SENATE SELECT COMMITTEE ON COVID-19

21 MAY 2020

Fair Work Commission

Senator Perin Davey asked the following question at the hearing on 21 May 2020:

Ms O'Neill: The increase in unfair dismissals has been unprecedented. It's significantly higher than any other period, from our records. Dismissal claims have been reasonably constant over a number of years now. We had seen a modest increase during this financial year to date, but we're seeing at the moment—and these are the latest figures I've got—an increase of more than 70 per cent in unfair dismissal claims. I think it's fair to say that it is clearly COVID-19. Internal research that we've done, for example, points to a positive correlation between unemployment levels and retrenchment rates and unfair dismissal claims, which makes a lot of sense when you think about it.

Senator DAVEY: I understand there was quite an increase during the GFC around 2009-10. Is the increase we are presently experiencing significantly higher than the increase we saw at that time?

Ms O'Neill: I think that is absolutely the case. I might take on notice the details. FWC I don't have the 2008-09 figures in front of me. Of course, at that time, 2009, the Fair Work Act commenced and the whole jurisdiction of employment was consolidated, so it might be difficult to draw a direct parallel, but there's no doubt that what we've seen in terms of a spike is unprecedented, as I've said.

The response to the honourable Senator's question is as follows:

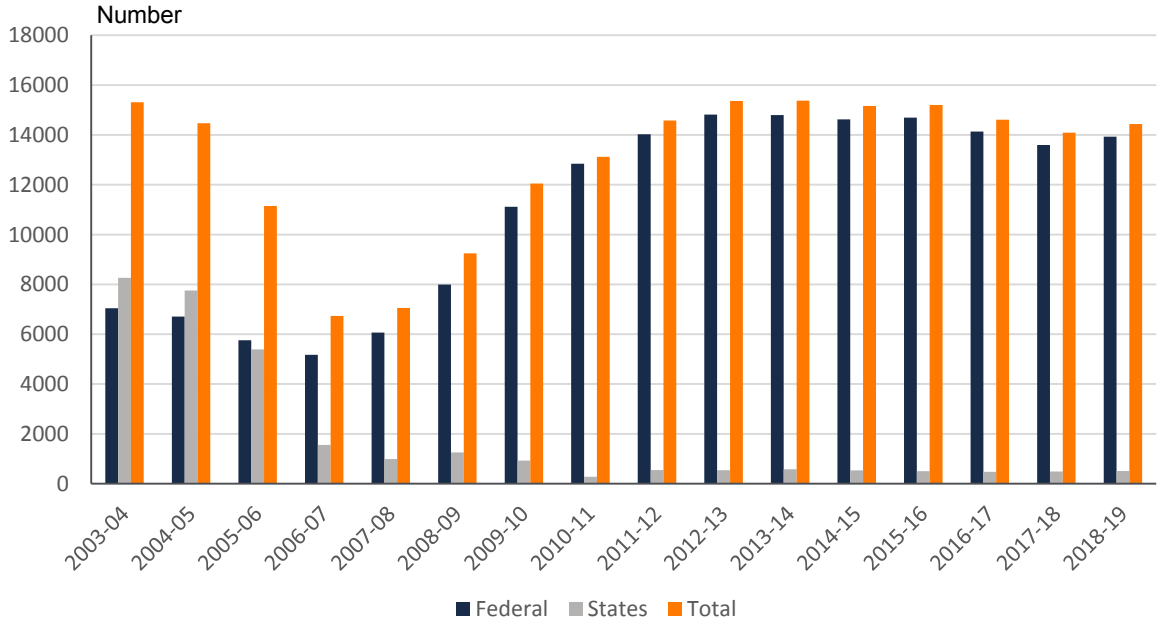
In the 4 week period to 15 May 2020, the number of unfair dismissal applications received was over 70 per cent higher compared to the same time last year. General protections involving dismissals also increased by more than 40 per cent.

In the 2019-20 financial year to 15 May 2020, 14,357 unfair dismissal applications have been lodged with the Fair Work Commission.

By comparison, in 2008-09 7,994 unfair dismissal applications were lodged with the Commission and 1,254 in state jurisdictions, for a total of 9,248.

However, this increase cannot be attributed solely to either the Global Financial Crisis or the COVID-19 pandemic. Direct comparisons are difficult. In addition to the transfer of most unfair dismissal matters from state jurisdictions to the national system in 2009-10, legislative changes at that time expanded the coverage of the unfair dismissal jurisdiction. In particular, the *Fair Work Act 2009* (Cth) removed an exemption for employers with fewer than 100 employees, bringing more employers and employees into the jurisdiction.

Chart 1: Number of unfair dismissal applications, 2003–04 to 2018–19



Note: Data was not available for 2015–16 to 2018–19 in South Australia so the number of unfair dismissals for these years were assumed to be the same as in 2014–15.

