

## **FWC Bulletin**

1 April 2021 Volume 12/21 with selected Decision Summaries for the week ending Friday, 26 March 2021.

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## **JobKeeper dispute information updated**

Most of the JobKeeper provisions in Part 6-4C of the *Fair Work Act 2009* (Cth) were repealed on 29 March 2021.

The Fair Work Commission has updated relevant information to reflect the changes, including:

- our [JobKeeper disputes](#) web page
- [Form F13A – Application for the Commission to deal with a JobKeeper dispute \(coronavirus economic response\)](#), and
- the [JobKeeper disputes benchbook](#)

## **Workplace Advice Service goes national**

We are pleased to announce that from 1 April 2021 the [Workplace Advice Service](#) will be available nationally.

We have recruited a further **14 new partner organisations** to provide legal assistance to clients in the **Northern Territory**, the **Australian Capital Territory** and **Tasmania**. This brings the total number of our partner organisations to 85.

The Workplace Advice Service is designed to improve access to justice and reduce complexity for its users. It is a free legal advice program co-ordinated by the Fair Work Commission.

In partnership with private law firms, Community Legal Centres, Legal Aid and barristers, we offer 1 hour of free legal advice to unrepresented individuals and small business employers on the issues of alleged unfair dismissal, bullying and the protection of workplace rights.

## Decisions of the Fair Work Commission

**The summaries of decisions contained in this Bulletin are not a substitute for the published reasons for the Commission's decisions nor are they to be used in any later consideration of the Commission's reasons.**

Summaries of selected decisions signed and filed during the week ending Friday, 26 March 2021.

- 1** MODERN AWARDS – variation – COVID-19 – ss.134, 157, 158 Fair Work Act 2009 – Full Bench – on 8 April 2020 a Full Bench of the Commission issued a decision on its own initiative [[\[2020\] FWCFB 1837](#)] varying 99 modern awards to insert a new Schedule X: Additional measures during the COVID-19 pandemic – varied awards included a group of 'Health Awards' – Schedule X contained provisions establishing entitlement of unpaid pandemic leave and taking twice as much annual leave at half pay – Schedule X in Health Awards was due to cease operation on 31 July 2020 – applications were made by various unions to insert an entitlement of paid pandemic leave in the Health Awards and the extension of Schedule X and were referred to the Full Bench – in a statement issued 29 July 2020 [[\[2020\] FWCFB 3986](#)] the Full Bench expressed a provisional view that Schedule X provisions in the Health Awards be extended till 29 October 2020 – no party opposed this provisional view and a determination to vary the Health Awards was published on 31 July 2020 – in a decision dated 29 October 2020 [[\[2020\] FWCFB 5768](#)] the Full Bench further extended the operation of Schedule X provisions to 29 March 2021 – in a decision published 27 July 2020 [[\[2020\] FWCFB 3940](#)] the Full Bench varied the Aged Care Award, Nursing Award and HPSS Award in respect of employees employed by residential aged care providers or required to work in residential aged care facilities to provide an entitlement of paid pandemic leave – this entitlement was inserted as Schedule Y and was to operate until 29 October 2020 – on 20 October 2020 the Full Bench issued a statement [[\[2020\] FWCFB 5578](#)] expressing a provisional view that Schedule Y be extended until 29 March 2021 – on 29 October 2020 a decision [[\[2020\] FWCFB 5768](#)] was published confirming Full Bench's provisional view and extending the operation of Schedule Y till 29 March 2021 – on 3 March 2021 a statement [[\[2020\] FWC 1148](#)] was issued advising that Schedules X and Y in certain awards were due to expire and indicated that parties who wished for extended operation of these schedules to make an application – applications to vary Schedule X in all Health Awards and Schedule Y in the Aged Care Award, Nurses Award and the HPSS Award were received – application sought extension of both schedules until 31 December 2021 – Full Bench when deciding to extend Schedule Y in July 2020 considered a number of factors such as the public interest because of the vulnerability of aged persons to COVID-19 fatalities and infection control measures – at the time of the July decision the COVID-19 position was deteriorating significantly, particularly in Victoria – more recently the position has significantly improved – the emergency circumstances which caused the Full Bench to award the paid pandemic entitlement for aged care employees no longer exist – Full Bench is minded to extend operation of Schedule X as community transmission of COVID-19 has occurred in Australia – without Schedule X there is a regulatory gap in the award safety net concerning employees who are required to self-isolate –

