Senate Education
and Employment
Legislation Committee

Inquiry into the Commonwealth's Fair Work (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Victorian Government submission to Senate

4 February 2021

Industrial Relations Victoria
Department of Premier and Cabinet
1 Spring Street, Melbourne Victoria 3000

Contents

1 Introduction

1. The Victorian Government considers that all governments have a responsibility to strike a balance between the rights and responsibilities of employers, and the rights and responsibilities of workers. In doing so, governments must recognise that there is often a power imbalance between the respective players.

2. The Victorian Government also considers that all employees should have access to decent working conditions and secure employment.

3. Coronavirus (COVID-19) has proved challenging to individuals, communities, businesses and governments. However, our experiences in managing its effects offer an opportunity to review and if necessary, modify Australia's industrial relations laws to support the broader economic and social prosperity and recovery of Australians post-COVID. Although there are encouraging signs and recent economic indicators showing Victoria's economy is rebounding with strong growth in employment and retail spending, for many, the effects of the pandemic will be long-lasting.

4. The Fair Work (Supporting Australia's Jobs and Economic Recovery) 2020 (the Bill) does little to encourage jobs growth, strengthen the labour market or address insecure employment, which has been shown by the coronavirus (COVID-19) pandemic to have implications beyond the individual employee.

5. The Victorian Government submits that the Bill represents a lost opportunity to make our workplace laws fairer, and to better facilitate productive and innovative work practices. Any changes to the current laws should be directed at combatting the long-term effects of the pandemic and embedding financial security for business and workers.

2 The Bill

2.1 Better Off Overall Test (BOOT)

6. The Victorian Government continues to support collective bargaining. It opposes any changes to the *Fair Work Act 2009* (the FW Act) that will serve to deter collective bargaining, or changes that will have the effect of undermining the minimum safety net of conditions and entitlements provided by the National Employment Standards and modern awards.

7. The Bill will allow the Fair Work Commission (FWC) to approve enterprise agreements that do not pass the BOOT in a two-year period from the commencement of the amendments (the agreements then operate for a two- year period but in practice this is only the nominal expiry date). In considering an application to certify an agreement, the FWC will be required to consider the impact of coronavirus (COVID-19) on the enterprise, non-monetary benefits compared to the modern award, and the views of employers and employees about whether the agreement passes the BOOT.

8. The Victorian Government does not support weakening the threshold for approval of an enterprise agreement from the current BOOT. The BOOT provides an important safeguard for employees during bargaining (especially given the BOOT is not assessed against an employee's existing conditions, only the minimum conditions in the modern award).

9. Currently, there must be exceptional circumstances for the FWC to approve agreements that do not pass the BOOT. There is no clear need for this provision to be amended, given that it would already be open for coronavirus (COVID-19) to be considered as an "exceptional circumstance" by the FWC in approving agreements that do not pass the BOOT.

2.2 Agreement making

10. The Victorian Government supports the broad objective of improving the timeliness of agreement approvals. If the FWC is satisfied that there is genuine agreement between the parties, including the involvement of representative organisations, then there is no reason for the agreement not to be approved by the FWC.

11. The Bill provides that the FWC must approve an enterprise agreement if it is satisfied there was a "fair and reasonable opportunity to decide whether or not to approve the agreement." This replaces the separate mandatory requirements for approval of agreements, including that employees have access to the agreement and related materials for 7 days before a vote is held.

12. Current pre-approval requirements will be factors the FWC may consider in deciding if a fair and reasonable opportunity has been given to employees, including:

    - issuing a notice of employee representational rights within 28 days of starting bargaining (increased from current 14 days)
    - explaining the terms of the agreement to employees that takes into account their special circumstances (e.g. age, cultural background) and
    - providing access to the agreement and related materials for 7 days before the employee ballot.

13. Whilst the current pre-approval requirements may appear technical in nature, they provide important procedural guarantees which meaningfully contribute to the likelihood that employees genuinely understand and agree to an enterprise agreement.

14. The FWC has significantly reduced the time it takes to approve enterprise agreements since the median time it took to approve an enterprise agreement peaked in the 2017/18 financial year. The 2018 FW Act amendments gave the FWC power to approve enterprise agreement with minor procedural or technical defects in the notice of employee representational rights, and streamline the FWC's internal processes. This has reduced the median time to finalise approval applications from 72 days in the 2017/18 financial year to 37 days in the second half of 2019.

