
No quarantine for workplace rights — Part 3-1 of the Fair Work Act 2009 Cth and COVID-19

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The impact of COVID-19 has led to a flurry of legislative and related changes in the area of Australian workplace relations. Initiatives such as the Federal Government's jobkeeper scheme¹ have brought with them changes to the Fair Work Act 2009 (Cth) (FW Act),² while award variations have given employers greater flexibility during the pandemic.³ In May 2020, relevant changes were also made to the Privacy Act 1988 (Cth) (Privacy Act).⁴ The jobkeeper and award changes are presently envisaged as temporary.⁵ It is important for those affected by these changes to remain aware, however, that the changes do not have the effect of suspending other rights and obligations under the FW Act during their period of operation. In particular, the relevance of Pt 3-1, the general protections, needs to be kept in mind.

The role of Part 3-1

Most readers will be aware that Pt 3-1 of the FW Act contains a range of protections,⁶ backed by civil penalties for their contravention.⁷ Relevantly for present purposes, pursuant to s 340 of the FW Act, employees are protected from "adverse action" in connection with their workplace rights. Adverse action is defined to include termination of employment; injury of the employee in their employment; alteration of the employee's position to their prejudice; or discrimination between the employee and the employer's other employees.⁸ Workplace rights are broadly defined and, for an employee, include:⁹

- being entitled to the benefit of, or having a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body
- being able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument
- being able to make a complaint or inquiry to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument, or

- being able to make a complaint or inquiry in relation to their employment

Relevantly, employees are also protected from coercion or being subject to false or misleading statements in relation to their workplace rights.¹⁰

The jobkeeper amendments to the FW Act and workplace rights

In essence, the jobkeeper payments scheme, as established under the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth) (the Rules),¹¹ involves the Commonwealth paying qualifying employers a subsidy of \$1500 per fortnight, per employee, in relation to their eligible employees. Various eligibility conditions apply,¹² and the scheme is presently scheduled to cease operation at the close of September 2020.¹³

New Pt 6-4C of the FW Act works in conjunction with the Rules. Broadly,¹⁴ under Pt 6-4C, an employee, in respect of an employee participating in the jobkeeper scheme:

- may, provided the direction is reasonable¹⁵ and other preconditions are met,¹⁶ direct the employee to perform less work, no work, different work or the same work at a different time or in a different location.¹⁷ An employee must comply with a lawful jobkeeper direction¹⁸
- must either pay the employee the value of the jobkeeper subsidy provided to the employer for that employee, or a higher amount (being the amount lawfully required to be paid for the work being performed, if work is being performed and the amount due for that work is greater than the value of the jobkeeper payment).¹⁹ This obligation upon the employer is known as the "wage condition"²⁰
- may request that an employee take an amount of their paid annual leave (provided that a balance of no less than 2 weeks' annual leave is retained). The employee must consider, and must not unreasonably refuse, such a request,²¹ and

- may agree with an employee that the employee may take twice as much annual leave as they have accrued, for half the employee's rate of pay²²

In addition, an employee who is subject to a jobkeeper direction may make a request of the employer for an opportunity to engage in reasonable secondary employment, or for training or professional development. The employer must consider, and must not unreasonably refuse, such a request.²³

It is not surprising that Pt 6-4C is expressly stated to operate subject to Pt 3-1 (as well as other parts of the FW Act).²⁴ The importance of Pt 3-1 in this context is reinforced by the fact that new s 789GY of the FW Act clarifies that the following are workplace rights:²⁵

- the benefit that an employee of an employer has or derives because of an obligation of the employer under s 789GD to satisfy the wage condition (essentially, the obligation to pay the employee)
- the employee agreeing, or refusing to agree, to:
 - perform duties on different days or at different times (see s 789GG(2))
 - an employer's request that they take annual leave (see s 789GJ(1))
 - take twice the amount of annual leave at half pay (see s 789GJ(2))
- the employee making a request to engage in reasonable secondary employment, or for training or professional development (see s 789GU)

The Explanatory Memorandum to the Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 (Cth) and Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020 (Cth) further reminds readers that coercion and false or misleading statements in relation to workplace rights are prohibited.²⁶

