

President's statement

The Fair Work Commission's Coronavirus (COVID-19) response

Justice Ross, President

Melbourne, 8 May 2020

[1] On 31 March 2020 the Fair Work Commission released a [statement](#) setting out the steps we had taken to continue to deliver services to the community. This statement provides an update on our actions.

JobKeeper dispute jurisdiction

[2] On Thursday 9 April 2020 the *Fair Work Act 2009* (the Act) was amended to insert new provisions to help employers that qualify for the JobKeeper payment deal with the economic impact of COVID-19. The new provisions enable an employer that qualifies for the JobKeeper scheme and becomes entitled to JobKeeper payments for an employee during the relevant period, to give the employee a “JobKeeper enabling direction”, request the employee agree to altering their days or times of work, and request that the employee agree to take annual leave (including at half pay).

[3] There are three types of “JobKeeper enabling directions”:

- “JobKeeper enabling stand down directions”, which require the employee to work less hours than they would usually work (which can include no hours)
- directions in relation to the duties to be performed by the employee, to temporarily alter the employee’s usual duties, and
- directions to perform duties at a place different to the employee’s normal place of work, including their home.

[4] The new provisions also enable an employee who has been given a JobKeeper enabling stand down direction to give their employer a request to engage in reasonable secondary employment, training or professional development.

[5] The new provisions are confined to employers that are “national system employers” and employees who are “national system employees”, as defined in the Act.

- [6] The new provisions were enacted and received Royal Assent within 24 hours of being introduced into Parliament. The provisions of new Part 6-4C described above apply until 28 September 2020.
- [7] Under the new provisions, the Commission has a role in helping parties resolve disputes regarding the operation of Part 6-4C including disputes about the implementation of JobKeeper enabling directions and agreements.
- [8] Within hours of the legislation passing, the Commission:
- developed an application form
 - developed case management processes and [information resources](#) about the jurisdiction and the Commission's role, and
 - began receiving enquiries and applications.
- [9] Deputy President Gostencnik has been appointed as the National Practice Leader for JobKeeper applications and a dedicated case management team has been established.
- [10] On Monday 20 April 2020 I approved an updated application form (F13A) with additional questions concerning processes that have been announced by the Australian Taxation Office since the original form was approved. The updated [Form F13A](#) is available on the Commission's website.
- [11] On Monday 27 April 2020 the Commission published the [JobKeeper Disputes Benchbook](#). The benchbook has been prepared by staff of the Commission to provide employees, employers and representatives with detailed information about the Commission's role in dealing with JobKeeper dispute applications under the Act. The benchbook will be updated as the new jurisdiction evolves.
- [12] We have dealt with JobKeeper dispute applications quickly and will continue to do so. Within hours of an application being lodged, Commission staff will:
- process the application and enter it into our case management system
 - identify any potential issues with the application (such as where the employer is not a national system employer or where the application is incomplete)
 - telephone the applicant about any potential issues with their application, and
 - refer the case to the National Practice Leader unless it is withdrawn by the Applicant.
- [13] Once forwarded to the National Practice Leader, applications are allocated to a Member of the Commission, generally for convening of a conference.

[14] It is important that JobKeeper disputes are resolved in a timely manner to provide certainty and allow employers and employees to move on as quickly as possible. Reflecting this, the Commission has implemented the following timeliness benchmarks for the JobKeeper dispute jurisdiction.

Event	Timeliness benchmark
Lodgment* of application to first conference/hearing *Lodgments between 8am-8pm AEST Monday to Friday and 9am-5pm AEST weekends and public holidays	Within 48 hours from lodgment
Decision issued	Decisions are issued ex tempore wherever possible. Reserved decisions issued within 48 hours of hearing.
Lodgment to finalisation (all cases)	90% within 4 days 100% within 14 days

[15] These benchmarks will be reviewed as we continue to monitor and improve our performance.

[16] The Commission has also implemented processes to provide parties with appropriate information and assistance. Since commencement, the JobKeeper disputes webpage on the Commission website has received more than 60,000 unique views. Calls to the Commission’s helpline are up 25%, with more than 1,700 directly COVID-19 related. We are also working with our partners in the Workplace Advice Service, the free legal advice service coordinated by the Commission, to enable Commission Members to refer eligible parties to receive free legal advice about JobKeeper disputes.

[17] As at 7 May 2020 the Commission had received 212 JobKeeper dispute applications. I intend to refer an appropriate application to a Full Bench to provide early clarity about the operation of the new jurisdiction.

[18] Of applications lodged, approximately 25% are within the Commission’s jurisdiction. Seventy-five per cent of the cases lodged appear to raise jurisdictional issues.

[19] Of the 25% of applications that are within the Commission’s jurisdiction (noting that some applications relate to more than one of the subjects below):

- 41% relate to a dispute about a JobKeeper enabling stand down direction (s.789DC)
- 12% relate to a dispute about a direction about duties of work (s.789GE)
- 9% relate to a dispute about a direction about location of work (s.789GF)
- 65% relate to a dispute about a request to make an agreement about change to an employee's days or times of work (s.789GG)
- 12% relate to a dispute about a request to make an agreement to take annual leave (s.789GJ)
- 5% relate to a dispute about a request for secondary employment or training etc (s.789GU).

