



COVID-19, BACK TO WORK AUSTRALIA



AUSTRALIA

Despite some initial delay, Australia reacted relatively quickly to the COVID-19 crisis with both the industrial tribunals and the government introducing changes to allow business to change and cope with increasing restrictions and the need to make changes to allow businesses to cope with a significant downturn in the economy. The public health restrictions included limits on non-essential travel (for most businesses, this included the inability to travel to work) and this meant a major shift for many employers to a majority of employees working from home, bringing issues of supervision, technological control, privacy issues and safety obligations in ways not previously experienced. The economic impact has been significant and is likely to be felt for a number of years. For many businesses, there has been reduced income (sometimes no income) and continuing expenses such as rent and outgoings, meaning that wages have been impacted, job losses increased, and an increased reliance on government support. The material below outlines the position but as public health measures have so far proved successful, the legal position is rapidly changing as governments ease restrictions in an effort to return the economy to previous levels.

For further background of Australia's response to the COVID-19 crisis, we refer to our previous L&E article: ***Australia: Variations to Modern Awards and Introduction of the JobKeeper Scheme in Response to Serious Industry Concerns During the COVID-19 Crisis***

I. EMERGENCY MEASURES

DECREES, ORDERS OR GUIDELINES IN EFFECT AND PERTAINING TO REOPENING FACILITIES.

The position on reopening facilities depends on the State or Territory in which the business is located. Further, the position is changing rapidly, for example, NSW has recently announced a planned easing of the position so that by July the

only restrictions on some businesses will be that the "social distancing" rules must be observed (1.5 metres apart for non-household members, with 4 square metres of space per person determining the maximum capacity of a venue). Some restrictions (for example, limits on numbers attending funerals) have been lifted with immediate effect (again, social distancing still applying). As of the morning of 12 June 2020 the following restrictions applied:

- a.NSW:** In cafes and restaurants up to 50 people can dine-in, as long as businesses observe the four square metre rule (maintaining an area of four square metres per person). Hairdressers, nail, waxing, tanning and beauty salons can open to 10 customers at a time. Gyms and fitness centres are prohibited from opening.
- b.Victoria:** In cafes and restaurants up to 20 people can dine-in, as long as businesses observe the four square metre rule, with tables being spaced 1.5m apart. Hairdressers, nail, waxing, tanning and beauty salons can open to 20 customers at a time. Gyms and fitness centres are prohibited from opening.
- c.Queensland:** In cafes and restaurants up to 20 people can dine-in, as long as businesses observe the four square metre rule. Beauty therapy, tattoo parlours, spas, and nail salons can open to up to 50 people at a time. Gyms and fitness centres allowed to reopen to 20 people in each facility.
- d.Tasmania:** In cafes and restaurants up to 10 people can dine-in, as long as businesses maintain four square metre rule. Only hairdressers and barbers can open. Gyms and fitness centres are prohibited from opening.
- e.Western Australia:** In cafes and restaurants up to 20 people can dine-in, as long as businesses observe the four square metre rule. Only hairdressers and barbers can open. Gyms and fitness centres allowed to reopen to 20 people in each facility.
- f. South Australia:** In cafes and restaurants up to 80 people can dine-in, as long as businesses observe the four square metre rule. Hairdressers, along with beauty salons, nail and tattoo parlours can all reopen. Gyms and fitness centres allowed to reopen to 20 people in each facility.



g. Northern Territory: All businesses allowed to reopen with a COVID-19 plan. Hairdressers, along with beauty salons, nail and tattoo parlours can all reopen. Gyms and fitness facilities allowed to operate.

h. ACT: In cafes and restaurants up to 20 people can dine-in, as long as businesses observe the four square metre rule. Hairdressers, along with beauty salons, nail and tattoo parlours can all reopen. Gyms and fitness centres allowed to reopen to 20 people in each facility.

OPTIMAL APPROACH TO KEEP TRACK OF THE LATEST UPDATES.

- a. The Fair Work Ombudsman is a key resource for information about workplace entitlements and obligations during the COVID-19 crisis.
- b. Safe Work Australia, the Australian Government’s statutory agency tasked with improving work health and safety and workers’ compensation arrangements across Australia, has collated industry-specific information and resources for employers during the COVID-19 crisis.
- c. The National COVID-19 Coordination Commission has introduced an Online planning tool to help business develop a plan to keep their workers, customers and the community safe as they reopen or increase their activities in the weeks and months ahead.
- d. The Department of Health is providing up to date news and alerts on COVID-19, specifically targeted towards the Australian Government’s responses and initiatives.

