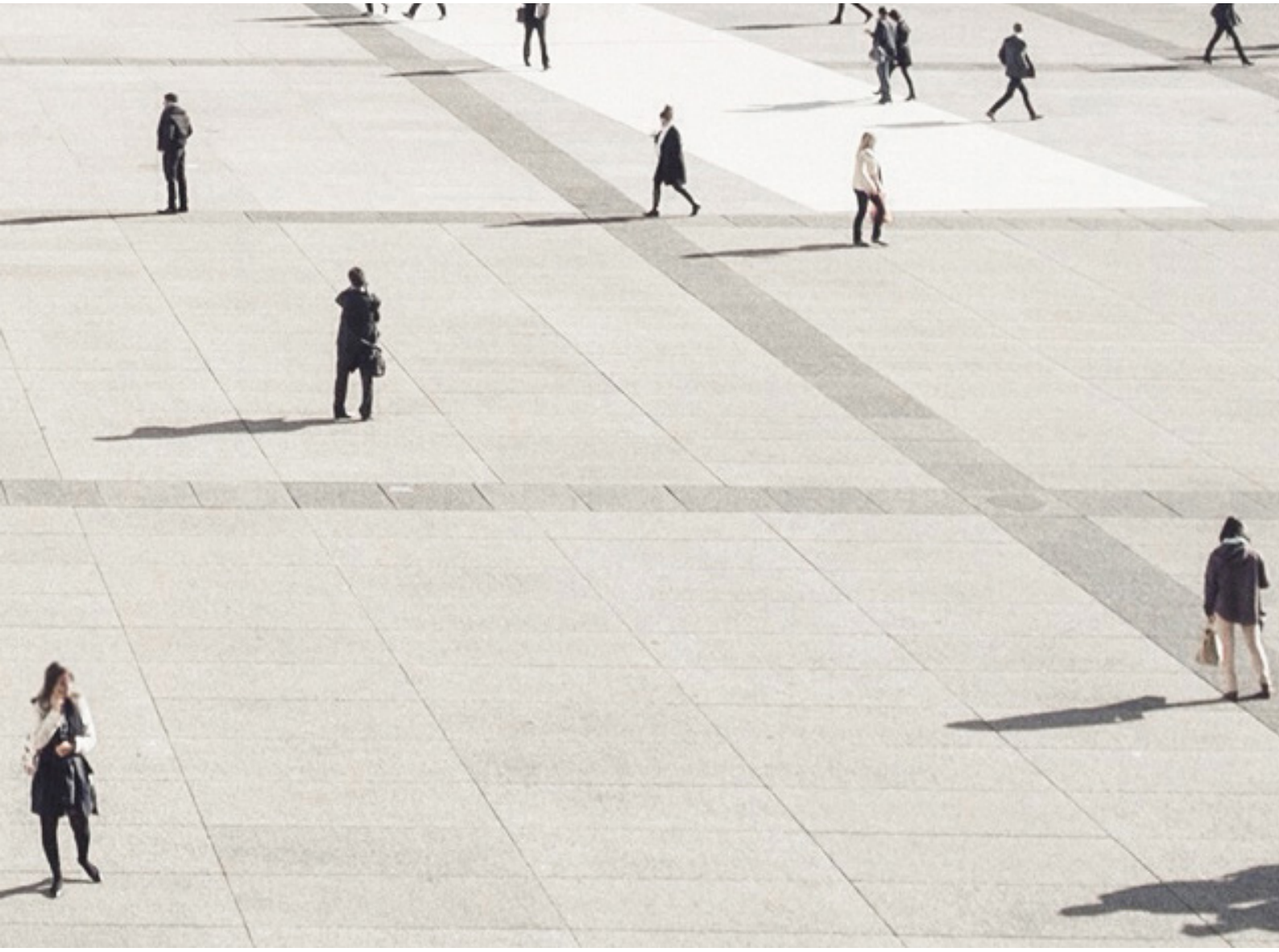

COVID-19: The next critical phase Actions for employers

Insight Employment & Labour

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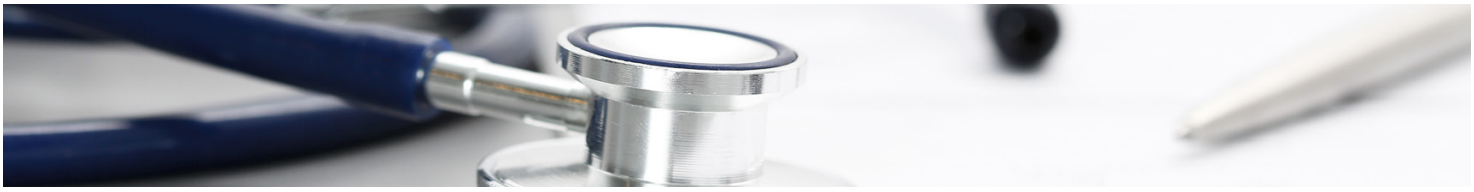
In our Insight article COVID-19: Implications for employers, we provided guidance on the likely safety, employment and labour issues emerging from the COVID-19 outbreak to assist your thinking and planning. The likely issues we identified have arisen and, in many respects, been overtaken. While the full extent of the Federal and State Governments varied approaches to the shutdown of services is not yet clear, one thing is: We are now in the next, critical phase.

In this Insight, we navigate the key safety, employment and labour issues emerging from this next stage to assist in your decision making at this critical juncture.

For other insights on this evolving crisis – including our thoughts on contracting issues, banking and finance concerns, implications for M&A and insolvency issues – please visit our COVID-19 micro-site.



