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Welcome to the COVID-19 Challenges session

We start shortly please stand by

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COVID-19 Challenges

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Upshot as at 25 March

- Recommendation to National Cabinet that all outdoor gatherings should cease, with a limit of 10 persons in a related group
- Further limits on indoor gatherings, including strong recommendation to limit unnecessary visits to private residences and enforcement of density limit (1 person per 4 square metres) for any indoor gathering
- Large number of businesses shut. The real question of who is still open?
 - Chemists, supermarkets, petrol stations, hairdressers and liquor shops;
- Huge welfare injection via Centrelink;
- Small business relief through no interest loans, relaxation of payroll tax, bank moratoriums on debt

Federal Government Position

- **21 Jan** – COVID-19 officially designated a “listed human disease” under the Biosecurity Act
- **18 Feb** – Emergency Response Plan for COVID-19 issued
- **13 Mar** – Non-essential gatherings of 500+ people banned
- **18 Mar** – All non-essential indoor gatherings for 100+ people banned. COVID-19 also declared a “human biosecurity emergency”
- **19 Mar** – Travel ban put in place for all non-citizens/non-residents coming to Australia
- **20 Mar** – Density limit enforced for indoor and outdoor gatherings of 1 person per 4 square metres
- **23 Mar** – Places of social gathering, such as entertainment and recreational venues, ordered to close
- **24 Mar** – Further business ordered to close and further recommended limits on gatherings
- **25 Mar** – National COVID-19 Coordination Committee established to coordinate advice to the Australian Government and National Cabinet

New South Wales Government Position

- **15 Mar – Public Health Order** made banning gatherings of 500+ people
- **18 Mar – Public Health Order** made banning all mass gatherings of 500+ people outside or 100+ people inside from being hosted, organised or attended
- **21 Mar – Public Health Order** made further banning all gatherings where there is not at least 4 square metres of space per person
- **23 Mar – Public Health Order** made forcing the closure of businesses and premises as listed in the Order
- **25 Mar – Public Health Orders** made placing additional restrictions on non-essential activities, weddings, funerals and social sports; and enforcing isolation if diagnosed with COVID-19

Victorian Government Position

- **15 Mar** – Statement from CHO advising not to hold non-essential gatherings of 500+ people
- **16 Mar** – **Declaration** of State of Emergency over VIC
- **18 Mar** – **Direction** issued banning mass gatherings of 500+ people outside or 100+ people inside
- **22 Mar** – **Direction** issued placing further limits, banning all gatherings where there is not at least 4 square metres of space per person
- **23 Mar** – **Direction** issued forcing the closure of all non-essential businesses as defined in the Direction
- **26 Mar** – **Directions** issued placing additional restrictions on non-essential activities, weddings, funerals and social sports; and enforcing isolation if diagnosed with COVID-19

Queensland Government Position

- **31 Jan** – **Order** made declaring Public Health Emergency over QLD
- **18 Feb** – **Regulation** published extending Public Health Emergency for 90 days
- **19 Mar** – **Public Health Act** amended to give government more powers to effect National Cabinet initiatives to manage COVID-19
- **21 Mar** – **Public Health Direction** made banning the hosting, organising or attending of mass gatherings of 500+ people outside, 100+ people indoors, or <100 where there is more than 1 person per 4 square metres
- **23 Mar** – **Public Health Direction** made forcing non-essential business undertakings, as defined in the Direction, to close
- **24 Mar** – **Public Health Direction** made forcing mandatory self-isolation period for anybody entering Queensland from interstate
- **25 Mar** - **Public Health Direction** made forcing additional non-essential business undertakings, as defined in the Direction, to close

ACT Government Position

- **16 Mar – Declaration** of Public Health Emergency over ACT
- **19 Mar**
 - **Public Health Emergency Direction** issued banning indoor gatherings of 100+ people until the end of the declared emergency
 - **Public Health Emergency Direction** issued banning outdoor gatherings of 500+ people until the end of the declared emergency
 - **Public Health Emergency Direction** issued enforcing self-isolation for any travellers arriving in ACT from overseas
- **20 Mar – Declaration** extending Public Health Emergency
- **23 Mar – Direction** issued enforcing forcing closure of non-essential businesses as done in other states
- **25 Mar – Declarations** issued placing additional restrictions on non-essential business activities and enforcing isolation if diagnosed with COVID-19
- **26 Mar – Declaration** further extending Public Health Emergency

