



ASU Submission

Standing Committee on Employment, Education and Training

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Date:	9 November 2021

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1. The ASU

The Australian Services Union (ASU) is one of Australia's largest unions, representing approximately 135,000 members.

The ASU was created in 1993. It brought together three large unions – the Federated Clerks Union, the Municipal Officers Association and the Municipal Employees Union, as well as a number of smaller organisations representing social welfare workers, information technology workers and transport employees.

ASU members work in a wide variety of industries and occupations, including:

- Social and community services;
- Disability support;
- Local government;
- State government;
- Transport, including passenger air and rail transport, road, rail and air freight transport;
- Clerical and administrative employees in commerce and industry generally;
- Call centres;
- Electricity generation, transmission and distribution;
- Water industry;
- Higher education (Queensland and South Australia); and
- Australian Taxation Office.

The ASU has members in every State and Territory of Australia, as well as in most regional centres. Around 50% of ASU members are women, the exact percentage varies between industries, e.g. in social and community services around 70% of our members are women. Our members are employed in both the Federal Fair Work and state industrial jurisdictions.

2. Our submission

The impact of Covid-19 on our members was significant but varied. Some members were stood down for extended periods or worked reduced hours under Jobkeeper enabling directions. Other members experienced significant disruption to their normal working patterns because public health orders required them to change how, when and where they worked.

The ASU agrees with the observation of Justice Ross that *'while responding to the consequences of the pandemic, the Commission has also seen an increase in its caseload with substantial increases in the number of unfair dismissal matters and workplace disputes.'*

Normal industrial activity (such as Award Reviews, enterprise agreement approvals, unfair dismissals, disputes, and bargaining) continued during the pandemic. On top of our normal work, the policy responses to the pandemic generated additional industrial activity, which increased the number of matters run in the Commission.

For the most part, the ASU's industrial activity was driven by employers' responses to the pandemic policy. However, the ASU also proactively initiated industrial activity to advance our members interests. Major peaks were seen at the start of the pandemic, at the introduction of Jobkeeper, and at the end of Jobkeeper.

In particular, we would like to discuss the impact of stand down disputes, bargaining and the modern awards jurisdiction on the Commission's caseload.

3. Stand downs and Jobkeeper enabling directions

A significant number of ASU members were either stood down under s 524 of the *Fair Work Act 2009* ('the Act') or subject to a Jobkeeper Enabling Direction under Part 6-4C of the Act. This generated a significant amount of industrial activity in the Commission.

Section 524 of the Act provides an employer with the power to stand down an employee in certain circumstances ('stoppages of work') that mean they cannot be usefully employed.

Before the pandemic, this provision was very rarely used. There was very little precedent to guide the use of this provision, which exploded in the early stages of the pandemic. Naturally, without clear guidance on the application of s 524 there were disagreements between employers and employees about how it should be applied. Generally, disputes concerned the allocation of available work amongst employees or whether a stand down was authorised under s 524.

Additionally, there has been disagreement between members of the Commission about the extent of the Commission's powers to resolve disputes. In some cases, the Commission has granted compensatory payments and orders that the employee should be returned to work. In other cases, the Commission has found that it did not have the power to make such orders.

Case Study – Local Government in Victoria

In Local Government in Victoria stand downs pursuant to the Act were unheard of until late March 2020. By the end of April 2020, the ASU Victorian Authorities and Services Branch had filed 7 separate stand down disputes in the Commission. All but one of the matters was resolved during conciliation before the Commission, and none were ultimately arbitrated. Conciliation of the matters tended to be a lengthy process requiring multiple appearances before the Commission. In total, the matters were subject of 16 separate conferences before the Commission. The ASU filed an additional 6 disputes under enterprise agreements in 2020 against employer's in Victorian Local Government about circumstances arising from Covid-19-19. Those applications included disputes about agreement obligations relating to consultation, working from home arrangements and occupational health and safety. Legislative stand down provisions, and agreement provisions, were relied upon in numerous further disputes that were raised at the local level and resolved without an application to the Commission. Enterprise bargaining in Victorian Local Government was impacted by Covid-19 and resulted in 6 applications to vary enterprise agreements in 2020. The applications related to agreements that were up for renegotiating but for which a 'rollover' variation was sought as an interim step to allow normal bargaining processes to commence later, typically after a further 12 months. There were also numerous informal arrangements made by which agreement was reached to delay bargaining for a period.