15. The requirement to approve, insofar as practicable, within 21 days, will reduce the capacity of the FWC to independently verify terms of an agreement and necessarily increase reliance on claims of the parties, who as has been noted, sit within a power imbalance. In some cases, the new requirement will further delay approval of agreements by imposing additional administrative burdens on the FWC for applications that are more complex, and usually require undertakings from the employer to address concerns with the application.

16. Where the FWC does not require undertakings from the employer to approve an enterprise agreement, the median time to approve those agreements was 32 days in the 2017/18 financial year and just 17 days in the 2019/2020 financial year. The policy rationale for the 21-day timeframe is unclear given the proposed amendment to remove the requirement for the FWC to be satisfied an enterprise agreement is consistent with the NES, should further reduce the time it takes to approve agreements because undertakings will no longer be required for inconsistencies.

17. Under the Bill, non-bargaining parties will not be able to intervene in applications for approval of agreements. This exclusion may deprive the FWC of important information about shortcomings in the content or procedure of an agreement. Combined with the proposed changes to the BOOT (discussed above), the relaxed procedures have the potential to lead to unfairness in some cases.

18. The Victorian Government supports amendments to the FW Act that will see enterprise agreements made before 1 July 2009 (so-called 'zombie' agreements) cease to operate. Zombie agreements can undermine the existing award safety net as they were made without the protection of the BOOT. However, the proposed sunset date of these Zombie agreements has been delayed to 1 July 2022. The Victorian Government submits that these agreements should cease operation as soon as possible. The Victorian Government notes that the provisions will not affect employees' and employers' usual rights to pursue entitlements and other claims under old agreements.

2.3 Casual employees

2.3.1 Definition of 'casual'

19. The Bill will, for the first time, include a statutory definition of casual employment. The question of whether the person is a casual employee is to be assessed on the basis of the offer of employment and the acceptance of that offer at that time, not assessed on the real nature of the relationship and not on the basis of any subsequent conduct of either party. A person who commences employment as a result of acceptance of an offer of employment remains a casual until or unless:

    - the employee's employment is later converted to full-time or part-time under the provisions in the Bill; or
    - the employee accepts an alternative offer of employment (other than casual) by the employer and commences work on that basis.

20. There is clearly a need to clarify and codify work status - to reduce doubt about that work status and the consequent application of entitlements, protections and obligations for workers and business. However, the Bill's definition does not meet this objective. The proposed reliance on the formal offer of employment made at the time employment started - regardless of the actual nature of the working relationship at that starting point or any subsequent changes to it - means that an employee may be formally treated as a casual, even though this practice does not reflect the actual employment conduct.

21. It is also unclear how the proposed new definition of a casual employee will interact with existing provisions in the FW Act providing casuals, for example, with access to unfair dismissal remedies (currently accessible by casuals who are engaged on a regular and systematic basis *and* had a reasonable expectation of continuing employment on a regular and systematic basis).

2.3.2 Casual conversion

22. The Bill includes casual conversion provisions, allowing casual employees to convert their employment to full-time or part-time employment, in limited circumstances.

    An employer must make an offer to a casual employee to convert to part-time or full-time employment (depending on the hours worked) if the employee has been engaged for 12 months and on a regular and ongoing basis for 6 months. There are, however, exceptions to making an offer, including reasonable business grounds, where the employee's position may cease to exist, or where conversion may result in a significant change in their hours. The employee will have 21 days to accept or reject the offer to convert to ongoing employment. Employers must not reduce or vary an employee's hours, or terminate their employment, to avoid the new conversion rights and obligations.

23. The Victorian Government submits that whilst the provisions offer an improvement on current casual conversion request arrangements, these improvements are marginal. The ability for employers to not offer, or refuse a request for, conversion on reasonable business grounds, is likely to limit the effectiveness and take-up of the entitlement.

24. Similarly, the requirement for consent for the FWC to arbitrate disputes also limits the effectiveness of the provisions. Insecure workers deserve more. As a minimum, employees refused the right to convert to ongoing employment should have a real opportunity to challenge refusals, such as the right to seek review by the FWC. While employees could seek penalties, compensation and other remedies from a court for NES contraventions, the national tribunal provides a more efficient and less formal process for resolving industrial disputes.

