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COVID-19 and Construction Law:

Comparing the United Kingdom and Australian Response

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1. INTRODUCTION

On 5 January 2020, the World Health Organization ('WHO') issued a 'Disease Outbreak News' report, which relayed that its China Country Office had been informed of cases of pneumonia with an unknown cause in Wuhan City, Hubei Province, China. At that time, there were 44 reported cases, 11 of which were severe.¹ By 9 January 2020, the WHO reported that a new (or novel) coronavirus was a possible pathogen causing the cluster of pneumonia cases.² By 11 March 2020, the WHO announced its assessment that COVID-19 could be characterised as a pandemic.³ By 20 November 2020, there had been over 40 million COVID-19 cases, just over 1.1 million deaths worldwide,⁴ and almost 30,000 cases and over 900 deaths in Australia.⁵ There had been more than 700,000 confirmed cases of coronavirus in the UK and more than 40,000 people had died.⁶ However, these figures include only people who have died within 28 days of testing positive for coronavirus and other measures suggest that the number of deaths is higher. The early focus of COVID-19 reporting was human health and safety; however, attention has turned to the profound impact of COVID-19 on global, national and local economies and industries. In the 'Introduction' to Part 2 of the 2020 issue of this journal, the Editors acknowledged the inevitable impact of the COVID-19 pandemic on contractors and projects.⁷ The impact has, indeed, been profound. Around the world, those operating in the construction sector report delivery delays, interrupted supply chains and ongoing uncertainty.

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¹ World Health Organization, 'Pneumonia of Unknown Cause', *Emergencies preparedness, response* (Disease Outbreak News, 5 January 2020) <<https://www.who.int/csr/don/05-january-2020-pneumonia-of-unknown-cause-china/en/>>.

² World Health Organization, 'WHO Statement regarding cluster of pneumonia cases in Wuhan, China', *News Detail* (Statement | China, 9 January 2020) <<https://www.who.int/china/news/detail/09-01-2020-who-statement-regarding-cluster-of-pneumonia-cases-in-wuhan-china>>.

³ World Health Organization, 'WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020', *Speeches Detail* (WHO Director-General Speeches, 11 March 2020) <<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>>.

⁴ Worldometer, 'Coronavirus Cases', *Coronavirus* (Report, 20 October 2020) <https://www.worldometers.info/coronavirus/?utm_campaign=homeAdvegas1?>.

⁵ Australian Government Department of Health, 'Coronavirus (COVID-19) current situation and case numbers', *Health alerts* (Report, 20 October 2020) <<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-current-situation-and-case-numbers>>.

⁶ BBC News, 'Covid-19 in the UK: How many coronavirus cases are there in your area?', *News* (Report, 20 October 2020) <<https://www.bbc.co.uk/news/uk-51768274>>.

⁷ Doerries, C. A. and Jones, D., 'Introduction' [2020] ICLR 2, 104.

In New York, United States of America, work being performed on 85% of operational construction sites was halted by mid-April 2020.⁸ In China, lockdowns meant that migrant construction workers who had returned to their hometowns for the Lunar New Year could not return to work. The consequence has been an acute shortage of labour.⁹ Hong Kong has experienced occasional closures of construction sites, delays to the procurement of materials, plant and equipment (especially those coming from China) and disruption to day-to-day site operations to ensure compliance with social distancing rules, temperature checks and increased hygiene measures (such as regular disinfecting of tools).¹⁰ And in Taiwan (which has reported comparatively low COVID-19 infection rates), construction sites have continued to operate albeit subject to administrative and environmental controls.¹¹

Great Britain's construction output fell by a record 29.8% in the three months to May 2020, compared with the previous three-month period. The Office for National Statistics release explains that, 'Construction output in April 2020 was significantly affected by the coronavirus as large parts of the industry shut down as businesses adhered to the official government guidance'.¹² This paper focuses on England, but the other nations, Scotland, Wales and Northern Ireland are mentioned in particular, regarding health protection, which is a devolved responsibility.

A Roads Australia¹³ survey conducted in March 2020 found that over one third of industry representatives surveyed said the COVID-19 crisis was 'already affecting their capacity to deliver current projects, and creating uncertainty about future project timing and funding'.¹⁴ Also, some contractors reported incurring between four and 12 week delays for materials imported from overseas, higher costs for sourcing materials locally, social distancing decreasing the number of workers on site and, consequently, decreased productivity and business closures (particularly at the subcontractor level).¹⁵

⁸ Haag, M., 'N.Y. Building Sites Reopen, Carefully, in Sign of Life Gearing Back Up' *The New York Times* (online, 28 April 2020) <<https://www.nytimes.com/2020/04/28/nyregion/nyc-construction-coronavirus-safety.html>>.

⁹ Chow, S. L., 'The Impact of COVID-19 on the Construction Industry in China', *FTI Consulting Asia Pacific: Insights, Articles* (Article, 19 August 2020) <<https://www.fticonsulting-asia.com/insights/articles/impact-covid-19-construction-industry-china>>.

¹⁰ Holloway, C., 'Prolongation and Disruption of Construction Projects in Hong Kong due to COVID-19', *FTI Consulting Asia Pacific: Insights, Articles* (Article, 18 August 2020) <<https://www.fticonsulting-asia.com/insights/articles/prolongation-disruption-construction-projects-hong-kong-covid-19>>.

¹¹ Chow, S. L., 'The Impact of COVID-19 on the Construction Industry in Taiwan', *FTI Consulting: Insights, Articles* (Article, 18 August 2020) <<https://www.fticonsulting-asia.com/insights/articles/impact-covid-19-construction-industry>>.

¹² Office for National Statistics, 'Construction output in Great Britain: May 2020', *Construction Industry* (Release, 14 July 2020) <<https://www.ons.gov.uk/businessindustryandtrade/constructionindustry/bulletins/constructionoutputingreatbritain/may2020>>.

¹³ Roads Australia is the peak industry body for roads in Australia. Its members include construction contractors, subcontractors and suppliers active in the roads and infrastructure sectors. Roads Australia hosts forums for its members to discuss – including with Government representatives – issues of importance to the industry, such as procurement, the project pipeline and diversity and inclusion.

¹⁴ Roads Australia, 'Road and rail projects feeling the heat of COVID-19', *Media Releases: The latest news from Roads Australia* (Media Release, 27 March 2020) <<https://www.roads.org.au/News/ArticleId/514/road-and-rail-projects-feeling-the-heat-of-covid-19>>.

¹⁵ Emmett, T., 'COVID-19 and the impact on Australian construction projects', *Turner & Townsend: Perspectives* (Article, 22 April 2020) <<https://www.turnerandt Townsend.com/en/perspectives/covid-19-and-the-impact-on-australian-construction-projects/>>.

This paper considers the way in which construction law has changed or is being applied in the response to the COVID-19 impact on construction in the UK and Australia. Despite relatively similar construction industry impacts in the UK and Australia, and even though a shared history has given rise to similar legal systems, the way in which the law relating to the construction industry has been applied, modified and enforced in these countries is different. Having considered the numerous changes in construction law since the outbreak of the COVID-19 pandemic, the article concludes with an analysis of the ways that the impact of COVID-19 on construction law is similar and different in the UK and Australia. This paper also anticipates what construction industry participants can expect from the ongoing evolution of the law applying to the industry and for the way in which construction law is practiced.

2. BACKGROUND

United Kingdom

The initial UK COVID-19 infections emerged from China and east/southeast Asia; however, by March 2020, the majority of infections originated from European countries.¹⁶ On 23 March 2020, the UK Prime Minister (Boris Johnson) instructed all UK residents to stay at home except for very limited purposes including buying food and medicine, exercising once a day and seeking medical attention. Travel to and from work was permitted but work from home was encouraged. Advice to keep two metres apart from anyone outside your household was given. A subsequent letter from the UK Prime Minister posted to householders warned, ‘These rules must be observed. So, if people break the rules, the police will issue fines and disperse gatherings’.¹⁷ The UK Prime Minister announced a ‘conditional plan’¹⁸ to reopen society, allowing people in England who could not work from home to return to the workplace, on 10 May 2020. Prime Minister Johnson mentioned construction and manufacturing as examples of industries where restarting would now be explicitly encouraged. However, lockdown regulations came into force in England on 14 October 2020, creating a three-tier system of restrictions to address local outbreaks of COVID-19.¹⁹ New English national restrictions²⁰ replacing the Local COVID-19 Alert Level measures were imposed from 5 November until 2 December 2020.

Scotland took a more cautious route out of lockdown, using phases that usually started two or three weeks after the rest of the UK.²¹ The Scottish Government published their COVID-19

¹⁶ COVID-19 Genomics UK (COG-UK) Consortium, ‘Use of SARS-CoV-2 Genomics to Understand Transmission’, *Coronavirus (COVID-19)* (Research Paper, 28 June 2020) <https://www.gov.uk/government/publications/cog-uk-use-of-sars-cov-2-genomics-to-understand-transmission-28-june-2020>.

¹⁷ Letter from Boris Johnson, the UK Prime Minister, to the UK Nation (28 March 2020), 1.

¹⁸ Johnson, B., ‘Boris Johnson speech: PM unveils “conditional plan” to reopen society’, *BBC Online* (United Kingdom, 10 May 2020) <<https://www.bbc.co.uk/news/uk-52609952>>

¹⁹ Stone, P., Hardy, P., Blunden, J., McLellan, G., Burton, S. and Bingham, S., ‘Three tier UK coronavirus local lockdowns’, *DLA Piper Insights*, (Publication, 19 October 2020) <<https://www.dlapiper.com/en/uk/insights/publications/2020/10/three-tier-uk-coronavirus-local-lockdowns/>>.

²⁰ United Kingdom Cabinet Office, ‘New National Restrictions from 5 November’ (Guidance, 31 October 2020) <<https://www.gov.uk/guidance/new-national-restrictions-from-5-november>>.

²¹ Sridhar, D. and Chen, A., ‘Why Scotland’s slow and steady approach to covid-19 is working’, *BMJ* (online) (Britain, 6 July 2020) <<https://www.bmj.com/content/370/bmj.m2669>>.

Strategic Framework²² on 23 October 2020 explaining their approach to suppress the virus, while striving for a return to more normal life, by implementing five levels of protection. The Welsh Government mandated a coronavirus fire-break from 23 October to 9 November 2020.²³ The Northern Ireland Executive agreed regulations²⁴ to be in place for 4 weeks from 16 October 2020 to curb the spread of COVID-19.

Australia

The first cases of COVID-19 in Australia were reported on 25 January 2020 (in incoming travellers from China), and the first COVID-19 death occurred on 1 March 2020.²⁵ By 13 March 2020, Australia's Prime Minister (Scott Morrison) advised a ban on non-essential outdoor gatherings of more than 500 people and a requirement that persons arriving from overseas were to isolate for 14 days (effective from 16 March 2020); he also urged Australians not to travel outside Australia.²⁶ On 19 March 2020, the Prime Minister took the 'unprecedented step'²⁷ of closing Australia's borders to all non-citizens and non-residents (with exemptions only for Australian citizens, permanent residents and their immediate family and New Zealand citizens living in Australia as Australian residents or transiting to New Zealand).²⁸ Since 19 March 2020, restrictions in Australia generally, and each of its States and Territories have fluctuated in response to COVID-19 case numbers and deaths. At 22 November 2020, the most stringent restrictions (which were imposed in Victoria when the State experienced a 'second wave' of COVID-19 cases in May and June 2020) are being progressively relaxed. And the story is also positive in other Australian States and Territories. For example, the Australian Capital Territory has not reported a COVID-19 case since early July 2020.²⁹ The focus points for the Commonwealth Government in Australia include securing early access to a COVID-19 vaccine, delivering economic support packages to encourage investment and keep people employed and providing other financial support to health initiatives (such as telehealth services and mental health and wellbeing plans).³⁰

²² Scottish Government, 'COVID-19 Scotland's Strategic Framework', *Publications* (Strategy/Plan, 23 October 2020) <[file:///prs-store2.unv.wlv.ac.uk/home0\\$/in1755/home/Profile/Downloads/covid-19-scotlands-strategic-framework.pdf](file:///prs-store2.unv.wlv.ac.uk/home0$/in1755/home/Profile/Downloads/covid-19-scotlands-strategic-framework.pdf)>.

