

Managing a workplace in COVID times – what's new, what's different?

CPD Legal Studio

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Agenda

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- Ongoing WHS obligations

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- Working from home and returning to the office

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- COVID vaccinations

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- Fair Work Act and Award responses to COVID (and other changes)



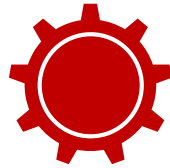
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Ongoing WHS obligations

National COVID-19 Safe Workplace Principles

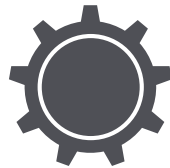
'New Normal' Blueprint

Guide approach to ensuring a safe workplace whilst COVID-19 remains a threat



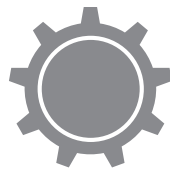
Supplement Safe Work Information

Underpin detailed and industry-specific WHS information provided by Safe Work Australia



Reflect WHS Duties

Reflect an existing provision in the model WHS law and guide a COVID-specific approach



Primary duty of care

Principle 1

All workers, regardless of their occupation or how they are engaged, have the right to a healthy and safe working environment.

Principle 2

The COVID-19 pandemic requires a uniquely focused approach to WHS as it applies to businesses, workers and others in the workplace.



Section 19: Primary Duty of Care

A person **conducting a business or undertaking** must ensure, so far as is **reasonably practicable**, the **health and safety** of **workers** under their control or influence and **must not** put the health and safety of other persons at **risk** from work carried out as part of the conduct of the business or undertaking.

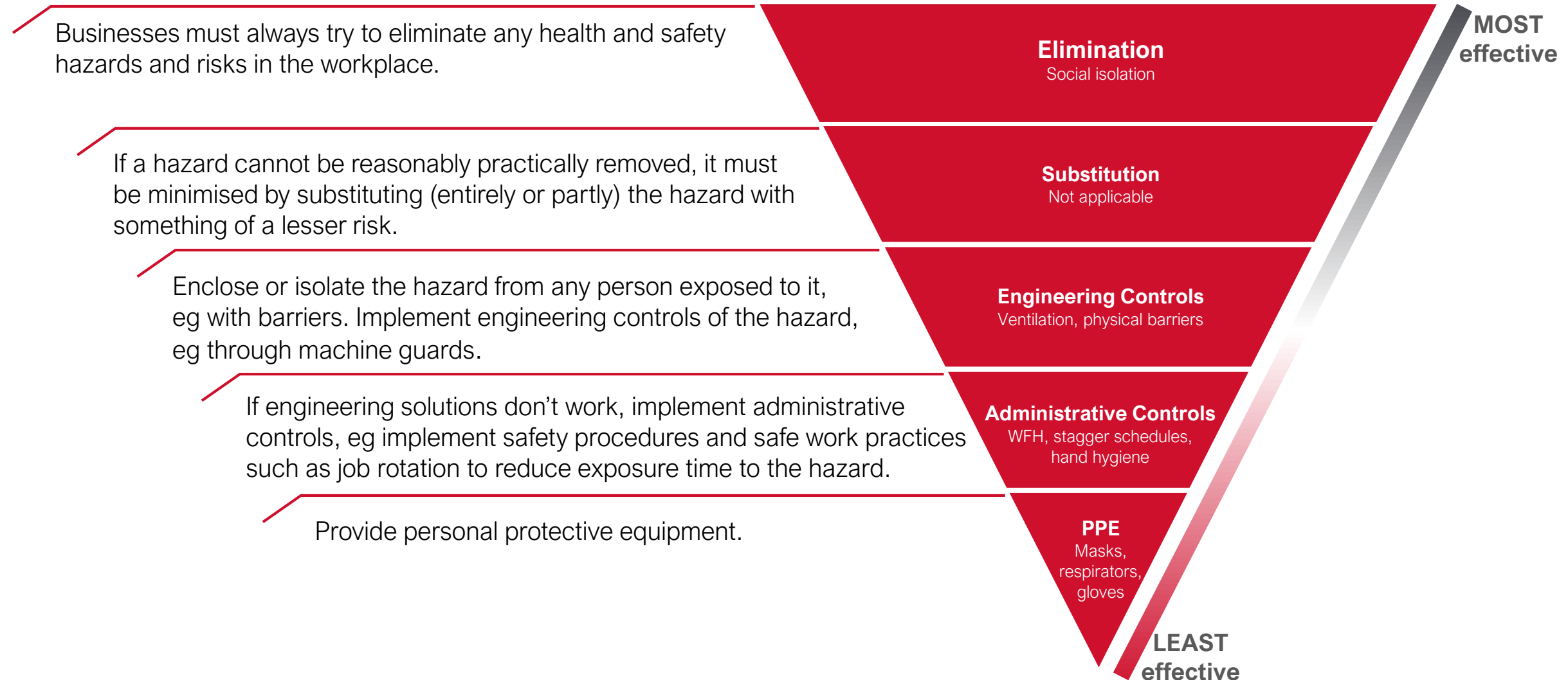
What is reasonably practicable in a COVID-19 workplace?

