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Dr John White
Standing Committee on Employment, Education, & Training
Department of the House of Representatives
Parliament House
Canberra ACT 2600
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Dear Dr White,

Inquiry into FWC COVID-19 pandemic caseload

Thank you for your email dated 26 October 2021 inviting the AHA to contribute to the Standing Committees inquiry into “How policy responses designed to manage the COVID-19 pandemic may impact the Fair Work Commission’s (FWC) caseload, including vaccine mandates, shutdowns, lockdowns, self-isolation and quarantine, and inconsistencies between the public health orders of the states and territories”. We are able to appear at the public hearing and consent to our submission being made public.

Executive Summary

The AHA has a federated structure, with branches in each state and territory, plus a Canberra based National office. This structure enabled the AHA to advise its members quickly regarding pandemic regulatory landscape, with constant change being implemented by the federal government and state/territory governments.

The workplace relations issues regarding the COVID-19 pandemic have been the most complex set of circumstances any of the AHA workplace relations team can recall dealing with. This was principally a result of:

- The changing nature of pandemic proximity, strains, cases and timelines
- The complex overlay and competing objective of federal and state/territory rules, e.g. Fair Work Act, Safe Work Acts, Workers Compensation Acts
- Where clear public health orders in regard to vaccines did not exist, complex and important vaccine decisions being deemed a matter for individual businesses rather than completely clear and simple advice from government and regulators
- For businesses operating nationally, the lack of consistency and conflicting logic between public health orders

There is no doubt that these issues caused uncertainty and angst amongst employers and employees alike and may have led to cases before the FWC.

FWC caseload

Set out in the table below is the number of Fair Work Commission matters that each AHA branch has either acted in or assisted members with over the last three calendar years (N.B. 2021 data is for ten months only and is current as at 31 October 2021). Noticeable trends apparent in this data include:

- Unfair dismissal and General Protections (involving termination) matters have fallen from 2019. A potential explanation for this is that claims involving termination of employment, and for the large parts of 2020 and 2021 (at least in the case of NSW and Vic) it's a safe assumption less terminations would have occurred with workforces stood down.
- Job Keeper Disputes, being a newly created and short-lived jurisdiction obviously spiked in 2020, when Job Keeper was introduced resulting in a temporary increased workload.
- Other matters (which generally don't involve termination of employment) have remained constant across 2020-21.

Table - Australian Hotels Association - Fair Work Commission Matters 2019 -2021¹

Calendar Year	Unfair Dismissal	General Protections	Stand Down Dispute	Job Keeper Dispute	Other FWC Matter
Victoria					
2019	12	4	0	0	0
2020	4	3	0	12	1
2021	6	2	0	0	0
WA					
2019	5	1	0	0	0
2020	6	2	0	0	0
2021	3	0	0	0	0
QLD + NT + ACT					
2019	7	2	0	0	0
2020	11	1	1	2	3
2021	9	2	0	0	2
SA					
2019	13	3	0	0	0
2020	12	2	0	0	0
2021	4	0	0	0	0
NSW					
2019	20	9	0	0	6
2020	17	1	1	0	3
2021	6	4	0	0	5
TAS					

1. . Please note, 2021 data is for ten months only and is current at 31 October 2021

2. QHA provides IR advisory services to AHA ACT and Hospitality NT.

3. NSW provides advocacy through its incorporated legal practice, Hospitality Legal. These figures may reflect interstate clients.

4. "Other matters" include Disputes, General Protections Contraventions not involving dismissal, anti-bullying applications and Enterprise Agreement Terminations.

5. Figures only include matters before the FWC that relevant AHA branch has either advised on or advocated for member on. Does not include matters in other jurisdictions (e.g. Federal Court, State Courts, State Industrial tribunals or Human Rights bodies).

2019	10	1	0	0	0
2020	12	1	0	1	0
2021	12	1	0	0	0
TOTAL					
2019	67	20	0	0	0
2020	62	10	2	15	7
2021	40	9	0	0	7

AHA actions and initiatives to minimize FWC caseload

The AHA believes that the JobKeeper safety net was a key reason that disputes relating to stand down orders were minimised. The AHA believes that actions and initiatives it undertook in two key areas as set out below were critical in minimising the caseload for the FWC.

