

# COVID-19 and Australian Labour Regulation: An Overview Impacts, Policy Responses and Future Directions

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## Introduction

Commencing in March 2020, the Australian Commonwealth, State and Territory governments took measures to reduce the transmission of COVID-19, including via the imposition of ‘lockdowns,’ social distancing requirements and restrictions on local and international travel.<sup>1</sup> These restrictions were quite successful in minimising the transmission of COVID-19 in Australia in 2020 and 2021 (Australia. Department of Health 2021a). Restrictions were reduced once most eligible Australian adults became vaccinated against the virus.<sup>2</sup> In December 2021, the Commonwealth government changed its national strategy from ‘suppression with a goal of no community transmission’ to ‘living with COVID-19 where the community is able to function more normally and disruptions to society and the community are minimised’ (Australia. Department of Health 2021b). Government directions shifted to mandating that those who had contracted the virus, or were close contacts of known cases, complied with testing and isolation requirements (Morrison 2021a; Morrison 2021b; Kurmelovs 2021). Since January 2022, the prevalence of the Omicron variant of COVID-19 has led to wider-spread transmission of the virus (Jose 2021).

These events had a profound impact on the labour market in Australia, as elsewhere. The onset of the pandemic in March 2020 led the unemployment rate to increase from 5.3% (in March 2020) to 7.4% (in June and July 2020) (ABS 2021a). There was substantial growth in employment, the number of hours worked, and total wages between June 2020 and May 2021 due to low community transmission of the virus and reduced restrictions (Ibid.). However, between June and October 2021, subsequent COVID-19 outbreaks in the States of Victoria and New South Wales led to further significant losses in jobs and the number of hours worked in these regions (Nguyen 2021; Willingham et al. 2021; ABS 2021a: table 19). By December 2021, under the revised national strategy, the unemployment rate fell to 4.2% (ABS 2021b). Despite this recovery, the impact of the pandemic on the labour market is ongoing. There has been a lack of significant wage growth in 2020 and 2021 (Borland 2021). Recovery has been uneven, with fewer hours worked by casual employees in November 2021 than in February 2020 in industries hardest hit by the virus (ABS 2021c: chart 3b, 3c). Since January 2022, government

1. Australia is a federation of six States which, along with two self-governing Territories, have their own constitutions, parliaments and laws. The national government of Australia is usually called the Commonwealth Government or Australian Government. The Constitution gives the law-making power of the Commonwealth to the Parliament. The Parliament consists of the Queen, Governor-General and two Houses of Parliament (House of Representatives and the Senate). The Parliament passes legislation. Proposed laws are called Bills and have to be agreed by both Houses of Parliament to become law. Members of Parliament are democratically elected representatives (Ministers). Constitutions in each State and Territory also give the law-making power of the State/ Territory to the State/ Territory Parliament. Accordingly, throughout this article reference is made to the Commonwealth Government, State/ Territory Governments, Commonwealth Parliament and State/ Territory Parliaments. See further, Part II.

2. In February 2022, 93.5% of eligible Australian adults aged 16 years and over had been fully vaccinated against COVID-19: Australia. Department of Health 2022.

isolation requirements have also diminished worker availability and impacted supply chains (Butler 2022).

This article provides an overview of three key aspects of the impact of COVID-19 on Australian labour regulation. It examines groups of workers impacted by the pandemic in Australia, labour policy responses by the Australian Commonwealth, State and Territory governments and future directions in labour policies. Space does not permit a detailed analysis of these impacts. However, there is a growing body of Australian labour law literature that examines these matters in depth. Key contributions are highlighted in this article.<sup>3</sup>

Part I of this article discusses the impact of the pandemic on certain groups of workers, namely: casual and other insecure workers; essential workers; and workers with family and caring responsibilities who worked from home ('WFH'). Part II provides an overview of the policy responses to the pandemic by the Australian governments. Part III canvasses future directions of labour policies. It discusses the passage of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (Cth) ('*Omnibus Bill*') into law in March 2021.<sup>4</sup> It is argued that the Coalition Government's reform agenda, as evinced in the *Omnibus Bill*, overlooked significant labour market challenges that have been amplified by the pandemic, including the prevalence and invidious consequences of insecure work.

## Part I. The impact of COVID-19 on labour markets

This Part briefly discusses how three key groups of workers were impacted by the pandemic. In each instance, COVID-19 exacerbated existing deficiencies in Australian labour regulation that specifically affected these groups.

