

新冠病毒 & 您的澳洲法律合同

通常合同终止是因为合同双方义务已经履行，或者合同到期。但是，新冠病毒大流行几乎对我们经济各方各面都有影响。这导致了供应链问题，旅行限制令，法律的改变和政府限令，延迟，还对‘照常营业’造成影响。这导致，

“企业有可能不能履行其签署的合同所规定的义务，亦或是企业有可能因为新冠病毒的影响想要终止合同”。

合同双方也可以以新冠病毒为由再次商讨价格，商讨其他合同重要条款。但是，合同的一方在什么情况下可以以新冠病毒为由合法终止合同呢？

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触发合同条款

仔细审阅合同的条款非常重要。因为绝大多数合同包含在何种情形下可以终止合同的条款。例如：

- 合同条款可能规定，如果合同一方因新冠病毒导致中断或延误，不能履行合同义务造成违约，另一方可以终止合同。

“合同的条款可规定如遇不可抗力事件，任意一方可终止合同”。

典型的不可抗力条款规定，一方不应对因其无法控制之事件造成合同不履行承担任何责任。类似于新冠病毒大流行这样的事件，合同一方可提出这是合同双方无法控制的事件。

有时候，不可抗力条款会列明具体不可抗力事件，比如不可抗力（主要指自然灾害），罢工，自然灾害或战争。如不可抗力条款列明具体不可抗力事件，那还可能包括传染病，大流行。既然新冠病毒被世卫组织官方定义为大流行性疾病，如果大流行被合同列为不可抗力事件之一，那么该合同的不可抗力条款会生效，双方可以此为由终止合同。

即使不可抗力条款未列明具体不可抗力事件，该条款通常会包含较宽泛的范畴，约定不可抗力为所有‘超出合同双方控制之事件’。因此，该类条款有可能包含新冠病毒大流行。然而，在

澳大利亚，合同一方是否可以基于不可抗力终止合同最终取决于合同的具体约定以及新冠病毒对于合同一方义务履行的影响。总的来说，您必须能够证明该事件不可预见，是外在因素，且不能克服。

“合同一方因新冠病毒导致的政府禁令而无法履行合同义务，该方有可能可以提出这属于不可抗力”。

但由于情况改变导致合同一方利润降低，或更难履行义务，不足以引发不可抗力条款生效。



普通法下的合同终止

如果您的合同不包含不可抗力条款或其他可以因为新冠病毒影响生效的条款，那又会怎么样呢？

无论合同是否包含终止合同的条款，您都可能基于普通法终止合同。

如果一方**违约**，您可终止合同。通常，需要**严重违反合同规定**才可终止合同。且绝大多数情况下，您必须给予对方**违约通知**，并给予对方**补救的机会**。

“您也可能基于普通法下的‘受阻’原则终止合同”。

受阻适用基于以下条件：

1. 不可预测。
2. 超出合同双方控制范围。
3. 使得义务无法履行或至少与双方约定之时的义务履行有本质区别。

比如，由于新冠病毒影响，对于履行合同至关重要的**产品或服务不可用**，且某一方又必须在**特定时间内履行义务**，则该合同‘受阻’。又比如，由于新冠病毒，政府出台禁令或其他应急条例，导致履行合同违反法律法规，则合同亦‘受阻’。

最终基于何种原由取决于双方在合同下的**义务**，以及新冠病毒是否导致这一义务无法履行。普通法下的受阻通常比不可抗力条款要求更高。

终止后果

您可以基于合同条款本身或普通法终止合同。

"但是，仔细想清楚基于哪种理由终止合同非常重要。因为这将会决定终止合同的后果和所能拿到的救济".

1. 如果是根据合同条款终止合同，那终止后发生什么也依照合同条款来办。
2. 不可抗力条款生效后的结果要看合同的具体规定，条款有可能规定如遇不可抗力：
 - 一方可在不可抗力事件存续期间暂停履行合同义务；
 - 在不可抗力事件存续期间对造成的损失不承担责任；
 - 就合同的截止日期延期；或
 - 如不可抗力事件延续超过某个特定时段，一方有权终止合同。
3. 违约的结果就是合同终止。无辜方可获赔偿。
4. 受阻的结果是合同终止。但是在受阻发生前所须履行的义务仍须履行。
5. 导致的结果也有可能是以下条款：
 - 价格调整条款。
 - 责任限制条款。
 - “适用法律更改”条款（即因为适用法律的改变使得一方无法履行义务，此条款允许合同任意一方终止或重新商讨合同，）。

但是如一方非法终止合同，另一方有权因对方违约或拒绝履约要求赔偿。因此，确保您有合法理由终止合同尤为重要。如果您有任何疑问，欢迎随时联系我：



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COVID-19 & YOUR AUSTRALIAN LEGAL CONTRACTS

Usually a contract is terminated because the parties discharge their obligations under the contract, or the contract period ends. However, the COVID-19 pandemic has impacted almost every sector of our economy. This has resulted in supply chain issues, travel restrictions, changes in legislation and government bans, delays and general disruption to 'business as usual'. As a result,

“Businesses may be unable to perform their contractual obligations or may wish to terminate contracts because of the impact of COVID-19”

Parties may also try to use the COVID-19 pandemic as a basis for re-negotiation of price or other key contractual provisions. But when can a party legally terminate a contract due to COVID-19?



