

# 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.

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## 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.

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## 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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