SQUIRE PATTON BOGGS

Client Advisory Regarding COVID-19 Legal Issues in Australia

As a response to the unprecedented global impact of the coronavirus disease 2019 (COVID-19), many businesses were required to adapt to the changing legal and regulatory environment and make some tough decisions that directly impact their employees, customers, suppliers and broader business stakeholders. In Australia, we have been actively advising our clients as they manage these new measures, both at state and federal levels. This document provides a brief overview of some of these areas of change, covering corporate, labour and employment, commercial, real estate, hospitality, tourism and leisure, tax, insolvency, construction, disputes, banking and finance, and immigration.

Corporate

Changes to Foreign Investment Framework

The Australian Treasurer has announced new and far-reaching changes to Australia's foreign investment approval framework. With effect from 10:30 p.m. AEDT on Sunday 29 March 2020, (1) all monetary thresholds that apply to foreign investments under the Foreign Acquisitions and Takeovers Act 1975 (Cth) and associated regulations have been reduced to $0; and (2) the timeframes for the consideration of existing and new applications for Foreign Investment Review Board (FIRB) approval will be extended from 30 days to up to six months. The government has advised that urgent applications for investments that directly protect and support Australian business and jobs will, however, be prioritised.

The key consequences of the above changes are that a greater number of transactions involving interests in Australian land, businesses, assets and entities must now be notified to FIRB for approval regardless of the value of the interest acquired (or the amount paid for that interest) and regardless of whether the acquiring party is from a free trade agreement partner of Australia. That said, we expect there will be closer scrutiny of transactions in certain sectors, such as primary production land and infrastructure assets.

Capital Markets

On 31 March 2020, in response to suspensions by ASX-listed companies that were assessing the impact of COVID-19, ASIC has provided temporary relief to allow "low doc" placements, rights issues and share purchase plans where a listed company has been suspended for a total of up to 10 days (extended from five days) in the previous 12-month period prior to the offer and they were not suspended for more than five days in the period commencing 12 months before the offer and ending 19 March 2020. Ordinarily, companies that have been suspended for more than five days would instead need to prepare a prospectus or apply to ASIC for individual relief, which can be costly and involve delay.

We anticipate that there will be future equity capital raising activity for ASX-listed companies to repair their balance sheets as a result of the economic downturn. We may see, for example, a repeat of the raft of secondary raises that occurred during the uncertainty of the global financial crisis. There are various options available. However, those that produce a quick cash injection will likely be favoured, such as institutional placements followed by share purchase plans to retail holders in order to ease dilution. Alternatively, those entities that do not have sufficient placement capacity may need to turn to rights issues for the desired outcome.

Down-rounds and Anti-dilution

In the emerging and private company space, venture investors will, no doubt, have their hands full managing existing portfolio companies through the crisis and will likely favour investing in those portfolio companies rather than making additional new investments. In any event, it is likely that most new investments will represent a "down round" (i.e. based on a valuation lower than that of the previous round), which will, in many cases, trigger anti-dilution protection mechanisms, which, in effect, dilute founders and earlier stage investors. As has been the case in previous down markets, we may see the implementation of "pay to play" provisions for new investors to ensure future funding remains available.

Facilitating Deferred and Virtual Annual General Meetings (AGMs)

On 20 March 2020, ASIC released guidelines for upcoming AGMs. ASIC has confirmed that it will take no action if AGMs are postponed for two months, until the end of July. This is most immediately relevant for listed and unlisted public companies with 31 December balance dates that require an AGM to be held by 31 May 2020. ASIC will also support the holding of AGMs using appropriate technology, including both "hybrid" and "virtual" AGMs, which we expect will be put to use fairly soon.