Unique to each workplace but generally:

- creating a COVID-19 response plan
- reviewing existing exposure and infection control policies
- implementing safe systems of work
- monitoring the COVID-19 situation

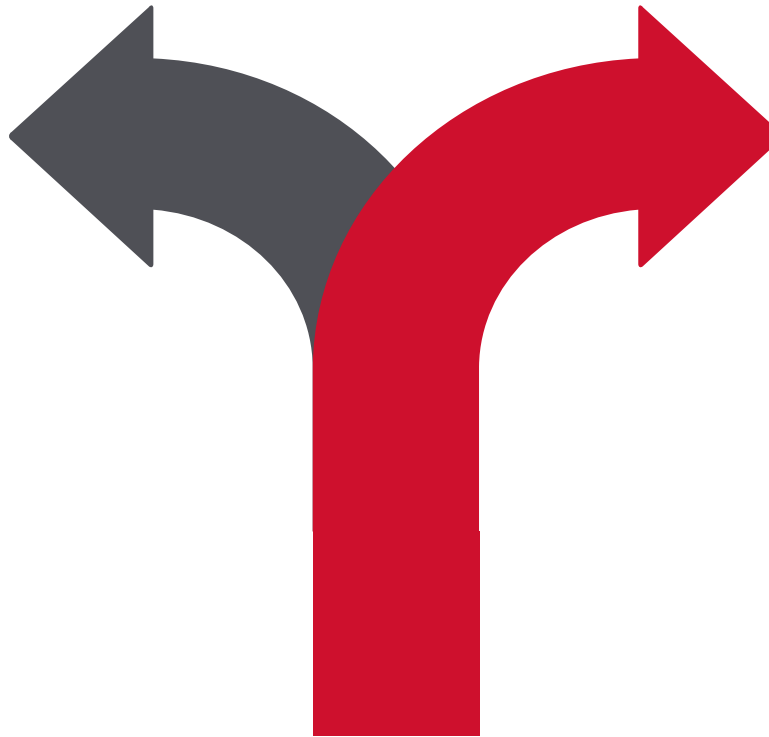


Hierarchy of controls



Approach of WHS regulators

- Take account of employers' pandemic constraints
- Supportive and educative
- Initially postponed campaigns and proactive assessment



- Will respond as usual to serious incidents
- Will expect plan to deal with COVID
- Returning to 'business as usual'

