

##### 34.1 Progress

The *Contractor* shall ensure that *WUC* reaches *practical completion* by the *date for practical completion*.

##### 34.2 Notice of delay

A party becoming aware of anything which will probably cause delay to *WUC* shall promptly give the *Superintendent* and the other party written notice of that cause and the estimated delay. ”

## EXAMPLE: STANDARD CONTRACTS – AS4000

### 4 Extension of Time

#### “ 34.3 Claim

The *Contractor* shall be entitled to such extension of time for carrying out *WUC* (including reaching *practical completion*) as the *Superintendent* assesses (*'EOT'*), if:

- a) the *Contractor* is or will be delayed in reaching *practical completion* by a *qualifying cause of delay*; and
- b) the *Contractor* gives the *Superintendent*, within 28 days of when the *Contractor* should reasonably have become aware of that causation occurring, a written claim for an *EOT* evidencing the facts of causation and of the delay to *WUC* (including extent).

If further delay results from a *qualifying cause of delay* evidenced in a claim under paragraph (b) of this subclause, the *Contractor* shall claim an *EOT* for such delay by promptly giving the *Superintendent* a written claim evidencing the facts of that delay. ”

## EXAMPLE: STANDARD CONTRACTS – AS4000

### 4 Extension of Time

“ *qualifying cause of delay* means:

- a) any act, default or omission of the *Superintendent*, the *Principal* or its consultants, agents or other contractors (not being employed by the *Contractor*); or
- b) other than:
  - i) a breach or omission by the *Contractor*;
  - ii) industrial conditions or inclement weather occurring after the *dare for practical completion*; and
  - iii) stated in *Item 23*:

...

#### Item 23

23 *Qualifying causes of delay* Causes of delay for which EOT's will not be granted ”



# EXAMPLE: STANDARD CONTRACTS – AS4000

## 5

## Suspension

### “ 33 Suspension

#### 33.1 Superintendent's suspension

The *Superintendent* may direct the *Contractor* to suspend the carrying out of the whole or part of *WUC* for such time as the *Superintendent* thinks fit if the *Superintendent* is of the opinion that it is necessary:

- a) because of an act, default or omission of:
  - i) the *Superintendent*, the *Principal* or its employees, consultants, agents or other contractors (not being employed by the *Contractor*); or
  - ii) the *Contractor*, a subcontractor or either's employees or agents;
- b) for the protection or safety of any person or property; or
- c) to comply with a court order.”

## EXAMPLE: STANDARD CONTRACTS – AS4000

### 5

## Suspension

### “ 33.2 Contractor's suspension

If the *Contractor* wishes to suspend the carrying out of the whole or part of *WUC*, otherwise than pursuant to subclause 39.9, the *Contractor* shall obtain the *Superintendent's* prior written approval. The *Superintendent* may approve the suspension and may impose conditions of approval.

### 33.3 Recommencement

As soon as the *Superintendent* becomes aware that the reason for any suspension no longer exists, the *Superintendent* shall direct the *Contractor* to recommence suspended *WUC* as soon as reasonably practicable.

The *Contractor* may recommence *WUC* suspended pursuant to subclause 33.2 or 39.9 at any time after reasonable notice to the *Superintendent*.”

## EXAMPLE: STANDARD CONTRACTS – AS4000

5

### Suspension

#### “ 33.4 Cost

The *Contractor* shall bear the cost of suspension pursuant to paragraph (a)(ii) of subclause 33.1 and subclause 33.2. If the *Contractor* made the protection, safety or court order necessary, the *Contractor* shall bear the cost of suspension pursuant to paragraph (b) or (c) of subclause 33.1. If the *Contractor* otherwise incurs more or less cost than otherwise would have been incurred, the difference shall be assessed by the *Superintendent* and added to or deducted from the *contract* sum. ”

→ suspension for the protection or safety of any person



## **EXAMPLE: STANDARD CONTRACTS – AS4000**

**6**

### **Termination for Convenience**

→ not in the unamended AS4000

→ may be inserted by Principal

# PLANNING TIMELINES

## Planning System Acceleration Program (NSW)

→ Fast tracking of development applications

Criteria:

Jobs

Timing

Public Benefit

### Other States:

- Fast tracked approval system (NSW, ACT, SA, TAS, NT, WA)
- Extended statutory timeframes (QLD, TAS, NT, WA)