continued access to unpaid pandemic leave will enable people to remain in employment and support the important public policy objective – on 24 March 2021 the Full Bench expressed the provisional view [\[\[2021\] FWCFB 1596\]](#) that the operation of the provisions in Schedule X in the 9 health awards, which provide for an entitlement to unpaid pandemic leave and a facility for employees to take twice the amount of annual leave at half pay, should be extended until 31 December 2021 – Full Bench also of the provisional view that Schedule Y should not be further extended – parties were invited to file written submissions about the provisional view – no submissions were received opposing the provisional view – Full Bench confirmed its provisional view that the operation of the Schedule X provisions in the health awards should be extended until 31 December 2021 – Full Bench also confirmed its provisional view that the operation of the Schedule Y provisions in the Aged Care Award, the HPSS Award and the Nurses Award should not be extended beyond 29 March 2021 – as the Full Bench has stated in its earlier decisions, if circumstances in the aged care sector or in the areas of employment covered by the health awards generally change, the Full Bench will respond expeditiously either on application or at its own initiative.

Health sector awards – Pandemic Leave

AM2021/15 and Ors  
Hatcher VP  
Clancy DP  
Dean DP  
Spencer C  
Lee C

Sydney

[\[2021\] FWCFB 1622](#)  
26 March 2021

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- 2** MODERN AWARDS – variation – COVID-19 – ss.134, 138, 157 Fair Work Act 2009 – Full Bench – on 9 December 2020 the Commission received a letter from the Minister for Industrial Relations – requested the Commission 'undertake a process to ensure several priority modern awards in sectors hardest hit by the pandemic be amended' – the awards identified by the Minister included the *General Retail Industry Award 2020* (the Retail Award) – on 10 December 2020 the Commission issued a Statement which commenced a process in relation to the awards identified in the Minister's correspondence [\[\[2020\] FWC 6636\]](#) – conferences were held on 17 and 18 December 2020 and parties encouraged to engage in discussions to see if any joint positions could be advanced – on 26 February 2021 the Shop, Distributive and Allied Employees' Association (SDA), the Australian Workers' Union (AWU) and Master Grocers Australia (MGA) (collectively, the Joint Applicants) filed a joint application to vary the Retail Award (the Joint Application, AM2021/7) – Joint Application seeks to insert a new schedule: 'Schedule I – Additional flexibility measures – Part-time employees' into the Retail Award – in broad terms the proposed new Schedule I facilitates agreements between an employer and certain part-time employees to work more ordinary hours than their guaranteed number of hours agreed under clause 10.5 (an additional hours agreement), up to a maximum total of 38 ordinary hours per week – such 'additional hours' are to be paid at the employee's ordinary time rate of pay, and are subject to the restrictions in clause 15 of the Retail Award and clause 1.4 of the proposed Schedule I – the Joint Application was supported by the Australian Council of Trades Unions (ACTU) and the Council of Small Business Organisations Australia (COSBOA) – Commission sought submissions from interested
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parties – submissions in support of the application were received from the ACTU; AWU; SDA and MGA – submissions opposing the application were received from Australian Business Industrial, NSW Business Chamber and the Australian Chamber of Commerce and Industry (ABI) which included a draft determination foreshadowed by ABI as an alternative to the Joint Application (the ABI proposal); the National Retail Association (NRA); Retail and Fast Food Workers Union (RAFFWU); The Australian Industry Group (Ai Group) and The Australia Retailers Association (ARA) – both the Joint Application and the ABI proposal include a number of protections for employees, including the requirement that an additional hours agreement cannot be a condition of employment and cannot be entered into concurrently with an offer of employment – both proposals also provide a mechanism whereby a part-time employee who has regularly worked additional hours in excess of the number of hours agreed under clauses 10.5 or 10.6 may request that their employer vary the agreement under clause 10.5 to reflect the ordinary hours