

Leading your business through the Coronavirus Pandemic



A Guide for Indigenous businesses

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TERRI JANKE AND COMPANY
LAWYERS & CONSULTANTS

Leading your business through the Coronavirus Pandemic: A guide for Indigenous Businesses

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Important notice:

This paper is current as of 16 April 2020. It provides general information only and does not constitute legal advice. If you have a specific legal problem, please contact us.

The information contained in this book may be updated and changed. It is important to keep informed with government directives.

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Introduction

The Coronavirus (COVID-19) pandemic is an international health emergency which not only impacts the safety of our Indigenous communities but also the growing Indigenous business sector.

The global economy has been severely impacted and Indigenous businesses are also feeling the effect. During the downturn, paying debts, keeping employees, meeting obligations of contracts, leases and loan repayments must all be managed. Checking your cash flow is key to getting through these hard times. It is essential that Indigenous business owners make informed decisions about keeping their business going during the pandemic.

This guidebook provides general advice on the legal issues arising from the impact of the Coronavirus (COVID-19) pandemic. If you need specific legal advice, please contact us to discuss your matter.

The guidebook covers:

- 1. What is the Coronavirus (COVID-19)?**
- 2. Work Health and Safety (WHS):** Meeting your WHS obligations as an employer.
- 3. Managing employees when things get tight:** Working from home; options for leave.
- 4. Business health:** Checking your cashflow; insolvency; director's duties; bankruptcy; and business support.
- 5. Managing contracts:** Rights and obligations; termination; force majeure; frustration.
- 6. Privacy, IP and ICIP considerations:** Your obligations as an employer under the Privacy Act; protecting intellectual property (IP) and Indigenous Cultural and Intellectual Property (ICIP) rights.

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Part 1: What is Coronavirus (COVID-19)?

Coronavirus (COVID-19) is an infectious disease caused by a new strain of coronavirus. The virus causes mild to moderate respiratory illness and is known to have a more serious effect on people with weak immune systems or a pre-existing medical condition. However, no one is immune. In a rapid amount of time, coronavirus has spread around the world and has been responsible for thousands of deaths. This serious situation is changing rapidly, and investigations are underway to create a vaccine.¹

How is the virus spread?

COVID-19 is spread through contaminated droplets caused by coughing or sneezing, or through contact with contaminated surfaces (e.g. hands, skin, objects).² Avoid touching your eyes, mouth or nose.

How long does COVID-19 last on surfaces?

Studies have suggested that COVID-19 may live on surfaces for a few hours to several days. This may vary under different conditions (e.g. type of surface, temperature or humidity of the environment). If you think a surface may be infected, clean it with a common household disinfectant to kill the virus. Clean your hands thoroughly with soap and water or use alcohol-based hand sanitiser.

What are the symptoms?

Patients with coronavirus may display symptoms including a fever, dry cough, runny nose, fatigue, difficulty breathing and other symptoms. In more severe cases, infection can cause pneumonia with severe acute respiratory distress. The time between exposure to the virus and appearance of symptoms is typically 5–6 days, although it can range from 2–14 days. For this reason, people who may have been in contact with a confirmed case are being asked to self-isolate for 14 days. Most COVID-19 cases appear to be spread from people who have symptoms. A smaller percentage of people may be infectious before their symptoms developed.

Worimi man Dr Kelvin Kong is an Ear, Nose and Throat (ENT) Surgeon who explains the symptoms in this useful video produced by the Department of Health:

<https://www.youtube.com/watch?v=mT5mjs22008>.

How is COVID-19 diagnosed?

Infection with COVID-19 is diagnosed by finding evidence of the virus in respiratory samples such as swabs from the back of the nose and throat, or fluid from the lungs. Testing for COVID-19 is done in public health laboratories.

¹ World Health Organization, 'Coronavirus', < <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>> [Accessed 15 April 2020]

² NSW Government, *COVID-10 (Coronavirus)*

<<https://www.health.nsw.gov.au/Infectious/diseases/Pages/coronavirus.aspx>> [Accessed 14 April 2020]

How long does the infection last?

This varies from case to case. In mild cases, recovery may take 10–14 days. For people with pre-existing health issues (e.g. low immunity, respiratory condition) recovery may take weeks and, in some cases, has the potential to be fatal.

What should I do if I have been in contact with someone who has COVID-19?

The coronavirus is most commonly spread from close contact with an infected person. A close contact is typically being face to face for at least 15 minutes or being in a shared closed space for at least 2 hours with an infectious person. If you have experienced close contact with someone who has a confirmed case of COVID-19, you will need to isolate yourself at home for 14 days and monitor your health. There is still a small risk even if your contact with the person was less than this so monitor your health for 14 days since you were exposed to the virus. The public health unit will keep in touch with people who are close contacts of patients with COVID-19. If you develop symptoms call a doctor or healthdirect on 1800 022 222. Contacts must call the public health unit to report those symptoms.