Labour and Employment

Employees and Stand-down Provisions

With Victoria in stage 3 of the COVID-19 shutdown and other Australian states and territories contemplating moving from stage 2, together with further mandates regarding business closures, some employers may have to close their operations indefinitely. In this instance, employers should first attempt to reach an agreement with employees on whether they agree to take a form of paid leave (annual leave or long service leave) or take unpaid leave. If employees and employers cannot agree on leave and employees cannot usefully be employed because of a stoppage of work for a cause for which the employer cannot reasonably be held responsible (for example, an enforceable government direction to close down operations), employers may "stand down" their employees for the period of the stoppage of work and will not be required to make payment to employees for that period. However, caution should be taken in implementing stand-down provisions, as their application is understandably somewhat limited and will be dependent on the particular factual circumstances of each case.

Individual Employee Absence

Employers have a primary duty to ensure, as far as is reasonably practicable, the health and safety of their employees. For employees that have symptoms of illness and are not able to attend work, those employees are entitled to paid personal/carer's leave and should provide a medical certificate, if requested by the employer, for the period in which they are unable to attend work (including any mandated period of isolation during and after recovery). Before attending work after an illness, employers should require employees taking paid personal/carer's leave to provide a medical certificate indicating that it is safe for them to return to work.

JobKeeper Payment

The JobKeeper Payment is a temporary subsidy scheme open to businesses impacted by COVID-19. The scheme provides AU$1,500 per fortnight per eligible employee for up to six months. The JobKeeper Payment is intended to enable businesses to retain their employees in their jobs so that businesses are able to reactivate their operations quickly once the crisis is over. For employees, this means they can earn an income even if their hours are cut and they can keep their job. However, there are eligibility requirements for businesses, including either having a turnover of less than AU$1 billion and turnover is reduced by more than 30% or having a turnover of AU$1 billion or more and turnover is reduced by 50%, that the business is not subject to the Major Bank Levy and that the eligible employee was employed by the employer as at 1 March 2020.

Commercial

Force Majeure and Frustration in Contracts

COVID-19 is impacting the global economy with projects experiencing supply chain issues, labour shortages and financing pressures. To determine if circumstances arising from COVID-19 may represent a so-called *force majeure* event, parties should closely examine the specifics of the relevant provisions in their contracts. Generally, *force majeure* events are unexpected circumstances outside of a contracting party's reasonable control that prevent it from performing its contractual obligations. Subject always to the particular drafting, COVID-19 may be considered a *force majeure* event if there is terminology related to either an "infectious disease", "pandemic", "government action", "national emergency" or "labour shortage" present in the contract. If the scope of the clause is not broad enough to cover COVID-19, or a contract does not have a *force majeure* clause, and the contract becomes impossible to perform as a consequence of the COVID-19 outbreak, other avenues may be available depending on the circumstances, for example pursuant to the theory of "frustration of contract". However, the required standard of proof is very high for frustration and typically higher than circumstances contemplated by a *force majeure* clause.

Real Estate

The unprecedented nature of COVID-19 has significantly impacted bricks and mortar. With the announcement of forced government shutdowns and restrictions on trade, a number of tenants have questioned whether they are still required to perform under their leases, and, if so, what relief may be available to offset the costs associated with tenancies that cannot be occupied.

Unlike other performance contracts, leases do not generally contain *force majeure* type clauses or remedies. In most instances, a tenant will not be able to rely on current events to avoid their leasing obligations. Most leases also do not provide for rental relief, rent suspension or set-off rights in circumstances other than where a tenant is unable to use the premises due to physical damage or destruction of the premises or the building within which the premises is located.

On 25 March 2020, the COVID-19 Legislation Amendment (Emergency Measures) Act 2020 was passed in NSW. The Act grants the NSW government the power to make regulations under the relevant legislation (including the Residential Tenancies Act 2010 (NSW) and the Retail Leases Act 1994 (NSW)) to impose restrictions on landlords and to grant some relief to tenants.

