Law Council
OF AUSTRALIA

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

Senate Education and Employment Legislation Committee

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- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council is grateful for the contributions of its Equal Opportunity Committee, the Industrial Law Committee of the Law Council's Federal Dispute Resolution Section, and the Law Society of New South Wales in the preparation of this submission.

Introduction

1. The Law Council is grateful for the opportunity to provide a submission to the Senate Education and Employment Legislation Committee (the **Committee**) inquiry into the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (the **Bill**).

2. The Law Council's submission is focused on Schedule 1 to the Bill, which primarily amends the *Fair Work Act 2009* (Cth) (the **FW Act**).

Part 1—Casual employment

3. Part 1 of Schedule 1 to the Bill proposes to replace the existing definition of 'casual employee' and introduce a new pathway for eligible employees to change to permanent employment.

4. The Bill also proposes to move the definition of casual employment closer to what the Federal Court had determined to be the meaning before the High Court decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23 (and the prior legislative change to section 15A of the FW Act). The main change is that it would not allow for an employee to be considered a casual merely because the contract says they are—indeed it makes it a civil penalty to mischaracterise the work status of an employee.[1]

5. The Bill addresses the common complaint of businesses in relation to the common law approach: namely, that someone who was legitimately employed from the outset as a casual could successfully claim they had over time become a permanent employee due to changes in the work relationship. The Bill does this by making clear that, if an employee is originally and legitimately employed as a casual then thereafter, they remain a casual unless they either make a successful application to convert to permanent employment or, having failed in their request, they make a successful application to the FWC to become permanent.[2]

6. The proposed definition of 'casual employee' focuses on the whole relationship between the parties, rather than merely the terms of the agreement or employment contract between them. Under proposed subsection 15A(1), an employee will be considered a 'casual employee' if:

    - the arrangement is characterised by an absence of a 'firm advance commitment to continuing and indefinite work'; and

    - the employee is entitled to casual loading or a specific rate of pay applicable to casual employees under a fair work instrument or employment contract.

7. The question of whether there is an absence of a 'firm advance commitment to continuing and indefinite work' is to be determined by considering factors including a mutual understanding or expectation between the employer and employee, the employee's ability to accept or reject work, the availability of ongoing work, whether there are full-time employees or part-time employees performing the same kind of work in the enterprise, and whether there is a regular pattern of work.[3]

[1] Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) s 359A-359C ('Closing Loopholes Bill').
[2] Ibid. See proposed new div 4A subdiv B 'Employee choice about casual employment'.
[3] Ibid s 15A(2)(c).

8. While the Law Council does not object to this approach in principle, it may be difficult in practice for an employer to apply as there may be greater uncertainty around the status of particular employees, thereby increasing the risk of disputes.

9. One opportunity for creating greater certainty is to clarify the meaning of 'same kind of work' in proposed paragraph 15A(2)(iii). In many cases, casual employees supplement the work performed by a permanent workforce. In these cases, there may be uncertainty as to whether other permanent employees are performing the 'same kind of work' as the casual employee, and as to whether the mere existence of permanent work in the business suggests that a particular worker is considered permanent.

10. The Bill would give the Fair Work Commission (the **FWC**) a power to deal by arbitration with a dispute concerning a change of an employee's employment status from casual to permanent.[4] Proposed subsection 66M(10) deals with representation in respect of that dispute. It states:

> *Representatives*
>
> *(10) The employer or employee may appoint a person, or an employer organisation or employee organisation, that is entitled to represent the industrial interests of the employer or employee to provide the employer or employee (as the case may be) with support or representation for the purposes of:*
>
> *(a) resolving the dispute;*
>
> *(b) the FWC dealing with the dispute.*
>
> *Note: A person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC (see section 596).*

11. Proposed subsection 66M(10) does not give an employer or an employee the right to be represented by their choice of lawyer. As the legislative note identifies, parties can only be represented by a lawyer with the permission of the FWC.[5] The Law Council has long identified that the FW Act is deficient in not allowing parties to be represented by a lawyer as of right. The Law Council's recommendation of automatic right to be legally represented in the FWC is discussed further at paragraphs [57] to [58] below.