Source: 2003–04 to 2010–11 from Chart 10.1 of the Australian Government (2012), *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, August, 2011–12 to current using data from State tribunals and the Fair Work Commission.

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Fair Work Commission

Senator Perin Davey asked the following question at the hearing on 21 May 2020:

Senator DAVEY: It would be really interesting to see the data comparisons. I understand the GFC occurred over a much longer time frame, so job losses didn't occur overnight as they did in this instance, but the comparison of job losses to claims, truncated, would be very interesting to see.

Mr Hehir: Recognising there is that complexity of jurisdiction, with states and territories being predominantly responsible prior to 2009-10, as opposed to now.

Ms O'Neill: There is a longitudinal picture, which we're happy to provide on notice, which looks at the overall volume of, essentially, dismissal claims dating back prior to 2009, which looks at what the volume of cases before state tribunals was. That's probably the best we could provide to give the longer term picture.

Senator DAVEY: That would be interesting to see.

The response to the honourable Senator's question is as follows:

Please see response to Question on Notice regarding unfair dismissal claims.

Senate Select Committee on Covid 19

21 MAY 2020

Attorney General's Department

Senator the Hon Katy Gallagher asked the following question at the hearing on 21 May 2020:

How many applications to vary Enterprise Agreements received since new the Fair Work Amendment (Variation of Enterprise Agreement) Regulations 2020 came into effect on 17 April have included a permanent change to employees' pay?

The response to the honourable Senator's question is as follows:

There were 38 applications to vary enterprise agreements lodged with the Fair Work Commission between 17 April 2020 and 21 May 2020. Analysis of these applications indicate that 15 propose a change to wages or allowances payable under the enterprise agreement. Of these 15 applications, the notice period before a vote by employees on the proposed change was seven or more calendar days in at least nine applications.

Under the *Fair Work Act 2009* an enterprise agreement, including any variations to it, remain in force until the agreement is terminated or replaced. Therefore, the extent that the above variations may be regarded as permenant is limited to the operational period of the agreement as varied.

SENATE SELECT COMMITTEE ON COVID-19

21 MAY 2020

Fair Work Commission

Senator Katy Gallagher asked the following question at the hearing on 21 May 2020:

CHAIR: Thank you, Ms Quinn. I have a final question for the Fair Work Commission or maybe Attorney-General's, which I hope hasn't been asked before. How many JobKeeper disputes have been received in total with the commission?

Ms O'Neill: We've had 323 disputes lodged as at 19 May.

CHAIR: Are they easily broken down? What are the main causes of the disputes? How would you categorise the break-up of the main three areas?

Ms O'Neill: The largest ones would be around stand-down directions, requests to make changes to employees' dates, time and hours of work and requests to agree to take annual leave.

CHAIR: Okay. Are they equally split?

Ms O'Neill: In some cases there can be more than one category for the same dispute, but, yes, they're reasonably evenly split. I'm happy to take the detail on notice, if that helps.

The response to the honourable Senator's question is as follows:

As at 19 May 2020 there were 323 applications lodged under s.789GV – application to deal with a dispute under Part 6-4C of the *Fair Work Act 2009*.

Detail on the subject matter of the dispute applications is provided in the table below. Please note that a single dispute application may fall into multiple subject matter categories.

Nature of JobKeeper disputes	
789GDC Jobkeeper enabling stand down	41
789GE Duties of work	10
789GF Location of work	6
789GG Days of work etc.	40
789GJ Taking paid annual leave	28
789GU Employee requests for secondary employment, training etc.	5

The remaining 237 dispute applications were outside the Fair Work Commission's jurisdiction.

Senate Select Committee on COVID-19

21 MAY 2020

Attorney-General's Department

Senator Kristina Keneally asked the following question at the hearing on 21 May 2020:

Senator KENEALLY: Last week, as part of the deal with One Nation to prevent the access period from returning to the seven-day period, the Minister for Industrial Relations announced that the effect of any approved variations would be limited to 12 months. He made this announcement. Were you asked for advice on whether or how such an amendment could be achieved?

Mr Hehir: I don't have the detail of that in front of me in terms of whether we were asked for the mechanics of how it could be achieved. I am not sure of the detail of whether the mechanics were actually checked. We would have given policy advice on the intent and whether it was possible, would be my view, but I'm happy to take on notice what was actually provided.

The response to the honourable Senator's question is as follows:

The Attorney-General's announcement was informed by legal advice provided by the department. The department is continuing to advise the Attorney-General on the drafting of the new regulation.