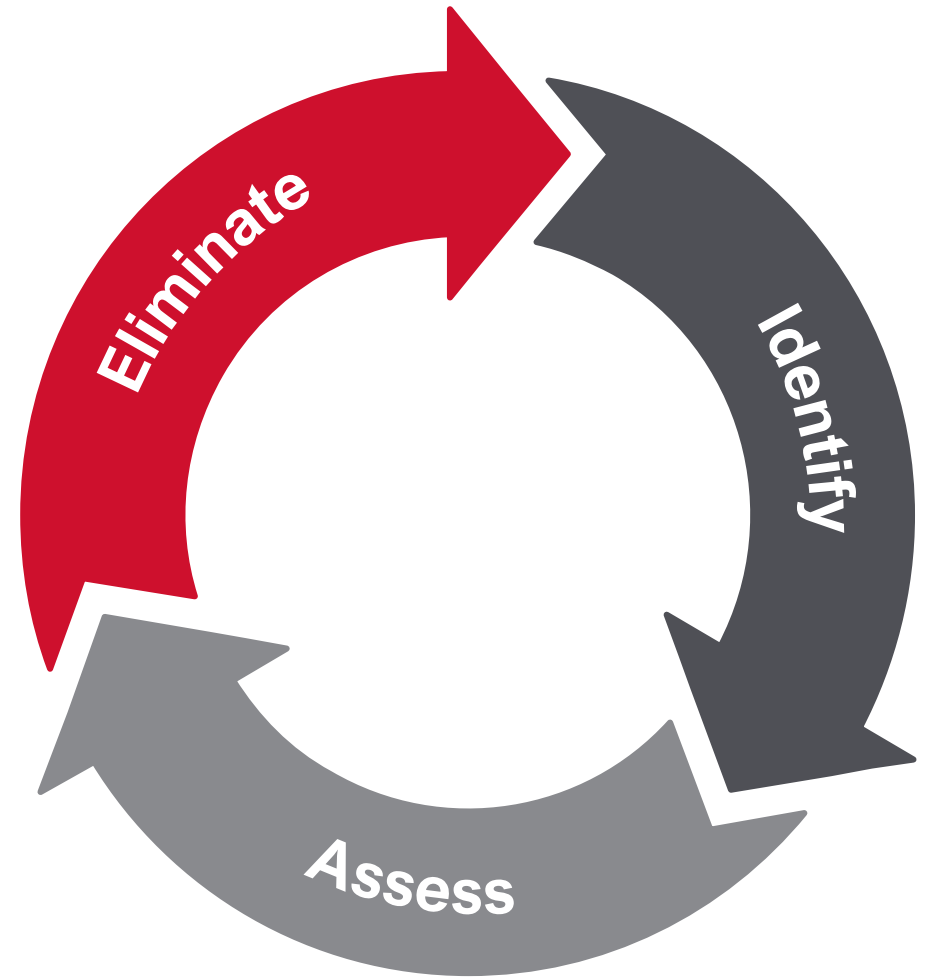
Risk assessments – not just about when you are returning to an office environment!

- Risk assessments are useful tools to commence consultation processes
- COVID-19 risk assessments for returning to the workplace are a must but also for other COVID-19 related matters:
 - Each change in 'phase' – changes in work practices, recommencing operations, increasing operations
 - Psychological risks
 - Vulnerable workers
 - Other unique aspects of your workplace eg customer aggression, high work demands, working in isolation
 - How you will respond to a suspected or confirmed case?



Key issues for COVID-19 risk assessments

- Format – depends on the seriousness of the risk. Can range from discussion with workers to formal, documented risk assessment. Safe Work Australia template is a useful start (see <https://www.safeworkaustralia.gov.au/doc/template-and-example-covid-19-risk-register>)
- Must be based on what is reasonably practicable
- Consider if you need expert advice
- Review periodically when changes arise (eg changes in COVID-19 cases in area or changes in public health orders) or when new information becomes available
- Watch for differences in Public Health Orders across States and Territories - different approach to social distancing taken. What is necessary for your business to operate or what is possible?



Key issues for COVID-19 risk assessments **continued**

Current advice and orders from government and health authorities about the current situation

Case numbers for COVID-19 cases in the area

Nature of your work eg does it require regular and close contact with other persons

What modifications to the nature of the work can be reasonably made?

Is the work being carried out in a high-risk environment (e.g. with vulnerable people)?

Hygiene facilities including for hand washing and/or hand sanitising

Cleaning and disinfecting arrangements

Response to a case (confirmed or suspected)

New risks that need to be controlled eg upset customers, working from home, increased demands or shortage of safety supplies

Review of control measures

Vulnerable workers

Psychological impacts



Consultation with workers regarding COVID-19 – When?