Precautions to help ‘flatten the curve’

The governments of some countries around the world, including Australia, have directed people to stay at home to help to ‘flatten the curve’ or slow down the pace that the virus is transmitted to prevent exhausting the health system. States and territories have put in place different penalties for not obeying the rules, including on-the-spot fines and imprisonment.

- Travellers returning from overseas must ‘self-isolate’ at home for 14 days.
- Everyone must stay home except for essential reasons such as essential shopping, medical appointments, exercise, providing care and attending school/work.
- Indoor and outdoor gatherings are restricted to two people (entire households are ok).
- Weddings are limited to 5 people and funerals to 10 people.
- Avoid close contact with people (no handshaking, hugging or kissing hello). The guide is 1.5 metres between people.
- Make sure to thoroughly clean your hands for at least 20 seconds with soap and water or an alcohol-based hand sanitiser.
- State borders have been closed with exceptions to residents and essential workers.
- For more information refer to the Australian Government’s Department of Health website: www.health.gov.au

Impact on Indigenous arts and culture

The Federal Government has banned large indoor and outdoor gatherings to prevent the spread of coronavirus (COVID-19). As a result, many Indigenous cultural gatherings, conference and events have been postponed. For instance, the NAIDOC Ball has been postponed to protect the Aboriginal and Torres Strait Islander community.

For those working in Indigenous arts businesses, the Australia Council for the Arts hosts a weekly First Nations' Roundtable for creative independents and organisations to discuss the current situation that affects us all in relation to COVID-19:³

<https://www.australiacouncil.gov.au/aboriginal-and-torres-strait-islander-arts/first-nations-roundtables/>.

The Australia Council established a \$5M Resilience Fund to provide immediate relief to the Australian arts sector. The 2020 Resilience Fund is designed to provide emergency relief to support the livelihoods, practice and operations of Australian artists, groups and organisations during the COVID-19 pandemic. Details of the fund are available at this link: <https://www.australiacouncil.gov.au/funding/funding-index/2020-resilience-fund/>.

The limits on large gatherings also includes sorry business. Funerals must be limited to no more than 10 people. This impacts the respectful practice of sorry business for many Indigenous communities.

Indigenous health and safeguarding communities

Aboriginal and Torres Strait Islander peoples and remote Indigenous communities are at greater risk from the Coronavirus. On 20 March 2020, the Australian government placed restrictions on travel to remote communities under the *Biosecurity Act 2015* (Cth) to protect the health and wellbeing of residents. The Act gives police powers to enforce restrictions. There are penalties for anyone deliberately breaching the laws. The maximum penalty is 5 years imprisonment and/or a maximum penalty of \$63,000. There may also be penalties under state or territory legislation.

If you are entering a restricted remote Indigenous community, you must meet the following entry conditions:

- No coronavirus related symptoms in the last 14 days
- No overseas travel in the last 14 days
- Not entering for the purpose of breaking the law
- Not prohibited from entering by any other law.

You will also need to go into quarantine from the community for a minimum of 14 days before you can enter. This rule applies each time you enter a restricted community. For information on the restricted communities, visit the state department of Aboriginal Affairs websites:

- NT: <https://coronavirus.nt.gov.au/community-advice/remote-communities/travel>

³ Australia Council for the Arts, *First Nations' Roundtables*
<<https://www.australiacouncil.gov.au/aboriginal-and-torres-strait-islander-arts/first-nations-roundtables/>> [Accessed 15 April 2020]

- QLD: <https://www.datsip.qld.gov.au/coronavirus/travel-restrictions-remote-communities>
- WA: <https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/covid-19-coronavirus-remote-aboriginal-communities-restrictions-entering>

Wellbeing

Mental and emotional wellbeing is always important, especially during this time of pandemic and the challenges it may bring. Here are some helpful platforms:

National Aboriginal Community Controlled Health Organisation (NACCHO)	https://www.naccho.org.au/
Black Dog Institute	https://www.blackdoginstitute.org.au/
Headspace	https://headspace.org.au/
Beyond Blue	https://www.beyondblue.org.au/
Lifeline Crisis Hotline	13 11 14

Coronavirus (COVID-19): Tips for employers

- Stay up to date with advice from national and state government departments
- Provide regular updates to your employees and give them access to helpful information about their well-being
- Keep connected, spread positivity and regularly check in with your colleagues, families, friends and communities.
- Connect with other Indigenous business owners by joining relevant Indigenous webinars and roundtables.
- Connect regularly with your work colleagues via video calls.

Part 2: Work Health and Safety (WHS)

Australia's current model Work Health Safety law (*WHS Act 2011*) requires a person conducting a business or undertaking (PCBU) to ensure, so far as is reasonably practicable, the health and safety of their workers and others within the workplace. The term 'reasonably practicable' involves weighing up the likelihood of the hazard/risk; the degree of harm of the hazard/risk; what is known or ought to be known about the hazard/risk and how to eliminate/minimise it; and the availability of suitable ways to eliminate the hazard/risk.