Part 6—Closing the labour hire loophole

12. Part 6 of Schedule 1 to the Bill will insert Part 2-7A into the FW Act, enabling the FWC to make 'regulated labour hire arrangement orders'. These would require labour hire providers to pay their employees no less than what they would be entitled to be paid under the host business's enterprise agreement (or other employment instrument) if the employee were directly employed by the host business.

13. The Law Council supports, in principle, measures to prevent workers being intentionally disadvantaged through the inappropriate use of labour hire arrangements. However, the provisions in Part 6 of the Bill are highly complex and it is likely that many employers will be unable to implement them without significant

[4] Ibid s 66MA.
[5] *Fair Work Act 2009* (Cth) s 596 ('FW Act').

administrative assistance (noting there is an exclusion for small business employers as defined in the FW Act).

14. The Law Council raises the following issues for consideration in relation to proposed section 306E, which establishes that the FWC may make a regulated labour hire arrangement order:

    (a) Proposed subsection 306E(2) states:

    Despite subsection (1), the FWC must not make the order if the FWC is satisfied that it is not fair and reasonable in all the circumstances to do so, having regard to any matters in subsection (8) in relation to which submissions have been made.

    This provision is written in a double negative and is unclear. A public interest test may be clearer and has case law to support the relevant considerations.

    (b) As a result of proposed subsection 306(3), the section has very broad application and may pick up arrangements not intended to be covered.

    (c) Proposed subsection 306(4) is presumably intended to pick up the fact that an agreement may not cover certain types of employment (for example, casual employees). However, this provision could result in significant uncertainty if the covered employee agreement does not cover the type of employment of the employee, as it will not be clear on what basis the employee should be paid.

    (d) Proposed paragraph 306E(7)(b) provides that an employee of the regulated host will have standing. However, such an employee may have no interest in the application—in fact, they may not be covered by the host employment instrument. The same issue applies to an employee organisation that is entitled to represent the industrial instruments of an employee of a regulated host.

    (e) Proposed subsection 306E(7) does not enable an employer itself, to make an application for a regulated labour hire arrangement order. The Law Council notes that an employer may wish to clarify their obligations regarding a proposed or existing arrangement and should be entitled to do so by being able to make such an application.

    (f) Proposed subsection 306E(8) sets out factors that the FWC must consider before making a regulated labour hire arrangement order. These include being satisfied that it is fair and reasonable to do so, having regard to considerations which include whether the performance of the work is, or will be, wholly or principally for the provision of a service, rather than the supply of labour. A number of factors will be used to determine this question, including the employer's involvement in the performance of the work and the extent to which the employer 'directs, supervises or controls' the employee, the extent to which the employee uses the employer's systems, plant or structures, whether the work is subject to industry or professional standards or is work of a specialist or expert nature, and whether the host enterprise agreement applies to other employees.

    Examples of arrangements traditionally considered to be service contracts, but which may be caught by Part 2-7A if the employer has a degree of day-to-day control or supervision over the employee, include service contracts for

professional services.[6] Secondment arrangements may also be caught by the provisions. Additionally, there is no exclusion for wet hire, owner/operator and other similar arrangements not typically considered labour hire. The question as to whether these types of arrangements are affected by the provisions as drafted will turn on the facts of each case and, as a result, may be a source of disputes and contested litigation. The Law Council suggests clarifying the types of arrangements that are intended to be affected by the reforms.

15. Proposed section 306F of the Bill provides for the 'protected rate of pay' payable to employees if a regulated labour hire arrangement order is in force. In proposed subsection 306F(4), 'protected rate of pay' is defined by reference to the 'full rate of pay' that would be payable to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee. However, 'full rate of pay' is not defined and it is unclear whether it is intended to include the base rate only, or (as is likely intended) overtime, penalties and allowances as well. Additional clarity in this regard would be beneficial.

16. The Law Council has also received input querying the effect that the Bill will have on the primacy of an employer's enterprise agreement where there is a term in the host employer's enterprise agreement dealing with the same issue. While this is something the FWC can take into account, the Law Council suggests that further clarity be provided as to what will actually apply to the employer in practice.

Part 7—Workplace delegates' rights

17. Part 7 of Schedule 1 proposes new statutory workplace rights, expressed at the level of principles, for workplace delegates.

18. The protection at proposed sections 350A and 350 are conditioned by the words 'subsection (1) applies only in relation to the workplace delegate acting in that capacity'.[7] Whilst the condition makes theoretical sense, it may be unworkable in practice. As examples, it gives rise to questions including:

    - How is the capacity that an employee was acting in to be determined by the court?