### *Casual and other insecure workers*

Casual work has been a persistent feature of the Australian labour market (see further, Landau and Orifici 2021), with approximately 19% of all Australian employees engaged casually in November 2020 (ABS 2020a). At law, casual workers do not have an expectation of ongoing work nor do they receive entitlements such as paid annual or personal leave, notice of termination or redundancy pay (Stewart 2021: ch 4). Other forms of insecure work, such as within the 'gig economy,' are also growing in prevalence in Australia (see further, Victoria. Department of Premier and Cabinet 2020). The pandemic impacted casual and other insecure workers in a number of ways. For example, with no legal right to ongoing work, casual workers were the hardest hit by the job losses in 2020 and 2021 (ABS 2020a; Stanford 2021: 2). In addition, without paid personal leave entitlements, casual workers had to make invidious choices regarding attending work while ill (Robertson 2020).<sup>5</sup> Thirdly, with lower weekly earnings than permanent employees (Stanford 2021: 3), many casual and other insecure workers were required to work multiple jobs during the pandemic, heightening their risk of exposure to and transmission of the virus (Wright 2021; Robertson 2020). As examined in detail by Dr Jim Stanford, despite these impacts, casual work has dominated the labour market recovery during the pandemic (2021: 1–3). Legislative changes during the pandemic that are aimed at clarifying the legal entitlements of casual employees, are likely to further encourage employers' engagement of workers on a casual basis into the future (Stewart et al. 2021b).

### *Essential workers*

Essential workers (such as frontline health care and social assistance workers, teachers and early childhood education and care workers) were also significantly impacted by the crisis. These workers assumed additional

3. See, in particular, the special issue on significant developments in Australian labour regulation in response to COVID-19: Forsyth and Stewart 2021a.

4. *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth).

5. Notably, the Commonwealth and Victorian governments introduced temporary measures during the pandemic that went some way to addressing this issue, see further: Gilfillan 2020; O'Neil 2021: 422, 426.

workloads and faced heightened personal risk of contracting COVID-19 (Wood et al. 2021: 10). Early research suggests that these working conditions impacted the health, safety and mental wellbeing of essential workers (APS 2020; see also, Stubbs et al. 2021; AMWU 2021: 6). The reduced restrictions since December 2021 and the spread of the Omicron variant also increased health and safety risks to workers in essential sectors (Forsyth 2022; see also, Workplace Express 2022). The pandemic continues to raise difficult questions about employers' obligations to workers under work health and safety legislation, and workers' rights to refuse to attend work under these conditions (Forsyth 2022; see also, Workplace Express 2022).

### ***Workers with family and caring responsibilities***

Workers in office-based occupations (including professionals, most managers, and clerical staff) were required to WFH during the pandemic and suffered fewer job losses (Nahum and Stanford 2020: 2) but were nevertheless impacted by the pandemic. Many workers were required to balance WFH with family and caring responsibilities including home schooling.<sup>6</sup> Family and caring responsibilities increased for many workers due to the pandemic (Nahum 2021: 6), and many more workers requested flexibility from their employers to enable them to address these increased responsibilities (Nahum 2021: 6; VEOHRC 2021: 4). Some employers continued to direct employees to WFH in 2022 due to the prevalence of the Omicron variant (see eg, Sier et al. 2022) and emerging research suggests that many employees will ask to WFH at least some of the time into the future (Nahum 2021: 6; see also, Wade and Rugari 2020). These working conditions raise challenges for labour regulation including in relation to: the rights of employees to 'disconnect' while WFH (Nahum 2021: 6; Golding 2021); remote monitoring and surveillance (Nahum 2021: 6); the scope of employers' obligations for workers' safety and wellbeing when they routinely WFH (Bluff and Johnstone 2021: 123–124); and whether legal regulation affords workers the capacity to request the flexibility they need to balance work and non-work commitments in a WFH environment (see further, Allen and Orifici 2021: 83–89; Allen and Orifici 2022).

## **Part II. Policy responses by the governments**

### ***Commonwealth government's response***

In the early months of the pandemic, the Commonwealth government took a cooperative approach to implementing measures to respond to the crisis including by informally consulting with employer groups and unions (Forsyth and Stewart 2021b: 1). With the support of these parties, the Fair Work Commission ('FWC')<sup>7</sup> varied Modern Awards to include a right to unpaid pandemic leave.<sup>8</sup>

To preserve employment during the pandemic, the Commonwealth government introduced the JobKeeper income support scheme in late March 2020. This scheme has been described as 'an urgent solution to an urgent problem' (Neil SC et al. 2021: 24). Under JobKeeper, employers that could demonstrate a requisite decline in turnover<sup>9</sup> were eligible to receive a wage subsidy that assisted to preserve eligible jobs and businesses (Ibid.). The scheme operated for 12 months. Temporary legislative amendments to the *Fair Work Act 2009* (Cth) ('**FW Act**') were also introduced, which enabled employers to stand down workers, pay them only the JobKeeper

6. This situation was heightened in locations where 'lockdowns' resulted in schools, kindergartens and childcare centres being closed for extended periods. For a detailed discussion see Allen and Orifici 2021.

