

# INDUSTRIAL RELATIONS UPDATE

2nd April 2020

## Options in Response to Pandemic

### Varying an Enterprise Agreement

The NSW government has announced it intends to leave the social distancing rules in place now for at least three months until June 30th. That means for many companies, it will be impossible to operate normally and comply. Other jurisdictions are likely to be in the same boat sooner or later. Normal business is going to be difficult to sustain for those that have not already ceased operations. For those that are operating now, but concerned that time is against them, there are measures that may be taken to alleviate some pressures.

Some employers have enterprise agreements which prescribe terms and conditions that won't be sustainable in the short to medium term given the dramatic drop in trade and commerce that has occurred and looks likely to get worse. If there were some relief from those conditions, the business may be able to sustain the downturn without resorting to stand downs or redundancies, or at least keeping those to a minimum. There is a mechanism to reduce terms and conditions in agreements, by agreement with employees, that if introduced, could save businesses and jobs.

For example, an enterprise may have an agreement with wages 20% higher than the award which would otherwise apply. To bring the wages back to, say, 5% higher than the award rate, may make enough of a difference. Assuming other terms and conditions are on par with the award, however they may be packaged, if employees agree, and an application to vary an agreement were made, this would be approved by the Fair Work Commission (FWC).

The law is not clear if it is possible for the FWC to vary an enterprise agreement in such a way that it would not pass the better off overall test (BOOT). The FWC has decided to convene a full bench to test the limits of the legislation, if an application is made to vary an agreement that would result in the agreement failing the BOOT.

If the FWC finds that it has the power to approve a varied agreement which fails the BOOT, some other variations that may provide temporary relief are:

- a clause permitting full time employees to work less than 38 hours and be paid for only the hours they work;
- ability to send employees on annual leave at short notice;
- ability to send employees on annual leave at half pay, but for twice as long;
- reducing the minimum daily engagement;
- changing the spread of hours in which ordinary hours can be worked so that work at home employees can work at different times.

Some of these could be introduced by way of variation and the overall deal still pass the BOOT. Each case will be determined on its merits.

To vary an agreement, the process is similar to making an agreement in the first place in respect of consultation, explanation, access period, voting and proper documentation to be filed, but does not require several of the other steps involved in agreement making.

There could be many such applications made to the FWC. It has established a mechanism in its systems to expedite those. Even so, for some companies, by the time their matter reaches the front of the queue, the crisis will have passed. However, for other companies, the recovery from this emergency may take some considerable time, so now is the time to start making preparations to cope. This is especially so since the announcements that social distancing is to last another three months at current estimates.

We think the best approach to take if any business goes down this path is to construct an Appendix with cross references to the main text of the agreement, and the Appendix deals with the key items (and has a finite life). This is how the

FWC has dealt with similar types of applications to 'reduce' award conditions temporarily due to the pandemic.

We think if the Appendix makes it clear the employees continue to accrue their normal leave entitlements as if all their originally contracted rights and entitlements were intact, that the FWC will look favourably on applications to vary.

### Terminating an Agreement

For some companies, cancelling their agreement and resuming award observance may be the best answer. Terminating an agreement can happen before or after its nominal expiry date. The processes are different depending on that basic fact, but generally speaking, in both cases it is easier done where there is solid support for the action from the employees working under the agreement.

A decision to go down this path requires an analysis of the relevant award in key areas that directly affect operational imperatives (e.g. working hours' limits, penalty rates, demarcations in classification structures). Importantly, employers must consider that if their enterprise agreement has useful flexibilities that are important in normal times, then when this emergency is over, the bargaining process must begin again. An assessment would need to be made to determine if a new agreement could be negotiated and approved that was as relevant and useful in the key aspects.

### Stand Down

As referred to in earlier Updates, stand downs can occur when useful work is not available due to circumstances beyond an employer's control. This is now happening at a significant rate across many industries. Some disputes have

arisen. For example, there is disagreement about whether or not applications for personal leave, after an employee has been stood down, can or should be approved by an employer. To be clear, this is not about an employee in quarantine or who an employer directs to go home because of concerns about fitness. This is where a stand down has been effected, and subsequently, an employee becomes ill or injured and claims paid personal leave.

We believe the employee should be paid personal leave. It is an NES item and an entitlement. The Fair Work Act explicitly says that when an employee is authorised to be absent, then the employee is not stood down. This matter is before the Federal Court, however we cannot predict when a decision will be made. Our best advice to employers in respect of stood down staff is to pay personal leave if the usual conditions are met.

A stand down should be formally instituted with appropriate explanation and documentation, with records kept. Employees on stand down continue in their employment, i.e. the period of stand down is service for all purposes, so employees continue to accrue entitlements such as leave, as if they were at work.

### Award Variations

At time of writing, there have been variations to awards covering clerks, hospitality and restaurant workers. We think others will follow. These changes are similar to those referred to above that introduce flexibilities in working hours and ability to send employees on leave at short notice etc. Where these awards apply, that relief is immediately available.