## **Planning System Acceleration Program (NSW)**

**28 April 2020**

- **24 projects identified**
- **Almost 9,500 new jobs**
- **Inject \$7.54 billion into the state's economy**

**Media release from Rob Stokes,  
Minister for Planning and Public Spaces**



# TAKE-HOME POINTS

- (1) Consider contractual obligations**
- (2) Consider contractual notice requirements**
- (3) Review recent statutory changes**
- (4) Consider financial security**
- (5) Consider supply chain disruptions**

**PART  
B**

# Real Estate Issues

# TIMELINE



**25 January, 2020** First case of COVID-19 in Australia

**25 March, 2020** *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 No1 (NSW)* commences

**30 March, 2020** Strict restrictions on gathering and movement, closure of certain premises

**7 April, 2020** National Cabinet Mandatory Code of Conduct – Commercial Leasing Principles during COVID-19 announced

**22 April, 2020** *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020 (NSW)* commences

**24 April, 2020** *Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW)* commences



24 April 2020

# Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW)

## Does it affect me?

**Applies to:**

Retail shop lease and  
commercial leases

*“impacted lessee”*

JobKeeper

Turnover < \$50M

- Corporations:  
turnover of the group
- Includes online sales

**But NOT leases:**

Entered into after  
24 April 2020

Under the *Agricultural  
Tenancies Act 1990*

- Regulation still applies to  
renewed or extended leases

24 April 2020

# Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW)

## What does it do?

### Restrictions against:

Eviction

Re-entry

Securities

Distrain of goods

Increasing rent

Termination

Damages

Interest

Possession

### For reasons of:

Failure to pay rent  
and outgoings

Business not trading

→ Landlords can still  
enforce rights for  
other reasons

→ Until October 2020

24 April 2020

# Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW)

## What does it do?

Tenants & Landlords must  
renegotiate rent in good  
faith

Mediation

- Consider economic impacts  
of COVID-19
- Consider leasing principles  
in Code of Conduct

If mediations fail:

Tribunal and courts must  
have regard to  
National Code of Conduct

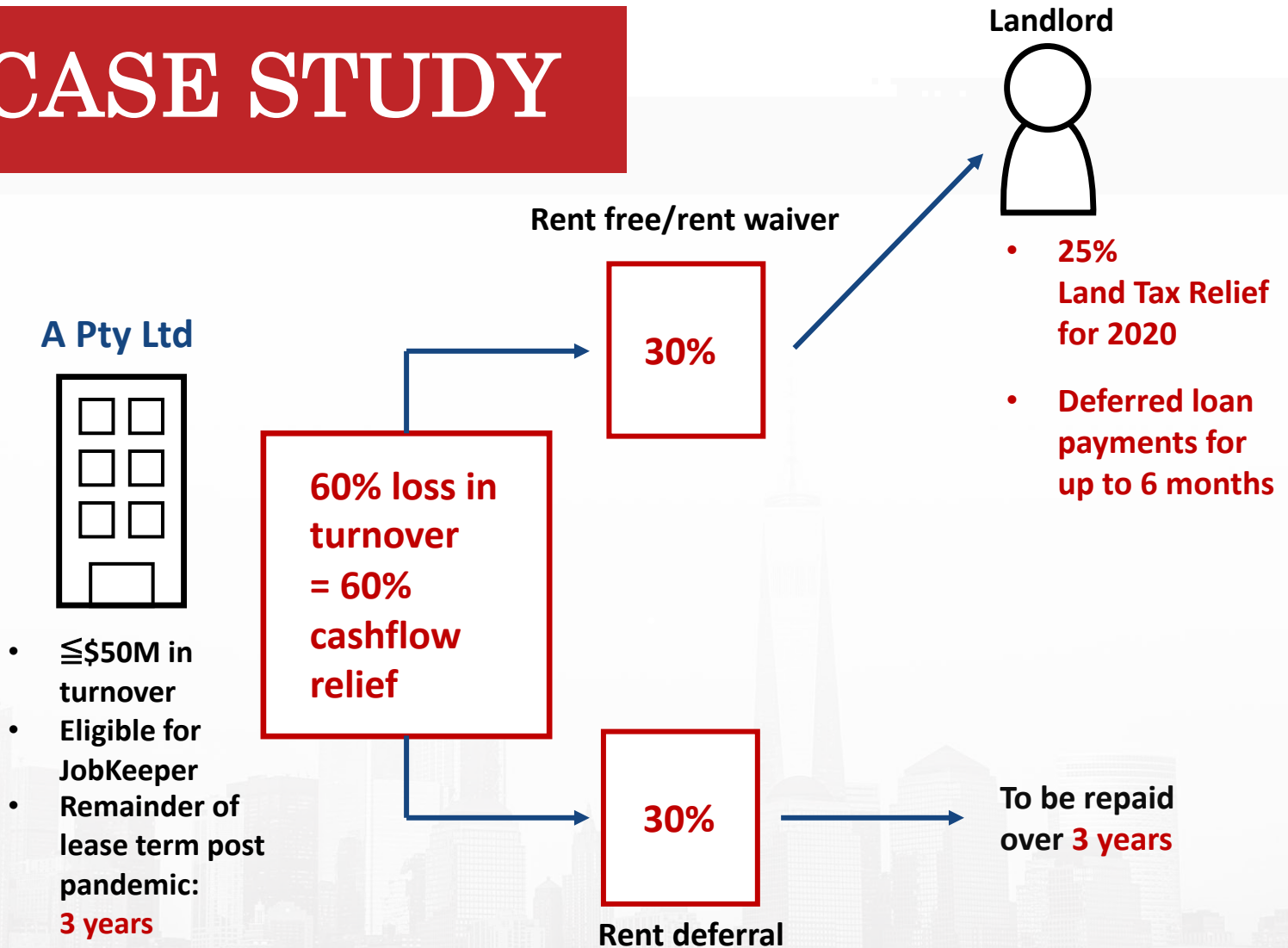
→ therefore,  
good faith and legitimate  
practices are important



