Australian Government
Department of Employment and Workplace Relations

Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023

Supplementary submission from the Department of Employment and Workplace Relations to the Senate Standing Committees on Education and Employment

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Introduction

The Department of Employment and Workplace Relations welcomes the opportunity to make a supplementary submission to the Senate Standing Committee on Education and Employment inquiry into the Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 (the Bill).

The department made an initial submission to the inquiry on 14 April 2023. This supplementary submission responds to issues raised by stakeholders in their submissions to the inquiry.

Protection for migrant workers

The department notes that stakeholders have expressed broad support for the insertion of the new section 40B 'Effect of the Migration Act 1958' into Division 4 of Part 1-3 of the *Fair Work Act 2009* (Fair Work Act). Section 40B clarifies that any effect of the *Migration Act 1958* (Migration Act), or any instrument made under that Act, is to be disregarded when considering the validity of a contract of employment or a contract for services for the purposes of the Fair Work Act. Section 40B has been designed to ensure that workers receive all entitlements for work undertaken, both wages and leave entitlements, even if work occurred in breach of the Migration Act.

Some stakeholders have suggested that additional wording be included in section 40B to deal with prospective employment. It is clear that temporary migrants with appropriate work rights under the Migration Act would have the same workplace protections as all other prospective employees under the Fair Work Act. The Migrant Workers' Taskforce did not contemplate conferring prospective employees' workplace rights on persons without appropriate rights to work in Australia.

It has also been suggested that the amendments should deal with circumstances where a temporary migrant worker is working in breach of the hours requirements pursuant to a visa granted under the Migration Act. The provision as drafted already deals with this scenario and the Explanatory Memorandum to the Bill states that temporary migrant workers are entitled to the benefit of the Fair Work Act regardless of immigration status.

Some stakeholders have submitted that additional amendments to the Migration Act are needed to clarify that migrant workers are not excluded from protections that fall outside the Fair Work Act framework, such as Workers Compensation and anti-discrimination laws. The department notes that amendments to the Migration Act are ultimately a matter for the Home Affairs portfolio.

Stakeholders have also submitted that the Government should consider reforms to provide additional protections for migrant workers who report exploitation. The Government has made a range of commitments in relation to protecting migrant workers, including to implement the recommendations of the Migrant Workers' Taskforce, as well as announcing at the Jobs and Skills Summit that it would bring forward a suite of measures to combat migrant worker exploitation in 2023.

The department notes that there is an existing Assurance Protocol between the Department of Home Affairs and the Fair Work Ombudsman (FWO) to provide protection for migrant workers who report exploitation. Under the Assurance Protocol, the Department of Home Affairs will not cancel a migrant worker's visa where they have breached their work-related visa conditions because of workplace exploitation – provided that the worker seeks advice from the FWO and assists with any inquiries, there is no other reason to cancel the worker's visa, and the worker commits to following visa conditions in future. The Government has committed to strengthening these protections by establishing a firewall between the Department of Home Affairs and the FWO.

Superannuation in the National Employment Standards

Regulatory processes

Some stakeholders raised concerns that the proposed entitlement to superannuation in the National Employment Standards (NES) would create additional regulatory complexity for employers or duplicate regulatory functions. As set out in the department's previous submission, the entitlement to superannuation in the NES will be aligned with and refer to superannuation legislation. This design intentionally minimises the possibility of different obligations arising under superannuation legislation and the NES.

The Australian Tax Office (ATO) and the FWO currently both have regulatory powers in relation to superannuation and have implemented a memorandum of understanding to support their respective regulatory powers. The ATO has broad regulatory powers to recover unpaid superannuation, including through director penalty notices, the use of security bonds and dedicated expert staff and resources. The FWO has standing to recover unpaid superannuation under a modern award, enterprise agreement or other industrial instrument.

As set out in the department's previous submission, the ATO and FWO will continue to work in complementary roles in relation to the recovery of unpaid superannuation, particularly when it arises in the context of other contraventions of employment entitlements. The ATO will maintain primary responsibility for ensuring compliance with the superannuation guarantee and associated obligations, while the proposed amendment would complement the FWO's existing powers to recover unpaid superannuation.

Role of the Fair Work Commission and the Courts

Some stakeholders raised concerns that the proposed entitlement to superannuation in the NES might allow the Fair Work Commission to make decisions that have a binding effect on existing superannuation legislation or policy or affect the content of terms of modern awards that deal with superannuation. This department does not agree that this is the case.

The proposed entitlement to superannuation in the NES would not have any impact on terms of modern awards that relate to superannuation, or the Fair Work Commission's existing powers to vary the content of such terms.

An application alleging a contravention of the NES may be made to a court listed in section 539 of the Fair Work Act. There is no general power for the Fair Work Commission to make orders about alleged contraventions of the NES. The proposed amendments would not disturb this existing arrangement.