II. STATE AID

GOVERNMENT SUBSIDIES AND SPECIAL RELIEF RESOURCES ALLOCATED TO SUPPORT EMPLOYERS, AND WORKERS, IN THEIR EFFORTS TO MAINTAIN EMPLOYMENT AND PULL THROUGH THE CRISIS.

a. The Fair Work Commission has, on application by the parties, introduced variations to some industry-specific Modern Awards, for example, the Hospitality Industry (General) Award 2010,

the Clerks – Private Sector Award 2010, and the Restaurant Industry Award 2010. The variations provide increased flexibility for employers and employees during the COVID-19 crisis, including allowing for flexible “working from home” arrangements, leave entitlements and work hours.

- b. On 8 April 2020, the Australian Federal Parliament passed the Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020 (Cth) and the Coronavirus Economic Response Package Omnibus (Payments and Benefits) Act 2020 (Cth), introducing temporary amendments to the FW Act to allow employers to change workplace arrangements and claim “JobKeeper payments”, this being a fortnightly \$1,500 JobKeeper payment for each eligible employee, until business conditions improve.
- c. On 8 April 2020, the Fair Work Commission varied 99 awards by inserting a new Schedule dealing with “Additional measures during the COVID-19 pandemic” under section 157 of the FW Act. These variations entitle employees to take two weeks unpaid pandemic leave if required, by government or medical authorities or acting on medical advice, to self-isolate or is otherwise prevented from working by measures taken by the government or medical authorities in response to the COVID-19 pandemic. Further, the variations entitle employees to take twice the amount of their annual leave at half pay by agreement with their employer.
- d. The Australian Federal Government has established a \$1 billion COVID-19 Relief and Recovery Fund to provide tailored support to communities and industries disproportionately affected. Support provided by the Fund is targeted towards initiatives supporting industries including aviation, agriculture, fisheries, tourism and the arts. Available support may include fee or levy relief, increasing payments through existing grant programs and establishing targeted new programs to support the particular needs of an industry sector.
- e. On 2 April 2020, the Australian Government announced the new Early Childhood Education and Care Relief Package. From 6 April 2020, weekly payments have been made directly to early childhood education and care services in lieu of the Child Care Subsidy and the Additional Child Care Subsidy, to help them keep their doors open and employees in their jobs.



A number of these provisions are time-limited and are due to be reviewed in September 2020 at the latest. Some changes have already been announced.

III. HEALTH AND SAFETY MEASURES

REQUIREMENTS MANDATED BY LAW OR ANY OFFICIAL GUIDANCE.

- a. Physical distancing measures are still in place across Australia. Currently, this means keeping a distance of at least 1.5 metres between people and 4 square metres per person.
- b. The Australian Government has introduced the COVIDSafe app, an entirely voluntary contact tracing tool to assist health officials to quickly contact people who may have been exposed to COVID-19.

MEASURES TYPICALLY IMPLEMENTED BY EMPLOYERS AND THE ASSOCIATED LEGAL RISKS, LIMITATIONS, OBLIGATIONS AND ISSUES TO CONSIDER.

- a. The model Work Health and Safety Laws (see attached Guide) require employers to take care of the health, safety and welfare of their workers and other staff, contractors and volunteers, and others (including clients, customers and visitors) at the workplace.
- b. Measures typically implemented by employers to comply with their work health and safety obligations include:
 - i. implementing working from home arrangements;
 - ii. discouraging workers from unnecessary usage of public transport;
 - iii. requiring workers and other people to practice physical distancing;
 - iv. requiring workers and other people to practice good hygiene (e.g., through workplace policies and ensuring access to adequate and well stocked hygiene facilities);
 - v. requiring workers to stay home when sick;
 - vi. requiring others to stay away from the workplace, unless essential, e.g., such as family, friends and visitors;

