Law Council
OF AUSTRALIA

Office of the President

19 April 2023

Senator Tony Sheldon
Chair
Senate Education and Employment Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: eec.sen@aph.gov.au

Dear Senator Sheldon

Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023

1. The Law Council welcomes the opportunity to make this submission to the Senate Education and Employment Legislation Committee (**Committee**) in relation to its Inquiry into the Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 (Cth) (**the Bill**).

2. The Law Council acknowledges the assistance of the following committees in preparing this submission: the Industrial Law and Migration Law Committees of the Federal Dispute Resolution Section; and the Superannuation Committee of the Legal Practice Section.

Schedule 1—Protection for migrant workers

Item 1: Proposed section 40B of the Fair Work Act 2009 (Cth)

3. As noted in the Law Council's submission to the Joint Standing Committee on Migration as part of its Inquiry on Migration, Pathway to Nation Building, the Law Council is supportive of the principle that a migrant worker should be entitled to the same pay and conditions, and workplace protections, as an Australian worker.[1]

4. Schedule 1 to the Bill proposes to insert a new section 40B into the *Fair Work Act 2009* (Cth) (**FW Act**). The purpose of this amendment is to provide that a contract of employment or contract for services is not invalid merely because of a person's immigration status (including for example that they are employed in circumstances where they are not eligible to work).

5. However, if the intended purpose is broader than that, namely to '[ensure] that migrant workers (including temporary migrant workers working in Australia) would be entitled to the benefit of the FW Act regardless of immigration status' (as per the Explanatory Memorandum's Statement of Compatibility with Human Rights at paragraph [4]), then

[1] Law Council of Australia, Submission No 117 to the Joint Standing Committee on Migration, Parliament of Australia, *Migration, Pathway to Nation Building* (31 March 2023) 7 <https://www.lawcouncil.asn.au/resources/submissions/migration-pathway-to-nation-building>.

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639 • *Email* mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

the Law Council notes that the current text does not extend as far as it could to achieve that purpose.

6. The section as drafted goes only to the validity of a contract. The FW Act provides rights in circumstances where no contract has been created (for example, Part 3-1 creates rights in respect of conduct taken by a prospective employer against a prospective employee). Further, the Migration Act might have an impact on rights under the FW Act even if there is a valid contract—for example, a person employed whose visa only allows them to work 20 hours a week may have a valid contract but the *Migration Act 1958* (Cth) may arguably prevent them claiming payment or annual leave at a rate of more than 20 hours a week, despite the fact they have in fact worked longer hours.

7. The Law Council therefore suggests that the quoted purpose from the Explanatory Memorandum would be enhanced if the text were amended as follows:

> **40B Effect of the Migration Act 1958**
>
> For the purposes of this Act, any effect of the Migration Act 1958, or an instrument made under that Act, on the validity of a contract of employment, or the validity of a contract for services, or otherwise on the availability of workplace rights under this Act, is to be disregarded.

Schedule 3—Superannuation

8. For many years now, it has been a requirement that a modern award include a term that requires an employer covered by the award to make contributions to a superannuation fund for the benefit of an employee covered by the award, so as to avoid liability to pay the superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* (Cth) (**SGC Act**) in relation to the employee (section 149B of the FW Act). The current proposal is, in essence, to introduce a very similar obligation (for an employer) into the National Employment Standards (proposed section 116B of the FW Act). The practical effect of this amendment would be to allow an employee who is not covered by a modern award (or a relevant enterprise agreement, or a contractual entitlement) to take direct action against an employer for unpaid superannuation guarantee contributions.

9. The proposed new obligation closely follows the terms of the provision about modern awards—it refers to making contributions to a superannuation fund for the benefit of an employee 'so as to avoid liability to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the employee'. According to the Explanatory Memorandum at paragraph [90], this formulation is sufficient to 'adopt all rules, requirements and exemptions relevant to an employer's liability to pay the superannuation guarantee charge as specified' in the SGC Act and the *Superannuation Guarantee (Administration) Act 1992 (Cth)*.

10. There is also a provision that reduces the employer's obligation under proposed section 116B to the extent that they make superannuation guarantee charge payments (proposed new section 116C). A corresponding provision has been proposed in relation to the existing modern awards provision (proposed new section 149B(2)). The corresponding provision appears to be an issue that was overlooked when section 149B was first introduced.

