Memo

To: Dr Jacoba Brasch QC, President, Law Council of Australia

From: Tania Wolff, President, Law Institute of Victoria

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

Date: 29 January 2021

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1. Introduction

The Law Institute of Victoria ('**LIV**') welcomes the opportunity to provide a response to the Law Council of Australia's ('**LCA**') memorandum seeking comment on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 ('the **Bill**'). These comments are informed by members of the LIV Workplace Relations Section, whose constituents represent employer and/or employee clients in legal practice depending upon each practitioner.

The LIV understands that the Bill has attracted divisive and distinct views. As a result, the LIV has sought to express both employer and employee-based views in response to four of the five proposed reform areas (save for greenfield agreements) to reflect the diverse practices of its practitioners.

2. Casual employment

New definition of 'casual employment'

Employee views

There is concern that the focus on the "initial engagement" rather than a retrospective consideration of the totality of the employment relationship may adversely affect some casual employees. This is because the status of an employee's engagement can vary over time into something more permanent, and this may occur unintentionally. Simply put,

a casual employee may be left 'leave-deprived' and 'permanently insecure' even where that employee is working a regular and systematic pattern of hours[1].

It is acknowledged that the success of the conversion right, will determine whether the above concerns can be appropriately addressed. Whilst the conversion principles are generally welcomed, there is still a need for an employee to challenge any employer justification to refuse conversion on reasonable business grounds.

Employer views

The new definition of casual employment is a welcome clarification to the current uncertainty that exists. There are also other positive elements of the legislative change as set out below.

Firstly, by narrowing the assessment of whether an employee is casual to the circumstances that exist upon commencement significantly simplify the approach.

The definition effectively removes the risk and financial uncertainty that would otherwise exist and in doing so provides employers with confidence to engage employees and assist to reinvigorate the economy.

Secondly, it also narrows the factors a Court can consider in assessing whether a person is a casual employee.

Thirdly, the provision is capable of adequately dealing with changes to labour and an individual's working arrangement without penalising an employer.

Fourthly, it is arguable that the statutory casual conversion mechanism, and requirement for employers to issue a 'Casual Employment Information Statement' as provided in the Bill, will largely alleviate the above employee concerns.

Statutory casual conversion mechanism

Employee views

The statutory casual conversion mechanism is generally praised for providing greater protection for casual employees who have been employed for at least 12 months. There is benefit in imposing a statutory obligation to ensure that the conversion right applies to

[1] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (Cth) s.15A(3).

all casual employees, irrespective of the applicable employment instrument[2]. Another notable benefit is that a casual conversion employee cannot be converted to a fixed term contract[3]. This could essentially put an end to employers using fixed-term contracts as a means of prolonging insecure employment, and fixed-term contracts being used to fend off unfair dismissal claims. It may also be easier to satisfy the requirement that at least 6 months of the 12-month period (rather than most of the 12-month period) consisted of a regular pattern of work on an ongoing basis[4]. (the test for access to unfair dismissal is different to this assessment)

Some issues are flagged though, in relation to the application of the conversion right.

Firstly, the Bill provides that an employer is not required to make an offer of casual conversion on several 'reasonable grounds', including where 'the hours of work which are required to be performed will be significantly reduced in that period[5]'. It is unclear how this 'expectation' will be reasonably tested. Some LIV members have questioned whether it will permit unreasonable and unfounded predictions, and what recourse a casual employee will have to rebut these assertions. For example, an employer may reject a request to convert on the basis that the business is expected to suffer a downturn because of the ongoing impacts of COVID-19, or under the premise that the workplace may undergo 'restructuring'. However, it later becomes clear that the employer's assertion was false, yet the request to convert remains rejected.

Secondly, some LIV members are concerned that the conversion right is weakened by an inability to force an employer to arbitrate. If the parties are unable to resolve a dispute about a rejected casual conversion request, then it can be referred to the Fair Work Commission ('**FWC**'). However, if the parties are unable to resolve the matter through mediation or conciliation and seek a binding decision, both parties must agree to refer the matter to arbitration[6]. In practice, this may allow an employer to refuse a request for casual conversion, including a refusal made on unreasonable grounds, knowing that it cannot be conclusively settled by arbitration.

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[2] Explanatory Memorandum, Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 (Cth), viii- ix.
[3] Ibid, [at 21].
[4] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (Cth) s. 66B(1)(b).
[5] Ibid s. 66C(2).
[6] Ibid, 66M(4).

Employer views

From an employer perspective, the statutory conversion right can provide a useful mechanism for reviewing the use of casuals, to ensure that their working pattern reflects the arrangement initially agreed to the employment contract. The uniform approach of a casual review at 12 months, and keeping records of employees' responses, can help reduce the risk of a casual misclassification claim.

