

This circular provides general information for employers in relation to the potential for a significant disruption in work which the business cannot be reasonably held responsible arising from either:

- a government directed stoppage, or
- the direct impacts on a business from a government stoppage (not directed at the business itself but which plainly results in a stoppage of work).

Note: as per our [previous update](#), stand down requires careful assessment of all relevant circumstances. This includes reviewing the applicable award/agreements/contracts of employment, the causes of the stoppage and available work opportunities. Although each formulation of stand down may be different, it is usual (but not certain) that the threshold question is *whether the employee can be usefully employed as a result of a cause that is beyond the employer's control*.

While each situation is different, some level of pre-planning is recommended so that if or when a situation arises you are better able to manage the process.

Immediate Assessment

Prior to considering a stand down, an employer needs to consider:

- What are the **causes** and do they justify stand down? The underpinning legal basis for the stand down needs to be carefully considered at this time. Stand downs cannot be [preemptive](#).
- What **work of value** is available? This requires an assessment of the cost of performing work and the benefits to the employer. It may not be reasonable to redeploy on a particular day but it may be reasonable to mobilise resources soon after.
- Are there **alternatives**? Can employees take leave or other entitlements.
- Is there any other available **information**? Presumably if the cause for the stoppage is a government decision there will be some information that may be relevant to planning and implementing the below.

Initial communication

If the decision is made to stand employees down then it should be promptly communicated. The default rules are ambiguous as to whether stand down only occurs after it is communicated or can be backdated to when the circumstances arose. Some clauses refer to a right to “deduct pay” for the period, which is more suggestive that backdating might be available. Some clauses are clear that communication must occur. In any case, this should be promptly communicated to employees to avoid all doubt.

Communication should include:

- A clear statement – preferably followed shortly after in writing – that sets out the facts



and basis for the stand down. For example, if there was a government decision that created a stand-down circumstances for employees covered by the default rules a statement to the effect of:

We have just become aware of circumstances that have prevented us from working today. These circumstances are [insert circumstances]. Regrettably these are circumstances beyond our control. We have assessed the available work and there is insufficient work to productively engage you. As a result, you are being stood down while these circumstances continue.

- To the extent known, the expected length of the stand down should be communicated. If this is not known, a statement to the effect of “*At this stage it is not known how long this situation will last. We are working hard to find out more information and will communicate this when known.*”
- The initial communication should also deal with readily available options to mitigate. For example, annual leave, long service leave, rostered days off or TOIL (or similar) should be [considered](#). An employer can only direct an employee to take an accrued entitlement in accordance with the lawful arrangements that give rise to the entitlement. For example, annual leave may only be taken by [agreement](#) unless an [award/agreement](#) or [contract](#) (for award/agreement free employees) permits it. Records should be kept of any requests to minimise the risk of future argument.
- A statement to the effect of the below, modified as appropriate for the employer’s available options should be considered:

During this period, you will not be paid unless you are able to take a period of paid leave or other accrued entitlement. If you would like to apply for leave or take a period of leave please let us know.

- If there is a government directed stoppage there is also likely some information and potentially contact points available to refer to. If these are known at the time they should be considered and advised as best as is known at that time.
- It is important to ensure that there are clear and open lines of communication established and this is communicated to employees. This is a time of significant insecurity and failing to deal with this situation appropriately can lead to escalation, including third-party involvement. A statement to the effect of “*This is a difficult time for everyone and we thank you for your understanding. We will be in touch with you as soon as we can to discuss this situation further and to explore options if it continues. However, if there is anything you want to discuss, please contact [insert contact details]*”.
- To the extent possible, there should be a nominated point of contact within the business to streamline queries. The business should also consider what options it has to communicate with employees going forward (e.g. via email, bulk SMS service etc).



Take Stock

Once the initial notification has occurred there is an opportunity to review and consider the circumstances and prepare a plan of action.