The evolving landscape

The impacts of the COVID-19 pandemic are as unprecedented, as they are uncertain. The number of confirmed COVID-19 cases continues to rise. The focus on suppression and social distancing will continue and gain pace, and move towards further response measures in order to reduce community transmission of the virus.

On 22 March 2020, Prime Minister Scott Morrison announced a series of comprehensive restrictions on non-essential gatherings and services as part of Stage 1 in a national response to COVID-19.[1] This included the decision of the National Cabinet to restrict the opening of certain facilities as from noon on 23 March 2020.

The Prime Minister indicated that these restrictions will be implemented by state and territory Premiers and Chief Ministers through state and territory laws, rather than by the Commonwealth. These laws will be constantly reviewed.

While the Commonwealth does possess broad powers under the *Biosecurity Act 2015* (Cth) to make general emergency requirements and directions to control the spread of COVID-19,[2] we expect these powers to be used sparingly. The only Commonwealth direction issued so far concerns the entry of international cruise ships into Australia.[3]

At this stage, the businesses caught by the restrictions are generally places of social gathering, including pubs, registered and licenced clubs (excluding bottle shops attached to these venues), hotels (excluding accommodation), gyms, indoor sporting venues, casinos, night clubs, restaurants, cafes (except for takeaway and/or home delivery), religious gatherings, places of worship or funerals (in enclosed spaces and other than very small groups and where the one person per four square metre rule applies). Isolated remote community hubs are specifically excluded.

It is important to note that all businesses or undertakings that continue to operate must comply with the 'mass gatherings' laws, which limit indoor gatherings in an undivided space to fewer than 100 people (with density rules for gatherings of fewer than 100 people) and outdoor gatherings to fewer than 500 people.

Each state and territory is moving to clarify that, within their respective state/territory, petrol stations, supermarkets, banks, pharmacies, freight and logistics and home delivery services are able to continue to operate.

We set out a two-step test to check whether your business is required to comply with the shutdown measures:

a. Do you own, control or operate **a business or undertaking which falls within one of the restricted categories** as set out by the relevant Government direction in your jurisdiction?[4]

If so, you must cease business operations within the time specified for your jurisdiction.

b. If your business does not fall within (a), then you must ensure that your business does not allow:
    i. a gathering of 500 people or more in a single undivided outdoor space at the same time;
    ii. a gathering of 100 people or more in a single undivided indoor space at the same time; or
    iii. the density of people in an indoor space to exceed one for every four square metres.[5]

However, the situation is in a constant state of flux. What is not restricted today, will likely change over time with the prospect that the restricted industries or business will broaden. It is also unclear for how long restricted services will be closed, and there may be a staggered resumption to service. At this stage, the Prime Minister has stated Australians should expect the restrictions to be in place for at least six months.

1 Prime Minister, 'Update on Coronavirus Measures', Media Statement (22 March 2020) https://www.pm.gov.au/media/update-coronavirus-measures-220320.

2 *Biosecurity Act 2015* (Cth) ss 477–8. See also *Biosecurity (Listed Human Diseases) Amendment Determination 2020* (Cth) sch 1 s 1, inserting *Biosecurity (Listed Human Diseases) Determination 2016* (Cth) s 4(h); *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth).

3 See *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020* (Cth).

4 See, e.g. *Public Health (COVID-19 Places of Social Gathering) Order 2020* (NSW); Chief Health Officer (Qld), *Non-Essential Business Closure Direction* (23 March 2020); Director of Public Health (Tas), '*Public Health Act 1997* Direction under Section 16' in Tasmania, *Tasmanian Government Gazette*, No 21,954, (23 March 2020), 143, 143–4; Deputy Chief Health Officer (Communicable Disease) (Vic) *Non-Essential Business Closure Direction* (23 March 2020).

5 See, e.g. *Public Health (COVID-19 Gatherings) Order 2020* (NSW); Chief Health Officer (Qld), *Mass Gatherings Direction (No 2)* (21 March 2019); Chief Executive of the Department for Health and Wellbeing (SA) *Mass Gatherings Directions (No 2)* (22 March 2019); Deputy Chief Health Officer (Communicable Disease) (Vic), *Mass Gatherings Direction (No 2)* (21 March 2020); Authorised Emergency Officer (WA), *Mass Gatherings Directions (No 2)* (20 March 2020).

For many employers, decisions made now are about survival. Many employers will need relief from all, or part, of their wages bill for a period of time over the coming months but will also need to avoid the immediate financial impact of large scale redundancy payments. At the same time, they will need to retain their trained and skilled workforce to support operations when the economy begins to recover. Decisions made now will shape the future. The concept of 'business as usual', as we used to know it, is being redefined.

Of course, the decisions businesses make go well beyond safety, employment and labour issues. These are just one part of business continuity issues that demand attention, such as supply chain challenges, intervention of government, disclosure requirements and the overall economic impact. There are also broader issues associated with the solvency of companies, suppliers and customers, and the potential of utilising the safe harbour protections which we discuss in this article. At board level, directors need to be proactive in managing the risks, which include but go well beyond the work health and safety risks we identify in this article.

While not all businesses are facing the same challenges, we have identified six critical safety, employment and labour considerations that we are seeing now and can see on the horizon. There is no playbook for how to deal with the crisis, but in this article we share our thoughts with a view to assisting you achieve the best outcome for you, your people and your business.

Amidst the uncertainty and current difficulties, protecting the health safety and welfare of employees remains of paramount importance and is an overarching consideration for employers. It remains a key issue as the pandemic continues, and we start there.

1 Work health and safety

Employers understand the need to identify risks at the workplace, and do what is reasonably practicable to eliminate those risks or, where this is not reasonably practicable, to minimise those risks. The principal considerations in determining what measures are reasonable include the likelihood of the risk occurring; the degree of harm that might result; and the availability and suitability of control measures.