[20] Seven per cent of cases lodged have been settled, 33% are currently open, and approximately 60% have been withdrawn.

[21] Of the applications that raise jurisdictional issues (again noting that some applications relate to more than one subject):

- 56% relate to whether a casual employee is an "eligible employee" (an employee for whom the employer can claim JobKeeper payments)
- 17% relate to the "one in all in" principle and nomination of employees for JobKeeper payments
- 3% relate to employer eligibility for the JobKeeper scheme
- 7% relate to a stand down that occurred before 9 April 2020
- 5% relate to a dispute about an employee's employment status
- 13% relate to a dismissed employee who seeks re-engagement in order to become an eligible employee.

[22] The greatest number of cases involve the Accommodation and food services industry (29%), followed by the Retail industry (25%). The Arts and recreation services, Education and training (private) and Health care and social assistance industries are each involved in approximately 10% of cases to date.

[23] Forty-two per cent of cases involve employers with more than 100 employees, 26% involve employers with between 15 and 99 employees, 19% with between 1 and 14 employees and the employer size is not known in 13% of cases.

[24] In approximately 90% of all cases, applicants have been self-represented.

[25] The Commission is committed to using plain language in all JobKeeper dispute correspondence to parties. This [respondent service letter](#) is an example. Using

plain language helps parties understand the Commission's processes and can help minimise the confusion and anxiety that many people feel during encounters with the legal system. This is particularly important given the number of unrepresented parties lodging JobKeeper disputes.

Awards varied in response to COVID-19

- [26] The Commission has acted quickly to vary modern awards to provide flexibility for employers and employees to make workplace changes in response to COVID-19, both upon application by employer and employee organisations and by acting on its own motion.
- [27] The [31 March 2020 statement](#) referred to urgent award variation cases covering the Hospitality Award, the Clerks – Private Sector Award and the Restaurants Award. Each of these applications were heard within 48 hours of lodgment and decisions issued shortly afterward.
- [28] A subsequent application to vary the Educational Services (Schools) General Staff Award was considered and a [decision](#) issued within a similar timeframe.
- [29] It is important to note that these variation applications were made by employer organisations with the consent of the major unions and with the support of both the ACTU and the Minister. The consent of the key industrial parties was a significant consideration in enabling the Commission to move as quickly as it has. Different considerations arise in contested applications.
- [30] On 8 April 2020 a Full Bench of the Commission issued a [decision](#) (on its own motion) varying 99 modern awards covering millions of Australian employees and their employers.
- [31] The decision inserted a new Schedule which operates until 30 June 2020 and provides for a period of up to 2 weeks' unpaid pandemic leave and a capacity to take annual leave at half pay for employers and employees covered by these awards.
- [32] During the course of these proceedings, the ACTU, AMNF, HSU and APESMA made submissions regarding the particular circumstances of health workers covered by a number of awards and sought a mechanism to advance claims for paid pandemic leave for these health workers. On 9 April 2020 I issued a statement establishing a separate process to deal with these issues. A further statement was issued on 1 May 2020. A separate page has been set up in the major cases part of the Commission's website, which can be viewed here: [Health sector awards – pandemic leave](#). Interested parties can [subscribe to updates](#) to be notified when documents are published on the major case site,

by creating an account or logging in and selecting the Health sector awards – pandemic leave announcement service. The matter is ongoing.

Varying enterprise agreements in response to COVID-19

- [33] The Commission has received a number of enquiries from parties about how to urgently vary existing agreements. To assist parties with these applications, the Commission has provided information on its [website](#) (including a [fact sheet](#) about making an application to vary an agreement) and has established a dedicated telephone support line. Parties can call 03 8656 4548 or email member.assist@fwc.gov.au with any agreement-related enquiries.
- [34] The dedicated email address set up for parties making urgent COVID-19 applications (COVID19Applications@fwc.gov.au) can also be used for applications to vary agreements. These applications will be given priority.
- [35] One of the first variation applications received was referred to a Full Bench for urgent hearing. On 2 April 2020 a Full Bench of the Commission issued its [decision](#) approving variation of the CVSG Electrical Construction Enterprise Agreement 2017 – 2021.

New Approaches

- [36] The Commission’s New Approaches program is assisting parties to navigate the challenges that COVID-19 has created at the workplace level. For many workplaces, the COVID-19 pandemic is challenging workplace parties to consider making significant workplace changes very quickly.
- [37] The New Approaches program involves the Commission working with employers and unions at the workplace level to build cooperative and productive workplaces. The Commission’s services include providing training and assistance in collaborative workplace change to deliver outcomes that meet the needs of all parties, and facilitating efficient agreement reaching and approval processes.
- [38] For example, a peak body in the disability services sector, National Disability Services, together with the Australian Services Union, the Health Services Union and the United Workers Union (the NDIS Unions) has used the Commission’s New Approaches program to assist the parties to discuss the impact of, and to respond to, the COVID-19 pandemic. The dialogue has focused on the challenges of:
- recognising, rewarding and training workers who need to “run towards the problem”

- supporting workers who are impacted by service closures etc during this period
- ensuring the health of those who are continuing to provide or receive services, and
- mechanisms to enable changes to be made in the workplace and to resolve any disputes arising.