Assessing the risk COVID-19 presents to the health and safety of workers

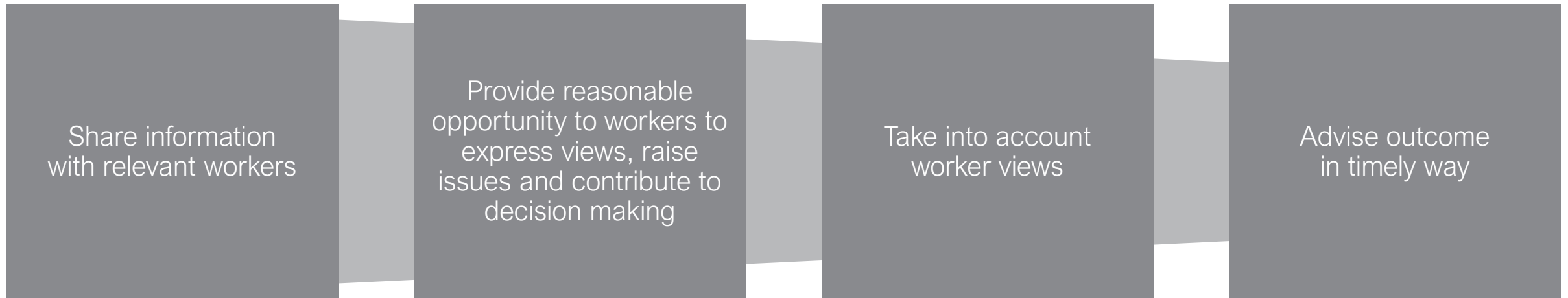
Deciding on the adequacy of facilities for the welfare of workers (e.g. hand washing facilities)

Must consult with **directly affected** workers in relation to COVID-19 on an ongoing basis – not just back in March 2020. This means consultation is required when:

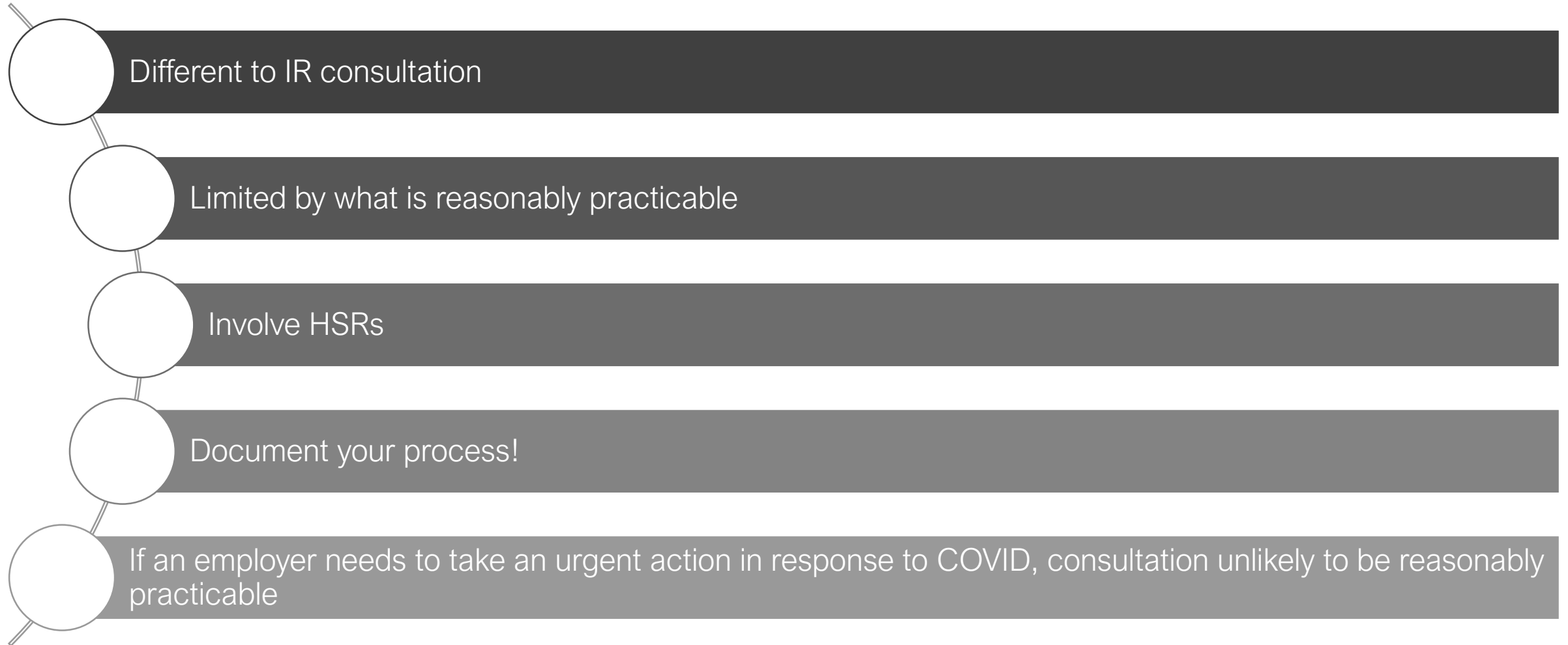
Deciding on control measures to eliminate or minimise the risk of exposure to COVID-19

