

COVID-19 and Labour Law: Australia

Anthony Forsyth*

Update: 22 July 2020

Abstract

The Australian regulatory response to the COVID-19 pandemic initially involved high levels of cooperation between all levels of government, the Australian Council of Trade Unions (ACTU) and key business groups. The impacts of business closures and restricted operations were quickly seen through widespread stand downs and, increasingly, layoffs of workers. A wage subsidy scheme for affected employees (JobKeeper) left out many casual and migrant workers. Norms of workplace regulation were rapidly adapted to allow businesses to adjust operations and many employees to work from home, while those working in essential sectors contended with overwork and safety concerns. The economy opened up again as the infection rate was brought under control, only to be followed by the re-imposition of even stricter controls in the state of Victoria due to a surge in COVID-19 cases. Four months into the crisis, the early consensus approach to appropriate regulatory settings for employment relations is under significant strain. Contestation over the shape and extent of industrial relations reform has re-emerged, as it becomes clearer that business interests and conservative political forces seek to utilise the pandemic to advance a deregulatory agenda.

Keywords: Covid-19; Labour Law; JobKeeper income support scheme; Home working; Stand downs; Redundancies; Pandemic leave.

1. General Framework.

As the COVID-19 emergency began to take hold in Australia throughout March 2020, federal and state governments responded with increasingly strict measures to prevent the spread of the virus and protect the community. The Australian Government declared the existence of a human biosecurity emergency on 18 March¹. State governments around the country declared a state of emergency within their jurisdictions². The restrictions that

* Professor of Labour Law, RMIT University, Melbourne, Australia; Author & Editor of the Labour Law Down Under Blog: <https://labourlawdownunder.com.au/>

¹ *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020*.

² For example, in the state of Victoria on 16 March: <https://www.premier.vic.gov.au/state-of-emergency-declared-in-victoria-over-covid-19/> (accessed 9 April 2020). Under Australia's federal structure, state and territory governments play an important role particularly in ensuring public health. Complementary emergency

followed began with Social Distancing Guidelines³, moving progressively to encompass the closure of venues including pubs, restaurants, cafes, gyms, cinemas, public sites (e.g. libraries, museums), etc and a ban on Australians travelling overseas (with limited exceptions)⁴; new restrictions on returning overseas travellers including an enforced 14-day isolation period⁵; and ultimately, requiring that citizens stay at home unless they needed to shop for food and essential supplies, attend to medical or health needs, work or study (if this is not possible remotely) or exercise (in accordance with the limits on public gatherings of no more than two people)⁶.

These measures had a devastating impact on Australian businesses and workers in the first couple of months of their operation. Early data from the Australian Bureau of Statistics showed that 49% of Australian businesses reported an adverse impact from COVID-19, and 85% expected to be impacted in coming months⁷. The enforced closure of non-essential enterprises and travel restrictions resulted in mass stand downs⁸ of staff, and in some instances redundancies, especially in the hospitality, retail, entertainment, tourism and aviation sectors⁹. Work in many other industries continued, but with major adjustments to business operations to ensure compliance with government restrictions. This included schools, universities, professional services, media and public administration, with the implementation of work-from-home arrangements one of the major employment issues¹⁰. Workers in critical areas such as supermarkets, pharmacies, hospitals, transport, distribution

responses to the pandemic have been implemented through the National Cabinet (made up of federal, state and territory leaders). This article focuses primarily on the response to the COVID-19 crisis at the federal level.

³ Australian Government, Department of Health, *Social Distancing Guidance*, 15 March 2020.

⁴ Prime Minister, *Update on Coronavirus Measures*, 24 March 2020: <https://www.pm.gov.au/media/update-coronavirus-measures-24-March-2020> (accessed 9 April 2020).

⁵ Australian Border Force, *New Arrangements for Arrivals from Overseas*:

<https://newsroom.abf.gov.au/releases/new-arrangements-for-arrivals-from-overseas> (accessed 9 April 2020).

⁶ The specific rules and exceptions for these 'Stage 3 restrictions' vary in each state and territory. See for example Victorian Government, *Coronavirus (COVID-19) restrictions Victoria*: <https://www.vic.gov.au/coronavirus-covid-19-restrictions-victoria> (accessed 9 April 2020).

