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Office of the President

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Mr Michael Tidball
Chief Executive Officer
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By email: [redacted]

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's submission on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020.

This submission outlines some key issues raised by members of the Queensland Law Society's Industrial Law Committee which we consider should be examined by the Senate Committee and ultimately addressed by the Government.

Casual employees

Definition

Schedule 1 of the bill relates to casual employees, who are defined in proposed section 15A as follows:

> (1) A person is a casual employee of an employer if:
>
> (a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and
>
> (b) the person accepts the offer on that basis; and
>
> (c) the person is an employee as a result of that acceptance.

Subsection (2) provides an exhaustive list of factors that can be used to make this assessment.

Subsection (4) limits consideration of whether a person is a casual employee to the offer of employment and acceptance of that offer, and precludes consideration of any subsequent

conduct of either party. This may provide greater certainty where there is a written contract, but could create problems and uncertainty where there is not, in the view of some of our members. Where the contractual arrangements are informal, as is often the case with casual employment, it may be necessary to infer the terms from the manner in which the contract is subsequently performed.[1] The bill should permit consideration of the subsequent conduct of the parties unless the offer was made in writing.

In addition, we would advocate for further consideration of a casual employee's right to refuse a shift (which we support) and whether consideration should be given to creating a right to take unpaid leave (at least for personal leave purposes, with such leave accruing on a pro rata basis).

Recommendation 1:
a. Amend proposed section 15A to allow for consideration of the subsequent performance of the parties unless the offer was made in writing.

Casual conversion

QLS supports increasing rights and obligations of employees and employers in respect of "casual conversion". However, we note that even with the amendments proposed in the bill, there may be difficulty in achieving the desired policy outcomes.

On one view, an employer cannot be forced to employ someone as a full time or part time employee and hence, this bill is limited to imposing an obligation on the employer to make an offer of conversion, unless there is a reasonable basis not to make an offer. Enforcing this obligation may be difficult and any remedy will be left to the Fair Work Commission's (**FWC**) dispute resolution processes.[2]

If no offer is made, and no reasonable basis for not making an offer is put forward by the employer, then there may be pecuniary penalties imposed on the employer for a breach of the National Employment Standards under section 44 of the *Fair Work Act 2009* (Cth) (**Fair Work Act**). However, this breach in itself is not a FWC matter, but rather is actionable (albeit highly speculatively) in the Federal Court or Federal Circuit Court (**FCC**) (unless accompanied by another claim such as a General Protections claim).

Further, the effect of these amendments mean casual conversion provisions in the NES will be different to and potentially conflict with existing provisions. There has been no rationale provided for this difference in the explanatory material. In our view, further consideration should be given to this issue so as to limit uncertainly for both employers and employees.

1. *Clarifying when conversion can be offered or requested*

On our reading of the provisions, it appears that the employer only has a "one time" obligation to offer casual conversion (proposed section 66B(1)) and that once an employee refuses that offer, there is no further obligation on an employer to offer conversion at any time in the future.

In addition, it would appear as though the employer's obligation to make an offer of conversion only arises if, in the first 12 months of employment, the employee works a regular pattern of hours for at least 6 months. As such, if in the first year of employment the employee does not

[1] *Workpac Pty Ltd v Rossato* [2002] FCAFC 84 at 433, 443 (White J).
[2] See below comments on dispute resolution.

work a regular pattern of hours, but in the second or subsequent years they do, the obligation to offer conversion does not apply.

Proposed section 66F does create a resident right for an employee to request conversion. However, this section is unclear. Proposed section 66F(c)(i) seems to disentitle a casual employee from making a request for conversion if they have refused an offer of conversion within the 6 months prior to making the request, but the wording in (c)(ii) and (c)(iii) may create some confusion as to whether a further request can be made at all and should be amended.

In practical terms, this right to request conversion may be somewhat redundant if it accrues at the same time the employer is required to make an offer under proposed sections 66B and 66C(3) (that is 12 months post-employment and six months of regular and systemic). Employees will be disadvantaged without clarity to ensure they are able to make future requests (after the passage of the 6 month period).

For example, an employer may not be required to make an offer initially because, at the end of the first year of employment, the employee has not worked on a regular basis for 6 months. In later years, the situation may change so that the employee's work pattern does become regular. The employer's situation may have also changed that the parties should not be dissuaded from revisiting the issue.

