
# COVID-19: HOW TO IDENTIFY AND MANAGE THE KEY AREAS OF RISK AND EXPOSURE FOR YOUR BUSINESS

Over the next several months, all businesses can expect to be impacted by Coronavirus (whether directly or as a result of its broader economic impact).

To help our clients navigate their way through the economic uncertainty MPH has undertaken a close look at the issues likely facing your business or those businesses that you advise.

This summary paper is intended to help you identify the risks that the Coronavirus and its effects might present to businesses in the immediate term and, having done that, develop the right strategies to meet the associated challenges. Please note however that this paper is of a general nature only and should not be relied upon as legal advice. Specific advice should be obtained in relation to your circumstances.

We encourage you to undertake a holistic review of your business by working your way through the issues identified in the tables on the following pages, as well as any others that will emerge as being particularly relevant to your business. We have been working with clients across a range of industries over the past few weeks to assist them with this exercise and can also put you in touch with other specialist advisers as needed.

For assistance, please get in touch with your usual advisor at MPH or contact one of the directors below.

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## 1. Corporate Policy

| Policy area | Recommendations |
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| *Human Resources and OH&S* | Employers have an overarching duty to take reasonable steps to ensure the health and safety of their employees. Recommended steps:<br>• Monitor the WA Department of Health and WHO web sites for advice and recommendations in particular here: https://ww2.health.wa.gov.au/Articles/A_E/Coronavirus and here: https://www.who.int/ .<br>• Regularly assess the risks to the workplace and the precautions that are reasonably available to reduce or minimise the risks that arise in your work environment. Update your policies as and when they can be improved or if circumstances change.<br>• Formulate and implement policies for the prevention of Coronavirus spreading in the workplace. Remember that listed entities are now expected by the ASX to have developed and be implementing a policy for the management of Coronavirus risks. Ensure your policy requires employees to disclose their personal travel arrangements.<br>• Take as many of the inexpensive and simple measures that are available i.e. make sanitiser accessible; ensure tissues are stocked; discourage anyone with flu-like symptoms from attending the workplace including third party visitors where possible; let your people know that you are taking the risk seriously and engage with them.<br>• Educate your employees on options to reduce risks outside of the workplace i.e. maintaining high standards of hygiene, keep to recommended distances in meetings, avoiding densely populated areas or facilities.<br>• Remain mindful of your obligation to protect the personal information of your employees. |
| *Meetings* | • Assess the need for face-to-face meetings and promote telephone and video conferencing where it is possible.<br>• Make your meeting policies known to external parties, especially those visiting your premises and ask them to comply with the policy. This may include implementing a mandatory questionnaire to determine the risk of meeting with external parties if face-to-face meetings cannot be avoided or rescheduled.<br>• A mandatory questionnaire will require external parties to advise of items such as the following:<br>    • if they have travelled to or transited through any of the higher or moderate risk countries, as determined by and listed on the Australian Government's Department of Foreign and Trade **("DFAT")** website;<br>    • whether the external party has been exposed to someone with Coronavirus in the past 14 days; and<br>    • whether they currently have any cold or flu symptoms.<br>• If the external party answers yes to any of those mandatory questions, then postpone meetings with them as they may be at risk including by reason of their recent travel or because they display cold or flu-like symptoms.<br>• Consider rescheduling meetings with an anticipated attendance of greater than 10 or more people, or arranging for alternative methods of conducting such a meeting including video conferencing, or pre-recorded videos. |

