

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Inquiry into the Fair Work Commission Annual Report 2019-20

House of Representatives Standing Committee on Employment, Education and
Training

March 2022
CANBERRA

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ISBN 978-1-76092-393-8 (Printed Version)

ISBN 978-1-76092-394-5 (HTML Version)

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Chair's foreword

This inquiry examined certain aspects of the *Fair Work Commission Annual Report 2019-20*. In particular, how policy responses designed to manage the COVID-19 pandemic have impacted and may continue to impact the Commission's caseload, including: vaccine mandates, shutdowns, lockdowns, self-isolation and quarantine requirements, and inconsistencies between the public health orders of the states and territories.

The Commission's caseload increased by eight per cent during 2019-20, with significantly more unfair dismissal applications and workplace disputes than in other years associated with the beginning of the pandemic. The Committee found that the JobKeeper program and the temporary variation of industry awards provided flexibility in workplaces and prevented a larger surge in applications to the Commission. The responses of Australian, state, and territory governments to COVID-19 were largely successful in safeguarding the health of Australians while encouraging businesses to continue trading and retain staff.

While governments had to implement policies quickly to keep Australians safe and to preserve jobs and incomes, state and territory public health orders were often implemented at short notice and inconsistencies between jurisdictions made it difficult for businesses and workers to know what their rights and responsibilities were. Australian governments should strive to provide clear, consistent, and timely advice to employers and employees about policies that may give rise to workplace disputes.

Vaccine mandates helped protect vulnerable Australians in high-risk settings, encouraged higher vaccination rates, and provided greater certainty to businesses about their rights and obligations to their employees and customers. However, many Australians who did not want to have a COVID-19 vaccine lost their jobs because of mandates in certain sectors. The issue of vaccine mandates is polarising,

and it is likely the Commission will need to deal with further unfair dismissal applications and workplace disputes relating to vaccine mandates going forward.

Despite the surge in its caseload, the Commission provided guidance and resolved issues in a timely manner by mobilising resources and digital tools, and with the assistance of additional Australian Government funding. The Committee was satisfied the Commission is well placed to mobilise strategies and resources in the event there is another peak in its caseload.

The Fair Work system can be costly and time consuming to navigate, and the availability of accessible information and advice is crucial for ensuring fair outcomes for employers and employees. The Fair Work Ombudsman has the central role in providing education and advice on matters related to the operation of the *Fair Work Act 2009*. While the Commission is limited in its ability to give guidance and advice in relation to the Act, it provides up to one hour of free legal assistance to eligible employees and employers on a range of topics. However, this may not be enough time to help Australians navigate complex workplace issues, particularly in the context of COVID-19.

The Australian Government could consider a mechanism that would allow the Commission to dismiss vexatious claims as a way of reducing time and cost to businesses in responding to claims that are clearly without merit, with appropriate safeguards to protect the rights of employees.

On behalf of the Committee, I would like to thank those who contributed written submissions to the inquiry, and who participated at hearings.

Mr Andrew Laming MP

Chair

Members

Chair

Mr Andrew Laming MP

Deputy Chair

Ms Lisa Chesters MP

Members

Ms Angie Bell MP

Mr Garth Hamilton MP

Ms Celia Hammond MP

Hon Steve Irons MP (*from 25 October 2021*)

Ms Ged Kearney MP

Ms Joanne Ryan MP

Ms Rebekha Sharkie MP

Mr Terry Young MP

Committee secretariat

Greg Ward, Secretary

John White, Inquiry Secretary

Damian Mutton, Researcher (*from 29 November 2021*)

Cathy Rouland, Office Manager

Terms of reference

House of Representatives Standing Order 215(c) allows committees to inquire into the annual reports of government departments and authorities that stand referred to the committee under the schedule presented by the Speaker.

The annual reports of the Fair Work Commission stand referred to the House of Representatives Standing Committee on Employment, Education and Training under the Speaker's Schedule.¹

On 1 September 2021, pursuant to Standing Order 215(c), the Committee adopted an inquiry into the *Fair Work Commission Annual Report 2019-20*.

¹ Speaker of the House of Representatives, *46th Parliament Speaker's Schedule: Allocation to Committees of Annual Reports of Government Departments and Agencies*, August 2019, page 9.

Abbreviations

ACCI	Australian Chamber of Commerce and Industry
AHA	Australian Hotels Association
AHPPC	Australian Health Protection Principal Committee
Ai Group	Australian Industry Group
AMWU	Australian Manufacturing Workers' Union
ANMF	Australian Nursing and Midwifery Federation
ASBFEO	Australian Small Business and Family Enterprise Ombudsman
ASU	Australian Services Union
ATAGI	Australian Technical Advisory Group on Immunisation
COSBOA	Council of Small Business Organisations Australia
COVID-19	Coronavirus Disease of 2019
DPS	Department of Parliamentary Services
HSU	Health Services Union
NRA	National Retail Association
NSW	New South Wales

1. Introduction

- 1.1 On 1 September 2021, the Committee resolved to conduct an inquiry under House of Representatives Standing Order 215(c) examining certain aspects of the *Fair Work Commission Annual Report 2019-20*.

Background

- 1.2 The Fair Work Commission (the Commission) is Australia's national workplace relations tribunal and is responsible for administering the provisions of the *Fair Work Act 2009* (Fair Work Act).¹
- 1.3 The Commission's powers and functions include:
- dealing with unfair dismissal claims
 - dealing with anti-bullying claims
 - dealing with general protections and unlawful termination claims
 - making, reviewing and varying modern awards
 - approving, varying and terminating enterprise agreements
 - dealing with disputes brought to the Commission under the dispute resolution procedures of modern awards and enterprise agreements
 - promoting cooperative and productive workplace relations and preventing disputes.²
- 1.4 The Commission forms part of Australia's Fair Work system, which covers most Australian workplaces and was established by the Fair Work Act. There are four other bodies that have roles in the Fair Work system:

¹ Fair Work Commission, *Fair Work Commission Annual Report 2020-21: Access to Justice*, September 2021, page 13.

² Fair Work Commission, *Fair Work Commission Annual Report 2020-21: Access to Justice*, September 2021, page 13.

- Fair Work Ombudsman
- Australian Building and Construction Commission
- Registered Organisations Commission
- Fair Work Federal Division of the Federal Court and Federal Circuit Court.³

Scope and conduct of review

- 1.5 In undertaking this inquiry, the Committee was interested in how policy responses designed to manage the COVID-19 pandemic have impacted and may continue to impact the Commission's caseload, including vaccine mandates, shutdowns, lockdowns, self-isolation and quarantine requirements, and inconsistencies between the public health orders of the states and territories.
- 1.6 The Committee was particularly interested in the President of the Commission, Justice Iain Ross AO's observation that, '[w]hile responding to the consequences of the pandemic, the Commission has also seen an increase in its caseload with substantial increases in the number of unfair dismissal matters and workplace disputes.'⁴
- 1.7 The Committee acknowledges that since the inquiry was adopted, the *Fair Work Commission Annual Report 2020-21* was released, which reported that the Commission's caseload returned to more normal levels in 2020-21.⁵
- 1.8 Given the limited scope of the inquiry, which is focussed on the work of the Commission, the Committee did not seek public submissions. Rather, the Committee sought submissions from selected employer and employee groups, with the aim of hearing from those organisations that engage directly and regularly with the Commission. Any additional employer or employee groups who wished to be involved were encouraged to contact the secretariat. Furthermore, employer and employee groups were encouraged to seek feedback from their members in considering their response to the Committee's request for evidence.

³ Fair Work Ombudsman, 'The Fair Work system', www.fairwork.gov.au/about-us/legislation/the-fair-work-system, viewed 22 February 2022.

⁴ Fair Work Commission, *Fair Work Commission Annual Report 2019-20: Access to Justice*, September 2020, page 6.

⁵ Fair Work Commission, *Fair Work Commission Annual Report 2020-21: Access to Justice*, September 2021, page 21.