We note that the existing casual conversion provisions in many modern awards do not limit the number of times or circumstances in which an employee may "request" conversion (provided they meet the relevant test in relation to their pattern of work at the time of their request). As such, the new provisions, as drafted, (whilst creating a new obligation on employers to proactively offer casual conversion) could actually limit a casual employee's existing rights to request conversion.

As stated above, the provisions requiring an employer to make an offer of conversion are only triggered after the first 12-month period. In our view consideration should be given to amending proposed section 66B(1)(a) so that the obligation to offer conversion is triggered at further time, or at further times, when for example, the employee has been employed for at least 12 months and has worked the regular pattern of hours for at least 6 months. This would mean the obligation could arise at a time later than the end of the first year of employment. There should be some certainty for the employer in this process.

Proposed section 66G provides that an employer must give the employee a written response to the request within 21 days. The obligation to provide a written response should be enlarged to include an obligation to advise the employee that they must give written notice of acceptance within 21 days, or be deemed to have refused the offer, as this is the effect of section 66D.

Recommendation 2:

a. Amend proposed section 66F(1)(c)(ii) and c(iii) "at any time during the period referred to in paragraph (b)".

b. Amend proposed 66B(1)(a) so that the obligation to offer conversion is triggered at a further time, for example, when the employee has been employed for at least 12 months and has worked the regular pattern of hours for at least 6 months or, so that there is a requirement for an offer to be considered after each 12 month period of employment.

c. Amend proposed section 66G to include an obligation for the employer to advise the employee that the employee must give written notice of acceptance within 21 days or be deemed to have refused the offer.

2. *Dispute resolution*

The bill includes a default procedure for resolving disputes about casual conversion which applies unless there is a procedure for dealing with the dispute under an instrument, contract or other written agreement (proposed section 66M). The default procedure does not allow arbitration by the FWC except by consent of both parties. By contrast, award-covered employees who refer a dispute to the FWC can have confidence that FWC will arbitrate the dispute if is not resolved in accordance with the terms of the dispute clause. Employees to whom no award applies are therefore more likely to rely on taking action through the courts, which is a significant disincentive to taking enforcement action.

The FWC should have the power to make an order compelling the parties to participate in arbitration where the Commission considers it is appropriate to do so. In these matters an arbitrator can, at least, make a determination as to whether the employer had a reasonable grounds not to make the offer of conversion, for example.

Recommendation 3:

Consideration be given to amending proposed section 66M to allow the FWC to order the parties to participate in arbitration where they have not otherwise agreed.

Proposed section 545A

If the definition of 'casual employee' in proposed section 15A is to apply across the board once the bill is passed, then we query the need for the insertion of proposed section 545A into the Fair Work Act. Proposed section 545A sets out a statutory rule for offsetting amounts payable by an employer to a person for relevant entitlements by the amount of a casual loading previously paid by the employer to compensate the person for not having those entitlements.

We are unable to contemplate a situation in which a casual employee, so described at the start of the employment and otherwise meeting the factors under proposed section 15A(2), could be said to be "not a casual employee" for the purposes of proposed section 545A(1)(c).

Recommendation 4:

Review proposed section 545A in light of the definition of 'casual employee' in proposed section 15A.

Schedule 5, Part 2 – Small claims procedure

The explanatory memorandum provides that schedule 5 of the bill is intended to enhance the Fair Work Act compliance and enforcement framework to more effectively deter non-compliance with workplace laws and make it easier to recover wages when underpayment does occur. It

states that employees will be able to recover their entitlements more easily, quickly and cost-effectively through the small claims process, by increasing the small claims cap from $20,000 to $50,000. The FCC and magistrates courts will be able to refer small claims matters to the FWC for conciliation and consent arbitration.

Legal representation

QLS is concerned that under the small claims procedure in section 548 of the Fair Work Act, to be amended by the bill, legal representation continues to be available only with the leave of the FWC[3], despite the fact that a claim could concern reasonable sums of money up to $50,000.

It is our members' experience that allowing parties to be legally represented has a positive impact on a proceeding. Legal practitioners often assist a court, commission or conciliator through ensuring their own client understands the issues and in articulating their client's position concisely. Generally, legal practitioners play a constructive role in and are of significant assistance in resolving matters.