Employers must have measures in place to eliminate or mitigate risks related to COVID-19. To keep workers safe and limit the spread of COVID-19, every employer should:

- allow workers to work from home, where possible
- ensure physical distancing by keeping a distance of at least 1.5 metres between people
- encourage all workers to frequently wash their hands for at least 20 seconds with soap and water or by using an alcohol-based hand sanitiser and to practise good hygiene⁴
- be aware of how to spot COVID-19 symptoms (fever, cough, sore throat and shortness of breath) and make sure workers do not come to work if they are unwell⁵
- make sure your workplace is regularly cleaned and disinfected⁶
- have signs and posters⁷ around the workplace to remind workers and others of the risks of COVID-19 and the measures that are necessary to stop its spread.⁸

Employees who test positive for COVID-19 should not be in the workplace. If an employee has been tested positive, direct them to go home. Employers can make this decision if they act reasonably and the decision has been made on factual information about health and safety. This includes abiding by the Australian Government health and quarantine guidelines.⁹ Employees may draw on their personal leave (sick leave). Employers should trace back and advise all those who have been in contact with the infected person. The workplace should also be thoroughly cleaned.

If an employee lives with someone who has contracted COVID-19, they should also not be in the workplace and be directed to work from home. If the employee cannot work from home (e.g. construction worker), consider options to access accrued annual leave or take leave without pay (LWOP).

⁴See the Australian Government's Department of Health, 'Health alert', <<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/how-to-protect-yourself-and-others-from-coronavirus-covid-19/good-hygiene-for-coronavirus-covid-19%5d>>, [Accessed 15 April 2020]

⁵ Australian Government's Department of Health, 'healthdirect Coronavirus (COVID-19) Symptom Checker', <<https://www.health.gov.au/resources/apps-and-tools/healthdirect-coronavirus-covid-19-symptom-checker>> [Accessed 15 April 2020]

⁶ See the Australian Government's Department of Health's Environmental cleaning and disinfection principles for COVID-19, <<https://www.health.gov.au/sites/default/files/documents/2020/03/environmental-cleaning-and-disinfection-principles-for-covid-19.pdf>> [Accessed 15 April 2020]

⁷ Safework Australia, 'Signage and Posters – COVID-19', <<https://www.safeworkaustralia.gov.au/doc/signage-and-posters-covid-19>> [Accessed 15 April 2020]

⁸Safework Australia, 'COVID-19 Information for workplaces', <<https://www.safeworkaustralia.gov.au/covid-19-information-workplaces>> [Accessed 15 April 2020]

⁹ Fair Work Ombudsman, 'Coronavirus and Australian workplace laws', <<https://coronavirus.fairwork.gov.au/>> [Accessed 23 March 2020]



An employer cannot demand that an employee comes to work if they refuse to attend work (or perform certain duties) due to concerns related to coronavirus. Unless the employee is acting according to government advice, employers do not have any legal obligation to pay them or allow them to access leave with pay. Employers and employees can consider alternative work arrangements such as working from home, private transport and other hygiene protocols.

Working from home

Government officials have encouraged employers to allow their staff to work from home to stop the spread of coronavirus. Encourage workers to work from home if possible and appropriate in the circumstances. Develop a staged work from home plan, as the longer workers work from home, the more different risks come into effect such as ergonomic issues, mental health impacts, resourcing etc. There should be a continued need for work to be performed and an employee should have the means to work at home (i.e. access to computer, internet, phone). The employer must ensure their Working from Home Policy is up to date and complied to by all employees.

Mental Health

Employers have a duty of care for the psychological health of their employees too. The pandemic is a stressful time for people so employers should also take measures to reduce mental health risks to their staff. There may be extra demands placed upon staff during these times such as increased work demand or working in isolation with less support from the team. To address these factors, employers should:

- Have open discussions with your team about how they are handling things;
- Discuss their mental health and what strategies can assist;
- Provide people with information to support networks;
- Looking at the growing list of resources available from government website on looking after your mental health during the coronavirus (COVID-19).

Other Resources

Safe Work Australia advice for employers	https://www.safeworkaustralia.gov.au/doc/coronavirus-covid-19-advice-pcbus
Safe Work Australia Business Resource Kit	https://www.safeworkaustralia.gov.au/collection/business-resource-kit-covid-19
Victorian State Government's Health and Human Services website for " 10 ways to work well at home "	https://www.dhhs.vic.gov.au/coronavirus-information-aboriginal-communities

Work Health and Safety: Tips for employers

- Stay up to date with advice from federal and state authorities
- Provide regular updates to staff including access to practical information about their well-being
- If possible, move all workers to work from home, and develop your Working from Home policy. If still working from the workplace, provide disinfectant and hand sanitizer and make sure the physical space restrictions are met.
- Find ways to connect to staff and discuss their mental health and well-being and provide resources.

Part 3: Managing employees when things get tight

As the pandemic unfolds and evolves, it will inevitably affect business and the economy. Employers must be diligent and prepared to manage full time, part time, casual and contracted employees, and utilise their employment entitlements. Now is the time to look at your employment agreements, awards and enterprise agreements to identify what leave is available to your staff. It is best to keep the lines of communications open and be understanding and flexible as some people are experiencing higher than usual levels of stress and anxiety during this time. While it is good to know your legal rights as an employer, you should maintain care and compassion towards your employees.