- vii. cleaning the workplace regularly and thoroughly;
- viii. restructuring the layout of the workplace to allow for physical distancing;
- ix. limiting the number of people in the workplace at any given time;
- x. providing adequate facilities in the workplace to protect workers from contracting COVID-19 (e.g. washroom facilities including adequate supply of soap, water and paper towel, and hand sanitiser where it is not possible for workers to wash their hands);
- xi. providing any necessary information or training to protect workers from the risk of exposure to COVID-19; and
- xii. consultation with workers on health and safety matters relating to COVID-19, which involves taking the views of the workers into account and advising workers of the outcome of consultation.
- c. Both pre-made and customisable materials, including posters, stickers, and decals containing checklists, infographics, fact sheets for industry and posters on handwashing, hygiene and physical distancing, have been made available by the Australian Government for use by cafes, restaurants, stores and retailers, residential buildings and sports and entertainment venues to download and display in their workplaces. Resources can be found at COVIDSafe resources and Safe Work Australia.
- d. One factor where the employer is at risk from so many of the workforce working from home is that under the uniform Health and Safety legislation in place in a majority of Australian jurisdictions, the home is a workplace and the employer thus has duties towards the employee in relation to safety in that workplace. This includes everything from electrical safety, tripping hazards and ergonomic issues to safety of the person such as increased risk of domestic violence. This will be an increasing issue if home working continues to be widespread.
- e. Safe Work Australia has provided Guidance for employers on how to clean their workplace to keep it safe and limit the spread of COVID-19 .

IV. TELEWORKING

POLICIES AND PROCEDURES FOR TELEWORK ONCE THE BUSINESS REOPENS.



- a. Whether telework remains an option is heavily dependent on the employer and the industry in which they operate. Although some reports suggest that working from home will become more and more common in a future after COVID-19, employers still retain the discretion to direct their employees to return to the workplace (see point 8) provided it is safe to do so.
- b. In Australia, there has been a reported surge in sales of software to monitor employees' productivity at home. Only some jurisdictions have legislation covering monitoring of workplace computers and so the use of this software will not always be covered. Thus, most of the privacy issues would arise pursuant to employer's privacy policies.
- c. Employees may submit a formal request to continue to work remotely once business reopens. Requests for flexible working arrangements are protected as a National Employment Standard.
 - i. An employee may request a change in their working arrangements from their employer if they require flexibility because they:
 - 1. are the parent, or have responsibility for the care, of a child who is of school age or younger
 - 2. are a carer (within the meaning of the Carer Recognition Act 2010)
 - 3. have a disability
 - 4. are 55 or older
 - 5. are experiencing violence from a member of their family, or
 - 6. provide care or support to a member of their immediate family or household, who requires care or support because they are experiencing violence from their family.
 - ii. An employer can only refuse the request if there are reasonable business grounds to do so. On this issue, the fact that so many people working from home have proved that there is no issue with doing so and no loss of productivity may make it more difficult for an employer to argue that there are business grounds for refusing a request.
- d. Where a workplace has a small office space, Fair Work Australia has recommended rotating working from home for employers in order to allow for adherence to the four-metre sq rule.

V. MANAGING COVID-19-RELATED EMPLOYEE ISSUES

MANAGEMENT OF QUARANTINE, CHILDCARE AND MEDICAL LEAVE FOR EMPLOYEES AFFECTED BY COVID-19.

- a. On JobKeeper:** As part of the Australian Government's JobKeeper scheme, a qualifying employer can:
 - i. request an eligible employee to take paid annual leave (as long as they keep a balance of at least 2 weeks)
 - ii. agree in writing with an eligible employee for them to take annual leave at half pay for twice the length of time.
- b. Sick leave:** as paid sick leave covers only situations where an employee has illness, including COVID-19, employees cannot take sick leave for compulsory or voluntary self-isolation if they are not sick with any illness or injury. They can take sick leave in these occasions if they are sick with illness or injury.
- c. Compulsory or voluntary self-isolation:** employees must use their annual leave entitlements or take unpaid leave if they do not have annual leave available. This covers employees who are not sick and required to self-isolate because they have come into contact with a case of COVID-19 or have returned from overseas.
- d. Childcare:** employees can use paid carers leave to take care of children if schools or childcare centres close, or if their child is sick.
 - i. If an employee is on Parental Leave Pay, and their employer cannot continue to afford to pay them because of the impact of COVID-19, the employee can apply to the Government to receive their Parental Leave Pay.
 - ii. Notably, from 6 April 2020, the Australian Government implemented the Early Childhood Education and Care Relief Package. This means that between the period 6 April 2020 to 12 July 2020, families have not been charged fees for early childhood education and care. This has lessened the need to take childcare leave for employees.