It is [not clear](#) whether consultation is required in a case of stand down unless it is prescribed by a contract/enterprise agreement. However, from a risk-averse perspective – and particularly if the stand down is likely to be longer than a day or two – it would likely be recommended that consultation take place.

The [model](#) consultation clause, which is substantively similar to most modern awards requires consultation to occur as soon as practicable, which [means](#) with expedition but subject to reasonable, practical considerations. From a risk management perspective if someone is going to challenge the validity of the stand down, there are benefits in having these issues ventilated early.

Some enterprise agreement clauses – particularly those drafted by employee representatives – include far stricter obligations, and often require consultation prior to a stand down decision being taken. The application of these clauses to stand down is complicated and specific advice should be sought.

Ongoing communication / consultation

As noted above, irrespective of whether consultation is a legal requirement, consideration should be given to communication with workers. This is not something that can be formulated generically and requires consideration of all applicable circumstances. However, consideration should be given to matters such as:

- What steps the employer is taking to resolve the situation and seeking input for any ideas to assist.
- What work of value is available, if any? Under default rules an employee cannot be stood down if they can be [usefully employed](#). This is not limited to work in the employee's classification or location. Consideration must be given to the entire business to see what is available and future opportunities that might bring the stand down to an end. Properly consulting with employees and documenting the outcomes of the consultations will assist in minimising the risk of – and establish appropriate evidence to defend against – assertions the stand down was invalid.
- It follows that in considering what useful work is available, consideration of work from home is required, even if only some useful work would be available in that format. There are a myriad of issues to consider including [safety](#), supervision, communication arrangements, supervision, information security, connectivity and the costs and logistics associated with establishment and maintenance of the system.
- If some work is available but not enough for everyone, consideration needs to be given as to how it is allocated. Subject to any specific award/agreement/contract provisions, there are no set criteria for this. Any decision must be [lawful](#) and [non-discriminatory](#).



Otherwise, consideration should be given to allocating the work fairly having regard to the business' needs. For example, there may be good reason why key personnel are given priority. Beyond this, to the extent possible, options such as seeing volunteers for leave and otherwise sharing available work among remaining employees should be considered.

- Are there entitlements that I can access during this time? Annual leave and, if applicable, long service leave are obvious options. There may be the opportunity to access other payments, such as through a redundancy fund (such as [BIRST](#)) or through an employee's income protection. Access to these funds may require proper reason, including termination, and so care is required before exploring whether these options are lawful. Where termination is a pre-requisite, extra care is required to avoid unfair dismissal risks.
- Any other relevant factors such as project or job specific information (particularly where stand down arises as a result of a third-party decision), as well as all available information including from government and reliable third-party sources.

Employment laws still apply

Where work is conducted differently it may be that additional documentation is required to ensure compliance with workplace laws. For example, some awards and agreements are inflexible and may not permit proposed working time arrangements. There are usually options to work around this, such as [individual flexibility agreements](#), but individual circumstances must be considered.

Reevaluation

While each consultation will be different and take into account the above principles, it is important that employee expectations are managed appropriately.

There will be significant insecurity in circumstances where employees face a potential for loss of income over an uncertain or sustained period, especially where they have financial commitments. Likewise, employment arrangements (such as work from home) put in place to make the best of a difficult situation may not be sustainable long-term.

Accordingly, it is important at the initial stage to develop – as best can be in the circumstances – a communication strategy that is open and frank, minimises insecurity, and is also regularly reviewed to ensure it continues to meet the employer's objectives.

Any stand down must be reviewed continuously to ensure that the reasons for stand down continue to persist.

During any period of stand down, consultation should be regular whether that is in the form of email updates, meetings, phone contact or some combination of those, and the employer's strategy should at least contemplate the longevity of these arrangements given current uncertainty.



Need more information

It is important to remember that every circumstance is different and specific advice should be sought in respect of any **specific** situation. This is not intended to be legal advice in relation to any specific circumstances.

If you would like further information about the implications of the Coronavirus on employers' rights, responsibilities and duties, please contact the team at Fair Work Lawyers.



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