⁷ Australian Bureau of Statistics, *Business Indicators, Business Impacts of COVID-19, March 2020* (Cat. No. 5676.0.55.003):

<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/5676.0.55.003Main+Features1March%202020>

(accessed 9 April 2020).

⁸ 'Stand down' under Australian law is similar to the concept of 'furlough' in the UK and USA. An employer can stand an employee down where they cannot be usefully employed because of a work stoppage for which the employer cannot reasonably be held responsible (Fair Work Act 2009, section 524(1)(c)). The effect of this is that the employee remains employed but is not required to work and is not paid.

⁹ See for example Lucia Stein, 'Qantas has just stood down 20,000 staff. How can they do that?', *ABC News*, 19 March 2020; Patrick Hatch, 'Star Entertainment stands down 90 per cent of staff after casinos shut', *Sydney Morning Herald*, 25 March 2020; 'Myer announces it will close down stores and stand down 10,000 staff due to Covid-19 crisis', *The Guardian*, 27 March 2020; 'Lonely Planet shuts Australian office, staff laid off due to COVID-19', *Sydney Morning Herald*, 9 April 2020. There have been some disputes over the legitimacy of employer stand-downs and related issues such as whether employers (like the national carrier, Qantas) can prevent stand down workers from accessing their sick leave entitlements: see Forsyth A., 'What do we know about the extent of stand downs, their legal basis, and challenging unlawful stand downs?', *Labour Law Down Under Blog*, 24 April 2020, at: <https://labourlawdownunder.com.au/?p=837> (accessed 21 July 2020); *CEPU v Qantas Airways Limited* [2020] FCA 656, 18 May 2020.

¹⁰ See for example ACTU Centre for Health and Safety, *COVID-19 (coronavirus): Workplace FAQs FACTSHEET* (CV01 1.3).

centres and wider supply chains faced different issues including greatly increased workloads and exposure to the risk of coronavirus infection¹¹.

The strict lockdown measures had the desired impact in reducing the levels of new coronavirus infections, so that by late April-early May, restrictions could be eased around the country¹². The federal Government outlined a three-step framework for emerging from restrictions: cautious re-opening of some businesses and allowing gatherings of up to 10 people in private homes, moving to larger numbers of gatherings and business activity with COVID-safe precautions, and then minimal restrictions with the possibility of large public gatherings (e.g. at sporting events) and travel between Australia and New Zealand¹³. The pace of implementation of these measures varied among the states and territories, with Victoria notable for taking the most cautious approach to lifting restrictions. Even there, by early June it was possible to eat out at cafés and restaurants (subject to a maximum of 20 people at one time), go to the gym, visit a museum or gallery or travel for holidays within the state (or interstate subject to other states' border restrictions)¹⁴.

It was ironic, given Victoria's strict approach to lifting the lockdown, that a resurgence of COVID-19 infections occurred in that state in the second half of June¹⁵. This has led to the re-imposition of even more stringent measures than the first lockdown, including: a return to Stage 3 restrictions¹⁶ (initially in a select group of Melbourne suburbs with higher infection rates¹⁷, then in all of metropolitan Melbourne and an adjoining regional shire)¹⁸; a 'hard lockdown' of nine public housing tower blocks in the inner north of Melbourne for a two-week period¹⁹; and the mandating of mask-wearing when going out in public²⁰. Concerns that the Victorian outbreak had spilled across the border to New South Wales led to the closure of the border²¹. In other parts of Australia, citizens have been able to resume many normal

¹¹ For example, members of the United Workers Union took industrial action at a warehouse supplying Coles Supermarkets over COVID-19 safety concerns and 10-14 hours work-days: see Daniel Lopez, 'We Can Use this Crisis to Reconceptualize the Economy', *Jacobin*, 1 April 2020.

¹² N Gan, 'How did Australia flatten its coronavirus curve? Restrictions easing as infection rate continues to fall', *CNN*, 1 May 2020: <https://edition.cnn.com/2020/05/01/asia/australia-coronavirus-success-intl-hnk/index.html> (accessed 20 July 2020).