# PROACTIVE RISK MANAGEMENT

- **Tenants: Commence discussions with landlords ASAP**
  - Focus on rent waiver or deferral to avoid anticipatory breach or repudiation
  - Maintain compliance with lease
  - Keep documentation to prove eligibility
- **Landlords:**
  - 1 Carefully assess Tenant's financial circumstances
  - 2 Structure rent relief
  - 3 If no agreement – dispute resolution
    - Important to take a pragmatic approach

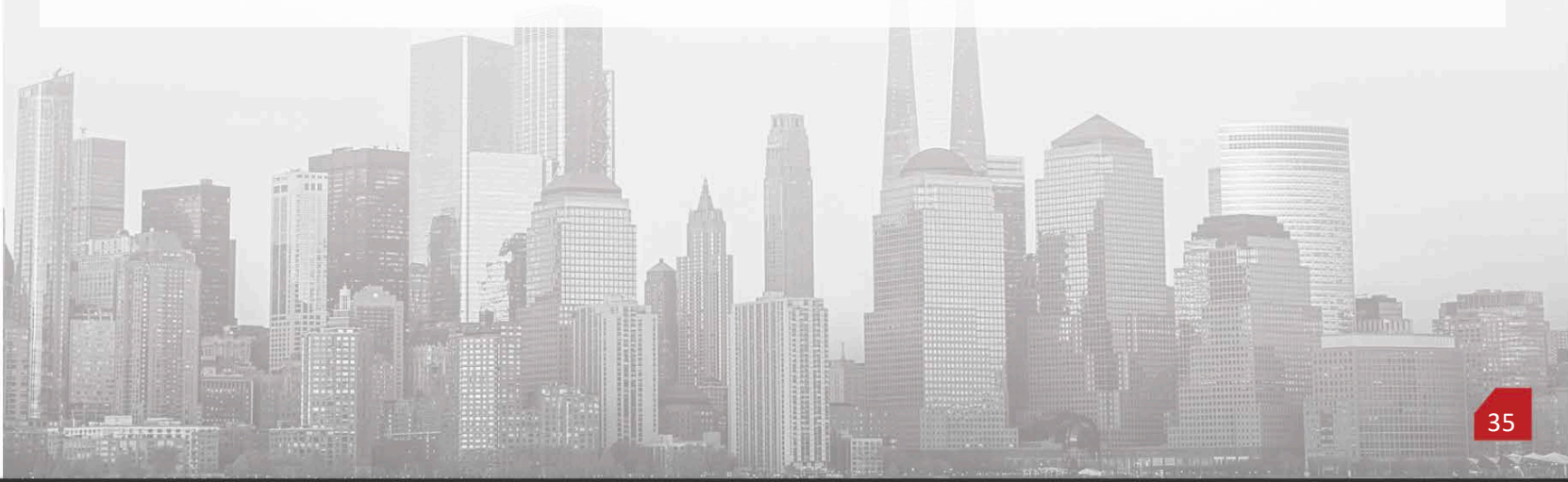
# CASE STUDY



# CASE STUDY

## **Agreement :**

- 30% waiver of rent for pandemic period
- 30% deferral of rent
- Deferred rent to be repaid over the remainder of the lease post-COVID-19 (3 years)
- Possible extension of lease





# PROPERTY TRANSACTIONS IN THE AGE OF COVID-19

## **Sales exchanged but not settled**

- Variation by mutual agreement
- Forfeiture of deposits?

## **Future sales**

- Drafting a special condition?
- Alternative methods for exchange

- Under general law, COVID-19 unlikely to fundamentally affect rights and obligations of parties for conveyancing

# LAND DEALINGS

## IN THE AGE OF COVID-19

### *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020 (NSW)*

→ signatures can be witnessed via audio visual link

For: a will, power of attorney, deed or agreement, statutory declaration...

Observe the person  
signing the document  
in real time

Endorse the  
document or its copy  
with a statement

Confirm by signing a  
document or its copy

→ Specifying the method  
used to witness the signature  
→ State document was  
witnessed in accordance  
with the regulation

→ Including with  
the LRS

→ Note difficulties  
with corporations

# LAND DEALINGS

## IN THE AGE OF COVID-19

### Electronic signing



#### Near or above electronic sign:

*Electronic signature of me, [insert full name], affixed by me, or at my direction, on [insert date]*

#### OR:

Use digital signing platform that indicates electronic signature, date and time

*"I, [name] attest that this document was signed in counterpart and witnessed by me by audio-visual link in accordance with clause 2 of Schedule 1 to the Electronic Transactions Regulation 2017".*



Witnessing of documents via audio visual link



# LAND DEALINGS

## IN THE AGE OF COVID-19

Deeds and agreements

Can be witnessed electronically

Powers of Attorney

Can be witnessed electronically. Signing dependent on jurisdiction, but generally wet ink required.

Statutory declarations

Can be signed electronically and sworn over audio visual link

Mortgage

Dependent on specific jurisdiction, or electronically transacted through PEXA

Loan agreement

Can be electronically signed, but hardcopy of Loan Agreement must be sent to guarantor

Documents relating to dealings with land

Changes to *Conveyancing Rules* allow paper land dealings, plans and s 88B instruments to be signed electronically or witnessed via audio visual link

→ Requirements for execution, certification and verification of identify, establishing right to deal remain

PART  
C

# Workplace Health and Safety, & Business Continuity



**HARMERS**  
WORKPLACE LAWYERS

# WORKPLACE RELATIONS, HEALTH AND SAFETY AND BUSINESS CONTINUITY ISSUES FOR THE CONSTRUCTION AND PROPERTY SECTORS



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# **1. MAINTAINING WORK HEALTH, SAFETY & WELFARE**

