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WORKPLACE LAW

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**COVID-19 and Managing Wage Costs –
Virtual Round Table Discussion**

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This briefing is for your general information only.

*You should seek advice before acting on
anything in this briefing.*

If you need legal or other advice, then please contact us.

Topics

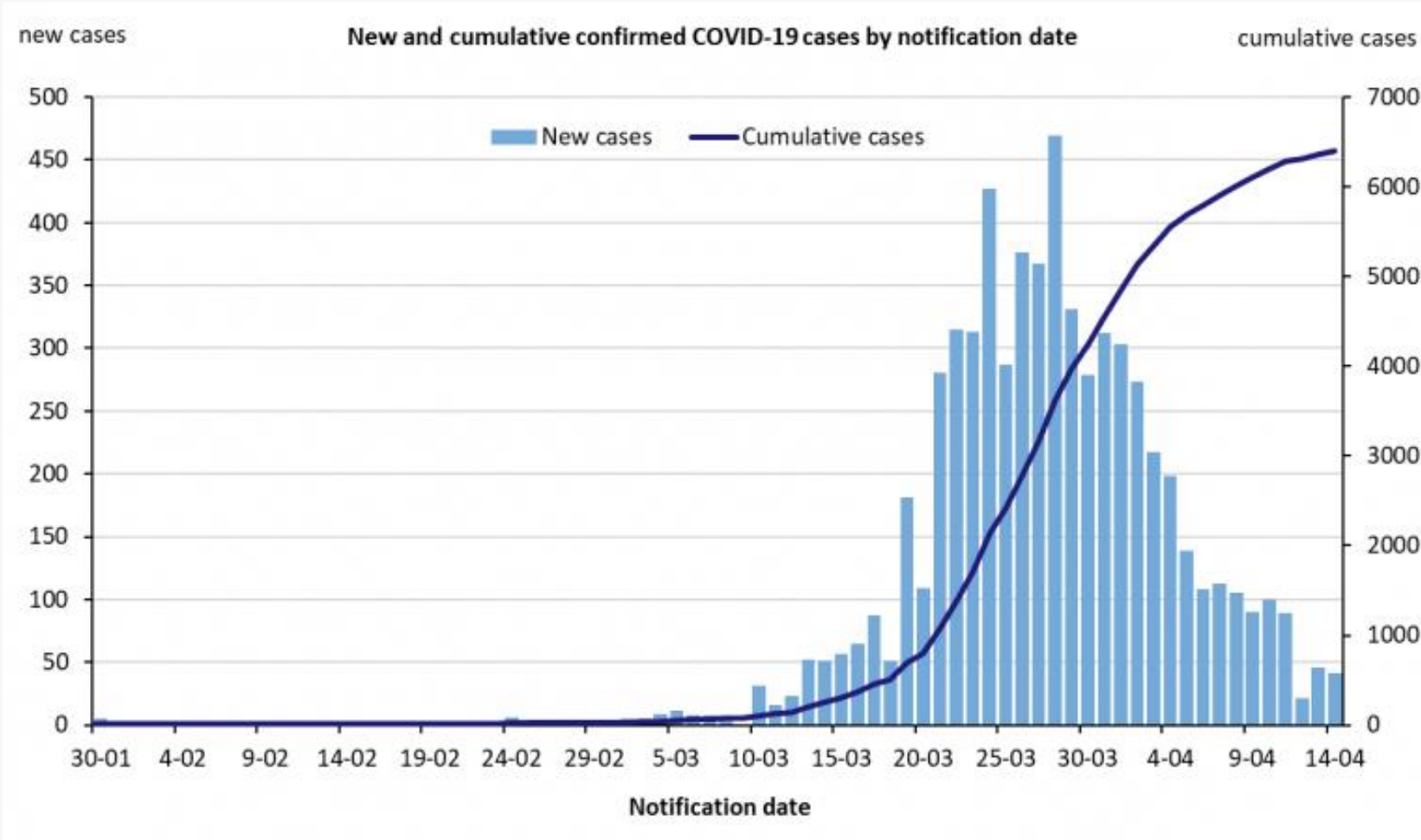
1. COVID-19 overview
2. Ways to manage wage costs:
 - a. JobKeeper wage subsidy
 - b. JobKeeper enabling stand down
 - c. Stand down (“**traditional stand down**”)
 - d. Leave
 - e. Redundancy