²³ Llywodraeth Cymru Welsh Government, 'National coronavirus firebreak to be introduced in Wales on Friday', *All announcements* (Press Release, 19 October 2020) <<https://gov.wales/national-coronavirus-fire-break-to-be-introduced-in-wales-on-friday>>.

²⁴ The Executive Office, Northern Ireland, 'Executive tightens restrictions to curb Covid-19', *The Executive Office* (Article, 14 October 2020) <<https://www.executiveoffice-ni.gov.uk/news/executive-tightens-restrictions-curb-covid-19>>.

²⁵ Ting, I. and Palmer, A., 'One hundred days of the coronavirus crisis' *ABC News Online* (online, 4 May 2020) <<https://www.abc.net.au/news/2020-05-04/charting-100-days-of-the-coronavirus-crisis-in-australia/12197884?nw=0>>.

²⁶ Worthington, B., 'Gatherings of more than 500 people to be cancelled, Australians urged not to travel overseas amid coronavirus fears', *ABC News Online* (online, 14 March 2020) <<https://www.abc.net.au/news/2020-03-13/coronavirus-scott-morrison-coag-premiers-cancelling-events/12053382>>.

²⁷ Prime Minister, Minister for Foreign Affairs, Minister for Women, Minister for Home Affairs, 'Border Restrictions Media Release', *Prime Minister of Australia* (Media Release, 19 March 2020) <<https://www.pm.gov.au/media/border-restrictions>>.

²⁸ Above, fn 27.

²⁹ ACT Government, 'Coronavirus (COVID-19) in the Australian Capital Territory', *Microsoft Power BI* (Report, 20 October 2020) <<https://app.powerbi.com/view?r=eyJrIjoiZTY4NTI1NzQtYTlhYy00ZTY4LTk3NmQtYjBjNzdiOGMzZjM3IiwidCI6ImI0NmMxOTA4LTAzMzQtNDIzNi1iOTc4LTU4NWVlODhINDE5OSJ9>>.

³⁰ Australian Government Department of Health, 'Government response to the COVID-19 outbreak', *Coronavirus (COVID-19) health alert* (Alert, 28 August 2020) <<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/government-response-to-the-covid-19-outbreak>>.

The outbreak of the COVID-19 pandemic has prompted the exercise of existing, and the introduction of new, legislative powers in the UK and Australia. The legislative response to COVID-19 is – notwithstanding the similarities between the UK’s and Australia’s legal and political systems – distinct. For example, whereas the UK moved quickly to introduce new legislation empowering the UK Parliament to exercise ‘emergency powers’, in Australia, the Commonwealth, State and Territory Governments drew upon existing legislative powers to respond to the pandemic on the basis that it constitutes an ‘emergency’. The following section of this paper summarises the UK and Australian legislative responses having an impact on construction.

3. LEGISLATION

In both the UK and Australia, the legislative response to COVID-19 has been prolific. Whether under existing or new primary legislation, Governments and authorised personnel have exercised statutory powers to issue numerous statutory instruments, each with the purpose of ‘stopping the spread’ of COVID-19 and safeguarding the health and safety of residents.

United Kingdom – the *Coronavirus Act 2020* (UK) and its associated instruments

The *Coronavirus Act 2020* (UK)³¹ received Royal Assent on 25 March 2020, having been fast-tracked through the UK parliament. The UK Act contains ‘emergency powers’ to enable public bodies to respond to the COVID-19 pandemic. The UK Act has three main aims to: give further powers to the government to slow the spread of the virus; reduce the resourcing and administrative burden on public bodies; and limit the impact of potential staffing shortages on the delivery of public service. By 12 November 2020, there were only 14 secondary instruments under the UK Act: three UK, six Scottish, three Welsh Statutory Instruments and two Northern Irish Statutory Rules.

The first England, Scotland, Wales and Northern Ireland UK Act statutory instrument,³² on 26 March 2020, concerned registration of deaths and still-births and medical certificates for cremations. The second regulations³³ brought section 15 of, and Part 1 of Schedule 12 to the UK Act into force so that local authorities in England did not have to comply with certain duties in relation to meeting needs and carrying out assessments under the *Care Act 2014* (UK). The third UK regulations³⁴ were about protection of eviction from English residential tenancies.

The first UK Act Scottish Regulations³⁵ brought into force sections 16 (duty of local authority to assess needs: Scotland) and 17 (section 16: further provision) of the UK Act on 5 April 2020.

³¹ *Coronavirus Act 2020* (UK) (hereafter ‘**the UK Act**’)

³² *The Coronavirus Act 2020 (Commencement No. 1) Regulations 2020*.

³³ *The Coronavirus Act 2020 (Commencement No. 2) Regulations 2020*.

³⁴ *The Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2020*.

³⁵ *The Coronavirus Act 2020 (Commencement No. 1) (Scotland) Regulations 2020*.

The other five Scottish Regulations include Suspension: Adults with Incapacity³⁶ and Eviction from Dwelling-houses.³⁷

A Declaration³⁸ of threat to public health in Wales due to coronavirus was made by the Welsh First Minister on 29 March 2020 under Schedule 22 to the UK Act. The first Welsh statutory instrument³⁹ under the UK Act, made on 26 March 2020, concerned provisions relating to the Mental Health Review Tribunal for Wales and local authorities' duties under the *Social Services and Well-being (Wales) Act 2014* (UK). The subsequent two Welsh regulations concerned Assured Tenancies and Assured Shorthold Tenancies, Extension of Notice Period⁴⁰ and protection from eviction of residential tenancies.⁴¹

The first UK Act Northern Irish Order⁴² modified mental health and mental capacity legislation on 2nd April 2020. The second, on 10 August 2020 and last to date, Northern Irish Order⁴³ suspended modifications of the *Mental Health (Northern Ireland) Order 1986*.

The UK Act and its secondary legislation has, therefore, limited impact (if any) on the construction industry. Instead the applicable restrictions have been made under health protection legislation, which is considered in the next section.

Australia – new exercise of existing statutory powers

Unlike in the UK, there is no single Australian legislative or regulatory instrument that responds to the onset or consequences of the COVID-19 coronavirus pandemic. The Australian Constitution creates a federal system of government, which shares heads of power among the Commonwealth and the Australian States and Territories.⁴⁴

COVID-19 has prompted the Commonwealth Government and each of the State and Territory Governments to utilise the legislative and regulatory powers available to them to respond – as best they can within the limits of their power – to COVID-19. The result is a turbulent legal environment that, since March 2020, has been characterised by the issue of numerous directions, orders and guidance materials (and modifications to them) by various Governments, Government departments, authorities, ministers and officers. For construction companies operating nationally, the task of finding, becoming familiar with, and complying with the vast number of COVID-19 related operational, safety and reporting requirements is difficult and burdensome.

³⁶ *The Coronavirus (Scotland) Act 2020 (Suspension: Adults with Incapacity) Regulations 2020*.

³⁷ *The Coronavirus (Scotland) Act 2020 (Eviction from Dwelling-houses) (Notice Periods) Modification Regulations 2020*.

³⁸ Llywodraeth Cymru Welsh Government, 'Declaration of threat to public health in Wales due to coronavirus', *Staying safe and social distancing* (Document, 29 March 2020) <<https://gov.wales/declaration-threat-public-health-wales-due-coronavirus>>.

³⁹ *The Coronavirus Act 2020 (Commencement No. 1) (Wales) Regulations 2020*.

⁴⁰ *The Coronavirus Act 2020 (Assured Tenancies and Assured Shorthold Tenancies, Extension of Notice Periods) (Amendment) (Wales) Regulations 2020*.

⁴¹ *The Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Wales) Regulations 2020*.

⁴² *The Coronavirus Act 2020 (Commencement No.1) Order (Northern Ireland) 2020*.

⁴³ *The Coronavirus Act 2020 (Suspension) Order (Northern Ireland) 2020*.

⁴⁴ *Commonwealth of Australia Constitution Act* (hereafter **the 'Australian Constitution'**).

Victorian example – restrictions on construction activities

To illustrate, in Victoria, as at 12 August 2020, six different directions issued under section 200 (emergency powers) of the *Public Health and Wellbeing Act 2008* (Vic) (**‘Victorian PHW Act’**)⁴⁵ had the effect of introducing restrictions on construction activities, which differed across metropolitan Melbourne and regional Victoria. The directions are not published on Victoria’s legislation website; rather, they are accessible via the Victorian Government Health and Human Services’ website.⁴⁶ Under those restrictions, only work undertaken on a ‘Permitted Work Premises’ (defined in Restricted Activity Directions (Restricted Areas) (No 6)) could continue if it met the minimum restrictions applying to all construction sites. Those minimum requirements (captured in the six directions) included requirements that construction workers hold ‘Permitted Worker Permits’, limit their movement across multiple construction sites, wear face coverings and provide declarations as to their health during each shift worked, that construction sites had universal and high risk ‘COVID Safe Plans’ and a ‘PPE Training Plan’ in place, limited the density (or number) of workers working at the site and introduced cleaning requirements.

The directions imposed additional requirements on ‘large-scale construction sites’, ‘early stage residential land development sites’ and ‘small-scale construction sites’ (each of which was defined in Workplace (Additional Industry Obligations) Directions (No 3)). The directions then imposed examples from certain requirements for ‘critical and essential infrastructure’, which included critical maintenance and safety works for public infrastructure, essential public housing infrastructure and certain Victorian Government procured major infrastructure projects (specifically, the Metro Tunnel Project and Level Crossing Removal Project). This framework was in addition to the obligations and restrictions which were already in place for metropolitan Melbourne, which included a daily curfew from 8 pm to 5 am and the requirement to maintain physical distance. Australian law firm, Minter Ellison, published a summary of the requirements of the directions; it is a 16-page document and, when the Victorian Government’s stage 4 restrictions took effect on 2 September 2020, these requirements were modified.⁴⁷

The real time impact of the ‘permitted worker’ regime includes the imposition of additional administrative burdens (ie the time to apply for, and have issued, a ‘permitted worker permit’). Also, additional delay and disruption arises from modified ways of working (ie working in ‘split shifts’ and smaller teams and the time to attend longer ‘pre-start’ meetings and perform additional cleaning activities).

New South Wales example – relieving existing restrictions on construction activities

In Victoria’s northern neighbouring State, New South Wales, the approach to the impact of the COVID-19 pandemic has been different. Rather than imposing restrictions on the way in which construction workers work and construction sites operate, the *COVID-19 Legislation*

⁴⁵ The relevant directions are Stay at Home Directions (Restricted Areas) (No 10), Restricted Activity Directions (Restricted Areas) (No 6), Permitted Worker and Childcare Permit Scheme Directions (No 2), Workplace Directions (No 2), Workplace (Additional Industry Obligations) Directions (No 3) and Diagnosed Persons and Close Contacts Directions (No 8), each of which was issued under the *Public Health and Wellbeing Act 2008* (Vic), hereafter the **‘Victorian PHW Act’**.

⁴⁶ Victorian State Government Health and Human Services, ‘Victoria’s restriction levels’, *Coronavirus* (Webpage, 19 October 2020) <<https://www.dhhs.vic.gov.au/victorias-restriction-levels-covid-19>>.

⁴⁷ Barbaro, J., Maisie, H., and Mullins, J., ‘COVID-19 Stage 4 Restrictions: Impacts on the Construction Industry in Victoria’, *Minter Ellison Articles* (Article, 12 August 2020) accessible via <<https://www.minterellison.com/articles/covid-19-stage-4-restrictions-construction-industry>>.

