

# Alert

## EMPLOYMENT LAW

### COVID-19: Fair Work Commission Has New Powers to Deal With JobKeeper Disputes

By Ben Duggan

As reported in our previous [alert](#)<sup>1</sup>, JobKeeper laws, which create a six-month wage subsidy scheme, were recently passed at special sittings of the Federal Parliament.

The new laws include temporary amendments to the *Fair Work Act* 2009 (**FW Act**)<sup>2</sup> that commenced on 9 April 2020 and will be repealed on 28 September 2020.

These amendments aim to support the wage subsidy scheme.

The amendments introduce flexibilities that enable JobKeeper employers (**Employers**) to make changes to the terms and conditions of employment that may not be possible under current workplace arrangements. This allows them to respond to the enforced changes to their business operations brought about by the COVID-19 pandemic. These flexibilities include:

- the ability to make directions that enable either a total or partial stand-down of a workplace;
- the ability to consider changes to an employee's usual duties, days, times or location of work; and the ability to request an employee takes paid annual leave.

<sup>1</sup> <https://www.dwfoxtucker.com.au/2020/04/covid-19-flexibility-comes-to-the-fair-work-act/>  
<sup>2</sup> which are located in Division 10 of Part 6-4C of the Fair Work Act 2009 are set out below.

#### Role of the Fair Work Commission

The Fair Work Commission (Commission) has the power to deal with disputes relating these temporary measures.

A dispute may be referred to the Commission by an Employer, an eligible employee, an employer organisation or an employee organisation (i.e. Union).

The Commission can deal with the dispute by:

- mediation or conciliation;
- making recommendations to the parties; or
- arbitration.

When exercising its powers, the Commission is required by these amendments to 'take into account fairness between the parties' which provides it with a broad discretion to consider a range of matters when dealing with disputes.

The types of matters that the Commission may consider include:

- the financial position of the Employer;
- the personal circumstances of the employee; and
- the impact of government restrictions on the business of the Employer.

The Commission may make any order that it considers appropriate including:

- an order they deem desirable to give effect to a JobKeeper direction; or
- an order setting aside a JobKeeper direction.

These new powers to deal with JobKeeper disputes continue beyond 28 September 2020. However, they are more limited with there being no ability to make an order giving effect to or substituting a JobKeeper direction beyond 28 September 2020.

The amendments to the FW Act which contain these broad new powers for the Commission are contained in Division 10 of Part 6-4C<sup>3</sup>, and they provide as follows:

#### Division 10—Dealing with disputes

789GV FWC may deal with a dispute about the operation of this Part

1. The FWC may deal with a dispute about the operation of this Part.
2. The FWC may deal with a dispute by arbitration.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

<sup>3</sup> <https://www.legislation.gov.au/Details/C2020A00038>

continued overleaf...

3. The FWC may deal with a dispute only on application by any of the following:

- a. an employee;
- b. an employer;
- c. an employee organisation;
- d. an employer organisation.

4. The FWC may make any of the following orders:

- a. an order that the FWC considers desirable to give effect to a jobkeeper enabling direction;
- b. an order setting aside a jobkeeper enabling direction;
- c. an order:
  - (i) setting aside a jobkeeper enabling direction; and
  - (ii) substituting a different jobkeeper enabling direction;
- d. any other order that the FWC considers appropriate.

5. The FWC must not make an order under paragraph (4)(a) or (c) on or after 28 September 2020.

6. An order made by the FWC under paragraph (4)(a) ceases to have effect at the start of 28 September 2020.

7. In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

### Foreseeable disputes arising from JobKeeper laws

A dispute under the new laws is in our view most likely to arise in relation to either:

1. a JobKeeper request provided to an employee to take annual leave; or
2. a JobKeeper stand-down direction provided under these measures.

#### 1. A JobKeeper request to take annual leave

The new measures enable an Employer to request an employee takes a period of annual leave in the next six months.

An employee upon receipt of such request must consider it and must not 'unreasonably refuse the request.'

It is foreseeable that employees may challenge such requests based on the grounds of reasonableness. Employees may prefer to preserve their annual leave rather than being forced to take it during the COVID-19 pandemic.

#### 2. A JobKeeper stand-down direction

A JobKeeper stand-down direction permits an Employer to provide a direction that changes the duties, location and/or hours of work of an eligible employee.

The direction must be provided as a consequence of the eligible employee not being able to be usefully employed for their normal hours of work because of requirements introduced by Governments to control the spread of COVID-19.<sup>4</sup>

<sup>4</sup> Or COVID-19.

Safeguards apply to a JobKeeper stand-down, which include:

- the Employer has consulted with the employee about the stand-down direction;
- the Employer complies with payment obligations under JobKeeper; and
- the direction is not 'unreasonable in all of the circumstances.'

A disgruntled employee, particularly where their overall remuneration has reduced as a consequence of a stand-down direction, may seek to challenge it, possibly arguing that these safeguards have not applied by their Employer.

The Commission in anticipation of JobKeeper disputes has already prepared a form which enables the notification of a dispute under these new temporary amendments to the FW Act.

Should you wish to discuss how your business can seek to minimise the risk of having its request or direction being subjected to a successful challenge, please contact our Employment Law expert Ben Duggan.



[MORE INFO](#)

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