

# COVID-19: PRESSURE POINTS: EMERGENCY LEGISLATION & GOVERNMENT MEASURES - KEY PUBLIC LAW ISSUES (AUSTRALIA)

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Legal Briefings - By **Graeme Johnson, Jacqui Wotton, Merryn Quayle, Mark Smyth and Sascha Kouvelis**

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## WHAT YOU NEED TO KNOW

1. Understanding the statutory powers and basis for government action in response to COVID-19 is critical for legal and business teams navigating the impact of government action, as well as government authorities ensuring the appropriate exercise of statutory powers. This is particularly the case as government action evolves, and is eased or tightened as circumstances change into the future.
2. While the breadth and extent of government measures is unsurprising given the extraordinary circumstances, no statutory power is absolute or unfettered. Equally important is understanding how key principles of interpretation and public law will bear upon the validity, effect and operation of government responses.

## KEY LEGISLATION AND INSTRUMENTS TO DATE

In response to the COVID-19 epidemic, Commonwealth, state and territory parliaments have taken emergency measures, including by passing legislation, to deal with the crisis. They continue to do so. The legislation enacted to date has conferred broad powers on governments at all levels to respond to the crisis, including to 'flex' restrictions up and down depending on the status of the crisis. Businesses will have to continue to adjust swiftly to this constantly changing regulatory environment, as the Government moves to implement its three step plan to open the economy.

## **FEDERAL**

Some of the measures that have been taken at a Federal level include:

- **Biosecurity powers:** the Governor-General declared the existence of a human biosecurity emergency due to COVID-19 under section 475 the *Biosecurity Act 2015* (**Biosecurity Act**), triggering the Health Minister's special emergency powers to manage COVID-19 by directing or requiring individuals/businesses to act in a certain way. These powers are extreme in nature and action by the Health Minister overrides any other Australian law.
- **Economic response measures:** The Federal Government passed legislation to respond to economic consequences of COVID-19. Current laws include:
  1. The *Coronavirus Economic Response Package Omnibus Act 2020*, which amends the *Corporations Act 2001* (Cth) to: (i) exempt directors from liability for debts incurred in the ordinary course of business in the next 6 months if the company is insolvent (new section 588GAAA); (ii) empower the Minister to exempt classes of persons from, or modify the operation of, certain provisions of the Act (new section 1362A).
  2. The *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Act 2020*, which enables the Minister to grant guarantees to lenders in connection with loans made, or to be made, by the institution to SME entities.
  3. The *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*, which establishes the framework to administer the Coronavirus economic response payments – the JobKeeper Payment scheme.

4. The *Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 (Cth)*, which permits AGMs to be conducted virtually and company documents to be executed electronically.
- **Tax relief measures and other incentives:** The Federal Government has put in place tax relief initiatives to alleviate the financial impact on businesses, including relaxing corporate PAYG installments payments, interest and penalty remission on tax liabilities, asset-write off incentives for acquisitions of depreciating assets and an accelerated depreciation package.
  - **Changes to foreign investment:** The *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* brought into effect the Federal Government's proposal that foreign investments into Australia subject to the *Foreign Acquisitions and Takeovers Act 1975* must obtain approval from the Foreign Investment Review Board, irrespective of their monetary value or the nature of the foreign investor. The Government has indicated that urgent applications for investments that protect and support Australian businesses and jobs may be prioritised.
  - **Other temporary measures to assist corporations:** Regulators have sought to assist corporations maintain their operations and comply with their statutory obligations during the crisis, through introducing measures such as:

1. Various interim authorisations granted by the ACCC, which allow co-operation and/or co-ordination within particular industries during COVID-19.
  2. The *ASIC Corporations (Trading Suspension Relief) Instrument 2020/289*, which facilitates capital raisings by entities affected by national and international responses to COVID-19.
  3. The *ASIC Corporations (Extended Reporting and Lodgment Deadlines - Unlisted Entities) Instrument 2020/395* and the *ASIC Corporations (Amendment) Instrument 2020/396*, which facilitate financial reporting by unlisted entities, whose reporting processes take extra time due to COVID-19 impacts.
- **Workplace health and safety:** The Cabinet has released a set of National COVID-19 safe workplace principles, including that workers still have a right to a healthy and safe environment, businesses must continue to provide such an environment during COVID-19, and both businesses and workers must actively control against the transmission of COVID-19 while at work.
  - **Therapeutic goods exemptions:** The Health Minister has issued exemptions from the usual requirements under the *Therapeutic Goods Act 1989 (Cth)* for certain essential classes of goods.