Assessing risk, implementing appropriate control measures and monitoring the effectiveness of those control measures are tasks that need to be undertaken on an ongoing and regular basis.

The current climate challenges the application of these fundamental principles. We set out below some key issues that we have seen, and foresee, for businesses with respect to workplace health and safety and how they can be addressed.

1.1 Working from home

Workplace health and safety laws do not stop when employees are working from home.

Risk control measures should factor in both physical and psychological health risks. Common issues associated with working from home include:

- workstation set up;
- work hours and breaks;
- physical environment such as heat, cold, lighting, electrical safety, home hygiene and home renovations;
- psychosocial risks such as isolation, reduced social support from managers and colleagues, fatigue, online harassment and domestic violence.[6]

In light of the increasing number of people working from home, state and federal regulators have recently released guidance and checklists to assist employers to manage these risks.[7] Examples of practical guidance includes:

- providing workers with guidance on their workstation setup;
- requiring workers to familiarise themselves with good ergonomic practices, including requiring them to comply with a self-assessment checklist;[8]
- maintaining daily communication with workers through phone or videoconferencing;
- continuing to make support services available, such as employee assistance programs.

In relation to workers who have children at home, it is recommended that they set up their workstation and establish boundaries around work hours. It is also recommended that workers identify any potential distractions so that strategies can be put in place to minimise them. This may include, separating their workstation from the rest of the house.

Ongoing and regular consultation and communication with workers about working from home is important as risks may change over time.

6 Safe Work Australia – Coronavirus (COVID-19): Advice for Employers (20 March 2020).

7 See for example, WorkSafe Victoria – Minimising the spread of coronavirus (COVID-19): Working from home (23 March 2020); and Comcare – Coronavirus (20 March 2020).

8 See for example, Comcare – Working from Home checklist (20 March 2020) https://www.comcare.gov.au/__data/assets/pdf_file/0009/276948/Working_from_home_checklist_20032020.pdf.

1.2 Operational Issues

1.2.1 Health screening

So far, regulators and government have not directed or recommended mandatory health screening of workers for COVID-19 when attending at a workplace. Temperature testing (using non-contact thermometers) is an alternative, less invasive, screening measure which is being trialled in some workplaces as a risk mitigation measure in addition to requiring employees to self-disclose any symptoms.

However, temperature testing is not conclusive. A fever may be masked by medication; not every fever is caused by COVID-19; the virus does not always present with a fever; or a person may still be in the incubation period and exhibit no symptoms (current evidence suggests that a person may spread COVID-19 whilst asymptomatic).[9]

Notwithstanding this, a temperature screening regime may be implemented at a workplace by consent, or as a lawful and reasonable direction of the employer consistent with their work health and safety obligations, subject to meeting legislative and other consultation and privacy obligations (discussed below). Testing should only be carried out by appropriately qualified persons and the legal and practical implications of a positive fever result, in terms of the person's employment, carefully considered.

1.2.2 Social distancing

Social distancing requires less contact between people to stop or slow the spread of infection.[10] For those continuing operations (in full or in part), pre-starts, toolbox talks and trainings still need to be conducted.

As at the date of this publication, social distancing measures require people to keep 1.5 metres between themselves and others, where possible.[11] All discussions that need to occur should take place outside with appropriate distances kept. If conducting discussions outside is not an option, increase the ventilation in the room to the extent possible.

Attendances at such discussions are also typically recorded by each attendee signing a sheet, however to avoid the circulation of paper and pens, one person should be tasked with recording. When workers take breaks, if they can be staggered at different times, they should be. The location of where those breaks are taken also needs to be considered, particularly if they are being taken close or, or near, members of the public.

Some systems of work will necessarily require workers to work in pairs or groups. In these circumstances, alternative controls to social distancing measures will be need to be identified. Personal protective equipment (**PPE**), such as gloves and eye protection could be introduced (if not required already) to prevent the risk of infection. If suitable PPE is not available, or in limited supply, consider whether the work should go ahead at that point in time. Each worker should reconsider sharing tools and equipment with co-workers during this time.

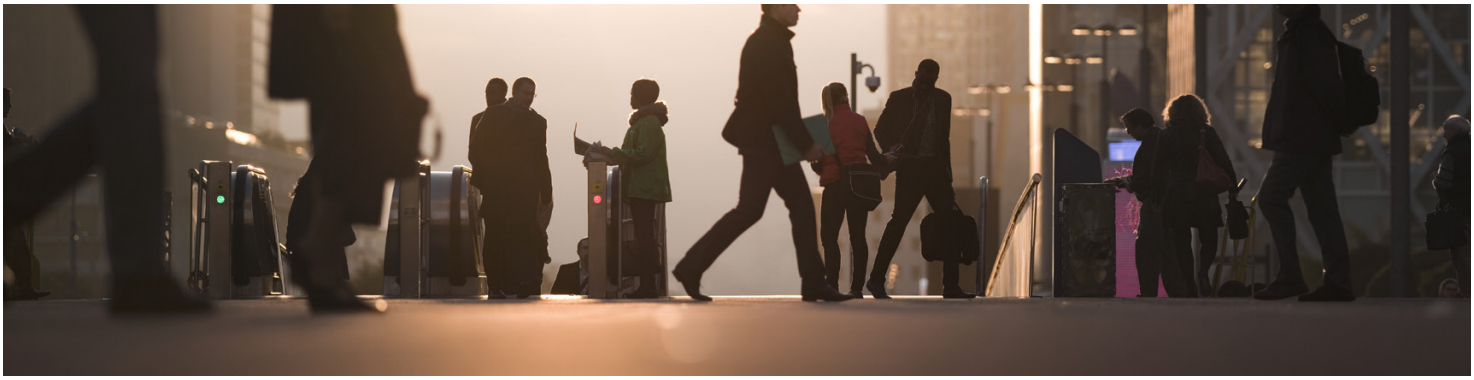
1.2.3 Masks

The national policy body for work health and safety, Safe Work Australia, provides that masks are not currently recommended for people who are healthy to prevent infection; masks are only helpful in preventing people who have COVID-19 from spreading it to others.[12] This advice is consistent with the Commonwealth Department of Health, which adds that masks are also helpful for health care workers in frequent, close contact with those infected.[13]