¹³ Australian Government, Department of Health, *Easing of coronavirus (COVID-19) restrictions*: <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-restrictions/easing-of-coronavirus-covid-19-restrictions> (accessed 20 July 2020).

¹⁴ Preiss B. and Dexter R., 'Victoria moves to dramatically ease coronavirus restrictions', *The Age*, 24 May 2020.

¹⁵ It appears that breaches of safety procedures by security staff engaged to enforce hotel quarantine rules for returned overseas travellers were a major cause of this outbreak, leading the Victorian Government to establish a judicial inquiry into the matter: see Ilanbey S., 'Police guard "hot" hotels as quarantine inquiry set to begin', *The Age*, 19 July 2020.

¹⁶ See note 6 above and accompanying text.

¹⁷ Nally A., 'How Victoria's coronavirus lockdown across 10 Melbourne postcodes will work', *ABC News*, 30 June 2020.

¹⁸ 'Victoria reimposes coronavirus stage 3 lockdown on metropolitan Melbourne and Mitchell Shire after record rise in cases', *ABC News*, 7 July 2020.

¹⁹ Kelly D. et. al., 'Melbourne tower lockdowns unfairly target already vulnerable public housing residents', *The Conversation*, 6 July 2020.

²⁰ 'Victorian coronavirus cases climb as Government makes masks mandatory for Melbourne and Mitchell Shire', *ABC News*, 19 July 2020.

²¹ Kontominas B., 'New border zone introduced between NSW and Victoria with tighter restrictions for crossing', *ABC News*, 19 July 2020.

activities with minimal restrictions, although strict controls remain in place in relation to most interstate travel and overseas travel is still prohibited²².

The ongoing impact of the original round of restrictions, and those re-introduced in Victoria, has been significant. While stand downs were a major feature of the earlier period, redundancies have become increasingly common as the crisis wears on: workers in aviation, tourism, retail, finance, the media, arts, sport and higher education are among the hardest-hit²³. By May, the Fair Work Commission (FWC) was reporting a 40 per cent increase in the volume of unfair dismissal claims.²⁴ In June, the Grattan Institute warned that: 'Australia faces a globally synchronised deep recession'²⁵. Explaining this predicament further, and its impact on employment levels, the Institute said: 'The official unemployment rate rose from 5.2 per cent in March to 7.1 per cent in May. The true employment hit is much larger. The ABS has stated that if all "stood down" workers were counted as 'unemployed', the unemployment rate would have been 11.3 per cent in May.'²⁶ The official unemployment rate increased to 7.4 per cent in June²⁷. As different parts of the country began to emerge from restrictions, attention shifted to the implementation of COVID-safe return-to-work plans (including on public transport)²⁸ and continuing support for those still required to work from home²⁹ and those who had kept performing essential work at their workplaces³⁰.

2. Regulatory Interventions to Support Affected Businesses and Workers.

(a) Economic Stimulus and Income Support Measures

The Australian Government implemented several economic stimulus programs in the early stages of the crisis³¹. The most extensive of these was the A\$70 billion JobKeeper scheme³². This enables businesses with at least 30% reduced turnover to obtain a wage subsidy of A\$1500 per fortnight, in respect of employees as at 1 March who continue

²² Landis-Hanley J., 'Australia's Covid-19 lockdown rules and coronavirus restrictions explained: how far can I travel and can I have people over?', *The Guardian*, 20 July 2020.

²³ 'Coronavirus pandemic job losses from major Australian employers', *ABC News*, 30 June 2020.

²⁴ 'COVID-19 drives unfair dismissal "surge": FWC President', *Workplace Express*, 8 May 2020.

²⁵ Daly J. et. al., *The Recovery Book: What Australian Governments Should Do Now*, Grattan Institute Report No. 2020-10, June 2020, page 3.

²⁶ *Ibid*, page 16 (reference omitted).

²⁷ Australian Bureau of Statistics, *Labour Force, Australia, June 2020*, Cat. No. 6202.0, 16 July 2020.