The amendment to the Retail Leases Act 1994 (NSW) entitles the minister to recommend to the governor that regulations be made (1) to prohibit the repossession of a premises; (2) to prohibit termination of a lease or the exercise of another right that the landlord of the land has under a lease; (3) to exempt a tenant from the operation of a provision of the Retail Leases Act; and (4) where such regulations are needed to protect the health, safety and welfare of tenants under the Retail Leases Act.

Any regulations made under these new powers will expire six months after the day on which the regulation commences. At the time of writing, the regulations have not been made and there is no indication whether the states and territories outside of NSW will follow suit.

In respect of commercial leases, on 29 March 2020, the National Cabinet agreed to a set of principles to underpin relief and govern landlord intervention for commercial tenancies in response to COVID-19. These principles are set out below:

- The provision of a short-term, temporary moratorium on eviction for non-payment of rent to be applied across commercial tenancies impacted by severe rental distress due to COVID-19
- Tenants and landlords are encouraged to agree on rent relief or temporary amendments to the lease
- The reduction or waiver of rental payment for a defined period for impacted tenants
- The ability for tenants to terminate leases and/or seek mediation or conciliation on the grounds of financial distress
- Commercial property owners should ensure that any benefits received in respect of their properties will also benefit their tenants in proportion to the economic impact caused by COVID-19
- Landlords and tenants not significantly affected by COVID-19 will be expected to honour their lease and rental agreements
- Cost-sharing or deferral of losses between landlords and tenants, with Commonwealth, state and territory governments, local government and financial institutions to consider mechanisms to provide assistance

At the time of writing, it is unclear how and when these principles will be implemented and applied by the various states and territories.

Hospitality, Tourism and Leisure

For business, the hospitality industry is at the frontline of dealing with the effects of and responding to COVID-19. The direct, indirect and other industry-related events are having significant adverse effects on businesses, employers and employees. While many responses are helping to secure the health and wellbeing of the population, these responses raise new challenges for the industry, such as international travel restrictions and quarantine arrangements, airline flight reductions, corporate travel restrictions, food and beverage trading restrictions and social distancing requirements.

In responding to the changing regulatory, health and safety environment, hospitality asset owners should be considering:

- Terms of their hotel management agreement (or other management agreement), including the responsibilities of the owner and manager with respect to employees, annual budget reviews and special financial arrangements, *force majeure* provisions and the doctrine of frustration
- Health and safety of their employees, employer responsibilities and applicable stand-down provisions and awards under the Fair Work Act 2009 (Cth), applicable enterprise agreements, the Hotel Industry (General) Award and government directions
- Terms of their facility agreements, including regarding notifiable and default events to their lenders/financiers, as well as any cross-collateralised or cross-default arrangements
- Insurances that may be available, as well as notification requirements, mitigation responsibilities and changes to policies
- Terms of their service agreements, supply agreements and accommodation contracts, including termination rights, *force majeure* provisions and the doctrine of frustration
- Support from government for industry, including through the JobKeeper Payment of employers and employees, restrictions on trading, hotel accommodation for inbound travellers and other arrangements discussed in this document
- Work, health and safety obligations of a property owner and/or business owner, with respect to employees, guests and invitees
- For mixed-use projects, common areas, access and egress points and areas of responsibility/management

As an owner, responsibility and liability (including for directors) with third parties will ultimately rest with the owner, irrespective of any management agreement or other arrangement that is in place.

For new acquisitions and sales, there will need to be greater consideration and stress testing on the due diligence materials (legal, financial and operational), conditions to exchange and completion and the availability of financing. We may also see more transactions prepared under put and call options. Joint venture parties will need to be more rigorous on clarifying roles and responsibilities, allocation of risk and capital commitments for new projects. For those projects planned or underway, please also consider our comments on "Construction" and "Disputes" in this document. It is also a time to consider learning from the present circumstances and considering additional terms that may be appropriate to include in new contractual arrangements.

Tax

The federal government will be providing up to AU$100,000 to eligible small and medium-sized businesses, and not-for-profits (including charities) that employ people, with a minimum payment of AU$10,000 as a refund to the employer of the tax deducted from the employee's wages. The payments will be paid for the March, June and September quarters with the initial payment available from 28 April 2020 and then additional payments available to employers who continue to employ staff.