- 1.9 The Committee received nine submissions, which are listed at Appendix A.
- 1.10 The Committee held hearings with the Commission and selected employer and employee groups on 19 November 2021, and with the Australian Technical Advisory Group on Immunisation (ATAGI) on 8 December 2021. Both hearings were held via teleconference/videoconference due to COVID-19 restrictions.
- 1.11 Several employee groups declined the Committee's invitation to appear at a hearing.
- 1.12 The purpose of the hearing with ATAGI was to examine its recommendations regarding COVID-19 outbreak settings and the risks and/or benefits of COVID-19 vaccination in those circumstances.
- 1.13 Details of hearings, including the witnesses that appeared, are listed at Appendix B.
- 1.14 The evidence received and examined in Chapter 2 is limited to events that occurred from the arrival of the virus in Australia in early 2020 up to the time of the Committee's hearings in late 2021. This includes policy responses to COVID-19 variants up to and including the Delta variant, but not the more recent Omicron variant.
- 1.15 The Committee was mindful of the sub judice convention of the House of Representatives and that legal proceedings relating to issues outlined in this report were ongoing during the inquiry. As such, the Committee did not seek evidence relating to relevant legal proceedings and will not be commenting directly on any of those matters.

2. Impact of policy responses to the COVID-19 pandemic on the Fair Work Commission's caseload

- 2.1 The Fair Work Commission (the Commission) reported an increase of eight per cent in its caseload during 2019-20, particularly in areas related to unfair dismissal matters and workplace disputes.¹ The increase in the Commission's caseload was temporary and occurred in the first year of the COVID-19 pandemic in Australia.² This was a time of unprecedented policy challenges for governments in protecting the health of Australians, while safeguarding jobs and the incomes of individuals and businesses.
- 2.2 This chapter examines the reasons why the Commission's caseload peaked in 2020, including the impact of state and territory public health orders on workplaces and whether the communication and direction provided by governments was clear, consistent, and timely. The chapter also considers the Commission's capacity to deal with future caseload increases and whether policy responses to the COVID-19 pandemic are likely to further impact the Commission's caseload going forward.
- 2.3 The Commission's response to managing its increased caseload is examined, along with a range of other issues that were raised in submissions and at hearings.

¹ Fair Work Commission, *Fair Work Commission Annual Report 2019-20: Access to Justice*, September 2020, pages 6, 9.

² Fair Work Commission, *Fair Work Commission Annual Report 2020-21: Access to Justice*, September 2021, page 21.

COVID-19 policy responses in 2020 and 2021

Overview

- 2.4 Australia detected its first case of COVID-19 on 25 January 2020.³ As the virus became increasingly prevalent within Australia, governments responded to the significant health, safety, and economic implications of the pandemic to minimise its impact.
- 2.5 On 18 February 2020, the Australian Government released the *Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19)*, which was designed to guide the Australian health sector response to COVID-19.⁴
- 2.6 On 13 March 2020, the National Cabinet was established to address the country's overall response to COVID-19, comprising the Prime Minister, state Premiers and territory Chief Ministers.⁵
- 2.7 The National Cabinet is advised by the Australian Health Protection Principal Committee (AHPPC), led by the Australian Government's Chief Medical Officer and comprising the chief health and medical officers from each jurisdiction, and the National Coordination Mechanism, convened by the Department of Home Affairs. The National Coordination Mechanism works with jurisdictions, industry and key stakeholders to ensure a consistent approach to managing the impacts of the pandemic in addition to immediate health issues.⁶
- 2.8 Australian, state and territory governments implemented a range of preventative health measures to control the spread of COVID-19. Public health orders required some businesses and industries to shut down, while others had to operate with limited capacity to comply with social distancing

³ The Hon Greg Hunt MP, Minister for Health and Aged Care, 'First confirmed case of novel coronavirus in Australia', *Media Release*, 25 January 2020.

⁴ Department of Health, 'Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19)', www.health.gov.au/resources/publications/australian-health-sector-emergency-response-plan-for-novel-coronavirus-covid-19, viewed 22 December 2021.

⁵ The Hon Scott Morrison MP, Prime Minister, 'Advice on Coronavirus', *Media Release*, 13 March 2020.

⁶ The Hon Scott Morrison MP, Prime Minister, 'Advice on Coronavirus', *Media Release*, 13 March 2020.

rules. At various times, Australians were required to stay at home and to only leave if their travel was essential.⁷

- 2.9 There was an increase in employer-employee separation during the March 2020 quarter and Australia's underemployment rate hit an historic high of 13.8 per cent, with 1.8 million people working reduced or no hours. Two-thirds of Australian businesses reported a reduction in turnover.⁸
- 2.10 To protect jobs and the incomes of individuals and businesses, Australian, state and territory governments announced a range of COVID-19 economic stimulus measures.⁹
- 2.11 On 30 March 2020, the Australian Government announced its primary economic support program, JobKeeper, which provided \$1,500 before tax per fortnight per employee to eligible organisations.¹⁰ The Committee notes that JobKeeper supported businesses and not-for-profit organisations in two main ways: it provided economic relief for organisations suffering economic hardship; and it introduced flexibilities surrounding classification and duties of employment, hours of work, annual leave, and place of work to keep employees engaged with their employers.
- 2.12 JobKeeper was extended from 28 September 2020 until 28 March 2021 due to the ongoing hardship experienced by Australian businesses, although payments were progressively reduced and targeted.¹¹
- 2.13 Between 28 September 2020 and 3 January 2021, eligible organisations received \$1,200 per fortnight for employees who worked an average of 20 hours or more a week and \$750 for employees who worked less than 20 hours a week on average. Between 4 January and 29 March 2021, this was reduced to \$1,000 per fortnight for employees who worked an average of

⁷ Department of Parliamentary Services (DPS), *COVID-19: a chronology of state and territory government announcements (up until 30 June 2020)*, 22 October 2020.

⁸ Australian Bureau of Statistics, *One year of COVID-19: Aussie jobs, business and the economy. A timeline of significant COVID-19 events and statistical and economic insights over the last year*, 17 March 2021.

⁹ DPS, *COVID-19: a chronology of state and territory government announcements (up until 30 June 2020)*, 22 October 2020.

¹⁰ The Hon Scott Morrison MP, Prime Minister, '\$130 billion JobKeeper payment to keep Australians in a job', *Media Release*, 30 March 2020.

¹¹ The Treasury, 'JobKeeper Payment', www.treasury.gov.au/coronavirus/jobkeeper, viewed 31 January 2022.

20 hours or more a week and \$650 for employees who worked less than 20 hours a week on average.¹²

2.14 In addition to JobKeeper, the Australian Government supported individuals and businesses through:

- the HomeBuilder program¹³
- the Pandemic Leave Disaster Payment¹⁴
- COVID-19 lockdown support for businesses, jointly funded by the states and territories¹⁵
- a temporary reduction in minimum superannuation drawdown requirements¹⁶
- a reduction in social security deeming rates.¹⁷

2.15 Australia's COVID-19 vaccination program began in February 2021 and aimed to offer vaccines to all Australians by the end of October 2021.¹⁸

2.16 On 31 May 2021, the World Health Organization declared the COVID-19 Delta strain a variant of concern, which had the potential to be more infectious, carry a higher viral load, and cause more serious illness including long COVID.¹⁹ To slow the spread of the Delta variant, state and territory governments reintroduced a range of public health orders.²⁰

¹² The Treasury, 'JobKeeper Payment', www.treasury.gov.au/coronavirus/jobkeeper, viewed 31 January 2022.

¹³ The Treasury, 'HomeBuilder', www.treasury.gov.au/coronavirus/homebuilder, viewed 28 February 2022.

¹⁴ The Treasury, 'Supporting individuals and households', www.treasury.gov.au/coronavirus/households, viewed 28 February 2022.

¹⁵ The Treasury, 'Businesses and employers', www.treasury.gov.au/coronavirus/businesses, viewed 28 February 2022.

¹⁶ The Treasury, 'Supporting individuals and households', www.treasury.gov.au/coronavirus/households, viewed 28 February 2022.

¹⁷ The Treasury, 'Supporting individuals and households', www.treasury.gov.au/coronavirus/households, viewed 28 February 2022.

¹⁸ The Hon Scott Morrison MP, Prime Minister, 'First COVID-19 vaccinations', *Media Release*, 21 February 2021.