1.2.4 Barriers with members of the public

For some workers facing members of the public, particularly in food and retail, social distancing measures may be difficult to maintain. Floors can be marked to demonstrate how distances need to be kept or alternatively, temporary physical barriers could be introduced. Temporary physical barriers also assist with any potential for violence, abuse or aggression from members of the public. The need to exchange cash should also be limited or removed.

9 Symptoms of COVID-19 and how the virus spreads, healthdirect.gov.au, (23 March 2020).
10 Australian Government – Department of Health, Social Distancing Guidance (23 March 2020).
11 Announcement by the Prime Minister (22 March 2020).
12 Safe Work Australia – Coronavirus (COVID-19): Advice for Employers (20 March 2020).
13 Australian Government – Department of Health, Information on the Use of Surgical Masks (23 March 2020).



1.2.5 Communication on site

As the crisis rapidly evolves, it necessitates constant communications with the workforce. Communications provided on site need to be suitable, adequate and readily understandable to each worker receiving it. This needs to take into account the language skills of employees. In certain circumstances, signage and pictographs may need to be used – whatever is considered effective.

1.2.6 Chain of responsibility

The duties on those in the chains of responsibility under Heavy Vehicle National Laws continue to apply in circumstances where there is heightened pressure on the transfer of certain goods, within each state and territory and across borders.[14] The management of fatigue, speed, mass dimension and load restrictions for drivers is essential for safe transport.

1.2.7 Management of workplaces

The evolving nature of workplaces during this period means those in management need to review how they will manage risks to health and safety at those workplaces, including access and egress. A practical approach to those working at home may be adopted, but for many still in an office, adequate and accessible facilities still need to be maintained. Where there are lifts, limits as to the number of people who can travel in them at any one time should be considered.

There also may be some parts of a workplace where entry needs to be limited or closed. Emergency plans, particularly for multiple workplaces in a building, still need to be effective, resourced and executable in the event of an emergency.

When there are multiple workplaces in a building, consultation needs to occur about how the risk is being managed and reporting lines need to be clear for when there is an escalation of the risk.

1.3 High Pressure Environments

1.3.1 Fatigue and workload

In some industries, COVID-19 has resulted in unusually high levels of work for some employees and contractors, who are being required to work additional hours and extra shifts. Aside from ensuring working hours are reasonable, and in line with any applicable industrial instrument or governing contract, organisations need to identify any risk to the health and safety of their employees and contractors and eliminate or minimise such risks.

If this is a risk for your workplace, as a result of consultation appropriate control measures may require greater management oversight in relation to actual hours worked, ensuring workers are taking scheduled breaks and there are adequate gaps between working days or shifts. This could also require additional check-ins with staff working remotely, when workload is not able to be easily assessed.

During this time, your organisation's usual alcohol and drug use policies should continue to be followed and applied.

14 For updates on restrictions to cross-border movements, visit the National Heavy Vehicle Regulator's website.

1.3.2 Aggression or violence

As COVID-19 escalates, understandably people may become anxious or overwhelmed. Less understandably is where this translates into aggression or violence, as we have recently witnessed in the retail and health care industries.

As most organisations will have some degree of contact with third parties, a risk assessment should identify the likelihood of employees and others within your workplace being exposed to this risk. If a risk is identified, organisations should consult with those in the workplace to determine appropriate control measures that can be put in place.

Depending upon the nature of your business, this could include the implementation of a greater level of security support. For example, by providing additional security on site or security contacts, additional surveillance, limiting exposure to third parties through reducing access to your workplace to essential visitors or encouraging use of remote contact. We appreciate this may not be appropriate for all workplaces, but employers should consider control measures that are suitable to their workplace and workforce.

In relation to aggression or violence between employees and/or contractors, your organisation's usual policies and procedures will continue to apply and should be followed.

1.3.3 Psychological considerations

In addition to the physical risks arising from a high pressure working environment (which can also lead to psychological risks), the uncertainty created by COVID-19 also has the potential to create significant psychological risks in your workplace. Such fears may be as a result of working in isolated environments, or fears associated with stand downs (discussed below) and redundancies. The reality is that this is a period of heightened anxiety and immense uncertainty. The psychological risks are real.

Upon identifying key psychological risks and consulting with workers, control measures might include the provision of additional information and updates regarding your workplace on a regular basis. For example, through scheduled team meetings or by a daily update email, promoting exercise (to the extent possible) and providing resources to encourage care for mental health (for example, meditation and mindfulness guides), and regular individual check-ins conducted by direct managers.

Regard should also be had to any individual circumstances of workers which may make them more susceptible to psychological risks, resulting in the need for additional control measures.

Employee assistance programs should remain available to workers during this time, with use encouraged and contact details made easily accessible. We recommend sending reminders about these services to all workers if this has not been done already.

2 Standing down employees

The concept of 'stand down' without pay was historically considered of mutual benefit for employers and employees as it was seen as a preferable alternative to termination of employment. True to its purpose, we are seeing the option of stand down without pay as a viable, and necessary, step for many employers.