JobKeeper Payment Scheme

Under the new JobKeeper Payment scheme, qualifying businesses impacted by the coronavirus can access a government subsidy so they can keep paying wages to employees. Small business employers that experience a 30% or more reduction in their total revenue for a minimum period of one month compared to the previous year, can claim \$1500 per fortnight for each qualifying employee who was employed as at 1 March 2020 and who remains employed.¹⁰ Sole traders can be eligible for the JobKeeper payment if they meet the criteria. The payments will be paid fortnightly for up to 6 months. Check the criteria to assess whether your employees are eligible for the JobKeeper Payment scheme. These include that they are:

- Employed, and were either a permanent full time or part time employee at 1 March 2020
- Long term casual employees (employed on a regular basis for at least 12 months) as at 1 March 2020 and not a permanent employee of another employer
- At least 16 years old on 1 March 2020
- Australian residents as at 1 March 2020
- Not in receipt of any of the listed government payments
- Agree to be nominated by you.

On 9 April 2020, the *Fair Work Act 2009* was amended in light of the introduction of the JobKeeper payment. The new temporary provisions apply to employers who qualify for the JobKeeper scheme and their eligible employees. Once an employer is qualified, the new provisions allow employers to:

- Make temporary and partial stand downs in certain circumstances;
- Temporarily alter employee's usual duties and locations of work in certain circumstances;
- In agreement with their employees, alter an employee's days and time of work and use of annual leave in certain circumstances.

These changes may allow employers and employees to negotiate on a change in the number of workdays/hours to reduce pay. However, you should refer to the relevant award or enterprise agreement and seek legal advice. If you do not qualify for the JobKeeper scheme, these new temporary provisions will not apply.

¹⁰ Australian Tax Office, 'JobKeeper Payment, Eligible employers', <<https://www.ato.gov.au/general/jobkeeper-payment/employers/eligible-employers/>> [Accessed 16 April 2020]

Fair Work Commission coronavirus pandemic temporary changes

The Fair Work Commission has made temporary changes to a number of Awards to support the implementation of the JobKeeper Payment scheme and enable leave flexibility during the pandemic. On 8 April 2020, the Fair Work Commission made determinations varying 99 awards to provide unpaid pandemic leave and greater flexibility for annual leave for employees. This provides employees with:

- 2 weeks of unpaid pandemic leave; and
- The ability to take twice as much annual leave at half their normal pay if their employer agrees.

Awards that apply include the Aboriginal Community Controlled Health Services Award, Banking Finance and Insurance Awards, Clerks – Private Sector Award, Live Performance Award and the Legal Services Award.

Changes to the Clerks Award

The Fair Work Commission has also made changes to the Clerks – Private Sector Award 2010 (Clerks Award) by introducing ‘Schedule 1 – Award Flexibility During the COVID-19 Pandemic.’ These changes are applicable from the first full pay period of the employee that started on or after 28 March 2020 to 30 June 2020. Extensions beyond this timeframe can be applied for. The changes allow:

- Flexibility around the range of duties that employees can perform;
- Minimum shift and working hours flexibilities for employees who are working from home;
- Temporary reductions in working hours where agreed by 75% of the affected employees, with consideration to be given by employers to secondary employment and personal development sought by employees;
- Facilitating representation and advice for employees’ consideration of proposals to reduce working hours;
- The capacity to take longer periods of leave at proportionally reduced rates of pay; and
- The capacity for employers to close down operations while employees are on leave, or direct employees to take leave having regard to their personal circumstances.¹¹

¹¹ Australian Chamber of Commerce and Industry, ‘FWC Full Bench varies Clerks Award to address COVID-19 challenges’, <<https://www.australianchamber.com.au/news/fwc-full-bench-varies-clerks-award-to-address-covid-19-challenges/>> [Accessed 15 April 2020]

Types of leave

Employers may be able to negotiate with staff to use their leave entitlements during the business downturn. Employers should not direct employees to take leave, but instead negotiate with them to access their leave. However, no employer can lawfully negotiate an agreement lower than the employee's entitlements under an award, enterprise agreement, employment contract, National Employment Standards (NES) or the *Fair Work Act 2009* (Cth).

Personal/carer's leave

If an employee is showing symptoms of a sickness, an employer can send them home. It may be hard to distinguish the severity of the sickness, so if the employer sends home an employee with mild symptoms, the employee made need to be paid until they seek medical attention and clearance. Full time and part time employees are eligible to 10 days of paid personal/carer's leave each year. It is best practice to allow the employee to access paid leave where possible. Casuals are eligible for unpaid leave.

Compassionate leave

Part time and fulltime employees are entitled to take 2 days of paid compassionate leave to spend time with a member of their immediate family who has sustained a life-threatening illness or injury. Casuals are entitled to 2 days unpaid compassionate leave.