¹⁹ Department of Health, 'COVID-19 Delta variant', www.health.gov.au/health-alerts/covid-19/symptoms-and-variants/delta, viewed 1 February 2022.

²⁰ DPS, *COVID-19: a chronology of state and territory government announcements (up until 30 June 2020)*, 22 October 2020.

- 2.17 On 2 July 2021, the National Cabinet agreed to formulate and implement a four-phase National Plan to transition Australia's National COVID-19 Response (the National Plan).²¹ The National Plan emphasised that targeted lockdowns would be introduced only where necessary, and focussed on achieving high vaccinations rates, opening international borders, and the easing of restrictions.²²
- 2.18 As a result of further updated modelling and the continued spread of the Delta variant within Australia, the National Plan was updated multiple times in the latter half of 2021.²³
- 2.19 By the end of November 2021, 86.7 per cent of Australians aged 16 years and over had received two doses of COVID-19 vaccine.²⁴
- 2.20 The Omicron variant of concern had not yet been identified at the time of the Committee's hearing on 19 November 2021, although governments had begun to take measures to limit the spread of Omicron before the hearing on 8 December 2021.²⁵

State and territory public health orders

- 2.21 COVID-19 outbreaks have affected different parts of Australia at different times and have varied in severity and duration. In response, state and territory governments have implemented a range of public health orders to keep their citizens safe, which have varied according to jurisdictional requirements and context.²⁶ These decisions have been based on state and territory health advice, supported by the expertise of the Australian

²¹ The Hon Scott Morrison MP, Prime Minister, 'National Cabinet Statement', *Media Release*, 2 July 2021.

²² Australian Government, 'National Plan to transition Australia's National COVID-19 Response', www.australia.gov.au/national-plan, viewed 1 February 2022.

²³ Department of the Prime Minister and Cabinet, 'National Plan to transition Australia's National COVID Response', www.pmc.gov.au/national-plan-transition-australias-national-covid-response, viewed 1 February 2022.

²⁴ Australian Government, Operation COVID Shield, *COVID-19 Vaccine Roll-out*, 28 November 2021, page 2.

²⁵ The Hon Scott Morrison MP, Prime Minister, 'Pause to further easing of border restrictions', *Media Release*, 29 November 2021.

²⁶ DPS, *COVID-19: a chronology of state and territory government announcements (up until 30 June 2020)*, 22 October 2020.

Technical Advisory Group on Immunisation (ATAGI).²⁷ Public health orders have been updated throughout the pandemic in response to new information, evidence and advice.²⁸

- 2.22 Australian, state, and territory governments have different responsibilities in operating, managing, and regulating Australia's health system. State and territory governments are individually responsible for managing their hospital, ambulance and emergency services systems,²⁹ and for implementing decisions arising from the National Cabinet.³⁰
- 2.23 In response to COVID-19, governments have implemented a range of public health orders that have affected both employers and employees, including:
- lockdowns
 - quarantine
 - trading restrictions
 - capacity restrictions
 - public gathering restrictions
 - physical distancing
 - mask mandates
 - travel restrictions
 - risk management requirements
 - vaccine mandates.³¹
- 2.24 The Committee heard that jurisdictional differences in public health orders created legal uncertainty for businesses,³² and contributed to disputes between employers and employees.³³

²⁷ Professor Christopher Blyth, Co-chair, Australian Technical Advisory Group on Immunisation (ATAGI), *Committee Hansard*, Canberra, 8 December 2021, page 4.

²⁸ DPS, *COVID-19: a chronology of state and territory government announcements (up until 30 June 2020)*, 22 October 2020.

²⁹ Department of Health, 'The Australian health system', www.health.gov.au/about-us/the-australian-health-system, viewed 22 December 2021.

³⁰ National Federation Reform Council, 'National Cabinet', www.federation.gov.au/national-cabinet, viewed 21 February 2022.

³¹ DPS, *COVID-19: a chronology of state and territory government announcements (up until 30 June 2020)*, 22 October 2020; Ms Alexi Boyd, Chief Executive Officer, Council of Small Business Organisations Australia (COSBOA), *Committee Hansard*, Canberra, 19 November 2021, page 14. See also: footnote 47.

³² National Retail Association (NRA), *Submission 9*, page [1].

³³ Ms Alexi Boyd, COSBOA, *Committee Hansard*, Canberra, 19 November 2021, page 14;

Communication and direction from governments

- 2.25 The overall process of engaging with the Commission can be burdensome and time consuming for employers and employees.³⁴ Access to clear, concise and timely communication from governments can ease this burden.
- 2.26 From the outset of the pandemic, relevant information was communicated through a range of Australian, state and territory government announcements. Frequently changing directions and quick policy responses created a complex and uncertain environment for employers and employees to navigate.
- 2.27 The Committee heard there was some confusion when public health orders were issued close to their enforcement date. The Australian Chamber of Commerce and Industry (ACCI) observed that while employers wanted to comply with public health orders, requirements were often difficult to interpret at short notice and changed quickly.³⁵
- 2.28 The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) and the Council of Small Business Organisations Australia (COSBOA) raised similar concerns and noted that small businesses, in particular, were adversely affected because they did not have the resources of larger counterparts to interpret the changing directions.³⁶ COSBOA stated:

What's COVID's taught us is that small businesses are hungry for information and they want it delivered in such a way that's clear and an applicable to their business and something that they can pick up, make a quick decision on and then move on with their business. They haven't got the time to unpack it.³⁷

Australian Hotels Association (AHA), *Submission 2*, page 1; Australian Manufacturing Workers' Union (AMWU), *Submission 7*, page [2].

³⁴ Australian Small Business and Family Enterprise Ombudsman (ASBFEO), *Submission 1*, page [2].

³⁵ Ms Tamsin Lawrence, Deputy Director, Workplace Relations, Australian Chamber of Commerce and Industry (ACCI), *Committee Hansard*, Canberra, 19 November 2021, page 4.

³⁶ The Hon Bruce Billson, Ombudsman, ASBFEO, *Committee Hansard*, Canberra, 19 November 2021, page 14.

³⁷ Ms Alexi Boyd, COSBOA, *Committee Hansard*, Canberra, 19 November 2021, page 17.

2.29 The Committee heard that a lack of clear and timely guidance on a range of matters relating to COVID-19 led to confusion for employers and employees,³⁸ and contributed to an increased caseload for the Commission.³⁹

2.30 ACCI emphasised the importance of clear communication and direction from governments:

Things don't have to get to the commission. They don't have to get to a dispute. If everyone understands what is required under law then that usually means that you can get to a resolution without it getting to the commission ... So, if we can stop it getting there by making it very clear to everyone what the rules are and why they're in place, that would definitely lead to less disputes heading to the commission.⁴⁰

2.31 It was reported that trade unions and workers' federations supported their members on a wide range of issues, including access to support payments, tracking and tracing, and movement across borders. The Australian Manufacturing Workers' Union said this was necessary because of a lack of coordination across jurisdictions and agencies.⁴¹

2.32 The National Retail Association (NRA) attributed increases in requests for assistance with unfair dismissal claims and stand-down disputes involving its members to lockdowns and restrictions under state and territory public health orders, which brought an end to employment relationships.⁴² NRA reported that '[a]ny significant shift in law causes our phone calls to increase by about 300 to 400 per cent. We observed that during JobKeeper last year and we observe it each time a state public health order is issued that impacts retailers.'⁴³

2.33 The Committee heard there was confusion about how public health orders applied to different sectors of the economy, which gave rise to disputes.

³⁸ ASBFEO, *Submission 1*, page [1]; AHA, *Submission 2*, page 1; Australian Services Union (ASU), *Submission 4*, page 4; Australian Nursing and Midwifery Federation (ANMF), *Submission 3*, page 6; Health Services Union (HSU), *Submission 5*, pages 10-11; The Hon Bruce Billson, ASBFEO, *Committee Hansard*, Canberra, 19 November 2021, page 14.

³⁹ The Hon Bruce Billson, ASBFEO, *Committee Hansard*, Canberra, 19 November 2021, page 14.

