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30 March 2021

Senator Tony Sheldon
Chair
Select Committee on Job Security
Department of the Senate
PO Box 6100
Canberra ACT 2600

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

Dear Senator,

Select Committee on Job Security

The Law Society appreciates the opportunity to contribute to the Senate Select Committee on Job Security ('Select Committee'). This submission, which is informed by our Employment Law and Human Rights Committees, addresses paragraphs (e) and (h) of the Select Committee's terms of reference.

(e) the effectiveness, application and enforcement of existing laws, regulations, the industrial relations system and other relevant policies

The Select Committee has been established to inquire into and report on the impact of insecure or precarious employment on the economy, wages, social cohesion and workplace rights and conditions. For the purposes of this submission, the Law Society considers insecure or precarious employment to include casual work, contract work and platform work (also known as 'gig' work). In our view, current laws, regulations, and policies do not provide sufficient protection for workers involved in these types of employment, and they also do not provide sufficient certainty for employers.

Part 2-2 of the *Fair Work Act 2009* (Cth) ('Fair Work Act') sets out the National Employment Standards, which are the minimum terms and conditions of employment that apply to national workplace relations system employees. Below we outline how the full range of these minimum terms and conditions are not available to workers in specific types of insecure or precarious employment.

Casual employees

A casual employee is an employee who does not have a firm commitment in advance from an employer about how long they will be employed for or the hours and days they will work, and does not commit to all work an employer might offer.¹ Schedule 1 of the Fair Work Amendment

¹ 'Casual Employees', *Fair Work Ombudsman* (Web Page) <<https://www.fairwork.gov.au/employee-entitlements/types-of-employees/casual-part-time-and-full-time/casual-employees>>.

(Supporting Australia's Jobs and Economic Recovery) Bill 2021 (Cth) ('the Bill') will insert a statutory definition of casual employee into the Fair Work Act.

Casual employees are excluded from a number of aspects of the National Employment Standards: annual leave (s 86); paid personal/carer's leave (s 95); paid compassionate leave (s 106); payment on jury service (s 111); and notice of termination and redundancy pay (s 123). Casual employees are not protected from unfair dismissal unless the employment was on a regular and systematic basis and the employee had a reasonable expectation of ongoing employment on this basis (s 384(2)). This is a contested area of law due to the difficulty in identifying a "true" casual from a "long term" or "regular" casual.²

While casual employees and employers are afforded more certainty by sch 1 of the Bill, which passed both Houses of Parliament on 22 March 2021, there are areas in which the Bill could have been improved. A complete list of suggested improvements is contained at pp 8-12 of The Law Council's Submission to the Senate Standing Committees on Education and Employment dated 5 February 2021.³

Contract workers

Contract workers are also precluded from some of the benefits and protections in the Fair Work Act and the National Employment Standards (ss 123 and 386(2)(a)). Contract workers, for the purpose of the Fair Work Act and the National Employment Standards, are workers employed for a specified period of time, for a specified task or for the duration of a season and are terminated at the end of that period. However, employees in a number of industries, including most prevalently in education and training, are employed on rolling maximum duration or fixed term contracts.⁴ These employees often do not know whether their contract will be renewed at the end of each term and the contracts are required to be scrutinised to determine the true nature of the relationship and whether the protections should be ousted.

This situation could be improved by the legislature adopting the assessment articulated by the Full Bench of the Fair Work Commission ('FWC') at [75] of *Khayam v Navitas English Pty Ltd* [2017] FWCFB 5162 to determine the true nature of the employment, i.e., whether it was intended to be ongoing or for a specified period.

Platform workers

Platform work is work accessed through, or organised by, digital platforms which match workers and clients via internet platforms or apps.⁵ In October 2018, the Victorian Government commissioned an inquiry into the Victorian on-demand workforce in response to concerns about the wages and conditions of workers in the on-demand economy, which includes platform workers. The final report arising from the inquiry, published in July 2020 ('the Report'), found that platforms have deliberately framed their arrangements with workers to avoid the operation of existing labour regulations.⁶

² See for example: *Workpac Pty Ltd v Rossato* [2020] FCAFC 84; and *WorkPac Pty Ltd v Skene* [2018] FCAFC 131.

³ Law Council of Australia, Submission No 57 to Senate Standing Committees on Education and Employment, *Inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, 5 February 2021, 8-12. Available: <https://www.lawcouncil.asn.au/resources/submissions/fair-work-amendment-supporting-australias-jobs-and-economic-recovery-bill-2020>

⁴ Australian Bureau of Statistics, *Forms of Employment, Australia, November 2013*, Cat 6359.0.

⁵ Victorian Government, *Report of the Inquiry into the Victorian On-Demand Workforce* (Report, June 2020) 11.