Proposing other changes to the workplace as a result of COVID-19 which may affect health and safety

Consultation with workers regarding COVID-19 – How?



Consultation: Key points to note



Consultation with workers regarding COVID-19 – Practical tips

- Consultation does not have to be face to face - include workers who are working from home
- Consequences of not doing consultation?
- Consultation is not just about returning to the workplace – also relevant for workforces who never left the usual place of work
- Ongoing obligation including in relation to the longer term impacts of COVID-19 on workplace design (eg open plan offices without screening, reduction of worker touch points, shift changes)
- Risk assessments make useful tools to conduct consultation processes



Consultation – Concurrent duty holders

- Consult, cooperate and coordinate with concurrent duty holders – who is doing what?
 - Suppliers about how to safely manage deliveries
 - Other businesses that share your worksite or premises about how to manage shared facilities (eg lifts, lunch rooms, car parks) and the process for a suspected or confirmed case
 - Other businesses you interact with eg contract cleaner
- Document the process!
- Even prior to COVID safety regulators were beginning to enforce - AW Geotechnical Pty Ltd



Mental health issues

Increasing focus on psychosocial risks by safety Regulators

- Includes bullying, harassment, stress, fatigue, occupational violence
- Safe Work Australia released national guidance on managing psychological safety in 2018
- Sexual harassment highlighted as a key WHS issue in 2021
- State Regulators currently developing Codes of Practice and guidance materials

Likely legislative change to model WHS laws to address the issue

- COVID has emphasised the issue but was a concern prior to the pandemic
- Issue highlighted in the Boland report, 2020 Sexual Harassment National Inquiry Report, etc.

Need to manage interface between HR and WHS teams in managing these risks





2

Managing working from home and returning to the office

Deciding who gets to come back, when

- Capacity restrictions mean many workplaces are only allowing % of workers at any one time
- How do you decide who starts returning?
 - Operational needs
 - Vulnerable workers
 - Individual employees who may be unsafe at home