⁴⁰ Ms Tamsin Lawrence, ACCI, *Committee Hansard*, Canberra, 19 November 2021, page 5.

⁴¹ AMWU, *Submission 7*, page [2].

⁴² NRA, *Submission 9*, page [1].

⁴³ Ms Lindsay Carroll, Deputy Chief Executive Officer and Legal Director, NRA, *Committee Hansard*, Canberra, 19 November 2021, page 10.

ASBFEO indicated that, during the early stages of the pandemic, hairdressing salons and beauty parlours were not immediately required to close. However, as some were unable to maintain a safe working environment and had significantly reduced customers, they decided to shut regardless. These 'at will' closures created disputes and confusion among employees and employers and resulted in additional Commission cases.⁴⁴

- 2.34 However, the Committee also heard that, on average, the level of communication and cooperation between employers and employees has been much higher during the pandemic than in previous years.⁴⁵

Vaccine mandates

- 2.35 Based on the advice of AHPPC and the agreement of the National Cabinet on 28 June 2021, COVID-19 vaccination became a mandatory condition of employment for all Australian residential aged care workers on 17 September 2021.⁴⁶
- 2.36 Subsequently, state and territory governments required workers in other sectors of the economy to be vaccinated as an ongoing condition of their employment, and for individuals to be vaccinated to visit certain services and businesses. These mandates have varied and continue to vary by state and territory.⁴⁷

⁴⁴ ASBFEO, *Submission 1*, page [2].

⁴⁵ Ms Tamsin Lawrence, ACCI, *Committee Hansard*, Canberra, 19 November 2021, page 5; Mr Stephen Smith, Head of National Workplace Relations Policy, Australian Industry Group (Ai Group), *Committee Hansard*, Canberra, 19 November 2021, pages 8-9; Ms Lindsay Carroll, NRA, *Committee Hansard*, Canberra, 19 November 2021, page 12.

⁴⁶ Department of Health, 'Mandatory COVID-19 vaccination in aged care,' www.health.gov.au/initiatives-and-programs/covid-19-vaccines/information-for-aged-care-providers-workers-and-residents-about-covid-19-vaccines/mandatory-covid-19-vaccination-in-aged-care, viewed 21 February 2022.

⁴⁷ Australian Capital Territory Government, 'Information for employees that require vaccination', www.covid19.act.gov.au/stay-safe-and-healthy/vaccine/information-for-employees-that-require-vaccination, viewed 22 February 2022; New South Wales Government, 'Vaccination requirements for workers', www.nsw.gov.au/covid-19/vaccination/requirements-for-workers, viewed 22 February 2022; Northern Territory Government, 'Mandatory vaccinations', www.coronavirus.nt.gov.au/business-and-work/mandatory-vaccinations#section1, viewed 22 February 2022; Queensland Government, 'Vaccination requirements for workers in high risk settings', www.qld.gov.au/health/conditions/health-alerts/coronavirus-covid-19/current-status/public-health-directions/vaccination-requirements-for-workers-in-high-risk-settings, viewed 22 February 2022; Government of South Australia, 'Emergency Declaration and

- 2.37 When questioned on justification and proportionality of vaccine mandates in different settings, ATAGI stated that it is a matter for individual jurisdictions to consider with respect of their own contexts and legal frameworks.⁴⁸
- 2.38 The Committee acknowledges that there has been significant public concern about vaccine mandates, particularly among those who have lost their jobs because they do not wish to be vaccinated against COVID-19.

Rationale for mandates

- 2.39 Vaccine mandates are not a new concept in health industry settings,⁴⁹ where vaccinated workers help keep vulnerable Australians safe from transmissible illnesses including influenza. Furthermore, families are encouraged through access to family assistance payments to have their children vaccinated according to the National Immunisation Program, which is provided free of charge. In some jurisdictions, children are required to meet immunisation requirements to enrol in early childhood education and care.⁵⁰
- 2.40 The Committee heard that vaccines are effective in preventing Australians from developing severe COVID-19,⁵¹ and that high vaccination rates give employers the confidence to employ staff and invest.⁵²

Directions', www.covid-19.sa.gov.au/emergency-declarations, viewed 22 February 2022; Tasmanian Government, 'Vaccination requirements', www.coronavirus.tas.gov.au/business-and-employees/vaccination-requirements, viewed 22 February 2022; Victorian Government, 'Worker vaccination requirements', www.coronavirus.vic.gov.au/worker-vaccination-requirements, viewed 22 February 2022; Western Australian Government, 'COVID-19 coronavirus: Mandatory COVID-19 vaccination information', www.wa.gov.au/government/covid-19-coronavirus/covid-19-coronavirus-mandatory-covid-19-vaccination-information, viewed 22 February 2022.

⁴⁸ Professor Allen Cheng, Co-chair, ATAGI, *Committee Hansard*, Canberra, 8 December 2021, page 3.

⁴⁹ ANMF, *Submission 3*, page 8.

⁵⁰ Department of Health, 'Immunisation for infants and children', www.health.gov.au/health-topics/immunisation/when-to-get-vaccinated/immunisation-for-infants-and-children, viewed 22 February 2022.

⁵¹ Professor Allen Cheng, ATAGI, *Committee Hansard*, Canberra, 8 December 2021, page 3.

⁵² Mr Stephen Smith, Ai Group, *Committee Hansard*, Canberra, 19 November 2021, page 8.

2.41 When questioned about evidence on the use and efficacy of COVID-19 vaccines, ATAGI indicated three reasons why people should be vaccinated:

- to prevent COVID-19
- to prevent severe COVID-19
- to prevent the transmission of COVID-19.⁵³

2.42 ATAGI noted that the last two of these reasons, to prevent severe illness and to prevent transmission, can provide a rationale for a vaccine mandate. ATAGI explained:

So, in the first one, we might say, for example, for someone who is at occupational risk of having exposure to infections, like a staff member on a COVID ward, that's an occupational health and safety consideration, like having a hard hat on a building site, and part of a suite of protections. The second reason, about transmission, would be that we know that elderly people—particularly those who are frail and in aged care—don't respond as well to vaccines. Most of their contacts are the people that work there and care for them and, therefore, to have a vaccine for the people they come into contact with is reasonable to protect both the worker and the person that they're caring for in that setting. Equally, there are things like hotel quarantine workers coming into contact with people that might have SARS 2 [COVID-19] and are coming in from overseas.⁵⁴

2.43 The Committee was interested in the proven ways to prevent the spread of COVID-19 infection within Australia, and why vaccines are important alongside other measures. ATAGI responded:

We have three ways of preventing the spread of infection. There's vaccination, there's contact tracing—what's called test, trace, isolation and quarantine—and then there's what we call public health and social measures. There are all three. When we didn't have vaccination, we had to go hard on the other two. But with vaccination, we can rely more on vaccination preventing a substantial number of infections and we do not have to rely quite so heavily on the other two.⁵⁵

⁵³ Professor Allen Cheng, ATAGI, *Committee Hansard*, Canberra, 8 December 2021, page 3.

⁵⁴ Professor Allen Cheng, ATAGI, *Committee Hansard*, Canberra, 8 December 2021, page 3.

⁵⁵ Professor Allen Cheng, ATAGI, *Committee Hansard*, Canberra, 8 December 2021, page 5.

Efficacy of mandates

- 2.44 The Committee heard that, during the COVID-19 pandemic, vaccine mandates have provided businesses with confidence to be able to operate in a safe manner. For example, the Australian Hotels Association (AHA) commented:

Unfortunately, in the unique circumstances of a pandemic, the nature of much of the regulatory advice was uncertain. In a fast-changing environment, employees were forced to try and navigate their way through various competing obligations: providing a safe workplace on the one hand; but on the other hand not offending unfair dismissal laws. It was probably not until some states and territories began to mandate vaccines in the hospitality sector, that employers in those states and territories felt greater certainty as to their rights and obligations regarding their employees in the pandemic.⁵⁶

- 2.45 The Committee was interested in whether vaccine mandates had contributed to the high vaccination rates within states and workplaces. The Australian Industry Group (Ai Group) responded:

I think it played a really important role ... The common experience was that, as soon as the public health order required vaccination by a particular date, the employees who hadn't yet been vaccinated got out and got vaccinated because they really didn't want to not be able to work from that date, so it definitely had an effect.⁵⁷

Disputes relating to mandatory vaccination

- 2.46 The Committee was interested in whether there was a significant increase in disputes or dismissals related to vaccine mandates and how this would affect the Commission's caseload in the future.
- 2.47 Between 29 September 2021 and 17 November 2021, the Commission conducted a manual audit of applications it had received referencing COVID-19 vaccinations. The audit revealed that most of the applications concerned unfair dismissal, but the number of unfair dismissal cases referencing COVID-19 vaccinations in the period only equated to approximately 10 per cent of all unfair dismissal applications, based on

⁵⁶ Mr Stephen Ferguson, National Chief Executive Officer, AHA, *Committee Hansard*, Canberra, 19 November 2021, page 27.