    - Can an employer recharacterise the conduct of an employee as being in the employment capacity rather than the delegate capacity as effectively occurred in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41?

19. Proposed subsection 350C(1) states that a 'workplace delegate' is a person 'appointed or elected, in accordance with the rules of an employee organisation'. This provision may be too strict. For example, it would be a problem where a union doesn't have rules about appointing or electing delegates (as is understood to be the case for some unions). This strictness could also be a problem where the rules are not closely complied with, and a substantial compliance argument arises (such as occurred in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 or *Ramsay v Menso* [2018] FCAFC 55).

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[6] Professor Andrew Stewart, 'The new workplace ground rules' (Speech, Minerals Week Conference, 6 September 2023) cited in: David Marin-Guzman, 'Labour hire laws could extend to lawyers, accountants and IT staff', *Australian Financial Review* (online, 7 September 2023); and Paul Karp, 'Labor's "same job, same pay" bill contains "major flaw", leading expert says', *The Guardian* (online, 6 September 2023).

[7] Closing Loopholes Bill, ss 350A(2) and 350B(2).

20. Proposed subsection 350C(2) creates an entitlement for workplace delegates to represent the industrial interests of members (and persons entitled to be members) of an employee organisation in disputes with their employers. Proposed subsection 350C(3) entitles workplace delegates to reasonable communication and access to workplaces and workplace facilities, as well as reasonable access to paid time during normal working hours, for related training. It will then be up to modern awards and enterprise agreements to set out specific requirements for particular industries or workplaces in more detail.

21. Under proposed subsection 350C(3), the new rights extend to what is 'reasonable'. In determining what is reasonable for that purpose, regard must be had to the size and nature of the enterprise, resources of the employer and the facilities available (proposed subsection 350C(5)). Consideration could be given to providing guidance on what would be considered reasonable. For example, in the context of small business employers, the amount of leave to be provided for the purpose of training relative to an employer's size. Alternatively, the legislation could differentiate or exempt small business employers on the basis that they have limited capacity to support some or all of these activities.

Part 8—Strengthening protections against discrimination

22. Part 8 of Schedule 1 will establish a new protected attribute in the FW Act to improve workplace protections against discrimination for employees who have been, or continue to be, subjected to family and domestic violence. The Law Council strongly supports this reform.

23. However, the Law Council notes that the definition of domestic and family violence in the FW Act is narrow when compared with other legislation.[8] Subsection 106B(2) of the FW Act states:

> *(2)* ***Family and domestic violence*** *is violent, threatening or other abusive behaviour by a close relative of a person, a member of a person's household, or a current or former intimate partner of a person, that:*
>
> *(a) seeks to coerce or control the person; and*
>
> *(b) causes the person harm or to be fearful.*

24. This narrow definition, for example, may not capture all relationships in which people with disability experience family and domestic violence—including, but not limited to, carer and support worker relationships, disability-based violence, and abuse and violence in supported accommodation settings.[9]

[8] The definition provided in s 106B(2) of the FW Act is largely consistent with the definition in s4AB of the *Family Law Act 1975* (Cth). However, the Disability Royal Commission has recommended this definition be made more inclusive: Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, 29 September 2023) rec 8.24 (see discussion at vol 8, 338-344) ('Disability Royal Commission Report').

[9] See Disability Royal Commission Report, vol 8, 338-344.

25. The Law Council recommends that further work be undertaken by the Australian Government and its state and territory counterparts to ensure that legislative definitions of family and domestic violence (including the definition in the FW Act) are broad, inclusive and, where possible, consistent. This is consistent with Recommendation 8.24 of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**).[10] In this regard, the Law Council has developed a *Model Definition of Family Violence* as a means of beginning discussions towards harmonising the meaning of family violence across the nation.[11]

26. The Law Council notes that the introduction of an entitlement to paid family and domestic violence leave is a related, but relatively recent development.[12] Its practical application, including whether the fear of stigma precludes victims making use of the provisions, and the evidentiary requirements, have not been fully tested. On that basis, the Law Council suggests that the Australian Government closely monitor the operation of both sets of reforms, to ensure a consistent approach is maintained and that they are having their desired effect in practice.

