

CORONAVIRUS ACT 2020

GOVERNMENT POWERS TO REQUIRE ASSISTANCE WITH DEATH MANAGEMENT EXPLAINED

April 2020

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As the tragedy of the Covid-19 crisis unfolds, the real estate sector should be aware that the Coronavirus Act 2020 includes some important wide reaching powers in Schedule 28 to deal with the increasing number of coronavirus deaths. This is a difficult subject but the powers allow the Government or local authorities to requisition “anything” that could facilitate the transportation, storage or disposal of dead bodies or human remains. This means not only existing funeral or morgue operators, but also potentially any operators of suitable premises and transport/logistics networks as well as other services and facilities could be called on to assist.

In this briefing we discuss the considerations for operators who may be approached by a local authority to assist on a voluntary basis or are issued with a direction under these powers.

CORONAVIRUS ACT PROVISIONS

Below is a summary of how the powers work:

Ascertaining capacity to deal with the transportation, storage or disposal of dead bodies or other human remains

The first formal step in the process is that a local authority may make a request requiring the provision of information about a person’s capacity to deal with the transportation, storage and disposal of bodies. It is a criminal offence to fail to respond to such a notice. Requests must also be treated confidentially without disclosing more widely any of the requested information. Responses must be accurate and made to the identified authority within the specified timescale. It will be important for recipients of communications relating to the above to determine with advisors whether they are exploratory communications or formal steps and directions being taken under the Act.

Power to direct provision of services and premises for death management

If it is deemed that there is insufficient capacity in an area, the Government or a designated local authority can require “a person” to provide services, facilities, premises, vehicles, equipment, or anything else within their possession or control to deal with the transportation, storage or disposal of dead bodies (as well as directing requirements over burial or cremation). “Persons” does not extend to individuals and appears to be aimed at corporate or legal entities.

The power has the potential to affect any operators of a wide range of premises (such as storage and distribution) and transport/logistics networks e.g. ice rinks are being used in other countries as temporary morgues.

In exercising its functions under Schedule 28, a designated local authority or the appropriate national authority must have regard to the effect that any direction is likely to have on the ability of any person to carry on their normal business.

The extent to which these powers are used will be dependent on how the trajectory of Covid-19 deaths continues from here, but clearly the Government has to prepare for the worst case.

How will business operators be compensated?

The compensation scheme has not yet been published, but a party given a direction under Schedule 28 will be entitled to be paid:

- a reasonable sum in respect of anything provided in accordance with the direction;
and
- compensation in respect of:
 - a) any losses;
 - b) any liabilities to pay damages for breach of contract; or
 - c) any other liabilities incurred by the person as a result of the direction.

There is also a general catch-all that the scheme may include provision for payments in respect of other matters, presumably yet to be determined in due course as part of the scheme.

As with any compensation claim, a claimant has the duty to mitigate loss and it is important to maintain records and evidence of losses, expenditure, costs and liabilities to support any claim.

Considerations for affected business operators

Parties affected by such directions will need to establish whether they are acting by agreement or under a direction in order to establish compulsion and whether the compensation provisions proposed to be introduced by Government apply or not.

Where parties are acting on a voluntary basis then it will be important to either establish compensation upfront, or at least the basis of compensation, or alternatively apply the Government scheme by agreement, once the details are known. Difficulties in agreeing matters up front include the lack of clarity over how long the pandemic (and the effect of a direction) will last and what the losses during the period of requisition would be.

Historic approaches to compensation

There is historic precedent for emergency land requisition from World War II. Compensation was provided on the basis of the rental value during the period of possession¹, enabling the loss to reflect the market position including any improvements. Costs for property damage were also paid. Another approach lies in the compensation for temporary possession of land which generally allows for claims for 'any loss or damage arising from the exercise of the power'².

However the Schedule 28 powers are wider than just requisition of land, as identified above. Correspondingly a wider form of compensation factoring in overall business loss for a period of time/closure of the business may be necessary, assuming the business is still operating during the crisis.

Understandably the Government's priority at this stage is ensuring it has the necessary infrastructure in place to deal with the crisis. The relationship between the State and people has necessarily changed beyond anything previously imaginable and these powers are a facet of that new reality. We suggest that anyone receiving communications relating to these powers contact their advisors immediately.

¹ Payable quarterly.

² Usually provided for in the individual enactments authorising temporary possession powers whether Transport Works Act Order, Hybrid Bill or Development Consent Order for example.

Getting in touch

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

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