⁵⁷ Mr Stephen Smith, Ai Group, *Committee Hansard*, Canberra, 19 November 2021, page 8.

2020-21 figures.⁵⁸ Notably, the audit found that unfair dismissal applications had not increased as a result of vaccine related issues and the Commission had not experienced an increased caseload above their baseline during this period. The audit indicated that the 10 per cent of applications that referred to COVID-19 vaccinations had been absorbed into the Commission's case numbers.⁵⁹

2.48 Similarly, Ai Group reported:

... we've seen no evidence that factor [vaccine mandates] has led to an increase in unfair dismissal claims so far, and we're not expecting to see a significant increase over the months ahead. In our experience, when vaccination has been required, either through a public health order or through an employer direction, there has been a high level of compliance by employees with the order of direction.⁶⁰

2.49 Other stakeholders suggested there was a possibility vaccine mandates may contribute to the Commission's caseload in the future.⁶¹ Similarly, the Commission noted that, when the grace periods relating to various vaccine mandates finish,⁶² there may be an increase in applications that involve vaccination mandates in the workplace. The Commission indicated that issues relating to mandatory vaccination are most likely to arise in the context of applications relating to unfair dismissals and general protections involving or not involving dismissal.⁶³

⁵⁸ Mr Murray Furlong, General Manager, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, pages 22-24.

⁵⁹ Ms Ailsa Carruthers, Executive Director, Client Services Delivery Branch, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 24.

⁶⁰ Mr Stephen Smith, Ai Group, *Committee Hansard*, Canberra, 19 November 2021, page 7.

⁶¹ HSU, *Submission 5*, page 11; The Hon Bruce Billson, ASBFEO, *Committee Hansard*, Canberra, 19 November 2021, page 18.

⁶² For example, the grace period for residential aged care workers to be vaccinated was from 28 June 2021 to 17 September 2021. See: Department of Health, 'Mandatory COVID-19 vaccination in aged care,' www.health.gov.au/initiatives-and-programs/covid-19-vaccines/information-for-aged-care-providers-workers-and-residents-about-covid-19-vaccines/mandatory-covid-19-vaccination-in-aged-care, viewed 21 February 2022.

⁶³ Mr Murray Furlong, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 22.

- 2.50 The Committee heard that the Commission is not a court that can rule on the validity or otherwise of a mandate under a public health order, and that it is not the role of the Commission to provide advice on the lawfulness of vaccination requirements.⁶⁴ The Commission said that it 'routinely refer[red] inquiries about COVID vaccinations to the Fair Work Ombudsman, which is the agency responsible for providing education and advice on matters of the operation of the Fair Work Act.'⁶⁵

Fair Work Commission caseload

- 2.51 A comparison of the Commission's 2019-20 and 2020-21 annual reports reveals that 2,670 more applications were submitted to the Commission during 2019-20.⁶⁶ The most significant contributors to caseload numbers during 2019-20 were applications concerning unfair dismissal, general protections involving dismissal, and workplace disputes.⁶⁷

Unfair dismissal and general protections involving dismissal

- 2.52 Section 394 of the *Fair Work Act 2009* (Fair Work Act) provides the application framework for a person who has been dismissed and is seeking an unfair dismissal remedy. Section 365 of the Fair Work Act provides the application framework for a person who has been dismissed in alleged contravention of a general protection.
- 2.53 Unfair dismissal applications represented both the largest category and category increase for the Commission in 2019-20. The Commission received a total of 16,558 unfair dismissal applications, an increase of 2,630 applications or 19 per cent from the previous year. In April 2020, unfair dismissal applications rose to a monthly high of 2,043, which is more than 60 per cent higher than the corresponding period in the previous year.⁶⁸

⁶⁴ AMWU, *Submission 7*, page [2]; Mr Murray Furlong, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 22.

⁶⁵ Mr Murray Furlong, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 22.

⁶⁶ Ai Group, *Submission 6*, page 2.

⁶⁷ Fair Work Commission, *Fair Work Commission Annual Report 2019-20: Access to Justice*, September 2020, pages 6, 9, 17-18.

⁶⁸ Mr Murray Furlong, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 21; Fair Work Commission, *Fair Work Commission Annual Report 2019-20: Access to Justice*, September 2020, page 33.

- 2.54 As previously noted, Australia's underemployment rate peaked in March 2020. Ai Group commented:
- ... between the week ending 14 March 2020 and the week ending 18 April 2020 alone, employee jobs decreased by 7.5%. This amounted to almost 1 million employees losing their jobs due to COVID-19 and the restrictions applied by State and Federal Governments to prevent the spread of the virus.⁶⁹
- 2.55 Applications for general protections involving dismissal represented the second largest category for the Commission in 2019-20.⁷⁰ The Commission received a total of 4,823 applications for general protections involving dismissal, an increase of 315 applications or seven per cent from the previous year.⁷¹
- 2.56 The Fair Work Act stipulates that an application under section 365 or 394 must be made within 21 days after the dismissal took effect. The sharp increase in activity the Commission experienced between March and May 2020 is therefore consistent with the timeline of policy responses to managing the COVID-19 pandemic within Australia.

Reinstatement

- 2.57 In both 2019-20 and 2020-21, less than one per cent of total unfair dismissal applications lodged with the Commission resulted in workers being reinstated.⁷² The Committee heard that while dispute resolution by reinstatement was low, it was not always the best outcome for employers and employees. AHA stated that the conciliation process almost always ends in an agreement between the parties that suits both parties.⁷³

⁶⁹ Ai Group, *Submission 6*, page 3.

⁷⁰ Fair Work Commission, *Fair Work Commission Annual Report 2019-20: Access to Justice*, September 2020, pages 17-18.

⁷¹ See: Fair Work Commission, *Fair Work Commission Annual Report 2018-19: Access to Justice*, September 2019, page 21; Fair Work Commission, *Fair Work Commission Annual Report 2019-20: Access to Justice*, September 2020, page 17.

⁷² Ms Ailsa Carruthers, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 26.

⁷³ Mr Sean D'Almada-Remedios, Senior Lawyer, AHA NSW, *Committee Hansard*, Canberra, 19 November 2021, page 30.

- 2.58 Part 3-2 of Division 4 of the Fair Work Act sets out the remedies the Commission can grant for unfair dismissal which include reinstatement and compensation. Agreements between the parties can also include a statement of service, reference, or recharacterisation of the termination to assist the employee in gaining new employment sooner.⁷⁴

Stand downs

- 2.59 Businesses stood down employees for a range of reasons during the pandemic, including because of public health order requirements, an employers' inability to maintain work health and safety requirements, and decreased business traffic. Employer-employee stand down disputes arose during 2019-20 in relation to employee general protections and the interpretation of section 524 of the Fair Work Act. The Committee also heard that disputes arose regarding the allocation of available work.⁷⁵
- 2.60 Section 524 of the Fair Work Act provides the circumstances in which an employer may or may not stand down an employee and the corresponding payment requirements.⁷⁶ Section 526 of the Fair Work Act dictates how and under what circumstances the Commission may deal with a stand down dispute.
- 2.61 During the 2018-19 reporting period, only 10 applications were made under section 526 of the Fair Work Act, compared to 183 in 2019-20. Ai Group noted that '[t]he dramatic downturn in business and the inability of many businesses to trade as a result of intermittent lockdowns by the various State and Territory Governments accounts for the increase in applications made under s. 526.'⁷⁷
- 2.62 Difficulties arose during the early stages of the pandemic when employers relied heavily on the use of section 524 of the Fair Work Act to stand employees down. There was limited precedence guiding the broad use of section 524 prior to COVID-19 and differences arose in how employers and employees interpreted section 524. These factors resulted in an increase in

⁷⁴ Mr Sean D'Almada-Remedios, AHA NSW, *Committee Hansard*, Canberra, 19 November 2021, page 30.