COVID-19-inspired amendments to awards and workplace rights

Parliament is not the only body which has taken steps to deal with the challenges posed by COVID-19. On 8 April 2020, the Fair Work Commission (FWC), acting on its own initiative, handed down a decision²⁷ varying several industrial awards to include an entitlement to 14 days' unpaid pandemic leave (to enable employees, who may not have sufficient other forms of leave available, to self-isolate where necessary to minimise COVID-19 infection risk) and an entitlement to take longer periods of annual leave at half pay. The variations are in place until 30 June 2020, a period that may be extended upon application.²⁸

Awards are, of course, s 341 workplace instruments for purposes of the s 340 protection.²⁹ Accordingly,

among other things, in making its 8 April 2020 decision, the FWC was alive to the potential impact from a Pt 3-1 perspective. Notes in the template clauses are included to the following effect:

NOTE 1: A employee covered by this Award who is entitled to the benefit of clause X.2.1 or X.2.2 has a workplace right under s 341(1)(a) of the Act.

NOTE 2: Under section 340(1) of the Act, an employer must not take adverse action against an employee because the employee has a workplace right, has or has not exercised a workplace right, or proposes or does not propose to exercise a workplace right, or to prevent the employee exercising a workplace right. Under s 342(1) of the Act, an employer takes adverse action against an employee if the employer dismisses the employee, injures the employee in his or her employment, alters the position of the employee to the employee's prejudice, or discriminates between the employee and other employees of the employer.

NOTE 3: Under section 343(1) of the Act, a person must not organise or take, or threaten to organise or take, action against another person with intent to coerce the person to exercise or not exercise, or propose to exercise or not exercise, a workplace right, or to exercise or propose to exercise a workplace right in a particular way.³⁰

To date, bespoke variations made by the FWC to other awards (and enterprise agreements)³¹ do not expressly address the issue of workplace rights. However, clearly Pt 3-1 may also have a role to play in respect to actions taken in relation to discretions of the type contemplated in these variations:

- The *Clerks — Private Sector — Award 2010*³² amendments in relation to minimum shifts, payments and hours of work when working from home; operational flexibility regarding employees' duties; agreed reduction in hours of work; and additional flexibilities regarding taking, and being directed to take annual leave and close down.³³
- The *Restaurant Industry Award 2010*³⁴ and *Hospitality Industry (General) Award 2010*³⁵ amendments in relation to on operational flexibility regarding employees' classifications and duties, hours of work, additional flexibilities regarding taking, and being directed to take annual leave and close down.³⁶

The question of variations for the fast food industry,³⁷ vehicle industry³⁸ and for paid pandemic leave for the health sector remained open at the time of writing.³⁹ It remains to be seen whether Pt 3-1 considerations materially affect the FWC's decisions in relation to those applications.

Privacy law amendments

In April 2020, the Commonwealth Government introduced the “COVIDSafe App” (App), an application that persons may elect to adopt on their communication devices (such as mobile phones)⁴⁰ to assist in tracking and tracing COVID-19 cases.⁴¹ As of 16 May 2020, various amendments were made to the Privacy Act in relation to the App.⁴²

Relevantly for present purposes, steps have been taken to ensure there is no compulsion, by employers or others, in relation to use of App.⁴³ Under new s 94H of the Privacy Act, it is unlawful to require a person (for example, an employee), to download the App; have the App operating on a communication device; or consent to the uploading of App data to the National COVIDSafe Data Store.⁴⁴ Section 94H(2) further states that it is an offence to:

- refuse to enter into, or continue, a contract of employment
- take adverse action, as defined in s 342 of the FW Act, against another person
- refuse to allow another person to enter premises that are accessible to the public or which the other person has a right to enter, or
- refuse to allow another person to participate in an activity,

on grounds including that the person has not downloaded the App, does not have the App in operation or has not consented to the uploading data from the App.

Penalties for contraventions of the s 94H(1) and (2) prohibitions include imprisonment for up to 5 years, a fine of \$63,000, or both.⁴⁵

The Explanatory Memorandum to the Privacy Amendment (Public Health Contact Information) Bill 2020 makes it clear that:

Paragraphs 94H(2)(a) and 94H(2)(b) are intended to protect employees from disadvantageous action being taken against them by their employer on the basis that the employee refuses to take specific actions in regard to COVIDSafe. It is intended that refusing to allow an employee to enter their normal workplace, even if the workplace does not fall within the premises listed in paragraph 94H(2)(c), would constitute a contravention of paragraphs 94H(2)(a), 94H(2)(b), 94H(2)(d) or 94H(2)(e) in that an employer is disadvantaging an employee, either through failure to allow an employee to continue their work contract, constituting adverse action, refusing to receive services from a person, or refusing to allow a person to participate in an activity.⁴⁶

Importantly for Pt 3-1 purposes, s 94H(3) clarifies that s 94H(2) is a workplace law for the purposes of the FW Act and that the benefit that a person derives because of an obligation of another person under s 94H(2) is a workplace right within the meaning of Pt 3-1.