| Policy area | Recommendations |
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| *Travel and self-quarantine* | • Note that travel recommendations and government and public health policy in relation to travel are constantly being updated and hence ensure that you stay abreast of all relevant developments.<br>• *As at 16 March 2020, a number of Australian States have declared states of emergency in response to the Coronavirus threat. In WA, Premier McGowan has declared both a state of emergency and a formal public health emergency. Those declarations provide the WA Police Force and Chief Health Officer with additional powers to enforce quarantine and self-isolation measures:*<br>  • *Anyone arriving into Australia from overseas will be forced to self-isolate for 14 days.*<br>  • *Non-essential, organised gatherings of 500 or more people can no longer go ahead.*<br>  • *International cruise ships will are banned from docking in Australia for at least 30 days.*<br>*These rules will be enforced with a $50,000 penalty. Schools, universities and public transport will not stop.*<br>• Businesses should assess the need for all work-related travel and minimise or ban all unnecessary travel – particularly to high-risk and moderate risk locations (as identified on the DFAT website).<br>• Consider amendments to your leave policy to incorporate mandatory quarantine or self-quarantine periods before any employee leave is approved. |
| *Contact with Coronavirus* | • Consider the need for arrangements for employees who may have come into 'close contact' with someone who has a confirmed case of Coronavirus. This will include self-quarantine for 14 days at their place of residence.<br>• Close contact for these purposes means 15 minutes of face-to-face contact, or being within a 1-metre proximity, or sharing a closed space for a prolonged period greater than two hours.<br>• If an employee has been notified by public health authorities that they are a person who has had close or casual contact with a confirmed case of Coronavirus, or are themselves a suspect or a confirmed case of Coronavirus, they should not attend work. |
| *Working from Home (WFH)* | • Equip your employees and other personnel to work remotely and consider WFH arrangements even if your employees are not at risk.  This will require an assessment from an operational and capability perspective as to the software, data and work tools that are required to perform day-to-day duties and their accessibility from off-site locations.<br>• Consider 'stress testing' such WFH arrangements with employees to ensure your IT systems and infrastructure have been calibrated to ensure it is still able to perform with large amounts of employees can remotely access your companies' systems simultaneously in the event that all employees are unable to attend your premises or are directed to work remotely.<br>• Remember to assess any risks that might arise from WFH arrangements i.e. the potential for IT, confidentiality and data breaches.  Remember that scammers will exploit a topical issue.  Remind your personnel about the risks of opening spam email. |

| Policy area | Recommendations |
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| *Annual leave and sick leave* | • Consider the use of sick leave and/or mandatory annual leave so as to manage quarantine periods and unexpected downturns in work volume (or cash flow) addressed below. |
| *Business Continuity Plan* | • Your business continuity plan should consider your employees, and supply inputs and outputs. You should consider if you can operate on a significant reduction in employees due to a potential localised outbreak.<br>• Consider how you can contact your employees in the event that your premises or office building is unavailable. We recommend preparing any communication to your employees in advance. The communication plan should consider who, when, what and most importantly, how to continue and/or restore business if your business continuity plan should be enacted.<br>• As part of your business continuity plan, ensure important documentation and critical business information is available electronically and/or secured at a different physical location.<br>• Your company's business continuity plan should already consider the unavailability or reduction of your supply chain and have a mitigation strategy in place to enact. If you don't have a business continuity plan at present, at the very least, we recommend you identify your suppliers that might be at risk of interrupting your supply chain based on the current, expected or forecast conditions. |