While it is always an exploration of the facts, the legal bar for employers to jump over before a stand down situation is available has been set high. The height of this bar is likely to be tested over the coming weeks and months and we expect to see the traditional focus of standing down "blue collar" workers expanding to the office environment.

2.1 Legal framework – an overview

The power to stand down employees without pay is derived from the Fair Work Act 2009 (Cth) (**FW Act**), enterprise agreements and contracts of employment.

Industrial instruments and employment contracts take precedence over the FW Act: i.e. an employer cannot rely on s 524(1) of the FW Act to stand down employees where an agreement or contract contains provisions on stand down.[15]

Accordingly, the starting point for employers is reviewing the applicable industrial instruments and contracts of employment. In the event the industrial instrument does not contain a stand down provision, employers can rely on the FW Act.

Employers must ensure that each of the three limbs under s 524(1) is satisfied. An employer may stand down an employee:

a. during a period in which the employee **cannot usefully be employed**;
b. because of a **stoppage of work** for any cause;
c. for which the employer **cannot reasonably be held responsible**.

15 S 524(2) of the FW Act.

Timing is critical. Employers must ensure that stand downs are not commenced until work at a particular worksite has stopped (for a reason for which employers cannot reasonably be held responsible) and it is satisfied that the affected employees cannot be usefully employed.

Stand downs will be closely scrutinised and likely to be challenged if not implemented in accordance with the applicable legal obligations. If a stand down is found to be unlawful, employers could be ordered to back pay their employees and the employees may have a right to return to 'useful' work.

2.2 Key elements under the FW Act

2.2.1 Cannot usefully be employed

Whether an employee can or cannot be usefully employed is a question of fact, and the onus will be on employers to prove that fact. The stand down will be unlawful if it is found that employees were stood down for convenience when there was in fact work for them to do.

A general reduction of work is not sufficient to stand down employees.[16] Whilst a reduction of work may meet the threshold for redundancy, the test for stand downs is whether the employee can be usefully employed.

The case law reveals that a fertile ground for challenge to a stand down relates to the concept of 'useful employment'. Accordingly, demonstrating that stood down employees cannot usefully be employed should be approached at a forensic level, commencing with relevant classes of employees and drilling down to individuals, if necessary, in particular circumstances.

The presence of third party labour is relevant in this context. There is no absolute requirement that all third party labour must cease before standing down direct employees but the ability and consequences of employees performing work of contractors and labour hire staff must be carefully considered and evaluated, as this will be the starting point for unions in particular.

2.2.2 Stoppage of work and cause

The stoppage of work must be for a cause for which the employer cannot reasonably be held responsible. For example, this will be the case if an employer had to cease operating at a particular site due to the direction of government or a result of measures imposed to manage the COVID-19 crisis more generally (e.g. the closure of non-essential services). In these circumstances, there will be work that simply stops through no fault of the employer.

On the other hand, if an employer was to purport to stand down employees because it was seeking to manage costs in light of an overall slow-down in business, this may not satisfy the requirement. There will inevitably be, in the current crisis, instances where an employer will understandably need to take steps to stop the relevant work on economic grounds. Careful consideration will need to be given to the narrative to support a stand down in such circumstances.

There must also be a 'temporal connection' between the 'stoppage of work' and the stand down.[17] Employers should ensure they do not stand down employees before the 'stoppage of work' commences.

2.3 Consultation and union/employee engagement

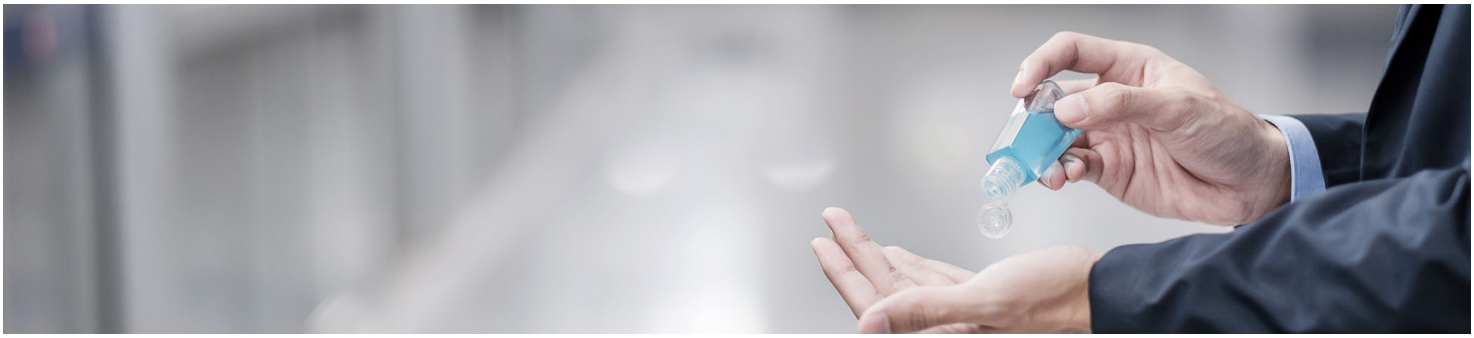
As a general rule, the concept of 'workplace consultation' does not fit comfortably with the implementation of a stand down of employees. Any legal requirement to consult will arise from applicable modern awards and enterprise agreements in the context of a 'major change'.

Close consideration should therefore be given to the terms of the consultation clauses within the relevant industrial instruments. There is a sound argument that consultation is not required, in which case employers should approach the communication and implementation phases as largely an engagement exercise (rather than consultation strictly) to ensure employees and unions are fully informed of the decision, its reasons and implications.

Outside of the 'consultation' space, it would be prudent for employers to begin proactively engaging with relevant unions (and their workforces) in any case in order to mitigate risks of industrial unrest moving into the peak period of COVID-19 related disruption.