Part 9—Sham arrangements

27. Schedule 1, Part 9 proposes to change the defence to misrepresenting employment as an independent contracting arrangement, known as 'sham contracting', from a test of 'recklessness' to one of 'reasonableness'.

28. While the Law Council does not object to applying an objective test as to what constitutes 'sham contracting', as set out in the proposed amendments, it has identified some difficulties arising from the drafting. These particularly relate to the basis on which a 'reasonable' belief must be determined.

Additional guidance through non-exhaustive list of factors

29. At paragraph [781] of the Explanatory Memorandum (**EM**) it is stated that the intention of these provisions is to implement recommendations for an objective test, and that 'the new defence under subsection 357(2) would enable a court to assess an employer's behaviour according to what the employer reasonably believed' for which the new sub-section 357(3) would provide guidance.

30. Paragraph [778] of the EM states that '[t]he amendments in this schedule would also provide a non-exhaustive list of factors a court must consider when assessing reasonableness under the new defence'. The proposed section, however, does not do this to a sufficient extent.

31. Proposed new subsection 357(3) states:

> *(3) In determining, for the purpose of subsection (2), whether the employer's belief was reasonable:*
>
> *(a) regard must be had to the size and nature of the employer's enterprise; and*
>
> *(b) regard may be had to any other relevant matters.*

[10] Ibid, rec 8.24.
[11] Law Council of Australia, Model Definition of 'Family Violence' (27 November 2021).
[12] *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth).

32. As drafted, subsection 357(3) does not provide the level of guidance suggested at paragraph [784] of the EM:

> *Subsection 357(3) would provide guidance to employers as to the evidence they may seek to rely upon in establishing the new defence to sham contracting and reinforce the expectation that employers should take appropriate steps, commensurate with their experience and the nature of their enterprise, to understand how they are engaging an individual before entering into a contract.*

33. In the Law Council's view, it would be helpful for employers, employees and their representatives to have an indication as to the types of matters that will be given weight by the FWC. This could be achieved by expanding proposed paragraph 375(3)(b) to include a non-exhaustive list of factors as anticipated by the wording of the EM. Helpfully, the EM provides a set of potentially relevant factors which could be included for this purpose. These factors include:

- the employer's skills and experience;
- the industry in which the employer operates;
- how long the employer has been operating;
- the presence or absence of dedicated human resource management specialists or expertise in the employer's enterprise; and
- whether the employer sought legal or other professional advice about the proper classification of the individual, including any advice from an industrial association, and, if so, acted in accordance with that advice.

34. The EM at paragraph [173] also states that 'the employer is best placed to provide evidence about the belief they held when making the "representation"'. Arguably, this is not the case if they do not know the matters that will hold weight.

35. It is also likely that the breadth of '*any* relevant matters' does not provide any better protection for employees affected by sham contracting. The EM at paragraph [781] states that the amendment is intended to correct the ability of employers to evade liability for sham contracting under the current provisions. The current provision has been criticised for being too complex and broad, and this issue will be exacerbated by the proposed drafting.[13]

Scope of 'employer's enterprise'

36. The one mandatory factor to consider in determining reasonable belief is the 'size and nature of the employer's enterprise', as proposed by subsection 357(3). The changed meaning under the Bill of 'employee' and creation of an 'employee-like' category for gig-workers who have been incorrectly classed as independent contractors, make this a complicated basis for an assessment of reasonable belief, and may make subsection 357(2) a difficult onus for employers to discharge. It should also be clear whether an 'enterprise' would include consideration of the 'employee-like' category.

37. Without guidance as to how to apply this test, and given the new 'employee-like' category, there is a risk that many employers genuinely would not know and yet would be found to not have a reasonable belief given these new provisions.

[13] Electrical Trades Union of Australia, Submission 197, cited in Senate Education and Employment References Committee, Parliament of Australia, *Corporate Avoidance of the Fair Work Act* (Final Report, 6 September 2017) [7.16].

Punitive rather than a deterrent

38. The EM at paragraph [781] states that the intention is to create a stronger deterrent for employers from engaging in 'sham contracting'. However, the proposed section 357 may apply more punitively for employers who mistakenly conceive that a contract is an employment contract. There is no connection to intention in the concept of 'reasonable belief', compared with the current use of 'reckless', which imports a sense of culpability.

