

# COVID-19

## AUSTRALIAN OVERVIEW

7 April 2020

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### INTRODUCTION

The COVID-19 pandemic has seen unprecedented Australian federal and state government intervention.

Not surprisingly, stock markets have fallen sharply and many industries have been hard hit, including transport, tourism, events, hospitality, sports, real estate, retail and education – and significantly most SMEs. This has resulted in employee redundancy or stand downs, as well disruption to the manufacturing supply chain with significant financial losses flowing.

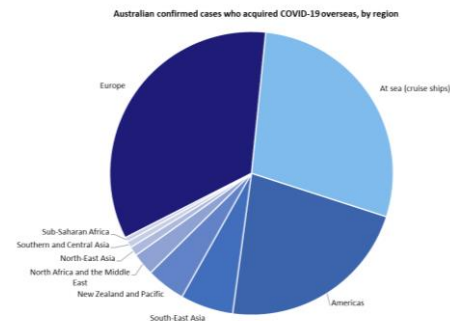
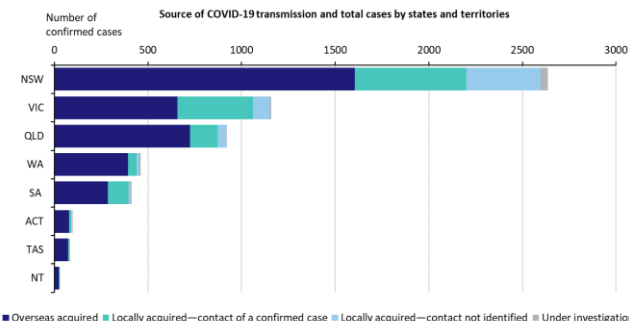
This guide is designed to provide an overview of the new legislation, emergency orders and directives now in place. It also highlights key developments across different product classes in Australia, which our insurance clients can use to inform their decisions regarding Australian losses.

Wotton + Kearney's team of insurance specialists are available to assist insurers and their customers in responding to any specific enquiry, or financial losses associated with the virus in Australia.

### CURRENT STATE OF THE PANDEMIC IN AUSTRALIA

As of 7 April 2020, there have been **5,895 confirmed cases** of COVID-19 in Australia with **45 deaths**. More than **297,000 tests** have been conducted across the country, which is one of the highest per capita rates across the world. The eastern states have recorded the most cases, as shown in the graph below left. The majority of Australian cases acquired their infection overseas, including on board cruise ships (with one significant public health issue involving the Ruby Princess) or associated with recent travel to Europe or the Americas.

All travellers arriving in Australia by air or sea must be isolated in mandatory quarantine accommodation for 14 days from their arrival. In each state, the transport to the accommodation and isolation for those arriving from overseas now occurs under police or military guard at a range of hotels funded by the Australian Government. All Australian states have also closed their borders to domestic travel requiring mandatory self-isolation for anyone arriving by air, sea or road.



# Regulatory responses

## FEDERAL & STATE LEVELS

Australia's regulatory response has been driven by the Commonwealth Government, with consequential responses where necessary, at a state level. The Australian Government wants a uniform approach across the states. However, the relevant state legislative instruments allow states to extend their restrictions beyond those implemented from Canberra if necessary.

Each state has legislative provisions that allow them greater reach and power in times of crisis. These powers, which are otherwise unavailable to the respective state health ministers, ensure that the executive is well-equipped to rapidly respond to unfolding situations without the need for regular parliamentary approval processes.

The effect of these provisions is that each government can undertake the measures it deems fitting to address the COVID-19 emergency and can tighten or amend the restrictions it implements.

**See over for breakdown of key legislation by area.**



## Commonwealth legislation

At this stage, the governmental focus appears to be directed towards intervening before the stage where claims would have to be made.

This includes the following assistance:

- up to \$100,000 to eligible small and medium-sized businesses, and not for-profits that employ people;
- temporary relief for financially distressed businesses;
- increase to the instant asset write-off to \$150,000;
- a 15-month business investment incentive; and
- subsidy of up to 50% of apprentice and trainee wages for 9 months.

## Insurance Council of Australia

On 11 March 2020 the Insurance Council of Australia (ICA) declared COVID-19 an "insurance catastrophe".

As a part of this declaration, the ICA has formed an insurance industry taskforce to "ensure that accurate claims data is captured by industry, and that industry positions on the virus can be understood by stakeholders".

At this stage, the ICA has published some general guidelines regarding the likelihood of COVID-19 triggering cover under the following types of policies:

- business interruption insurance;
- travel insurance; and
- life insurance.