The risk assessment around 'consultation' must be viewed in the context of timing considerations, balanced against the consequences of any breach (i.e. orders from the Fair Work Commission or the courts interfering with the implementation of the stand down).

16 *Bristow Helicopters Australia Pty Ltd v Australian Federation of Air Pilots* [2017] FWCFB 487.
17 *CEPU and AMWU v FMP Group (Australia) Pty Ltd* [2013] FWC.



2.4 Other considerations

In addition to the safety concerns we identified above and the need for ongoing communication and access to support, there are other options that may be viable depending on the business situation.

2.4.1 Leave entitlements and payroll

Employers should consider allowing employees to access accrued annual and long service leave during any stand down to mitigate the impact of employees not being in receipt of payment. This will not be a controversial position for employers to adopt.

The position with respect to accessing personal leave whilst stood down is far less clear. An employer can clearly decide to permit employees to utilise personal leave when satisfied that the relevant triggers have been met. However, there are cogent arguments to support an employer taking the view that employees are not entitled to access personal leave in such circumstances. The same might be said for payment for public holidays.

Stand down periods also count as periods of service under the FW Act. Accordingly, employees are entitled to continue to accrue service-based leave during a period of stand down.[18]

Close co-ordination will be required between operational managers and payroll teams to ensure wages and leave entitlements are paid and ceased at the appropriate times. It will be difficult, in the circumstances, to claw back any overpayments.

2.4.2 Releasing employees from conflict of interest prohibitions in employment contract

Employers may wish to consider writing to particular cohorts of employees to confirm that they will be free (within reasonable bounds) to seek alternative casual work during the period of any stand down. We have already seen this occur in the context of recent high profile stand downs.

3 Navigating the contract of employment

Another option to minimise the stand downs (if available), and redundancies, is to renegotiate employee salaries and working hours with their employees.

In doing so, it is important to remember that employers may not unilaterally impose changes to employee hours, salaries, or other material contractual entitlements, without employee agreement. Doing so would constitute a repudiation of the contract of employment and expose employers to risk of a breach of contract claim.

In our experience, however, at a time of crisis employees are prepared to engage with the idea of varying a contract to protect their employment, and contribute to maintenance of the business.

3.1 Implementing variations

Any variation to the contract of employment should preferably be recorded in writing (noting that contracts of employment often require that any such variation be made in writing in order to be effective).

Subject to any express written terms of the contract, contractual variations may also occur by conduct. For instance, an employer may advise that it proposes to reduce an employee's working hours by 50%, with a commensurate reduction in salary and, should the employee elect to continue working in accordance with these terms, then the employer will take the employee to have accepted the contractual variation. However, this approach involves a higher degree of risk and ought be approached with caution.

Any reduction in remuneration must not fall below the relevant minimum required under a modern award, enterprise agreement or the National Minimum Wage (as applicable).

Some employees may refuse to agree to contractual variations that result in a diminution of wages and conditions. The harsh reality is that this may lead to the need to terminate the employment. Whether the termination is effected by giving notice under the terms of the contract, or by way of redundancy (if applicable), should be determined on a case by case basis.

18 See s 22(2) of the FW Act.

3.2 Executives: Bonuses and other contractual entitlements

Executive employees are often eligible to participate in bonus, commissions, and incentive payment schemes. In the absence of terms to the contrary, an executive's entitlement to a bonus or incentive payment will generally not be contractually enforceable. However, employers should carefully review each executive contract to determine whether or not the executive's bonus entitlement is contractually enforceable or not.

Where executives do enjoy a contractual entitlement to a bonus or incentive payment that the employer wishes to vary in order to reduce cost pressures, this should be approached by way of renegotiation with the individual executive. Again, it is not open to an employer to simply refuse to pay a bonus to which an executive is otherwise contractually entitled.

More often, executive contracts contain an entitlement to participate in discretionary bonus or incentive payment schemes, on terms that may be varied by the employer in its sole discretion. Employers should therefore also give consideration to the variations that may be required in light of the COVID-19 crisis.

In all cases, employers must avoid decisions in relation to bonuses that may be characterised as capricious, arbitrary or unreasonable. In the present crisis, this risk is best navigated by clear communications with eligible employees concerning any revisions to the eligibility criteria for bonuses and incentive payments.

3.3 Legal risks

Enforcing changes to wages or working hours without agreement presents risk that the employer will have repudiated (breached) the contract of employment by imposing unilateral changes to a material term of the contract.

In the case of a repudiation, the employee may accept the repudiation, bring the contract of employment to an end and pursue a breach of contract claim, with damages in the form of unpaid remuneration, notice, redundancy pay, or contractually enforceable bonuses, commissions, or other entitlements.

Unilaterally changing employee contracts also gives rise to risk of:

- An unfair dismissal claim (for eligible employees) or an adverse action claim on grounds of constructive dismissal; and
- Invalidation of post-employment restraints of trade and other post-employment obligations.

In our experience, these are risks that are manageable with clear communication as to the reasons for any proposal as part of a broader strategy to work through the crisis.

4 Alternative labour strategies

In many situations, an employer will not have the option of instituting a formal stand-down because, for example, there is not yet a stoppage, or some employees may be 'usefully employed'. In other situations, negotiating a reduction in salary or wages will not save the business, even where it is agreed, noting that there remains the requirement to pay employees in accordance with the minimums contained in an industrial instrument or the National Minimum Wage.

So in the absence of a formal 'stand down', or a capacity to sufficiently reduce the salary and wages of employees, what are the options for an employer to be relieved of their labour costs for a period, keep their workforce and avoid large scale redundancies?