regularly being worked – two points of distinction between the two models: the minimum period before a request can be made (Joint Application: 6 months; ABI proposal: 12 months) and access to arbitration in respect of a dispute pertaining to whether there were reasonable business grounds for refusing an employee request (Joint Application: yes; ABI proposal: no) – also more general points of distinction between the Joint Application variation determination and the ABI proposal – broadly speaking the revised variation determination filed by the Joint Applicants is supported by the ACTU, AWU, MGA and COSBOA – the ABI proposal is supported by the ARA, NRA and (with some caveats) Ai Group – RAFFWU opposes the ABI proposal – central issue in these proceedings is the mechanism for facilitating the working of additional ordinary hours by part-time employees – at the outset the Full Bench wished to acknowledge the cooperative manner in which the parties have engaged with this issue – in particular, the level of cooperation and agreement between the parties to the Joint Application: the SDA and MGA; with the support of the ACTU, AWU and COSBOA, is unprecedented in this sector – Full Bench also acknowledged the cooperative way in which all parties participated in the conciliation process and endeavoured to narrow the issues in dispute – Full Bench recognise the significance of the fact that the Joint Application has the support of the principal union and some, though not all, relevant employer organisations – while such a level of consent is relevant to the consideration of the Joint Application it is not determinative – the Commission may make a determination varying a modern award if the Commission is satisfied the determination is necessary to achieve the modern awards objective – ascertaining the *effect* of a proposed variation is an essential part of the task of considering whether the variation proposed is *necessary* to achieve the modern awards objective – the Joint Application and the ABI proposal both seek to vary the operation of the current award terms relating to part-time employees, in particular clause 10 – the proper construction of clause 10.5 and 10.6 (and related provisions) is central to the argument put – the evident confusion in the operation of the current award and the impact of the COVID-19 pandemic on the retail sector warrant consideration being given to the variation of the Retail Award to provide certainty regarding the circumstances in which part-time employees may work 'additional hours' (that is in addition to the agreed hours under clause 10.5), without those hours being regarded as overtime – a modern award 'should be able to be read by an employer or employee without needing a history lesson or paid advocate to interpret how it is to apply in

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the workplace' – Full Bench of the view clause 10 is uncertain and requires variation to resolve that uncertainty – without clarification, any additional arrangements proposed by the parties are likely to also be uncertain, and the relationship with the award provisions more generally, problematic – once the proper construction of clause 10.6 (and any required variations) is determined the Full Bench can give more detailed consideration to the terms of the Joint Application and the ABI proposal – given the level of consensus that has emerged during the proceedings it is the *provisional* view of the Full Bench that there may be merit in the variation of the Retail Award to introduce a mechanism whereby a part-time employee who regularly works additional hours may request that their guaranteed hours be reviewed and increased, and their employer cannot unreasonably refuse such a request – next step in progressing these issues will be for Hampton C to convene a further conference to discuss the meaning and intent of clause 10 of the Retail Award and the *provisional* view of the Full Bench regarding the variation of the Retail Award – Full Bench will act on its own initiative under s.160(2)(a) to address these issues – the conference process set out above will conclude by no later than Friday 9 April – Full Bench will publish a *provisional* draft variation in the week commencing Monday 12 April 2021 – parties will be given an opportunity to file submissions in respect of any such proposal – the objective is to ensure that the Retail Award provides a simple, clear and easy to understand means whereby a part-time employee can agree with their employer to work additional ordinary hours.