²⁸ Australian Government, National COVID-19 Coordination Commission, *Planning tool to help businesses reopen and be COVIDSafe*, at: <https://pmc.gov.au/nccc/resources/planning-tool-help-businesses-reopen-and-be-covidsafe> (accessed 20 July 2020); Daly et. al., above note 24, pages 67-68.

²⁹ ACTU Centre for Health and Safety, *COVID-19 (coronavirus): Working from home and psychological health and safety* (CV01 14).

³⁰ See for example United Workers Union, 'NEW COVID CASE: Melbourne Distribution Centre tells workers it's business as usual despite confirmed COVID-19 case', *Media Release*, 10 July 2020.

³¹ See for example Prime Minister and Treasurer, *Economic Stimulus Package*, Joint Media Release, 12 March 2020.

³² The original A\$130 billion estimated cost of the scheme was revised down in May: see Hitch G, 'JobKeeper numbers cut by 3 million after Federal Government reveals accounting bungle in coronavirus stimulus program', *ABC News*, 22 May 2020.

working, are stood down from their employment or are re-hired if made redundant³³. The legislation implementing JobKeeper included provisions that effectively allow employers to ask, and in some instances direct, employees to accept certain changes in employment conditions that would otherwise be impermissible under awards³⁴ or enterprise agreements (e.g. a reduction in working hours to ensure the employee works only the hours equivalent to the \$1500 payment)³⁵. The Government was originally opposed to introducing an income support program, but relented after concerted lobbying by the union movement and even some business groups³⁶. The unions' campaigning continued, seeking to ensure that around 2 million workers who were originally excluded could obtain access to JobKeeper payments³⁷. The Government also increased income support for unemployed Australians through a Coronavirus Supplement of A\$550 to the level of fortnightly benefit payments (JobSeeker)³⁸, and made child care free of charge (to support the child care sector and assist those who rely on child care to continue working)³⁹.

As lockdown restrictions were eased, the Government ended free child care⁴⁰ and debate picked up about the future of the JobKeeper scheme and the increases to JobSeeker payments (both scheduled to end in September). Respected commentators argued for the income support measures to be extended: for example, JobKeeper would need to remain in place beyond September, to prevent employees in businesses that have not fully recovered from being laid off⁴¹. On 21 July, the Government announced both the extension of, and

³³ For further details, see Australian Government, *JobKeeper Payment: Frequently Asked Questions*, 9 April 2020. The JobKeeper scheme also covers sole traders (which includes many independent contractors).

³⁴ An award is a legal instrument setting minimum wages and conditions for employees. There are 122 'modern awards', which apply on an industry or occupational basis, in operation under the *Fair Work Act* (see: <https://www.fwc.gov.au/awards-and-agreements/awards/modern-awards/modern-awards-list>).

³⁵ *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*, inserting a new Part 6-4C in the *Fair Work Act 2009*. Many disputes over the operation of these provisions have been determined by the Fair Work Commission (FWC), see for example *McCredy v Village Roadshow Themes Park Pty Ltd* [2020] FWC 2480, 13 May 2020 and *Powell v H & M Hennes & Mauritz Pty Ltd* [2020] FWC 2514, 13 May 2020 (refusal by employees to comply with employers' requests to draw down on annual leave entitlements while on JobKeeper, held unreasonable in both cases).

³⁶ Kehoe J., *Government to pay workers' wages for coronavirus*, in *Australian Financial Review*, 28 March 2020.

³⁷ Full-time and part-time employees are covered, along with casual employees employed on a regular and systematic basis with one employer for more than 12 months: see Australian Government, *JobKeeper Payment: Frequently Asked Questions*, 9 April 2020. This excludes many casuals who may have had regular shifts but changed employers in the 12 months before 1 March, and migrant workers (e.g. international students and those on working holiday or skilled migration visas) except for New Zealand citizens. Other exclusions (explicit or practical) emerged over time, including those employed by the Australian entities of foreign-owned corporations and staff at most Australian universities: see, respectively, Derwin J., 'Emirates is threatening to stand down 4,500 Australian staff after the Federal Government excluded it from JobKeeper', *Business Insider Australia*, 7 May 2020; Karp P., 'Australian universities angry at "final twist of the knife" excluding them from JobKeeper', *The Guardian*, 4 May 2020. In contrast, priests and other members of religious orders are covered by JobKeeper (even though they do not, usually, fall within the legal definition of 'employee'): McGrath P. and McClymont A., 'Priests eligible for JobKeeper asked to donate the extra allowance to their Catholic diocese', *ABC News*, 17 June 2020.

