

Navigating the NSW shutdown of the construction industry

22 July 2021

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Webinar housekeeping

- All attendees will be on mute and their cameras turned off for the entire webinar.
- We have BD tech support live to assist with any technical issues.
- Use the chat function for any comments/technical issues.
- Use the Q&A function for specific questions related to the webinar content - Questions will be addressed at the end of the webinar.
- There will be a post webinar survey link sent at the end of the webinar, we value attendee feedback, presentation slides will also be sent to all attendees.
- This webinar is being recorded.

Disclaimer

The information contained in this presentation is intended as **general commentary only** and should not be regarded as legal advice.

Should you require specific advice on the topics or areas discussed, please contact the presenters directly.

Topics covered today

1 Overview

- Current landscape
- Shutdown period
- Affected areas
- Exemptions
- QR Codes / checking-in on site

2 Contractual issues

- Extensions of time
- Delay and disruption issues
- Force majeure issues
- Payment obligations

3 Employment issues

- Government benefits
- Employer/Employee relationship



Current Landscape

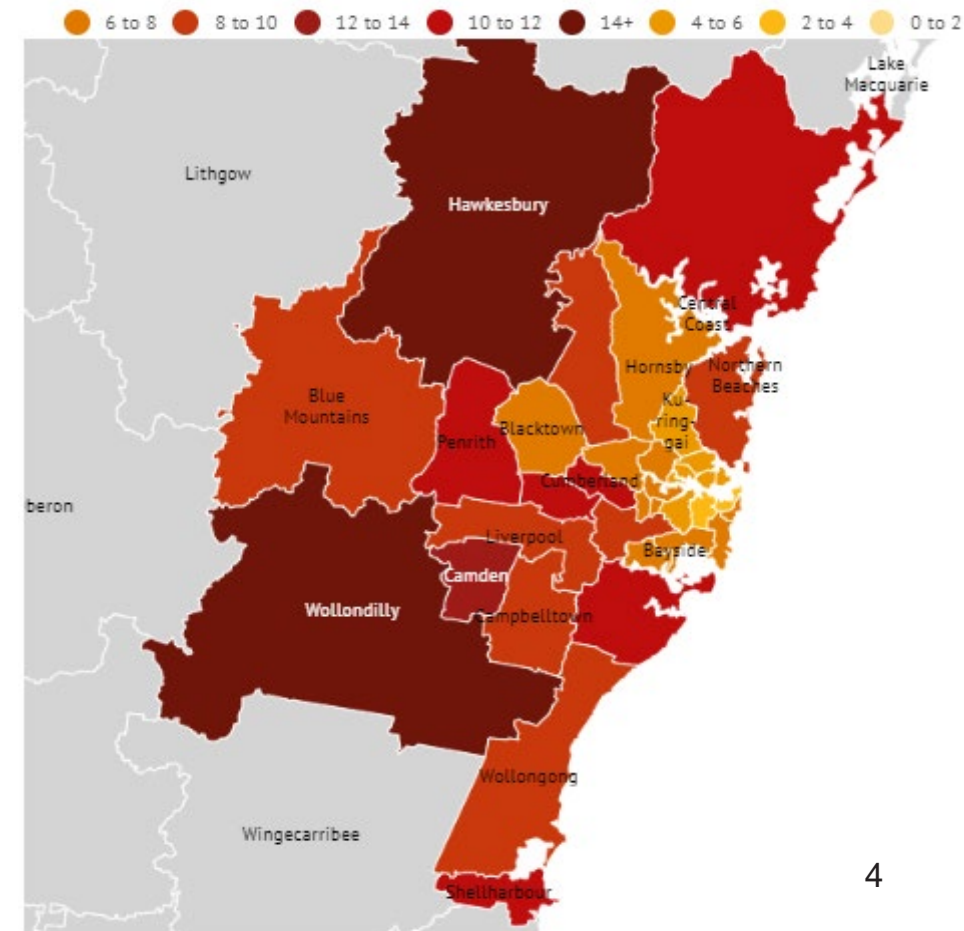
- NSW construction industry is worth \$24.4 billion.
- The shutdown will cost the NSW Government around \$700 million per week.
- Approximately 25,000 workers in the construction industry across the Greater Sydney (National Institute of Economic Research 2019-2020).
- NSW Transport Minister has stated that the shutdown will impact 130,000 workers on government transport infrastructure projects.
- Most affected areas are the Wollondilly and Hawkesbury LGAs. About 15% of workers in these two regions are employed in the construction industry.
- The building and construction industry is also the largest employer in Penrith and Camden with more than 1 in 10 adults working in the construction sector.