⁶ *Ibid* 138.

Platform workers are generally characterised as ‘independent contractors’, an arrangement that leaves them outside the protection of the National Employment Standards.⁷ These workers are also not entitled to protections provided by awards including: classification-based wage rates; additional payments (penalties) for work outside of standard hours or on public holidays; overtime for additional hours; dispute resolution procedures; consultation procedures; and minimum engagement periods. In addition, platform workers are excluded from the collective bargaining scheme of the Fair Work Act and, as such, are unable to negotiate in support of collective claims for improved conditions of work. Such an exclusion may be inconsistent with Australia’s obligations under the *Right to Organise and Collective Bargaining Convention, 1949*.⁸

There is no clear line dividing workers who are employees and those who are not employees. While there is an accepted multi-factor test set out by the High Court as to how to determine whether someone is an employee (*Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16 and many others), borderline cases are very difficult to determine. Some examples that demonstrate this difficulty are: *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, in which the FWC found that a Foodora delivery rider was an employee; *Gupta v Portier Pacific Pty Ltd*; *Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698, in which the FWC Full Bench found that an Uber Eats driver was not an employee; and *Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610, in which the FWC found that an Uber driver was not an employee.

The Law Society’s view is that there should be a simpler mechanism for determining whether a platform worker is an employee, so that parties can be provided with certainty early on in their relationship. A body, such as the FWC, could be provided with the power to issue class rulings – akin to Australian Tax Office rulings – that are binding on the parties as to the nature of the relationship. Such a mechanism would be consistent with the approach urged by the ILO in the *Employment Relationship Recommendation, 2006*.⁹ In addition, the sham contracting provisions at Part 3-1 of the Fair Work Act should be strengthened to incorporate penalties for providing incorrect or misleading information to the body issuing such rulings.

Consideration should also be given to providing minimum entitlements and fair conduct provisions to platform workers who are not employees. In NSW, the unfair contracts provisions at Part 9 of the *Industrial Relations Act 1996* (NSW) are designed to prevent contractors from being paid less than employees doing the same work. While a protection of this nature has been legislated by the Commonwealth in the *Independent Contractors Act 2006* (Cth) (‘IC Act’), the Report noted only 16 claims had been commenced under the IC Act since 2014, with 11 of these being discontinued, which led it to suggest “that this little used jurisdiction has produced few positive outcomes”.¹⁰ The Report suggests that the reasons for this low number of claims include limited support and information available to people seeking to access to the unfair contracts jurisdiction under the IC Act, and the fact that an application to review a contract must be made to the Federal Court or Federal Circuit Court.¹¹

In this respect, the situation in Australia differs from the United Kingdom and the European Union. The Supreme Court of the United Kingdom recently decided, in *Uber BV v Aslam* [2021]

⁷ ‘Gig Economy’, *Fair Work Ombudsman* (Web Page) <<https://www.fairwork.gov.au/find-help-for/independent-contractors/gig-economy>>.

⁸ International Labour Organization, *Right to Organise and Collective Bargaining Convention, C098*, 32nd sess, (1 July 1949). Available: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312243:NO.

⁹ International Labour Organization, *Employment Relationship Recommendation, R198*, 95th sess, (15 June 2006). Available: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312535.

¹⁰ Victorian Government (n 5) 167.

¹¹ *Ibid* 166.

UKSC 5, that Uber drivers are workers for the purposes of the *Employment Rights Act 1996* (UK). In contrast to the limited scope of the IC Act for non-employee workers in Australia, non-employee workers in the UK receive certain guaranteed protections under the *Employment Rights Act 1996* (UK) and other legislation, including (inter alia) payment of a minimum hourly wage, payment for public holidays and maximum weekly hours of work.¹² The *Employment Rights Act 1996* (UK) also includes a clear definition of 'worker' to ensure that, for instance, platform workers are covered, but genuine small business owners (who are not in a hierarchical relationship with an employer or other entity) are not.¹³ Similar arrangements are required under European Union law.¹⁴

Section 7.5 of the Report outlines recommendations that would enhance certainty, choice, and fairness for platform workers. We suggest the Select Committee give consideration to the recommendations in the Report directed to the Commonwealth, which include:

- clarify and codify work status in legislation to reduce doubt about work status and, therefore, 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 arrangements 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; and
- enhance enforcement to ensure compliance, including where sham contracting has occurred.