We submit that representation should be as of right for all claims and should extend to consent hearings and conciliation conferences (both in the FWC and the FCC), however, each party should bear their own costs for small claims. Claims for larger sums are likely to be more complex than smaller claims and the availability of legal representation is likely to be of benefit to the court, commission and conciliators.

Recommendation 5:
Amend section 548 of the Fair Work Act (and make other consequential amendments as necessary) to allow legal representation as of right for claims for amounts of $20,000 including for hearings, consent hearings, conciliations and arbitrations.

Dispute resolution

Proposed section 548D provides a process for arbitration by the FWC following the unsuccessful conciliation of a matter. The parties need to agree to the FWC arbitrating their matter, however (proposed section 548D(1)(c)).

We refer to our comments in relation to the process for resolving disputes relating to casual conversion. Similar arguments about the need for FWC intervention can be made for disputes under the small claims procedure.

Recommendation 6:
Consideration be given to amending proposed section 548D to allow the FWC to order the parties to participate in arbitration where they have not otherwise agreed.

Schedule 5, Part 7 – Criminalising underpayments

The bill inserts a new criminal offence into the Fair Work Act for employers who dishonestly engage in a systematic pattern of underpaying one or more employees.

[3] Section 548(5) of the Fair Work Act.

The proposed offence, according to the Explanatory Memorandum, is to be applied to;

> "the most egregious and persistent kinds of underpayments by criminalising conduct where an employer dishonestly engages in a systematic pattern of underpaying one or more employees... The offence provision would apply in relation to national system employers and employees only".[4]

Amendments to section 26 of the Fair Work Act and the Queensland Criminal Code

The bill also proposes amendments to section 26 of the Fair Work Act (Part 7 – Criminalising underpayments, clause 43 of the bill) to clarify the Act's interaction with State and Territory industrial laws in relation to underpayments and 'records offences' for national system employers and national system employees:

> *(da) a law of a State or Territory providing for an employer, or an officer, employee or agent of an employer, to be liable to be prosecuted for an offence relating to underpaying an employee an amount payable to the employee in relation to the performance of work;*

The Explanatory Memorandum, at paragraph 404, state:

> *"404. Paragraphs 26(2)(da) and (2)(db) confirm that State or Territory laws that criminalise underpayment or record-keeping failures by national system employers in relation to their employees,* ***but not general criminal laws of theft or fraud****, are intended to be excluded."* (emphasis added)

Last year, the Queensland Parliament passed legislation to amend the offence of stealing in the Queensland *Criminal Code* to explicitly capture the underpayment of wages by an employer.[5] An amendment was also made to the fraud offence in section 408C to provide that an offender is liable to 14 years imprisonment if the offender is or was an employer of the victim.

The relevant stealing offence provisions are:

1. "Section 391 Definition of stealing" which was amended to include:

> *"(6A) For stealing that is a failure to pay an employee, or another person on behalf of the employee, an amount payable to the employee or other person in relation to the performance of work by the employee—*
>
> *(a) the amount is a thing that is capable of being stolen; and*
> *(b) subsection (6) does not apply; and*
> *(c) the amount is converted to the person's own use when—*
>
> *(i) the amount becomes, under an Act, industrial instrument or agreement, payable to the employee or to the other person on behalf of the employee; and*
> *(ii) the amount is not paid.*
>
> *(7) In this section—*
>
> ***"Act"*** *includes an Act of another State or the Commonwealth.*

[4] Page cxvii.
[5] *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020*

"industrial instrument" *means—*

(a) an industrial instrument under the Industrial Relations Act 2016 schedule 5; or
(b) a fair work instrument under the Fair Work Act 2009 (Cwlth)."

2. Section 398 Punishment of Stealing, Punishment in special cases, which was amended to include:

   "16 Stealing by employers If the offender is or was an employer and the thing stolen is the property of a person who is or was the offender's employee, the offender is liable to imprisonment for 10 years."

3. "Section 408C Fraud" which add, to subsection (2) te offender is liable to imprisonment for 14 years if, for an offence against subsection (1)—

   "(e) the offender is or was an employer of the victim."

As it stands, it is not clear whether:

a. the effect of the amendments to section 26 will be that the operation of the relevant provisions of the Queensland *Criminal Code* (extracted above) will be excluded where this conduct involves national system employers and national system employees, which we understand to be a significant portion of the workforce; or
b. whether these provisions are "general criminal laws of theft and fraud", despite specific elements relating to employers and employers.