Part 14—Wage theft

39. Part 14 of Schedule 1 introduces a new criminal offence for wage theft. Criminal sanctions may be effective as a deterrent in very serious cases. Underpayment is inherently a monetary-based malfeasance and may be adequately and appropriately addressed through monetary compensation in the vast majority of cases, particularly where the underpayment was unintentional. Criminal sanctions may, however, have an appropriate deterrent effect in serious cases, where the companies or persons involved are not concerned about compensatory orders or pecuniary penalties, such as in circumstances where they intend to claim insolvency or bankruptcy in the event of penalties being enforced against them and/or because pecuniary penalties will have no substantial impact on profitability. The Law Council does not object to limiting the offence to cases involving intentional conduct.

40. The Law Council provides the following comments to assist in improving the clarity of the proposed provisions under Part 14.

Application of wage theft offence to failure to pay contractual entitlements

41. The new wage theft offence would relevantly apply where an employer is required to pay an amount under 'this Act': proposed subparagraph 327A(1)(a)(i). This would appear to include a situation where an employer is required to pay an amount pursuant to section 323 of the FW Act. Section 323 has been held to require the payment of entitlements (including entitlements to bonus and commission) under, among other things, a contract of employment.[14] Thus, the new offence would appear to apply to a failure to pay contractual entitlements. It is unclear from the EM whether this is intended. The Victorian and Queensland wage theft offences are understood to cover a failure to pay contractual entitlements.[15] However, the criminalisation of a failure to comply with a contract is a significant step, and it would be desirable to clarify whether this is intended.

Jurisdiction of courts

42. Although the explanatory material does not address this issue, it is understood that section 68 of the *Judiciary Act 1903* (Cth) will operate to confer jurisdiction on state and Territory courts in criminal proceedings for the new offence, just as it presently does for other offences contained in the FW Act. This gives rise to a disconformity between the courts on which jurisdiction is conferred to deal with civil underpayment matters (see sections 545 and 546 of the FW Act and the definition of 'eligible State or Territory court' in section 12) and the new wage theft offence. It would be desirable to clarify whether this is intended.

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[14] *Murrihy v Betezy.com.au Pty Ltd* (2013) 238 IR 307, [142]; *Association of Professional Engineers, Scientists and Managers Australia v Wollongong Coal Ltd* [2014] FCA 878, [28]-[36].
[15] See *Wage Theft Act 2020* (Vic) s 3(1) (definition of 'employee entitlement'); *Criminal Code Act 1899* (Qld) s 391(6A)(c)(i).

Limitation periods and continuing offences:

43. Proposed subsection 327C(2) relevantly provides that proceedings for the new wage theft offence may be commenced within six years after the commission of the offence. However, there is a significant body of authority, beginning with *Jones v Lorne Saw Mills Pty Ltd* [1923] VLR 58, which has considered whether a failure to pay an amount gives rise to a continuing offence for as long as the amount remains unpaid, which has the effect of postponing the commencement of the limitation period until the amount is paid. These authorities were recently surveyed in *Joseph v Worthington* [2018] VSCA 102 at [45]–[77].

44. It is unclear whether the new wage theft offence is intended to be such a provision. The offence relevantly applies where an employer 'engages in conduct' (proposed paragraph 327A(1)(c)) and the conduct 'results in a failure to pay the required amount … in full on or before the day when the required amount is due for payment' (proposed paragraph 327A(1)(d)). It is unclear whether a continuing failure to pay *after* 'the day when the required amount is due for payment' is capable of amounting to such conduct. It would be desirable to clarify what is intended.

Referrals, investigations and prosecutions

45. Part 14 proposes a new framework for the making of cooperation agreements between the Fair Work Ombudsman (**FWO**) and a person who has self-reported to the FWO the possible commission of an offence, or at least the physical elements of an offence. This is intended to provide the person with a 'safe harbour' from potential criminal prosecution relating to possible commission of wage theft where they self-report and a cooperation agreement is in place. The Law Council suggests that the proposed wage theft safe harbour provision may be more effective in encouraging self-reporting if the proposed FWO discretion to enter into a cooperation agreement in each case is either removed or defined by clearer parameters.