## 2. Contract reviews – liabilities, risks and exposures

| Risk centre | Recommendations |
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| *General* | • Analyse/identify key areas of sensitivity and dependency for your business within your suite of contracts.<br>• Review key provisions to identify areas of potential risk – in particular, ensure you are familiar with your contractual terms regarding issues such as force majeure or suspension, termination, liquidated damages or penalties for delay, variation processes, payment terms and consequences/rights if late payment occurs. |
| *Supply contracts and your payment obligations* | • Review your supply contracts and sub-contracts. Consider whether late payment by you could allow a supplier or sub-contractor to terminate exposing you to risk.<br>• Conduct an assessment of your supply chain and sub-contractors. Identify those that may be at risk of insolvency and have a back-up supplier if required. |
| *Your service or supply obligations and protecting your cash flow* | • Carefully analyse your entitlement to payment for the supply of goods or services by your business. Consider whether you have a right to terminate for non-payment or late payment.<br>• If you have tolerated late payment in the past, inform your customers or head-contractors that for the foreseeable future they will be required to comply strictly with required payment terms. If you intend to exercise termination rights, make that clear.<br>• Start talking to your principals, customers and clients if you are not being paid on time but exercise great caution before continuing to extend credit or tolerate late payment. You may be putting your own business at risk and if you are director or officer, perhaps putting your own assets at risk (more below).<br>• Identify each and every circumstance in which your principal or customer can terminate your contract and ensure that you do not allow that to happen.<br>• What do you do if your contract is suspended? Which of your employees or contractors can be stood down so as to reduce your overheads, which supply and sub-contracts could be terminated or suspended? Ensure that you carefully consider the consequences of these actions including redundancy, termination, suspension and other entitlements. Take advice if necessary.<br>• Assess the value of your relationships and the capacity of your own balance sheet to tolerate delays remembering that this might be the first of many. Consider whether there is value in being one step ahead of other creditors i.e. by serving a letter of demand from your solicitor; making use of the rapid adjudication procedure under the Construction Contracts Act; service of a statutory demand or issuing a writ. Conversely, consider whether expensive legal action will produce a commercial outcome. |
| *Force Majeure* | • Review all of your contracts to determine whether you or your suppliers/ subcontractors have force majeure rights.<br>• Force majeure rights are generally determined by reference to the specific contractual terms. You are looking for events such as pandemic, epidemic, act of God etc. If these terms not specifically mentioned, whether or not an event related to Coronavirus will be covered by the particular clause will depend on the overall wording of the clause. Note that most force majeure clauses exclude events which a party can control, or take reasonable steps to prevent or overcome – hence it may be important in order to successfully claim force majeure that you can demonstrate what measures you have taken to minimise the chance of a Coronavirus-related interruption. |

| Risk centre | Recommendations |
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| | • Where you have back-to-back service contracts, identify every project where your downstream supplier or contractor has force majeure rights but you don't' have an upstream right. You are at high risk of being caught in a position where your subcontractor could avoid performing its obligations but you have no contractual right to avoid a claim against you if you fail to perform your obligations under a head contract.<br>• Consider whether other remedies such as frustration may be available. For example, if a construction site, a mining camp or production facility is closed down for an indefinite period and you supply to that business. Can you terminate, suspend or claim standing costs? |
| *Finance facilities* | • Most finance agreements offer the lender a wide degree of latitude to restrict the provision of funding in adverse circumstances (for example, on the occurrence of material adverse events).<br>• You should closely examine your finance agreements and assess whether your lenders have rights to suspend funding (or even call up their debt), and when those rights may be triggered. Be proactive and consider whether a suspension of repayments might be available for a period of a few months without penalty. Engaging with your bank will almost certainly produce a better outcome than having to respond to repeated payment defaults.<br>• If those rights exist, you should identify the circumstances that may allow funding to be withdrawn and (to the extent possible) avoid them or seek confirmation from your lenders that they will not withhold payment or call up funds because of general economic conditions. Essentially – seek greater certainty that denial of funding will only be caused by things which you have the power to control.<br>• If your finance is at risk, plan for associated possibilities - including the possibility that the entire debt could be called in. This should include planning for lack of funds and investigating the possibility of alternative finance arrangements that can be called on if the need arises.<br>• Short term financiers will likely be active during the next few months. Talk to them, but do it early to give yourself time to explore multiple options and minimise your exposure to oppressive interest rates and fees. |
| *Financial covenants* | • As part of considering your finance facilities, you should take a close look at whether any requirements of your finance facilities are at risk of being affected by uncertain economic conditions.<br>• For example, consider whether a fall in your financial performance, share price or any other circumstance will place you in breach of any financial covenant.<br>• Consider whether you are at risk of failing to comply with any requirements or adequacy ratios as a result of a temporary or ongoing economic downturn, or a delay in receipt of receivables.<br>• Consider whether there are steps you can take to mitigate or avoid that risk and consider early engagement with your lenders. |