2.3.3 Orders relating to casual loadings

25. The Bill requires courts to reduce compensation payable to an employee who is wrongly classified by an amount commensurate with an identifiable loading paid to that employee. The Explanatory Memorandum to the Bill at paragraph 88 notes that "this is intended to achieve a balance between ensuring that employees are appropriately classified and receive their correct entitlements, and that employers do not have to effectively pay for such entitlements twice." The amount of the deduction will depend in part on whether the loading was expressed to be in substitution for specified entitlements.

26. These provisions appear to be an attempt to avoid the outcome of the Federal Court decision in WorkPac Pty Ltd v Rossato [2020] FCAFC 84 (Rossato). In that case, the employer failed in its bid to reduce compensation as the court was unable to 'set off' the casual loading payments made against statutory employee entitlements.

27. These provisions will operate retrospectively and will apply to currently engaged casuals with the effect of potentially reducing existing entitlements for some employees. By doing so, the Bill effectively endorses past conduct of employers in mis-characterising an employment relationship.

2.4 Wage theft

28. The Victorian Government opposes both the form and operation of the proposed Commonwealth wage theft laws and submits that the Commonwealth should amend its proposed wage theft provisions to bring them into line with the Victorian offences.

29. The current Victorian Labor Government was elected in 2018 with a commitment to introduce criminal offences for the deliberate and dishonest underpayment of wages and other entitlements (often referred to as 'wage theft') by employers and their officers. In response, it introduced the *Wage Theft Act 2020*, a standalone Act with offences targeted to the types of exploitative behaviours employers use to withhold lawful entitlements from workers, to commence from 1 July 2021. The Victorian Act also introduces a strong enforcement regime and a dedicated enforcement body to ensure that the laws are effective.

30. The Victorian Government supports the policy objective to criminalise the deliberate and dishonest underpayment of workers by employers and the introduction of strong national wage theft laws. However, a number of high profile and large-scale underpayment cases have provided overwhelming evidence that the current civil penalty regime has failed to deter ongoing worker exploitation. The Commonwealth has put forward laws that are likely to be far less effective than those that will operate in Victoria from 1 July 2021. Its proposed laws fail to meet community expectations regarding the seriousness and prevalence of this conduct, effective deterrence and the intended protection of workers, in particular, insecure workers.

31. The Commonwealth Bill introduces a new criminal offence for employers who dishonestly (measured objectively) and systematically underpay workers. The evidentiary threshold for the proposed offence is high, requiring the prosecuting agency to prove both the dishonesty of the employer and that the offending is part of a systematic pattern of underpayments. The offences will apply in a more limited range of circumstances than the Victorian offences, and this will likely result in few cases being suitable for prosecution or being successfully prosecuted, undermining any deterrent effect.

32. The Commonwealth Bill provides financial penalties of over $1 million for individuals and over $5 million for bodies corporate for employers found guilty of the new offence. The Bill also enables individuals to be sentenced to a four-year maximum term of imprisonment in addition to any financial penalties. The Commonwealth Bill lacks comparable offences as to falsifying records and failing to keep records to avoid underpayment detection ('records offences').

33. The Victorian offence provides up to a 10-year maximum imprisonment for individuals. The deterrent effect of imprisonment is a significant one and, together with increased media and community scrutiny, and the prospect of government interventions, can be said to have already contributed to a broad pre-emptive

compliance response with a number of businesses self-disclosing large 'accounting errors' over the last two to three years.

34. The Victorian Government submits that the Commonwealth ought to bring their wage theft provisions into line with the Victorian wage theft offences for any national model. The offences need to specifically target the types of conduct employers use to withhold lawful entitlements from employees and include records offences to deter employers from falsifying or failing to keep records in an effort to avoid detection for underpaying staff. This is a known problem for the FWO in investigating underpayment cases and the proposed offence in the Commonwealth's Bill misses a critical opportunity to address this.