Amendment (Emergency Measures) Act 2020 (NSW) amended the *Environmental Planning and Assessment Act 1979* (NSW). The amendments gave the Minister for Planning and Public Spaces the power to give orders authorising development without planning approval where the Minister had consulted the Minister for Health and Medical Research and the orders were necessary to protect the health, safety and welfare of the New South Wales public during the COVID-19 pandemic.⁴⁸

The Minister for Planning and Public Spaces has made numerous orders affecting the construction industry. These include the Environmental Planning and Assessment (COVID-19 Development – Construction Work Days) Order 2020, which allows commercial development works to be carried out on weekends and public holidays to ensure that ‘workers can practice social distancing without a loss of productivity or jobs on construction projects’⁴⁹ and the Environmental Planning and Assessment (COVID-19 Development – Infrastructure Construction Work Days) Order 2020, which extended those working hours to certain public infrastructure projects.

South Australian example – construction industry closure

Unlike its sister States, the Government in Victoria’s western neighbouring State, South Australia, did not issue any construction specific directions or orders in the first six months of the pandemic (March to November 2020 inclusive). Rather, the measures it introduced to respond to the impact of COVID-19 on the South Australian construction industry were the same as those applying to businesses and organisations generally.⁵⁰

However, in response to a cluster outbreak of 18 COVID-19 cases recorded on 16 November 2020, which occurred after 228 days of case numbers less than 10,⁵¹ South Australia’s Government placed the State into a severe ‘circuit breaker’ six-day lockdown. The restrictions applying to residents and industry were stricter than the stage 4 restrictions imposed in Victoria; residents were prohibited from leaving their homes except a single person per day for specific reasons (including to exercise outside) and all schools, universities, takeaway food outlets and pubs were closed. Significantly, the construction industry was also closed and ‘fly in, fly out’ work was banned.⁵²

It was later discovered that the man who had prompted the introduction of this lockdown misled authorities; he said he had contracted COVID-19 but had actually increased his exposure to the virus. In response to this new information, the South Australian government

⁴⁸ *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW), s 2.8, which inserted the new section 10.17 into the *Environmental Planning and Assessment Act 1979* (NSW).

⁴⁹ NSW Government, ‘COVID-19 response and recovery: Extended days for infrastructure construction work’, *Policy and Legislation* (Webpage, undated, but accessed 21 October 2020) <<https://www.planning.nsw.gov.au/Policy-and-Legislation/COVID19-response>>.

⁵⁰ See Master Builders South Australia, ‘COVID-19 Key Information for Members’, *COVID-19 Information* (Webpage, 2020) <<https://mbasa.com.au/covid-19-information/>> and Government of South Australia SA Health, ‘COVID-19 Fact Sheet, Advice for businesses and organisations’, published online and accessible at Government of South Australia, *Support for businesses* (Fact Sheet, 3 June 2020) <<https://www.covid-19.sa.gov.au/business-and-work/support-for-businesses>>.

⁵¹ Government of South Australia, ‘Dashboard Table Data’, *SA.Gov.Au: COVID-19* (Report, 17 November 2020) <<https://www.covid-19.sa.gov.au/home/dashboard/dashboard-table-data#covid-19-daily>>.

⁵² ABC News, ‘South Australia ordered into six-day lockdown amid COVID-19 outbreak’, *ABC News Online* (online, 18 November 2020) <<https://www.abc.net.au/news/2020-11-18/sa-ordered-into-major-lockdowns-amid-coronavirus-outbreak/12894666>>.

reduced the period of the lockdown to three days and relaxed restrictions to allow outdoor exercise and business openings subject to complying with ongoing restrictions.⁵³

Despite the challenges of navigating the COVID-19 legislative (and regulatory) changes, two things are clear. First, in both the UK and Australia, most of the COVID-19 health protection measures have been made in secondary legislation including regulations, declarations, determinations, orders and directions. Second, the focus of the requirements introduced since the initial outbreaks is human health. These are detailed in the next section.

4. HEALTH PROTECTION

United Kingdom – initial response

Health protection is devolved to the individual UK nations: England, Scotland, Wales and Northern Ireland. The *Health Protection (Coronavirus, Restrictions) England Regulations 2020* (UK)⁵⁴ were made on 26 March 2020, ‘in response to the serious and imminent threat to public health which is posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) in England’⁵⁵ and came into force immediately. The Secretary of State considered that ‘the restrictions and requirements imposed by these Regulations are proportionate to what they seek to achieve’ and was of the opinion that, ‘by reason of urgency, it is necessary to make this instrument without a draft having been laid before, and approved by a resolution of, each House of Parliament’.⁵⁶

The UK HP Regulations incorporated the requirement to close premises, on which food or drink were sold for consumption,⁵⁷ and businesses not specified⁵⁸ during the emergency with restrictions on movement⁵⁹ and gatherings of more than two people.⁶⁰ Enforcement was by way of offences and penalties,⁶¹ fixed penalty notices⁶² and prosecutions.⁶³

United Kingdom – opposition to the initial response

There has been opposition to the UK HP Regulations with Lord Sumption (former UK Supreme Court judge) arguing that ‘It is our business, not the state’s, to say what risks we will take with our own health ... The lockdown is now all about protecting politicians’ backs. They are not wicked men, just timid ones, terrified of being blamed for deaths on their watch. But it is a wicked thing that they are doing’.⁶⁴ There have also been two unsuccessful challenges to the

⁵³ Dillon, M. and Boisvert, E., ‘South Australia to end coronavirus lockdown three days early after pizza worker’s lie’, *ABC News Online* (online, 21 November 2020) <<https://www.abc.net.au/news/2020-11-20/sa-coronavirus-hard-lockdown-to-end-early/12903834>>.

⁵⁴ *Health Protection (Coronavirus, Restrictions) (England) Regulations 2020* (UK) (hereafter ‘**UK HP Regulations**’).

⁵⁵ UK HP Regulations, ‘Introductory Text’.

⁵⁶ UK HP Regulations, ‘Introductory Text’.

⁵⁷ UK HP Regulations, reg 4.

⁵⁸ UK HP Regulations, reg 5 (businesses are not listed in Part 3 of Schedule 2).

⁵⁹ UK HP Regulations, reg 6.

⁶⁰ UK HP Regulations, reg 7.

⁶¹ UK HP Regulations, reg 9.

⁶² UK HP Regulations, reg 10.

⁶³ UK HP Regulations, reg 11.

⁶⁴ Lord Jonathan Sumption, ‘Set us free, ministers, and stop covering your backs’, *Sunday Times* (England, 15 May 2020).

UK HP Regulations. On 21 May 2020, Mr Justice Swift refused to grant an interim order to enable a mosque to hold Friday prayers during Ramadan but did grant permission to apply for judicial review.⁶⁵

On 2 July 2020, the Honourable Mr Justice Lewis heard an application for permission to apply for judicial review to challenge the UK HP Regulations and a decision to close schools and educational establishments.⁶⁶ The claimants questioned the approach taken and priorities of the Government in addressing the coronavirus epidemic. They highlighted the impact on the economy, jobs and education and the effect on treatment of other health conditions. The judge recognised that questioning the appropriateness of the measures are matters of legitimate public debate. The judge denied permission for judicial review on the grounds that the Secretary of State: had the legal power to make the UK HP Regulations; in making and maintaining the regulations, he has not fettered his discretion and has had regard to relevant considerations; and he has neither acted irrationally nor disproportionately.⁶⁷

Although the UK HP Regulations were not directed at the construction industry, they had an indirect impact. For example, the schools closure meant working parents were responsible for home schooling their children. Furthermore, informal childcare by family members in particular, grandparents was not permitted. Therefore, working parents were unable to leave their children unsupervised to work on site and those working from home could be distracted.

United Kingdom – review of the initial response

The UK HP Regulations were required to be reviewed every 21 days⁶⁸ and so were regularly amended and expired six months after they came into force.⁶⁹ Face covering regulations⁷⁰ applicable to public transport came into force on 15 June 2020 and were amended⁷¹ on 28 August 2020. Additional face covering regulations⁷² came into force on 24 July 2020, were amended⁷³ on 8 August 2020 with further amendments⁷⁴ made on 22 August 2020. The enforcement of these regulations is similar to the UK HP Regulations enforcement provisions.

On 14 September 2020, guidance⁷⁵ was issued that people must not meet in groups larger than six in England. In response, Lord Sumption's challenge to government continued:

⁶⁵ *R (Hussain) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin).

⁶⁶ *Dolan and Others v Secretary of State for Health and Social Care and Secretary of State for Education* [2020] EWHC 1786 (Admin).

⁶⁷ *Dolan and Others v Secretary of State for Health and Social Care and Secretary of State for Education* [2020] EWHC 1786 (Admin).

⁶⁸ UK HP Regulations, reg 3.

⁶⁹ UK HP Regulations, reg 12.

⁷⁰ *The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place and on Public Transport) (England) Regulations 2020* (UK) (hereafter, '**UK Face Coverings Regulations**').

⁷¹ UK Face Covering Regulations.

⁷² UK Face Covering Regulations.

⁷³ *The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) (Amendment) Regulations 2020* (UK).

⁷⁴ *The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) (Amendment) (No.2) Regulations 2020* (UK).

⁷⁵ Cabinet Office, 'Guidance: Coronavirus (COVID-19): Meeting with others safely (social distancing)', *Publications* (dated 14 September 2020; updated 22 September 2020)

<<https://www.gov.uk/government/publications/coronavirus-covid-19-meeting-with-others-safely-social-distancing/coronavirus-covid-19-meeting-with-others-safely-social-distancing#seeing-friends-and-family>>. For the purpose of writing, this Guidance was accessed on 25 September 2020. It has since been updated, on 7 October 2020.

Of all the ways of buying time, legal coercion is the most inefficient. Legal coercion is indiscriminate, whereas this virus discriminates.... No one can respect laws made with no achievable objective or coherent plan.⁷⁶

On 22 September 2020, the Government announced further national measures to address rising cases of coronavirus in England⁷⁷ including increased use of face coverings and ‘office workers who can work effectively from home should do so over the winter’.⁷⁸ Clearly, site-based construction workers do not have the option to work from home, whereas construction management and professionals may choose to work from home. Businesses selling food or drink were mandated to be closed between 10 pm and 5 am. The announcement concluded: ‘The government’s expectation is the measures ... will need to remain in place until March 2021’.⁷⁹

United Kingdom – Joint Committee on Human Rights inquiry

The UK Parliament’s Joint Committee on Human Rights undertook an inquiry into ‘The Government’s response to COVID-19: human rights implications’, examining whether the Government’s approach was compliant with human rights in particular, the right to life⁸⁰ while proportionately interfering with the right to liberty⁸¹ and the right to respect for family life⁸². The Committee’s report,⁸³ published on 21 September 2020, included the finding that:

The lockdown regulations have had a huge impact on the rights of millions of people across the country. There has been confusion over the status and interpretation of guidance, and the relationship between guidance and the law.⁸⁴

The conclusions and recommendations included:

It is unfortunate that the Government has chosen not to use the powers within the *Civil Contingencies Act 2004*⁸⁵ or the *Coronavirus Act 2020* to legislate. These pieces of legislation were designed to be used in emergencies, and contain specific safeguards to ensure that while the Government can act, its actions are subject to Parliamentary monitoring and approval.... The Government must explain why it used the 1984 [*Public Health (Control of Disease)*] Act power for legislating rather than the *Coronavirus Act 2020* or the *Civil Contingencies Act 2004* with all the safeguards that these measures contain.⁸⁶

⁷⁶ Lord Jonathan Sumption, ‘No ‘rule of six’, please, we’re British. We can decide for ourselves’, *Sunday Times* (England, 13 September 2020).