The federal government is increasing the instant asset write-off threshold from AU$30,000 to AU$150,000 and expanding access to include businesses with an aggregated annual turnover of less than AU$500 million (up from AU$50 million) until 30 June 2020. A 15-month investment incentive (through to 30 June 2021) will also be provided to support business investment and economic growth over the short term, by accelerating depreciation deductions. Businesses with a turnover of less than AU$500 million will be able to deduct 50% of the cost of an eligible asset.

Individuals affected by COVID-19 will be permitted two releases of AU$10,000 each tax free from their superannuation savings and the government is temporarily reducing superannuation minimum drawdown requirements for account-based pensions by 50% for the 2019-20 and 2020-21 income years.

The state governments will also provide payroll tax relief, with each state having different timings and requirements. For example, in NSW, payroll tax need not be paid for the months of March, April and May 2020, and there is an increase of the payroll tax-free threshold to AU$1 million. While in WA, small and medium-sized businesses will be eligible to defer their monthly payroll tax payments for the remainder of 2019-20, a one-off grant of AU$17,500 will be available for businesses with a payroll up to AU$4 million and the payroll tax threshold will be increased to AU$1 million for the 2020-21 financial year.

Insolvency

The Coronavirus Economic Response Package Omnibus Act 2020 (Cth) came into effect on 25 March 2020 and applies for the next six months (until approximately 23 September 2020). It seeks to provide temporary relief to companies under financial stress as a result of the economic slowdown brought about by COVID-19. In terms of the impact for directors, it significantly relieves directors from the risk of personal liability for insolvent trading where the debts are incurred in the ordinary course of business after the enactment of the act and prior to the engagement or appointment of any external administrator. In enacting this legislation, the federal government is encouraging directors to take calculated risks to address their financial challenges, in potentially expanded ways, such as by reasonably accumulating new debt, seeking credit, raising equity or adopting a mobile workforce. The act also increases the monetary threshold for creditors to issue a statutory demand from AU$2,000 to AU$20,000 and allows companies six months to respond, rather than the previous 21 days. It is important to note, however, that creditors will continue to have the right to enforce debts against companies or individuals through the courts and by utilising the regular processes during the temporary relief measures.

Construction

As at 31 March 2020, the restrictions on public gatherings in Australia have not extended to construction sites and construction work. However, this may change quickly. Even though work may be able to continue, progress may be affected by issues including (1) the requirement of members of the workforce to self-isolate; and (2) supply chain issues, particularly where products must be imported.

Many construction contracts will not contain a *force majeure* clause (or an applicable *force majeure* clause). Therefore, the position of principals and contractors under construction contracts, including relief from time for performance or entitlement for reimbursement for increased costs, will need to be worked out on a case-by-case basis. Sometimes, other provisions of the contract may apply (for example, provisions relating to a change in legal requirements). In other circumstances, it may be able to be argued that the contract should cease to apply because of the doctrine of frustration. In any event, there are likely to be significant disputes about parties' rights and entitlements.

Disputes

As highlighted elsewhere in this note, COVID-19 has heightened the risk of new disputes because it impacts the ability to perform contracts of many different types (including commercial, financing, real estate, services and works), and may challenge the underlying foundation of the negotiated clauses (for example, earn-out type clauses where the purchase price is linked to performance).

Care needs to be taken in regard to contractual mandatory notice provisions and timeframes for making claims. Non-compliance with such provisions may disentitle a party to making a claim. Further, many contracts have mandatory dispute resolution procedures. There are likely to be significant difficulties in complying with contractual dispute resolution procedures that require face-to-face meetings in circumstances where the parties are not cooperating.

COVID-19 also has a potentially significant impact on current and future damages claims. In some situations, damage might be increased by COVID-19 impacts, and in other cases, damage might be reduced.