1. COVID-19 OVERVIEW

COVID-19 in Australia

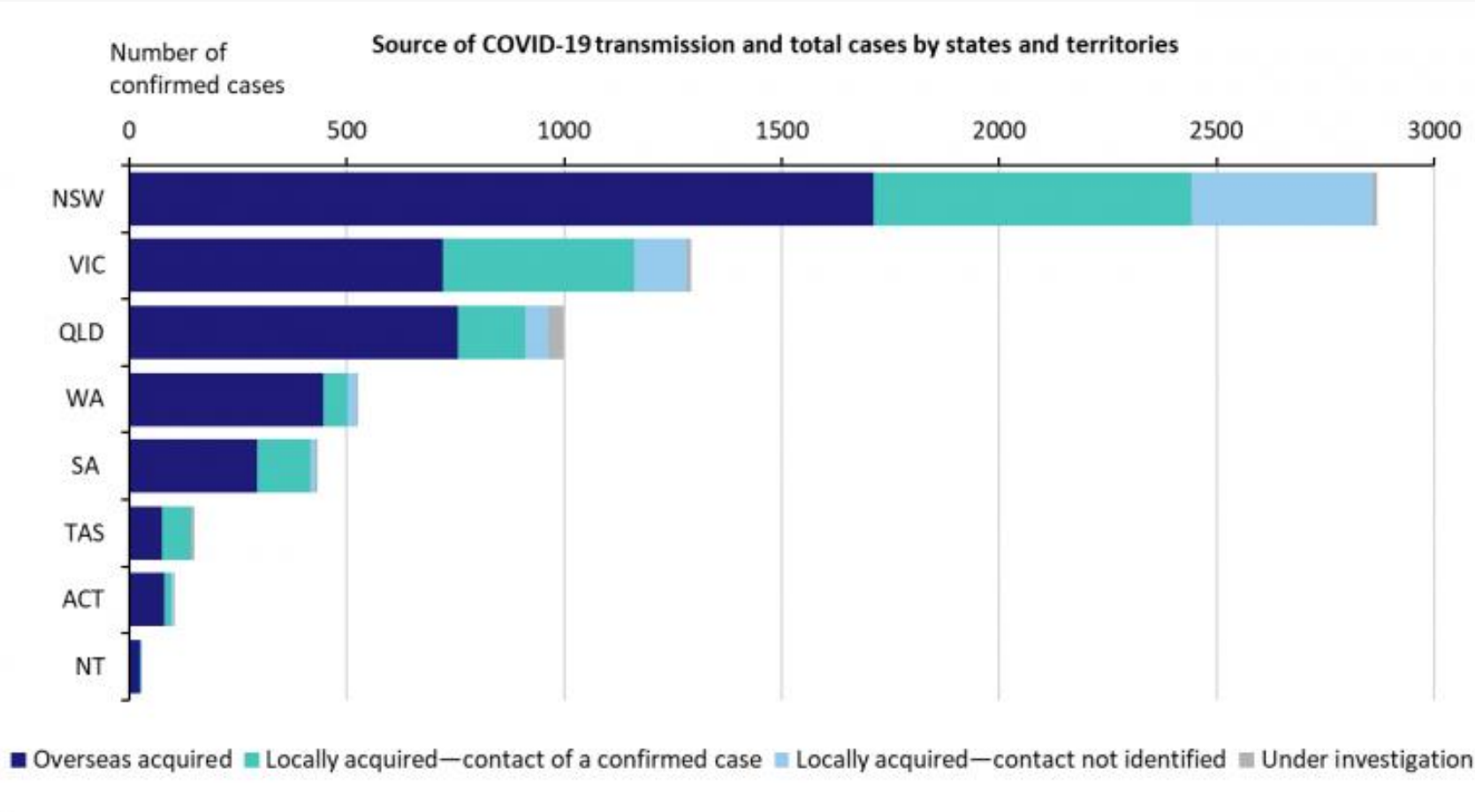
- The spread of COVID-19 and the measures taken to slow its spread has imposed unprecedented challenges on businesses.
- According to Australian Bureau of Statistics figures collected in mid-March, before the announcement of social distancing measures, 49% of Australian businesses had already experienced adverse impacts as a result of COVID-19.
- At present, a number of Government directives are in force, which include:
 - The forced closure of many businesses;
 - Bans on public gatherings;
 - Strict indoor and outdoor capacity limits; and
 - Social distancing directives.