⁷⁷ Cabinet Office, ‘Coronavirus (COVID-19): What has changed – 22 September’, *News* (News Story, 22 September 2020) <<https://www.gov.uk/government/news/coronavirus-covid-19-what-has-changed-22-september>>.

⁷⁸ Cabinet Office, above fn 7.

⁷⁹ Cabinet Office, above fn 7.

⁸⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, ETS No. 005 (entered into force 3 September 1953) (hereafter ‘**ECHR**’), art 2.

⁸¹ ECHR, art 5.

⁸² ECHR, art 8.

⁸³ UK Parliament’s Joint Committee on Human Rights, ‘The Government’s response to COVID-19: human rights implications’, *Publications and records* (Committee Publications, 21 September 2020) <<https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/265/26502.htm>>.

⁸⁴ UK Parliament’s Joint Committee on Human Rights, above fn 83, ‘Summary’.

⁸⁵ *Civil Contingencies Act 2004* (UK).

⁸⁶ UK Parliament’s Joint Committee on Human Rights, above fn 83, ‘Conclusions and recommendations’, paras 53 and 54.

And:

The use of emergency procedures for passing laws should be exceptional, limited to situations where the nature of the emergency itself requires the use of emergency procedures, and should require explicit justification, especially when human rights are at stake. The Government must consider whether a better balance could be struck between the flexibility of urgent legislation and the need for scrutiny by Parliament when legislating to respond to a public health crisis such as this.⁸⁷

United Kingdom – September 2020

Nevertheless, by 25 September 2020, the following coronavirus secondary legislation had been made: 202 UK Statutory Instruments; 77 Northern Ireland Statutory Rules; 73 Scottish and 69 Welsh Statutory Instruments.⁸⁸ These included the requirement to quarantine after returning from identified countries, which varied between the nations, and restrictions applicable to specified geographical locations for example, Leicester, Blackburn, Bradford and Luton. However, not all this secondary legislation relates to health protection, but the numbers are indicative of the myriad of coronavirus rules.

England – October 2020 response

New lockdown regulations came into force in England on 14 October 2020, creating a three-tier system of restrictions to address local outbreaks of COVID-19. The lowest tier, medium,⁸⁹ replicates the existing restrictions that apply nationwide by default. The upper tiers, high⁹⁰ and very high,⁹¹ standardise local restrictions for regions with higher rates of infection.

In areas on high alert:⁹²

- The rule of six applies only to outdoor settings; households must not mix indoors, whether at home or in a public place.
- Businesses and venues must ensure people do not meet in their premises with people from outside of their household or support bubble.

In areas on very high alert:⁹³

- Pubs and bars must close. The only exception is where the venue operates as a restaurant, serving substantial meals. Alcohol may only be served as part of such a meal.

⁸⁷ UK Parliament's Joint Committee on Human Rights, above fn 83, 'Conclusions and recommendations', paras 53 and 54.

⁸⁸ A list of these instruments is available on the UK Legislation website via this link: <https://www.legislation.gov.uk/secondary?title=coronavirus>.

⁸⁹ *The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020* (UK).

⁹⁰ *The Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020* (UK).

⁹¹ *The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020* (UK).

⁹² Stone, Hardy, Blunden, McLellan, Burton and Bingham, above fn 19.

⁹³ Stone, Hardy, Blunden, McLellan, Burton and Bingham, above fn 19.

- Businesses and venues must ensure people do not meet in their premises with people from outside of their household or support bubble.
- Households must not mix socially either indoors or outdoors, with the exception of certain outdoor spaces such as parks, beaches, countryside, forests, public gardens, allotments, outdoor sports courts and facilities, and playgrounds.
- The Government may seek to agree additional restrictions with local authorities on a case-by-case basis, for example closing restaurants (except for takeaways), leisure centres, gyms, libraries, performing arts venues and community centres.
- The Government advises against travelling in and out of the area.

These regulations revoked measures in previous regulations that contained similar restrictions.

United Kingdom – Autumn 2020 response

Regrettably, new English national restrictions⁹⁴ were imposed from 5 November until 2 December 2020: stay at home, except for specific purposes; avoid meeting people you do not live with, except for specific purposes and close certain businesses and venues.⁹⁵

The Scottish Government published their COVID-19 Strategic Framework⁹⁶ on 23 October 2020 explaining their approach to suppress the virus, while striving for a return to more normal life, by implementing five levels of protection. The Welsh Government mandated a coronavirus fire-break starting on 23 October 2020 ending on 9 November 2020. It applied to everyone living in Wales and replaced the local restrictions which were in force in some parts of the country.⁹⁷ The Northern Ireland Executive agreed regulations⁹⁸ to be in place for 4 weeks from 16 October 2020 to curb the spread of COVID-19. On 12 November 2020, there were 30 Health Protection (Coronavirus) (Wales) Regulations⁹⁹ in force imposing restrictions and dealing with travel and quarantine requirements and 18 Health Protection (No 2) (Coronavirus, Restrictions) Regulations¹⁰⁰ (Northern Ireland) 2020.

Australia – responding to health ‘emergencies’

In Australia, in the field of public health and wellbeing, the Commonwealth, State and Territories each have legislative powers in relation to ‘states of emergency’, the movement of people and the operation of businesses.¹⁰¹ Various Commonwealth, State and Territory Acts

⁹⁴ *The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020.*

⁹⁵ United Kingdom Cabinet Office, above fn 20.

⁹⁶ Scottish Government, above fn 22.

⁹⁷ Llywodraeth Cymru Welsh Government, above fn 23.

⁹⁸ The Executive Office, above fn 24.

⁹⁹ Llywodraeth Cymru Welsh Government, ‘Coronavirus legislation and guidance on the law’, *Coronavirus and the law* (Guidance, 13 November 2020) <<https://gov.wales/coronavirus-legislation-and-guidance-law>>.

¹⁰⁰ *The Health Protection (Coronavirus, Restrictions) (No2) Regulations (Northern Ireland) 2020.*

¹⁰¹ The Australian Constitution; *Biosecurity Act 2015* (Cth), *National Health Act 1953* (Cth), *Public Health Act 1997* (ACT) and *Emergencies Act 2004* (ACT), *Public Health Act 2010* (NSW), *Public and Environmental Health Act 2011* (NT), *Public Health Act 2005* (Qld) and *Disaster Management Act 2003* (Qld), *South Australian Public Health Act 2011* (SA), *Emergency Management Act 2004* (SA) and *COVID-19 Emergency Response Act 2020* (SA), *Public Health Act 1997* (Tas), *Emergency Management Act 2006* (Tas) and *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas), *Public Health and Wellbeing Act 2008* (Vic), *Emergency Management Act 1986* (Vic), *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic), *Public Health Act 2016* (WA) and *Emergency Management Act 2005* (WA).

allow persons holding specific positions of authority (for example, the ‘Chief Health Officer’, the ‘Minister for Health’ or ‘Public Health Commander’) to issue declarations, determinations and orders, which then trigger the exercise of further statutory powers. The powers available have been utilised to introduce and mandate requirements such as social / physical distancing, limit the number of visitors to private residences, funerals and weddings, wearing face masks and restrict the operation of certain businesses.¹⁰²

At a Commonwealth level, Australia’s Governor General declared, under section 475 of the *Biosecurity Act 2015* (Cth), the existence of a human biosecurity emergency on 18 March 2020. The declaration instituted a ‘human biosecurity emergency period’ during which the Commonwealth Health Minister may issue any direction (s 478) and determine any requirement (s 477) that the Minister considers necessary to prevent or control the entry to, emergence, establishment or spread of COVID-19 in Australia or to another country. One of the determinations made by the Health Minister is the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020. This determination prohibited Australian citizens and residents from leaving Australia (subject to certain exemptions).

In Queensland, the Minister for Health and Minister for Ambulance Services issued a ‘Public Health Emergency Order’ under section 319 of the *Public Health Act 2005* (Qld) on 29 January 2020, having been satisfied that there was a public health emergency due to the outbreak of the coronavirus within China, its pandemic potential and the public health implications within Queensland.¹⁰³ The Minister’s order enlivened the Chief Health Officer’s power to make public directions to assist in containing, or to respond to, the spread of COVID-19 within the Queensland community.

One of the Chief Health Officer’s directions was the Border restrictions direction (No. 15). Under this direction, persons entering or proposing to enter Queensland from another Australian State or Territory must provide a valid Queensland Border Declaration Pass and prevents entry into Queensland from COVID-19 ‘hotspots’ identified on the Queensland Health website¹⁰⁴ (with exceptions).¹⁰⁵

Whilst these restrictions are not specifically directed to the Australian construction industry, they have an indirect impact. For workers permitted to travel (for example, where a worker is the subject of a travel exemption), restrictions such as these have created administrative burdens, which can have associated delay impacts. These were discussed above in Part 3.

¹⁰² For example, Victorian State Government Health and Human Services, ‘Religion and Ceremony: Regional Victoria Third Step’, *Victoria’s restriction levels* (Webpage, 21 September 2020) <<https://www.dhhs.vic.gov.au/religion-and-ceremony-regional-victoria-third-step-covid-19>> and Victorian State Government Health and Human Services, ‘Face coverings: whole of Victoria’, *How to stay safe and well* (Webpage, 6 October 2020) <<https://www.dhhs.vic.gov.au/face-coverings-covid-19>>.

¹⁰³ Queensland, *Queensland Government Gazette*, No. 25, 31 January 2020, 97.

¹⁰⁴ The list of COVID-19 hotspots identified at 21 October 2020 is accessible via this link: (<https://www.qld.gov.au/health/conditions/health-alerts/coronavirus-covid-19/current-status/hotspots-covid-19>).

¹⁰⁵ Young, J., ‘Direction from Chief Health Officer in accordance with emergency powers arising from the declared public health emergency’ *Border restrictions Direction (No. 15)* (Direction, 22 September 2020) <<https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/border-restrictions>>.

As highly regulated sectors focused on safety,¹⁰⁶ the construction industries in the UK and Australia were well-placed to adapt quickly to the introduction of health and safety requirements aimed at reducing the spread of COVID-19. These requirements, their introduction and their publication to those to whom they apply are analysed below. This paper has already observed the difficulty in Australia that is finding COVID-19 related requirements (introduced other than through primary legislation and regulation) and, in the UK, the relationship between guidance materials and the law. Both these issues are evident in the following discussion about the COVID-19 health and safety response in the construction landscape.

5. CONSTRUCTION HEALTH AND SAFETY

United Kingdom – construction industry guidelines

UK employers have clear health and safety responsibilities, primarily under the *Health and Safety at Work Act 1974* (UK).¹⁰⁷ Under the Act, employers have a duty to undertake steps ‘reasonably practicable’ to manage health and safety risks, including COVID-19 risks, which can be addressed by undertaking and implementing risk assessments.¹⁰⁸

The UK Government published guidance for the construction sector on 11 May 2020.¹⁰⁹ The guidance covers social distancing, personal protective equipment (‘PPE’) and face coverings. However, the guidance does not supersede any legal obligations relating to health and safety, employment or equalities and employers must carry out an appropriate COVID-19 risk assessment.¹¹⁰ The Scottish Government published construction sector guidance,¹¹¹ on 6 April 2020, emphasising the requirement that employers carry out a COVID-19 risk assessment. The Scottish guidance addresses physical distancing, PPE, compliance and future development. The Scottish guidance is supplemented by a Construction Re-Start Plan¹¹² and Working on site during the COVID-19 pandemic: Construction Guidance.¹¹³

¹⁰⁶ For example, the Construction Forestry Mining and Engineering Union in Australia states that it ‘never compromises on safety’ and trains workplace health and safety representatives to ‘minimise risk to workers’: CFMEU Construction, *About the union* (Webpage, 19 May 2019) <<https://cg.cfmeu.org.au/your-union>>. For a UK example, see *The Construction (Design and Management) Regulations 2015* (UK).

