

**APPLICATION FOR COVID-19 JOBKEEPER PACKAGE GENERAL ORDER  
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

**CITATION** : 2020 WAIRC 00272

**CORAM** : CHIEF COMMISSIONER P E SCOTT  
SENIOR COMMISSIONER S J KENNER  
COMMISSIONER T B WALKINGTON

**HEARD** : WRITTEN SUBMISSIONS

**DELIVERED** : THURSDAY, 14 MAY 2020

**FILE NO.** : APPL 19 OF 2020

**BETWEEN** : CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN  
AUSTRALIA LIMITED  
Applicant  
  
AND  
  
(NOT APPLICABLE)  
Respondent

**CatchWords** : Industrial law (WA) – Application for COVID-19 JobKeeper Package General Order pursuant to s 50 – Further flexibility to manage employment arrangements – Applicable to private sector employees – Finite operation period until review – Dispute resolution – Utilisation of s 44 for employee access – General Order issued

**Legislation** : *Industrial Relations Act 1979* (WA) s 6(a), s 6(af), s 6(ag), s 6(c), s 7(1), s 29(1), s 44, s 50  
*Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Cth)  
*Fair Work Act 2009* (Cth)  
*Employment Disputes Resolution Act 2008* (WA) s 36

**Result** : General Order issued

**Representation:**

- Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia Limited
- Dr T Dymond on behalf of UnionsWA
- Ms C Purcell for the Hon. Minister for Industrial Relations

*Reasons for Decision*

- 1 The Chamber of Commerce and Industry of Western Australia Limited applies for a General Order pursuant to s 50 of the *Industrial Relations Act 1979* (the Act) to make further provisions for private sector employers and employees in Western Australia in relation to the COVID-19 pandemic. The Commission has previously issued Reasons for decision (2020 WAIRC 00203) and a General Order (2020 WAIRC 00205) for flexibility of leave arrangements in the context of the COVID-19 pandemic.
- 2 The Chamber says that the purpose of this application is to provide employers with further flexibility to manage employment arrangements in a manner that supports the JobKeeper Scheme established under the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Cth). This package includes amendments to the *Fair Work Act 2009* (Cth).
- 3 The application seeks a General Order applicable to private sector employees, to operate until 28 September 2020, to provide:
  - (a) A requirement that where a JobKeeper payment is payable, the employer is to provide eligible employees the value of the JobKeeper payment or the amount owed for work performed;
  - (b) Ability for an employer to stand down employees (either fully or partially) because they cannot be usefully employed arising from the COVID-19 pandemic or government initiatives to slow the transmission of COVID-19;
  - (c) Ability for an employer to alter the duties of work of an employee in order to continue the employment of one or more employees of the employer;
  - (d) Ability for an employer to alter the location of work in order to continue the employment of one or more employees of the employer; and

(e) Options for an employer and employee to agree to work being performed on different days and times, provided that the employee does not unreasonably refuse an employer's request.

- 4 The Commission published a notice of the application on the Commission's website and invited submissions from interested persons. Submissions were received from the Chamber, UnionsWA and the Minister. The Commission also convened conferences between those parties as they are recognised by s 50 of the Act.
- 5 The Commission expresses its appreciation to the Chamber, UnionsWA and the Minister for the constructive way that they have worked together to bring this matter to a largely agreed resolution.

### **Consideration**

- 6 We note the circumstances facing industry generally and employers and employees arising from the COVID-19 pandemic and the restrictions which have affected businesses and employment. We noted some of those circumstances and restrictions in our Reasons for decision in relation to the General Order ([2020] WAIRC 00205) referred to earlier.
- 7 We note the various statements of the Commonwealth and Western Australian governments as well as by bodies such as the Reserve Bank of Australia (Statement of Monetary Policy – May 2020) as to the effects of the current situation. In particular, we have taken account of the amendments to the *Fair Work Act* to enable the Fair Work Commission to deal with disputes relating to the JobKeeper payment arrangements.
- 8 We consider that the General Order proposed by the Chamber and generally supported by UnionsWA and the Minister will assist in maintaining the employment of as many employees

as possible and support businesses to continue to operate. We believe that it is appropriate in all of the circumstances.