35. The Victorian Government also submits that any national model be strongly supported with realistic funding for compliance and enforcement. The effectiveness of the new Commonwealth laws, if passed, will in part be determined by the level of resources provided to the FWO to enforce them, and what priority they are afforded. A stand-alone agency with resources and expertise dedicated to investigating and enforcing underpayment offences would be able to give priority and attention to those employers who are breaking the law. Victoria's *Wage Theft Act 2020* establishes the Wage Inspectorate Victoria as a dedicated statutory body with strong powers to investigate and enforce wage theft offences.

36. The Bill signals an intention to 'cover the field' by amending the definition of 'State or Territory industrial law' in the FW Act to purportedly include Victoria's wage theft offences. It further provides that only the Fair Work Ombudsman (FWO) may prosecute the new underpayment offence. The Victorian Government strongly opposes these amendments and any attempt to prevent the operation of state and territory criminal offences. The Commonwealth should remove the 'cover the field' intention and further amend the Bill to facilitate the concurrent operation and enforcement of state and territory laws.

37. The Commonwealth should engage in genuine consultation with States and Territories about a nationally consistent model in a manner which respects the requirements of the 2009 *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector*. In this regard, it notes that despite a lengthy stakeholder consultation process over some months, the Commonwealth failed to genuinely consult jurisdictions, and only presented a confidential draft Bill just days before the Bill was introduced into the Commonwealth Parliament.

3 A lost opportunity – what the Bill fails to do

38. In three key areas, the Bill represents a failure on the part of the Commonwealth to real problems facing Australian workplaces. These are:

- gender equality and equal pay
- the 'on-demand' economy
- sham contracting.

3.1 Gender equality and equal pay

39. Gender-based pay inequity is compounded by Australia's persistently gender-segregated labour market (by industry and occupation). Average remuneration in female dominated industries is lower than in male dominated industries. Many of these industries – food services, tourism, arts, varying roles in higher education and hospitality and accommodation – may not fully recover as global economies change. This has increased the recognition of the disadvantage women workers face during distressed economic times, such as during the current pandemic, where many businesses have ceased operating, some permanently.

40. Women are more likely to be engaged in casual or insecure work than men, which contributes to the persistent gender pay gap in Australia. The industries with the highest rates of casual workers are also the industries with the highest rates of women workers (accommodation and food services, retail trade, and health care and social assistance). The rate of female casuals is higher than the rate of males in the period between 2004 and 2018. In 2018, about 27 per cent of female workers were casual compared with about 23 per cent of male workers.[1]

Equal Pay Cases

41. The FW Act at sections 157(3) and 158 allows for the FWC to make orders to ensure that there will be equal remuneration for men and women workers for work of equal or comparable value. However, equal pay cases can be very expensive to run and the need for a male comparator has meant poor outcomes running such cases for women. Even if successful, such cases are of limited precedent value for workers in other female-dominated industries not related to the specific equal pay proceedings.

42. The Victorian Government recommends that the FW Act be amended to remove the male comparator requirement under the equal remuneration provisions.

[1] Victorian Government Submission, Annual Wage Review 2019-2020, pp. 23 and 24.

43. The Victorian Government also recommends the inclusion in the FW Act of gender pay equity principles/indicia (like those in jurisdictions such as Queensland and New Zealand). These principles would then be applied in any equal pay case, which would in turn lead to a work valuation exercise to determine the quantum of any pay increases.

44. Until these reforms occur, there are unlikely to be real and positive outcomes for women across the labour market.

3.2 The on-demand economy

45. The Bill fails to clarify the status of gig economy workers by statutorily defining who is an employee more generally or deeming those workers to be employees.

46. It is a pity that the Commonwealth has not used this opportunity to adopt the reforms to national work laws identified in the *Report of the Inquiry into the Victorian On-Demand Workforce* (the Inquiry Report)

47. The Inquiry into the Victorian On-Demand Workforce (the Inquiry) was established by the Victorian Government in late September 2018 to examine the extent and nature of the on-demand workforce and economy in Victoria including:

- the effect of the on-demand economy on the labour market and the economy
- the legal or work status of people working with or for online platforms in Victoria
- the application of workplace laws to on-demand workers, whether contracting arrangements are being used to avoid workplace laws and statutory obligations, and to assess whether workplace laws are being enforced effectively.

48. The focus of the Inquiry was on platform work, facilitated by digital platforms, matching workers and clients via internet platforms or apps.