Award flexibility – General Retail Industry Award 2020

AM2021/7  
Ross J  
Asbury DP  
Hampton C

Melbourne

[\[2021\] FWCFB 1608](#)  
24 March 2021

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- 3** MODERN AWARDS – variation – COVID-19 – s.158 Fair Work Act 2009 – Full Bench – on 8 April 2020 the Full Bench varied 99 modern awards to insert Schedule X: Additional Measures [\[\[2020\] FWCFB 1837\]](#) – Schedule X provided unpaid pandemic leave and options to take annual leave at half pay – subsequent decisions inserted Schedule X into additional awards and extended operation – 24 September 2020 decision extended operation of Schedule X until 29 March 2021 [\[\[2020\] FWCFB 5137\]](#) – applications filed to extend operation of Schedule X in 57 awards until 31 December 2021 – Full Bench considered continued access to pandemic leave will enable more people to remain in employment and self-isolate when required – considered the reasoning in the 8 April 2020 decision remains relevant – on 24 March 2021 the Full Bench issued a decision setting out its *provisional* view that the variation of each of the awards in Attachment A to extend the operation of Schedule X until 31 December 2021 was necessary to ensure that these awards achieve the modern awards objective [\[\[2021\] FWCFB 1601\]](#) – interested parties were invited to file submissions in response to the *provisional* view – one submission was received from the Australian Council of Trade Unions – raised issue that it was not clear to them whether the provisional views concerning Schedule X stated in the decisions of the Commission in [\[2021\] FWCFB 1601](#) and [\[2021\] FWCFB 1596](#) related to only the unpaid leave entitlement in that Schedule or the entirety of that Schedule –
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ACTU did not oppose the *provisional* view – no submissions received opposing the *provisional* view – Full Bench noted that its *provisional* view related to 'the operation of Schedule X' – had the Full Bench intended to only extend the operation of part of the Schedule (that is unpaid pandemic leave, as sought in the variations) it would have said so – without the continued operation of Schedule X there would be a 'regulatory gap' in the award safety net concerning employees who are required to self-isolate – continuing access to unpaid pandemic leave will enable more people to remain in employment and will support the important public policy objective of encouraging those who should self-isolate to do so – this will assist in limiting the spread of COVID-19 in workplaces and allowing businesses to continue to operate – Full Bench satisfied that the variation of each of these 57 awards to extend the operation of Schedule X until 31 December 2021 was necessary to ensure that these awards achieve the modern awards objective.

#### COVID-19 Award Flexibility Schedules

AM2021/9 and Ors  
Ross J  
Clancy DP  
Bissett C

Melbourne

[\[2021\] FWCFB 1621](#)

