

Ai GROUP SUBMISSION

House of Representatives
Standing Committee on
Employment, Education and
Training

**Inquiry into the Fair Work
Commission Annual Report
2019-20**

9 November 2021



Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Inquiry by the House of Representatives Standing Committee on Employment, Education and Training (**Committee**) into the Fair Work Commission Annual Report 2019-20 (**Inquiry**).

The Fair Work Commission (**Commission**) presented its Annual Report for the financial year ended 30 June 2020 (**Annual Report**) to the Attorney-General and Minister for Industrial Relations on 23 September 2020.

Included within the President of the Commission's introduction to the Annual Report was the following statement:¹

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. We have responded by reallocating resources, piloting new methods to deal with matters more efficiently, and through short-term assistance from staff of other Commonwealth agencies. Notwithstanding the increase in caseload, the Commission has maintained its focus on performance and providing an efficient and effective dispute resolution service to the Australian public.

The goal of the Inquiry is to examine "how policy responses designed to manage the COVID-19 pandemic may impact the Fair Work Commission's caseload, including vaccine mandates, shutdowns, lockdowns, self-isolation and quarantine, and inconsistencies between the public health orders of the states and territories."

A comparison between the Annual Report and its predecessor for the 2018-19 reporting period reveals that 2,670 more applications were lodged in the Commission. The most significant increases were:

- s. 394 – Application for unfair dismissal remedy (an increase of 2,630 in applications);
- s. 789GV - Applications to deal with a dispute under Part 6-4C (an increase of 416 in applications);
- s. 365 - Application to deal with contraventions involving dismissal (an increase of 315 in applications);
- s.739 – Application to deal with a dispute (an increase of 185 in applications);
- s.526 – Application to deal with a dispute involving stand down (an increase of 173 in applications);
- s.789GV – Application to deal with a dispute in relation to a JobKeeper direction (an increase of 128 in applications).

¹ Fair Work Commission, *Annual Report* (2019-20) p 6.

Given the major impact of the COVID-19 pandemic which emerged during the 2019-20 reporting period, it is unsurprising that the increase in applications pertaining to dismissals was the most marked. Numerous businesses were unable to trade normally as a result of the pandemic and a large number of workplaces were forced to close due to the lockdowns enforced by the State and Territory Governments.

Policy responses from Government encouraged businesses to go on trading and enabled greater flexibilities to employers in the workplace. These responses encouraged businesses to retain staff and assisted in preventing an even larger surge in dismissal related applications to the Commission.

The additional workload generated by the newly introduced jurisdiction to deal with disputes in relation to a JobKeeper direction and under Part 6-4C of the *Fair Work Act 2009 (FW Act)* accounts for a significant part of the increased number of applications to the Commission in the 2019-20 reporting period. This element of the increase requires no additional policy response given the repeal of the majority of the JobKeeper provisions from the FW Act on 29 March 2021.

Stand down disputes were a significant contributor to the increase in applications in the 2019-20 reporting period. Such disputes increased dramatically in comparison to the previous reporting period owing to the difficult trading conditions imposed by the COVID-19 pandemic and the government's response. These disputes have now substantially decreased.

Unfair dismissals

The Annual Report for the 2018-19 Reporting Period states that there were 13,928 applications for an unfair dismissal remedy. A very significant increase is noted for the 2019-20 reporting period, during which 16,558 applications were made.

The substantial uptick in unfair dismissal applications can be attributed to the major effect of COVID-19 on employers in the first year of the pandemic. On 5 May 2020, the Australian Bureau of Statistics reported that between the week ending 14 March 2020 and the week ending 18 April 2020 alone, employee jobs decreased by 7.5%.² This amounted to almost 1 million employees losing their jobs due to COVID-19 and the restrictions applied by State and Federal Governments to prevent the spread of the virus.