In April 2020, the Act was amended to provide employers with the power to issue directions modifying an employee's hours of work if that employee was receiving a Jobkeeper payment. The Jobkeeper enabling directions applied in a much broader range of circumstances than s 524 stand downs. Additionally, the Commission was granted greater powers to handle disputes, including the ability to set aside or modify Jobkeeper enabling directions.

Entirely novel and hurriedly drafted, the Jobkeeper enabling directions caused significant disagreement between employers and employees about their application. Disputes concerned the eligibility of members for Jobkeeper, the operation of the directions, and the interaction between the Jobkeeper provisions and paid leave entitlements.

Case Study – Private Sector in Victoria

The Victorian Private Sector Branch had an increased number of matters that were referred to the Commission during the Covid-19 period. In particular matters pertaining to 'consultation' obligations under the Jobkeeper legislation where employers had made unilateral decisions to retrench staff where we believe they could have been provided with Jobkeeper payments to see them through the downturn period, instances where Jobkeeper payments were unjustifiably withheld, the calculation of Jobkeeper payments where someone was working some hours and the application in regards to equity for the distribution of work during lockdown. Aside from the application of Jobkeeper there were issues around withholding public holiday entitlements during stand down, issues over allowing employees to work from home on an equitable basis and the provision of work to employees on an equitable basis after Jobkeeper payments had expired as well as unfair dismissal applications on non bona-fide redundancies. Also there were disputes around the application of annual and long service leave both during Jobkeeper and after.

In our experience, the Commission responded quickly to applications to deal with stand down and Jobkeeper disputes. Matters were quickly allocated to Commission members and convened for conference after applications were lodged. While not all stand down or Jobkeeper matters proceeded to arbitration, some did.

4. Modern Award Variation Applications

The Commission is responsible for maintaining the 'Modern Award' system of industry-based minimum standards for pay and conditions. In making Modern Awards, the Commission is acting as a regulator setting a floor for pay and conditions in the Federal Jurisdiction. Modern Awards, unlike historical awards, are not made to settle disputes between employers and employees. However, the Commission relies on the industrial parties (usually employers' associations, unions, and peak bodies) to provide it with the information it requires to make and vary these Awards through an arbitral process. In any case, a Modern Award matter is likely to be time and resource intensive for both the industrial parties and the Commission. In particular, a Modern Award may only be made, varied or revoke by a Full Bench, constituted by three members, including at least one who is a President, Vice President or Deputy President of the Commission.

In 2021, the Fair Work Commission made a number of variations to modern awards on its own motion, notably providing an entitlement to unpaid pandemic leave in all Modern Awards.

In 2020 and 2021, the ASU was actively involved in a several modern award cases relating to the pandemic. These matters include:

- the ACTU-coordinated claims for paid and unpaid pandemic leave in all modern awards.
- The ASU application to vary the *Social, Community, Home Care and Disability Services Industry Award 2010* ('**SCHDS Award**') to secure additional compensation for disability sector employees providing services to clients infected with Covid-19.
- The ASU negotiated a significant temporary variation to the *Clerks (Private Sector) Award 2010* to provide flexible working arrangements for employees working from home.