¹⁰⁷ *Health and Safety at Work Act 1974* (UK).

¹⁰⁸ Health and Safety Executive, ‘Making your workplace COVID-secure during the coronavirus pandemic’, *Working safely* (Guidance, 5 October 2020) <https://www.hse.gov.uk/coronavirus/working-safely/index.htm?utm_source=hse.gov.uk&utm_medium=refferal&utm_campaign=coronavirus&utm_term=working-safely&utm_content=home-page-popular>. This Guidance is scheduled for review on 5 November 2020.

¹⁰⁹ HM Government, *Working safely during COVID-19 in construction and other outdoor work* (15 October 2020), published online at: <<https://assets.publishing.service.gov.uk/media/5eb961bfe90e070834b6675f/working-safely-during-covid-19-construction-outdoors-100720.pdf>>.

¹¹⁰ HM Government, above fn 109.

¹¹¹ Scottish Government, ‘Coronavirus (COVID-19): construction sector guidance’, *Publications* (Guidance, 30 July 2020) <<https://www.gov.scot/publications/coronavirus-covid-19-construction-sector-guidance>>.

¹¹² Construction Scotland, *Construction Re-Start Plan* (28 May 2020) (published online at <<https://www.cs-ic.org/media/4046/cs-re-start-model-commentary-28-05-20-2.pdf>>).

¹¹³ Construction Scotland, *Working on site during the COVID-19 pandemic: Construction Guidance* (28 May 2020) (published online at <<https://www.cs-ic.org/media/4048/cs-sog-28-05-20-2.pdf>>).

The Welsh Government published, on 7 July 2020 and last updated on 9 November 2020, Construction and outdoor work: coronavirus workplace guidance.¹¹⁴ The objectives include: that all employers and businesses carry out a COVID-19 risk assessment and to support employees to work from home whenever possible. The Health and Safety Executive (Northern Ireland), on 27 April 2020, published Covid-19: Safety Guidance from the Construction Employers Federation NI (CEFNI) Taskforce.¹¹⁵

Australia – the proliferation of guidelines

The model work health and safety law embodied in the *Work Health and Safety Act 2011* (Cth) and the *Work Health and Safety Regulations 2011* (Cth) (**‘Australian WHS Laws’**) have been adopted in all Australian States and Territories, except Victoria and Western Australia.

Under the Australian WHS Laws, persons conducting a business or undertaking have a primary duty to ensure, as far as reasonably practicable, the health and safety of workers engaged by them at work in the business or undertaking.¹¹⁶ Such persons must also ensure that other persons are not put at risk from work carried out as part of the business or undertaking.¹¹⁷ This includes providing and maintaining a work environment without risks to health and safety and safe systems of work.¹¹⁸

Whilst Australian construction sites have – subject to complying with relevant workplace health and safety rules – continued to operate, the introduction of ‘stage 4 restrictions’ in Victoria represents a significant shift. Under stage 4 restrictions, only ‘Permitted Work Premises’ may continue to operate.¹¹⁹ Construction is a ‘Permitted Work Premises’, but it is now subject to additional restrictions. This paper identified above the type of restrictions applying in Victoria, which include mandatory High Risk COVIDSafe Plans for, and no more than one worker per four square metres of enclosed workspace on, all Victorian construction sites.¹²⁰ Also, all employees, supervisors and on-site specialists are prohibited from carpooling and must limit movement between multiple sites and large-scale construction sites must limit their daily maximum number of workers to the higher of 25 percent of their baseline workforce or five people.¹²¹

¹¹⁴ Llywodraeth Cymru Welsh Government, ‘Construction and outdoor work: coronavirus workplace guidance’, *Your responsibilities as an employer: coronavirus* (Guidance, 9 November 2020)

<<https://gov.wales/construction-and-outdoor-work-coronavirus-workplace-guidance-html>>.

¹¹⁵ Health and Safety Executive (Northern Ireland), ‘Covid-19: Safety Guidance from the Construction Employers Federation NI (CEFNI) Taskforce’, *HSENI Controlling Risk Together* (Article, 27 April 2020) <<https://www.hseni.gov.uk/news/covid-19-safety-guidance-construction-employers-federation-ni-cefni-taskforce>>.

¹¹⁶ *Work Health and Safety Act 2011* (Cth), s 19(1).

¹¹⁷ *Work Health and Safety Act 2011* (Cth), s 19(2).

¹¹⁸ *Work Health and Safety Act 2011* (Cth), s 19(3).

¹¹⁹ Business Victoria, ‘Creating a COVIDSafe workplace’, *COVIDSafe workplaces* (Webpage, 19 October 2020) <<https://www.business.vic.gov.au/disputes-disasters-and-succession-planning/covid-safe-business/creating-a-covid-safe-workplace>>.

¹²⁰ Business Victoria, ‘Business Operating Reductions – Construction’, *Sector guidance* (Webpage, 19 October 2020) <<https://www.business.vic.gov.au/disputes-disasters-and-succession-planning/covid-safe-business/construction-sector-guidance#construction>>.

¹²¹ Business Victoria, above fn 120. A ‘large scale construction site’ is a construction site that is permitted to be (at completion) more than three storeys high (excluding any basement), or larger than 1,500 square metres in floor size (including all floors), or any office, internal fit out or retail premises, or any industrial, large format or retail use. The ‘baseline workforce’ is the average daily number of workers on site across the project lifecycle, as derived from the project’s resourcing plan at 31 July 2020.

Each of the Commonwealth and State and Territory Governments has a health and safety regulator, which performs certain functions in relation to workplace (or occupational) health and safety.

Commonwealth regulation – Safe Work Australia

The Commonwealth regulator is Safe Work Australia, which is a statutory body created in 2008.¹²² Its objective is to improve national work health and safety outcomes and its functions include developing national workplace health and safety strategies and monitoring the adoption by Australian States and Territories of the Australian WHS Laws.¹²³ Safe Work Australia has published COVID-19 information for workplaces on its website.¹²⁴ That information includes guidance material about physical distancing, hygiene and cleaning, as well as signage, posters and resource kits for workplaces. Safe Work Australia's 'National guide for safe workplaces – COVID-19' (**'SWA Guidelines'**):

assist[s] persons conducting a business or undertaking (e.g. employers) meet their work health and safety (WHS) duties in relation to COVID-19 given the significant risk this disease presents to the health and safety of people at the workplace.¹²⁵

The SWA Guidelines uses 'must' to denote legal requirements that businesses must comply with. In the SWA Guidelines, the legal requirements imposed upon employers include consulting with workers on COVID-19 related health and safety matters (including deciding the control measures to eliminate and reduce the risk of exposure to COVID-19) and genuinely taking those views into account when making decisions, implementing measures to maximise the distance between people to the extent it is safe and possible to do so and continuing to practice good hygiene and all times.¹²⁶

State example – Tasmania and WorkSafe Tasmania

In Tasmania, WorkSafe Tasmania forms part of the Department of Justice and supports the Minister for Building and Construction by administering, among other things, the *Work Health and Safety Act 2012* (Tas). Like Safe Work Australia, WorkSafe Tasmania has published 'guidelines' on its website, including the 'Building Construction and Construction Services COVID Safe Workplace Guidelines' (**'Tasmanian Guidelines'**). The purpose of the Tasmanian Guidelines is to 'set out what employers should do as they continue, or seek to resume, business operations'. The Tasmanian Guidelines profess that:

[b]y following these guidelines you will be able to show how you will comply with minimum standards determined by Public Health, and with the requirements of the Work Health and Safety Act.¹²⁷

¹²² *Safe Work Australia Act 2008* (Cth), s 5(1).

¹²³ *Safe Work Australia Act 2008* (Cth), ss 5A and 6.

¹²⁴ Safe Work Australia, 'COVID-19 Information for workplaces', *Safe Work Australia* (Webpage, 2 October 2020) <<https://www.safeworkaustralia.gov.au/covid-19-information-workplaces>>.

¹²⁵ Safe Work Australia, *National guide for safe workplaces – COVID-19* (14 August 2020) published online at <<https://www.safeworkaustralia.gov.au/doc/national-guide-safe-workplaces-covid-19>>, 4.

¹²⁶ Safe Work Australia, above fn 125.

¹²⁷ WorkSafe Tasmania, *COVID Safe Workplace Guidelines: Building Construction and Construction Trade Services Industry* (version 3, 25 June 2020), published online at

The Tasmanian Guidelines then set out ‘standards’ and ‘actions to controls the risks associated with COVID-19’.¹²⁸ For example, the Tasmanian Guidelines state:

Minimise the use of shared equipment and tools. If sharing is unavoidable, the use of gloves is encouraged and the tools need to be disinfected [regularly]. Each worker/contractor **must** have their own gloves (emphasis added).¹²⁹

and:

If workers are required to travel together for work purposes and the trip is longer than 15 minutes, air conditioning **must** be set to external airflow rather than to recirculation or windows should be opened for the duration of the trip (emphasis added).¹³⁰

As is the case in the UK, guidance material such as this does not expressly supersede the legal obligations imposed on employers under the Australian WHS Laws (or, in Victoria, the *Occupational Health and Safety Act 2004* (Vic) and *Occupational Health and Safety Regulations 2017* (Vic) or, in Western Australia, the *Occupational Safety and Health Act 1985* (WA) and the *Occupational Safety and Health Regulations 1996* (WA)). However, the question remains, where guidelines such as the SWA Guidelines and Tasmanian Guidelines use mandatory language (‘must’) and are published by the key regulator, must employers and workers comply with them (ie are they binding)?

This paper examines the contractual risk allocation for compliance with ‘laws’, which may provide a partial answer to this question. The following Part of this paper examines the way in which COVID-19 laws and regulations have been enforced, including by safety authorities.

6. ENFORCEMENT OR RESISTANCE?

United Kingdom – COVID-19 prosecutions

The Crown Prosecution Service reviewed¹³¹ more than 200 finalised cases, up to the end of April 2020, under the coronavirus legislation. The vast majority of prosecutions under the HP Regulations (175 out of 187) were charged correctly but all 44 cases under the UK Act were found to have been incorrectly charged because there was no evidence they covered potentially infectious people. Sample offences include a man who was sentenced to six months in prison for COVID-related offences including spiting at police officers¹³² and another man who was

<https://www.worksafe.tas.gov.au/__data/assets/pdf_file/0006/569868/COVID-Safe-Workplace-Guidelines-Building-Construction-and-Construction-Services.pdf>.

¹²⁸ WorkSafe Tasmania, above fn 127.

¹²⁹ WorkSafe Tasmania, above fn 127, 5.

¹³⁰ WorkSafe Tasmania, above fn 127, 5.

¹³¹ Crown Prosecution Service, ‘CPS announces review findings for first 200 cases under coronavirus laws’, *News* (Article, 15 May 2020) <<https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws>>.

¹³² Crown Prosecution Service, ‘Castleford: Poundland queue-jumper sentenced to six months for COVID-related offences’ *News, Violent crime* (Article, 17 April 2020) <<https://www.cps.gov.uk/yorkshire-and-humberside/news/castleford-poundland-queue-jumper-sentenced-six-months-covid>>.

jailed for seven months¹³³ after he deliberately coughed on three police officers as he was being cautioned for breaching COVID-19 lockdown measures.