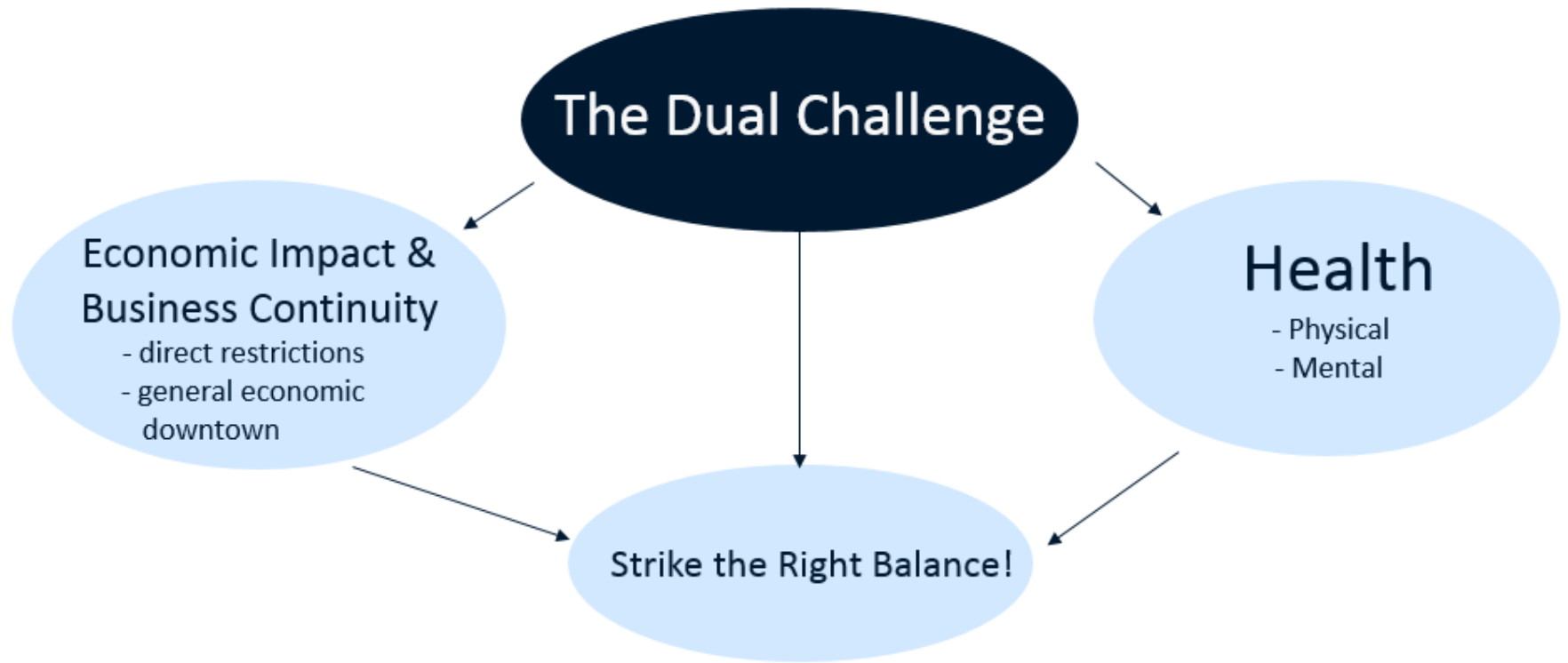
during the

**CORONAVIRUS**

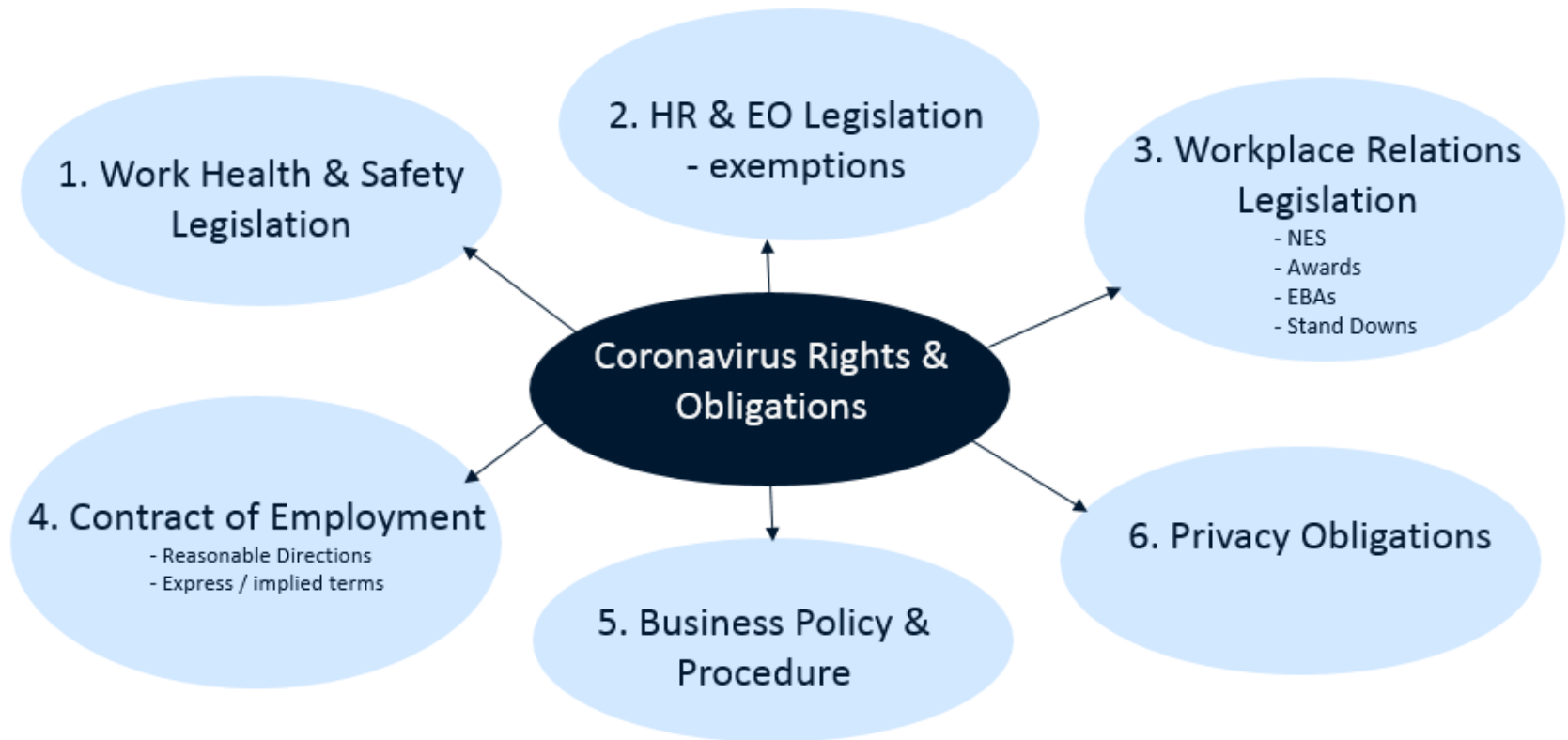
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**CONSTRUCTION AND PROPERTY SECTORS**