If the intent of the reforms is to exclude the Queensland offence provision, it may be that a national system employer's conduct does not meet a "systematic pattern of underpayment" but that they cannot be prosecuted under the Queensland offence provisions, because of the amended section 26 of the Fair Work Act. The drafting in the Bill should be clarified so that there is certainty for employers and prosecuting agencies.

Additional resources for the FCC, the FWO and the legal assistance sector

In all of our advocacy on the issue of underpayment of wages, QLS has repeatedly stated that the creation of new offences takes a simplistic approach to the problem of 'wage theft'. Whilst there may be a general deterrence effect, there are already obligations under the Fair Work Act and in other laws/awards dictating that employees should be paid correctly.

We have identified that a key barrier to employees recovering unpaid entitlements is a lack of available resources, including an under-resourced Federal Circuit Court, which leads to delays and inability for many workers to access legal advice. We have also called for additional resources for the Fair Work Ombudsman so that this office is able to more actively pursue these kinds of cases.

The creation of any new offence needs to be accompanied by additional funding in order to achieve the policy objective.

Simplified addition hours agreements

Reasons for inclusion in the Fair Work Act

While we understand the context for 'simplified addition hours agreements' in the hospitality and retail sectors, we do not understand the rationale for including these types of agreements in the Fair Work Act rather than under a relevant award. We are aware that complexity in awards is an issue, however, the Government must also be conscious of not making the Fair Work Act overly complex as well.

The explanatory memorandum outlines the need for these types of agreements, but is silent on why the rules are not able to sit under an award. The explanatory memorandum should address this point.

Complexity of the provisions

Despite being nominally 'simplified', the Simplified Additional Hours Agreement (**SAHA**) provisions tend to increase, rather than reduce, the complexity of the task of understanding and applying the relevant award obligations. The steps for entering into a SAHA are simple, the interaction between these provisions and award entitlements is not.

As is appropriate, the bill preserves many obligations and entitlements with respect to overtime and the hours of work which remain in effect and operate alongside the SAHA; for example, proposed sections 168Q(3) and 168P. This, however, creates complexity and a real risk that employees will not understand the effect of the agreement, especially the entitlements which are being given up and those which remain as this will depend on the instrument which applies.

In addition, the Fair Work Ombudsman could be required to produce a general information statement to be given to an employee before a SAHA comes into effect. The information statement could set out, in general terms, the obligations and entitlements that continue to operate alongside the SAHA.

The formal requirements of the SAHA are, in contrast to its legal effect, indeed 'simple'. All that is required is that the SAHA identify the additional agreed hours and be entered into before the start of the first such period (proposed section 168N). The employer must also inform the employee that the agreement is a SAHA, but there is no requirement that the agreement be in writing (although, if not in writing, a record of the agreement must be made). A requirement that a SAHA be in writing and signed by the employee would not add undue complexity or regulatory burden and is reasonable to protect the interests of both parties and avoid disputes.

Further, the written SAHA should be required to include a statement which explains the employee's workplace rights as clarified in proposed section 168T (entering, not entering and terminating a SAHA are workplace rights) and, the SAHA should not commence until at least 7 days from the employee being given a copy of the proposed SAHA.

Recommendation 8:

a. Amend proposed section 168N to require that a SAHA be in writing and signed by the employee.

b. Amend proposed section 168N (or insert a provision) to require the SAHA to include a statement explaining the employee's workplace rights in proposed section 168T.

c. Amend proposed section 168N (insert a provision) to provide that the SAHA should not commence until at least 7 days from the employee being given a copy of the proposed SAHA.

Flexible work directions

We are supportive of the Government's intention regarding flexible work directions in modern awards outlined in Part 2 of Schedule 2 of the bill. However, we query whether the creation of a 'deemed award term' may lead to unintended consequences. This part will mean that the Fair Work Act deems certain terms of an award (as opposed to, for example Part 2-3 of the act which provides for what can and cannot be in awards, rather than deeming specific terms). In our view, specific terms of an award should remain a matter for determination by the FWC, rather than prescription by statute.

Recommendation 9:

a. Amend proposed section 789GZO(2) so that the FWC may vary a term under this part in an award, where appropriate.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Elizabeth Shearer
President