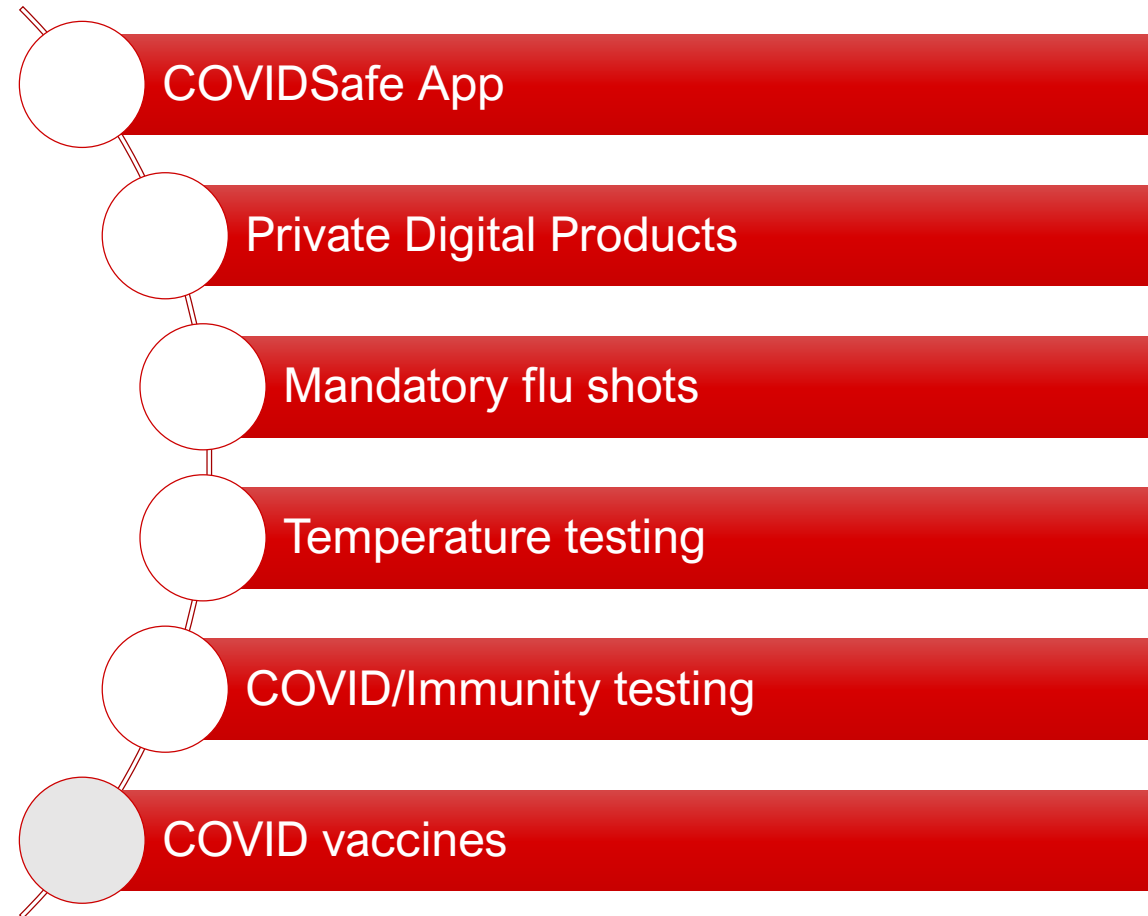


Managing those who don't want to come back...

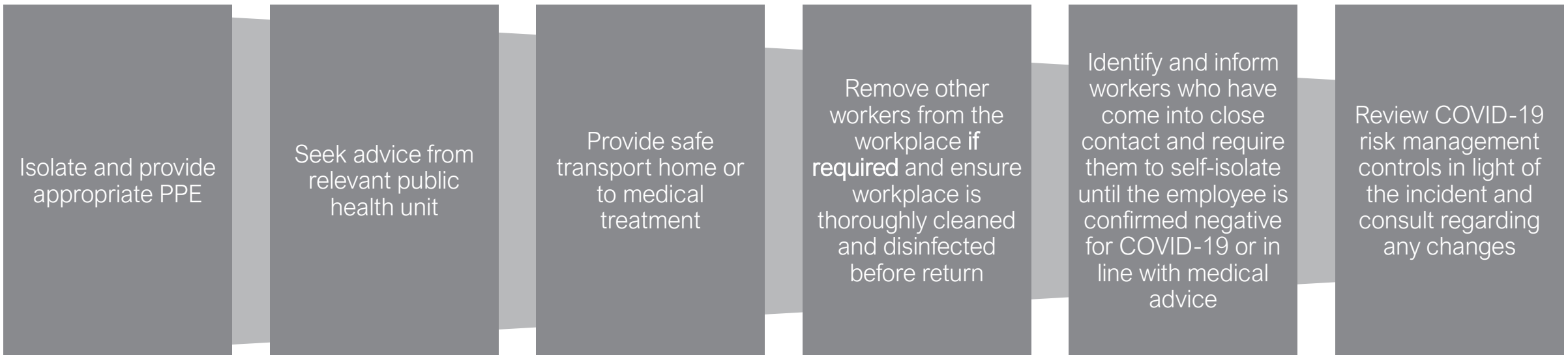
- Discuss the employee's reasons
 - Temporary?
 - Ongoing?
- Other underlying performance/conduct issues?
- Operational impact?



Limitations on potential control measures



Key risk issue: Responding to a confirmed or suspected case



Key risk issue: Responding to a confirmed or suspected case **continued**

You do not have to automatically close all of your workplace

- It may be adequate to only close parts
- Consider notification obligations to safety regulator
- In relation to communications with workforce:
 - Obtain consent to disclose COVID-19 diagnosis to others in the workplace on strictly **needs-to-know basis** and deidentified when possible
 - Only disclose information that is **reasonably necessary** to manage the risk of COVID-19
- What information you need to disclose to manage the risk of COVID-19 will depend on the circumstances
- May be necessary to provide information about when and where the person has been in the workplace (such as the area they work in, and what shifts/times they have recently worked)

General rule is that you should not use the individual's name and only advise those who have been in proximity with the person.