11. Schedule 3 also proposes a provision aimed at preventing multiple actions, in particular by preventing an employee from taking court action against the employer if the ATO is already taking court action against the employer (proposed new section 116C). However, no corresponding provision has been proposed in relation to the existing

modern awards provision. The Law Council submits that there should be a corresponding 'multiple actions' provision in relation to modern awards. Were it otherwise, the legislation would create an incentive for an employee who is covered by a modern award to take action based on the term required by section 149B, rather than based on proposed section 116B, as the former would not be restricted by an existing Australian Taxation Office action, while the latter would. In the Law Council's view, however unlikely that scenario may seem, multiple actions should be prevented just as much in the case of actions based on modern awards as in the case of actions under the new obligation.

Schedule 6—Coal mining long service leave scheme

Item 9: Proposed subsection 39AC(2) of the Coal Mining Industry (Long Service Leave) Administration Act 1992 (Cth)

12. Item 9 in Schedule 6 to the Bill would amend the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) to insert a new subsection 39AC(2) which would set out how the amount that is to be paid to a casual employee in the coal industry who takes a period of long service is to be calculated. Items 13 and 14—which set out proposed subsections 3B(3) and (4)(a) of the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992* (Cth)—contain text in similar terms. The following comments in respect of proposed subsection 39AC(2) are equally applicable to those proposed provisions. In the view of the Law Council, further consideration should be given to each of the proposed provisions to avoid uncertainty as to their effect.

13. Proposed subsection 39AC(2) provides two methods to calculate the rate. The primary method applies if there is an industrial instrument that covers that employee that specifies a casual loading that can be quantified. Otherwise, the secondary method (in proposed paragraph 39AC(2)(b)) is the employee's 'ordinary rate of pay (including incentive-based payments and bonuses'.

14. Three things can be said about the drafting.

15. First, an employee can be covered by an industrial instrument (such as an Award) that does not apply to that employee (for example, because there is an enterprise agreement—see sections 46, 47 and 52). It appears to be intended that proposed paragraph 39AC(2)(a) will be operative only where there is an industrial instrument that applies and contains a casual loading that can be quantified—since in order to be applied it requires both a 'base rate of pay' and, in addition, 'a casual loading'. If this interpretation is correct, the Law Council suggests that the word 'covers' ought to be changed to 'applies'. If it is not changed, then it may be the case that an employee is covered by an Award that has a casual loading (and proposed paragraph 39AC(2)(a) will set the applicable method of calculation), but whose rate of pay is set by an enterprise agreement that does not contain an identifiable casual loading, which would render its application difficult. In particular, in that situation, it would not be clear what the 'casual loading' is that is to be paid in addition to the 'base rate of pay').

16. Second, proposed paragraph 39AC(2)(a) uses the expression 'base rate of pay', an expression which is defined in section 16 of the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth), but then adds in parentheses the words 'including incentive-based payments, bonuses and the casual loading'. In the Law Council's view, this has the potential to create some uncertainty as the defined expression 'base rate of pay' expressly excludes incentive-based payments and bonuses and loadings and monetary allowances. If it is intended that the rate is the 'ordinary rate' that would be payable other than overtime (discussed below), the drafting might be improved by saying

so. If it is intended to be the defined expression 'base rate of pay' plus incentive-based payments, bonuses and the casual loading, then, again, it might be better to say so. Otherwise there will be some uncertainty as to whether the expression 'base rate of pay' is intended to have the defined meaning.

17. Third, proposed paragraph 39AC(2)(b) uses an expression that is not defined in the Act, namely 'ordinary rate of pay'. The explanatory memorandum states at paragraph [151] that the expression would be given its 'ordinary meaning' and then says: '[i]t is commonly understood as an amount of money an employee would receive for the hours they worked, excluding any additional overtime payment.' The Law Council submits that the expression does not in fact have a well understood meaning. Rather, its meaning is one that is very much drawn from context. For example, it is not clear that the expression would necessarily be read to exclude overtime pay, as apparently intended. It is also unclear whether it does or does not include other amounts such as allowances or shift penalties that might be paid had the employee not taken leave. If what is intended is the 'full rate of pay' (an expression defined in section 18) but excluding overtime, it might be clearer to adopt that text. Alternatively, a definition of 'ordinary rate of pay' might be included in the Act, which could utilise the text currently found at paragraph [151] of the Explanatory Memorandum.

18. Further, the expression 'ordinary rate of pay' if undefined gives rise to some potential uncertainty where an industrial instrument applies to an employee who is paid a higher rate of pay as a matter of contract. In that situation it is not as clear as it could be that the 'ordinary rate of pay' is the higher rate established by the contract. It could be made clear by using a defined expression.

Contact

19. The Law Council would be pleased to discuss this submission. Please contact Mr John Farrell, Senior Policy Lawyer, at j in the first instance.

Yours sincerely

Luke Murphy
President