Applying Part 3-1 in the context of COVID-19

At the time of writing, the author is not aware of any cases currently before the FWC, Federal Circuit Court or Federal Court, or complaints to the Australian Information Commissioner, in relation to the specific issue of Pt 3-1 rights in the context of COVID-19. This is not surprising, given the recent introduction of the legislative and award changes. However, it seems likely that such cases will eventuate. It is readily apparent that many of the changes introduced to the FW Act by Pt 6-4C, and to the amended awards by the variations to date (as well as variations likely to come) relate to matters that can reasonably be considered to be fundamental to the employment relationship. These include, in particular, the type of work to be performed; the amount of work to be made available; the hours and location in which work is to be performed; and annual leave arrangements. Matters relating to pandemic leave; training and development; and the capacity of an employee to undertake secondary employment may arguably be less central, but are likely to assume significance in many employment relationships.

In an environment where unemployment is rising and pressures on businesses are increasing, it is not difficult to imagine that disputes as to how employers seek to implement some of the new flexibilities available to them are likely to arise and that failure to take into account the Pt 3-1 protections may lead to difficulties, particularly for incautious employers. For example, an employer’s decision to reduce an employee’s hours may well be genuinely motivated by an economic imperative. However, if the employer in question is also motivated to select that particular employee for a reduction in hours because the employee has refused to agree to change their days of work or take a period of annual leave, or has requested permission to engage in secondary employment, the employer may find itself dealing with a s 340 claim.⁴⁷ There is also potential for employees to be misled about matters such as how much choice they have in relation to annual leave directions, if employers are inaccurate in the information they provide in this respect.⁴⁸ In addition, it is possible that other Pt 3-1 protections, such as the s 351 protection against discrimination on the basis of attributes such as family or carer’s responsibilities (which may, in some cases, be relevant to a refusal to change days of work, for example), or the s 346 protection against industrial activity discrimination (where an employee has some union affiliation, for example), may rear their heads in a particular situation.

From a Privacy Act perspective, it is easy to see why employers may wish to impose an obligation on employees to install and use the App in an attempt to manage

their health and safety obligations. However, given the restrictions imposed by section 94H, employers will need to tread carefully here, both to avoid commission of an offence under the Privacy Act and because of the potential for contravention of Pt 3-1.

There is much ground yet to be traversed and it is clear that the impact of COVID-19 is likely to reverberate in workplaces, and workplace law, for an extended period. While these developments unfold, employers and employees would be well advised to take care to ensure they exercise caution and are mindful of Pt 3-1 obligations and protections in relation to the App and when seeking to rely on the COVID-19-inspired FW Act amendments and award flexibilities.



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The views expressed in this article are those of the author and not necessarily of MinterEllison.