4.1 Agreed leave of absence

It is open to an employer to make an agreement with all or some of its employees to take a period of leave without pay (**LWOP**). In effect this would be an 'agreed' stand down. Additional considerations will apply for employees who are covered by an award or enterprise agreement, and these are discussed below.

Effective and honest communication with the workforce and unions (where relevant) will be critical. It will therefore be important that an employer has a clear plan in place as to how an agreed LWOP arrangement will be implemented. Employees will need to understand what the business is trying to achieve, what the options are, and what impacts a period of LWOP will have on them.

4.1.1 Agreement for LWOP

The following considerations will apply:

1 Employees might first be provided with the opportunity to take accrued annual leave and long service leave (including at half pay) before any period of LWOP takes effect. For businesses seeking to avail this option, paid personal/carer's leave is not a realistic option and hence it should be made clear that it will not be available during the period of LWOP.

2 Continuity of service will not be broken by the period of LWOP. However, under FW Act a period of unpaid leave, such as LWOP does not count towards service. As such, serviced-based leave entitlements would not accrue during a period of agreed LWOP. The Company could agree to allow employees to accrue service-based leave during the period of LWOP. This would be consistent with the position if the employee was subject to a formal stand down under the FW Act, an enterprise agreement or contract of employment;

3 It will also be important that employees understand that as they will remain an employee of the Company:

   a. they will likely not have access to the government Fair Entitlements Guarantee scheme, including in respect of wages not paid during the period of an agreed LWOP arrangement;

   b. the company may still be required to make their position redundant during the period of LWOP, or at the end of that period.

4 An agreement with an employee to take LWOP should be in writing and signed by the employee. The LWOP agreement should reflect and record the above principles. The LWOP agreement could also:

   a. include an option that the employee may apply to the Company for a voluntary redundancy package during the period of LWOP;

   b. include an option that the employee is free to accept alternative employment during the period of LWOP, subject to the employee maintaining their obligations with respect to confidential information and being available to return to duties at the end of the period of LWOP.

5 The Company will need to communicate with employees during a period of LWOP. This will be important for practical matters, but also to monitor the employees' health and wellbeing during a time of heightened anxiety.

6 The Company should nominate a contact number and email address for those employees who have questions during a period of LWOP.

7 The Company should maintain employees' ability to access employee assistance programs during the period of LWOP.

8 Employees will also need to understand what will happen if they do not agree to a period of LWOP. Will that mean redundancy, and what if some agree to take LWOP and others don't? One of the many difficult considerations for employers will be whether to adopt a 'one–in-all-in approach', or whether the employer can manage a situation where some employees to take a redundancy and others go on LWOP.

9 The Company will also need to determine what, if any staff, it requires during the period of LWOP and have a clear explanation as to why employees will remain working in particular positions. It may be appropriate for some employers to consider a worker rotation system.

Some additional considerations apply for employers who have employees covered by modern awards and enterprise agreements.

4.1.2 Consultation and notice obligations

A proposal that a large number of employees take a period of LWOP might be considered a major change for the purposes of the consultation clause in an industrial instruments. Therefore, employers who wish to enter into LWOP arrangements, with all or part of their workforce, should carefully review the consultation obligations arising under any applicable industrial instruments.

If the consultation obligation was triggered, in one sense, the act of discussing the proposal and seeking agreement will meet the consultation requirements in any event. However, in those circumstances, employers will also need to be mindful of when the obligation to consult arises and that employees are entitled to be represented for the purposes of consultation and their proposals considered.

Employers should also consider whether there are any provisions regarding change to rostering arrangements which need to be addressed under applicable industrial instruments, and whether there are any terms that would prevent the employer and employees entering into agreed LWOP arrangements.

4.2 Is variation or termination of an enterprise agreement a viable option?

More generally, an employer could consider whether it is necessary (and industrially possible) to vary the enterprise agreement in accordance with the FW Act to:

- include a term that permits the employer to stand down employees who are covered by the enterprise agreement in terms which address the current circumstances faced by the operation; and/or
- to remove provisions that impose onerous obligations on the employer, which, if the employer was relieved from those obligations, may supply some necessary relief;
- reduce wages or other costs to the business;
- remove any provisions which would prevent the ability to enter into agreed LWOP arrangements or include any provisions which would facilitate such arrangements.

Employees can be asked to approve a variation to an enterprise agreement by voting for it. The variation to the enterprise agreement will be made when a majority of the affected employees who cast a valid vote approve the variation. The employer must then apply to the Fair Work Commission to approve the variation within 14 days of the variation being made.

The process of seeking a variation to an enterprise agreement will take some time and therefore not provide immediate relief. The Fair Work Commission has advised that it is putting in place arrangements to deal with an anticipated surge in requests to vary enterprise agreements. However, there are numerous pre-approval steps and requirements that the Fair Work Commission must be satisfied are met before it will approve the variation. As is the case when seeking approval of an enterprise agreement, these must be carefully navigated to avoid delays which in the current environment could negate the purpose of seeking the variation.

The Fair Work Commission can also terminate an enterprise agreement either by agreement of the employer and employees, or on application by the employer, employees or relevant union after the enterprise agreement has passed its nominal expiry date.

Is this a mechanism to provide an employer with relief from onerous obligations set out in enterprise agreements? The process and potential challenges from employees and unions, mean that this option is also unlikely to provide immediate relief to business.

Further, in the event that an enterprise agreement is terminated by the Fair Work Commission, the provisions of the underlying modern award will apply. The obligation to pay wages will continue and some employers may confront new administrative challenges in having to operate under the modern award.

5 Safe Harbour

For directors of many companies in crisis, the only viable path is to place the company into external administration. To do otherwise exposes the directors to the risk of insolvent trading.