³⁸ Australian Government, Services Australia, *More financial support for people affected by coronavirus*, 25 March 2020.

³⁹ Prime Minister and Minister for Education, *Early Childhood Education and Care Relief Package*, Joint Media Release, 2 April 2020.

⁴⁰ Hayne J., 'Free child care to end in July after Minister says it did its job during coronavirus', *ABC News*, 8 June 2020.

⁴¹ Borland J., *Labour Market Snapshot #61*, Department of Economics, University of Melbourne, May 2020. See also Daly et. al., above note 25, pages 24-25, 29-31, 43-47 (suggesting several adjustments to the

important changes to, JobKeeper⁴²: the A\$1500 payment will fall to A\$1200 per fortnight from October to December (and to A\$750 per fortnight for those who were usually working less than 20 hours per week⁴³); then from January to March 2021, it will drop further to A\$1000 per fortnight (A\$650 for those working less than 20 hours per week). The JobSeeker coronavirus supplement payment for the unemployed will continue until the end of 2020, but will be reduced from A\$550 to A\$250 per fortnight from October⁴⁴.

(b) Changing Employment Regulation

In addition to income support programs, Australia's regulatory framework was swiftly adapted in the early stage of the crisis to enable flexible forms of engagement in several industries including work-from-home arrangements, and to provide new forms of leave for employees who need to self-isolate. Awards regulating working conditions in the hospitality and restaurant sectors were varied by the FWC on a temporary basis, allowing employees to work across job classifications; and empowering employers to direct employees to work fewer hours than usual or to take annual leave on 24 hours' notice⁴⁵. Similar changes were made to the clerical award, aimed at assisting employees to manage working from home at the same time as increased responsibility for children's schooling⁴⁶. These changes, affecting some 3 million workers, were implemented through unprecedented cooperation between trade union and business leaders⁴⁷. In addition, the FWC varied 103 of the 122 industry awards, inserting a new entitlement to two weeks' unpaid pandemic leave for employees

JobKeeper scheme); Spies-Butcher B., 'The Temporary Welfare State: The Political Economy of Job Keeper, Job Seeker and "Snap Back"' (2020) 85 *Australian Journal of Political Economy* 155.

⁴² Worthington B., 'JobKeeper and JobSeeker extended for months but rates cut and eligibility tightened', *ABC News*, 21 July 2020.

⁴³ The introduction of this tiered approach to the level payments was considered necessary to address an anomaly in the design of the original scheme, which allowed some workers who previously only worked a few shifts per week to obtain additional income through the A\$1500 per fortnight JobKeeper payment: see Waters C., "It's not money for jam": Staff refusing to come to work but demanding JobKeeper payments', *Sydney Morning Herald*, 27 April 2020. Some employers responded to this problem by directing part-time or casual employees to work additional hours, to bring them up to the level of JobKeeper payments; however in *Transport Workers Union of Australia v Prosegur Australia Pty Ltd* [2020] FWCFB 3655, 13 July 2020, a Full Bench of the FWC ruled that such an employer direction was unreasonable (at least in its application to part-time employees, where accompanied by a direction reducing the hours of full-time employees).

⁴⁴ Worthington, above note 42.

⁴⁵ *Australian Hotels Association and United Workers Union* [2020] FWCFB 1574, 25 March 2020; *Application to vary the Restaurant Industry Award 2010* [2020] FWCFB 1741, 31 March 2020.

⁴⁶ *Application to vary the Clerks – Private Sector Award 2010* [2020] FWCFB 1690, 28 March 2020.

⁴⁷ Marin-Guzman D., *Hotels, unions ditch work rules for jobs*, in *Australian Financial Review*, 24 March 2020, and Marin-Guzman D., *Workers give up penalties to keep jobs*, in *Australian Financial Review*, 26 March 2020.

required to self-isolate who cannot access other leave entitlements⁴⁸. Some employers also voluntarily granted new forms of paid or unpaid leave to employees⁴⁹.