Tasmanian Government Position

- **15 Mar** – Announcement advising not to hold non-essential gatherings of 500+ people
- **17 Mar** – **Declaration** of Public Health Emergency over TAS
- **18 Mar** – **Direction** banning all indoor gatherings of 100+ people
- **19 Mar** – **Authorisation** issued enforcing border protection measures including self-quarantine for any person arriving from TAS from interstate or overseas
- **20 Mar** – **Limit** placed on indoor gatherings of <100 people, enforcing a minimum density of 4 square metres per person
- **23 Mar** – **Public Health Direction** forcing the closure of non-essential businesses or undertakings as listed in the Direction

Northern Territory Government Position

- **18 Mar – Declaration** of Public Health Emergency over NT. Non-essential large gatherings of 500+ people outdoors or 100+ people indoors banned, and persons arriving from overseas legally required to self-isolate
- **20 Mar – Declaration** extending Public Health Emergency
- **23 Mar – Direction** restricting the opening of all indoor and outdoor facilities as listed in the Direction
- **25 Mar - Direction** issued forcing additional non-essential business undertakings, as defined in the Direction, to close

South Australian Government Position

- **16 Mar** – Announcement of declaration of Public Health Emergency declared over SA
- **18 Mar** – **Direction** enforcing self-isolation on arrival in SA from overseas
- **19 Mar** – **Direction** banning all mass gatherings of 500+ people outdoors or 100+ people indoors
- **22 Mar** – Announcement made that self-isolation would be enforced from 24 Mar for anybody entering SA from interstate or overseas
- **23 Mar** – **Direction** further limiting indoor gatherings of <100 people, enforcing a minimum density of 4 square metres per person
- **25 Mar** – **Direction** forcing the closure of non-essential business and also further limiting gatherings

Western Australian Government Position

- **15 Mar** – Declaration of State of Emergency over WA
- **16 Mar** – Declaration of Public Health Emergency over WA
- **18 Mar** – **Direction** enforcing self-quarantine following overseas travel
- **19 Mar** – Declaration extending State of Emergency
- **20 Mar** – **Direction** banning all mass gatherings of 500+ people outside, 100+ people inside or <100 people where there is not at least 4 square metres of space per person
- **23 Mar** – **Direction** ordering the closure of all ‘affected places’ as listed in the **Direction**
- **25 Mar** – **Direction** ordering closure of additional ‘affected places’ as defined in the **Direction**
- **26 Mar** – **Direction** ordering that people refrain from ‘affected activities’ as defined in the **Direction**

What can we do?

- Insurance
- Force majeure
- Directors/insolvent trading
- Liability – employees, functions etc

Insurance

- Need to look at liability policies such as industrial special risks for a business interruption component
- Issues will include whether the loss falls into the definition of “damage”
- Usually there is section 1 cover – loss or damage to property and section 2 cover – consequential loss such as loss of profit, revenue etc
- Usually there is a trigger – such as business losses arising from property damage, so you have to see if there is such a trigger in your policy;
- There are often extensions of cover to include – infectious diseases; interruption or interference with supplier’s or customer’s business, prevention of access to premises; the intervention of government or authorities;
- Contact your broker – they are your agent

Example Clause

- **Consequential loss:** *In the event of any building or any other property or any part thereof used by the insured at the Premises for the purpose of the Business being physically lost, destroyed or damaged by any cause or event not hereinafter excluded (loss, destruction or damage so caused being hereinafter termed 'Damage') and the Business carried on by the Insured being in consequence thereof interrupted or interfered with, the Insurer(s) will, subject to the provisions of this Policy including the limitation on the Insurer(s) liability, pay to the Insured the amount of loss resulting from such interruption or interference in accordance with the applicable Basis of Settlement.*

Basis of Settlement

- **Item 1: "The insurance under this item is limited to loss of Gross Profit due to:**

- (a) Reduction in Turnover and
- (b) Increase in Cost of Working

and the amount payable as indemnity thereunder shall be:

- (a) In respect of Reduction in Turnover the sum produced by applying the Rate of Gross Profit to the amount by which the Turnover during the Indemnity Period shall, in consequence of the Damage, fall short of the Standard Turnover
- (b) In respect of Increase in Cost of Working the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in Turnover which, but for that expenditure, would have taken place during the Indemnity period in consequence of the Damage, but not exceeding the sum produced by applying the Rate of Gross Profit to the amount of the reduction thereby avoided

less any sum saved during the Indemnity Period in respect of such of the charges and expenses of the Business payable out of Gross profit as may cease or be reduced in consequence of the Damage."