Across England and Wales, 20 fixed penalty notices for £10,000 each, for holding an event of more than 30 people, were issued between late August and 21 September 2020. There is no route to appeal. Instead, an option is not to pay the fine, be summoned to court and offer an explanation to a magistrate.¹³⁴ In November 2020, it was reported¹³⁵ that the police were to suspend on-the-spot £10,000 fines for breaking COVID-19 rules; punishments were instead to be issued as a summons requiring those fined to go before magistrates and be means tested. Following discussions with the government, the National Police Chiefs' Council ('NPCC') said that police forces can resume handing out £10,000 fines for breaches of coronavirus regulations:

People found to be in breach of the regulations relating to gatherings of over 30 people will be made fully aware of their options when faced with a £10,000 FPN (fixed penalty notice), to ensure fairness.¹³⁶

Australia – COVID-19 offences (civil and safety)

COVID-19 related offences in Australia include breaching directions or orders (including directions or orders about self-isolation, community gatherings, community activities and travel),¹³⁷ failing to wear an electronic monitoring device when directed to do so by an authorised officer,¹³⁸ failing to wear a face covering,¹³⁹ and intentionally spitting at, or coughing on, a public official or a worker while the worker is at the worker's place of work or travelling to or from that place (where the spitting or coughing is done 'in a way that would be reasonably likely to cause fear about the spread of COVID-19').¹⁴⁰ In Victoria, between 22 and 31 July, 205 people were fined AUD \$200 for not wearing a mask without a lawful excuse,¹⁴¹

¹³³ Crown Prosecution Service, 'Man jailed for assaulting police officers', *News, Violent crime* (Article, 28 April 2020) <<https://www.cps.gov.uk/west-midlands/news/man-jailed-assaulting-police-officers>>.

¹³⁴ Kent Smith, E. and Al-Othman, H., 'Family blame gatecrashers for party teen's £10,000 fine' *Sunday Times* (England, 18 October 2020)

¹³⁵ Hymas, C., 'Police suspend on-the-spot £10,000 fines for breaking Covid rules', *The Telegraph* (online) (England, 17 November 2020) <<https://www.telegraph.co.uk/news/2020/11/17/police-suspend-on-the-spot-10000-fines-breaking-covid-rules/>>

¹³⁶ Dodd, V., 'Police can resume issuing instant £10,000 Covid fines', *The Guardian* (online) (England, 17 November 2020) <<https://www.theguardian.com/world/2020/nov/17/police-chiefs-tell-officers-stop-issuing-instant-10000-covid-fines>>.

¹³⁷ For example, *Public Health Act 2010* (NSW), s 70(1); and *Public Health and Wellbeing Act 2008* (Vic), ss 120 and 203(1) and Sch 8, item 76.

¹³⁸ *Emergency Management Act 2005* (WA), s 70A(6).

¹³⁹ *Public Health and Wellbeing Regulations 2019* (Vic), s 203(1) and Sch 8, item 75.

¹⁴⁰ *Public Health (COVID-19 Spitting and Coughing) Order 2020* (NSW), s 5, made under the *Public Health Act 2010* (NSW), s 7.

¹⁴¹ Paynter, J., 'Police Crack down on people not wearing a mask in Melbourne', *The Australian* (online) (Australia, 31 July 2020) <<https://www.theaustralian.com.au/breaking-news/police-crack-down-on-people-not-wearing-a-mask-in-melbourne/news-story/cf0fbfc3db7647be68d9b5976614dbc7>>.

and failing to self-isolate attracts a fine of AUD \$4,957.¹⁴² These offences (and fines) are prosecuted by the police in each State and Territory.

Safety authorities also have enforcement functions in relation to COVID-19. For example, under the *Occupational Health and Safety Act 2004* (Vic) (**‘Victorian OHS Act’**), the Victorian WorkCover Authority (established under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) and known as ‘WorkSafe Victoria’) may appoint inspectors to enter ‘workplaces’.¹⁴³ Having entered a workplace, the inspector is empowered to require persons to answer questions, and it is an offence to fail to answer questions without reasonable cause.¹⁴⁴ Inspectors may also issue ‘improvement notices’ where they reasonably believe that a person is contravening, or is likely to continue to contravene, a provision of the Victorian OHS Act.¹⁴⁵

According to the *Daily Mail*, WorkSafe Victoria had conducted 3,460 site visits and 1,700 virtual inquiries that were directly related to or addressed COVID-19.¹⁴⁶ And *The Guardian* reported that WorkSafe had, generally, issued notices for:

workers not working from home where possible, missing or inadequate personal protective equipment, failing to maintain appropriate social distancing, inadequate hygiene controls, lack of health screening, and not having procedures to deal with a worker testing positive.¹⁴⁷

Although construction has been identified as a ‘high-risk’ industry, there is little information about work-place non-compliances (in any industry) and, at 1 September 2020, WorkSafe had not commenced any COVID-19 related prosecutions.¹⁴⁸

This absence of information about workplaces is in contrast with the Victorian Government’s daily reporting of COVID-19 case numbers and deaths. Some say that the lack of information is not only inconsistent with Australia’s system of democratic government, but also, one of the reasons that some Victorians have failed to comply with the restrictions imposed by the Victorian Government.¹⁴⁹ Melbourne writer Jill Stark said, ‘[Victorian Premier] Dan Andrews

¹⁴² Andrews, D., Premier of Victoria, ‘Stay Home: New Crackdown on Isolation Breaches’, *Premier of Victoria The Hon Daniel Andrews* (Webpage, 4 August 2020) <<https://www.premier.vic.gov.au/stay-home-new-crackdown-isolation-breaches>>.

¹⁴³ *Occupational Health and Safety Act 2004* (Vic) (hereafter, **‘Victorian OHS Act’**), ss 95(1) and 98(1).

¹⁴⁴ Victorian OHS Act, ss 100(1) and 100(2).

¹⁴⁵ Victorian OHS Act, ss 100(1) and 100(2)

¹⁴⁶ Coë, C., ‘How a vast majority of new COVID-19 cases in Victoria became infected in the workplace – as Dan Andrews launches an inspection BLITZ to catch out high-risk businesses’, *Daily Mail Australia* (online) (Australia, 19 July 2020) <<https://www.dailymail.co.uk/news/article-8537649/Daniel-Andrews-launches-Victorias-inspection-blitz-workplace-COVID-19-fears.html>>.

¹⁴⁷ Davey, M., ‘WorkSafe issues Victorian hospitals with five notices for failing to meet Covid regulations’, *The Guardian* (online) (Australia, 1 September 2020) <<https://www.theguardian.com/australia-news/2020/sep/01/worksafe-issues-victorian-hospitals-with-five-notices-for-failing-to-meet-covid-regulations#:~:text=WorkSafe%20issues%20Victorian%20hospitals%20with%20five%20notices%20for%20failing%20to%20meet%20Covid%20regulations,-This%20article%20is&text=WorkSafe%20inspectors%20have%20issued%20hospitals,compliance%20checks%20since%2020%20July>>.

¹⁴⁸ Davey, above fn 147.

¹⁴⁹ Alcorn, G., ‘Daniel Andrews fronts the media every – but could his government be more transparent?’, *The Guardian* (online) (Australian, 6 August 2020) <<https://www.theguardian.com/commentisfree/2020/aug/06/daniel-andrews-fronts-the-media-every-day-but-could-his-government-be-more-transparent>>.

really has perfected the art of fronting up each day to give the perception of transparency and accountability but then not actually saying anything'.¹⁵⁰

Australia – opposition to the COVID-19 response

COVID-19 related restrictions in other Australian States and Territories have not been immune from challenge and there have been two challenges to State Government imposed restrictions on the basis that the laws implementing such restrictions are inconsistent with Australia's Constitution. In Australia, Constitutional issues are heard by the High Court of Australia. The High Court heard and issued its decisions in both on 6 November 2020 but, at 22 November 2020, had not published reasons for its decisions.

In Victoria, businessman, Julian Gerner, lodged an application in the High Court of Australia to challenge the Victorian rule imposing on Victorian metropolitan residents a restriction of five kilometres on their movement from home. Mr Gerner's application was made on the basis that this restriction was inconsistent with an implied freedom of movement in the Australian Constitution. At trial, the Victorian Government urged the High Court to abandon the matter because the Victorian Government was due to relax stage 4 restrictions in the coming days.¹⁵¹ However, Mr Gerner's legal team submitted that that the outcome of the case would determine whether the Government could impose a future lockdown. The Victorian Government argued that the Constitution did not found such an implied freedom, and the High Court accepted this argument.¹⁵²

One other case that has attracted significant attention is Clive Palmer's challenge to Western Australia's decision to close its borders to 'non-exempt travellers'. Mr Palmer is an Australian mining businessman, a director of Mineralogy Pty. Ltd. and former Minister for Parliament (Palmer United Party), who commenced proceedings in the High Court of Australia to challenge the constitutional validity of the Quarantine (Closing the Border) Directions made under the *Emergency Management Act 2005* (WA).

Mr Palmer's challenge was made under section 92 of the Constitution, which provides that, 'On the imposition of uniform duties of customs, trade, commerce and intercourse among States ... shall be absolutely free'. Mr Palmer's chief argument is that the decision to close the Western Australian border is not reasonably necessary as part of the Western Australian Government's response to COVID-19 (or, in other words, that the Government could have attained the object of the Directions without closing the State border).

In relation to the question before the High Court – whether the Western Australian Government's border closure directions breached section 92 –, the High Court first remitted the question of 'the reasonable need for and efficacy of the community isolation measures

¹⁵⁰ Quoted in Wahlquist, C., 'Questioning Daniel Andrews: how reporters came under attack in Victoria', *The Guardian* (online) (Australia, 3 October 2020) <<https://www.theguardian.com/australia-news/2020/oct/03/questioning-daniel-andrews-how-reporters-came-under-attack-in-victoria>>.

¹⁵¹ The Victorian Government has progressively relaxed stage 4 restrictions since 8 November 2020. At 22 November 2020, Victoria's 14 day average of COVID-19 cases is zero and, therefore, restrictions are forecast to be further relaxed.

¹⁵² Byrne, E., 'High Court dismisses challenge to Victoria's coronavirus lockdown', *ABC News Online* (6 November 2020) <<https://www.abc.net.au/news/2020-11-06/high-court-challenge-to-victorias-covid-19-lockdown-dismissed/12856416>>.

contained in the Quarantine (Closing the Border) Directions’ to the Federal Court of Australia.¹⁵³ In the Federal Court, Justice Rangiah’s findings included:

- The border restrictions did not eliminate the potential for COVID-19 to be imported into Western Australia from other States or Territories, but they have reduced the numbers of people entering.
- The restrictions had been effective ‘to a very substantial extent’¹⁵⁴ to reduce the probability of COVID-19 being imported into Western Australia from interstate.
- ‘If the current border restrictions were replaced by mandatory hotel quarantining for all entrants to Western Australia for 14 days, Western Australia could not safely manage the number of people in hotel quarantine’.¹⁵⁵
- Other measures – such as exit and entry screening and mandatory wearing of face masks – would be less effective than the border restrictions in preventing the importation of COVID-19.¹⁵⁶

At hearing, the High Court found that Mr Palmer’s challenge did not raise a Constitutional issue (the consequence being that Mr Palmer’s challenge was denied). However, Professor Anne Twomey of the University of New South Wales and constitutional law expert says that ‘The High Court’s orders in the Palmer case do not amount to a clear cut acceptance of the ability of the states to impose border closures’.¹⁵⁷ At 22 November 2020, the High Court has not published its reasons for decision.

Having regard to the Australian States’ and Territories’ COVID-19 construction law response, the outcomes of these Constitutional challenges have not actually had any significant impact on the construction industry. In the main, COVID-19 travel restrictions have not interfered with the movement of ‘fly in, fly out’ (**FIFO**) and ‘drive in, drive out’ (**DIDO**) workers and those who work on active construction sites. This is because the mining and construction industries provide an ‘essential service’ or form part of the ‘critical resources sector’.

