SUBMISSION TO THE COVID-19 RESPONSE INQUIRY

A *Introduction*

Please note, this submission does not reflect the opinion(s) of my employer(s), nor does it provide any reflection(s) upon my employer(s). I require my identity to remain confidential.

In early-2020, I, like so many aviation colleagues, was stood down without pay from my otherwise full-time employment under the guise of a Covid-19 response.[1] This occurred via email and was subject to a "rolling" end date. What began as a shock quickly turned into a fight for survival. As queues ran around the block at Centrelink offices nation-wide;[2] rent, mortgages, grocery and other bills kept coming in while our lives and livelihoods ground to a halt. Not because of anything we (the individuals) did, but rather the unilateral actions of our employers. At the time, there was little reason to believe that our employment would resume.

This submission is my own, and I wish to expose the improper use of stand down, far beyond any reasonable original intent. I also note the consequences of these decisions, as well as the discrepancy with the rest of the industry. I point out that stand down has a long history in Australian workplace law and it has never been used, nor should it be used, in scenarios such as these. This is particularly so given the objects of the *Fair Work Act 2009* (Cth) ('*Fair Work Act*'):[3] balance and fairness.[4] I submit that Parliament must tighten Australian law to prevent the overly wide use of stand down; as the "indefinite" use of these provisions cannot reasonably replace well-established measures that are otherwise rendered moot.

B *Key Points*

1. While stand down clauses have a long history in Australian employment law, they should not be read and executed in isolation, rendering the other operative clauses of a workplace instrument moot;
2. Stand down provisions should not be used as a workforce planning/management tool as other existing, and fairer/better options exist (such as surplus, and redundancy and re-employment);
3. There are significant public interest implications for the standing down of employees in critical sectors when those employees cannot be easily "stood up"; and
4. Parliament should amend the *Fair Work Act* to limit the indefinite use of stand down.

C *The Improper Use of Stand Down; and its Consequences*

1 *What does the* Fair Work Act *say?*

Section 254 of the *Fair Work Act* governs stand down.[5] *Inter alia*, it states:

> *(1)* An employer may … stand down an employee during a period in which the employee ***cannot usefully be employed*** because of one of the following circumstances*:*
>
> ***(a) industrial action (other than industrial action organised or engaged in by the employer);***
>
> ***(b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;***

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[1] < https://www.theguardian.com/business/2020/mar/19/coronavirus-qantas-and-jetstar-to-suspend-international-flights-and-stand-down-20000-workers >.
[2] < https://www.abc.net.au/news/2020-03-24/centrelink-minister-stuart-robert-not-anticipate-coronavirus/12080612 >.
[3] *Fair Work Act 2009* (Cth) ('*Fair Work Act*').
[4] Ibid s 3.
[5] Ibid s 254 (emphasis added).

(c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

(2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:

(d) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and

(e) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.

There is a wide uptake of enterprise agreements ('EAs') in my industry. As such, I was not stood down under the *Fair Work Act*, rather my EA.[6] The relevant clause is 15.6.

Critically, no temporal limit is prescribed. You will also note that, read together, 'strikes' and 'stoppages' are short-term events. Further, my EA has provisions for 'agreed steps for managing a surplus',[7] and 'redundancy' (including opportunities to work in other areas, as well as re-employment mandates).[8] Clearly, the latter alternatives are fit for purpose. Instead, I submit that "blanket" stand down was used as a convenient, workplace management excuse; whereas surplus and redundancy were more genuine, yet expensive, alternatives. Otherwise, what is stopping the employer standing down an employee for months or, in this case, years? Further, how could this be misused in other scenarios? Is this in-line with the intentions of full-time employment; all the while surplus and redundancy provisions are otherwise ignored? I submit that employers could use stand down as an "each way" bet; the employee sits at home without pay, while the employer is guaranteed their workplace participation in the future. This is more in line with casual employment, not full-time employment; and is materially (and foreseeably) harmful on the individual. Without temporal limits, the potential for misuse is profound.

2 *What is the intent of stand down provisions?*

As noted, stand down is not a new concept in Australia. Nevertheless, it was traditionally a contractual right.[9] Contracts should be read as a whole, and construction should avoid 'commercial nonsense'.[10] Traditional reasons for stand down were: 'a strike or a work stoppage or another cause for which the employer could not reasonably be held responsible'.[11] Clearly, the intent is short-term. However, there are obvious *competing social and economic issues* with stand down: continuity of employment versus *temporary* reductions in labour costs.[12] Covid exposed these in their rawest form. In the *Explanatory Memorandum to the Fair Work Bill 2008* (Cth), business closures such as 'flash flood[s]' were given as examples.[13] However, in 2020, some aviation employers envisioned parking aircraft for at least three

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[6] < https://www.fwc.gov.au/document-search/view/3/aHR0cHM6Ly9zYXNyY2RhdGFwcmRhdWVhYS5ibG9iLmNvcmUud2luZG93cy5uZXQvZW50ZXJwcmlzZWFncmVlbWVudHMvMjAyMC80L2FlNTA3ODU1LnBkZg2? > ('LHEA 10').