Annual leave (paid and unpaid)

Full time and part time employees are generally eligible to 4 weeks of paid annual leave each year. This accrues progressively during the year according to an employee's ordinary hours of work.¹² Due to coronavirus, an employee may need to access their annual leave in advance of it being accrued. Alternatively, the employee and employer can consider the option of the employee taking unpaid annual leave (leave without pay LWOP). See also the special coronavirus temporary option for the employee to take twice as much leave and be paid at half pay.

Family & domestic violence leave

All employees are entitled to 5 days unpaid family and domestic violence leave each year.

Casuals and contractors

Casual employees and independent contractors do not have paid leave entitlements.¹³ However, some employers are providing paid leave for short periods of time to help assist workers financially. Casuals and independent contractors should check their eligibility to access government welfare payments that have been put in place during this time.

¹² Fair Work Commission, 'Annual leave in advance', <<https://www.fwc.gov.au/awards-agreements/awards/modern-awards/modern-awards-fact-sheets/annual-leave-advance>> [Accessed 20 March 2020]

¹³ Fair Work Ombudsman, 'Coronavirus and Australian workplace laws' 22 March 2020 <https://www.fairwork.gov.au/about-us/news-and-media-releases/website-news/coronavirus-and-australian-workplace-laws#casual-employees-contractors>

Standing down

There are new temporary JobKeeper stand down provisions which enable an employer to stand down their employees if they meet the requirements of the JobKeeper scheme.

Other than the JobKeeper stand down provisions, employers may only be able to stand their employees down without pay under limited circumstances where the employee cannot usefully be employed if:

- The Government has directed your business to close
- A large proportion of the workforce is in self-quarantine meaning the remaining cannot be usefully employed.
- There is a stoppage of work due to a lack of supply which is out of the employer's control.¹⁴

If an employer meets these limited circumstances, they are relieved of the obligations to pay wages. Employees that are stood down remain employed during the period of the stand down. However, employees should be cautious to use this option as employees may be able to recover unpaid wages if the stand down is found to be unlawful. This is why it's essential to check awards, enterprise agreements, employment contracts and obtain advice about your individual circumstances before attempting to stand down any employee.

Redundancy

Redundancy happens when an employer either doesn't need an employee's job to be done anymore or becomes insolvent or bankrupt.¹⁵ This option has to meet strict legal criteria. Employers should note that making people redundant during this time may mean that you have to provide redundancy pay and this could come at a higher cost than other alternatives. You should seek advice before deciding on redundancies.

If an employee was made redundant due to the coronavirus impact business and is now rehired due to the support businesses can now receive under the JobKeeper Scheme, the JobKeeper payment will be available to the employer and backdated.

Resources

See the Fair Work website: <https://www.fairwork.gov.au/>

Managing employees: Tips for employers

- Provide regular updates to staff and discuss the health of the business and any impacts to the workflow
- Stay up to date with change in awards and legislation including the *Fair Work Act 2009 (Cth)*
- Be fair and flexible where possible when staff request leave
- Show leadership, compassion and understanding of staff situations. Be fair and flexible where possible.

¹⁴ Section 524, *Fair Work Act 2009 (Cth)*

¹⁵ Fair Work Ombudsman website, 'Redundancy', <<https://www.fairwork.gov.au/ending-employment/redundancy>> [Accessed 15 April 2020]

Part 4: Business Health

During the COVID-19 pandemic, businesses are being impacted by disruptions to supply chains, travel restrictions and the cancellation and postponement of projects, meetings and events, just to name a few. This is having an impact on business income and cashflow.

It is important to check your cashflow weekly and be realistic about your ability to pay your staff and any other debts. Do you have enough money to get through the next 3-6 months? This includes money the company has or that it reasonably expects to get and/or borrow. A sole trader will have more movement to minimise their business when not having to deal with large payments to employees or contractors.

Now is the time to closely review and adjust your business cashflow budgets. Reduce costs where possible, cutting out the non-essential overheads (e.g. unnecessary stock, subscriptions). Check for flexibility in your costs (e.g. rent deferral, extended terms on repayments, negotiating to get paid earlier). If it is looking doubtful, you will have to act swiftly. But it is important to remember that at some point in the future, your business will return to normal growth, so be careful what you choose to reduce or discard and how you treat others.

Code of Conduct for Commercial Tenancies

On 3 April 2020, the National Cabinet released a mandatory Code of Conduct for Commercial Tenancies (retail, office, and industrial property). The Code seeks to impose good faith leasing principles for negotiations between tenants and landlords. The Code will apply to tenants who are small to medium sized enterprises (SMEs) with a turnover of less than \$50 million per year; who are suffering from financial distress as a result of COVID-19; and who are eligible for the JobKeeper Payment.

The Code has 14 principles including:

- Landlords must not terminate leases, nor evict, due to non-payment of rent;
- Landlords must offer tenants proportionate reductions in rent payable in the form of rent waivers and rent deferrals (rent paid back later), with no interest or late fees;
- Landlords must pass on benefits received for reductions in property outgoings;
- Tenants must remain committed to the terms of their lease;
- Tenants should have the opportunity to extend their lease term.