## Regulatory intervention – APRA, ASIC and ACCC

On 23 March 2020, APRA outlined the following approach to COVID-19 support packages being offered by banks and other lenders, giving affected borrowers an option to defer their repayments for a period of up to six months. These packages have mainly been offered to small business and home loan customers.

Where a borrower who has been meeting their repayment obligations until recently chooses to take up the offer not to make repayments as part of a COVID-19 support package, APRA has advised the bank need not treat the period of the repayment holiday as a period of arrears.

Similarly, loans that have been granted a repayment deferral as part of a COVID-19 support package need not be regarded as restructured.

APRA advised it would contact all authorised deposit-taking institutions (ADIs) to advise them of the specific reporting treatment for loans subject to these support arrangements.

APRA will require ADIs to report to APRA, and publicly disclose, the nature and terms of any repayment deferrals and the volume of loans to which they are applied. ADIs must also still continue to provision for these loans under relevant accounting standards.

APRA and ASIC have also issued a joint letter to all superannuation licencees authorised by APRA under s 29D of the *Superannuation Industry (Supervision) Act 1993* (Cth).

In essence, this letter advised that despite the changes necessary to meet the challenges made by COVID-19, their legal obligations and their duty to act in the best interests of their members, particularly regarding superannuation licencees maintaining liquidity to meet payment requests.

# Regulatory responses

On 2nd April 2020, the ACCC provided interim authorisation for a package of support by insurers that includes a range of hardship measures, including:

- that existing eligible business customers suffering hardship due to the COVID-19 pandemic are able to defer their insurance premium payments for up to six months. The package will apply to insurance premiums that fall due up until 30 June 2020 and includes continuing cover when premises are left vacant due to the COVID-19 outbreak;
- unused premiums will be refunded where an SME customer has, or will have, to cancel cover; and
- all policyholders, including consumers, eligible small businesses and larger businesses, who cancel travel plans will be able to get a credit or refund for any unused travel insurance premiums.

The approved assistance measures are open to all insurers and brokers who choose to take part, as long as they notify the regulator. So far this includes IAG, Allianz, Suncorp and QBE.

Insurers have also committed to reducing payment times for SME suppliers and contractors involved in servicing claims to no more than 15 days.

SMEs covered by the ACCC approval include businesses that employ fewer than 20 people, or 100 if a manufacturer, and have an annual turnover of less than \$10 million.

## House of Representative Inquiry

We also understand that the Standing Committee of the House of Representatives has called a number of insurers to a meeting this week (w/c 6 April) to discuss their response to COVID-19.

One critical focus of the Standing Committee is to understand insurers' position on the scope of cover (and application of exclusions) in BI policies for small businesses.

We will continue to closely monitor whether the Commonwealth Government is considering legislative intervention to override restrictions in cover.

Key legislation by jurisdiction



## COMMONWEALTH

### • *Biosecurity Act 2015 (Cth)*

The Governor-General of Australia has declared a human biosecurity emergency, giving the Federal Health Minister executive order powers to restrict the movements of people or goods, and force closures and evacuations.

### • *Coronavirus Economic Response Package Omnibus Act 2020 (Cth)*

This new legislation gives temporary relief to company directors, including by creating a new safe harbour provision to protect businesses that trade while insolvent for the next 6 months.

## QUEENSLAND

### • *Public Health Act 2005 (Qld)*

The Health Minister declared a public health emergency on 29 January 2020. The Queensland Government is now empowered to implement the Commonwealth's containment measures. Emergency officers have extensive powers, including powers to require people to go to, stay at or leave a place, to direct or control their movements, and to order cleaning or disinfecting.

## NEW SOUTH WALES

### • *Public Health Act 2010 (NSW)*

Allows any part of NSW to be declared a "public health risk area" and the Minister for Health to give directions to segregate or isolate inhabitants. Breaches carry a \$11,000 fine or 6 month's imprisonment or both.

### • *State Emergency and Rescue Management Act 1989 (NSW)*

If an emergency has been announced and the Minister for Health believes there is a risk to public health, the Minister is empowered to take any action or give any order necessary.

### • *Public Health (COVID-19 Quarantine) Order 2020 (NSW)*

All arrivals into NSW who had been overseas in the last 14 days must self-isolate. Isolation now occurs at a hotel under guard by military or NSW Police to ensure adherence to protocols.

### • *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW)*

An overarching piece of legislation introduced to amend other legislation to implement emergency measures as a result of pandemic, including the *Evidence (Audio and Audio Visual Links) Act (NSW)*.