The greatest impacts in the courts are likely to be felt in cases that are well advanced and/or include an international element. Largely, the courts and arbitral institutions remain open to applications to resolve disputes, but at this stage, most cases will not progress unless urgent, and where hearings have not been cancelled, almost invariably hearings are being conducted without physical attendance. The approach to non-urgent matters will change depending on how long the COVID-19 restrictions on movement and gatherings continue. Currently, individual courts and tribunals are taking slightly different approaches. Hearings may occur by telephone or videoconference, or matters may simply be determined by reference to the documents and written submissions only. While many courts now have the technology and systems to deal with electronic documents only and to conduct hearings by telephone or video, significant challenges still arise. For example, there will be challenges in cross-examination, particularly where there are lay witnesses and multiple documents. Practical difficulties will arise in witnesses and in person litigants accessing the necessary technology, or simply overcoming issues around using the technology.

Banking and Finance

Australian businesses are facing unprecedented challenges as the consequences of the COVID-19 pandemic unfold. At this difficult time, it is critical to take measures to ensure that your business has sufficient working capital for at least three to six months and the risk of being required to repay or restructure your existing financing arrangements is mitigated to the maximum extent possible.

Solutions for liquidity concerns include utilisation of undrawn credit facilities and/or deferral of loan repayments, if possible. It is advisable that you assess the business' funding needs and determine if any headroom in your existing credit facilities should be utilised as soon as possible, well ahead of a possible credit crunch. If the term of your credit facility will expire soon, you should approach lenders to discuss an extension or a refinancing plan without delay.

Deferring loan repayments would help alleviate liquidity shortages. You should engage in commercial discussions with your lenders to seek their support by allowing for interest to be capitalised and principal amortisations to be suspended during the COVID-19 pandemic. Australian banks have agreed to defer loan repayments for small businesses affected by COVID-19 for six months. You should consider if your business is eligible for this relief and make an application quickly. In addition, commercial landlords with total business loan facilities of up to AU$10 million (up from the AU$3 million small business threshold) will now be able to defer repayments for loans attached to their business for six months. Where the AU$10 million threshold is exceeded, the relief may be available on a case-by-case basis. A key condition of the relief is that the landlord provides an undertaking to the bank not to terminate leases or evict current tenants for rent arrears as a result of COVID-19.

While we anticipate that lenders will act sensibly with a view to supporting businesses through the COVID-19 crisis, we recommend that a thorough review of your financing terms be undertaken to determine what should be done to mitigate the risk of defaults or being required to restructure your financing arrangements. The representations, undertakings and events of default should be reviewed to assess your ongoing compliance and identify defaults or potential defaults, which may require notification to the lender and prevent further facility drawdowns. An early approach to the lender with a remedial action plan or waiver request would assist in mitigating the risk of seeing unfavourable actions taken by the lender. It should also be noted that certain steps proposed to be taken as a business response to COVID-19, such as the standing down of employees, may be subject to restrictions under the terms of your financing arrangements and, thus, may require the lender's prior consent.

In general, we suggest that appropriate communication, transparency and good faith discussions with your lenders should assist in gaining their support through the current crisis.

Immigration

Travel Restrictions

The federal government has imposed significant travel restrictions in order to reduce the spread of COVID-19 within Australia. As of 25 March 2020, a travel ban is in place for all Australians. A Level Four travel advice has been instituted on the entire world by the Australian government. Level Four is the highest rating for travelling danger issued by Australia's Department of Foreign Affairs. This ban has been introduced following heightened security measures introduced by the federal government over the last week. From 20 March 2020, the Australian government imposed a travel ban that restricts all non-citizens and non-residents from entering Australia (unless there is an applicable exemption) and requires all travellers that entered the country from 15 March 2020 to self-isolate for 14 days, including Australian citizens and permanent residents. Heavy penalties are in place for those who do not comply, and for some states, it may be up to AU$50,000.