However, commercial leases are covered under state-based legislation. At the time of writing, each state is responding accordingly, with implementation and new regulations. Residential leases and rental agreements are not included in the Code (each state is also responding accordingly, with new regulation for residential rental agreements).

Insolvency

A company is insolvent when it is no longer able to pay its debts as and when they fall due. If you operate your business as a company and are a director of the company, you have a legal duty under the Australian corporation law (*Corporations Act 2001* (Cth)) not to trade insolvently. Under the Corporations Act, if a director is found to be dishonest and is a factor in insolvent trading, they may face penalties of up to \$200,000, or 5-years imprisonment, or both. The director could also personally have to pay the debts that the company incurs after it is insolvent. If a director is aware of the company trading insolvent, and mitigates the harm, thus rendering the company solvent, there will be no legal liability.

In response to COVID-19, the Australian Government has temporarily relaxed the insolvency laws for a 6-month period from 25 March 2020. Now, a director can no longer be personally liable for any debt incurred by a company in the ordinary course of business if, at the point they suspect the company may be insolvent, they start taking action that will lead to a better outcome.

Director's duties

Directors must still uphold their director's duties which include:

- to avoid conflicts of interest¹⁶
- acting in good faith and for a proper purpose¹⁷
- acting in the best interest of the company; and
- not improperly using your position¹⁸ or information received for personal gain.

Bankruptcy

The government also made changes to the bankruptcy law for 6 months from 25 March 2020. This includes raising the debt threshold from \$5,000 to \$20,000 for a creditor to apply for a bankruptcy notice against a debt and extending the timeframe for a debtor to respond to a bankruptcy notice from 21 days to 6 months. There was also a temporary increase in the threshold at which creditors can issue a statutory demand from \$2,000 to \$20,000 and the time within which a company must respond has been increased to 6 months.

¹⁶ *Corporations Act 2001* (Cth), s 182, 183 and 184.

¹⁷ *Corporations Act 2001* (Cth), s 181, 184.

¹⁸ *Corporations Act 2001* (Cth), s 182.

Business Support

For business support and more information, visit www.business.gov.au or call 13 28 46.

The Victorian Government has developed a business continuity tool for Aboriginal Community Service Organisations available from this page -

<https://www.dhhs.vic.gov.au/coronavirus-information-aboriginal-communities>.

Indigenous Business Australia (IBA) has some useful resources:

<https://www.iba.gov.au/indigenous-business-australia-covid19-support/>

See the Australian Government Fair Work website: <https://www.fairwork.gov.au/>

Australian Taxation Office: <https://www.ato.gov.au/>

Supply Nation has developed a webpage dedicated to support Indigenous businesses during the coronavirus pandemic. - <https://supplnation.org.au/covid19/> They have also developed a business listing for Supply Nation Certified Suppliers that offer COVID-19 related products and services. If your business offer relevant products and services, go to their on line form - <https://supplnation.org.au/covid19/certified-supplier-business-listing/>.

There is also a Facebook support group established by Leesa Watego, Indigenous entrepreneur and President of South East Queensland Indigenous Chamber of Commerce. The group is a space for Indigenous business owners to share information and resources – Indigenous Business – COVID-10 Support Group.

Business Health: Tips for employers

- Check cashflow weekly
- Keep up to date with changes in laws and awards
- Be aware of the government assistance schemes and consider whether you are available to apply
- Keep in close communication with your landlord and if need be discuss options for payment of commercial rent
- You may need to make difficult decisions for the survival of your business – communicate these reasons openly with your staff

Part 5: Managing Contracts – rights and obligations

The impacts of COVID-19 may, in some cases, cause a breach of contract if a party cannot meet their contractual obligations. Indigenous businesses should review their contracts to determine:

- a. What they need to do to discharge their obligations and receive payment;
- b. In what circumstances the contract may be terminated;
- c. What rights they have to be relieved of their obligations due to the impacts of COVID-19. This may include a claim under the contract for: a variation, a change in law, an extension of time, a relief event or a force majeure event;
- d. What rights they have to recover payment if the client fails to pay the Indigenous business. This may include negotiation, mediation, arbitration or litigation.

Termination of the Contract

Your contract may be terminated for breach of contract for a delay or failure to provide the goods, services or works within the required time frame due to the impacts of the Coronavirus. It is important to clearly understand:

- a. in what circumstances the client is able to terminate your contract; and
- b. how and in what time period you may be able to remedy the situation.

If you are in breach of a contract, you should aim to rectify the breach in the relevant timeframe to avoid termination, or you may be able to negotiate and agree on an alternative way to fix the situation to avoid termination of the contract.

Termination for convenience

Some contracts also allow the parties to terminate for convenience. This allows termination of the contract for any reason upon provision of a specified period of notice to the other party. Usually, these clauses entitle you to:

- a. A sufficient notice period;
- b. Payment up to the date of the termination; and
- c. Recoupment of reasonable expenses.