However, the Fair Work Act provides that parties to an enterprise agreement may agree to the Fair Work Commission as the arbiter of arbitration of disputes, including disputes that may arise in relation to under the NES or under the agreement. Whether the Fair Work Commission could arbitrate a dispute regarding unpaid superannuation under the proposed entitlement to superannuation in the NES because of an existing term would depend on what the parties agreed to in a relevant enterprise agreement. Parties may agree that the Fair Work Commission should arbitrate disputes arising under the NES, as amended from time to time. The Government considers that it is more appropriate for the Fair Work Commission to consider what dispute resolution the parties agreed to on a case-by-case basis, rather than an amendment which would prevent arbitration of NES superannuation disputes under pre-existing dispute resolution terms.

It is also common for enterprise agreements to include terms regarding the payment of superannuation contributions. Nothing in this Bill would affect parties' existing ability to request that the Fair Work Commission arbitrate a dispute about such terms.

Preventing multiple actions

The Bill provides that an employee cannot use the new NES entitlement to recover unpaid superannuation through a court if the ATO has already commenced legal proceedings to recover effectively those same amounts of unpaid superannuation. This prohibition would cease to apply if the ATO discontinued such a proceeding prior to an order for recovery against an employer.

Some stakeholders raise concerns that this bar on multiple actions should be broadened, while another has expressed concern that the provision lacks flexibility and that a strict bar on action is not appropriate in all circumstances.

The department recognises that there is a spectrum of enforcement action that may be taken by the ATO to recover unpaid superannuation contributions, up to and including court action. However, the inclusion of a right in the NES to superannuation is intended to expand the number of employees covered by the Fair Work Act who have an enforceable workplace right to superannuation, separately to the steps that may be taken by the ATO. The Bill strikes a balance between empowering individuals to bring actions to recover their own superannuation and avoiding duplicative court processes.

One stakeholder raised a concern that an employee should also be prevented from commencing legal proceedings to recover unpaid superannuation under the relevant term of a modern award if the ATO has already commenced legal proceedings to recover those amounts. Employees covered by a modern award have been able to recover unpaid superannuation under such terms for a number of years, and the department is not aware of employers being subject to multiple actions.

Further, stakeholders recommended that the *Superannuation Guarantee Charge Act 1992* should be amended to prevent the ATO from commencing court proceedings in relation to unpaid superannuation entitlements if such proceedings have been commenced under the proposed NES entitlement. Any amendments to superannuation legislation are a matter for Government (and fall within the responsibility of the Treasury portfolio).

Orders for compensation

Some stakeholders recommended that the Explanatory Memorandum be amended to clarify that an order for compensation made under section 545 of the Fair Work Act for contravening the proposed NES entitlement could include compensation for insurance benefits that are lost due to non-payment of superannuation or loss of returns on unpaid superannuation contributions.

A court has discretion under section 545 of the Fair Work Act to make any order it considers appropriate if a provision of the NES has been contravened, including orders awarding compensation for loss that a person has suffered because of the contravention. The court's compensatory power is sufficiently broad to allow a court to respond to any particular loss that a person might suffer if the proposed entitlement to superannuation is contravened. The court would always be informed by the submissions of the parties when making orders for compensation.

ATO guidance

Concerns have been raised that an employer who has relied on guidance issued by the ATO to ensure compliance with superannuation legislation could be subject to pecuniary penalties if they are found to have contravened the proposed NES entitlement to superannuation.

Administrative guidance issued by the ATO about superannuation is not legally binding and cannot affect a taxpayer's base tax liability. However, the department acknowledges that the ATO's current practice is that a taxpayer is protected against discretionary ATO imposed penalties and interest charges if they rely on such guidance reasonably and in good faith. The civil penalty regime contained in the Fair Work Act is discretionary. A court may order a pecuniary penalty that it considers is appropriate if a person has contravened a civil remedy provision. Evidence that an employer's contravention arose solely from good faith reliance on ATO guidance would weigh strongly against imposition of a civil penalty.

A key limitation on the court's discretion to make a pecuniary penalty order is set out in the note to subsection 546(1) of the Fair Work Act:

> *Pecuniary penalty orders cannot be made in relation to conduct that contravenes a term of a modern award, a national minimum wage order or an enterprise agreement only because of the retrospective effect of a determination (see subsections 167(3) and 298(2)).*

This recognises that a person should be in a position to know in advance whether their conduct could attract a civil penalty or not. Section 556 further provides that a person cannot be ordered to pay a pecuniary penalty twice under the Commonwealth bodies of law in respect of the same conduct (that is, to avoid double jeopardy). The department considers that there is no comparable rationale for limiting the court's discretion in relation to the proposed entitlement to superannuation in the NES.

