

Update on FWC JobKeeper disputes, Awards/EBAs, tsunami of legal claims and wage theft

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Abstract:

The President of the Fair Work Commission (FWC) released a [statement](#) providing statistics on JobKeeper disputes and increases in unfair dismissal and general protections claims, and information on award variations and steps to take for urgent variations of enterprise agreements (Statement).

The FWC has provided a central page for updates and advice on COVID-19, addressing pandemic impacts on safety, workplace entitlements, award and agreement flexibility, the Annual Wage Review 2019-20, Anti-bullying, 4 yearly review of modern awards, general protections, protected action ballots and unfair dismissal. This can be found here: [Coronavirus \(COVID-19\) updates & advice](#).

FWC Statement shines the light on COVID-19 legal action

Justice Ross, President of the FWC, issued a [Statement](#) on 8 May 2020 which sets out analysis and guidance on steps taken by the FWC in response to COVID-19.

JobKeeper disputes

The FWC has a role in helping parties resolve disputes under Part 6-4C of the *Fair Work Act 2009* (Cth) (FW Act), including regarding disputes on JobKeeper enabling directions and agreements.

The FWC has set strict timeliness benchmarks, with the first conference/hearing to be held within 48 hours of the application being lodged ([Form F13A](#)) and the decision being issued soon or straight after the hearing wherever possible or at least within 48 hours of the hearing. 90% of cases should be finalised within 4 days and 100% in 14 days.

The FWC has published the [JobKeeper Disputes Benchbook](#) and has a specific [JobKeeper dispute webpage](#) which has received over 60,000 unique views.

Of the JobKeeper disputes lodged, 75% raised jurisdictional issues. The majority of jurisdictional issues (ie, 56%) relate to whether a casual employee is an “eligible employee” (ie, a casual employed on a regular and systemic basis for longer than 12 months as at 1 March 2020). See, for eg: [Alice Coxon v Precious Cargo Lockleys Pty Ltd T/A Precious Cargo Education \[2020\] FWC 2246](#). Otherwise, the jurisdictional issues relate to the “one in all in” principle, employer eligibility, pre-9 April 2020 stand downs, status of employment and re-engagement of dismissed employees.

For disputes within the FWC’s jurisdiction, 41% relate to a JobKeeper enabling stand down direction, 12% relate to directions about duties, 9% relate to location of work, 65% relate to an agreement to change days/times of work, 12% relate to an agreement to take annual leave and 5% relate to a dispute about secondary employment or training. Some disputes relate to more than one issue.

Unsurprisingly, disputes are higher in particular industries, including the Accommodation and food services industry (29%), the Retail industry (25%), Arts and recreation services (10%), Education and training (private) (10%) and Health care and social assistance (10%). All of which are significantly affected by social distancing requirements.

Large employers are having the most disputes, with 42% involving employers with over 100 employees, 26% involving employers with between 15 and 99 employees and 19% with between 1 and 14 employees.

Interestingly, in 90% of cases applicants have been self-represented. This approach is supported by the FWC and reflecting this commitment the FWC has used plain language in its correspondence. See, for example: [respondent service letter](#).

Variation of awards

99 modern awards were varied on 8 April 2020 by the FWC (on its own motion) to insert a new schedule which operates until 30 June 2020 and which provides up to 2 weeks' unpaid pandemic leave and the capacity to take annual leave at half pay: see [Variation of awards on the initiative of the Commission \[2020\] FWCFB 1837](#).

The FWC has addressed and determined applications for urgent variations to the [Hospitality Award, the Clerks – Private Sector Award, the Restaurants Award](#) and the [Educational Services \(Schools\) General Staff Award](#).

Most recently, the FWC determined a variation to the [Vehicle Manufacturing, Repair, Services and Retail Award](#) in similar terms, recognising that the sales demand for new cars has slumped by almost 50% as a consequence of COVID-19.

Waiting in the wings are potential variations to the [Fast Food Industry Award 2010](#), [Social, Community, Home Care and Disability Services Industry Award](#), [Legal Services Award 2020](#), [Health Sector awards – pandemic leave](#), and the [Real Estate Industry Award 2020](#). Employers in these industries should keep a weather watch over these proceedings.

Enterprise agreements

The FWC has seen an uptick in applications to vary enterprise agreements to introduce flexibility, with employers taking advantage of the temporary reduction of the access period to the proposed changes to enterprise agreements from 7 to 1 days: [Fair Work \(Variation of Enterprise Agreements\) Regulations 2020](#).

New regulations are flagged in this area so that variations achieved with shorter access periods will have a limited 12 month lifespan.

A dedicated webpage has been set up to keep track of enterprise agreement specific COVID-19 changes: [COVID-19 & enterprise agreements](#).

Increase in unfair dismissal and general protections claims

The FWC has been bombarded with tsunami-like increase to unfair dismissal claims, as dismissed employees defend themselves against the devastating financial losses of unemployment by taking legal action. The FWC reports the increase in unfair dismissal claims to be 65% higher in April 2019 as compared to April 2020.

General protection claims are also 20% higher – noting also the interaction between JobKeeper disputes and workplace rights where an employer is prohibited from taking adverse action because an employee asserts JobKeeper workplace rights: ss 789GD (wage condition); 789GG(2) (duties on different days/times), s 789GJ(1)-(2) (annual leave direction) and 789GU (request for secondary employment/training).

Disputes outside FWC jurisdiction

The FWC cannot deal with claims relating to eligibility for jobkeeper payments, these are decisions of the ATO. The FWC is also unable to assist where an employer refuses to apply for JobKeeper payments.

As for the inevitable underpayments issues, these are for the Federal Court/Federal Circuit Court unless the application relates to a dispute resolution procedure in an enterprise agreement or modern award: ss 738-739, FW Act.

And it is clear that the ongoing epidemic of “wage theft” continues unabated.

The Suncorp Group recently issued an [ASX announcement](#) estimating that the costs of remediating underpaid pay and leave entitlements to be approximately \$40-70 million dollars. The Suncorp Group has self-reported to the Fair Work Ombudsman and joins the ranks of other self-disclosing employers awaiting finalisation of their court-enforceable undertakings, including: Woolworths, Wesfarmers (Target and Bunnings), Coles, Super Retail Group, the Commonwealth Bank, the ABC and Michael Hill Jewellers.

In March 2020, Qantas entered into a [court-enforceable undertaking](#) and will backpay hundreds of marketing and administration staff millions of dollars. At the same time, Activ Foundation Inc. also entered into a [court-enforceable undertaking](#) to rectify its underpayments of 1695 current and former employees working in manufacturing, property maintenance, landscaping and product packaging.

See: [Beyond COVID-19: The unresolved epidemic of wage theft and underpayments](#) and [Underpayments of entitlements](#).

Actions

Faced with a rapidly shifting legal environment and the urgent need to shore up business continuity, employers and employees should take heart that the FWC has pulled out all stops to provide prompt and plain English assistance to all parties to assist in their navigation through this crisis. To take advantage of this keep a close eye on the FWC webpages for updates.

Employers should make sure that they carefully follow all notice and consultation requirements for job redundancies, JobKeeper enabling directions and agreements and have well-founded and valid reasons for any dismissals unrelated to an employee’s workplace rights.

See also: [Pandemics and COVID-19](#), [Underpayments of entitlements](#) and [COVID-19 Toolkit for Employers](#)