Force Majeure

- These clauses come in lots of different forms but in essence if a designated event occurs – a FM event – you can give notice suspending your obligations under the contract
- The main thing is whether a FM event has occurred – often the events are very general. Lets say there is one that says “pandemic, epidemic, quarantine”. Is it when COVID-19 first surfaced in Wuhan or the WHO declaration of a pandemic or Australian government action?
- Did you suffer loss, from say shutting the business, cancelling an event, saying to contractors you cannot use them, from a Government direction or your choice
- Important re Judge’s view on FM events and what to refer to in the notice
- Follow the clause re the notice – Courts have held they are conditions precedent to relying on FM not just a mere contractual breach
- Be very wary if references to say “good engineering and operating practice” – opens up the whole event to challenges and production of documents
- So, serve the notice and negotiate

Material Adverse Change or Event (MAC/MAE) Clause

- These clauses will appear in financing documents. The well drafted ones give a lender the sole discretion to terminate a transaction because of an event that negatively impacts the nature or value of the company or business.
 - Something like - ‘no material adverse change in the financial condition (consolidated if applicable) of the Borrower since the date of the loan agreement”
- Usually, a loan agreement would include at least an event of default triggered by the occurrence of any event or circumstance which has a "material adverse effect". Many representations, warranties and covenants in loan documents only are a breach of the document if the relevant event "has, or is reasonably likely to have, a material adverse effect“

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Material Adverse Change or Event (MAC/MAE) Clause (continued)

- The event or change needs to significantly affect the borrower's ability to perform its obligations under the loan documents, in particular its ability to repay the loan. Otherwise a lender could call a default or suspend lending when the borrower's financial condition does not fully justify it. This would involve assessment of the financial statements of the borrower as at the relevant date, although other information may provide compelling evidence to show a material adverse change.
- Changes that undermine the lender's original decision to lend or would cause the lender to proceed upon significantly different terms (as to such matters as margin, maturity or security) are also usually sufficient.

Likelihood of FM Being Called Upon

- **Acting for a seller/service provider so more likely to call FM**
- You would want a wide series of FM events. Simply saying something like “pandemic, epidemic, or quarantine” maybe too generalized so you may want something a bit more granular such as “Any declaration by the WHO that a health issue is a pandemic”
- You would want a lengthy period for the giving of a notice to allow negotiations
- You would want to cut out any references to “good operating or engineering practice” or the same ilk as that will enable a counter-party to widen the dispute
- You would want to leave quite general the reference to suspension of obligations under the contract
- **Acting for a recipient of goods or services so more likely to have FM called against them**
- You would want a limited set of FM events – say a declaration by the Australian Commonwealth Government under the Biosecurity Act or a State Government under their respective Public Health Acts. If a need to be wider to encompass overseas situations perhaps “any directive or order from a government authority that has the effect of.....”. So you avoid general FM events and try to tie to some specifics
- A short notice period – as soon as possible, as soon as reasonable. Immediately may be difficult to obtain
- Lots of references to good operation practice
- A granular description of what happens if there is a suspension

In essence the mirror opposites of each other as is usual in these matters and you meet somewhere in the middle. The Notice one is what catches people as commercial people try and negotiate, so perhaps give way on the definition but have a short notice period

Insolvency

- It suspends, for at least 6 months the current ‘insolvent trading’ regime under the Corporations Act whereby directors can be personally liable for debts incurred by their company at a time it is insolvent. So relief from trading whilst insolvent;
- The existing ‘safe harbour’ is unlikely to adequately deal with an unprecedented situation of sudden, widespread distress of uncertain duration. In such circumstances, it may be difficult for directors to rationally form a view that a restructuring or other plan or “course of action” (in the language of the current legislation) would be likely to lead to a better outcome for the company than the immediate appointment of administrators or liquidators;
- It is nevertheless critical for directors to understand that they remain bound by their general statutory and common law duties – that is, to act with reasonable care and diligence, in good faith in the best interests of the company and for proper purposes. The new legislation will not give carte blanche for Boards to behave as they wish, or to fail to act where action is clearly required, whether during the 6-month hiatus period or otherwise.;
- Directors must consider cash flow, available assistance, possible financing options, have a plan and document actions;
- Statutory demands increased from \$5,000 to \$20,000 and bankruptcy notices from \$2,000 to \$20,000 and time to respond from 21 days to 6 months.

Termination of memberships/refunds

- Consumer law generally provides that if a good or service is not provided, a supplier cannot take payment even if a contract says they can suspend services
- Postponing is difficult. It is a variation to the contract and generally people can seek a refund

Questions?