# The Dual Challenge



# Coronavirus Rights and Obligations





# Prevention

## – *Preventing the Spread of the Virus*

1. Corporate Commitment and Leadership
2. People Commitment and Business Culture
3. Allocation of Responsibility
4. Understanding Legal Obligations and Opportunities
5. Risk Identification, Analysis, Assessment and Prioritisation
6. Introduction of Risk Controls
7. Supervision, Training and Enforcement
8. Monitor and Review

# Reaction

## - *Reacting to Certain Potential Impacts of the Virus*

1. Specific Emergency Response Plans
2. Internal Reports
3. External Reports
4. Internal Investigation
5. External Investigation
6. Steps to Prevent Recurrence
7. Risk Transfer
8. Monitor and Review

# Short to Medium Term Perspective on the Coronavirus



## **2. BUSINESS CONTINUITY**

during the

**CORONAVIRUS**

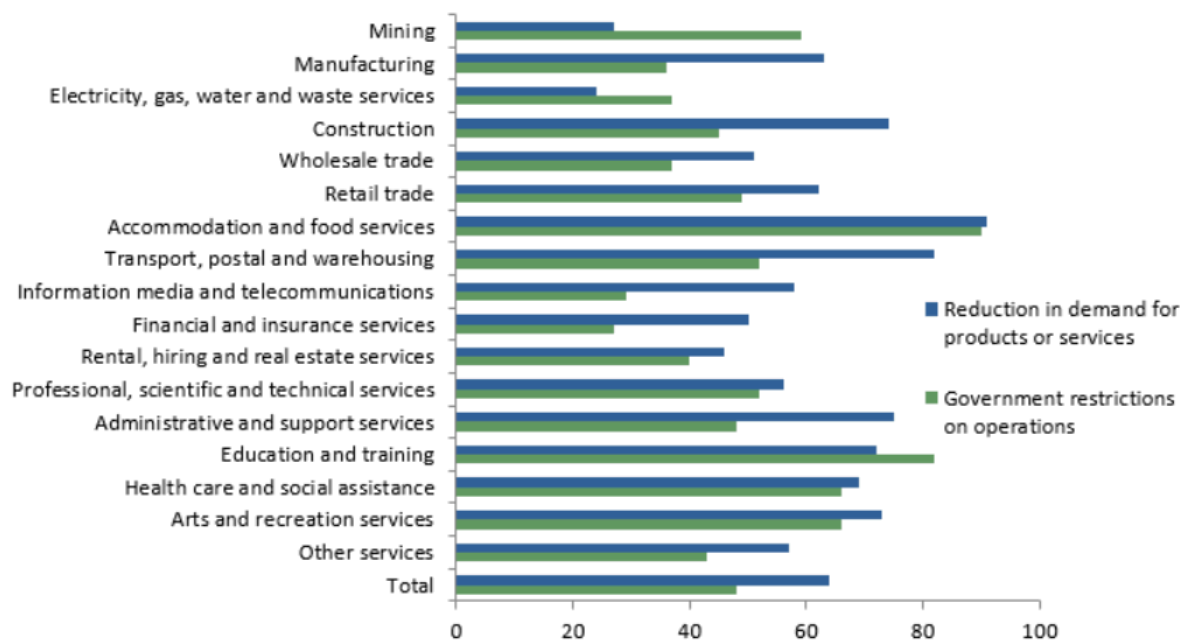
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# Economic Impact: Industry Sector – ABS April 2020