TRIGGERED BY THE TERMS OF THE CONTRACT

It will be important to carefully review the terms of the contract as most contracts include grounds for termination. For example:

The terms may provide that a party may terminate the contract if the other party is in breach of its obligations because of disruptions or delays brought about by COVID-19.

“The terms of the contract may provide that the either party can terminate if there is a ‘force majeure’ event”.

A typical **force majeure clause** will provide that a party is excused from its contractual obligations in circumstances where a party cannot perform its obligations under the contract due to an event that is beyond the reasonable control of the parties. It is arguable that a pandemic, such as COVID-19, is an event that is beyond the reasonable control of the parties.

Sometimes, a force majeure clause will specify a list of events for example: an act of God, industrial strikes, natural disasters or war. If the clause sets out a list of events, it may include infectious disease, epidemic or pandemic. Since COVID-19 has been officially classified as a pandemic by the World Health Organisation (WHO), this will trigger the force majeure clause to apply as a ground of termination where pandemic is listed as a specific event. Force majeure clauses also often include events such as delay in transportation, labour shortages, and acts of governmental authority. These events may also be relevant in the present circumstances.

Even if the force majeure clause does not list any specific events, it often includes a general catch-all of 'events beyond the reasonable control of the parties', which will likely cover the COVID-19 pandemic. However, whether a party would be successful in terminating a contract on the grounds of 'force majeure' before the Australian courts will ultimately depend on the precise wording of the force majeure clause and the impact of COVID-19 on a party's ability to perform its contractual obligations. **In general, you must be able to show that the event was unforeseeable, external and impossible to overcome.**

“If a party is unable to perform its contractual obligations due to government bans that have been introduced because of COVID-19, then this may give the party a valid claim of force majeure”.

However, a change in circumstances which makes the contract less profitable or which makes the contract more onerous to perform, will not be sufficient to trigger a force majeure clause.



TERMINATION AT COMMON LAW

What happens if your contract does not contain a force majeure clause or other termination clauses that may be triggered by COVID-19?

Regardless of whether the contract contains express termination provisions, a party may be entitled to terminate a contract under common law.

You may terminate if there is a **breach of the contract**. Usually, there must be a serious breach, and in most cases, you must give reasonable notice of the breach to the other party and the opportunity to remedy the breach.

“You may also be able to rely on the common law doctrine of ‘frustration’ to terminate a contract”.

Frustration will operate where an event occurs which is:

1. Unexpected.
2. Beyond the control of the parties.
3. Makes performance impossible or, at least, makes the obligations of the contract radically different from those contemplated by the parties at the time of contracting.

For example, if a product or service that was essential to the performance of the contract was unavailable because of COVID-19, then this would frustrate the contract if the contract had to be performed in a certain time. Or, if performance of the contract becomes illegal because of a government ban or other emergency regulation put in place because of COVID-19, then the performance of the contract would also be 'frustrated'.

Ultimately, the types of arguments that may be put forward will depend on the obligations of the parties under the contract and whether or not the circumstances arising from COVID-19 has made it impossible to perform those obligations. This is usually a higher standard than the 'force majeure' clause.

CONSEQUENCES OF TERMINATION

You may have grounds to terminate the contract under the terms of the contract itself or under common law.

"However, it is important to carefully consider which grounds of termination you will rely on because the grounds of termination will impact the consequences and any remedies available".

1. If a contract is terminated in accordance with the provisions of the contract itself, then what happens after termination will be governed by the terms of the contract.
2. The effect of a force majeure clause will depend on the exact wording of the clause, but it may provide:
 - For a party to suspend performance while the force majeure event continues;
 - No liability for any loss or damage while the force majeure event continues;
 - Extensions of any deadlines under the contract; or
 - A right to terminate the contract if the force majeure event continues for a specified period.
3. The effect of a breach of contract is termination of the contract. The innocent party may be entitled to recover damages.
4. The effect of frustration is termination of the contract. However, obligations prior to the frustrating event remain enforceable.
5. There may also be other consequences in contracts such as a:
 - Price adjustment clause.
 - Limitation of liability clause.
 - "Change of law" clause (entitling either party to terminate or renegotiate the contract, where a change in the applicable law makes it impracticable or impossible for a party to perform its contractual obligations).

If a party **unlawfully terminates a contract**, the other party may be entitled to damages for breach or for wrongful repudiation. So, it's important to make sure that you do have legal grounds to terminate. If you have any questions, please feel free to contact me at:



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