46. Proposed sections 327B(2) and 717A(1) would prohibit the FWO from referring certain conduct to the Director of Public Prosecutions (**DPP**) or the Australian Federal Police (**AFP**) for action. The former where the FWO is satisfied that a small business employer complied with the Voluntary Small Business Wage Compliance Code, the latter where a cooperation agreement is in force between the FWO and a person. This gives rise to two queries. First, even where the FWO is prohibited from making a referral, there would not appear to be any restriction on another person (such as an employee or union) from making such a referral. Second, even where the FWO is prohibited from making a referral, there would appear to be no restriction on the DPP or the AFP commencing proceedings for a wage theft offence. It would be desirable to clarify whether these matters reflect what is intended.

Role of education

47. The introduction of criminal sanctions should not be seen as the sole means by which underpayment issues can be addressed. While criminal sanctions could play an important deterrent effect, they alone are not going to alter the vast majority of cases of underpayment of wages. Therefore, the Law Council suggests more resources must be directed to enforcing current laws and educating workers to ensure they are aware of their rights and are able to adequately and easily access legal recourses. Additional education is also required to help improve the capability of employers to navigate wage entitlements under the relevant awards and/or enterprise agreements, and to minimise the risk of inadvertent breaches.

Resourcing

48. The Law Council strongly submits that the Australian Government must carefully consider the impact of the introduction of these offences on the resourcing of the agencies with the power to prosecute, and on the resourcing of the courts.

49. Similar consideration is also required in relation to the introduction of a new offence of industrial manslaughter in the *Work Health and Safety Act 2011* (Cth) as set out in Schedule 4 to the Bill.

Part 15—Definition of employment

50. Part 15 of Schedule 1 inserts provisions for determining the ordinary meanings of 'employee' and 'employer' for the purposes of the Act, requiring consideration of the 'real substance, practical reality and true nature of the relationship' by 'reference to the totality of the relationship between the parties'.

51. The Law Council does not object to this return to the 'multi-factorial test', previously applied by courts and tribunals before the High Court's decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (***Personnel Contracting***) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (***Jamsek***). It is also consistent with the provisions in Schedule 1, Part 1, relating to whether an employee is a casual employee, in examining the relationship as a whole, and how the employment agreement is performed, rather than merely the terms of the agreement itself.

52. However, it appears the common law test (as set out by the High Court in *Personnel Contracting* and *Jamsek*) will continue to apply for purposes outside the FW Act, for example in tort-based claims based on vicarious liability, or in the context of payroll tax, workers compensation, or superannuation matters. In these cases, the definition under the Act and the common law definition may be pleaded as alternatives, resulting in further litigation on the point. This would add undesirable complexity to proceedings.

Part 16—Provisions relating to regulated workers

53. Part 16 of Schedule 1 provides certain independent contractors, such as employee-like workers performing digital platform work and workers in the road transport industry, with greater workplace protections, including access to minimum standards, once set by the FWC.

54. As a general comment, the Law Council agrees there is a need to strengthen protections for independent contractors. It is appropriate to limit the reforms concerning digital platform work to workers with low bargaining power, a low level of pay and/or little authority over the performance of the work, leaving others the flexibility to negotiate their terms of work. The Law Council also supports the broad and technologically-neutral approach to defining 'digital labour platform' in proposed section 15L to ensure that it can capture new market structures and forms of work as they emerge. Given that the FWC's jurisdiction to hear these claims is expressed in general terms, it will be appropriate to monitor the operation of Part 16 and review the extent to which jurisdictional disputes arise.

55. In relation to road transport industry workers, the Bill only provides a framework for regulation, with the detail to be contained in regulations and a code, which are yet to be released. The Law Council looks forward to opportunities to comment on these instruments in due course.

56. The significant proportion of Australian workers operating as independent contractors suggests these reforms may result in a substantial increase in FWC claims. In particular, this is likely to include a significant number of unfair deactivation and unfair termination claims made by 'deactivated' gig economy workers. It will be important that the FWC is appropriately resourced in anticipation of being able to effectively deal with this new jurisdiction.

Other matters

The right to representation in the FWC

57. The Law Council's longstanding position is that section 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. The Law Council suggests that this should occur during the current reform process, to provide parties appearing before the FWC in all matters with an automatic right to legal representation.

58. The Law Council'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 Council does not agree that lawyers should be excluded from proceedings before the FWC or have their involvement limited.