Selected business operational impacts, by Industry division<sup>(a)(b)</sup>

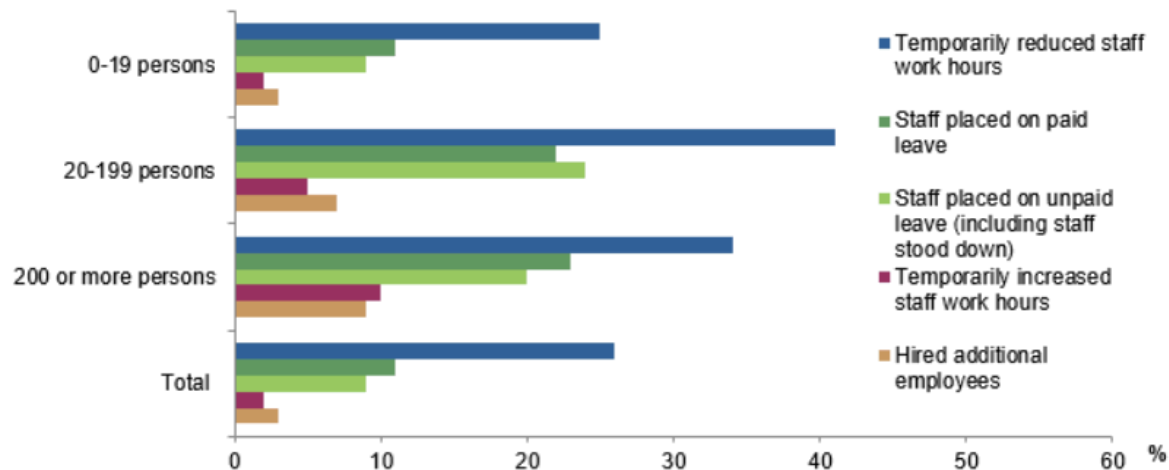


(a) Proportions are of businesses currently trading.

(b) Businesses could select more than one option.

# Economic Impact: Business Size – ABS April 2020

Proportion of businesses trading that made changes to workforce arrangements<sup>(a)</sup> in the last two weeks as a result of COVID-19, by employment size<sup>(b)(c)</sup>