However, the normal work of the Commission continued. For example:

- the ASU was involved in the Four Yearly Review of the SCHDS Award in 2020 and 2021. In March 2020, the review of the SCHDS Award was listed for nearly a week of hearing days during the outbreak of the Pandemic. The matter was then on hold until the Commission issued a Decision in May 2021. Following May 2021 Decision, there have been multiple rounds of submissions and evidence, including additional days of oral submissions.
- The ASU has lodged a variation to update the Victorian Local Government Industry Award 2015 to reflect changes made to Modern Awards by the Fair Work Commission during the Four Yearly Review of Modern Awards.
- In March 2022, the Commission opened a review of the family and domestic violence leave provisions in Modern Award. The ASU has been actively in supported the ACTU claim for 10 days paid family and domestic violence leave.

Each of these matters required at least one day of hearing (and in some cases more) and the attention of a senior member of the Commission (including the President, one of the Vice Presidents or a Deputy President). Undoubtedly, this would have increased the caseload of the Commission.

5. Bargaining

The impact of Covid-19 on enterprise bargaining was significant. Our experience was that employers across all sectors of the economy delayed the commencement of bargaining or put existing negotiations between March 2020 and March 2021. However, the reduction in bargaining in 2020 will be balanced by an increase in bargaining as the economy returns to normal. Since March 2021, the ASU has seen a significant amount of bargaining in some industries (such as local government and the energy sector). It is likely that the number of agreements under negotiation will increase as the economy returns to normal.

Bargaining generates industrial activity in the form of scope disputes, good faith bargaining disputes, protected action ballot applications and agreement approval applications. If bargaining is not happening, these activities will be reduced. This will have reduced the caseload of the Commission. However, it is likely that the caseload of the Commission will increase as employers return to bargaining after the pandemic.

In some industries, we saw an unusual number of applications to vary enterprise agreements.

Case Study – Bargaining in Victorian Local Government

Enterprise bargaining in Victorian Local Government was impacted by Covid-19-19 and resulted in 6 applications to vary enterprise agreements in 2020. The applications related to agreements that were up for renegotiating but for which a ‘rollover’ variation was sought as an interim step to allow normal bargaining processes to commence later, typically after a further 12 months. There were also numerous informal arrangements made by which agreement was reached to delay bargaining for a period.

Case Study – Bargaining in the Aviation Industry

The ASU represents customer service, operational, administrative, professional and managerial employees in aviation industry. We have negotiated enterprise agreements with Australian airlines (Qantas, Jetstar, Virgin), International Airlines (such as Singapore Airlines and Malaysian Airlines), ground-handling contractors (Menzies Aviation and Dnata Airport Services). The ASU has only finalised a two enterprise agreements in the aviation sector since March 2020 since (Virgin Australia in February 2021 and Singapore Airlines in April 2021). This has created a backlog of agreements requiring renegotiation. In the near future, the ASU will need to negotiate new enterprise agreements for each of the Australian airlines, the major ground handling contractors, and the international airlines. It is likely that bargaining at most of these employers will commence in 2022.

6. Online hearings

Finally, the Commission has relied extensively on Microsoft Teams to conduct proceedings during the pandemic. While there are some obvious efficiencies in using electronic platforms to conduct proceedings, in our experience there are also significant limitations. When the parties and their representatives appear in person they are able to interact with each other and build rapport. When appearing electronically this is less likely to happen. We have found that is much more difficult to resolve issues with employers through the electronically mediated proceedings. The limitations of the electronic platforms should be considered when the Commission considers its post-pandemic approach.

Case Study – Electrical Power Industry in South Australia

The ASU (and other unions) represent workers employed by Utilities Management Pty Ltd t/a SA Power Networks and are currently negotiating a new enterprise agreement.

The enterprise agreement negotiations have become protracted and involved multiple applications to the Fair Work Commission including applications for scope and bargaining orders.

Despite the relatively lower impact of Covid-19-19 restrictions in South Australia hearings and conferences held by the Commission have been conducted solely via Microsoft Teams even in circumstances where there were no applicable state government directives that would have prevented the business of the Commission being convened in person either in chambers or a Hearing Room available at the Adelaide offices of the Commission.