SENATE SELECT COMMITTEE ON COVID-19

21 MAY 2020

Fair Work Commission

Senator Kristina Keneally asked the following question at the hearing on 21 May 2020:

Senator KENEALLY: Would the Fair Work Commission usually be consulted prior to a change of regulation such as this?

Ms O'Neill: Not necessarily. Sometimes input is sought, in terms of a technical review from an operational perspective, but it is not necessarily the case on all occasions that there's such consultation.

Senator KENEALLY: Did the Fair Work Commission consider that this change was necessary?

Ms O'Neill: We'd be completely agnostic as to whether it was necessary or appropriate or have any other view on the merits of it.

Senator KENEALLY: You can take this on notice: could you let me know the last time there was a regulation change by the minister for industrial relations where you were consulted.

Ms O'Neill: Certainly.

The response to the honourable Senator's question is as follows:

In mid-2019 the Fair Work Commission was asked to identify any technical or implementation issues in relation to the proposed *Fair Work Amendment (Modernising Right of Entry) Regulations 2019*.

Senate Select Committee on COVID-19

21 MAY 2020

Attorney-General's Department

Senator Kristina Keneally asked the following question at the hearing on 21 May 2020:

Senator KENEALLY: Right. To the Fair Work Commission: are you waiting to finalise any agreements until the new regulation is in place?

Ms O'Neill: I wouldn't anticipate so. The commission operates under whatever legislative regime is in place for any applications that would have been put in abeyance, for example, pending any potential change in regulations.

Senator KENEALLY: So, essentially, even though the government's announced a change in policy, you're going to continue under the current policy?

Ms O'Neill: There are applications before the commission and it will be up to the members that are dealing with them as to how and when they determine the applications. At this point, they will be doing so on the basis of the legislation in place.

Senator KENEALLY: I go back to the question that was put to the Attorney-General's Department. You can't give us a date for when this new amendment is going to be finalised and enforced?

Mr Hehir: I'm happy to take that on notice. We are finalising the drafting and then it has to go through the formal approval processes.

The response to the honourable Senator's question is as follows:

The timing for the proposed regulations is a matter for the Federal Executive Council. The department is seeking to finalise the draft regulations for the Minister's approval and submission to the Federal Executive Council as soon as practicable.

SENATE SELECT COMMITTEE INTO COVID 19

21 MAY 2020

Attorney General's Department

Senator Jacqui Lambie asked the following question at the hearing on 21 May 2020:

Senator LAMBIE: What's the policy rationale for limiting the notice period for variations to enterprise agreements from seven days to one day? First of all, where did that come from and what's your rationale behind it?

Mr Hehir: That policy is a matter for government, so that's something you'd need to ask the Attorney—

Senator LAMBIE: Did any of the departments advise?

Mrs Kuzma: Effectively the feedback, we understand, from business to the government is that, in the context of a lot of flexibility happening in the award system, some really good consensus-building work going on through changes to flexibility in the award system, there wasn't that same change flowing through to enterprise agreement variations, and there was some time on that. Where people all agree to everything, there was a seven-day period that could be an impediment to getting things done really quickly in the steps. So, when everyone is on the same page and it's all by agreement—and these are obviously things that are voted up and approved by employees—it makes it happen quickly in terms of the changes and the flexibility that's needed as part of the overall picture of flexibility and change by consensus.

Mr Hehir: Remembering that approximately 2.2 million employees are covered by awards but more than four million employees are covered by enterprise agreements, and, in addition to the flexibility that was being enabled by award variations, there are thousands of individual agreements, so we weren't able to get a process for varying those in bulk. We were looking for ways to speed up the process and enable businesses to respond quickly.

Senator LAMBIE: You said that businesses were involved in that request. I don't suppose there's any way that we could see a list of those businesses that believed this was the best rationale or the best way forward?

The response to the honourable Senator's question is as follows:

The development of the Regulations was informed by ongoing dialogue the Attorney-General had with stakeholders. Public endorsement for the Regulations were made by a number of organisations including the Australian Industry Group, the Business Council of Australia and the Australian Resources and Energy Group.

Senate Select Committee on COVID-19

21 MAY 2020

Attorney-General's Department

Senator Jacqui Lambie asked the following question at the hearing on 21 May 2020:

Senator LAMBIE: I wanted to ask whether or not you guys gave advice with the days and times of the employees—the new regulation that came in from seven days to one under the Fair Work Act. Were you guys asked for any advice on that at all? Any of the departments?

Mr Hehir: The making of the regulation is a matter that the department would normally provide advice on, and advice was provided.

Senator LAMBIE: Could you provide us? Is that advice public knowledge?

Mr Hehir: I would need to take that on notice, Senator.

The response to the honourable Senator's question is as follows:

The Attorney-General's Department provided legal advice to the Government about the *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020*, as it does for all regulations within the industrial relations portfolio.