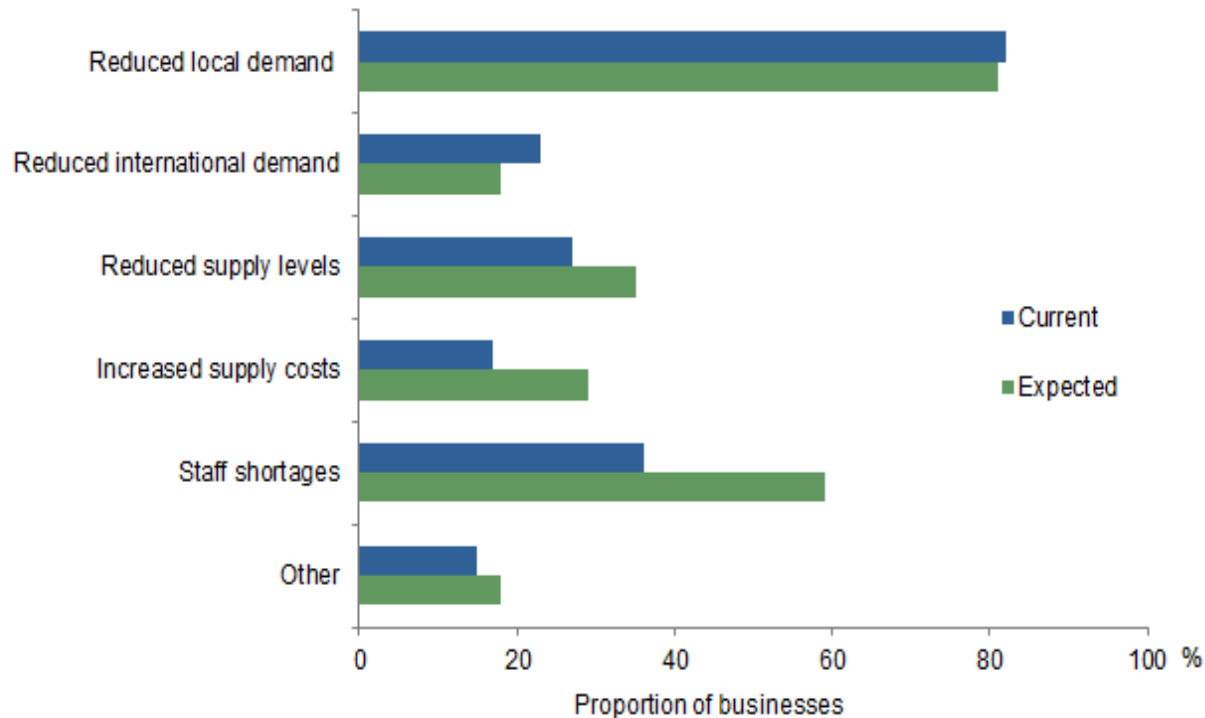


(a) Graph presents selected workforce arrangements.

(b) Proportions are of businesses currently trading.

(c) Businesses could select more than one option.

# Economic Impact: Impact Factors – ABS April 2020



# Government Stimulus Measures

- **Business Loan, Commercial Lease and Cash Stimulus Support**
- **JobSeeker Allowance**
  - unemployment benefit doubled
- **JobKeeper Allowance**
  - Aimed to sustain the employment relationship
  - \$1,500.00 fortnightly payment by the Federal Government via the Employer
  - available for 6 months from 30/3/20 to 28/9/20
  - **Businesses eligible if:**
    - 30% decline if annual turnover < \$1 billion
    - 50% decline if annual turnover > \$1 billion
  - available for full-time, part-time, long-term casuals and stood down employees on books at 1 March 20



# Comparative Cost Pressures

Guarantee of Annual Earnings (High Income Threshold) -  
Average (2019/2020)

\$2,859.00

Full-Time Adult Average Total Earnings (November 2019)

\$1,720.00

Median Wage (August 2019)

\$1,100.00

Job Keeper Rate (March 2020)

\$750.00

Federal Minimum Wage (July 2019)

\$741.00

Job Seeker Rate (March 2020)

\$225.00

\$0.00 \$500.00 \$1,000.00 \$1,500.00 \$2,000.00 \$2,500.00 \$3,000.00 \$3,500.00

# **JobKeeper Amendments to the *Fair Work Act 2009 (Cth)***

## **Reasonable Directions for:-**

- Stand Downs**
- Altered duties, location, days/hours of work**
- the taking of paid annual leave**

# Other Available Modes of Relief for Employers

- **Leave**
- **hours and pay flexibility**
- **Stand Downs**
- **Redundancy**

# Fair Change Management

1. Audit obligations
2. Clear objectives
3. Definite decisions
4. Timing imperative
5. Communication strategy
6. Notice
7. Consultation
8. Attempt to avert/mitigate impact
9. Counselling
10. Phased implementation
11. Hardship cases
12. Proactive utilisation of the industrial system
13. Legal risk management
14. Monitor/review/improve





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# Q&A

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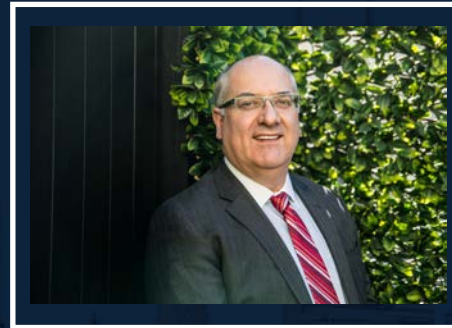
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