## VICTORIA

### • *Public Health and Wellbeing Act 2008 (Vic)*

The Minister for Health declared a state of emergency and several measures were implemented. The Chief Health Officer may authorise certain officers to exercise powers including powers to close premises, to direct people to enter or not enter any premises, and to require premises be cleaned or destroyed.

# Business impact by executive orders/restrictions

The Australian Government has implemented, by stages, a range of business and social restrictions resulting in significant impact on business and economies. There is now a looming human and social issue necessitating some significant changes in the way everyone goes about their daily life. Below we outline a timeline of the restrictions imposed on businesses.

The scale of impact, and its consequences on the supplementary business, should not be underestimated. While retail shopping centres are not on the restricted business list (at this stage), retailers are severely impacted by closures of food/eateries, restrictions on gatherings (now limited to two people outside family units) and strong messages from the Australian Government to stay home bound unless people need to go out for essential reasons. This has resulted in voluntary closures of a raft of retail stores within larger shopping centres.

## Restrictions imposed on businesses by the Australian Government



# Insurance impact

COVID-19 has impacted every industry and every state in Australia. Society will not be operating as it ordinarily does and many business continuity plans are activated and being tested. As such, there may be a “tail dependency” as seen following other catastrophic events, such as the terrorist attacks of 9/11.

## GENERAL LIABILITY



Businesses, particularly those that open their doors to the general public, may find themselves targets of claims that their negligence led to the exposure and infection of clients including:

- exposure resulting in bodily injury or property damage;
- negligence related to visitors to businesses or locations such as offices, day care centres, retail shops, hotels and places of worship;
- product liability related to air filtration and recirculation, particularly in situations involving airplanes and hospitals;
- personal injury involving occurrences such as wrongful eviction or imprisonment;
- constitutional claims involving the quarantine or restriction of infected or exposed persons; and
- negligence or other liability suits against a company or organisation that fails to implement a pandemic contingency plan.

Of course, the target of such claims will not only be the business but also the business's general liability insurance and its coverage for “bodily injury.” Policy exclusions may exist for claims arising from a pandemic, virus (including SARS like viruses) or bacteria. Many insurers also include broadly worded pollution exclusions that could serve to preclude or limit coverage.

With empty shopping centres and many retail business closed and extra precautions taken around workplace health and safety, there is likely to be a reduction in claims involving “slip & trips” but the evidence will take time to appear given the longtail nature of the claims.

This outlook is tempered by ongoing construction activity and, in NSW, an extension of working days to allow construction to continue while enforcing social distancing protocols. This brings an additional risk for insurers of the construction industry to risk of virus transmission which can be mitigated through implementation and enforcement of appropriate policies.

## WORKERS COMPENSATION



Workers' compensation policies generally extend insurance benefits to employees for injuries “arising out of or in the course of employment.”

Workers' compensation actions addressing the language often consider whether the claimed injury is truly work-related, focusing on factors related to the loss such as the nature of the injury, the injured employee's activity, and the time and location of the incident.

Consequently, employees and employers whose work is related to coronavirus should maintain records identifying potential exposures.

# Insurance impact

## ERRORS & OMISSIONS



There is an adage that the most likely place to get sick is in a hospital. Medical care and managed care providers purchase errors and omissions (E&O) insurance that provides coverage for bodily injury arising out of their providing or failing to provide medical care.

While these policies generally preclude coverage for bodily injury to employees during the course of their employment (i.e. an employee being exposed to an infectious or contagious disease), policies may respond to claims that a health care professional acted or failed to act in a manner that led to a patient (non-employee) contracting a coronavirus bodily injury.

The significant falls on the sharemarket (the ASX has fallen by more than 20% in March 2020) and potential declines in real property prices (residential and commercial) may have implications for investments advisers (e.g. stockbrokers, fund managers and financial planners) and valuers. Unforeseen exposures, such as ASIC writing on 3 April 2020 to all real estate agents across Australia warning them that they were not licensed to provide advice to tenants about options to access superannuation under certain government relief schemes, highlights the likelihood of new risks emerging for all service providers.

## DIRECTORS & OFFICERS



COVID-19 has roiled stock markets worldwide, resulting in ups and down depending on whether the market perceives that the crisis is being managed appropriately and whether global supply chains will be impacted. Ultimately, how a company was prepared for and responds to the coronavirus may subject its directors and officers to the scrutiny of the company's shareholders.

The safe harbour provisions enacted as part of the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) will afford some protection from insolvent trading claims. However, poor management practices and conduct before the coronavirus pandemic may be exposed by the financial strains now imposed on companies. Insolvency will result in D&Os' conduct being heavily scrutinised regarding compliance with directors' duties. Claims alleging a failure to adequately prepare a company for a major economic disruption, adequate contingency planning or effective management of supply chain and labour force risks are possible.