⁷⁵ ASU, *Submission 4*, page 4.

⁷⁶ Subsection 524(3) of the *Fair Work Act 2009* states: 'If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.'

⁷⁷ Ai Group, *Submission 6*, page 5.

workplace disputes and ultimately contributed to an increased caseload for the Commission.⁷⁸

- 2.63 The Australian Services Union (ASU) argued that their industrial activity was largely driven by employers' responses to pandemic policy, particularly in relation to stand down disputes, bargaining and the variation of modern awards.⁷⁹

JobKeeper disputes

- 2.64 JobKeeper payments were wage subsidies paid by the Australian Government to businesses who met the JobKeeper criteria. If an employer was entitled to JobKeeper payments, the Fair Work Act provided for JobKeeper enabling directions that authorised employers to, among other things, give their employees stand down directions and make rostering arrangements that would not otherwise be permitted under enterprise agreements.⁸⁰
- 2.65 Section 789GV of the Fair Work Act provided the framework for the Commission to deal with JobKeeper disputes relating to Part 6-4C. As such, applications could be submitted to the Commission to deal with a JobKeeper dispute or a dispute in relation to a JobKeeper enabling direction.
- 2.66 As JobKeeper introduced a new jurisdiction for the Commission, it also introduced the potential for new disputes. Some JobKeeper enabling directions caused disagreement between employers and employees about their application. ASU indicated that they had observed disputes arising from the eligibility of members for JobKeeper, the operation of the directions, and the interaction between JobKeeper provisions and paid leave entitlements.⁸¹
- 2.67 Ai Group stated:
- The additional workload generated by the newly introduced jurisdiction to deal with disputes in relation to a JobKeeper direction and under Part 6-4C of

⁷⁸ ASU, *Submission 4*, page 4.

⁷⁹ ASU, *Submission 4*, page 3.

⁸⁰ AMWU, *Submission 7*, page [2].

⁸¹ ASU, *Submission 4*, page 4.

the *Fair Work Act 2009* ... accounts for a significant part of the increased number of applications to the Commission in the 2019-20 reporting period.⁸²

- 2.68 During the 2019-20 reporting period the Commission received 544 JobKeeper dispute applications and completed 518. However, the Commission indicated that of the 544 applications, 363 did not appear to be disputes about the operation of Part 6-4C and were administratively dismissed or withdrawn.⁸³
- 2.69 Since the JobKeeper scheme ended on 28 March 2021, the Commission has continued to have a small role in dealing with disputes about the accrual of leave and notice entitlements while a JobKeeper enabling direction was in place.⁸⁴
- 2.70 The Committee notes that while JobKeeper created a new jurisdiction and category of dispute for the Commission, it also minimised the volume of stand down, unfair dismissal, and other dispute applications. This is because JobKeeper introduced flexibilities surrounding classification and duties, hours of work, annual leave, and place of work. JobKeeper flexibility helped keep employees engaged with their employers, as stand downs were being forced by trading restrictions and lockdowns put in place by state and territory public health orders.⁸⁵

Pandemic leave

- 2.71 The Committee heard that many employees were required to expend their own annual leave to adhere to health and safety requirements, particularly in early 2020. The Health Services Union (HSU) reported that 'the issue of leave entitlements is one of the most frequently raised concerns of HSU members in the context of COVID-19.'⁸⁶
- 2.72 The Commission temporarily amended 99 modern awards in April 2020 by inserting a temporary Schedule X, which allowed two weeks unpaid

⁸² Ai Group, *Submission 6*, page 3.

⁸³ Fair Work Commission, *Fair Work Commission Annual Report 2019-20: Access to Justice*, September 2020, page 23.

⁸⁴ Mr Murray Furlong, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 21.

⁸⁵ AHA, *Submission 2*, page 3.

⁸⁶ HSU, *Submission 5*, page 7.

pandemic leave and the option to take twice as much annual leave at half pay.⁸⁷

2.73 The Commission also inserted a temporary Schedule Y in the Aged Care Award, Nurses Award and Health Services Award, allowing aged care employees covered by those awards to take up to two weeks paid pandemic leave. Schedule Y applied from 29 July 2020 to 29 March 2021.⁸⁸

2.74 HSU noted that the paid pandemic leave provision did not come into effect until August 2020 and excluded casual workers with irregular hours from accessing leave. HSU said '[t]his exclusion undermined the very intent of the claim and overlooked the exact workers who were at highest likelihood of working multiple jobs to subsidise low hours and low wages.'⁸⁹ HSU commented that the Commission's decision to award paid pandemic leave:

... appeared to be reactive to extensive outbreaks in residential aged care facilities in Victoria at the time, rather than a proactive measure which could provide comfort for any worker required to test, isolate or quarantine that they would not be penalised financially for doing so. The entitlement was removed in March 2021, notwithstanding the continuation of the pandemic.⁹⁰

2.75 The Commission discussed why other awards did not include provision for paid pandemic leave, and stated:

... the commission, taking into account the modern awards objective, the legislative powers under which provisions can be modified or inserted into awards, considered that it wasn't necessary to provide the relevant safety net in other awards to have paid pandemic leave inserted into the awards. Having said that, there are other mechanisms—the national employment standards and other mechanisms—by which such entitlements could be provided to employees.⁹¹

⁸⁷ Fair Work Ombudsman, 'Unpaid pandemic leave in awards', coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/pay-leave-and-stand-downs/unpaid-pandemic-leave-annual-leave-changes-in-awards, viewed 1 March 2022.

⁸⁸ Fair Work Ombudsman, 'Paid pandemic leave for residential aged care employees', portal.fairwork.gov.au/library/k600660_paid-pandemic-leave-for-residential-aged-care-employees, viewed 21 February 2022.

⁸⁹ HSU, *Submission 5*, page 8.

⁹⁰ HSU, *Submission 5*, page 9.

⁹¹ Ms Catherine Luby, Acting Executive Director, Tribunal Support Branch, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 25.

Caseload response

Guidance and advice from the Commission

- 2.76 The Commission said that it moved quickly to provide guidance relating to JobKeeper by developing a plain-language application form, case management practices and processes, and publishing relevant information on the Commission's website.⁹²
- 2.77 To provide additional guidance and advice to those who need to prepare or respond to an application under the Fair Work Act, the Commission prepares and updates various benchbooks. Benchbooks explain how the Commission has interpreted the legislation in previous cases to make decisions.⁹³ The Commission published and continuously updated a JobKeeper disputes benchbook to provide information on the new jurisdiction.⁹⁴
- 2.78 The Committee received mixed evidence regarding the Commission's benchbooks. The Committee heard evidence that the benchbook was useful and relatively easy to understand for the lay person,⁹⁵ but also that some businesses found it difficult and time consuming to interpret, particularly considering the diverse nature of small businesses.⁹⁶
- 2.79 The Commission also provides one hour of free legal assistance to eligible employees and employers to answer questions regarding:
- dismissal
 - general protections
 - bullying at work
 - sexual harassment at work.⁹⁷

⁹² Mr Murray Furlong, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 21.

⁹³ Fair Work Commission, 'Case law benchbooks', www.fwc.gov.au/hearings-decisions/case-law-benchbooks, viewed 3 March 2022.

⁹⁴ Mr Murray Furlong, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 21.

⁹⁵ Ms Tamsin Lawrence, ACCI, *Committee Hansard*, Canberra, 19 November 2021, page 4.

⁹⁶ Ms Alexi Boyd, COSBOA, *Committee Hansard*, Canberra, 19 November 2021, page 17.