7. The FWC is Australia's principal industrial tribunal. It is established under s 575 of the FW Act.

8. *Variation of awards on the initiative of the Commission* [2020] FWCFCB 1837 (8 April 2020). Modern Awards are legal instruments under the FW Act that outline minimum pay rates and conditions of employment for an industry or occupation. There are currently 121 industry or occupation awards that cover most people who work in Australia. See: <https://www.fwc.gov.au/awards-and-agreements/awards/modern-awards/modern-awards-list>. This is just one dimension of the role played by the FWC in initiating responses to the crisis, see further, Murray et al. 2021.

9. *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth); *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) Part 2; Neil SC et al. 2021: 24, 27–28.

amount, and preserve their employment.<sup>10</sup> The FWC and courts were empowered to deal with disputes between employers, employees and unions about JobKeeper.<sup>11</sup> The Commonwealth government also introduced a coronavirus supplement for unemployed workers known as the JobSeeker payment, which also operated for 12 months.<sup>12</sup> To address the further lockdowns after June 2021, the Commonwealth government announced a COVID-19 Disaster Payment for workers who had lost work or income because of a COVID-19 lockdown,<sup>13</sup> and a Pandemic Leave Disaster Payment for workers who had been directed by their employers to isolate due to having COVID-19 or being a close contact of a confirmed case. These payments ceased in November 2021.

In 2020, the Commonwealth government also relied on the cooperative approach from employers and unions in the early stages of the pandemic to initiate discussions for a revised agenda of labour law reform (Stewart et al. 2021b: 132–138). These discussions culminated in the *Omnibus Bill*. As discussed further in Part III, the *Omnibus Bill* largely reflected the government's pre-pandemic labour policy agenda.

### *State and territory governments' responses*

Key State and Territory government policy responses to outbreaks of COVID-19 supplemented the policy response of the Commonwealth government (see further, Forsyth and Stewart 2021b: 5–6). Firstly, in response to outbreaks of COVID-19 in 2020–2021, State and Territory governments introduced WFH directives for relevant workers (see eg, Victoria. Department of Health and Human Services 2020; ABC News 2020). Secondly, in 2021, some State governments introduced 'hardship payments' for workers, such as casual employees and independent contractors, who did not have entitlements to paid personal leave (see, eg, Victoria. Department of Families, Fairness and Housing 2021). These payments provided support to persons who were not eligible for the Pandemic Leave Disaster Payments introduced by the Commonwealth government, discussed above. Thirdly, throughout 2021, State and Territory governments made public health orders that required certain workers to be vaccinated, unless a prescribed exemption applied to their circumstances.<sup>14</sup>

## **Part III. Future directions of labour policies in the post-COVID-19 era**

### *The Omnibus Bill*

The Coalition Government tabled the *Omnibus Bill* in Parliament in late 2020. This followed a consultative approach with employer and union groups (see further, Stewart et al. 2021b: 134–138; see also, Forsyth 2020). Despite the consultative process, the *Omnibus Bill* ultimately proposed reforms to the FW Act, which reflected matters previously raised by the Coalition Government and employer groups (see eg, Stewart et al. 2021).

The *Omnibus Bill* proposed significant amendments to the *FW Act* including with respect to enterprise agreement making (see further, Stewart et al. 2021b: 159–163), the legal definition of 'casual employment' (see further, Stewart et al. 2021b: 140–155), and forms of flexibility available to employers (see further, Stewart et al. 2021b: 155–159). Groups such as labour law scholars (Stewart et al. 2021a), and the union movement (see eg, Cruse 2021), expressed concern that some of the proposed amendments could negatively impact wage growth and job security.<sup>15</sup> Due to negotiations with minor parties and a strict deadline for the passage of the *Omnibus Bill* through Parliament, however, most of its central provisions were abandoned. The provisions that were

10. *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) Sch 13. On stand-downs see further, Forsyth and Stewart 2021c.

11. *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Cth) Part 6–4C (repealed 29 March 2021).

12. For a detailed discussion, see O'Donnell and Arup 2021.

13. *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 2) Regulations 2021* (Cth).

14. Eg, to date, in the State of Victoria, the government has issued *COVID-19 Mandatory Vaccination (Workers) Directions (Nos 1–8)* pursuant to the *Public Health and Wellbeing Act 2008* (Vic), s 200. For an overview of public health orders in each State and Territory see FWO 2022.