Suggested amendments to superannuation legislation

A number of stakeholders suggested amendments to superannuation legislation to reduce the prevalence of unpaid superannuation, including aligning the requirement to make superannuation with the payment of wages. Any amendments to superannuation legislation are a matter for Government.

Coal mining long service leave scheme

Casual loading

While some stakeholders support the inclusion of casual loading in the definition of eligible wages for the purposes of levy calculation and payment of employees' long service leave entitlement in the Coal Mining Industry (Long Service Leave Funding) Scheme (Scheme), others have raised concerns that this inclusion would create an unfair advantage to casual employees over permanent employees. Permanent employees accrue paid entitlements such as personal leave and annual leave while they are on long service leave. Casual employees receive a casual loading to compensate them for lack of paid entitlements and the insecure nature of their role. In achieving the intent of this measure, the Government's position is that it is therefore equitable for a casual to continue to receive the casual loading during their period of long service leave.

This change will also ensure that some casuals (who may not be covered by industrial instruments offering more generous entitlements) are paid their usual salary when taking long service leave, something that already occurs for permanent employees.

Ordinary rate of pay

Some stakeholders noted that they oppose the alternative method of incorporating casual loading – that is, when a casual rate is part of a 'rolled-up-rate', the employees' ordinary rate of pay will be used to calculate the additional cost. While some stakeholders have stated that this will mean that overtime hours are counted in the accrual of the entitlements, the generally accepted meaning of ordinary rate of pay does not include overtime hours (see, for example, the Fair Work Ombudsman's glossary definition of "Ordinary pay rate"[1]).

Averaging of hours

Some stakeholders have stated that the change to the reporting of hours, or the averaging method, will mean that casuals will have their overtime hours counted when permanent employees will not. However, counting these overtime hours for casuals (subject to the same 35 hour per week cap that applies to permanent employees) is an existing feature of the Scheme[2] and recognises the insecure nature of this casual work. The amendments build on this existing feature by averaging out the total hours worked by a casual employee across all the weeks that begin in a quarter (or all applicable weeks in a quarter where an employee does not work for the entire quarter), but still maintaining the 35 hour cap per week.

Effectively this is a balance – permanent employees do not get their overtime counted for the levy, but equally casual employees are not guaranteed 35 working hours a week under the Scheme (for the purposes of calculating accrual of long service leave qualifying service) regardless of how many hours they work.

The number of 'working hours' per week and the rate of pay for those hours on which levy is calculated are separate concepts. A casual employee may work a number of hours per week (capped at 35), some of which are ordinary hours and some of which are overtime. The current Scheme

[1] https://www.fairwork.gov.au/taxonomy/term/413 (accessed 23/04/2023).
[2] See section 39AA(2)(c) of the *Coal Mining Industry (Long Service Leave) Administration Act 1992*

requires levy to be paid for all hours worked, but calculated on "eligible wages" which is the base rate of pay (including incentive-based payments and bonuses). The amendments continue to adopt this approach but also include the addition of casual loading (where it can be quantified) into the meaning of "eligible wages"; or the employee's ordinary rate of pay (including incentive-based payments and bonuses) where the casual loading cannot be quantified.

Proposed amendments to drafting

The broad intention of the reforms in Schedule 6 to the Bill is to ensure that casual employees are treated no less favourably than permanent employees in the accrual and payment of their long service leave entitlements. The drafting is intended to maintain consistency in language with the current *Coal Mining Industry (Long Service Leave) Administration Act 1992* while providing for the inclusion of casual loading in the payment of an employee's entitlement to place them on the same footing as permanent employees (who continue to accrue annual leave and personal leave while on long service leave).

Some stakeholders have proposed amendments to the drafting of Schedule 6. The distinction between the terms 'covers' and 'applies' was raised with regard to drafting. The *Coal Mining Industry (Long Service Leave) Administration Act 1992* currently defines and uses the term 'covers' (see for example, existing sections 4(1), 39AD and 39EB). The drafting in Item 9 of Schedule 6 of the Bill (proposed subsection 39AC(2)) adopts the same language for consistency. Practically, these provisions operate by referring to the industrial instrument that applies to the employee.

Specific further amendments to the drafting of Schedule 6 were proposed relating to paragraphs 39AC(2)(a) and 39AC(2)(b) in Item 9. The drafting of proposed paragraph 39AC(2)(a) in Item 9 of Schedule 6 to the Bill matches the wording used in existing subsection 39AC(1) for consistency. The intention is to continue reliance on the term 'base rate of pay', but to also add on casual loading (that can be quantified in the industrial instrument) to the amount to be paid to an eligible employee for a period of long service leave. Incentive-based payments and bonuses are, of course, already included for all employees under section 39AC(1) and the proposed amendments would continue this position.