Government responses improved the capacity of businesses to trade and provided an incentive to maintain employment relationships. Through the earlier states of the pandemic, the JobKeeper Payment scheme provided substantial assistance in ensuring employees could remain in their roles until conditions were once again favourable. The Reserve Bank reported in November 2020 that the JobKeeper payment was responsible for saving 700,000 jobs.³

² Australian Bureau of Statistics, *Weekly Payroll Jobs and Wages in Australia* (5 May 2020).

³ Reserve Bank of Australia, *How Many Jobs Did JobKeeper Keep?*, Research Discussion Paper – RDP 2020-07.

The policy response assisted in reducing the number of unfair dismissal applications made. There were 13,281 unfair dismissal applications in the 2020-21 reporting period – a return to a more ‘normal’ level.

Commission’s temporary jurisdiction relating to JobKeeper

A substantial contributor to the increase in the number of applications to resolve disputes in the Commission was the temporary amendments to the FW Act enabling applications to be made to deal with a dispute in relation to a JobKeeper direction and to deal with a dispute in relation to Part 6-4C of the Act.

The FW Act was amended on 9 April 2020 to include new JobKeeper provisions as Part 6-4C. The *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Cth) introduced section 789GV into the FW Act which provided the Commission with the capacity to deal with a dispute about the operation of Part 6-4C. Section 789GV authorised the FWC to deal with a dispute by arbitration and permitted it to make:

- an order it considered desirable to give effect to a JobKeeper enabling direction;
- an order setting aside, or substituting, a JobKeeper enabling direction; or
- any other order it considered appropriate.

The 2019-20 Annual Report was the first reporting period during which such applications were available. As such, a combined 544 applications were made under these provisions in that reporting period. The Annual Report reveals that the majority of the applications lodged under these provisions were withdrawn or administratively dismissed because they were not applications about Part 6-4C and the relevant jurisdiction was not enlivened.⁴ This may be attributed to some general unfamiliarity among applicants with the new jurisdiction. The Commission published a benchbook to assist parties in utilising the jurisdiction.

On 29 March 2021, the majority of the JobKeeper provisions were repealed.⁵ From this date, employers could no longer give an employee a JobKeeper enabling direction or request an employee to change their days and time of work under Part 6-4C. In addition, all JobKeeper enabling directions and agreements ceased to have effect after 29 March 2021. Although the Commission’s jurisdiction to deal with disputes under Part 6-4C of the FW Act has been retained, the scope of disputes which may arise under s. 789GV is significantly diminished. As such, only 291 applications were made to the Commission under the JobKeeper provisions in the 2020-21 reporting period. Similar to the 2019-20 reporting period, the majority of these were withdrawn. The reasons given for these withdrawals in the Annual Report were:⁶

⁴ Fair Work Commission, *Annual Report* (2019-20) p 23.

⁵ *Coronavirus Economic Response Package (Jobkeeper Payments) Amendment Act 2020*, Schedule 2, Part 1.

⁶ Fair Work Commission, *Annual Report* (2020-21) p 27.

- the applications did not concern a dispute about the operation of Part 6-4C;
- parties reached an agreement without the assistance of the Commission;
- the applicants withdrew their application after a discussion with Commission staff.

Owing to the COVID-19 specific circumstances under which the increased number of applications brought to the Commission under Part 6-4 of the FW Act arose, the number of applications brought under these provisions will continue to fall and no policy response is necessary to deal with this burden on the Commission's resources.

Disputes regarding stand down

In the 2018-19 reporting period, only 10 applications were made under s.526 - Application to deal with a dispute involving stand down. Since the onset of the COVID-19 pandemic, the number of applications made under this section increased to 183. The number rose again in the 2021-21 reporting period to 247 applications.

The dramatic downturn in business and the inability of many businesses to trade as a result of intermittent lockdowns by the various State and Territory Governments accounts for the increase in applications made under s. 526.

With the repeal of the majority of the JobKeeper provisions and the persistent lockdowns after the 2019-20 reporting period, applications made under this section rose again in the 2020-21 reporting period.

Due to the COVID-19 specific circumstances under which the increased number of applications under s.526 were made, these disputes have now substantially decreased. Accordingly, no policy response is necessary to deal with this burden on the Commission's resources.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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