Directors may be held personally liable for debts incurred by a company while that company is insolvent. While there are certain defences available to directors, section 588GA of the *Corporations Act 2001* (Cth), introduced a new defence for such personal liability known as 'safe harbour'. The defence is available to a director provided the director can demonstrate that the elements of safe harbour have been satisfied.

On 22 March 2020, in response to the adverse economic affect the coronavirus is having on businesses throughout Australia, the Federal Government released a statement entitled 'Temporary relief for financially distressed businesses' in which it stated: "directors will be temporarily relieved of their duty to prevent insolvent trading with respect to any debts incurred in the ordinary course of business". It is designed to relieve a director of the personal liability that would otherwise be associated with insolvent trading and will apply for six months.

However, at this point the legislation has not been enacted and it does not absolve directors from their statutory duties under section 180 and 181 of the *Corporations Act*. Therefore, from the perspective of a director of a company encountering financial difficulties caused by the coronavirus, serious consideration should be given to satisfying the requirements of the safe harbour legislation.

In the context of COVID-19, a safe harbour plan may consist, for example, of an accountant confirming that – if the workforce is effectively stood down for six months (thus preventing employee entitlements from becoming due and payable) – the financial landscape at the end of that six-month period (based on historical financials) would place the business back into solvency and perhaps profitability.

Many of the options outlined in this article are squarely in play, although properly utilising safe harbour laws requires careful and considered planning. Amongst other matters, it is imperative that the company has substantially complied with its obligations to pay employee entitlements as they fall due, as well as its taxation obligations.

6 Privacy

Employers understand the need to handle personal information appropriately, and we recommend having a management plan in place in response to COVID-19 that respects employees' privacy by limiting the collection, use and disclosure of personal information to what is necessary to manage the risks to health and safety associated with the virus. But what does that really mean?

As the COVID-19 pandemic has chartered untested employment issues, so it is that it raises difficult and fraught privacy issues. Our thoughts on the common questions we are seeing are below.

6.1 Testing: Should we require staff to undergo testing for COVID-19, and can we ask for the results?

Although it goes without saying, first and foremost you should follow government health guidance at all times and seek medical advice where necessary.

For employees displaying virus symptoms, our recommendation at this stage is to ask those individuals to take personal leave where they are unwell or work from home as appropriate. Employees should then seek their own medical advice about whether testing is necessary. At present, the testing is limited to individuals assessed as being high risk (e.g. individuals who have recently returned from overseas or have had close contact with a confirmed case).

As we discuss above, some employers are arranging temperature testing as part of their risk considerations.

If employees are tested, in the circumstances we consider it is reasonable to ask the employee to provide you with their test outcome. Such information should be stored securely and with access restricted to HR and senior management.

6.2 Confirmed cases: If we are notified that one of our employees has tested positive for COVID-19, what type of information can we share and with whom? Should we send an office-wide communication?

In the event of a confirmed case, you should immediately seek advice from health authorities. The communication requirements will depend on the circumstances and should be informed by medical advice. However, the *Privacy Act 1988* does not prevent the sharing of critical information to manage the spread of the virus.

As a general proposition, we recommend being transparent with employees and providing regular updates about the company's approach to these matters, along with the latest developments. While certain information about the affected employee's situation can be disclosed, it does not mean you can disclose any information about an employee who has tested positive.

It will be necessary to adapt the information provided to suit the audience. More detailed information will need to be provided to those employees who have been in close contact with a confirmed case, so that consideration can be given to whether they may need to undertake testing.

However, unless there is medical advice to the contrary, the identity of the affected person should not be the subject of a company-wide communication or a communication beyond those that 'need to know'. That information should be limited to those people who might be at high risk as a result (i.e. those people with whom the affected person had close contact) and disclosed in confidence. Where possible, the proposed communication should be discussed with the affected person before their personal information is disclosed.

6.3 Showing symptoms: If an employee has symptoms consistent with COVID-19, or is being tested for the virus (but before we know the results), with whom can we share this information?

Again, it is important to consider each case on its merits.

Generally speaking, unless there is a particularly high risk associated with an individual and you receive medical advice that the information should be shared with others, we consider that it is not reasonable or necessary to tell other team members that an employee has reported symptoms consistent with the virus.

However, if an employee has been advised by a medical professional that they are in a high-risk category and need to be tested, we are of the view that this information can be treated in the same way as information relating to the positive testing of an employee (as mentioned above).

To reiterate, you should not disclose more information than is reasonably required and only disclose specific details as necessary.

6.4 Working remotely: How can we protect personal information when working remotely?

Some tips to secure and protect personal information include:

- securing mobile phones, laptop, and storage devices;
- increasing cyber security measures in anticipation of higher demand;
- ensuring the storage of devices in safe locations;
- applying multi-factor authentication for remote systems access;
- using only trusted networks and services; and
- ensuring all devices, networks and firewalls are current.

Contacts

John Tuck
Partner

+61 3 9672 3257
+61 434 181 323
john.tuck@corrs.com.au

Paul Burns
Partner

+61 3 9672 3323
+61 417 325 009
paul.burns@corrs.com.au

Heidi Roberts
Partner

+61 3 9672 3562
+61 487 326 643
heidi.roberts@corrs.com.au

Stephen Price
Partner

+61 2 9210 6236
+61 418 115 145
stephen.price@corrs.com.au

Jack de Flamingh
Partner

+61 2 9210 6192
+61 403 222 954
jack.de.flamingh@corrs.com.au

Nicholas Ellery
Partner

+61 8 9460 1615
+61 417 505 613
nicholas.ellery@corrs.com.au

Nick Le Mare
Partner

+61 7 3228 9786
+61 428 556 350
nick.lemare@corrs.com.au

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