

Article: observations on the effect of novel Coronavirus ('COVID-19') upon workplace law, and particularly the *Fair Work Act 2009* (Cth)

On 15 March 2020, the State government in Victoria made a declaration of a 'state of emergency' pursuant to section 198(1) of the *Public Health and Wellbeing Act 2008* (Vic). That declaration, based upon of circumstances causing a serious risk to public health, took effect from midday on 16 March 2020,¹ and was recently varied to extend the declaration² to May 2020, with further extensions being foreshadowed. Other State governments³ and the Commonwealth⁴ have either passed legislation, as New South Wales has done, or invoked existing public health and emergency legislation, as in Victoria either to access emergency powers or to make enforceable limits on movement, and unnecessary travel.

The restrictions on movement, cessation or disruption to Court activity,⁵ economic activity and ordinary life has had a corresponding and notable effect upon workplace law. In this summary, I explore some of the key effects. This article is by no means comprehensive: it omits references to the 'JobSeeker' and 'JobKeeper' payments regimes to employees and employers respectively, each funded by the Commonwealth government,⁶ but does deal with other aspects, including the 'JobKeeper' variations to the *Fair Work Act 2009* (Cth) ('**FW Act**').

Redundancy, 'stand-down' and other effects upon employees

A great number of employees have been made redundant, or else 'stood down' since late March 2020. Some of these are by reason of direct cessation of business (such as in pubs, bars and cafes) and others because of a reduction in economic activity caused by restrictions on movement.

Most workplace lawyers (myself included) have given much in the way of redundancy and stand-down advice since this period. Many contractual (and enterprise agreement) provisions dealing with stand-down have been examined in detail: and some for the first time since they were drafted. Aside from the 'JobSeeker' variations in Part 6-4C of the FW Act, which appear designed to avoid these steps, several aspects have become clear:

¹ And the declaration remained in force for four weeks, according to its terms.

² See section 198(3) of the *Public Health and Wellbeing Act 2008* (Vic). The extension was made on 13 April 2020.

³ See for example in relation to Court proceedings the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) (Act No 1 of 2020). This legislation was assented to on 25 March 2020. In relation to wider movements, see the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020*, made on 30 March 2020 pursuant to the *Public Health Act 2010* (NSW).

⁴ See the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020*, made on 18 March 2020 pursuant to section 475 of the *Biosecurity Act 2015* (Cth).

⁵ The changes to procedures includes moving many Court applications to phone appearances (including in the Federal Court of Australia, amongst other Courts) and altering appearances in person to video appearances on Zoom, or other video platforms such as Microsoft Teams.

⁶ See *Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020* (Cth) and the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth), being the Commonwealth governments' first two legislative responses to COVID-19 to date.

- a. the effects of COVID-19 upon the economy has created an environment of fear for both employers and employees.
- b. some of the decisions made in such an environment do not take account of some of the basic principles of workplace law. For example, some directions given to employees even prior to the commencement of Part 6-4C may not be in accordance with law, including the contracts of employment. Conversely, an examination of many 'redundancies' leads me to the conclusion that 'redundancy' in some circumstances has been used as a synonym for 'dismissal'.

As I set out below, it remains to be seen whether this aspect of the COVID-19 pandemic will have a consequence in either unfair dismissal, or other termination cases.

General protections and 'unfair dismissal'

The sheer scale of stand down and redundancies since late March 2020 is one of the more striking aspects of this COVID-19 period.

At present, the Fair Work Commission ('**Commission**') is hearing applications for general protections and unfair dismissal in the usual way. However, it is likely that most listed applications will be heard in a way not in keeping with former practice, including by video link rather than with 'in person' appearances.

One of the aspects of the COVID-19 pandemic which is not known is the degree to which the stand-downs and redundancies will cause an increase in applications for relief. The 'JobSeeker' payments regime⁷ will reduce the immediate need for dismissed employees to make applications – but the payments under this legislation are not due until May 2020. Desperate employees unhappy with their treatment may seek relief, regardless of merits. This is one area to watch.

Award implications – Schedule to modern awards

Modern awards made pursuant to Part 2-3 of the FW Act apply widely amongst Australian employees. Where the terms of an award apply, (often pursuant to cl 4.1 of the particular award) then they apply to:

- a. an employer in a particular industry; and
- b. where the employee or employees concerned are covered by the classification structure, contained in the particular modern award.

The Commission is in the process⁸ of varying more than one hundred modern awards (commencing with the Hospitality Award and the Clerks Award, both in late March 2020) by inserting a specific 'COVID-19' schedule into those awards. That schedule provides:

- a. first, that an employee may be entitled to 'pandemic leave' which is unpaid leave;
- b. second, that certain employees will have certain flexibilities. This includes the flexibility to work ordinary hours from home, rather than at the workplace;
- c. third, there are further effects. Note 1 to the draft schedule notes that any person entitled to a benefit under the schedule has a 'workplace right' within the meaning of section

⁷ See fn6, above.

⁸ See <https://www.fwc.gov.au/awards-and-agreements/awards/award-modernisation/variation-applications/AM2020/12?type=variation>.

341(1)(a) of the FW Act. This, along with the contents of Part 3-1 of the legislation, effectively provides that COVID-19 has the potential to be a basis for applicants seeking relief for dismissal, or from adverse treatment in employment.

The COVID-19 schedule is not identical in all cases, but subject to variation between industries, has many of the attributes listed above.

'JobKeeper' provisions in Part 6-4C of the FW Act

The *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Cth) has upon passing into law on 9 April 2020, amended the FW Act by applying specific COVID-19 provisions to existing employees.

These provisions include:

- a. a new Part 6-4C in the FW Act;
- b. the power to the employer to alter duties, and place an employee who is eligible for JobKeeper payments to take twice as much annual leave at half the employee's rate of pay, whilst the employee obtains JobKeeper payments.

The main question in relation to Part 6-4C is the extent to which it will prove useful to employees and employers. From my observation, many flexible arrangements (without regard to the FW Act or even existing awards) are being made on a daily basis by employers and employees. The new Part 6-4C provides an admirable level of flexibility and one which has been previously resisted by peak union bodies, but it may be superseded by 'on the ground' pragmatism.

Conclusion and way forward

Whilst strictly speaking, the COVID-19 pandemic is a health crisis, it has implications both in economics, in the administration of the state, and of course in the political sphere.

For reach of these reasons, the extensive disruption and effects of COVID-19 are likely to be felt for many years. The major unknown factor is whether the effects will be nation-wide, and longer term, or whether (in the latter part of 2020) the Australian, regional and global economies will bounce back to some degree.

One curious side-effect to watch will be whether the flexibilities contained in the COVID-19 specific award schedule and Part 6-4C remain, as after the pandemic it is no longer of considerable force and effect. I consider it possible though unlikely that the health crisis could cause or even contribute to substantial regulatory change in workplace law.

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