The lifting of restrictions from around May inevitably led to a revisiting of the adjustments to employment regulation, and some breaking down of the union-employer consensus. Employers sought to extend the clerical award variations from 30 June to 30 September against the objections of the Australian Services Union. A Full Bench of the FWC found in the employers' favour, citing the 'second wave' of COVID-19 infections in Victoria and rejecting the union's argument that JobKeeper was providing sufficient support to affected businesses⁵⁰. An application by commercial legal firms to vary the legal services award (e.g. to more easily reduce working hours) was opposed by the Australian Services Union, and ultimately withdrawn by the employers⁵¹. Also contributing to the fraying of tripartism, the Federal Government implemented an amendment (by regulation) to the *Fair Work Act* requirement that employees be provided with at least seven days' notice of proposed enterprise agreement variations (reducing this to one day)⁵². With little take-up by employers of this amendment⁵³, it was reversed by the Government on 11 June⁵⁴. However, significant damage to government-union relations had been done,⁵⁵ coming on top of the Government's unilateral imposition of a six-month freeze on federal public sector wages in early April⁵⁶.

Given the resurgence of coronavirus in Victoria in late June and through July, and the increasing threat of an outbreak in New South Wales, the union movement reinvigorated its campaign for increased protections for employees. The ACTU argued for the introduction of paid pandemic leave across Australia as 'an essential public health measure', to ensure that employees required to self-isolate do not attend work out of economic necessity.⁵⁷ An

⁴⁸ *Application to vary awards on the initiative of the Commission* [2020] FWCFB 1760, 1 April 2020 and [2020] FWCFB 1837, 8 April 2020. The unpaid pandemic leave provisions in many awards were subsequently extended by the FWC beyond their scheduled end date of 30 June: see 'Unpaid pandemic leave extended', *Workplace Express*, 1 July 2020.

⁴⁹ ACTU, 'List of employers who have agreed to two weeks special paid leave', at:

https://www.australianunions.org.au/cv_good_employers_list (accessed 9 April 2020).

⁵⁰ *Application to vary the Clerks – Private Sector Award 2010* [2020] FWCFB 3443, 9 July 2020. In contrast, the United Workers Union agreed to a three-month extension (sought by employers) of the changes to hospitality and restaurant awards, with some additional protections for employees: 'Common sense prevails, say employers, as award change extended', *Workplace Express*, 1 July 2020.

⁵¹ 'Law firms drop pandemic-related bid to vary award', *Workplace Express*, 26 May 2020.

⁵² *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020*, operative from 17 April 2020.

⁵³ The shorter notice period of agreement changes was used only 23 times: 'Porter to restore seven-day access period', *Workplace Express*, 11 June 2020. However the incidence of employers seeking to vary agreements, to reduce pay and conditions due to the pandemic, has been more widespread than this: see for example 'Melbourne Uni staff rebuff coronavirus agreement change', *Workplace Express*, 11 June 2020; 'Stevedoring companies using pandemic to slash wages: MUA', *Workplace Express*, 18 June 2020.

⁵⁴ *Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020*. The Government had also previously 'compromised' on the impact of the original *Fair Work Act* change, placing a 12-month limit on any pandemic-induced agreement variations that were made on the basis of the new rule: 'Controversial notice regulation trimmed: Porter', *Workplace Express*, 14 May 2020.

⁵⁵ ACTU Secretary Sally McManus described the Government's original *Fair Work Act* change as 'a disgusting power grab', while the Construction, Forestry, Maritime, Mining and Energy Union brought a court challenge to invalidate it: 'Union abandons reg challenge', *Workplace Express*, 15 June 2020.

⁵⁶ *Public Service (Terms and Conditions of Employment) (General wage increase deferrals during the COVID-19 pandemic) Determination 2020*, operative from 14 April 2020.