COVID-19 in Australia



Source: Australian Government Department of Health

COVID-19 in Australia



Source: Australian Government Department of Health

2. WAYS TO MANAGE WAGE COSTS

A. JOBKEEPER WAGE SUBSIDY

JobKeeper Wage Subsidy

- On 30 March 2020, the Federal Government announced a wage subsidy for companies that have seen or expect to see a decline in turnover. For companies with a turnover below \$1bn, a 30% reduction in revenue compared to last year is required.
- The subsidy is a payment of \$1,500 per employee, per fortnight, to be paid by the Australian Taxation Office to employers and passed on to employees.
- The subsidy applies to employees engaged as of 1 March 2020, including full-time workers, part-time workers, and long-term casuals (casuals employed on a regular basis for longer than 12 months as at 1 March 2020).
- Payments will be issued in the first week of May but backdated to 30 March 2020.
- If an employer has already terminated an employee, but wishes to re-engage them and pay them with the help of the wage subsidy, this is possible.
- If an employee's ordinary wage is more than \$1,500 per week, the employer is able to provide them with a top-up.

B. JOBKEEPER ENABLING STAND DOWN

JobKeeper Enabling Stand Down

- On 9 April 2020, the Federal Parliament introduced a new “JobKeeper enabling stand down” provision into the *Fair Work Act 2009* (Cth) (“**FW Act**”).
- Where the employer is qualified for the JobKeeper scheme and an employee cannot be usefully employed on their normal days or hours due to business changes attributable to:
 - The COVID-19 pandemic; or
 - Government initiatives to slow the transmission of COVID-19,

an employer can give the employee a direction to not work certain hours or days which they would usually work. This includes reducing an employee’s hours to zero.
- The employee, if stood down by a JobKeeper enabling stand down would, in effect, be entitled to JobKeeper payments through their employer.
- During a JobKeeper enabling stand down, employees continue to accrue leave entitlements.
- An employer who qualifies must first consult with an employee before giving a JobKeeper enabling direction, which cannot be unreasonable in all the circumstances.
- If a JobKeeper enabling direction applies to an employee, the employee may request to engage in formal training or professional development. The employer must consider this request and must not unreasonably refuse it.

C. TRADITIONAL STAND DOWN

Traditional Stand Down

- Under s 524(1)(c) of the FW Act, employees may be stood down without pay if:
 1. They **cannot be usefully employed**;
 2. Due to a **stoppage of work** for any cause;
 3. For which the **employer cannot reasonably be held responsible**.
- Under this provision, stand down will only be available to employers in particular circumstances. For example, where a business is **required** to cease operations due to a Government directive.
- A general downturn in business due to decreased demand is unlikely to amount to a **stoppage of work**.
- If an enterprise agreement or employment contract provides for stand down, this will apply instead of the FW Act provisions.

Traditional Stand Down: What the cases say

- Stand down powers in the context of a pandemic remain untested.
- “A stand down encompasses a large range of situations where, for various reasons, an employer is **unable to provide useful work** for its employees, for a particular **period of time**, for **circumstances beyond its control**. The employer may be temporarily deprived of electricity to run its operation. The employer’s factory may have been flooded.” (*Coal and Allied Mining Services*)
- “The circumstances contemplated by s 524(1)(c) of the FW Act would require identification of some event which involved work being consciously halted for some reason and ordinarily for some identified period of time. **A reduction in the available work... does not represent a stoppage of work in satisfaction of the terms of s 524(1)(c) of the FW Act.**” (*Bristow Helicopters*)

