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(introduction, invited contributions and articles included in this part are linked to the LexisNexis platform)

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Introduction

The Impact of COVID-19 on Labour Regulation in Australia

— *Anthony Forsyth and Andrew Stewart*

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This introduction provides an overview of some of the significant developments in Australian labour regulation in response to the COVID-19 pandemic, as a prelude to the other articles in this special issue. We consider the federal government's efforts to foster a cooperative approach between business and union groups to tackling the crisis, including in the adjustment of awards to facilitate changes to business operations and home-working, as well as the implementation of various forms of income support. Responses by state and territory governments are also examined, including changes to the regulation of public sector work and the provision of pandemic leave payments. Finally, the introduction briefly discusses the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth), only fragments of which were eventually passed into law, and concludes by noting the significant problems that the Bill failed to address.

Invited Contributions

The Fair Work Commission's Response to COVID-19

— *Iain Ross*

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The restrictions imposed by the COVID-19 pandemic affected all facets of the Australian labour market. This article discusses the steps undertaken by the Fair Work Commission to respond to the impact of the pandemic and the implications for the future of work and workplace flexibility.

The Workplace Regulator's Response to COVID-19

— *Sandra Parker*

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The Fair Work Ombudsman is Australia's workplace regulator, an independent statutory agency with functions set out in the Fair Work Act 2009 (Cth). COVID-19 created a rapid and unprecedented surge in demand for the FWO's services and in response the agency quickly deployed resources to enhance advice channels and educational content. Over time, service offerings were refined in line with the evolving pandemic, including a nuanced approach to compliance and enforcement and annual priorities that focus on assisting workplaces to recover. Like most organisations, the FWO has found new ways to work in a COVID-safe environment and is reflecting on lessons learned to identify long-term opportunities for enhanced service delivery.

Articles

The JobKeeper Scheme

— *Ian Neil SC, David Chin SC and Christopher Parkin*

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The JobKeeper Scheme was an urgent solution to an urgent problem. Its primary functions were to provide a wage subsidy to assist employers to keep their employees on their payroll, and to inject money into the economy. The achievement of those goals contributed to a broader economic purpose: preserving employment, at least in some form, and preventing the economic stagnation that would have inevitably followed from mass unemployment. However, the implementation of the Scheme involved complex questions about eligibility, the mechanisms for its implementation, and situating it within Australia's broader legal framework for the protection of employees. This article describes and discusses each of these elements and (to the extent possible at the time of writing) comments on the legacy of the Scheme including, in particular, the effectiveness and coherency of the government's approach.

Income Support in a Time of Contagion

— *Anthony O'Donnell and Christopher Arup*

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The welfare state as a source of worker protection in times of joblessness came under acute pressure with the economic dislocation wrought by the COVID-19 pandemic. In Australia the federal government instituted a new JobKeeper wage subsidy scheme while also reconfiguring its principal unemployment benefit scheme, JobSeeker. This article outlines the impact of COVID-19 on our understandings of what counts as 'unemployment'; the role of JobKeeper as an income guarantee; and the various reconfigurations of JobSeeker. In particular, it situates JobSeeker within an established but evolving regulatory model of Australian unemployment assistance.

'Invidious Choices'? Adapting the Fair Work Safety Net during the Pandemic

— *Jill Murray, Charlie Schaffer and Bodhi Shribman-Dellmann*

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This article outlines the ways in which the National Employment Standards and modern awards were (and were not) adapted in response to the circumstances of the COVID-19 pandemic in Australia in 2020. Framed as an attempt to preserve businesses and jobs, awards were almost immediately varied to provide for functional, temporal and (in some cases) geographical flexibility, with the national tripartite parties and the Fair Work Commission itself playing significant leadership roles. Over the course of the pandemic, concern about the public health dangers of precarious work became more prominent but, to the extent that this represented a gap in the safety net, the matter was scarcely addressed. Finally, we identify a number of issues for further research.

Home Truths: What Did COVID-19 Reveal about Workplace Flexibility?

— *Dominique Allen and Adriana Orifici*

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In early 2020, many Australians found themselves working from home when workplaces were forced to close or drastically limit the number of workers on site to slow the spread of COVID-19. Schools

were also closed which meant that a large subset of workers were also responsible for caring for and home schooling children. To meet both work and family responsibilities, more workers than ever before required flexibility in the way they worked. The COVID-19 pandemic created an unprecedented workplace context in which flexible work practices predominated for workers with family responsibilities. The experience presents us with a unique opportunity to examine the right to request flexible working arrangements in s 65 of the Fair Work Act 2009 (Cth). In the aftermath of COVID-19 there is likely to be an increase in the number of requests for flexible working arrangements. Many employers also predict embracing more forms of flexibility in the way they work. We argue that our changed workplace behaviour could lead to a cultural shift in thinking about how the law can better facilitate a worker's ability to manage their work and family commitments and outline how this might be achieved in the context of s 65.

COVID-19, Employee Stand Downs and the Transfer of Economic Risk

— *Anthony Forsyth and Andrew Stewart*

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COVID-19 has been notable to date in Australia for causing a loss of working hours, more so than a loss of jobs. While that can partly be attributed to the JobKeeper scheme, many employees have also been stood down without pay under the general power conferred by s 524 of the Fair Work Act 2009 (Cth) or equivalent provisions in enterprise agreements. Despite potential doubts as to their applicability, the use of such provisions has been contested in relatively few cases. Although some questions have arisen from these decisions (including as to the extent of the Fair Work Commission's powers to impose partial stand downs or to order back pay in cases of unlawful stand down), stand down provisions have provided a useful tool for employers in temporarily reducing the need for staff. Unless interpreted more strictly, the stand down mechanism enables a considerable shifting of the risk or burden arising from the COVID-19 crisis from employers to employees.

COVID-19 and the Regulation of Work Health and Safety

— *Elizabeth Bluff and Richard Johnstone*

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This article examines the regulation of work health and safety (WHS) in relation to COVID-19 in Australia. It considers the broader public health response to COVID-19, which is separate from and has not overruled WHS laws or regulators' powers but has shaped the regulation of WHS in fundamental ways. As the article explains, WHS laws set high standards for the protection of workers and others at workplaces, and WHS regulators have far-reaching powers for promoting, inspecting and enforcing compliance. Yet, the WHS regulators have played an auxiliary role in government responses to COVID-19; promoting public health 'core practices' that entail lower order administrative methods and personal protective equipment, and conducting limited inspection and enforcement of COVID-19 risk control. The article provides examples of deficiencies in control of COVID-19 risks and concludes that more could have been done within the framework of WHS laws.

The Future of Work and Labour Regulation after COVID-19

— *John Howe, Joshua Healy and Peter Gahan*

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The worldwide shock of the COVID-19 pandemic has recast debates about the future of work. A discussion previously dominated by automation and the rise of the gig economy rapidly expanded to encompass new, and newly important, concerns: remote work, the protection and recognition of 'essential' workers, wage subsidies for the unemployed and furloughed, and government's broader

responsibilities to maintain social cohesion and rebuild economic vitality. As the Australian economy commences a tentative recovery from the deep ravages of 2020, we cast our eye over recent developments in the labour market and working practices, in light of that earlier future of work discourse, to ask how much of it remains relevant and what new issues and concerns have come to light. We argue that the role of technological change has been subdued, but not extinguished, by the current crisis. We highlight two important domains — workplace surveillance and enforcement of minimum standards — where governments and labour regulators can seize on nascent technological possibilities to realise a more equitable future of work after COVID-19.