[7] Ibid cl 15.9.

[8] Ibid cll 15.10, 15.10.15 and 15.10.19.

[9] < https://www.fwc.gov.au/documents/resources/covid-19-information/presidents-statement-fwc-covid-19-response-2020-08-07.pdf > ('President's Statement FWC Covid-19 Response').

[10] *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 [35].

[11] President's Statement FWC Covid-19 Response (n 10).

[12] *La Plume v Thomas Foods International Pty Ltd* [2020] FWC 3690 (15 July 2020) [42] (Anderson DP).

[13] Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) [link].

years.[14] The 'mere existence of [a] breakdown or work stoppage is not sufficient' for stand down;[15] it is the *lack of work*, or the *prevention of* work. Indeed, 'a mere reduction in available work can not constitute a stoppage'.[16] Even if 'the demand for the level of work in a continuing business unit reduced in response to an external event',[17] this is not a "stoppage". In this light, employees can undertake training instead of being stood down.[18] Clearly, one can see that there are many, many options available to the employer; particularly so in a training-intensive industry like aviation. Indeed, stand down itself is purely discretionary. Notably, if an employer schedules events (e.g., parking/maintaining aircraft), the reasons for the lack of work are within their control.[19] Yet, given all of this, stand down was widely adopted by aviation employers. There is clearly a mismatch between the intent of these provisions and their real-life execution; with nothing in place to stop it happening again. As such, temporal limits are needed for stand downs; but overwhelmingly, the provisions must actually fit the scenario. Aviation employees were never "stopped" from performing simulator training, other training, or flying; except by the unilateral and blanket actions of their employer. The "recovery" from the Covid era aptly demonstrates the longer-term effects of these stand down decisions.[20] Indeed, the public interest was *worsened* by the use of stand down.

3 *What did other employers do?*

Furthering my submission is that stand down in aviation was a uniquely Australian event. Cargo prices skyrocketed during the Covid era,[21] so much so that overseas airlines rushed to take out passenger seats to be replaced by cargo boxes.[22] Further, foreign passenger airlines gladly filled the void in Australia – indeed, a Middle Eastern carrier returned more Australians home than Australian airlines did. Hence the question, no useful work; or no intent to perform work? Stoppage, or refusal? Australian employers had JobKeeper which, undoubtedly, benefited employees early on. But how long after the initial shock was JobKeeper used to justify not paying one's employees? If stand down had short-term, temporal limits (such as during flash flooding, etc.) then the other operative clauses in EAs would have had to compete with minimum rates of pay. This is (comparatively) expensive when an employer refuses to employ. This is clearly not the fault of the employee, nor in the wider public interest.

As such, and as awful as it was to live through (indeed, over years), this should never be allowed to happen to another Australian worker again. If the stand down loopholes are fixed then an employee can once again rely upon his or her EA to function the way it was supposed to – in good times and bad. Otherwise, simply, what is the point of surplus, redundancy and re-employment clauses?

I thank the Inquiry.

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[14] < https://australianaviation.com.au/2020/09/trip-to-boneyard-signals-last-qantas-a380-flight-for-years/ >.
[15] *Australian Federation of Air Pilots v Bristow Helicopters Australia Pty Ltd* [2016] FWC 8515 (2 December 2016).
[16] *Marson v Coral Princess Cruises (N.Q.) Pty Ltd* [2020] FWC 2721 (25 May 2020) (Lake DP).
[17] *La Plume v Thomas Foods International Pty Ltd* (n 13). See also *Stelzer v The Trustee for The Ideal Acrylics Unit Trust* [2020] FWC 4129 (7 August 2020) [60] (Anderson DP).
[18] *Australian Workers' Union v Brockman Engineering Pty Ltd* [2015] FWC 2077 (30 March 2015).
[19] *Australian Federation of Air Pilots v Australian Helicopters Pty Ltd* [2013] FWC 7863 (15 October 2013).
[20] See < https://australianaviation.com.au/2022/04/now-alan-joyce-blames-not-match-fit-passengers-for-queues/ >.
[21] < https://www.mckinsey.com/industries/travel-logistics-and-infrastructure/our-insights/taking-stock-of-the-pandemics-impact-on-global-aviation >.
[22] < https://www.flightglobal.com/fleets/emirates-converts-10-777-300ers-into-temporary-freighters/139001.article >.