Significant falls in the sharemarket have raised the prospects of securities class actions directed at companies that may have unreasonably maintained profit guidance or misrepresented their preparedness to deal with the consequences of a major economic disruption. Most D&O insurers include absolute bodily injury exclusions that expressly preclude coverage for any claim or loss "based on, directly or indirectly arising out of, or relating to actual or alleged bodily injury." These exclusions may be tested by claims arising out of the current pandemic.

# Insurance impact

## EMPLOYMENT PRACTICES LIABILITY



For EPL insurers, the impact of the coronavirus has created the immediate need to reassess the quantum exposures of existing claims. In most dismissal claims the significant component of compensation is usually “future economic loss.” The usual argument is that, but for the unfair or unlawful dismissal, the applicant would have remained employed by the business for a significant period. Due to the impact of coronavirus that assumption of long-term employment can no longer be maintained. This will mean that claims for future economic loss will need to be heavily discounted and reduced by applicants, the courts and the Fair Work Commission (FWC).

Although there will be an unprecedented number of redundancies, it is not anticipated that these redundancies will lead to a large spike in unfair dismissal claims. Ironically, an EPL insurer may be exposed to higher risks of claims from employees who continue to work or be employed. Where an employer purports to unilaterally reduce hours or remuneration without the employee’s consent, they will be in breach of contract.

One area of considerable controversy is the use of the “stand down” provisions in the Fair Work Act. The provisions have not been widely used in the past and there is little case law regarding their use in this situation. Debate remains about whether employers can rely on stand down for a general economic downturn.

## CONSTRUCTION



As social distancing measures take greater effect, builders and supervisors are finding it increasingly difficult to manage their sites, particularly because of the close confines in which construction personnel tend to work. Construction professionals are also finding it difficult to discharge their obligations under contracts in circumstances where physical attendance to site is required. For example, under statute, surveyors and certifiers are required to conduct mandatory inspections of building works to a required standard.

There have already been reports of parties to construction contracts enforcing rights of force majeure by reason of the unexpected and disruptive effect of coronavirus. The terms of construction contracts will require careful review to assess whether parties are entitled to rely on any force majeure clause if they are unable to perform their contractual obligations by reason of coronavirus. If such a clause is incorrectly relied on, contractors risk being found in breach of contract for non-performance, or perhaps for having repudiated the contract.

Other contractual issues are delay and liquidated damages. Obvious causes of this, for example, are the unavailability of materials from affected countries or of trades or consultants. This may or may not entitle contractors to extension of time (EOT) claims under their contracts, depending how the EOT clauses are structured. Assuming EOT clauses entitle a contractor to make an EOT claim, it is imperative that the requirements of the contract are adhered to, for example regarding the giving of notice within the stipulated time with the requisite information. Contractors that are not entitled to an EOT are susceptible to damages or liquidated damages claims if they fall into delay.

It is also highly likely there will be an incentive to try and pass losses down the contractual chain in the hope that some form of recovery will help ease the burden of the negative financial impacts of coronavirus.

# Insurance impact

## CYBER SECURITY



COVID-19 is potentially the largest ever cyber-security threat to face businesses and consumers. The new norm is leaving businesses – which are already under pressure – more vulnerable to attacks than ever before. As businesses adjust, COVID-19 related cyber claims will spike in the weeks to come due to three key cyber vulnerabilities facing businesses: remote working, targeting of key organisations, and phishing scams.

Insurers are likely to receive an increase in cyber claims in the upcoming months. Numerous COVID-19 related attacks have already been reported since the outbreak, and the numbers are likely to continue to rise with increased numbers of employees working from home and the temporary closure of numerous businesses already susceptible to attack.

## PROPERTY/ISR



There is no doubt that the COVID-19 outbreak (and the closure orders issued by the State and Commonwealth Governments to slow its spread throughout Australia) will have severe economic consequences for all Australian insureds under Property/ISR policies.

Undoubtedly, there will be enormous business interruption losses (BI Losses) as a consequence of the government's closure orders aimed at reducing the spread of the COVID-19 pandemic. A key development to watch is the extent to which those BI Losses will be capable of triggering indemnity under the various wordings of the Contagious Disease Memorandum that are used in the Australian market to extend the business interruption cover provided by ISR policies.