Formal flexible work arrangements

- More requests for formal flexible work arrangement applications for work from home are likely
- Undertake the usual consideration process
 - Consider carefully before refusing - COVID arrangements have proved many jobs can be done remotely
 - Team cohesion is a valid consideration
- Document properly
 - Ensure expectations are clear
 - Limited duration, or ongoing
 - Reserve right of review for operational reasons
- Review regularly



Ensuring workplace health and safety at home

- Initial response to COVID-19 required rapid response
 - Many ad hoc arrangements
- Now need to ensure have considered workers' home working arrangements
 - Self-assessment checklists
 - Worker acknowledgements of their obligations
 - Consider physical and psychosocial risks
- Risk of workers' compensation claims
 - *Workers' Compensation Nominal Insurer v Hill* [2020] NSWCA ⁵⁴



Key risk issue: psychosocial risks and hazards

Risk / hazard	Example
Changes to work demand	Increased workload, feeling 'always on the job'
Feelings of isolation	Working from home, different / less communication with managers and colleagues
Low support	Lack of normal support due to isolation
Poor environmental conditions	Temporary workplaces hot / cold / noisy or unsafe work environment
Poor organisation management	Lack of information
Anxiety, stress, or fatigue	Over-worked, balancing of increased responsibilities, concerns about job control / security/financial stress



Integrating remote and in-person work teams

- More regular team meetings
- More regular 1:1 meetings
- Ensure workers know how and where to raise issues
- Knowledge sharing and collaboration
- Learning and development
- Share successes and fun
 - Agree on appropriate forum



Monitoring performance and conduct

- Codes of Conduct still apply
- Blurring of personal/work lines
 - Is IT being used for an inappropriate purpose?
- IT/Data security
- Delegations
- Regular reminders of expectations





3

Vaccinations

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Government position

Federal Government's vaccination policy released late last year sets out the anticipated approach to roll out but does not mandate vaccine

Priority categories of workers:	
Phase 1a	Quarantine and border workers Frontline health care workers Aged care and disability care staff
Phase 1b	Other health care workers Critical and high risk workers including defence, police, fire, emergency services and meat processing Aboriginal and Torres Strait Islander people >55 Elderly adults >70
Phase 2a	Other critical and high risk workers (those working in supply and distribution of essential goods and services such as food, water, electricity, telecommunication and other critical infrastructure) Adults aged >50

State and Territory governments may mandate the vaccine via public health orders or other laws (eg *Health Services Amendment (Mandatory Vaccination of Healthcare Workers) Act 2020* in Victoria and public health orders regarding flu vaccines in aged care), but the goal is to be consistent nationally.



Can employers require COVID vaccinations?

Currently, no...

- Primary issue is whether it is a lawful and reasonable direction.
- Need to consider discrimination risks and personal circumstances – issues may arise in relation to genuine religious beliefs or genuine medical conditions
- Without a public health order or other express obligation, a request to an employee is not likely to be a sufficient basis to make it lawful
- In some environments, it may become mandatory (eg health and aged care)
- Not just an issue for employees – contractors, visitors, inspectors, union officials exercising rights of entry etc
- Risks of giving a direction that is not lawful or reasonable – breach of contract, general protections and unlawful discrimination

Regulatory guidance

Safe Work Australia:

- It is unlikely that a requirement to be vaccinated will be reasonably practicable" because, among other things, "at present, public health experts, such as the Australian Health Protection Principal Committee has not recommended a vaccine be made mandatory in any industries

Fair Work Ombudsman:

- The overwhelming majority of employers should assume that they won't be able to require their employees to be vaccinated against coronavirus

Practical issues

1. Monitor government position and Australian Health Protection Principal Committee advice
2. Participate in industry consultation (eg health and aged care consultation is ongoing) – ACTU is pushing for an agreed position
3. Risk assess – use expert advice if possible
4. Prepare a policy – without public health direction/s, best option is to strongly encourage vaccination
 - If you do ‘strongly encourage’ vaccination, ensure that your position is based on a risk assessment which involves expert medical advice
 - Need to consult on the development and implementation of any policy as a WHS issue
5. Maintain other control measures
6. May reach a different conclusions on flu vaccines vs COVID vaccines – each should be considered separately



Practical issues continued

Proof of vaccination
certificates?