EMPLOYEES WHO FEAR INFECTION AND REFUSE TO WORK.

- a. Employers should first and foremost develop a COVID-19 plan (see 4 and 5). This means adhering to the four-square-metre rule and compliance with other WHS laws.
- b. Any employee who refuses a lawful and reasonable direction to return to work is in breach of an implied term of employment: *Grant v BHP Coal Pty Ltd (No 2)* [2015] FCA 1374.
 - i. A direction will be considered 'lawful' if it does not involve illegality, and falls within the scope of the employee's employment (*King v Catholic Education Office Diocese of Parramatta* [2014] FWCFB 2194, [27]). Notably, a direction could be construed as unlawful if it would create risks to WHS. Thus, it is crucial for employers to develop and follow a COVID-19 Safe plan.
 - ii. Whether a direction will be considered reasonable is based on the express and implied terms of the contract, nature of employment, established custom and relevant instruments (*CFMEU v Glencore Mt Owen Pty Ltd* [2015] FWC 7752). It may be considered reasonable in some instances to give a direction to go back to work, such as those roles that need physical presence (such as hospitality staff), but not reasonable in others (in white collar professional roles where work can be easily performed from home).
 - iii. If an employer refuses a lawful and reasonable direction, it may provide a valid reason for dismissal of the employee under the Fair Work Act 2009 (Cth). An employer can also discipline an employee or decide to take no action.
- c. Alternatively, employers can direct employees to use their paid and unpaid leave entitlements.

DISCLOSURE OF EMPLOYEES WHO ARE INFECTED.

- a. Safe Work Australia has outlined the Steps an employer must take when responding to an incident of COVID-19 in the workplace, which are as follows:
 - i. isolate the person;
 - ii. seek advice and assess the risks;
 - iii. ensure the person has transport home, to a location they can isolate, or to a medical facility if necessary;

- iv. identify and tell close contacts while maintaining the privacy of all individuals involved; and
 - v. review risk management controls.
- b. If an employee is infected with COVID-19, employers are directed to call their state or territory helpline and follow the advice of public health officials.
 - c. For assessing the risk to the workplace, workers and others, employers should ensure they have the current contact details for the infected person and make a note about the areas they have been in the workplace, who they have been in close contact with and for how long.

VI. COST-REDUCTION STRATEGIES

TO WHAT EXTENT CAN EMPLOYERS IMPLEMENT THE FOLLOWING COST-REDUCTION STRATEGIES AS A RESULT OF COVID, AND WHAT ARE THE PRIMARY LIMITATIONS ON EACH?

- a. **Furloughs.**
- b. **Salary reductions.**
- c. **Redundancy.**
- d. **Facility closure.**

Many rights in Australia are governed by legislation, either State (for example, long service leave legislation) or Federal (the Fair Work Act for example sets many minimum standards) and by instruments made under that legislation (registered agreements or industrial awards, for example, can both set minimum standards). So the ability to direct, for example, an employee to take leave will be restricted by that legislation.

Salary reductions will be partly governed by the contract of employment (an employer cannot unilaterally change a contract of employment) and so normally consent will be required. Even then, an agreement to reduce wages or conditions below the statutory minimum will be ineffective.

Redundancy is covered by legislation or instruments made by legislation. Condition attach: for example, there are consultation provisions.



Closing facilities will be governed by redundancy requirements and notice must be given to social security agencies.

Given that this advice is dependent on the individual circumstances of the employer, we recommend that employers seek personalised legal advice on matters related to cost reduction facilities.

VII. BEST PRACTICES

TIPS, RECOMMENDATIONS AND COMMON PITFALLS.

Employers should:

- Obtain legal advice as soon as possible and if necessary, financial advice.
- Review contracts of employment, industrial instruments, and statutory obligations, as well as any policies or documents such as handbooks to ensure compliance.
- Ensure they consult with employees about change (including consultation with unions where applicable).
- Ensure compliance with Work Health and Safety obligations.
- Ensure compliance with any public health orders or regulations.
- Implement any changes necessary to ensure compliance and safety as identified.
- Ensure proper support for employees, including assistance programs generally, counselling, financial advice, health advice etc as appropriate to the workforce.

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