26 March 2021

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- 4** TERMINATION OF EMPLOYMENT – termination at initiative of employer – abandonment – ss.386, 394 Fair Work Act 2009 – application for unfair dismissal – applicant worked on a full-time basis for the respondent as a food processing worker for a continuous period of 5 and a half years – applicant was provided with a salary increase to perform supervisory and organisational functions in the respondent's business operation – respondent became concerned about the deterioration in the applicant's attitude as respondent received customer complaints about delays with food deliveries – applicant and respondent entered into a disagreeable exchange where the applicant refused the directive of the respondent – respondent stated that if the applicant was not happy in the role then the applicant did not need to come to work the next day – the following day the applicant did not attend work or attempt to contact the respondent – after 10 days absence the respondent treated the actions of the applicant as resignation – respondent issued payments to the applicant in respect of termination of employment – following the receipt of termination payments the applicant filed his claim for unfair dismissal – Commission determined that the actions of the applicant and not the respondent, brought the employment to an end – Commission held that 'the applicant engaged in a risky game of brinkmanship and unfortunately for him the employer refused to concede to his position' – Commission found that the applicant could not properly treat the words spoken by the respondent as dismissal from employment – determined that as a matter of fundamental fairness, the applicant was obliged to test the circumstances after the exchange with the respondent – Commission concluded that the applicant was not a person dismissed from employment in accordance with the meaning of s.386 of the FW Act – application dismissed due to being without jurisdictional foundation.
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- 5** TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – application for unfair dismissal – applicant employed in 2011 to work at the Tarrawonga Open Cut Coal Mine – terminated for serious misconduct – respondent claimed the serious misconduct involved failure to follow processes, specifically Safehaven Rule 5, which was a general obligation for health and safety – applicant claimed there was not a valid reason for his dismissal, although it may appear that he breached the respondent's rules, the circumstances were such that he could not have complied with them – applicant submitted that as the reason for dismissal was serious misconduct, the respondent bares the onus of proving that the applicant engaged in the conduct that he was accused – the Commission found there was an incident and the applicant did admit to breaching respondent's Rule 5 which the respondent's policy states will be treated as serious misconduct, therefore the respondent had a valid reason for termination – however, the Commission found this incident was not a 'near miss' – the Commission found respondent did not give the applicant an opportunity to respond to the show cause letter – applicant was denied basic procedural fairness in the termination process – Commission found this lack of procedural fairness made the termination unjust – Commission found the termination was unreasonable as the applicant was not treated in the same way as his colleagues who had previously broken the respondent's Rule 5 – Commission also found the termination to be harsh having regard to the personal circumstances of the applicant – the Commission noted that the applicant had apologised for his conduct – believed that he is truly remorseful – undoubtedly very embarrassing for the applicant, who had been elected by his peers to sit on the Workplace Health and Safety Committee, to be dismissed for breaching one of the Safehaven Rules – Commission accepts that the applicant has learnt his lesson from this misconduct – found dismissal unfair – applicant sought reinstatement – Commission found no basis to conclude that the respondent had lost trust and confidence in the applicant or if trust and confidence had been lost then it could be restored – found reinstatement appropriate – also appropriate to make an order to maintain the applicant's continuity of employment and period of continuous service with the employer – Commission may also make any order it considers appropriate to cause the employer to pay to the applicant an amount for the remuneration lost, or likely to have been lost, by the applicant because of the dismissal – applicant has been unemployed since the dismissal some 26 weeks ago – Commission considered any order made for lost remuneration should be discounted by 3 days to equate the discipline for the applicant in the same manner as his colleagues who had previously broken the respondent's Rule 5 – would also be appropriate for the applicant to be issued with a final warning in acknowledgement of the his misconduct – appropriate to make an order for the respondent to pay the applicant 25 weeks' pay at the applicant's normal rate.
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- 6** TERMINATION OF EMPLOYMENT – misconduct – s.394 Fair Work Act 2009 – applicant worked for respondent since 2015 – stood down with pay in May 2020 after allegations of workplace bullying and harassment against colleague – allegations included calling colleague 'gumby', 'dumbo' and 'simple' and stating 'I don't like you' – independent workplace investigation found allegations of bullying were sustained but did not recommend termination as the nature of the bullying was 'at the lower end of the spectrum' – respondent found investigator report was 'short and inadequate' – Board of Directors conducted a show cause process putting allegations to applicant as a result – applicant argued behaviour had been friendly 'banter' and in line with the workplace culture – Board did not accept applicant's denial of, or justification for, behaviour and dismissed applicant with 5 weeks' pay in lieu of notice – applicant submitted there was no valid reason for dismissal which was also procedurally unfair – respondent submitted applicant's 'systemic course of conduct' towards colleague constituted bullying and harassment and provided a valid reason for dismissal – Commission satisfied that applicant had breached respondent's code of conduct on multiple occasions which constituted valid reason for dismissal – found that respondent had combined show cause letter with investigation which was procedurally unfair and prejudicial to applicant – found the seriousness of the valid reason for dismissal militated against a conclusion that dismissal was harsh – application dismissed.

Ives v Link-Up (Qld) Aboriginal Corporation

## Subscription Options

You can [subscribe to a range of updates](#) about decisions, award modernisation, the annual wage review, events and engagement and other Fair Work Commission work and activities on the Fair Work Commission's website. These include:

**Significant decisions** – This service contains details of recently issued full bench decisions and other significant decisions. Each email contains links to the complete decisions and the Find Commission decisions web page. It is emailed when decisions are published.

**All decisions** – This service contains details of all recently issued Commission decisions with links to the complete decisions. Each email contains links to the complete decisions and the Find Commission decisions web page. It is emailed up to twice daily.