- Currently vaccination recorded in Australian Immunisation Register
- Government intention is the record will form the basis of a certification (hard copy available on request)

Access to
vaccination?

- Facilitate access during work hours to assist in encouraging uptake
- Government advice is that employers can establish workplace vaccination clinics in partnership with health providers once roll-out progresses

Privacy issues?

- Vaccination status is health information and generally requires express consent to collect and disclose (although note employee records exemption if related to employment relationship)

Glover v Ozcare

Commissioner Hunt commented that:

...each circumstance of the person's role is important to consider, and the workplace in which they work in determining whether an employer's decision to make a vaccination an inherent requirement of the role is a lawful and reasonable direction. Refusal of such may result in termination of employment, regardless of the employee's reason, whether medical, or based on religious grounds, or simply the person being a conscientious objector.

- Relates to flu vaccines but concepts equally apply to COVID vaccines
- Jurisdictional issue as to whether the employee was dismissed
- Aged care worker repeatedly opted out of flu vac on basis that she nearly died as a child when she experienced anaphylaxis from a vaccination, but has not provided evidence of any medical condition
- Employee has worked for employer without vaccine since 2009
- When COVID struck, Ozcare had updated its policy requiring all aged care staff to receive flu vaccines and placed the worker on indefinite unpaid leave
- Employment found to be effectively terminated and unfair dismissal protection was triggered
- Hearing will need to consider whether employer gave 'lawful and reasonable' direction

Arnold v Goodstart Early Learning

Out of time application for unfair dismissal

- Commission declined to exercise its discretion to allow an unfair dismissal claim where application was lodged one day after the time limit
- The employee was a child care worker and was terminated after Goodstart made flu vaccinations mandatory (but allowed exceptions on medical grounds)
- Deputy President Asbury noted that she did "not consider that the merits of the Applicant's case are so apparent" that extending the application deadline was justified, ostensibly in part because Ms Arnold did not allege any medical reason for refusing vaccination.

Deputy President Asbury noted:

Prima facie the Respondent's policy is necessary to ensure that it meets its duty of care with respect to the children in its care, while balancing the needs of its employees who may have reasonable grounds to refuse to be vaccinated involving the circumstances of their health and/or medical conditions. It is also equally arguable that the Applicant has unreasonably refused to comply with a lawful and reasonable direction which is necessary for her to comply with the inherent requirements of her position, which involves the provision of care to young children and infants.

Indicates there is some sympathy to the argument that vaccination may be an inherent requirement of a role



4

Fair Work Act and Award responses to COVID (and other changes)

Temporary changes to workplace laws

During the height of COVID, a number of awards were varied to provide employers and employees extra flexibility to agree alternative working arrangements

- Temporary Award changes that still apply:
 - Unpaid pandemic leave and annual leave changes in awards
 - Paid pandemic leave in some awards
 - Clerks Award flexibility during coronavirus
 - Real Estate Award flexibility during coronavirus
- Temporary Award changes that no longer apply:
 - Educational Services (Schools) General Staff Award flexibility during coronavirus
 - Fast Food Award flexibility during coronavirus
 - Hospitality Award flexibility during coronavirus
 - Restaurant Award flexibility during coronavirus
 - Vehicle Award changes during coronavirus
- Changes to the *Fair Work Act* to support JobKeeper:
 - Scheme currently only operates until 29 March 2021
 - Provisions deal with JobKeeper enabling directions (eg stand downs, change in usual duties and change in work location) – if you are relying on these, need to address before provisions terminate



Fair Work (Supporting Australia's Jobs and Economic Recovery) Bill 2021

Currently before the Senate (second reading moved on 25 Feb 2021)

- Deals with a range of issues:
 - Defining casual employment
 - Casual conversion in NES
 - Casual Employment Information Statements
 - Offsetting of casual loadings
 - Additional hours for part-time employees
 - Flexible work directions
 - EA changes



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