THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ELC:JWas2014293

27 January 2021

Mr Michael Tidball
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Law Council of Australia
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By email: john.farrell@lawcouncil.asn.au

Dear Mr Tidball,

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Thank you for the opportunity to contribute to the Law Council submission to the Senate Education and Employment Legislation Committee inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 ("the Bill").

The Law Society's Employment Law Committee has contributed to this submission.

Schedule 1 – Casual Employment

Clauses 2 and 3: Meaning of casual employee and proposed process of conversion from casual to part-time or full-time status

The Law Society is of the view that the definition of casual employee proposed in the Bill, and the proposal that a person who is assessed as a casual employee at the time an employment offer is made would only be able to convert to part-time or full-time employment after 12 months, is not consistent with common law principles regarding the dynamic nature of employment contracts. These principles were articulated by Bromberg J in *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 (*"WorkPac"*) at paragraphs 90 to 92:

> 90. One of the key features of employment contracts is that they tend to be fluid and evolving. That feature is not necessarily unique to employment contracts but is a feature of contracts which govern an on-going relationship. It is useful, I think, to keep in mind Lord Hoffman's observation in *Carmichael* (at 2050) that agreements by which people are engaged to work are typically partly written, partly oral and "partly left to evolve by conduct" as time goes on.
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> 91. As McHugh JA (with Hope and Mahoney JJA in agreement) said in an often cited passage from *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110 at 11,118:
>
> > in an ongoing relationship, it is not always easy to point to the precise moment when the legal criteria of a contract have been fulfilled. Agreements concerning terms and conditions which might be too uncertain or too illusory to enforce at a particular time in the relationship may by reason of the parties' subsequent

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> conduct become sufficiently specific to give rise to legal rights and duties. In any dynamic commercial relationship new terms will be added or will supersede older terms. It is necessary therefore to look at the whole relationship and not only at what was said and done when the relationship was first formed.
>
> 92. In the dynamic and fluid environment of a contract of employment, the subsequent actions of the parties may impliedly vary or amend the contract such that the true agreement between the parties is no longer reflected by the written contact…
>
> …
>
> As Allsop CJ, Rares and McKerracher JJ recognised in *Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3)* [2017] FCAFC 102 at [64], by reference to the judgment of Gleeson CJ, Gaudron and Gummow JJ in in *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312; 103 IR 160 at [18]-[19]:
>
> > [o]ften in employment contracts, the parties, over the course of their relationship will add or vary the original terms, including, as occurs routinely, by changing the remuneration payable to the employee. In general, the relationship will evolve harmoniously by introducing such changes into a contract as variations or additions to the terms of the original contract.

The Law Society is concerned that the definition of casual employee proposed in the Bill may be open to manipulation by employers, as it only requires that an assessment be performed at a single point in time when the offer of employment is made, and this assessment may not reflect the nature of the work subsequently performed by the employee. We suggest the Bill be amended to address these concerns, and to better reflect the understanding of the fluid and evolving nature of employment contracts outlined by Bromberg J in *WorkPac*.

Clauses 19 and 20: Proposed sections 117(4) and 119(3)

The Law Society does not support proposed ss 117(4) and 119(3), which would exclude a period of casual employment from the calculation of notice or redundancy pay. Presently, prior casual employment is counted towards this calculation. Therefore, this change would effectively reduce existing rights of employees.

Consequences for making a sham casual employment offer

The Law Society suggests that a provision be included in the Bill allowing for civil remedy penalties to be applied in cases of sham offers of casual employment, to prevent employers from making a sham offer to avoid permanent employment entitlements for 12 months. This could be achieved by amending existing s 357 of the *Fair Work Act 2009* (Cth) ("Fair Work Act") to include misrepresenting an offer of full or part time employment as an offer of casual employment.

Retrospective operation of provisions related to casual employees' entitlements

Schedule 7 provides that the Bill applies to entitlements of casual employees that accrued before, on or after commencement of the amendments in the Bill. As some of the changes may reduce the entitlements of employees, retrospective application may not be appropriate.