For example, in Western Australia the *Quarantine (Closing the Border) Directions* issued by the Commissioner of Police and State Emergency Coordinator under the *Emergency Management Act 2005* (WA), prohibits persons entering Western Australia unless the person is an ‘exempt traveller’.¹⁵⁸ There are several further directions, which prescribe who constitutes an ‘exempt traveller’; these include rig or platform crew,¹⁵⁹ persons responsible for the provision of transport or freight and logistics services,¹⁶⁰ persons responsible for critical maintenance or repair of critical infrastructure,¹⁶¹ and FIFO Workers.¹⁶² The ‘permitted

¹⁵³ *Palmer & Anor v The State of Western Australia & Anor; Mineralogy Pty Ltd & Anor v State of Queensland; Travel Essence Pty Ltd & Ors v Young & Anor* [2020] HCATrans 88 (16 June 2020).

¹⁵⁴ *Palmer v State of Western Australia (No 4)* [2020] FCA 1221 (hereafter, ‘*Palmer*’), para 366.

¹⁵⁵ *Palmer*, above fn 154, para 366.

¹⁵⁶ *Palmer*, above fn 154, para 366.

¹⁵⁷ Quoted in Lewis, R., ‘Coronavirus: Clive Palmer loses WA border bid in High Court’, *The Australian* (online) (Australia, 6 November 2020) <<https://www.theaustralian.com.au/nation/clive-palmer-loses-wa-border-bid-in-high-court/news-story/c56244b064dc5cf9a41dbc2e563aa754>>.

¹⁵⁸ *Quarantine (Closing the Border) Directions* effective from 5 April 2020, s 4.

¹⁵⁹ *Quarantine (Closing the Border) Directions Approval for Rig or Platform Crew (No 3)*.

¹⁶⁰ *Quarantine (Closing the Border) Directions*, above fn 158, s 27(g).

¹⁶¹ *Quarantine (Closing the Border) Directions*, above fn 158, s 27(i).

¹⁶² *Quarantine (Closing the Border) Directions*, above fn 158, s 27(k).

worker' scheme applying in Victoria is discussed in Part 3 of this paper above. However, it remains to be seen whether any second or third wave triggers the introduction of similar – or more severe – lockdowns and/or restrictions that extend to industries that have, notwithstanding modifications to construction law so far, left the Australian construction and mining sectors relatively unimpacted (in comparison to individual Australian residents).

Notwithstanding the challenges to restrictions in Australia, there is little in the way of new construction case law or the development of existing common law relating to the construction industry. The UK – in this respect – is further advanced. Developments in the common law relating to the construction industry (with a focus on the UK) are examined in the following Part.

7. CONSTRUCTION CASE LAW

United Kingdom

Under the Civil Procedure Rules and Directions, English and Welsh civil courts already have wide discretion to use video and audio links.¹⁶³ However, Schedule 25 of the UK Act¹⁶⁴ includes provisions facilitating the participation of the public in both criminal and civil court proceedings consistent with the principle of open justice.

In *Millchris Developments Ltd v Waters*,¹⁶⁵ the contractor sought an injunction to prevent progress of an adjudication arguing that it would have insufficient time to prepare its defence. The grounds included that the contractor's solicitor was required to self-isolate and the contractor would have no representative at a site visit proposed by the adjudicator. HHJ Jefford refused the injunction as natural justice would not inevitably be breached if the adjudication proceeded. For example, the contractor's solicitor could be contacted remotely and a site visit recorded.

*Municipio De Mariana & Ors v BHP Group Plc*¹⁶⁶ arose out of the collapse of the Fundao Dam in Brazil on 5 November 2015 which led to the release of large quantities of toxic material. HHJ Eyre QC relied on the overriding object, in particular that cases are dealt with expeditiously, and a recent coronavirus pandemic practice direction¹⁶⁷ when considering an application for an extension of time. He adjourned a hearing date but re-listed it after a short delay.

These Technology and Construction court judges have endeavoured to progress cases expeditiously despite the coronavirus challenges.

Australia

¹⁶³ Ministry of Justice, *CPR – Rules and Directions* (updated 12 October 2020), published online at <<https://www.justice.gov.uk/courts/procedure-rules/civil/rules>>.

¹⁶⁴ Being the *Coronavirus Act 2020* (UK).

¹⁶⁵ *Millchris Developments Ltd v Waters* [2020] 4 WLUK 45

¹⁶⁶ *Municipio De Mariana & Ors v BHP Group Plc* [2020] EWHC 928 (TCC)

¹⁶⁷ Courts and Tribunals Judiciary, *118th Practice Direction Update to the Civil Procedure Rules – Coronavirus Pandemic related* (2 April 2020), published online at <<https://www.judiciary.uk/announcements/118th-practice-direction-update-to-the-civil-procedure-rules-coronavirus-pandemic-related/>>.

There has been little in the way of Australian construction case law relating to COVID-19, including the determinations and guidelines that restrict or adversely impact construction industry operations. Rather, case law has – in the main – focused on the hearing of criminal matters by a judge alone, sentencing during the COVID-19 pandemic and alterations to procedural matters.¹⁶⁸

It remains to be seen whether disputed claims for time and/or cost relief under construction contracts supplement the current scarcity in COVID-19 related construction case law. The introduction to this paper set out the types of construction project impacts that COVID-19 has caused, which included delivery delays and decreased workforce productivity. The following Part analyses the provisions common in UK and Australian contracts, which may be called upon by construction contractors to seek relief for such impacts.

8. CONSTRUCTION CONTRACTS

The COVID-19 pandemic may amount to *force majeure* relieving parties of their contractual obligations leading to a right to terminate. Government restrictions could be interpreted as an exercise of statutory powers or change of law. Allocation of responsibility between employer and contractor will depend on the terms of the construction contract and factual circumstances. Contractors may apply for extensions of time and may also be entitled to loss and expense. In these exceptional circumstances a case for collaboration could be made.¹⁶⁹

COVID-19 relief – a creature of contract

The Joint Contracts Tribunal ('JCT') has published an article¹⁷⁰ about construction projects in England and Wales using JCT contracts, entered into prior to the reasonable foreseeability of the effect of the coronavirus. The article recognises that impacts caused by the virus and Government action may give rise to extension of time, suspension of the works and termination of contractor's employment. A subsequent article¹⁷¹ sets out what the parties to a building contract should do within the context of the Government's response to the virus and the Construction Leadership Council ('CLC') Site Operating Procedures.¹⁷² In addition, Build UK

¹⁶⁸ For the hearing of criminal matters by a single judge see, for example, *R v IB* [2020] ACTSC 103. For sentencing see, for example, *R v Phan* [2020] QSC 95. For the alteration of procedural matters see, for example, *CPR Solutions Mackay Pty Ltd v Zammit Earthmoving Pty Ltd* [2020] QSC 165, which relates to the Court's powers under the *Covid-19 Emergency Response Act 2020* (Qld) to modify statutory time limits relation to a proceeding.

¹⁶⁹ CMS Law Now, 'Coronavirus and the construction industry: how the standard forms respond', *eAlerts* (Article, 17 March 2020) <<https://www.cms-lawnow.com/ealerts/2020/03/coronavirus-and-the-construction-industry-how-the-standard-forms-respond>>.

¹⁷⁰ Hibberd, P., *Coronavirus (Covid-19) and JCT Contracts* (April 2020) published online at <<https://corporate.jctltd.co.uk/wp-content/uploads/2020/04/Coronavirus-Covid-19-and-JCT-Contracts-v3.pdf>>

¹⁷¹ Hibberd, P., *Principal Covid-19 guidance from Government and Construction Leadership Council* (September 2020) published online at <<http://corporate.jctltd.co.uk/wp-content/uploads/2020/09/Principal-Covid-19-guidance-from-government-v1.pdf>>.

¹⁷² Construction Leadership Council, *Construction Sector - Site Operating Procedures Protecting Your Workforce During Coronavirus (Covid-19)* (Version 5, 4 July 2020) published online at <<http://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2020/07/Site-Operating-Procedures-Version-5.pdf>>.

has provided guidance¹⁷³ on how to deal with the effects of coronavirus in existing and future contracts.

Like the position in the UK, relief for COVID-19 (and its impacts) lies in the particular contractual arrangements between contractors and their clients. COVID-19 may amount to a ‘force majeure event’, relieving the contractor from its obligation to pay liquidated damages for late completion and, for prolonged force majeure events, giving rise to a mutual right to terminate. The introduction of new legal requirements may also give rise to compensable changes in law. In extreme cases, contracting parties may be discharged from their obligations through the application of the doctrine of frustration.

Force majeure challenges

A key theme that emerges from commentary on force majeure is that contractual force majeure regimes may not operate in the COVID-19 environment.¹⁷⁴ This is because contracting parties are unlikely to have predicted the onset of COVID-19. Therefore, neither COVID-19 nor its impact may be captured by the types of events included in common definitions of ‘force majeure events’ (such as natural catastrophes, war, terrorism or nuclear activities). Also, it will be challenging to establish that the onset of the COVID-19 pandemic (as opposed to some subsequent impact, or intervening event) caused a contracting party to be unable to perform, or delayed or disrupted in performing, its obligations under the contract.

The Hon Peter Vickery QC, former Judge in Charge of the Technology, Engineering and Construction List in the Supreme Court of Victoria, observed that ‘A new context for the construction industry and for construction contracts has emerged’.¹⁷⁵ In relation to the contractual remedies following force majeure, Vickery recommended the introduction of new legislation that creates a statutory force majeure regime and relieves contractors from liability for liquidated damages for the duration of the COVID-19 force majeure event. Vickery said that such legislation ‘will make a contribution to steering construction projects to successful outcomes through the challenging days ahead’.¹⁷⁶

Change in law

The majority of construction contracts in Australia are based on standard forms, such as Standards Australia’s contracting suite.¹⁷⁷ One of the most regularly used standard form

¹⁷³ Build UK, *Managing Covid 19 within Contracts* (2020) published online at <<https://builduk.org/wp-content/uploads/2020/09/Managing-COVID-19-within-Contracts.pdf>>.

¹⁷⁴ See, for example, Borgese, A. and Newbold, B., ‘COVID-19: Force majeure and frustration of your contracts’, *MinterEllison* (Article, 23 March 2020) <<https://www.minterellison.com/articles/covid-19-force-majeure-and-frustration-contract>> and Huby, J., ‘COVID-19: Contracts in the live performance industry, Force majeure and frustration of contract’, *HWL Ebsworth* (Article, 8 April 2020) <<https://hwlebsworth.com.au/covid-19-contracts-in-the-live-performance-industry-force-majeure-and-frustration-of-contract/>>.

¹⁷⁵ Vickery, P., ‘COVID-19: Managing the Impact on Construction Contracts’, paper delivered as an online presentation for the University of Technology Sydney (23 May 2020) (accessible at <<https://www.petervickeryqc.com/publications>>), 1.

¹⁷⁶ Vickery, P., ‘Liquidated Damages: a Proposal for Statutory Force Majeure Relief from COVID-19’, Submission to the Australian Construction Industry Forum as part of the ACIF contribution to the Senate Select Committee on COVID-19 and the government’s response (8 May 2020) (accessible at <<https://www.petervickeryqc.com/publications>>), 11.

¹⁷⁷ Sharkey, J., Bell, M., Jovic, W. and Marginean, R., *Standard Forms of Contract in the Australian Construction Industry* (June 2014) published online at <https://law.unimelb.edu.au/__data/assets/pdf_file/0007/1686265/Research-Report-Standard-forms-of-contract-in-the-Australian-construction-industry.pdf>.

contracts, the ‘AS4300-1995 General conditions of contract for design and construct’ (‘AS4300’),¹⁷⁸ allows the contractor to claim additional cost and an extension to the ‘Date for Practical Completion’ for a change in ‘legislative requirement’.¹⁷⁹ The AS4300 defines ‘legislative requirement’ as:

‘Legislative Requirement’ includes –

- (a) Acts, Ordinances, regulations, by-laws, orders, awards and proclamation of the Commonwealth and the State and Territory in which the work under the Contract or any part thereof is being carried out;
- (b) certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction in connection with the carrying out of the work under the Contract; and
- (c) fees and charges payable with the foregoing;¹⁸⁰

Although the definition is inclusive, it is unlikely to capture all the possible changes in law that have arisen following the onset of the COVID-19 pandemic and which have impacted the way in which construction projects are performed and the time within which they must be delivered. For example, it is unlikely that a legal requirement introduced in Wuhan, China, requiring that structural steel manufacturing facilities cease operations will activate the relief regime in clause 14.2 of the AS4300. The AS4300 does not define ‘State’ or ‘Territory’, but if these words are read in the context of the ‘Commonwealth’, they are unlikely to extend to a jurisdiction outside Australia.