JobKeeper structure and implementation

Very early in the COVID-19 pandemic, the AHA proposed to the Federal Government that financial assistance payments to workers be paid via employers, instead of requiring workers to make applications to Centrelink. The AHA advised this had the key benefits of (1) maintaining the employer/employee relationship, and (2) workers not having to attend Centrelink and bog down that workforce.

The AHA is pleased that these principles came to underpin the rationale of JobKeeper. A key benefit of JobKeeper was that it maintained job security in some form and minimised any loss of dignity from workers being stood down.

As such, the AHA believes its suggestion to maintain connection between employer and employees likely minimised the caseload of the FWC.

JobKeeper (Fair Work Act) flexibilities

On 24 March 2020, with the consent of the United Workers Union (UWU), the AHA successfully applied to the Fair Work Commission for a range of temporary "JobKeeper Flexibilities" to be included on a temporary basis in the Hospitality Award. The FWC deserves much credit for having decided the application within three days.

The application was intended to keep as many workers as possible engaged with their employer, as stand downs were being forced by trading restrictions and lockdowns put in place by state and territory governments. The application proposed changes to the Award so as to provide employers and workers more flexibility in regards to:

- Classification and duties
- Hours of work
- Annual leave
- Place of work

The Federal Government later amended the Fair Work Act so that many more awards and workers (not just hospitality) could be eligible for the type of protections and flexibilities achieved by the AHA and UWU. Those temporary flexibilities in the Fair Work Act expired on 28 March 2021; with the Government not agreeing with calls from business that they be further extended. The Australian Chamber of Commerce and Industry advises that an independent review of the *Fair Work Act*

flexibilities showed the flexibilities had a direct impact on slowing the loss of jobs and decline in wages during the initial COVID-19 economic shock.

The AHA view is that these flexibilities also minimised the need for stand downs and redundancies that would have likely to increases in the FWC caseload.

Vaccine mandates

The AHA notes that the Accommodation and Food Service (AFS) sector in which it operates has about 95,000 businesses employing 900,000 people. Of these businesses, 86,000 employ 0-19 people – thus are classified as small businesses, many of which are family owned and operated. The AFS sector was one of the key targets of public health orders and the consequent trading restrictions and lockdowns.

The Australian Government’s position on COVID-19 vaccination was that vaccines should be voluntary. Employers were directed to advice from the Fair Work Ombudsman (FWO) and Safe Work Australia (SWA). Businesses were advised that vaccination in the workplace was a matter for individual businesses and decisions needed to be made carefully on a case-by-case basis. Businesses were encouraged to seek legal advice in making decisions.

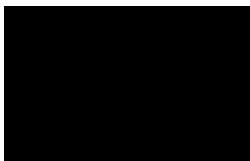
Unfortunately, the nature of much of the regulatory advice is uncertain. The burden on employers to weigh up their obligations, conduct risk assessments and then make decisions in considering vaccinations in the workplace is unprecedented. When assessing the need for mandatory vaccination, businesses needed to consider the range of factors on a “sliding scale”. For example, the threshold question of whether the virus was circulating in the community can vary from day to day. What can be a valid risk assessment on one day, can be invalid the next day. Even the categorisation of which FWO “tier” a business sits in is uncertain and can vary from time to time.

A survey conducted in August 2021 by AHA NSW found 63.5% of staff believed it should be a requirement for all workers to be vaccinated; but this desire of the workforce majority needed to be weighed up (or ignored) against the rights of the vaccine hesitant or complacent. Employers 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.

There is no doubt there was a great deal of uncertainty and angst amongst employers. One great fear was having disputes with workers unwilling to be vaccinated. 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.

Conclusion

Thank you for the opportunity to have made this submission.



STEPHEN FERGUSON
AHA NATIONAL CEO