Monthly change in Australian building approvals

	Private sector houses	Monthly change	Total units approved	Monthly change
NSW	3215	30.1%	6858	12.3%
Vic	4437	-5.0%	5536	-23.5%
Qld	3027	8.3%	3976	-14.3%
SA	1317	2.7%	1492	3.4%
WA	2422	-3.8%	2881	5.5%
Tas	-	-	428	-2.5%
ACT	-	-	-	-
NT	-	-	-	-
National	15063	4.6%	21482	-8.6%

*Source: Australian Bureau of Statistics, Building Approvals April 2021

Adult residents who work in the construction industry, by LGA (%)



Overview of the Construction Industry Shutdown

Shut down period

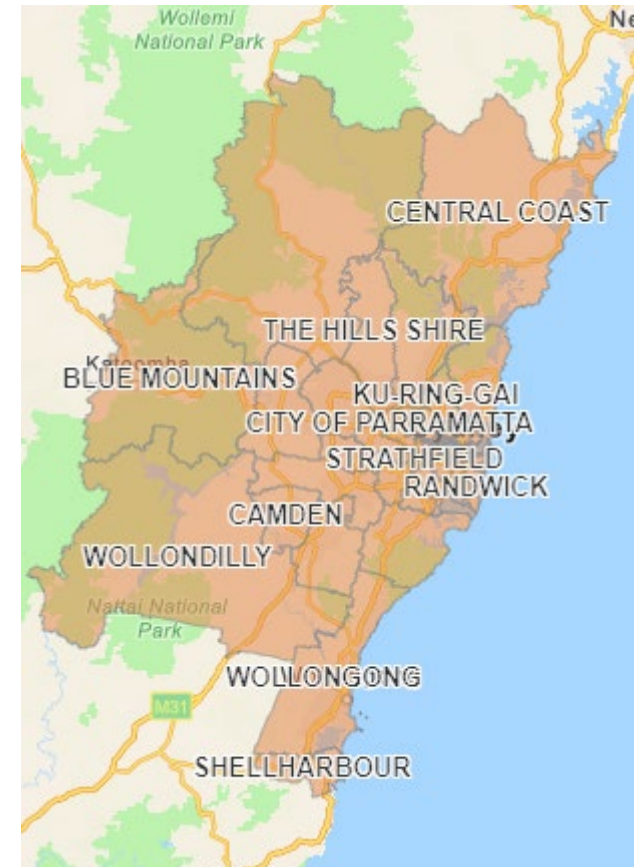
- All construction sites within the “affected areas” are shut down from 19 July 2021 to 30 July 2021.

Affected areas

- Residents in Fairfield, Liverpool and Canterbury-Bankstown LGAs cant leave the LGA.
- Restrictions for residents in Greater Sydney including the Blue Mountains, Central Coast, Wollongong and Shellharbour.

Exemptions to the construction shut down (except Fairfield, Liverpool and Canterbury-Bankstown LGAs)

- Manufacturing
- Hardware and building supplies
- Landscaping material supplies
- Garden centres and plant nurseries



Overview of the Construction Industry Shut Down

What construction work can you still do?

- Construction work outside of Greater Sydney (including the Blue Mountains, Central Coast, Wollongong and Shellharbour).
 - Where travelling more than 50kms outside of Greater Sydney you must get a COVID-19 surveillance test every 7 days– not required to self isolate whilst you wait for the results.
- “**Urgent works**” – which are works:
 - To ensure the safety or security of the construction site;
 - To deal with environmental risks;
 - To maintain and ensure the integrity of critical plant, equipment or assets, including partially completed works, that would otherwise deteriorate;
 - To receive deliveries of supplies that would otherwise deteriorate;
 - To maintain public utilities;
 - To ensure the safe operation of existing transport infrastructure;
 - By or on behalf of NSW Health in response to the COVID-19 pandemic; or
 - Because of an emergency.

QR Codes On Site

- Mandatory from Monday 12 July 2021, for all businesses and workplaces to use the NSW Government QR code.
- This means the NSW Government QR code will also be required for every building site.
- Employees, suppliers, and other visitors will need to use the Service NSW app to check-in.
- Exemptions: some smaller “trades people only projects” in the residential sector.



Contractual Issues



Extensions of time

Extension of time (EOT)

Contractor

- Is there an EOT regime in the contract?
- Does the shutdown give way to a permitted delay event?
- Need to comply with time requirements.
- Beware of time bars.
- Have processes in place to manage disputed EOT claims.

Principal

- Be on the lookout for EOT claims.
- Respond with EOT claims in accordance with the contract.



Delay / disruption costs

- No general entitlement to delay or disruption costs.
- Need to review your contract to determine if there is an entitlement for delay/disruption costs.
- Make sure you claim delay / construction costs in accordance with the contract.
- Principals – be on the lookout for delay / disruption cost claims.