However, it may be that the SWA Guidelines and the Tasmanian Guidelines examined above are captured by paragraph (c) of the ‘legislative requirements’ definition, particularly given that some of those guidelines use mandatory language (‘must’) and are, therefore, arguably ‘requirements of organisations having jurisdiction in connection with the carrying out of the work under the Contract’.

Frustration

Where contractual force majeure and change in law regimes have no application, the common law doctrine of frustration may apply. Frustration, however, applies in only very limited circumstances, where neither party is at fault and meeting their obligations under the contract becomes ‘radically different’.¹⁸¹ If a contract is frustrated, it is terminated immediately from the point of frustration and the parties are discharged from their future obligations and bear their own losses.¹⁸²

Construction delays and shortage of materials are considered inherent construction risks and reasonably foreseeable. Therefore, neither of these events are likely to give rise to frustration.¹⁸³ Also, where the contract has an operative force majeure clause, or performance

¹⁷⁸ Sharkey, Bell, Jovic and Marginean, above fn 177.

¹⁷⁹ AS4300-1995 General conditions of contract for design and construct (hereafter, ‘AS4300’), cl 14.2.

¹⁸⁰ AS4300, cl 2.

¹⁸¹ *Davis Contractors Limited v Fareham Urban District Council* (1956) AC 696.

¹⁸² *Fibrosa SA v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32

¹⁸³ *Davis Contractors Limited v Fareham Urban District Council* (1956) AC 696.

of contractual obligations has simply become more onerous or expensive, the doctrine is unlikely to apply.¹⁸⁴

For these reasons, a key theme emerging from the commentary on frustration is that the doctrine will be difficult to make out and unlikely to relieve construction contractors from the performance of their contractual obligations during the COVID-19 pandemic.¹⁸⁵ Instead, some law firms recommend that contracting parties negotiate a mutually acceptable outcome, or consider extra-contractual solutions (such as modified payment and timing obligations or adjusted commercial arrangements).¹⁸⁶

9. CONCLUSIONS

The 2020-21 Commonwealth Government budget was presented to the Australian public in October 2020. The budget earmarks a \$14 million investment in new and accelerated Australian infrastructure projects. Together with the Commonwealth Government's current \$110 billion infrastructure investment, this additional funding is forecast to support 140,000 jobs. In addition, the budget proposes stimulated activity in housing construction and increased economic activity in the domestic building industry.¹⁸⁷ The budget announcements in Australia present a new challenge for the Australian construction industry, as Australia works toward a 'COVID-19 normal' way of operating and attempts to 'build itself out of recession'.¹⁸⁸ This is because the COVID-19 pandemic has had an overwhelming impact on global economies including the construction sector. Around the world, construction industries have faced – and continue to face – unprecedented and ongoing uncertainty as countries experience second and, in some cases, third waves of COVID-19 cases.

Australia and the UK responded to the COVID-19 outbreak by mandating quarantine for people returning from other countries and quickly introducing social distancing requirements. England, Scotland, Wales and Northern Ireland confusingly imposed compulsory quarantine on return from different countries. In addition, Australia responded by closing its borders to all non-citizens and non-residents (with exceptions).

¹⁸⁴ *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 and Dennys, N. and Clay, R. (eds), *Hudson's Building and Engineering Contracts* (14th ed., Thomson Reuters, 2020), 1-081.

¹⁸⁵ See, for example, Vickery, P. and Cachia, C., 'COVID-19: Doctrine of Frustration: Implications for Contracts in Australia', *K&L Gates* (Article, 27 March 2020) <<https://www.klgates.com/COVID-19-Doctrine-of-Frustration-Implications-for-Contracts-in-Australia>> and Davidson, B., Stojcevski, E., Pappas, S. and Laurie, N., 'Legal consequences of the COVID-19 outbreak on contracts: force majeure and frustration', *Corrs Chambers Westgarth* (Article, 17 February 2020) <https://corrs.com.au/insights/legal-consequences-of-covid-19-outbreak-on-contracts-force-majeure-and-frustration#_ftn17>.

¹⁸⁶ Coulthard, W. and Cifelli, R., 'COVID-19 and Force Majeure', *Johnson Winter & Slattery* (Article, March 2020) <<https://jws.com.au/en/insights/articles/2020-articles/covid-19-and-force-majeure>> and Ogden, S. and Collins, O., 'COVID-19 NFP Guidance – Managing your contractual arrangements in the midst of COVID-19', *King & Wood Mallesons* (Article, 5 April 2020) <<https://www.kwm.com/en/au/knowledge/insights/covid-19-information-guide-managing-your-contractual-arrangements-20200406>>.

¹⁸⁷ Commonwealth of Australia, *Budget 2020-21 Economic Recovery Plan for Australia: Overview* (undated) published online at <<http://www.budget.gov.au>>.

¹⁸⁸ Adapted from Pupazzoni, R., 'Budget 2020 disappoints many experts and buildings with its lack of big infrastructure projects', *ABC News Online* (Australia, 9 October 2020) <<https://www.google.com/search?q=Budget+2020+disappoints+many+experts+and+buildings+with+its+lack+of+big+infrastructure+projects&oq=Budget+2020+disappoints+many+experts+and+buildings+with+its+lack+of+big+infrastructure+projects&aqs=chrome...69i57.272j0j4&sourceid=chrome&ie=UTF-8>>.

The UK hurriedly enacted the *Coronavirus Act 2020* (UK) but the majority of restrictions have been imposed by regulations made under health protection legislation. These regulations demanded the closure of food and drinks premises and businesses, with restrictions on movement and gatherings. The Commonwealth and Australian States and Territories took a slightly different approach, enlivening existing health protection and emergency powers to make determinations, declarations and issue orders, which restricted people's movements, business operations, workforce / labour numbers on construction sites and the number of people gathering together.

In both the UK and Australia, enforcement was (and continues to be) by offences and penalties, fixed penalty notices and prosecutions. In the UK, COVID-19 regulations have been opposed by Lord Sumption (former UK Supreme Court judge) and unsuccessfully challenged in Court. Despite the initial shambles of incorrect charges, many subsequent UK prosecutions succeeded. In Victoria (the Australian State the subject of the strictest restrictions), reportedly, only 845 of 19,324 fines (worth more than \$27 million) have been paid.¹⁸⁹

As the prevalence of COVID-19 continues and case numbers appear to be uncontrollable, ongoing restrictions have attracted resistance. At an international level, the WHO has recommended against lockdowns as the primary way to control the COVID-19 pandemic and, instead, to 'find a balance between restrictions and normal life'.¹⁹⁰ Resistance against restrictions is apparent in the UK and Australia.

The UK Parliament's Joint Committee on Human Rights report, *The Government's response to COVID-19: human rights implications* recognised confusion regarding the legal status and interpretation of guidance. The report censured the government for using the *Public Health (Control of Disease) Act 1984* (UK) rather than the *Civil Contingencies Act 2004* (UK) or the *Coronavirus Act 2020* (UK), with their Parliamentary monitoring and approval safeguards, to legislate. The report mandated that the Government consider whether an improved balance could be reached between the flexibility of urgent legislation and Parliamentary scrutiny when reacting to a public health crisis. Nevertheless, there has been an avalanche of coronavirus secondary legislation; 202 UK Statutory Instruments by 25 September 2020.

Whilst there has been little overt backlash by those participating in the Australian construction industry, there have been Constitutional challenges to Governments' responses to COVID-19. These challenges are yet to be heard and determined by Australian Courts.

As highly regulated industries focused on safety, the construction industries in the UK and Australia seem to have adapted to new ways of working through the COVID-19 pandemic. In the UK, employment health and safety is underpinned by safety legislation, the *Health and Safety at Work Act 1974* (UK). The same type of legislation is in place in Australia. And in both jurisdictions, work health and safety authorities have issued a plethora of guidance material recommending to construction organisations how they can continue construction operations in a manner that minimises the risks of contracting and transferring COVID-19 and that is safe and hygienic.

¹⁸⁹ Pearson, E., 'More than 19,000 COVID-19 fines issued but only 845 paid', *The Age* (online) (Melbourne, 12 October 2020) <<https://www.theage.com.au/national/victoria/more-than-19-000-covid-19-fines-issued-but-only-845-paid-20201012-p564cf.html>>.

¹⁹⁰ Doyle, M., 'WHO doctor says lockdowns should not be main coronavirus defence', *ABC News Online* (Australia, 12 October 2020) <<https://www.abc.net.au/news/2020-10-12/world-health-organization-coronavirus-lockdown-advice/12753688>>.

In the UK, Technology and Construction Court judges have endeavoured to progress cases expeditiously despite the coronavirus challenges as illustrated by *Millchris Developments Ltd v Waters* and *Municipio De Mariana & Ors v BHP Group Plc*.

In the field of construction contracts, contracting parties should consider the availability of time and/or cost relief for a force majeure event (constituted by the COVID-19 pandemic and/or its consequences) and/or changes in law, especially given the likely unavailability of rescission through the doctrine of frustration. Neither the UK nor Australia has yet experienced any challenge to a contractual claim brought on the basis of COVID-19.

As contracting parties attempt to interpret contractual relief regimes negotiated and agreed well before the onset of the COVID-19 pandemic, and without any knowledge of the impact that COVID-19 would have on active construction projects, the construction industry can expect a future of uncertain contractual application, disputed claims, potentially unintended results and jurisprudence relating to the terms commonly incorporated in definitions of ‘law’, ‘legislative requirements’ and ‘force majeure’.

In the foreseeable future, it is anticipated that the legislative and regulatory environment relating to the UK and Australian construction industries will continue to change, particularly if, despite the measures imposed by Government, COVID-19 case numbers and COVID-19 related deaths spike. For construction lawyers, this landscape no doubt provides for ample work, innovative and interesting argument and new precedents; welcome news for those who watch the development of the law with keen eyes. For construction businesses however, new ways of working that cause disrupted operations, decreased productivity and ongoing supply chain delays are likely to give rise to frustrations. This is particularly the case if contracting parties do not cooperate to reduce COVID-19 impacts. Construction contractors may perceive that the only way to recover time and cost losses is through dispute resolution procedures including arbitration and litigation.

There are many who advocate for ‘relationship contracting’¹⁹¹ or, in other words, a contract that prioritises the relationship between the parties to overcome their commercial differences,¹⁹² as a way to safeguard a project against failure. In the turbulent legal landscape ushered in by COVID-19, relationship contracting may assist parties to navigate adverse impacts on active and new projects to ensure that the construction operations thrive notwithstanding the COVID-19 impact on construction industries generally.

¹⁹¹ Mosey, D., *Collaborative Construction Procurement and Improved Value* (John Wiley & Sons Ltd, New Jersey, USA, 2019); Australian Constructors Association, *Relationship Contracting: Optimising Project Outcomes* (1999) published online at <<http://www.constructors.com.au/wp-content/uploads/1999/02/Relationship-Contracting-Optimising-Project-Outcomes-1999.pdf>>; Ning, Y. and Ling, F., ‘Boosting Public Construction Project Outcomes through Relational Transactions’ (2014) 140(1) *Journal of Construction Engineering and Management*, 04013037-1

¹⁹² Mosey, above fn 191, Australian Constructors Association, above fn 191 and Ning and Ling, above fn 191.