Some LIV members comment that the statutory conversion right is unlikely to result in an increased number of casual employees requesting to be converted to part time/full time employment or indeed accepting an employer's offer to convert. This is expected to be largely because of the 25% differential in wages and additional superannuation payments. Some employees view the effect of conversion as a pay cut. It is noted that the conversion right already exists under most modern awards as such it is a familiar concept for most employers to manage.

Prevention of double-dipping

Employee views

Generally, LIV members who represent employees do not object to the prevention of double-dipping. It is noted however, that it does not address the issue of the casual loading rate being 'lumped' in employee's contract of employment and payslip. This is particularly problematic for low-paid casual workers. A 2017 study found that on average, low-paid and leave-deprived casual workers are paid less compared to their equivalent permanent counterparts[7].

Whilst the Fair Work Regulations provides that any loading must be separately identifiable on a payslip[8], the Fair Work Ombudsman's website currently states: "a note could be included on a pay slip that the hourly rate incorporates the relevant casual loading[9]". It is recommended that the Bill take this as an opportunity to clarify a need to separately identify the casual loading on an employment contract and payslip. This would assist casual employees to more easily determine whether they have been

[7] Inga Lass and Mark Wooden, 'The Structure of the Wage Gap for Temporary Workers: Evidence from Australian Panel Data' (Discussion Paper No. 10670, Institute of Labor Economics (IZA), March 2017) 11.
[8] *Fair Work Regulations 2009* (Cth), Regulation 3.46(1)(g).
[9] Fair Work Ombudsman, 'Pay slips' (Webpage, accessed 28 January 2021) <https://www.fairwork.gov.au/pay/pay-slips-and-record-keeping/pay-slips>.

potentially underpaid, and whether casual employment remains an attractive alternative to permanent employment.

Employer views

The rectification of the double dipping issue is strongly supported. From an employer perspective, where a misclassified casual employee could keep the 25% casual loading and benefit from other entitlements that apply to permanent employment (for example annual leave), this can lead to an unfair financial disadvantage, particularly for small business employers, unjust enrichment arguments and unnecessary disharmony in the workplace arising from inequity arguments. The Bill attempts to correct this issue by requiring Courts to take casual loading into account[10], to reduce the value of entitlements found owing to casual employees who are later found to be permanent.

3. Modern awards

Flexible part-time employment

Employee views

From an employee-perspective, the ability to 'flex-up' part-time hours without a requirement to pay overtime up to 38 hours[11], has the potential to disadvantage certain employee for several reasons.

Firstly, the loss of overtime pay for work performed beyond regular contracted part-time hours, is viewed as a loss of potential earnings. There is the potential for an immediate impact to those employees particularly in lower paid sectors who would have been overtime and upon the introduction of this legislation will no longer be paid the additional amount.

Secondly, additional hours paid at normal rate may also impair that employee's ability to 'top up' their wages by undertaking higher paid work elsewhere, for example through a second casual employment job.

[10] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (Cth) s. 545A.
[11] Ibid, s. 168M.

Thirdly, although the legislation states that the legislation cannot 'require' an employee to enter a part-time flexible arrangement, this is still likely to occur due to inherent power imbalance between an employer and employee.

Fourthly, there is a concern that employees may be engaged on the minimum number of hours to maximise the flexibility. In effect it would reduce the guaranteed hours and then create insecure work by using them to work additional hours as they would a casual employee absent the casual loading.

Employer views

The concept of flexible part-time employment can potentially offer a huge benefit to employers.

Firstly, it is viewed as a win/win proposal, where part-time employees may be given an opportunity to work extra hours and employers may be afforded some financial relief in doing so. Moreover, it is envisioned that the flexible part-time arrangement will boost economic growth within the hospitality and retail sectors, which have been significantly impacted by the COVID-19 pandemic.

Secondly, it is argued that in the part-time employee suffers no loss of earnings, as the part-time employee will still be earning their ordinary pay – just not an overtime amount, unless they work above 38 hours or outside the span of ordinary hours. At present, part-time employees are entitled to an overtime rate for work done outside of their contracted hours, and also outside the span of 'working hours'. A potential middle-ground position is for all additional hours worked above contracted part-time hours to attract an additional loading (perhaps equivalent to the casual loading of 25%) or that the overtime rate only applies to hours worked in excess of 30 hours.

Thirdly, if the President of the FWC agrees to offer loaded rates in the 12 modern awards covering retail, food, and accommodation, this may ease concerns that flexible part-time arrangements will result in a loss of potential earnings but ultimately it does depend on the approach adopted by the FWC. Some LIV members have commented that the FWC should consider applying loaded rates across all industries, as this would overcome award complexities, relieve administrative burden, and avoid inconsistency across sectors.

Flexible work directions

Employee views

Regarding the flexible work directions introduced under Part 6-4D of the Bill, an employer is permitted to vary a workers' duties and location for two years (an allowance brought in with the JobKeeper subsidies) in the retail, accommodation, and food awards. This is intended to replicate and continue the flexibility made available to employers during COVID-19 under certain modern awards and the JobKeeper scheme.

