



The MBAV legal department has received a number of enquiries about COVID-19 and contractual implications. As a starting point, the MBV legal department encourages all parties to a building contract to ensure they approach the effects of COVID-19 in a generous spirit and work together to reach sensible outcomes.

Master Builders Victoria would expect that in these unprecedented times the government will approve reasonable requests for extensions of time from their contractors even if the contract doesn't technically entitle the contractor to one.

Delay, frustration and force majeure-type considerations

Questions around *force majeure* (acts of God) events and clauses and the doctrine of frustration can be very complex and will depend greatly on the specific circumstances and contractual terms agreed. General information is not enough, and specific legal advice must be sought. We encourage all members to make use of the legal department to discuss as a starting point.

General advice:

- Entering into a contract is a commercial decision. While it is daunting entering into a new contract while so much uncertainty reigns, there are ways of minimising risk. Please call the legal department on (03) 9411 4555 to discuss conscientious contracting considerations and possible special conditions.
- Difficulties with supply chains may not be a reason to claim an Extension of Time, i.e. if an item can be sourced elsewhere but at a higher price. This will depend on the specific contractual conditions.
- Security. Now is the time for builders to consider requiring proprietors to sign deed of indemnity for extra financial protection or consider other forms of security. The standard MBV contracts include deeds of indemnity which can be used.
- Be more generous in construction period The best time to make allowance for delay in construction periods is prior to signing a contract. Different contracts deal with construction periods differently, so please contact our department to seek specific advice.
- Make sure there is enough profit in the contract price. This consideration may seem obvious, but it must be examined in more detail in times of higher risk. It goes without saying that there is no point signing a contract that won't make you money.
- Frustration of a contract is a notoriously high bar to prove. For a contract to be frustrated, a contractual obligation must have become incapable of being performed because the change in circumstances renders it radically different from what had been agreed in the contract. Simply because the contract has become much more expensive to perform than was originally anticipated does not usually mean the contract is frustrated. In the opinion of our legal department, a government-mandated, lock-down event may result in a contract being frustrated. However, this will depend very much on the contractual terms agreed.
- Principal drafted or amended contracts will usually shift all risk and liability onto a contractor including often material supply risks.



Dealing with delay:

Whether a claim for delay will be accepted depends on the terms of the particular contract. If you are using an MBV standard contract there may be some relief:

- **MBV HC7 New homes Contract & MBV HIC6 Home Improvement Contracts (Domestic Contracts)**

Under Clause 15 the Builder is entitled to an extension of time if the progress of the Works is delayed by, amongst other things:

- the **general unavailability of any Materials** necessary to carry out the Works; or
- any other cause **beyond the reasonable** control of the builder
- **MBV MW2 Minor Works Contract & MBV PS1 Pool 7 Spa Contract (Domestic Contracts)**

Under Clause 14 the Builder is entitled to an extension of time if the progress of the Works is delayed by any cause beyond the reasonable control of the **Builder**.

- **MBC DCP2 Domestic Cost Plus Contract**

Under Clause 17 if, through no fault of the builder, the progress of the Works is delayed by:

- the **general unavailability of any materials** necessary to carry out the Works; or
- any other cause **beyond the reasonable control** of the builder.
- **MBV GCC6 General Conditions of Contract & MBV CP1 Commercial Cost Plus Building Contract (Commercial Contracts)**

Under Clause 19 the Contractor shall constantly use best endeavours to avoid delay in the completion of the Works by the due date; but shall be entitled to an extension to the Contract period and a corresponding adjustment to the Date for Practical Completion with respect to any delay caused by, arising from or attributable to any event or events beyond its **immediate control**.

Reasonable/immediate control:

- It is the legal team's opinion that the effects of COVID-19 are beyond the reasonable control or the immediate control of the Builder/Contractor, however, the Builder **must notify an Owner** of any possible delay as soon as possible as per the contract.



Actions to take:

- Familiarise yourself with your current contracts, paying attention to notification requirements (i.e time bars) around claims for extension of time.
- Master Builders Victoria strongly recommends calling the legal department on (03) 9411 4555 to seek guidance as each situation will be different and require different actions.

For assistance with finance and setting up lines of credit or additional funding, contact Financial Services on 1300 137 539 or contact the Director on harry@mbafinance.com.au or 0411 258 058.