Footnotes

1. See the Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020 (Cth) (CERPO Act) and Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth) (CERP Rules).
2. CERPO Act, above n 1, Sch 1.
3. See, for example, *Decision — Variation of awards on the initiative of the Commission* [2020] FWCFCB 1837.
4. See the Privacy Amendment (Public Health Contact Information) Act 2020 (Cth). See s 2 for commencement information.
5. The jobkeeper payment is due to cease operation at the close of September 2020: r 6(5)(b) and 19(a) of the Rules. Jobkeeper directions under Pt 6-4C of the FW Act expire on 28 September 2020: see s 789GP. Award variations are due to expire on 30 June 2020, unless extended (see, for example, above n 3).
6. These include, broadly, protections in relation to workplace rights, protected attributes, industrial activity and sham contracting. See further T Donaghey and E Goodwin, *General Protections under the Fair Work Act*, Lexis Nexis, 2019.
7. See Fair Work Act 2009 (Cth), ss 539 and 546.
8. Above, s 342.
9. Above n 7, s 341.
10. Above n 7, ss 343 and 345.
11. Made pursuant to the CERPO Act.
12. See CERP Rules, above n 1, rr 6 to 10 inclusive.
13. The jobkeeper payment is due to cease operation at the close of September 2020: CERP Rules, above n 1, rr 6(5)(b) and 19(a).
14. This is an overview of the provisions, rather than a detailed examination. It should be noted that there are rules about service, accrual of entitlements and the taking of entitlements when a jobkeeper direction has been given: see above n 6, ss 789GR and 789GS, and that disputes about jobkeeper directions may be dealt with by the Fair Work Commission: see above n 6, ss 789GV and 789GW.
15. Above n 7, s 789GK.
16. The direction must be necessary to continue the employment of the employee (above n 7, s 789GL) and must be in writing (above n 7, s 789GN). Prior consultation is required: above n 7, s 789GL.
17. Above n 7, ss 789GDC, 789E, 789GF and 789GG.
18. Above n 7, s 789GQ.
19. Above n 7, ss 789GD, 789GDA and 789GDB.
20. Above n 7, s 789GD and CERP Rules, above n 1, r 10.
21. Above n 7, s 789GJ(1).
22. Above n 7, s 789GJ(2).
23. Above n 7, s 789GU.
24. Above n 7, s 789GZ(1)(b).
25. Other protections, such as against misuse of jobkeeper directions, also exist. See above n 7, s 789GXA.
26. Explanatory Memorandum, Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 (Cth) — Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020 (Cth), [1.81].
27. *Decision — Variation of awards on the initiative of the Commission* [2020] FWCFCB 1837. Application to Building, Joinery and Mobile Crane Awards remained undetermined as at the time of writing: see Fair Work Commission, Notice of Listing, 13 May 2020, available at www.fwc.gov.au/documents/documents/awardmod/variations/2020/nol-130520-am202012.pdf.
28. See above n 3, at [111] and, for example, *Determination — Additional measures during the COVID-19 pandemic* — PR718141 (8 April 2020) (Determination PR718141).
29. See, for example, *Turley v James Frizelles Automotive Group* [2018] FCCA 2989; BC201810123 at [12].
30. See above n 3, at [111] and, for example, above n 27, *Determination PR718141*.
31. *CVSG Electrical Construction Pty Ltd* [2020] FWCFCB 1747.
32. *Application to vary the Clerks — Private Sector Award 2010* [2020] FWCFCB 1690.
33. New Sch 1 to the Clerks — Private Sector Award 2010, as implemented by Attachment A to the decision in above.
34. *Applications to vary the Restaurant Industry Award 2010* [2020] FWCFCB 1741.
35. Above and *Determination — Hospitality Industry (General) Award 2010 PR717757* (Determination PR717757) inserting new Sch L, pursuant to *Decision — Australian Hotels Association and United Workers' Union* [2020] FWCFCB 1574 (Decision FWCFCB 1574).

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36. New Schedule I to the Restaurant Industry Award 2010, as implemented by Attachment A to the decision above n 34 and Determination PR717757, above n 33, inserting new Sch L, pursuant to Decision FWCFB 1574, above n 35.
37. *Statement — Application by Australian Industry Group* [2020] FWCFB 2301.
38. *Statement — Joint application to vary the Vehicle Manufacturing, Repair, Services and Retail Award 2010* [2020] FWCFB 2356.
39. *Statement — Health sector awards — Pandemic Leave* [2020] FWCFB 2273; *Statement — Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010* [2020] FWCFB 2343.
40. Privacy Act 1988 (Cth), s 6(1).
41. For information about the App, see Australian Government, Department of Health, COVIDSafe App, www.health.gov.au/resources/apps-and-tools/covidsafe-app.
42. Amendments made by the Privacy Amendment (Public Health Contact Information) Act 2020 (Cth). See s 2 for commencement information.
43. See Explanatory Memorandum, Privacy Amendment (Public Health Contact Information) Bill 2020, [15]–[17].
44. Above n 40, s 94H(1).
45. Above n 40, ss 94H(1) and (2).
46. Explanatory Memorandum to the Privacy Amendment (Public Health Contact Information) Bill 2020 at [86].
47. Employers face a reverse onus of proof in relation to s 361 claims. See, in particular, *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500; 290 ALR 647; [2012] HCA 32; BC201206652; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243; 314 ALR 1; [2014] HCA 41; BC201408607 and *Victoria (Office of Public Prosecutions) v Grant* (2014) 246 IR 441; [2014] FCAFC 184; BC201411037.
48. On what may constitute a false or misleading statement, see the discussion in *General Protections under the Fair Work Act*, above n 6, at Ch 5, [5.13]–[5.51] inclusive.