⁵⁷ 'Mixed report card for virus response: Unions', *Workplace Express*, 23 June 2020.

application by the ACTU and health industry unions for paid pandemic leave entitlements to be provided to front-line health care and pharmacy workers was rejected by a Full Bench of the FWC in early July⁵⁸. The Full Bench was concerned about the financial burden of this new minimum standard for some employers (especially in the aged care and disability care sectors), concluding that: ‘... the degree of success in controlling the COVID-19 pandemic means that the elevated potential risk to health and care workers of actual or suspected exposure to infection has not manifested itself in actuality’⁵⁹. Some state governments stepped into the breach, introducing emergency payment schemes for self-isolating workers without access to sick leave or special pandemic leave entitlements⁶⁰.

3. Conclusion.

The initial response to the pandemic and necessary restrictions to control the spread of COVID-19 was premised on cooperation between all levels of government, business and unions in the national interest. The federal Government clearly needed the support of union leaders (especially in highly-unionised essential sectors), and therefore dropped some of its traditional animosity towards them⁶¹. Unions agreed to a significant undermining of traditional employment law protections, on a temporary basis. Business groups, and more recently the Prime Minister, have latched onto the crisis to justify extending some of these erosions of employment protections permanently⁶². The Prime Minister stated back in April that: ‘There are no more unions or bosses. There are just Australians now. That’s all that matters’⁶³. However, this spirit of national cohesion has been placed under extreme strain in the months since then. In May, the federal Government established a consultation process through which employer and union representatives would consider industrial legislation reforms in areas including casual work, the award system and enterprise bargaining⁶⁴. The ACTU agreed to participate but indicated that unions would only support long-term solutions to workplace reform issues⁶⁵. Tim Kennedy, National Secretary of the United Workers Union, warned that unions should avoid being ‘co-opted’ by the Government’s reform process and make it ‘very clear that we’re on the side of working people and them

⁵⁸ *Health Awards – Pandemic Leave* [2020] FWCFB 3561, 8 July 2020.

⁵⁹ *Ibid*, paragraphs [126] and [129]. However, two weeks later, the Full Bench invited submissions on the inclusion of pandemic leave in the aged care award as infections mounted in Victoria: ‘New COVID-19 crisis might justify paid pandemic leave: Bench’, *Workplace Express*, 22 July 2020.

⁶⁰ See for example Victorian Government, Health and Human Services, *Coronavirus (COVID-19) Worker support payment*, at: <https://www.dhhs.vic.gov.au/covid-19-worker-support-payment> (accessed 22 July 2020).

⁶¹ See the comments of the ACTU Secretary quoted in ‘ACTU to midwife “workers’ claim” around home-based employment’, *Workplace Express*, 4 June 2020.

⁶² Bonyhady N., “‘Not the time for tired arguments’: Employer group unveils industrial agenda’, *Sydney Morning Herald*, 19 May 2020; Cranston M. and Coorey P., ‘PM pushes for IR flex to ensure jobs recovery’, *Australian Financial Review*, 17 July 2020.

⁶³ ‘PM declares “no more unions and bosses” as JobKeeper heads for Canberra’, *Workplace Express*, 2 April 2020.

⁶⁴ Macmillan J., ‘Scott Morrison takes aim at Australia’s industrial relations system, reaches out to business and unions’, *ABC News*, 26 May 2020.

⁶⁵ Marin-Guzman D., ‘ACTU rules out crisis changes in IR reform’, *Australian Financial Review*, 16 June 2020.

getting a fairer share⁶⁶. However, as at late July, there is a real prospect that the COVID-19 pandemic could be utilised by business interests and conservative politicians to fast-track a deregulatory agenda, in the name of flexibility and job creation⁶⁷.

Copyright © 2020 Anthony Forsyth. This article is released under a Creative Commons Attribution 4.0 International License

⁶⁶ 'Union leaders canvass perils and pitfalls of IR roundtables', *Workplace Express*, 5 June 2020.

⁶⁷ See for example Cranston and Coorey, above note 62; Kaine S., 'Australian Industrial Relations and COVID-19' (2020) 85 *Australian Journal of Political Economy* 130; Peetz D., Colley L. and Nolan R., 'The Shock Doctrine and Industrial Relations' (2020) 85 *Australian Journal of Political Economy* 138.