⁹⁷ Fair Work Commission, 'Legal advice from the Workplace Advice Service', www.fwc.gov.au/resources/where-get-legal-help/workplace-advice-service, viewed 2 March 2022.

2.80 The Committee was interested in the scope and limitations of the Commission's free legal assistance and heard that while the legal advice was both welcomed and valuable, one hour was not enough time to help small businesses navigate complex employer-employee issues, particularly during the pandemic.⁹⁸ ASBFEO stated:

... if they're [small businesses] called to respond to general protection claim or unfair dismissal claim often the information's not complete, so they're really not sure what it is. In the area of adverse action ... that can be really quite complicated in knowing just what the nature of the concern or allegation is and then how to respond in an appropriate way. In terms of the role agencies can play, I think close collaboration between the Fair Work Ombudsman and the Fair Work Commission would be—the more we can do to encourage that, to explain decisions, to communicate effectively what it actually means, that would be terrific.⁹⁹

Caseload management

2.81 Despite the increased caseload in 2019-20, the Commission was able to resolve issues in a timely manner. The Commission approved enterprise agreements without undertakings within a median of 17 days and conciliated unfair dismissal cases in a median of 34 days.¹⁰⁰ The Committee acknowledges that in the latest annual report (2020-21), enterprise agreements without undertakings were approved in a median of 14 days and unfair dismissal cases were conciliated in a median of 21 days.¹⁰¹

2.82 Throughout the COVID-19 pandemic, the Commission said it provided efficient dispute resolution and acted quickly to vary modern awards, either through application or on its own merit.¹⁰²

⁹⁸ The Hon Bruce Billson, ASBFEO, *Committee Hansard*, Canberra, 19 November 2021, page 17; Ms Alexi Boyd, COSBOA, *Committee Hansard*, Canberra, 19 November 2021, page 17.

⁹⁹ The Hon Bruce Billson, ASBFEO, *Committee Hansard*, Canberra, 19 November 2021, page 17.

¹⁰⁰ Fair Work Commission, *Fair Work Commission Annual Report 2019-20: Access to Justice*, September 2020, page 16.

¹⁰¹ Mr Murray Furlong, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 22.

¹⁰² Mr Murray Furlong, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 21.

- 2.83 While the Commission experienced significant caseload increases early in the pandemic, it was able to manage the increased workload through the adoption of new technology, redistributing the Commission's resources, and gaining increased resources from other Australian Government agencies.¹⁰³
- 2.84 There was broad support for the Commission's ability to respond quickly to the increased workload and COVID-19.¹⁰⁴ For example, ACCI stated that the Commission 'showed remarkable elasticity in being able to deal with JobKeeper disputes last year and unfair dismissals when we had huge levels of turnover in the face of a very short recession'.¹⁰⁵
- 2.85 The Committee was interested in whether the Commission anticipated longer timelines for dispute resolution and the potential for increased workload as a result of vaccine mandates. The Commission responded:
- As we've gotten close to returning to pre-pandemic trend workload, we believe that we've got the systems in place to manage it. Just to reiterate, if there is a spike in workload we will move resources around the organisation to deal with it.¹⁰⁶
- 2.86 The Commission reported that it was not seeing any unusual spikes across any type of case when it appeared before the Committee on 19 November 2021.¹⁰⁷

Resources

- 2.87 In response to the increased workload associated with the COVID-19 pandemic, the Commission reallocated resources, piloted new methods to

¹⁰³ Mr Murray Furlong, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, pages 22, 24.

¹⁰⁴ Ms Tamsin Lawrence, ACCI, *Committee Hansard*, Canberra, 19 November 2021, page 5; Ms Alexi Boyd, COSBOA, *Committee Hansard*, Canberra, 19 November 2021, page 15; AHA, *Submission 2*, page 3; ASU, *Submission 4*, page 5.

¹⁰⁵ Mr Scott Barklamb, Director, Workplace Relations, ACCI, *Committee Hansard*, Canberra, 19 November 2021, page 3.

¹⁰⁶ Mr Murray Furlong, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 24.

¹⁰⁷ Mr Murray Furlong, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 22.

deal with matters more efficiently, and gained short-term assistance from staff of other Commonwealth agencies.¹⁰⁸

- 2.88 The Committee was interested in how the Commission was able to handle the increased caseload during this period without experiencing excessive response times. The Commission responded:

There are a couple of factors. One is that in the 2019-20 year we really did ramp up our resources. For instance, we had five conciliators join us from the Federal Court to assist us for three months or so, because, as you can imagine, we had almost a 70 per cent spike in the March, April, May period in 2019-20. We suddenly found ourselves with a vastly higher body of work, so we recruited some additional staff but also got some other people on secondment to help us out. That certainly tapered off after that initial spike, and five conciliators went back to the Federal Court. We continued to have a high level of staffing.¹⁰⁹

- 2.89 The Commission received additional one-off funding of approximately \$5.1 million over two years, including \$3.2 million in 2020-21 and \$1.9 million in 2021-22. The funding has been used to deal with the increased workload, and to develop digital tools and resources.¹¹⁰
- 2.90 One of the primary changes that enabled the Commission to respond with relative speed during the COVID-19 pandemic was implementation of digital resources, including online hearings.¹¹¹ While online hearings enabled the Commission's work to continue during the pandemic, ASU noted that it is much more difficult to build rapport, and resolve issues and disputes with employers through electronically mediated proceedings.¹¹²

¹⁰⁸ Fair Work Commission, *Fair Work Commission Annual Report 2019-20: Access to Justice*, September 2020, page 6.

¹⁰⁹ Ms Ailsa Carruthers, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 25.

¹¹⁰ Mr Murray Furlong, Fair Work Commission, *Committee Hansard*, Canberra, 19 November 2021, page 22.

¹¹¹ Fair Work Commission, *Fair Work Commission Annual Report 2019-20: Access to Justice*, September 2020, page 21.

¹¹² ASU, *Submission 4*, page 6.

Other issues

Compliance with public health orders

- 2.91 Throughout the course of the pandemic, adherence to public health orders and responsibility for enforcement, for example in relation to mask-wearing and vaccine mandates, has been a contentious issue. Employers and employees were required to enforce public health orders while navigating complex work environments and, in some instances, at risk of customer abuse and violence.
- 2.92 As previously noted, a lack of clear, concise and timely communication from governments about public health orders contributed to this complex environment. ASBFEO stated that small business owners had been placed in a difficult situation because they were required to enforce public health orders without fully understanding what was required of them.¹¹³
- 2.93 NRA reported significant spikes and increasing trends of customer abuse and violence during the pandemic, and stated:
- The strong message from our membership informing those consultations was that, where possible, retailers didn't want to have the burden of checking vaccine status placed upon them, primarily because they didn't want to put their staff at risk of customer violence and abuse.¹¹⁴
- 2.94 When asked whether employees would be responsible for not upholding public health orders, NRA said this was unlikely.¹¹⁵ NRA advised it had not received any inquiries about reprimanding or disciplining an employee for allowing unvaccinated customers into a store at the time of the 19 November 2021 hearing.¹¹⁶

Enterprise bargaining

- 2.95 The Committee heard evidence that COVID-19 had a significant impact on enterprise bargaining. ASU stated that in their experience employers across all sectors of the economy delayed the commencement of bargaining or put

¹¹³ The Hon Bruce Billson, ASBFEO, *Committee Hansard*, Canberra, 19 November 2021, page 18.

¹¹⁴ Ms Lindsay Carroll, NRA, *Committee Hansard*, Canberra, 19 November 2021, page 10.

¹¹⁵ Ms Lindsay Carroll, NRA, *Committee Hansard*, Canberra, 19 November 2021, page 11.