Suspension and demobilisation / site issues

- Most construction contracts will contain provisions setting out the parties' rights and obligations when the principal seeks to suspend the works. This can happen for many reasons.
- Is suspension provided for in your contract?
- If yes, does it apply to an industry wide shutdown due to COVID-19?
- Is the contractor entitled to any relief under the contract as a result of the suspension?
- Incidental costs of suspension - demobilisation / site issues:
 - Removing scaffolding
 - Securing the site
 - Sub-contract break costs



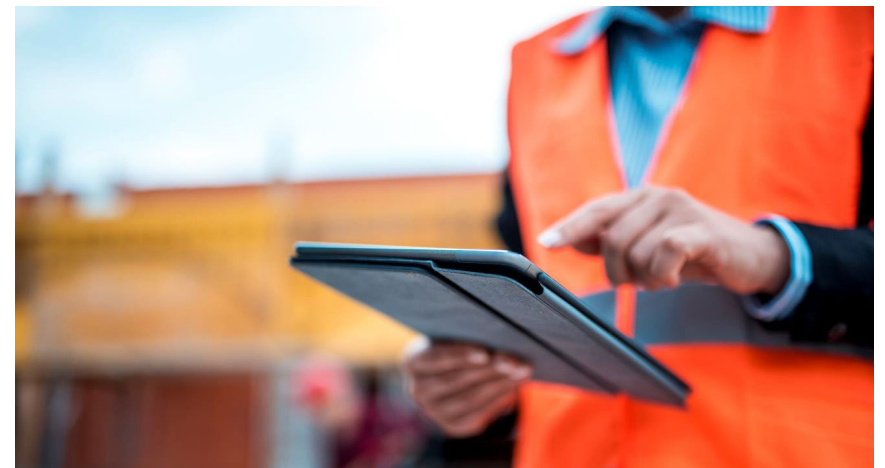
Force majeure issues

- Australian Standard contracts typically do not have force majeure clauses unless they have been amended.
- If there is a force majeure clause - does it cover shutdown due to COVID-19?
- Can you claim time and cost as a result of force majeure?
- Make sure you comply with noted requirements in respect of the force majeure.



Payment obligations

- Payment in the construction industry works on the following basis:
 - Under contract; and
 - Under *Building and Construction Industry Security of Payments Act 1999 (SOPA)*.
- Need to comply with both the contract and SOPA with respect to payment obligations.
- Lodge payment claims in accordance with the contract and SOPA.
- Make sure payment claims are complying with the contract and SOPA.
- Respond to payment claims in accordance with the contract and SOPA.
- “paid when paid” provisions in construction contracts – not enforceable.



Employment Issues



Overview of available Government benefits

Employers

- Business Support Grant.
 - For businesses with turnover between \$75,000 and \$50 million and total wage bill below \$10 million:
 - \$15,000 for a decline in turnover of 70% or more;
 - \$10,500 for a decline in turnover of 50% or more; and
 - \$7,500 for a decline in turnover of 30% or more.
- Jobsaver grant
 - For businesses with turnover between \$75,000 and \$50 million and total wage bill below \$10 million.
 - Decline in turnover of 30% or more.
 - For employing businesses, 40% of weekly payroll (\$1,500 - \$10,000 per week).
 - For non employing businesses, \$1,000 per week.
- Micro business grant
 - For businesses with turnover of \$30,000 and \$75,000.
 - For businesses that provide the primary income source for a person associated with the business (sole trader)
 - \$1,500 per fortnight for a decline in turnover of 30% or more.



Employment issues

Your options where your business is closed or operating in a reduced capacity

- Stand down employees in accordance with either the:
 - provisions in employment contract/enterprise agreement/modern award; or
 - section 524 of the *Fair Work Act 2009* (Cth).
- Invite employees to take paid or unpaid annual leave or long service leave.
- Amendment to Long Service Leave Act 195 (NSW) - relaxed eligibility to take long service leave
- Reduce employees' hours of work by mutual consent; or
- Make employees redundant.

Working from home

- From Wednesday 21 July, up to \$10,000 fine for employers making their employees come into the office where they can reasonably work from home.
- The *Work Health and Safety Act 2011* still applies if workers work somewhere other than their usual workplace – e.g. home.

What to do next



Action items

- Demobilise and secure construction sites;
- Ensure that only “urgent works” are being carried out. Seek advice where you are uncertain;
- **Contractors** - review construction contracts to ensure compliance and to otherwise claim any appropriate EOT and delay costs;
- **Principals** – review construction contracts and develop a strategy for how to respond to any contractors claims (EOT or cost) arising from the shutdown;
- Be on the lookout and be prepared for any payment claims under SOPA;
- Appropriately engage with stakeholders and supply chains; and
- Manage employment issues.



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