- 9 It achieves the purposes sought by the application and is in conformity with the objects of the Act (s 6). The arrangements promote goodwill in industry and within enterprises as they set out arrangements to enable jobs to be retained (s 6(a)). They facilitate the efficient organisation and performance of work according to the needs of industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises (s 6(af)). They encourage employers, employees and organisations to reach agreement appropriate to the needs of enterprises within industry and the employees in those industries (s 6(ag)). The arrangements also provide means for preventing and settling industrial disputes (s 6(c)). Further, they provide a system of fair wages and conditions of employment in the circumstances of the crisis brought about by the COVID-19 pandemic. Accordingly, the Commission is of the view that the General Order ought to issue.
- 10 We also note that the General Order will provide more favourable conditions in respect of the calculation of continuous service than does the Termination, Change and Redundancy General Order. We are of the view that the benefits of consistency with the JobKeeper arrangements outweigh any other potential issues on this occasion, particularly given the limited circumstances and duration of the General Order.

### **Operation**

- 11 The operation of the General Order will be for a finite period, from the date the General Order is issued until 28 September 2020, unless extended on application or at the initiative of the Commission.

- 12 Given that the circumstances and arrangements are yet to be tested, we will review the operation of this General Order after it has operated for a number of weeks. The Commission will initiate this review no later than 30 June 2020.

### **Dispute resolution**

- 13 There is one issue that requires comment and that is provisions relating to dispute resolution. We note that individual employees have traditionally had limited access to the Commission and have no standing to make applications to the Commission to deal with disputes of this nature (see Ministerial Review of the State Industrial Relations Systems – Interim Report, pp 115 – 119). Unlike the *Fair Work Act* which provides a range of areas of jurisdiction accessible directly by individual employees in their own right, the Act provides only limited access to the Commission by individual employees for dispute resolution. They may refer only claims of unfair dismissal or that they have been denied a benefit arising under their contract of employment (s 29(1)(b)), or in respect of a dispute relating to an entitlement to long service leave (s 44(7)(b)). Otherwise access to the Commission for conciliation and arbitration of disputes is given to an organisation registered under Division 4 of Part II of the Act (that is, a union of employees or employers), an employer and the Minister.
- 14 An employee may request that the Commission mediate a dispute with their employer under the *Employment Disputes Resolution Act 2008* (WA) (EDR Act). However, this requires the consent of the other party (EDR Act s 6(2)). That consent is not always given. Therefore, if the employee seeks mediation and the employer does not agree to it, then the Commission cannot mediate.
- 15 Any employee may seek to enforce an award or order in the Industrial Magistrate’s Court (Part III – Enforcement of Act, awards, industrial agreements and orders). However, this involves a different approach to that undertaken in conciliation and arbitration.

- 16 It is important that, in this case, disputes are resolved between employers and employees. There are real impediments to an individual employee seeking to have conciliation and arbitration of a dispute relating to this General Order under the State jurisdiction. Unlike the *Fair Work Act*, the Act has not been amended to deal specifically with this type of dispute. The Commission has worked with the s 50 parties to identify a range of options for various parties to refer disputes to the Commission for resolution, including employees. We have discussed with and received submissions from the Chamber, UnionsWA and the Minister about how this might be remedied.
- 17 One means would be through the Commission, on its own motion, summoning an employer and employee to attend a conference pursuant to s 44 of the Act as provided for by s 44(1). The Commission could do this only if the Commission forms the opinion that industrial action has occurred or is likely to occur. Industrial action is defined in s 7 of the Act. The circumstances of the particular case would need to be examined to determine if they do, in fact, meet that definition.
- 18 We note that this is not an orthodox use of s 44. As the Minister correctly points out, it may create a precedent and have unintended consequences. We recognise that this is in a time of crisis and exceptional circumstances and is for a finite period. However, it may create an avenue for access to the Commission well beyond this time and these circumstances. In the circumstances of employees otherwise having very limited access to the Commission to deal with disputes in relation to the General Order, and in these exceptional circumstances, we think it is worthy of inclusion and will monitor its use.
- 19 Minutes of the Proposed General Order will now issue. Any person wishing to speak to the Minutes is to do so in writing by no later than midday on Friday, 15 May 2020.