So be sure to check your contract or speak to your client about this option.

Relief from contractual obligations

Depending on the terms of your contract, it may provide for relief from your obligations due to the impacts of COVID-19. This may include a claim under the contract for a variation, a change in law, an extension of time, a relief event or a force majeure event.

A Variation

Depending on the terms of your contract, you will often be able to vary the terms of a contract with the mutual agreement of the parties. If the impact of the Coronavirus requires you to change the scope, nature, sequence or timing of the goods, services or work, a variation to the agreement could be negotiated with your client. A variation may allow for an extension of time and payment of additional costs incurred by you as a result of the coronavirus.

A Change in Law

Depending on the terms of your contract, you may be able to claim a change in law. A change in law occurs if there is a change in the law which impacts the performance of your obligations under the contract. This may include a declaration by the World Health Organization or Australian Government of restrictions on individuals and business, such as “lockdowns”. A change in law may entitle you to negotiate an adjustment of the scope, timing and costs for the provision of the goods, services or work. Importantly, this may allow for an extension of time and payment of additional costs incurred by you as a result of the coronavirus.

An Extension of Time or Relief Event

Depending on the terms of your contract, you may be able to negotiate:

1. an extension of time and delay costs for the period your obligations have been delayed by the coronavirus;
2. a relief event from key performance indicators and abatements for the period your performance obligations are inhibited by the coronavirus.

Force majeure

Force majeure is a contract provision that relieves the parties to the contract from performing their obligations when certain circumstances beyond their control arise, making performance of their obligations impracticable or impossible. Knowing what circumstances are covered by a force majeure clause in the contract is essential. This may include natural disasters like hurricanes, floods, earthquakes, weather disturbances and the coronavirus which are sometimes referred to as ‘acts of God.’

If a force majeure event includes an epidemic, pandemic or act of god, it is likely that you will be able to claim a force majeure event has occurred and be relieved from performance of your obligations under the contract until the COVID-19 pandemic has subsided. But that will require careful consideration. Check the termination clauses of your agreement as well as any notice provisions to activate any rights to exit the contract and seek professional advice.

Frustration

If a contract does not include a force majeure clause, then you may wish to look to the doctrine of frustration to see if the contract has been terminated. At common law frustration can be claimed if the contract becomes incapable of performance because it is radically different from what the parties intended (without either party defaulting) due to circumstances that are beyond the control of the parties.

Frustration of a contract **will generally not occur** if:

- there is an existing force majeure clause in the contract which operates to cover the circumstances that constitute the frustrating event;
- there is a delay in an obligation being able to be performed, unless the delay is for an unreasonable time; or
- the parties have merely suffered hardship, unforeseen loss, or the burden of performance has increased.

Frustration will be established where it is impossible to perform an obligation under the contract.

Frustration automatically discharges the contract, therefore people who cannot meet their contractual obligations due to COVID-19 may want to consider this legal avenue. Discharge is prospective from the time of frustration. The rights and responsibilities of the parties that have already accrued remain on foot, but the parties are released from any further performance.

It is important to note that some clauses remain operable including the dispute resolution clauses, and parties may need to instigate that process first rather than just claiming frustration.

Communication and negotiation

Ideally people in business together should be discussing their ability to continue to work towards achieving the project outcomes during the COVID-19 pandemic. Good communication, project and contract management during these times means getting on the front foot. For this reason, informal negotiation with your client is the most efficient means of resolving any disputes which arise due to the coronavirus. However, if your negotiations and contract claims are rejected, alternative dispute resolution processes such as mediation may be appropriate. Mediation can enable a facilitated discussion between parties to generate realistic solutions.

Recovery of Payment

If the client fails to pay you in accordance with the contract, you may be able to escalate the issue and recover payment through arbitration, small claims or litigation.

Legislative Claims

Business that are subcontracting will be impacted by any issues occurring upstream between the head contractor and the client. This is common in the construction industry where Indigenous business are subcontracted to a project. For example, if a head-contractor cannot complete milestones for payment or cannot purchase materials, the whole supply chain is impacted.

Subcontractors have no direct contractual relationship with the client, and delays and payment issues will need to be negotiated with the head contractor rather than the client. If you are in this position in the construction industry, you should be in close communication with the head contractor but also refer to the Security of Payment Act in each state and territory for resolution. This legislation overrides the contract terms and provides for a process for making claims against head contractors and potentially clients for payment under the contract. The legislation also provides for head contractors to by-pass contractors and pay subcontractors directly if an amount is legally required to be paid by the contractor to the subcontractor.

Insurance and performance bonds

You should also check your insurance to see whether you are entitled to any insurance proceeds for epidemics or pandemics such as the coronavirus. For those working in construction, a performance bond is usually issued by one party to the other party as security for failure to meet their contractual obligations. If the party providing the performance bond breaches their obligations, the other party may call on the performance bond to cover their losses.

