



Legal issues arising from Corona virus

Waste Industry Circular for WCRA Members
12 March 2020

The World Health Organisation yesterday declared that the Corona virus (Covid-19) has reached pandemic status. The pandemic declaration will raise contract and employment issues for members businesses, so WCRA asked Ross Fox and Jay Clowes of Fishburn Watson O'Brien to answer some critical questions that are likely to arise.

Should employers provide employees with personal protective equipment (hand sanitiser, gloves, etc.)?

Employers in NSW have an obligation to provide their workers with a safe workplace. Employers who fail to do so risk prosecution, fines and (if acting recklessly) possible imprisonment.

It is difficult to imagine SafeWork NSW prosecuting ordinary employers who had no specific reason to expect that their employees were any more at risk from Covid-19 than the ordinary public but it should also be remembered that employers will ultimately bear the burden of any employee becoming unwell and taking personal/carer's leave.

In those circumstances, it may be prudent for employers to provide appropriate personal protective equipment to their employees, particularly those with public-facing duties.

What reporting obligations do employees have?

Under the Work Health and Safety Act 2011, employees must (while at work):

- (a) take reasonable care for his or her own health and safety, and
- (b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons, and

- (c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act, and
- (d) co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.

Employers should remind their workers of these obligations and direct them to notify the relevant supervisor should they experience any of the symptoms associated with Covid-19, seek medical advice and comply with that advice.

Employers with large workforces should consider preparing a written Covid-19 policy and circulating it to their workers. Usual policy-acknowledgement procedures should apply.

What about workers who don't have any personal/carer's leave? Are they entitled to be paid?

No. Workers in this position (including casual employees) are entitled to take personal/carer's leave to care for their immediately family and members of their household but they are not entitled to be paid for it.

Workers with no accrued paid personal/carer's leave may wish to take paid annual leave instead. Annual leave must be taken by agreement between the worker and the employer but employers are not entitled to unreasonably refuse a request for annual leave.

How does the Covid-19 pandemic impact members' contractual obligations?

Many contractual obligations may become difficult to meet as a result of the pandemic. This may result in members being unable to comply with contractual and service obligations, for example due to lack of staff to drive trucks. It is important to get legal advice up front on these issues.

Many agreements contain a "Force Majeure" clause that gives parties special rights if circumstances arise that make it impossible to perform the agreement. The text of each Force Majeure clause is different so it is important to check whether your agreement contains a Force Majeure clause and, if it does, what the clause says.

If the Covid-19 pandemic makes performance of a contract impossible (such as if the only possible supplier of a necessary part or product suspends production or workers have been quarantined) then it is possible that Force Majeure clauses will apply.

Alternatively, the doctrine of frustration of contract may apply to relieve parties of obligations.

We recommend that any organisation that is considering invoking a Force Majeure clause seek specific legal advice as there are often specific requirements and legal impacts.

Other contractual tools that can be used

Parties may seek to invoke contract clauses including:

- price adjustment clauses due to increased supply chain costs;
- limitation or exclusion clauses to limit services;
- change in law clauses in the event that either state or Commonwealth governments create new quarantine or other laws.

Potential insolvency

Due to the financial impacts of Covid-19 on the supply chain, members may need to delay projects and investment. Where members financial business are experiencing distress, it is critical to seek advice on protection from creditors and legal obligations to avoid default and personal liability. Personal asset protection is also likely to become critical for members in these situations.

Way forward

Members who require further advice on employment matters should contact Jay Clowes, Principal, at Fishburn Watson O'Brien on 0418 960 275.

For all other inquiries contact Ross Fox, Principal, Fishburn Watson O'Brien on 0421 358 575 who will ensure that your inquiry can be dealt with by a specialist in the relevant area.



Please note that this is general advice only. We recommend that members seek specific legal advice in relation to their particular situation. If you require further information or advice, please contact:

Tony Khoury | Executive Director | Waste Contractors & Recyclers Association of NSW

Office: Suite 2, First Floor, 12-16 Daniel Street, Wetherill Park NSW

P: 02 9604 7206 | **M:** 0414 937 046 | **E:** tony@wcra.com.au; **W:** www.wcra.com.au

Jay Clowes | Principal | Fishburn Watson O'Brien Lawyers

Office: Level 12, 300 George Street, Sydney, NSW 2000

P: (02) 6650 7016 | **E:** jclowes@fwolaw.com

Ross Fox | Principal | Accredited Specialist Planning and Environment | Fishburn Watson O'Brien Lawyers

Office: Level 12, 300 George Street, Sydney, NSW 2000

M: 0421 358 575 | **E:** rfox@fwolaw.com