49. The Inquiry identified the following six key aspects of the current system that are not serving the community well, and that require governments to act:

- there is uncertainty around work status
- advice and support about work status is limited and fragmented
- participants in the on-demand economy have no real pathways to determine work status
- platforms are emerging and growing, and they mostly use non-employment models
- ‘low-leveraged’ workers are accessing work through platforms and work status is often ‘borderline’
- there are inadequate protections for non-employee ‘small business’ platform workers.

50. The recommendations for change set out in the Inquiry Report are directed at the following six key outcomes:

    - **Clarify and codify work status**: to reduce doubt about work status and the application of entitlements, protections and obligations for workers and business, and align legislative definitions across the statute books.
    - **Streamline advice and support**: for workers whose work status is borderline.
    - **Provide fast-track resolution**: of work status so workers and business do not operate with prolonged doubt about the rules.
    - **Provide for fair conduct for platform workers** who are not employees through establishing Fair Conduct and Accountability Standards that are principles based and developed through a consultative process with relevant stakeholders.
    - **Improve remedies for non-employee workers**: to address deficiencies and anomalies in the existing approach.
    - **Enhance enforcement**: to ensure compliance, including where sham contracting has occurred.

51. The Inquiry identified that the *mechanisms* relied upon to determine work status are critical to confirming whether workers gain entitlements, protections and obligations, but are not always accessible or effective.

52. The proposal by some that the Commonwealth should empower the FWC to deem groups of workers (such as gig workers) as being covered by workplace laws, warrants exploration and consideration.

53. The Victorian Government will continue to advocate to the Commonwealth to act on the suggested reforms of the national workplace system set out in the Inquiry Report. These reforms require establishing a fit-for-purpose regulatory framework, in collaboration with State and Territory Governments.

3.3 Sham contracting

54. The Victorian Government supports measures in the FW Act that seek to counter the effects of sham contracting in the community.

55. The Victorian Government notes that the Commonwealth, in the 2019-20 Commonwealth budget, provided $9.2 million in additional funding to the FWO to fund initiatives to target sham contracting arrangements. The Victorian Government considers that it is essential that regulators are adequately resourced to enforce work laws.

56. However, the Victorian Government remains concerned that changes proposed in the Bill, to increase penalties for sham contracting arrangements without complementary changes, are likely to have minimal impact. This is because it is difficult to *first* establish that sham contracting has occurred as the test to

establish unlawful conduct is too high a hurdle to jump over. Existing provisions in the FW Act consequently fail to prevent some parties from misusing independent contracting arrangements aimed at avoiding the reach of beneficial workplace laws.

57. The Inquiry Report recommended (Recommendation 19) that the sham contracting provisions in the FW Act be amended so that the current high threshold be lowered. Sham contracting arrangements could be better deterred if the legal test was amended to whether an employer "reasonably should have known" that workers engaged by them were to be classified as employees.

58. This proposal is also consistent with recommendations made by several previous reviews including the Victorian Inquiry into the Labour Hire Industry and Insecure Work, as well as the Commonwealth's own Productivity Commission Inquiry into the Workplace Relations framework, and the Black Economy Taskforce Inquiry.

4 What should the Commonwealth do? – a measured alternative to the proposed Bill

59. The Victorian Government recommends that the Bill in its present form be substantially amended. Those amendments should include:

- removing the requirement that an employee obtain consent of their employer before the FWC has jurisdiction to review the refusal of a casual conversion application
- amending the definition of 'casual' employment so that it takes account of factors at the time of the employment commencing and occurring after employment commenced
- removing the provisions relating to casual loading offsetting orders that allow for retrospective operation
- removing changes that allow agreements to be approved that do not meet the BOOT
- providing the FWC a discretion to hear submissions from non-bargaining parties with respect to the certification of enterprise agreements
- amending the wage theft provisions so that they are modelled on the Victorian Wage Theft Act and allow for concurrent operation
- amending the FW Act to remove the male comparator requirement under the equal remuneration provisions
- providing gender pay equity principles/indicia in the FW Act and
- improving protections for on-demand/gig economy workers, working collaboratively with Victoria and other Australian jurisdictions to implement reforms to national work laws identified in the *Report of the Inquiry into the Victorian On-Demand Workforce*.