¹¹⁶ Ms Lindsay Carroll, NRA, *Committee Hansard*, Canberra, 19 November 2021, page 11.

existing bargaining negotiations on hold between March 2020 and March 2021.¹¹⁷

- 2.96 HSU stated that despite the increased expectations placed on their staff within the health sector, COVID-19 was being used as an excuse to resist or delay bargaining.¹¹⁸
- 2.97 The Australian Nursing and Midwifery Federation (ANMF) reported that fewer enterprise bargaining applications had been made to the Commission during the COVID-19 pandemic, compared to previous years. ANMF said that bargaining had been delayed in the aged care sector due to the 'disastrous effects' of COVID-19, and in anticipation of the Australian Government's response to the Royal Commission into Aged Care Quality and Safety.¹¹⁹

Working from home

- 2.98 As a result of public health orders, many employees were required to work from home where they were able to do so. The Committee heard evidence that employers had to navigate complex work health and safety issues where employees' homes were not safe or suitable environments for work, including because of threats of domestic violence.¹²⁰
- 2.99 The Committee heard mixed evidence on whether working from home requirements would contribute to the Commission's future caseload. ASBFEO and COSBOA indicated that the new working environment brought added complexities and considerations for employers.¹²¹ However, Ai Group indicated that working from home arrangements have worked extremely well, and therefore they were not expecting any areas of increased work for the Commission.¹²²

¹¹⁷ ASU, *Submission 4*, page 6.

¹¹⁸ HSU, *Submission 5*, pages 5-6.

¹¹⁹ ANMF, *Submission 3*, page 5.

¹²⁰ Ms Alexi Boyd, COSBOA, *Committee Hansard*, Canberra, 19 November 2021, page 15.

¹²¹ The Hon Bruce Billson, ASBFEO, *Committee Hansard*, Canberra, 19 November 2021, page 18; Ms Alexi Boyd, COSBOA, *Committee Hansard*, Canberra, 19 November 2021, page 15.

¹²² Mr Stephen Smith, Ai Group, *Committee Hansard*, Canberra, 19 November 2021, page 8.

Vexatious claims

2.100 The Committee heard there have been instances where vexatious claims have been bought before the Commission.¹²³ NRA stated that in some instances, individuals have sought claims knowing it would be timely and costly for an employer.¹²⁴ COSBOA echoed these concerns, stating that the bar for unfair dismissal lodgement is relatively low, but the cost and risk to some businesses is high.¹²⁵

2.101 The Committee was interested in whether there was a way the Commission could triage cases to address some of these concerns. NRA suggested that a triaging mechanism could be implemented to allow some cases to be resolved without incurring the time and money of parties involved.¹²⁶ However, it was also acknowledged that introducing such a mechanism into the Commission would be complex and challenging. When questioned on this matter COSBOA stated:

... there is a notable portion [of cases] that are considered clearly without merit or hope of success. It would be considered ideal if the Fair Work Commission could exercise its right to dismiss claims that are clearly without merit before the business is forced to go into the time, expense, trouble and stress of responding to these claims.¹²⁷

Conclusion

2.102 The arrival of the COVID-19 pandemic in Australia in 2020 created considerable uncertainty and anxiety for individuals and businesses. Australian governments needed to balance the dual imperatives of keeping Australians safe while preserving jobs and incomes. Policies had to be implemented quickly and adjusted as circumstances changed.

2.103 While there was a significant increase in the Commission's caseload early in the COVID-19 pandemic, particularly in relation to unfair dismissal applications and workplace disputes, this was temporary.

¹²³ Ms Lindsay Carroll, NRA, *Committee Hansard*, Canberra, 19 November 2021, page 11; Ms Alexi Boyd, COSBOA, *Committee Hansard*, Canberra, 19 November 2021, page 15.

¹²⁴ Ms Lindsay Carroll, NRA, *Committee Hansard*, Canberra, 19 November 2021, page 11.

¹²⁵ Ms Alexi Boyd, COSBOA, *Committee Hansard*, Canberra, 19 November 2021, page 15.

¹²⁶ Ms Lindsay Carroll, NRA, *Committee Hansard*, Canberra, 19 November 2021, pages 11-12.

¹²⁷ Ms Alexi Boyd, COSBOA, *Committee Hansard*, Canberra, 19 November 2021, page 15.

- 2.104 The responses of Australian, state and territory governments to COVID-19 were largely successful in encouraging businesses to continue trading and retain staff. In particular, the JobKeeper program and the temporary variation of industry awards provided much-needed flexibility in workplaces, and prevented a larger and more prolonged surge in applications to the Commission.
- 2.105 However, regular changes to public health orders, which were often implemented at short notice, and inconsistencies between the approach taken by individual states and territories made it difficult for employers and employees to understand what their rights and responsibilities were. Australian governments should strive to provide clear, consistent, and timely advice to employers and employees about policies that may give rise to workplace disputes.
- 2.106 The Committee recognises that working from home arrangements allowed many employers and employees to maintain working relationships and provided flexibility to adhere to public health orders. However, it also introduced new workplace complexities which needed to be considered, especially in environments where the threat of domestic violence was present.
- 2.107 The introduction of vaccine mandates in late 2021 helped to protect vulnerable Australians in high-risk settings, encouraged higher vaccination rates, and provided greater certainty to businesses about their rights and obligations to their employees and customers. However, vaccine mandates did mean that many Australians who did not wish to have a COVID-19 vaccine lost their jobs.
- 2.108 The Committee recognises that the issue of vaccine mandates is polarising, and that it is likely that the Commission will need to deal with further unfair dismissal applications and workplace disputes relating to vaccine mandates going forward.
- 2.109 Despite the substantial increase in its caseload in 2020, the Commission provided guidance to employers and employees, and was able to resolve issues in a timely manner. The Committee notes that the Australian Government provided the Commission with additional funding to support its increased workload, and to develop digital tools and resources.

- 2.110 The Committee is satisfied that the Commission is well placed to respond to business-as-usual matters, and to mobilise strategies and resources in the event there is another peak in its caseload.
- 2.111 The Committee supports the provision of one hour of free legal assistance to eligible employees and employers on a range of topics by the Commission, however it is important to recognise that one hour may not be enough time to help Australians navigate complex workplace issues.
- 2.112 The Committee acknowledges that the Commission is limited in its ability to provide guidance and advice in relation to the operation of the Fair Work Act. Rather, the Commission has a rulemaking, mediation/conciliation and decision-making role. The Fair Work Ombudsman has the central role in providing education and advice on matters related to the operations of the Fair Work Act, such as workplace rights and obligations.¹²⁸
- 2.113 The Committee encourages the Australian Government to consider a mechanism that would allow the Commission to dismiss vexatious claims. This would be a way of reducing the time and cost to businesses when responding to claims that are clearly without merit. However, appropriate safeguards would need to be in place to protect workers' rights.
- 2.114 Since the hearings were held in late 2021, Australia has experienced a surge in Omicron variant cases, which has placed significant strain on public health systems. Australian, state and territory governments continue to monitor Omicron, and update public health orders in response to new information and scientific evidence.
- 2.115 To combat the Omicron variant, Australians are encouraged to be vaccinated and to receive their booster dose of the vaccine to ensure they have lasting and increased protection against infection, severe disease, and dying from COVID-19.¹²⁹

¹²⁸ Fair Work Ombudsman, 'Fair Work Commission – how we're different', www.fairwork.gov.au/about-us/our-role-and-purpose/fair-work-commission-how-were-different, viewed 10 January 2022.

¹²⁹ Department of Health, 'COVID-19 booster vaccine advice', www.health.gov.au/initiatives-and-programs/covid-19-vaccines/getting-your-vaccination/booster-doses, viewed 4 February 2022.

Mr Andrew Laming MP

Chair

16 March 2022

A. Submissions

- 1 Australian Small Business and Family Enterprise Ombudsman
- 2 Australian Hotels Association
- 3 Australian Nursing and Midwifery Federation
- 4 Australian Services Union
- 5 Health Services Union
- 6 Australian Industry Group
- 7 Australian Manufacturing Workers' Union
- 8 Confidential
- 9 National Retail Association

B. Hearings and witnesses

Friday, 19 November 2021

Canberra (via teleconference/videoconference)

Australian Chamber of Commerce and Industry

Australian Hotels Association

Australian Industry Group

Australian Small Business and Family Enterprise Ombudsman

Council of Small Business Organisations Australia

Fair Work Commission

National Retail Association

Nurses Professional Association of Queensland

Teachers Professional Association of Queensland

Wednesday, 8 December 2021

Canberra (via teleconference/videoconference)

Australian Technical Advisory Group on Immunisation