Employers Who Sponsor Foreign Workers

If your business currently sponsors foreign workers on subclass 457, 482, 407, 494, 186 or 187 visas and is considering terminations, reducing hours, working from home arrangements, unpaid leave or redundancies, it is important to be aware of your sponsorship obligations and ensure you have a clear understanding of what is and is not considered a breach.

Contacts

Corporate & Restructuring

Simon Adams
Partner, Perth
T +61 8 9429 7431
M +61 4 3903 5387
E simon.adams@squirepb.com

Tony Chong
Managing Partner (Perth)
T +61 8 9429 7688
M +61 4 1784 2287
E tony.chong@squirepb.com

Campbell Davidson
Managing Partner Australia
T +61 2 8248 7878
M +61 4 1009 6173
E campbell.davidson@squirepb.com

Richard Horton
Partner, Sydney
T +61 2 8248 7806
M +61 4 0114 2105
E richard.horton@squirepb.com

Simon Rear
Partner, Perth
T +61 8 9429 7483
M +61 4 0279 4093
E simon.rear@squirepb.com

Chris Rosario
Of Counsel, Partner Elect 1 May, Perth
T +61 8 9429 7553
M +61 4 1718 5248
E chris.rosario@squirepb.com

Ashley Rose
Partner, Sydney
T +61 2 8248 7879
M +61 404 129 920
E ashley.rose@squirepb.com

Construction & Projects

Cris Cureton
Partner, Sydney
T +61 2 8248 7846
M +61 4 6601 6540
E cris.cureton@squirepb.com

David Starkoff
Partner, Sydney
T +61 2 8248 7833
M +61 4 2311 9925
E david.starkoff@squirepb.com

Greg Steinepreis
Partner, Perth
T +61 8 9429 7505
M +61 4 1114 5615
E greg.steinepreis@squirepb.com

Banking & Finance

Hai-Dang Nguyen
Partner, Sydney
T +61 2 8248 7853
M +61 4 3456 9567
E hai-dang.nguyen@squirepb.com

Regulatory

Margie Tannock
Partner, Perth
T +61 8 9429 7456
M +61 4 2329 0269
E margie.tannock@squirepb.com

Tax

Louise Boyce
Tax Counsel, Sydney
T +61 2 8248 7802
M + 61 4 1387 0601
E louise.boyce@squirepb.com

Labour & Employment

Bruno Di Girolami
Partner, Perth
T +61 8 9429 7644
M +61 4 0798 3951
E bruno.digirolami@squirepb.com

John Oakes
Partner, Sydney
T +61 2 8248 7804
M +61 4 1471 7042
E john.oakes@squirepb.com

Litigation & Insolvency

Caroline Brown
Partner, Perth
T +61 8 9429 7432
E caroline.brown@squirepb.com

Michael Ferguson
Partner, Perth
T +61 8 9429 7402
M +61 4 2329 0279
E michael.ferguson@squirepb.com

Graeme Slattery
Partner, Perth
T +61 8 9429 7576
M +61 4 2329 0281
E graeme.slattery@squirepb.com

Masi Zaki
Of Counsel, Sydney
T + 61 2 8248 7894
E masi.zaki@squirepb.com

Real Estate

Dannelle Howley
Partner, Sydney
T +61 2 8248 7822
M +61 4 0738 9243
E dannelle.howley@squirepb.com

Mark Palermo
Partner, Perth
T +61 8 9429 7557
M +61 4 2329 0282
E mark.palermo@squirepb.com

Rahul Parrab
Partner, Sydney
T +61 2 8248 7848
M +61 4 3456 6513
E rahul.parrab@squirepb.com

Mary Pringle
Partner, Perth
T +61 8 9429 7475
M +61 4 1942 6151
E mary.pringle@squirepb.com

Michael Swift
Partner, Perth
T +61 8 9429 7626
M +61 4 2816 9009
E michael.swift@squirepb.com

37813/03/20