From an employee-perspective, this could stall the career progression of certain employees, and could potentially be misused by employers to excuse unreasonable work directions. As a result, some LIV members have questioned whether additional safeguards can be considered, and whether there is value in strengthening access to the provisions only on the basis of demonstrable COVID related impacts.

Employer views

The flexible work directions can afford employers in 'distressed' industries greater flexibility to re-structure their business to accommodate a variance of workflow caused by COVID-19. In turn, this may potentially save struggling businesses from closing all together. It is also arguable that the flexible work directions are only intended to apply to the extent that they are necessary; they do not expressly permit a reduction in working hours nor permit a reduction in the employees' base rate of pay.

4. Enterprise agreements

Changes to the 'Better Off Overall Test' ('BOOT')

Employee views

There is a strong concern that the proposed BOOT changes may result in significant pay cuts for some workers covered by enterprise agreements. The proposed change is viewed as effectively suspending the BOOT for two years, and it raises questions as to whether this is justified in a COVID-normal Australia. Instead of scrapping the BOOT, some LIV members suggest that the Bill should include a general disputes provision, so

that the FWC can assist in the negotiation process of enterprise agreements in a conciliatory manner. This may enhance the bargaining power of employees.

Employer views

There is a general view that the enterprise agreement process has become too complex, the employer community has generally moved away from the concept and in turn this has an unintended effect of halting the potential for wage increases and in turn has negative effects on the economy.

Simplifying the process is to be commended. Some LIV members question whether the proposed changes go far enough, and comment that it is time to axe the BOOT entirely. For those in favour of removing the BOOT, it has been suggested that it be replaced with a 'no disadvantage' test. The focus here is to ensure that the FWC in assessing agreements applies a truly global approach rather than a line-by-line comparison to the underpinning award provisions.

For those in favour of keeping a BOOT, it has been suggested that the BOOT be removed when a union is involved. This would however potentially undermine employees where there is no representation available to them.

Procedural changes to enterprise bargaining

Employee views

It is anticipated that the proposed 21-day time limit to approve certain applications[12] will be difficult to comply with. Some LIV members have commented that it is completely unrealistic. It is questioned how this will be done in a way that does not compromise the opportunity for real assessment, and how it will allow employee concerns to be raised and appropriately dealt with.

[12] Ibid, s. 255AA.

Phasing out of legacy agreements

Employee views

Legacy agreements, otherwise known as pre-modern award or 'zombie' agreements, are viewed as particularly harmful to employee interests where they often do not meet award standards. The continuation of legacy agreements is often viewed as a strategic ploy from employers to keep staff costs low, and to boost profits. Therefore, the phasing out of legacy agreements is seen as a massive win for employees.

Employer views

Some LIV members are concerned that the removal of zombie agreements may have unanticipated adverse consequences on some sectors. For example, some LIV members report that the costs associated with the Australian horticultural sector are deemed problematic, and that this is compounded by the lack of overseas labour linked to the COVID-19 pandemic.

5. Compliance and enforcement

Potential constitutional challenge

Employee views

It is understood that the federal government intends to introduce laws to criminalise wage theft, which may result in a constitutional challenge. If this occurs, employers may be hesitant to self-report underpayments where they must deal with both state and federal agencies. Moreover, there is a missed opportunity in that the Bill does not mandate employers to report underpayments to the Fair Work Ombudsman.

Employer views

Noting that certain states have already legislated the criminalisation of wage theft, with the possibility of a constitutional challenge, there is concern that employers will be left to decipher and interpret duplicative penalty regimes at both the state and federal level.

Effectiveness

Employee views

Some LIV members have expressed concern that the evidentiary threshold for serious wage theft (the requirement to prove dishonest conduct) may have been set too high to be effective. As a result, it is unclear whether this will result in an increased number of prosecutions against large companies.

In terms of simplification the recovery of underpayments, it has been recommended that the Bill consider establishing a centralised triage system for all wage related matters. It is noted that the initial application to the Federal Circuit Court is limited to underpayments (and not for all wage related matters) and still requires an element of sophistication which may well be lacking for most applicants.

Employer views

Instead of adopting a solely punitive approach, some LIV members comment that it may be preferable to focus on an educative-based response (i.e., commencing when the entity is established with the Australian Securities and Investments Commission). By working collaboratively with employers to simplify the underpayment process, this may help to tackle the complexity of the modern award system in a more productive and substantive way. The general view is that there is more work to be done, to simplify employment conditions and payments to achieve compliance. Furthermore, it is commented the use of payroll compliance programs as mooted should not be necessary nor imposed on employers.

6. Conclusion

If you would like to discuss the matters raised in this submission further, please contact Michelle Luarte, Policy Lawyer for the Workplace Relations Section of the Law Institute of Victoria at MLuarte@liv.asn.au or on (03) 9607 9413.

Yours sincerely,

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