(h) any related matters: international obligations and best practice

International Labour Organization instruments

Australia is a party to the ILO and a number of its conventions. Particularly relevant to the Select Committee's terms of reference are the *Termination of Employment Convention, 1982* ('the Convention')¹⁵ and its associated recommendation, the *Termination of Employment Recommendation, 1982* ('the Recommendation'),¹⁶ along with the *Employment Relationship Recommendation, 2006* referred to above.¹⁷

In the context of job security, it appears that Australia's current unfair dismissal scheme is inconsistent with provisions of the Convention and the Recommendation which relate to dismissals taken for economic, technological, structural or similar reasons. For instance:

¹² 'Employment status', *Government of the United Kingdom* (Web Page) <<https://www.gov.uk/employment-status/worker>>.

¹³ *Employment Rights Act 1996* (UK), s 230.

¹⁴ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1414674219132&uri=CELEX:32003L0088>.

¹⁵ International Labour Organization, *Termination of Employment Convention*, C158, 68th sess, (22 June 1982). Available: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158.

¹⁶ International Labour Organization, *Termination of Employment Recommendation*, R166, 68th sess, (22 June 1982). Available: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R166.

¹⁷ See also generally: 'Employment Security', International Labour Organization (Web Page) <<https://www.ilo.org/global/topics/employment-security/lang--en/index.htm>>.

- Article 14 of the Convention requires employers who are engaged in dismissals for economic, technological, structural or similar reasons to notify the “competent authority”. While the Fair Work Act (ss 530 and 785) does require an employer to notify the Chief Executive Officer of Centrelink of such dismissals if 15 or more employees are affected, it is not clear what is done with this information or whether Centrelink is the “competent authority”. The competent authority is generally understood to be the department, ministry or agency responsible for administering the laws relating to the Convention’s subject-matter and Centrelink plays no role in administering the Fair Work Act. The appropriate agency would appear to be the Fair Work Ombudsman or the Department of Education, Skills and Employment. The intention of the Convention is to provide a degree of supervision or oversight of mass dismissals in the interests of employment security, which current arrangements arguably do not provide.
- Article 23 of the Recommendation states that the employer should select employees for retrenchment on the basis of criteria which give due weight to the interests of both employees and the enterprise. By contrast, the FWC has interpreted the ‘genuine redundancy’ objection to an unfair dismissal to not permit it to consider whether fair criteria were used in deciding which workers will be made redundant, effectively leaving the employer with an unfettered discretion.¹⁸
- Article 24 of the Recommendation states that retrenched workers should be given certain priority in rehiring by the same employer within a period of time from their departure from the enterprise. There is no provision for priority in rehiring in the Fair Work Act or modern awards at present.

Indicators of Employment Protection Database

Another resource that can assist in assessing the suitability and adequacy of existing laws, policies, and systems in promoting job security in Australia is the *Indicators of Employment Protection* database of the Organisation for Economic Co-operation and Development (‘OECD’). This database provides qualitative and quantitative assessments of employment protection measures in OECD and select non-OECD countries.¹⁹

On one of the quantitative assessments in that database, Australia ranks 26th of 37 countries for “strictness of employment protection – individual and collective dismissals (regular contracts)”²⁰ and 29th of 37 for “strictness of employment protection – temporary contracts”.²¹ Countries ranked ahead of Australia on these measures are from Western Europe, Eastern Europe, Latin American and East Asia. This is indicative of the issues referred to above as to the adequacy of existing arrangements.

The qualitative side of the database contains useful information on the range of measures taken in other OECD countries to promote job security, in particular in the context of redundancies and other dismissals for economic reasons.

¹⁸ See, for instance, *UES (Int'l) Pty Ltd v Harvey* [2012] FWA 5241, [26]-[29]. The decision was issued when the FWC was known by its previous name, Fair Work Australia.

¹⁹ ‘OECD Indicators of Employment Protection’, Organisation for Economic Co-operation and Development (Web Page) <<http://www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm>>.

²⁰ ‘Strictness of employment protection – individual and collective dismissals (regular contracts)’, Organisation for Economic Co-operation and Development (Statistics) <https://stats.oecd.org/Index.aspx?DataSetCode=EPL_OV>.

²¹ ‘Strictness of employment protection – temporary contracts’, Organisation for Economic Co-operation and Development (Statistics) <https://stats.oecd.org/Index.aspx?DataSetCode=EPL_T>.

ILO Report on Digital labour platforms and the future of work

Finally, the Law Society draws the Select Committee's attention to the ILO's detailed 2018 report on the gig economy, *Digital labour platforms and the future of work: Towards decent work in the online world*. This document is the result of extensive research, including a survey of 2,500 gig workers across 75 countries, and contains 18 principles for ensuring decent work on digital labour platforms.²²

Should you have any questions or require further information, please contact Andrew Small, Policy Lawyer.

Yours sincerely,

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President

²² Janine Berg et al, *Digital labour platforms and the future of work: Towards decent work in the online world* (Report 2018). Available: https://www.ilo.org/global/publications/books/WCMS_645337/lang--en/index.htm/.