THE LAW SOCIETY
OF NEW SOUTH WALES

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Dr James Popple
Chief Executive Officer
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By email: john.farrell@lawcouncil.asn.au

Dear Dr Popple,

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

Thank you for the opportunity to provide input for a possible Law Council submission to the Senate Education and Employment Legislation Committee's inquiry into the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (**Bill**).

The Law Society's Employment Law and Human Rights Committees contributed to this submission.

As a general comment, we largely support the provisions, noting that they are likely to significantly increase the volume of applications made to each of the Fair Work Commission (**FWC**) and Fair Work Ombudsman (**FWO**), with resourcing implications for both. Adequate and sustained funding of these organisations will be required to ensure disputes are heard or investigated and resolved within reasonable timeframes.

Additionally, the Law Society has long advocated for an automatic right to be legally represented in the FWC. This issue is pertinent particularly in the context of the proposed reforms, as legal representation would help to streamline proceedings and support the expansion of the FWC's jurisdiction as a result of the Bill.

We provide our comments below, including in relation to the key issues noted in the Law Council Memorandum dated 15 September 2023.

Schedule 1 Part 1 – Casual employment

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

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. As proposed, an employee will be considered a 'casual employee' if both:

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

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- 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.

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.

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

One opportunity for creating greater certainty is to clarify the meaning of 'same kind of work'. 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.

We have no concerns about the proposed new pathway in Part 2-2 of the *Fair Work Act 2009* (**Act**) to enable an employee to notify the employer if they believe that, under the new definition, they are no longer a casual employee.

Schedule 1 Part 6 – Closing the labour hire loophole

Schedule 1 Part 6 of the Bill will insert Part 2-7A into the Act, enabling the FWC to make 'regulated labour hire arrangement orders' which require labour hire providers to pay an employee no less than what the employee would be entitled to be paid if directly employed by the host.

In principle, we support measures to prevent workers being intentionally disadvantaged through the inappropriate use of labour hire arrangements. However, it is not clear what types of arrangements are intended to be caught by Part 2-7A.

New section 306E 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 maintenance, IT support or domestic cleaning. Secondment arrangements may also be caught by the provisions. 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. We suggest clarifying the types of arrangements that are intended to be affected by the reforms.

We note also that s 306E(7) enables a host, an employee, an employee of the host, or an employee organisation, but not the employer itself, to make an application for a regulated labour hire arrangement order. We suggest 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.

Additionally, it would be helpful to clarify whether an existing regulated labour hire arrangement order passes with a transfer of the employer's business. It is unclear whether this question is addressed by the anti-avoidance provisions in proposed Division 4 of Part 2-7A.

Schedule 1 Part 7 – Workplace delegates' rights

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

We generally support these provisions. We note, however, that the new rights extend to what is 'reasonable' (new s 350C(3)), and, that 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 (new s 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.

Schedule 1, Part 8 – Strengthening protections against discrimination

Part 8 of Schedule 1 will establish a new protected attribute in the Act to improve workplace protections against discrimination for employees who have been, or continue to be, subjected to family and domestic violence.

The Law Society supports aligning the separate Commonwealth anti-discrimination laws, and aligning them with laws implemented at state and territory level, and on that basis we support the proposed amendments.

However, we note that at the Commonwealth level, the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* is a relatively recent development. 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, we suggest monitoring and comparing the operation of both sets of reforms, to ensure a consistent approach is maintained.

Schedule 1, Part 9 – Sham arrangements

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'.

We do not object to applying an objective test as to what constitutes 'sham contracting', as set out in the proposed amendments.

Schedule 1, Part 11 – Penalties for civil remedy provisions

Part 11 of Schedule 1 proposes to increase the maximum penalties for underpayments, by amending the civil penalties and serious contravention frameworks, and adjusting the threshold for what will constitute a serious contravention.

We agree that the general level of penalties for breaches of wage exploitation related provisions in the Act should be increased to be more in line with those applicable in other business regulatory legislation, especially consumer protection legislation. We note these provisions are intended to be supplemented by the common law, including the 'totality' principle, which requires the courts to consider the entirety of the contraventions and determine the most appropriate sentence for all the contraventions taken together.

Schedule 1, Part 14 – Wage theft

Part 14 of Schedule 1 introduces a new criminal offence for wage theft. The Law Society's position is that 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. We do not object to limiting the offence to cases involving intentional conduct.

In our view, criminal penalties should be one aspect of a multi-faceted approach, including civil penalties, and education for employers about their payment obligations. Resources should be directed to enforcing current laws and the education of workers, particularly migrant workers, and in circumstances where the applicable laws are inherently complex. Education is also required to help improve the capability of employers to navigate wage entitlements under relevant modern awards and/or enterprise agreements, and to minimise the risk of inadvertent breaches.

In addition, we note that Part 14 proposes a new framework for the making of cooperation agreements between the 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. We suggest 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.

Schedule 1, Part 15 – Definition of employment

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'.

We do not object to this return to the 'multi-factorial test', previously applied by courts and tribunals before the High Court's decisions in *CFMMEU 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.

We note, however, that it appears the common law test (as set by the High Court in *Personnel Contracting* and *Jamsek*) will continue to apply for purposes outside the 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.

Schedule 1, Part 16 – Provisions relating to regulated workers

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. As a general comment, the Law Society agrees there is a need to strengthen protections for independent contractors.

In our view, 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. We also support the broad and technologically neutral approach to defining 'digital labour platform' in proposed s 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.

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. We look forward to opportunities to comment on these instruments in due course.

The significant proportion of Australian workers operating as independent contractors[1] 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.

Schedule 4 – Amendment of the *Work Health and Safety Act 2011*

We do not object to these provisions introducing a new offence of industrial manslaughter, noting they are consistent with the industrial manslaughter provisions in the model Work Health and Safety Act and model Work Health and Safety Regulations.

Thank you for the opportunity to comment on these issues. Please contact Sue Hunt, Senior Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,

Cassandra Banks
President

[1] 8.3 per cent of the workforce or 1.1 million workers were engaged as independent contractors in 2022: Australian Bureau of Statistics, Characteristics of Employment, August 2022.