## Websites of Interest

**Attorney-General's Department** - [www.ag.gov.au/industrial-relations](http://www.ag.gov.au/industrial-relations) - provides general information about the Department and its Ministers, including their media releases.

**AUSTLII** - [www.austlii.edu.au/](http://www.austlii.edu.au/) - a legal site including legislation, treaties and decisions of courts and tribunals.

**Australian Building and Construction Commission** – [www.abcc.gov.au/](http://www.abcc.gov.au/) - regulates workplace relations laws in the building and construction industry through education, advice and compliance activities.

**Australian Government** - enables search of all federal government websites - [www.australia.gov.au/](http://www.australia.gov.au/).

**Federal Register of Legislation** - [www.legislation.gov.au/](http://www.legislation.gov.au/) - legislative repository containing Commonwealth primary legislation as well as other ancillary documents and information, and the Federal Register of Legislative Instruments (formerly ComLaw).

**Fair Work Act 2009** - [www.legislation.gov.au/Series/C2009A00028](http://www.legislation.gov.au/Series/C2009A00028).

**Fair Work (Registered Organisations) Act 2009** - [www.legislation.gov.au/Series/C2004A03679](http://www.legislation.gov.au/Series/C2004A03679).

**Fair Work Commission** - [www.fwc.gov.au/](http://www.fwc.gov.au/) - includes hearing lists, rules, forms, major decisions, termination of employment information and student information.

**Fair Work Ombudsman** - [www.fairwork.gov.au/](http://www.fairwork.gov.au/) - provides information and advice to help you understand your workplace rights and responsibilities (including pay and conditions) in the national workplace relations system.

**Federal Circuit Court of Australia** - [www.federalcircuitcourt.gov.au/](http://www.federalcircuitcourt.gov.au/).

**Federal Court of Australia** - [www.fedcourt.gov.au/](http://www.fedcourt.gov.au/).

**High Court of Australia** - [www.hcourt.gov.au/](http://www.hcourt.gov.au/).

**Industrial Relations Commission of New South Wales** - [www.irc.justice.nsw.gov.au/](http://www.irc.justice.nsw.gov.au/).

**Industrial Relations Victoria** - [www.vic.gov.au/industrial-relations-victoria](http://www.vic.gov.au/industrial-relations-victoria).

**International Labour Organization** - [www.ilo.org/global/lang--en/index.htm](http://www.ilo.org/global/lang--en/index.htm)  
- provides technical assistance primarily in the fields of vocational training and vocational rehabilitation, employment policy, labour administration, labour law and industrial relations, working conditions, management development, co-operatives, social security, labour statistics and occupational health and safety.

**Queensland Industrial Relations Commission** - [www.qirc.qld.gov.au/index.htm](http://www.qirc.qld.gov.au/index.htm).

**South Australian Employment Tribunal** - [www.saet.sa.gov.au/](http://www.saet.sa.gov.au/).

**Tasmanian Industrial Commission** - [www.tic.tas.gov.au/](http://www.tic.tas.gov.au/).

**Western Australian Industrial Relations Commission** - [www.wairc.wa.gov.au/](http://www.wairc.wa.gov.au/).

**Workplace Relations Act 1996** - [www.legislation.gov.au/Details/C2009C00075](http://www.legislation.gov.au/Details/C2009C00075)

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## Out of hours applications

For urgent industrial action applications outside business hours, please refer to our [Commission offices](#) page for emergency contact details.

The address of the Fair Work Commission home page is: [www.fwc.gov.au/](http://www.fwc.gov.au/)

The FWC Bulletin is a weekly publication that includes information on the following topics:

- information concerning notice of matters before the Fair Work Commission
- Practice Directions concerning the practice and procedure of the Fair Work Commission
- weekly decisions summaries
- details of procedural changes and developments within the Fair Work Commission, and
- advice regarding the rights and obligations of organisations registered under the *Fair Work (Registered Organisations) Act 2009*.

For inquiries regarding publication of the FWC Bulletin please contact the Fair Work Commission by email: [subscriptions@fwc.gov.au](mailto:subscriptions@fwc.gov.au).

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