[39] The parties have reached agreement on a consultation process for changes to be made at a workplace or service level in response to COVID-19, together with a number of potential support solutions that the parties intend to jointly pursue.

[40] In the child welfare sector, the Association of Children’s Welfare Agencies and the Australian Services Union have, with the assistance of the Commission’s New Approaches program, developed model individual flexibility agreements (IFAs) and associated guidelines for use by child welfare agencies and their employees in New South Wales, using an interest-based problem solving approach. The draft IFAs and associated guidelines provide an approach to using 12 and 24 hours shifts that are not ordinarily available under the relevant award. The NSW Department of Communities and Justice has attended the conferences as an observer, by invitation of the parties.

[41] These examples demonstrate the potential gains from an interest-based problem solving and a consultative approach, to dealing with the workplace challenges arising from the COVID-19 pandemic. Further information on the [New Approaches](#) program is available on the Commission’s website. If you would like to access training and facilitation services, customised to your needs, you can contact newapproaches@fwc.gov.au, or you can apply for our help by lodging the [Form F79 – New Approaches application](#).

Maintaining service provision during the COVID-19 pandemic

[42] The Commission is continuing to take active steps to ensure service provision is maintained during the social isolation period associated with the pandemic.

[43] There have been some significant shifts in the nature and volume of applications that have been lodged during the COVID-19 pandemic. Over the four week period to the end of April 2020 the Commission’s caseload increased by approximately 40% compared to the same period in 2019. This is a consequence of an increase in lodgments of some case types, most notably, unfair dismissal applications, that has not been offset by reductions in other case types.

- [44] Applications to approve enterprise agreements and other bargaining and industrial action-related applications have reduced. However, the decline in these applications has been outpaced, by some margin, by increases in other application types.
- [45] In addition to the COVID-19 related applications received to vary modern awards and enterprise agreements discussed above, the Commission has also dealt with a large number of stand-down disputes.
- [46] The most significant increase in volume terms has occurred in the unfair dismissal jurisdiction. In April 2020, the number of unfair dismissal applications received was 65% higher compared to April 2019. General protections involving dismissals have also increased, by more than 20%. Reflecting the difficult circumstances that many employers and employees find themselves in, the preparedness of parties to reach agreement through voluntary settlement has also declined.
- [47] The Commission has implemented a number of initiatives to deal with the increased flow of unfair dismissal applications, including reallocation of resources to support the case management and conciliation of unfair dismissal matters. A working group of Members, led by Deputy President Mansini, is formulating a plan to address the surge in applications in order to avoid a backlog of cases that would otherwise develop.
- [48] Notwithstanding the challenges associated with these changes, the Commission remains focused on performance improvement across all areas of our operations.
- [49] The timeliness with which enterprise agreements are approved continues to improve. The median time for dealing with 'simple applications' not requiring undertakings or follow up with the parties is now 13 days. The median time for approval of all agreements, including those agreements requiring submissions, undertakings or where the application involves contested proceedings, is now 35 days, down from 79 days in early 2019.

Justice Innovation Hub

- [50] The Commission is developing an online innovation hub for justice institutions to exchange ideas, share resources and collaborate on joint solutions, including those challenges associated with COVID-19. The Justice Innovation Hub will be open to courts, tribunals and associated organisations. Expressions of interest to join the hub can be sent to innovation.admin@fwc.gov.au.

The Commission is still operating but counters are closed

- [51] The Commission continues to operate between 9am and 5pm in all states and territories. However, public counters are closed. The Commission is now conducting almost all hearings and conferences by phone or videoconference, and parties should not attend the Commission unless a Commission Member specifically requests them to attend.
- [52] The Commission is not accepting hard copy applications in-person or by post. Clients can lodge applications using our online lodgment service, or by email or fax. Clients having trouble lodging applications can call 1300 799 675 for assistance.

COVID-19 updates & advice

- [53] We have created a [COVID-19 updates & advice](#) webpage to provide clients with up-to-date information about changes to our operations as a result of the pandemic. Clients with enquiries can also contact the Commission on 1300 799 675 or email us. Contact details for all Commission offices are on our website. We have included a link to the Fair Work Ombudsman website to direct clients to information about workplace entitlements and COVID-19.
- [54] The Commission has also published on our website, an [information note](#) outlining the measures undertaken by the Australian Government and various state and territory Governments.

Urgent applications related to the COVID-19 pandemic

- [55] The Commission has established an email account for urgent applications to deal with the consequences of COVID-19 such as applications to vary enterprise agreements or other instruments. The email address for these applications is COVID19Applications@fwc.gov.au.

Improving our performance

- [56] The Commission remains focused on improving the services we provide the public. Feedback and suggestions for improvement are welcome and can be sent to stakeholderrelations@fwc.gov.au.

PRESIDENT