| Risk centre | Recommendations |
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| *Insurance* | • Review all of your insurance contracts to identify each category of indemnified loss. Consider the adequacy of your existing policies (in terms of type and level of cover), as well as specific policy wording and/or exclusions around matters such as business interruption, public liability, debtor and professional indemnity.<br>• Consider initiating discussions now with your insurers about potential business impacts. You should understand what you are covered for, and what you aren't covered for. Ensure that you give early notice to your insurer of any claim in accordance with your policy.<br>• Monitor the financial stability of your insurer. |
| *New business and new opportunities* | • Consider your ability to service new commitments (especially long-term ones) in the event of a sudden and severe reduction in cash-flow. Are you taking on an unacceptable commercial or contractual risk?<br>• If entering into new contracts, consider cash-on-delivery or tightening up your payment terms so as to identify early debtor risks.<br>• Amend your T&Cs to permit termination for late payment if they don't allow for that already.<br>• Ensure that new clients or customers are forewarned prior to entry into any new contractual arrangements that you will require strict adherence to the payment terms.<br>• Ensure that you are registering your interest in any plant, equipment or goods that are property of your company or are subject to retention of title clauses. Remember, even the most minor defect in a PPSA registration could mean that your assets become property available for sale and distribution in a liquidation if the company in possession of your assets is wound up.<br>• Do not be tempted to exploit market conditions. The ACCC has powers to penalise companies and individuals that seek to exploit market power in an unconscionable manner. |
| *Dispute management* | • Identify areas of potential dispute risk and engage proactively with contract counterparties if possible, to avoid disputes arising (including identifying appropriate workarounds which reflect reasonable behaviour given the overall Coronavirus environment).<br>• If disputes arise, carefully assess the risks and benefits of litigation before threatening or deploying it as a preferred dispute resolution mechanism. Companies often have a greater appetite to litigate during depressed market conditions, but remain mindful that litigation is expensive and risky. Successful litigants never recover all of their costs and may recover less than half their costs. Further, there is no commercial value in obtaining judgment against a company that is immediately placed into administration or liquidation upon judgment being entered. |

## 3. Directors, operations, key personnel and decision-making

| Risk | Recommendations |
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| *Key personnel* | • Identify your key personnel and consider how their sudden absence from the workplace or inability to work at all will be managed. Ensure that your key personnel maintain and regularly update an activities list to facilitate a hand-over if required.<br>• Assess your policies and procedures for delegation and consider any adjustment that might be required in light of any amendment to your OH&S, travel and other policies in response to Coronavirus.<br>• Make a plan for sourcing labour and personnel to cover operationally critically roles. |
| *Information capture and storage* | • Make sure your knowledge capture/archiving and document register systems and practices are up to date and working effectively, so that if a key person is unavailable then all relevant information that is critical to your business and its customer, supplier and other relationships is still accessible.<br>• Have you saved all your key contacts on a central database? Look at lenders, accountants, solicitors, suppliers, clients/customers, regulators, referrers etc. |
| *Director duties* | • Company directors owe various duties at law and under the *Corporations Act 2001 (Cth)*, which apply to their decision-making generally (including any inaction on particular matters). Directors are required to act with care and diligence (s.180); to act in good faith in the best interests of the company and for a proper purpose (s.181) and not to improperly use their position to gain an advantage for themselves or for someone else (s.183). Directors also owe duties to not trade whilst insolvent (see below). Accordingly, company directors must be reviewing their cash flow and balance sheet position on a regular basis.<br>• Directors should be vigilant to ensure that at all times they are 'sanity checking' their conduct and all the decisions made by them against those duties. |