## **STATE AND TERRITORY**

Each state and territory government has used its respective public health and state emergency powers to respond to the outbreak, either by declaring a 'public health emergency', issuing similar state of emergency declarations, or exercising existing powers to make special directives or legislative amendments. A number of these powers have been exercised through the introduction of new legislation, regulations or orders, which provide for:

- restrictions on movement (including border controls), gatherings, businesses and delivery of goods;
- public health measures targeted at testing COVID-19 and prohibiting coughing or spitting on public officials that may cause fear about spreading COVID-19;
- support to retail, commercial and residential leases, by way of moratoriums on lease terminations and regulation of certain rights of lessors and lessees;
- developments being able to be carried out without normal development or planning approvals if necessary to protect the health and safety of the community;
- payroll tax deferrals and other tax relief measures for affected businesses; and
- alternative arrangements for the signature and witnessing of documents.

The impact on business operations continues to vary between the jurisdictions as the laws and actions taken by the government in each state and territory differ – it will be important to assess each law and action as and when issues arise in the different jurisdictions. At this stage, it is unclear whether further measures will be implemented or when and how existing measures will be lifted or moderated. It will therefore be important to also assess how each law and action contracts and expands as the crisis abates or returns and the Government's three step plan to open the economy is carried out. Businesses must be prepared to remain nimble and continue to carefully consider the fluid regulatory environment in which they operate.

## **OVERVIEW OF ISSUES OF STATUTORY INTERPRETATION & PUBLIC LAW**

Given the extraordinary global health and economic impact of COVID-19, it is unsurprising that a number of the legislative powers conferred to date are expressed in extremely broad terms and that a number of measures implemented under those powers have been drastic.

Nevertheless, statutory conferrals of power are not without limitation. No statutory power is absolute or unfettered. Important principles of interpretation and public law will bear upon the effect and operation of government responses, such as:

- **Interpreting the scope of statutory powers:** The exercise of these emergency powers conferred by parliament must be within the scope of the legislation. If government measures go beyond the purpose of the enabling Act, it is likely that they will be susceptible to legal challenge. Extensive case law on statutory interpretation in the context of national emergencies suggests that courts tend, up to a point, to construe powers more broadly and afford greater deference to government in times of genuine emergency. However, courts will carefully scrutinise broad conferrals of power and impose some limits, particularly where legislation interferes with, or has a disproportionate impact on, personal liberty and private property rights.
- **Exercise of statutory powers:** These statutory powers will, ordinarily, need to be exercised consistently with administrative law principles of rationality, legality and procedural fairness. Procedural fairness may operate in an attenuated way or sometimes not at all. If administrative decisions infringe these principles, for example, by not being seen as necessary and proportionate to manage the COVID-19 crisis, it is possible that they may be subject to judicial review.
- **The use, and limitations, of delegated legislation and instruments:** Government ministers have been given considerable powers to introduce secondary legislation and other soft law instruments, including *amending primary legislation* (i.e. “Henry VIII powers”). Broad conferrals of “quasi-legislative” making power are common in crises because they enable quick decision-making without going through the usual Parliamentary processes. However, like other exercises of statutory power, delegated legislation must be within the power conferred by the primary legislation and will be subject to challenge if it goes beyond the scope of, or is disproportionate to, the primary legislation. While courts tend to take a strict approach to interpreting these powers, greater leniency may be afforded to government in an emergency context and limit the scope of review.
- **Constitutional limitations and protections:** Certain provisions in the Constitution may also limit or affect the validity of government measures taken in response to COVID-19, such as: (1) s 51, which limits the matters over which *Federal* Parliament may make legislation; (2) s 92, which guarantees the freedom of interstate trade; (3) s 109, which provides that a state or territory law which is inconsistent with a Commonwealth law will be invalid and of no effect to the extent of that inconsistency; and (4) s 51(xxxi) which provides that the Commonwealth may only acquire property on “just terms”.

- **Potential restrictions on government acquisitions of private property:** Some foreign governments have nationalised certain industries (e.g. private hospitals, healthcare centres or transport networks) or engaged in large-scale acquisitions of private property. As the economic crisis develops, it will be important to keep in mind the Commonwealth constitutional requirement to provide “just terms” as well as protections that may be available to investors under bilateral investment treaties entered into between Australia and other states (nationals or companies from another state party to the treaty) in the form of adequate and prompt compensation (depending on the treaty’s terms).
- **Human rights:** Legislated human rights obligations in Queensland, Victoria and the ACT may be affected by government action taken in these jurisdictions to address COVID-19, including the right to: move freely within the State or Territory – to enter and leave it; peaceful assembly; and liberty.
- **Implications for government contracts:** New legislation and government measures may impact existing contractual relationships (i.e. through force majeure or change of law clauses or frustration) or in respect of government contracts, the actual performance by the government. Limitations on government powers to enter into contracts (non-fettering rules and estoppel) mean that there are likely to be challenges in holding government bodies to existing contractual commitments or difficulties in entering into certain types of government contracts during COVID-19.

If you have any questions on the legislation and government instruments implemented, or any other concerns around the impact of the COVID-19 legislation and instruments, please contact Graeme Johnson, Jacqui Wootton, Merryn Quayle, Bryony Adams or Mark Smyth. Please also visit our client COVID-19 hub [here](#) for more insight from Herbert Smith Freehills on the legal issues surrounding the current outbreak.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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