Schedule 2 – Modern Awards

Clause 8: Flexible work directions

The Law Society suggests the provisions in the Bill relating to flexible work directions be amended to narrow the eligibility of an employer to issue such directions, and the potential duration of the directions. Proposed s 789GZG provides that:

> An employer of an employee may give a direction (a flexible work duties direction) to the employee to perform any duties during a period that are within the employee's skill and competency if:
>
> (a) those duties are safe, having regard to (without limitation) the nature and spread of COVID-19; and
>
> (b) in a case where the employee was required to have a licence or qualification in order to perform those duties—the employee had the licence or qualification; and
>
> (c) those duties are reasonably within the scope of the employer's business operations.

Proposed s 789GZH provides that:

> An employer of an employee may give a direction (a flexible work location direction) to the employee to perform duties during a period at a place that is different from the employee's normal place of work, including the employee's home, if:
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> (a) the place is suitable for the employee's duties; and
>
> (b) if the place is not the employee's home—the place does not require the employee to travel a distance that is unreasonable in all the circumstances, including the circumstances surrounding the COVID-19 pandemic; and
>
> (c) the performance of the employee's duties at the place is:
>
> (i) safe, having regard to (without limitation) the nature and spread of COVID-19; and
>
> (ii) reasonably within the scope of the employer's business operations.

Proposed s 789GZI provides that:

> (1) A flexible work direction given by an employer to an employee of the employer continues in effect until:
>
> (a) it is withdrawn or revoked by the employer; or
>
> (b) it is replaced by a new flexible work direction given by the employer to the employee.
>
> (2) Subsection (1) has effect subject to any order made by the FWC in relation to the flexible work direction.
>
> (3) A flexible work direction ceases to have effect at the start of the day after the end of the period of 2 years beginning on the day this section commences.

These provisions have the potential for significant impact, as they permit an employer to direct an employee to perform duties they were not engaged to perform at a location they were not engaged to work from for up to two years. Although there is a requirement at s 789GZJ that the flexible work direction be reasonable in the circumstances, and at s 789GZK that the direction be a "necessary part of a reasonable strategy to assist in the revival of the employer's enterprise", these sections are open to broad interpretation. We suggest that – given the potential impact of these provisions – amendments be made to the Bill to ensure that the scope and duration of flexible work directions are directly linked to changes arising from the enterprise's operations due to COVID-19. We also suggest that any dispute about flexible work directions should be open to arbitration before the Fair Work Commission ("FWC"), as is the case in the current JobKeeper framework.

Schedule 3 – Enterprise Agreements

Clause 8: Pre-approval requirements

Schedule 3, Cl 8 in the Bill would repeal current ss 180(2) and 180(3) in the Fair Work Act, which contain the requirements an employer must comply with before requesting that employees vote to approve a proposed enterprise agreement. The Bill would insert new ss 180(2) and 180(3), which are less prescriptive, and require an employer to take reasonable steps to ensure that relevant employees are given a "fair and reasonable opportunity to decide whether or not to approve the proposed agreement". Proposed s 180(3) sets out some examples of "reasonable steps", without limiting proposed s 180(2). The Law Society is of the

view that insufficient justification has been provided for repealing and replacing the pre-approval requirements that are currently in the Fair Work Act. It is important that employees are properly informed as to the terms of the agreements they are making and there are appropriate protections in place to enable employees to vote.

Clause 54: How the FWC may inform itself

Proposed s 254AA(2)(c)(iv) in the Bill would have the effect of preventing the FWC from receiving submissions, evidence or information provided by a union that is not a bargaining representative for the enterprise agreement under consideration, unless the FWC is satisfied there are exceptional circumstances. In certain instances, a union with coverage of and insight into an industry will not be a bargaining representative for the enterprise agreement, for example when the enterprise agreement covers small groups of employees, none of whom are union members. We suggest this provision be reconsidered, given unions commonly have significant technical understanding of an industry and can provide relevant information. Preventing the FWC from considering such submissions may prolong its consideration of an application unnecessarily and lead to further litigation.

Clause 62: Exemption to transfer of business

Schedule 3, Cl 62 of the Bill proposes the insertion of s 311(1A) into the Fair Work Act, which would provide as follows.

