



## Commercial Contracts Frequently Asked Questions

### The obligations under a commercial contract cannot be complied with, what can we do?

There is most likely going to be significant disruption to contractual obligations as a result of COVID-19. Council should consult with contractors and consultants at the earliest opportunity. When entering into these discussions:

1. Put a framework around the discussion and reserve the Council's rights.
2. Do not make directions for a contractor or consultant to cease operations unless absolutely necessary as it may give rise to arguments that a contractor or consultants entitled to compensation from the Council.
3. Document the agreed arrangements.

### What relief for performance is available as a result of COVID-19?

This will depend on the clauses in the relevant contract. Some clauses that may be relied upon are:

1. Rights for delay or suspension – the contract may include rights to delay or suspend performance.
2. Force Majeure – this may afford the Council with the right to suspend the contract. The Council may also rely on the doctrine of frustration.

### What is Force Majeure?

Force Majeure is a contractual principle where unforeseeable circumstances occur to prevent the parties to a contract from fulfilling their contractual obligations (otherwise known as a Force Majeure event). A Force Majeure clause must be included as an express term of the contract.

A Force Majeure event can either extend the time in which the parties have to comply with their contractual obligations, suspend the operation of the contract or relieve the parties from their contractual obligations altogether.

### What is frustration?

A contract will be frustrated when the contract cannot be completed as a result of an unforeseen event out of the control of the parties, which either renders the contractual obligations impossible or radically changes the parties' principal purposes for entering into the contract.

If a contract is frustrated then it is taken to be terminated from the date that the event of frustration occurs and the parties will be discharged from their contractual duties from this date. However, only future obligations are discharged<sup>1</sup>, so parties still need to be aware of any accrued liabilities and take steps to remedy any outstanding breaches.

### Are there any other options to be considered?

Council should also consider whether there are any alternate avenues available to it. For example, the Council may be able to give a direction to a contractor or consultant via its powers under the public health legislation, rather than pursuant to the relevant contract, thus minimising the risk of that contractor or consultant seeking compensation from the Council under its contract .

### What needs to be considered for new contracts ?

Future contracts should have additional provisions built into them to take into account the existence, and the potential adverse implications, of the COVID-19 pandemic.

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<sup>1</sup> Section 6(2)(b) of the *Frustrated Contracts Act 1988* (SA) (the Act). Please note that the Act only applies to contracts contemplated in Section 4 of the Act. There is also similar legislation in other jurisdictions dealing with this issue.

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