15. There was, however, support for some aspects of the *Omnibus Bill* from these groups, including proposals to improve enforcement of prohibitions against 'wage theft.' See Stewart et al. 2021a.

passed dealt only with the legal characterisation of casual employment.<sup>16</sup>

Labour law scholars conducted detailed examinations of the proposals in the *Omnibus Bill* and discussed their implications (eg, Stewart et al. 2021a). As Stewart et al. and others have observed, had the *Omnibus Bill* been passed in its original form, many legal rights of employees would have been substantially weakened (see further, Stewart et al. 2021b: 140–155; see also, Stewart and Forsyth 2021b: 8). The amendments that were passed also reinforced employers' reliance on casual labour (Stewart et al. 2021; see also, Stanford 2021: 2). In addition, the *Omnibus Bill* did not propose measures that would address fundamental problems facing the Australian labour market such as insecure work or wage stagnation (Stewart and Forsyth, 2021b: 9). Overall, this policy approach entrenched rather than addressed key labour issues amplified by conditions during the pandemic.

It is widely recognised that pre-existing inequalities, including those arising from insecure work and employers' reliance on casual employment, were compounded during the pandemic. COVID-19 worsened inequality in workforce participation and wages for vulnerable groups of workers. For example, women and young people are more likely to be employed casually, and so were disproportionately impacted by the loss of casual jobs in the crisis (Wilkins 2020: 2). In the State of Victoria, which was most affected by prolonged lockdowns, the crisis has left a wider gender gap in workforce participation than before the pandemic (Victoria. Department of Premier and Cabinet 2021: 19 [60]). As Foley and Cooper (2021) have argued, the significant reliance on essential workers in the crisis provides an opportunity to reevaluate how the value of highly feminised industries and occupations (such as nursing, aged care work and teaching) are assessed (citing, Milte and Ratcliffe 2021). The *Omnibus Bill* did not seek to address these issues. The development of labour policy that is effective in addressing the impacts of COVID-19 on the labour market requires consideration of positive and proactive steps towards addressing inequality at work in future.

Furthermore, alongside the crisis of COVID-19, other developments led to labour law reform in 2021. For example, in 2020, a ground-breaking report into sexual harassment at work was published following an extensive inquiry by the Australian Human Rights Commission (AHRC 2020). This report was followed by a several controversies and significant public speculation, which led to the Coalition Government publishing a response to the report in 2021, which accepted some of its recommendations (Australia. Attorney-General's Department 2021). Modest reforms, including to the FW Act, were passed in 2021, which were intended to address the prevalence of sexual harassment at work.<sup>17</sup> Yet labour and equality law scholars widely argue that more needs to be done, including enshrining a positive duty on employers to eliminate sexual harassment at work in law (see eg, Gaze 2021). There has been a lack of cohesion with respect to these reforms and the broader labour law reform agenda of the Coalition Government.

### **Future directions**

Looking to the future, labour policies may be a battleground in the Commonwealth elections, which are to take place later in 2022. The incumbent Coalition Government and the opposition (the Australian Labor Party or ALP) are yet to announce their election policies. However, in 2021, the ALP announced a policy committed to legal reforms intended to improve protections and conditions for casual and other insecure workers and those in the 'gig economy' (ALP 2021). This policy countered the reform agenda of the Coalition Government expressed in the *Omnibus Bill* (Ibid.). It remains to be seen whether the election will produce any significant shifts in policy regarding labour regulation.

### **Conclusion**

The COVID-19 crisis profoundly impacted employers and workers in Australia. The pandemic will continue

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16. *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (*Amendment Act*) Sch 1.

17. *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth).



to produce novel and pressing legal issues for the Australian government, as well as for employers and workers. While immediate legal challenges will continue to require reactive policy responses, it is also an opportune time to re-examine the structural barriers to fair and equal work in the Australian labour market.<sup>18</sup>

The Coalition Government pursued an agenda of substantial labour policy reform during the first year of the crisis. The cooperative approach that initially characterised the development of the *Omnibus Bill* signalled that employer and union groups could work together to update labour regulation to respond to contemporary challenges and reinforced the central role of the FWC. However, the legal reforms introduced in the *Amendment Act* ultimately reinforced rather than addressed the prevalence of casual work, only exacerbating insecurity for affected workers.

The passage of the *Omnibus Bill* has prompted renewed discussion about central issues impacting the Australian labour market and reflection on how the FW Act contributes to these issues. Contemporaneous inquiries and debates also revealed other deficiencies in labour regulation under the FW Act, including with respect to the promotion of equality at work and the elimination of sexual harassment. Current conditions provide a valuable opportunity for the Commonwealth government to develop a policy of future reforms to the FW Act that is cohesive and meaningfully balances flexibility for employers against broader rights and protections for all types of workers (Victoria. Department of Premier and Cabinet 2020). It remains to be seen whether the imperative to recover from the social and economic impacts of the COVID-19 crisis will provide the impetus for substantial labour law reform in Australia.

\* This report is current, and describes the situation, up until March 2022. The author thanks Dr Ingrid Landau for valuable comments on a previous draft of this article and Renee Burns for excellent research assistance.

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