## 4. Financial management

| Risk | Recommendations |
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| *Budgets and forecasting* | • Start looking at your cash flows now.<br>• Cut all unnecessary expenditure and prepare your balance sheet for a sharply reduced cashflow.<br>• Assess the amount of time that your balance sheet can tolerate any reduction in cash flow and constantly assess the solvency of your company (more below). |
| *Information flows* | • Ensure that you have adequate processes in place to extract information regarding financial performance in real-time.<br>• Consider increased frequency of internal reporting regarding financial matters – ensure that key decision-makers have access to the information they need to make properly informed decisions. |
| *Profit revisions and guidance* | • Assess how your profit forecasting might be affected by debtor risk and a reduction in cash flow.<br>• If you are a listed company, give consideration as to whether it is necessary to revise any profit guidance you have previously given (or otherwise correct market expectations) and your associated continuous disclosure obligations. |
| *Debtor control* | • Consider cash on delivery, shortened payment terms, or discounts for prompt payment.<br>• Do not tolerate late payment. If you identify bad debt, consider whether you can terminate the contract and refuse further credit.<br>• Remember that if you are negotiating a payment arrangement with creditors in circumstances where it might reasonably be suspected that the company is insolvent i.e. because they are late paying or because they have requested deferred payment, then you may be liable to repay any receipt as a preference payment. |
| *Non-critical spending* | • Whilst depressed conditions do present as an opportunity, carefully assess the need for any non-critical expenditure (including as to timing).<br>• Favour the availability of cash over the reduction in debt if cash-flow solvency is, or may be, an issue for your business. |

## 5. Solvency considerations and risks

| Risk | Recommendation |
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| *Is your company solvent?* | • Regularly review your cash flows and balance sheet to assess whether your company is, or may become insolvent.<br>• Assess the contingencies that might change your solvency position and ensure that you know with reasonable accuracy how quickly those contingencies could eventuate and change the solvency position. |
| *Director liabilities* | • Directors should review their personal guarantees and indemnities to understand their personal exposure. Finance agreements, leases and supply contracts should be checked as a priority.<br>• Directors of small companies should check their director loan accounts. If you have taken drawings as a loan so as to delay withholding tax, that liability will be frozen upon the appointment of an administrator or liquidator and you will be required to repay the loan. Liquidators will owe a positive duty to creditors of the company to pursue that debt like any other. Directors of liquidated companies are often surprised and disappointed to discover this in a liquidation scenario.<br>• Remember that directors can be personally liable in many ways including:<br>  • insolvent trading;<br>  • unpaid superannuation and withholding tax;<br>  • from 1 April 2020, unpaid GST; and<br>  • losses suffered by third parties if the directors have engaged in misleading or deceptive conduct within the meaning of the Australian Consumer Law.<br>• Directors should also understand the strength of their asset protection strategies. By way of example, a house owned in the name of a director's husband or wife might be susceptible to claims by a trustee in bankruptcy of the director if the house was purchased and maintained using the director's money. Take careful advice before making decisions based on an expectation that your assets are out of reach of a trustee in bankruptcy. |
| *Safe harbour* | • Section 588GA of the Corporations Act creates a safe harbour for company directors and gives protection against insolvent trading claims. Safe harbour can be invoked if, after the directors start to suspect that the company may become insolvent, they develop a course of action or actions that 'are reasonably likely to lead to a better outcome for the company' and 'the debt is incurred directly or indirectly in connection with any such course of action during the period' during which the action is being taken.<br>• Whether the action is reasonable is informed by several possible factors including whether the director:<br>  • properly informs themselves as to the company's financial position;<br>  • takes steps to prevent misconduct; ensures the company is keeping appropriate financial records;<br>  • obtains appropriately qualified advice;<br>  • or is developing or implementing a restructuring plan. |

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| | • Directors should consider the instruction of accounting, insolvency, legal or business restructuring advisors and often, a combination of one or more is required so as to effectively enter the safe harbour.<br>• To qualify for safe harbour:<br>  • the company's books and records must be in order;<br>  • all employee entitlements must be paid; and<br>  • all tax returns, notices, statements, etc must have been lodged. |
| ***Voluntary administration*** | A voluntary appointment of administrators may be useful if the directors form the view that the company is or may soon become insolvent. An external administrator will be appointed to decide whether in his or her view the company should keep trading or be placed into administration. The creditors may vote to enter into a deed of company arrangement by which the creditors participate in the distribution of a fund realised from company assets with a view to the company being returned to the company directors upon entry into the DOCA. |
| ***Phoenix activity*** | Take very careful advice before considering the transfer of assets from a company at risk of insolvency. The transfer may be an illegal phoenix transaction in respect of which company directors could be guilty of an offence. |

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