Typically, business interruption cover under an ISR policy is triggered to respond only to BI Losses in consequence of damage to property insured. When included in an ISR policy, the Contagious Disease Memorandum operates to allow cover (that is usually constrained by a relatively small sub-limit) in circumstances where the business is interrupted or interfered with by a closure order by a public authority following an outbreak of a contagious disease at the insured's premises. While there are numerous different wordings of this type of memorandum in use in Australia, most variations exclude cover for diseases to which either the "*Quarantine Act 1908* (Cth) as amended" or the "*Biosecurity Act 2015* (Cth) as amended" apply.

As human coronaviruses with pandemic potential, such as COVID-19, are "listed human diseases" under the Biosecurity Act, cover for BI Losses under a Contagious Disease Memorandum that is referenced to the Biosecurity Act is unlikely. For those policies that include a Contagious Disease Memorandum that is referenced to the Quarantine Act as amended, which was repealed and replaced by the Biosecurity Act, there are likely to be coverage disputes about whether the reference to the Quarantine Act as amended includes the successor legislation of the Biosecurity Act.



# Managing the impact

## LESSONS LEARNT FROM THE HAYNE ROYAL COMMISSION

We expect ASIC will be monitoring the market to ensure insurers are demonstrating utmost good faith in claims negotiations.

It is important to act with caution regarding coverage decisions where the potential consequences might now realistically result in the insolvency of the insured and/or other potential consequential economic losses.

When dealing with claimants directly, it is important to be mindful of how settlements are negotiated and ensure claimants have the opportunity to seek independent legal advice where they are unrepresented.

## CLAIMS MANAGEMENT CONSIDERATIONS

Insurers need to be conscious of the vulnerability experienced by insureds and claimants, and the extent to which settlements are achievable where an insured cannot pay their policy excess.

As there are heightened collection risks for insurers it is important to consider how to deal with requests:

- for payment plans or refusals by insureds to negotiate based on the inability to pay an excess; and
- from insureds to defer payment of its excesses, including where those excesses are on costs inclusive basis.

Claims are affected by the impact of social distancing measures in various forms in the courts across Australia. Cases where juries are required are suspended. Where possible, courts are reverting to maintaining trials using technology for virtual hearings.

Insurers will need to balance the desire for a quick disposition of a trial against any forensic disadvantage of not cross-examining a witness in person where demeanour and credibility findings are key. Courts are hearing motions to vacate and adjourn hearings where a party's potential disadvantage is established.

Mediation and settlement conferences are being conducted virtually and effectively. Parties are also embracing settlement drives where claims assessment and trial are potentially delayed. This presents opportunities for insurers to consider early resolution reducing the overall cost of a claim.



## Personal injury claims:

### • Medical assessments

Psychological assessments will continue either in person or by telehealth video conference. Physical examinations are problematic. Each claim will need to be assessed on a case-by-case basis, depending on the seriousness of the claim and the implications for the claim valuation. If parties wish to proceed with a medico-legal examination, before getting an physical assessment, it is important to get an undertaking from the plaintiff firm not to take issue at trial on the forensic value of the exams.

### • Assessment of damages

The expanse of economic and social upheaval brought about by COVID-19 and consequential lockdown of certain industries have forced significant numbers of the labour market into, at best, a short-term stand down from employment, or at worst, long-term unemployment. Once these lockdowns are eased, there is no guarantee that the employment market will look the same as it did before COVID-19.

A claimant's potential entitlement to damages for future economic loss may well be increased depending on the claimant's relevant skillset, their age, their ability to re-enter the workforce, the position in which they were employed before COVID-19 and whether that position exists in a post COVID-19 world.

Practitioners acting for claimants will seek to justify ambit claims for future economic loss. Insurers will necessarily argue that the customary reduction on damages for the future for vicissitudes of life ought be applied at a higher percentage rate given the unforeseen severity that COVID-19 has had on employment markets and the global economy more broadly.



## Property damage claims:

Insurers need to be mindful of supply chain delays in the rectification of damage and that inspection of properties related to claims will not generally be available due to social distancing measures. Other means of undertaking inspections under the current social distancing restrictions, including virtual or desktop assessments, need to be explored.

## POLICY REVIEW

To prepare for, and manage, the catastrophic impact of a potential global pandemic, insureds, insurers and brokers must understand what is and is not covered under relevant policies. Insurers should review insurance policies to determine:

▶	if they are sufficient
▶	what new exposures and risks are present given the unique nature of the coronavirus
▶	which current policyholders (or portfolio) are likely impacted most
▶	the size, scope and nature of earlier claims and what they may indicate
▶	the process to triage claims to ensure they are handled in the best interest of all stakeholders.

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