Traditional Stand Down: Scenarios

Situation	Stoppage of work?	Proper Basis for Stand Down?
An indoor gym is ordered to close.	The business is subject to a Government directive requiring closure.	Probably yes
A business is experiencing a lack of supply due to a delay of Chinese imports.	The business cannot operate for a reason for which the employer cannot be held responsible.	Probably yes
A workplace is closed due to one of the above factors but there is work or training to be done from home.	There is no stoppage if there is work available to keep employees usefully employed.	Probably no
A restaurant is forced to close dine-in services but can still offer take away.	If it is possible to offer take away and delivery (eg. existing option in place), this may not be a stoppage of work.	May be a different outcome from employee to employee

Traditional Stand Down: Scenarios

Example	Stoppage of work?	Proper basis for stand down?
<p>A store is allowed to remain open but is subject to social distancing rules which are inconsistent with the business' operation.</p>	<p>Dependent on how restrictive to business operations social distancing rules are. For example, the current limit of one person per four square metres and maximum number of people permitted on premises based on occupancy rules.</p>	<p>Depends on particular business</p>
<p>A business who services a non-essential business forced to close. For example, a company that does repair work on gyms which have all closed due to a Government directive.</p>	<p>Dependent on whether all clients have closed down and/or it is possible to perform some work off site or move equipment.</p>	<p>Depends</p>
<p>The economic crisis has caused an downturn in demand and profits.</p>	<p>No. A general downturn does not bar the business from operation and probably does not amount to a complete stoppage.</p>	<p>Probably no</p>

General Principles and Questions: Traditional Stand Down

Identify cause of stoppage

- What Government directive or other constraining event is the business subject to?
- Can the business still operate under these directives and/or conditions?

Prove causation

- Is this inability to operate caused by the Government directive or the COVID-19 crisis, or is it simply a reduction in demand?
- Is this something for which the employer could not be held responsible?

Explore alternatives

- Can employees move to another location, work from home, or undergo training or some other form of useful employment (even if not part of their regular duties)?
- Allow employees the choice to take annual or unpaid leave as an alternative.

D. LEAVE

Leave and Reduced Hours

Outside of JobKeeper and Award Changes

- Generally, agreement between the employer and employee is needed to take leave.
- A contract variation which reduces a full-time or part-time employee's hours must also be agreed to.
- An Enterprise Agreement or Modern Award may restrict reducing hours.

Award Changes

- **Clerks – Private Sector Award 2010 (“Clerks Award”)**: On 28 March 2020, the Fair Work Commission (“FWC”) approved changes to the Clerks Award including allowing employers to direct employees to take annual leave with one week's notice.
- The Clerks Award changes also allow for employees to be placed on annual, or, if insufficient, unpaid leave, in the event of a **close down** of operations.
- **Architects Award 2010 (“Architects Award”)**: The FWC has inserted a Schedule into the Architects Award allowing employees to take two weeks' unpaid “Pandemic Leave”.
- An employee and employer can agree to take annual leave at half pay under the Architects Award.

JobKeeper Changes

- Under new legislative changes as of 9 April 2020, a “JobKeeper enabling direction” can be given by an employer who qualifies for the JobKeeper payment to an employee. These directions include:
 - Reducing the employee's ordinary hours of work;
 - Changing the duties to be performed by the employee; or
 - Changing the location of the employee's work.
- JobKeeper enabling directions must be, amongst other things, reasonable, necessary to continue the employment of one or more employees, and comply with consultation requirements.

E. REDUNDANCY

Redundancy

A genuine redundancy under s 389 of the FW Act occurs when:

1. The employee's job is no longer required to be done by anyone;
2. The employer has complied with any consultation requirements in an applicable Modern Award or Enterprise Agreement; and
3. It was not reasonable in all the circumstances for the employee to be redeployed.

Summary

Depending on your business, the following options to reduce wage costs can be considered:

- JobKeeper wage subsidy
- JobKeeper enabling stand down
- Traditional stand down;
- Leave;
- Reduced hours; and
- Redundancies.

This is an uncertain and constantly changing industrial landscape, but there are an increasing number of options available to manage wage costs.



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