Manage your risk

While a party is exposed to a breach that will impact their work performance, they should also attempt to mitigate their risk. Mitigation of the risk to a business will depend on the industry, size, geography and other factors. All businesses should complete a risk management assessment on performance of contracts and consider ways that contractual risk can be managed and reduced, for example, draft clauses in future contracts that allow for flexibility.

For more information: www.business.gov.au

Managing Contracts: Tips for employers

- Review your contracts to determine what you need to do to discharge your obligations and receive payment; or in what circumstances your obligations may be relieved or the contract terminated.
- Maintain open and clear communication with your clients during this time to resolve any disputes.
- Check your insurance and performance bonds to see if you are entitled to any proceeds for pandemic situations
- Complete a risk management assessment on performance of contracts.

Part 6: Privacy and IP considerations

Privacy and confidentiality

COVID-19 brings up privacy and confidentiality issues for employers and employees.

For employers:

The Australian privacy law, *Privacy Act 1988* (Cth), regulates how personal information is handled. Personal information is 'information or an opinion about an identified individual, or an individual who is reasonably identifiable'. The Privacy Act includes rules on the protection of sensitive information such as health information. During the COVID-19 pandemic, employers may be dealing with personal and sensitive information about their employees. Employers must ensure that their collection, use and disclosure of personal information complies to the obligations of the Privacy Act.

For employees:

While working at home, employees must continue to comply to the privacy and confidentiality clauses in their employee contracts. This may involve having the appropriate computer and server with password protection, and upholding confidentiality requirements even when working at home in shared spaces with people who are not part of the business.

Intellectual Property (IP) considerations

The stay at home restrictions during the pandemic means that there has been a swift move to conduct business and exchange information online. If your business is creating digital products, conducting webinars and publishing resources online, ensure that you are considering intellectual property (IP) issues. This includes:

- using the relevant copyright disclaimers
- respecting IP rights when reproducing third-party content and making sure that you have all rights to reproduce and communicate to others.

Where Indigenous Cultural and Intellectual Property materials are being shared online, ensure you are upholding ICIP rights such as attribution and consultation and consent to protect this knowledge.

Privacy and IP: Tips for employers

- Ensure that your collection, use and disclosure of personal information complies to the obligations of the *Privacy Act*
- Ensure that employees continue to comply to the privacy and confidentiality clauses in their employee contracts
- Be mindful of the Intellectual Property (ICIP) and Indigenous Cultural and Intellectual Property (ICIP) before sharing online, make sure you protect IP and ICIP rights.

Resources

Managing your Business during the Coronavirus Pandemic is a series of videos created by Indigenous Business Australia (IBA), 33 Creative and Terri Janke and Company.

▶  **Managing your business during COVID-19 with Dr. Terri Janke**
2:01 Indigenous Business Australia

<https://www.youtube.com/watch?v=E1jFNoOHKVA&t=1s>

2  **Employer Obligations during COVID-19 with Dr. Terri Janke**
11:41 Indigenous Business Australia

<https://www.youtube.com/watch?v=ee21InryfWU>

3  **Business financial obligations during COVID-19 with Dr. Terri Janke**
11:29 Indigenous Business Australia

<https://www.youtube.com/watch?v=yr7G2992Rrs>

4  **Managing legal contracts during COVID-19 with Dr. Terri Janke**
11:52 Indigenous Business Australia

<https://www.youtube.com/watch?v=lRoiLBbWLao&t=1s>

5  **Declaring insolvency and insolvent trading with Dr. Terri Janke**
11:49 Indigenous Business Australia

<https://www.youtube.com/watch?v=hPcIDlvXngE>

More Resources

National Coronavirus Helpline	1800 020 080
National Aboriginal Community Controlled Health Organisation (NACCHO)	https://www.naccho.org.au/
Department of Health (Cth)	https://www.health.gov.au/
NSW Health	https://www.health.nsw.gov.au/
World Health Organization (WHO)	https://www.who.int/
Safe Work Australia	https://www.safeworkaustralia.gov.au/
Smartraveller	https://www.smartraveller.gov.au/
Fair Work Commission	https://coronavirus.fairwork.gov.au/
Australian Taxation Office	https://www.ato.gov.au/
Aboriginal Health and Medical Research Council (AHMRC)	https://www.ahmrc.org.au/coronavirus/
Supply Nation	https://supplynation.org.au/covid19/
NSW Aboriginal Land Council	http://alc.org.au/nswalc-in-the-community/covid-19-updates.aspx
YARPA NSW	https://www.yarpa.com.au/resources/covid-19/

Indigenous Chamber of Commerce

Kinaway – Victorian Aboriginal Chamber of Commerce	https://kinaway.com.au/news/
SEQ Indigenous Chamber of Commerce	http://seqicc.com.au/
NSW Indigenous Chamber of Commerce	https://nswicc.com.au/
Noongar Chamber of Commerce & Industry	https://www.ncci.com.au/
Australian Chamber of Commerce & Industry	https://www.australianchamber.com.au/covid-19-business-support/