The intention of proposed paragraph 39AC(2)(b) in Item 9 of Schedule 6 to the Bill is not to adopt the concept of 'full rate of pay'. Instead, it is intended to apply to employees in the black coal mining industry who may be paid a 'flat rate' or 'rolled up rate' of pay. This rate may compensate for a number of matters, including casual loading. However, this paragraph would only apply when the percentage of the rolled up or flat rate of pay attributed to casual loading cannot be quantified.

Other issues in the Scheme

Some stakeholders noted that there are further issues with the Scheme that have not been dealt with in this Bill. An immediate priority for the Government is to address insecure work and ensure fairness for casual employees. This measure would ensure fair treatment of casual employees in the accrual and payment of their long service leave entitlements in the black coal mining industry.

This is the first reform the Government is implementing, stemming from the *Independent Review of the Coal Mining Industry (Long Service Leave Funding) Scheme*. Other recommendations canvassed in the review are a matter for Government.

Unpaid parental leave

Notice requirements

Some stakeholders raised concerns that the proposed notice requirements for taking unpaid parental leave may not provide employers, particularly small businesses, sufficient time and certainty to meet their business needs, given the increased quantum of flexible unpaid parental leave from 30 to 100 days. Some stakeholders were also concerned the notice provisions will allow employees to take flexible unpaid parental leave on an ad hoc or irregular basis.

The unpaid parental leave framework and the Paid Parental Leave scheme must complement each other, so employees have a corresponding Fair Work Act entitlement to take the time off work necessary to access government parental leave payments. This is why flexible unpaid parental leave was first introduced as an entitlement in 2020, and why it is expanding to 20 weeks in this Bill.

Flexibility has many benefits for businesses. It can mean experienced employees gradually recommence work after becoming a parent sooner, or only needing to fill a partial vacancy, instead of a full one. Employers, including small businesses with close relationships with their employees, will be able to work together with employees to find the right solutions for their circumstances at the workplace level.

Employees will, as they do now, need to give advance notice before taking leave, so employers can manage absences from their workforce. The Bill recognises existing notice provisions for taking flexible unpaid parental leave strike the right balance for employers and employees. Any amendments to the notice provisions that further limit when employees can access flexible unpaid parental leave would restrict employees' choices and ability to share work and caring responsibilities in a way that best suits their family's needs. Similarly, any amendments reducing notice for employers would make it difficult for employers to manage their workforce needs.

The department wishes to clarify the proposed note at subsection 74(4B) would provide guidance to both employers and employees about when it might not be practicable for an employee to give notice of taking unpaid parental leave in accordance with the normal timeframes under the Fair Work Act. While employees in some circumstances may be able to access paid or unpaid personal/carer's leave entitlements, these entitlements do not cover all unexpected parenting circumstances for which flexible unpaid parental leave could assist employees.

The department notes there is no reliable evidence of employees using flexible unpaid parental leave under the existing entitlements in the Fair Work Act to take leave on an ad hoc or irregular basis. The department also notes employees are unlikely to use unpaid parental leave in this way, given it is an unpaid leave entitlement and requires employees to plan their leave and care arrangements ahead of time.

Employee authorised deductions

Some stakeholders raised concerns about the possibility for confusion or additional costs to employers arising from deductions for variable amounts. The department notes that employees can only authorise deductions that an employer chooses to offer. It is open to employers to take a range of measures to simplify their own administration of deductions if they choose. Such measures could

include choosing to only offer to make deductions for a specified amount, requiring employees to complete a form authorising any change in the amount of a deduction, only offering variable deductions where the payment recipients agree to meet their process requirements, or not to offer deductions at all.

Concerns were also raised regarding whether the amendments provide sufficient safeguards for employees, including for employees who are more vulnerable to wage theft. As highlighted in the department's previous submission, an employee does not have to agree to variable deductions. Although not a requirement of the Bill, they may wish to also place an upper limit on the varying amount, after which they would need to provide a new written authorisation. The Government intends to introduce further safeguards for employees in the Fair Work Regulations to complement the legislative amendments. Intended amendments to the regulations would require certain information to be specified for authorisations to be valid, to reduce confusion and promote informed consent for vulnerable workers.

One stakeholder raised concerns that vulnerable employees employed by labour hire companies could be exploited by agreeing to salary deductions made for the benefit of a third party to whom they are contracted to work. The Government has committed to establishing national labour hire regulation to help protect labour hire workers from exploitation by improving compliance with relevant laws, including workplace laws. The department is currently consulting with stakeholders to inform the design of a national scheme.

Workplace determinations

No stakeholder concerns were raised about this measure and it is minor and technical in nature.