> (1A) However, there is not a transfer of business if:
>
> (a) the new employer is an associated entity of the old employer when the employee becomes employed by the new employer; and
>
> (b) before the termination of the employee's employment with the old employer, the employee sought to become employed by the new employer at the employee's initiative.

The Explanatory Memorandum accompanying the Bill notes that this proposed amendment:

> will limit rights in work in circumstances where the new employer's industrial instrument has terms and conditions that are less favourable than the old employer's instrument. Conversely, rights in work will be promoted where the new employer's industrial instrument has terms that are more favourable than the old employer's instrument.[1]

Due to the potential limitation on an employee's rights, the Law Society is of the view that the exemption at proposed s 311(1A) of the Bill should not apply simply because an employee sought to become employed by the new employer. Instead, the exemption should be narrowed so as to only cover circumstances where: the employee seeks employment with the new employer and the new employer recognises prior continuous service with the old employer; the old employer pays the employee all entitlements otherwise arising in the circumstance of redundancy; and/or the new employer's industrial instrument has terms that are more favourable than the old employer's instrument.

Clause 66: Sunsetting of enterprise agreements made during the bridging period

The provisions at Division 5 of the Bill would sunset (by 1 July 2022) agreements approved during the 'bridging period' prior to the commencement of the system of modern awards. While the fact sheet accompanying the Bill states that these amendments to end so-called 'zombie agreements' "will put an end to employees receiving rates and allowances below the relevant

[1] Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, cx.

modern award",[2] we suggest the Bill should contain provision for employees who will be worse off if the agreement is terminated. While this is a rare scenario, it should not be ignored.

Schedule 5 – Compliance and Enforcement

Clause 10: Proposed new sections 548A-548E

The Law Society welcomes the proposal for the Court to have the power to refer small claims proceedings of up to $50,000 to the FWC for conciliation, and for the FWC to be empowered to deal with a matter in dispute in small claims proceedings by arbitration. These powers provide a practical and relatively inexpensive way for employees to swiftly recover small underpayments.

The FWC processes for unfair dismissal claims are a useful guide to the effectiveness of conciliation as a means of resolving employment-based litigation. The FWC's Annual Report 2018-19 identifies that:

- 78% of matters were resolved by way of staff conducted conciliations; and
- the average period to conclude conciliations was 32 days.[3]

If such processes were made available for small claims proceedings, and appropriately resourced, there is no reason similar timeframes and results could not be achieved.

The right to representation in the FWC

The Explanatory Memorandum accompanying the Bill states that the new provisions which would empower the FWC to conciliate small claims proceedings "do not affect existing restrictions on representation by lawyers and paid agents in matters before the FWC in section 596 [of the Fair Work Act]". The Law Society's longstanding position is that s 596 of the Fair Work Act, which requires a person to seek leave to be represented by a lawyer or paid agent in a matter before the FWC, should be repealed. We suggest this should occur during the current industrial relations reform process, to provide parties appearing before the FWC in all matters, including small claims proceedings, with an automatic right to legal representation.

The Law Society's experience is that, rather than acting as an impediment to the swift and efficient resolution of employment related claims, legal representation allows for the prompt identification of the relevant facts and legal questions to be determined, which supports the proper administration of justice. Self-represented parties often arrive underprepared and overwhelmed. This can result in delays in pre-trial procedures, increased time spent at hearing discussing irrelevant matters, a greater number of adjournments, and difficulties in advancing settlement discussions. For these reasons, the Law Society does not agree that lawyers should be excluded from proceedings before the FWC or have their involvement limited.

Should you have any questions or require further information, please contact Andrew Small, Policy Lawyer, on (02) 9926 0252.

Yours sincerely,

Juliana Warner
President

[2] Australian Government Attorney-General's Department, 'Proposed reforms to enterprise bargaining' (December 2020), 2.
[3] Fair Work Commission, Annual Report 2018-19 <https://wwvv.transparency.gov.au/annual-reports/fairwork-commissiontreporting-year/2018-2019-11>.