GOVERNMENT OF WESTERN AUSTRALIA

SUBMISSION OF THE WESTERN AUSTRALIAN GOVERNMENT

FEBRUARY 2021

SENATE STANDING COMMITTEE ON EDUCATION AND EMPLOYMENT LEGISLATION
INQUIRY INTO THE PROVISIONS OF THE FAIR WORK AMENDMENT
(SUPPORTING AUSTRALIA'S JOBS AND ECONOMIC RECOVERY) BILL 2020

1. The Western Australian Government welcomes the opportunity to make a submission to the Senate Standing Committee on Education and Employment Legislation (the Committee) inquiry into the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (the Bill).

2. The Western Australian Government is committed to a fair safety net of wages and entitlements for all workers.

3. Western Australia has not referred its industrial relations powers to the Commonwealth. The Western Australian Government, via the Department of Mines, Industry Regulation and Safety (DMIRS), therefore continues to have a regulatory role ensuring private sector employers comply with industrial instruments and employment laws that fall within the State industrial relations system. The following submission is reflective of this experience, particularly with small business employers and their employees.

4. The Western Australian Government's submission addresses the following provisions of the Bill:

   a) the definition of 'casual employee';

   b) casual conversion to permanency;

   c) Fair Work Commission (FWC) approval of agreements which do not pass the better off overall test (BOOT);

   d) the timing of the automatic termination of agreements made prior to the commencement of the *Fair Work Act 2009* (FW Act);

e) the prohibition on advertising employment with a rate of pay less than the national minimum wage; and

f) the criminal offence for the dishonest and systematic underpayment of employees.

5. The submission also discusses the Western Australian Government's view that the Bill is an opportunity to repeal the transitional long service leave national employment standard (NES) and raises the issue of appropriate resourcing for the enforcement of employment laws.

A. DEFINITION OF CASUAL EMPLOYEE

6. The definition of casual employee in proposed s 15A of the FW Act centres on the nature of an employer's offer of casual employment and a person's acceptance of the offer of employment on that basis at the commencement of the employment of the employee.

7. In accordance with proposed s 15A(1), a person is a casual employee if the employer makes an offer of employment on the basis of no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person. Proposed s 15A(2) sets out the considerations to which regard must be had in determining whether an offer was made on that basis.

8. It is arguable that a consequence of these provisions is that, if an employer does not make an offer in the exact terms (be it in writing or orally), the employee will, at law, be considered a permanent employee as they will not fall within the definition of casual employee in s 15A.

9. It is DMIRS' experience that many employers, especially small business employers, are unlikely to offer casual employment to a person in such clearly defined terms. This is particularly the case when an offer of employment is made orally which, in DMIRS' experience, is more common than formalised employment arrangements. Under the Bill's provisions, an employer may consider they have offered casual employment to a person but, if they have failed to meet the prescriptive terms in proposed s 15A, the employment will be permanent by default. This is likely to lead to significant confusion among employers and employees about their employment relationship and the entitlements that derive from the characterisation of the relationship.

10. Conversely, an employee who falls within the definition of casual employee at the commencement of employment but whose nature of employment subsequently changes, is nonetheless deemed to continue to be a casual employee (subject to the limited and unenforceable circumstances in which conversion can occur or an alternative offer of employment is accepted).

11. Furthermore, an employer and employee may make a contract of employment that complies with the requirements of proposed s 15A(1) but the employer's subsequent conduct is inconsistent with s 15A(2)(a) – for example, the employer subsequently prevents the employee from electing to reject work. The employee would still, at law, be considered a casual employee because the initial employment contract was consistent with s 15A(1) yet, due to the employer's conduct, the casual employment may in fact be a contrivance.

12. In accordance with proposed s 15A(5) an employee remains a casual employee until:

    a) the employee has converted from casual employment pursuant to proposed Division 4A Subdivision B (employer offer of casual conversion);

    b) the employee has converted from casual employment pursuant to Division 4A Subdivision C (employee request for casual conversion); or

    c) the employee accepts an 'alternative offer of employment' (other than as a casual employee) by the employer and commences work on that basis.

Employer offer of casual conversion

13. An employer is required to make an offer of casual conversion if:

    a) the employee has been employed by the employer for 12 months; and

    b) the employee has worked regular hours on an ongoing basis for at least the last 6 of the 12 months.

14. An employer is not, however, required to make an offer if there are reasonable grounds not to make the offer and, if the employee does not accept the offer in writing within 21 days, the employee is taken to have declined the offer.

15. Consequently, an employee working regular hours on an ongoing basis will nonetheless remain a casual employee, if, for example:

    a) they have worked regular hours on an ongoing basis for anything less than 6 months of the first 12 months' employment;

    b) their employer has reasonable grounds not to make an offer; or

    c) the employee does not accept, in writing, the offer within 21 days.

Employee request for casual conversion

16. An employee may request a conversion to permanency if they:

    a) have been employed by the employer for more than 12 months;

    b) have, in the period of 6 months ending the day the request is made, worked a regular pattern of hours on an ongoing basis;

    c) have not, in the period of 6 months before the request is made, refused an offer of casual conversion under Subdivision B;

    d) have not, in the period of 6 months before the request is made, received a notice under s 66C(3)(a) that the employer has decided not to make an offer under s 66B (Subdivision B) on reasonable grounds;

    e) have not in the period of 6 months before the request is made, been refused casual conversion under Subdivision C; and

    f) the request is not made in the 21 days following the completion of 12 months' employment.

17. Consequently, an employee whose pattern of ongoing work is inconsistent with casual employment will nonetheless continue to be a casual employee if the employee does not make a request for casual conversion whether, for example, they are unaware they can do so, they are concerned for the continuity of their casual employment if they do so or because they choose not to make the request.

Alternative offer of employment

18. Proposed s 15A(5) provides that an employee remains a casual employee of the employer until either conversion to full-time or part-time employment under the casual conversion provisions (s 15A(5)(a)) **or** 'the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis' (s 15A(5)(b)). The operation of proposed s 15A(5)(b) is unclear as it does not provide any guidance as to what may or may not constitute an alternative offer of employment.

19. For example, it appears that, based on the illustrative example provided in the Explanatory Memorandum to the Bill at page 6, an agreement offered by an employer and accepted by the employee to change the employee's hours from casual, irregular hours to regular hours on an ongoing basis would **not** constitute an alternative offer of employment within the meaning of s 15A(5)(b).

20. In that example, Ollie, who falls within the definition of a casual employee, works shifts that are irregular and change significantly week to week for the first several months of his employment. After a part-time colleague quits, Ollie is asked by his employer to cover the shifts of the former part-time employee. Ollie agrees and thereafter works shifts from 10am to 3pm, Thursday to Saturday each week. Ollie therefore remains a casual employee despite working the regular part-time hours formerly worked by a part-time colleague. This results in Ollie receiving different entitlements to the former employee that worked those hours. Ollie will have no entitlement to annual leave or sick leave and will be required to be paid casual rates (at least until a possible casual conversion).

21. In practice, it is likely to be difficult to differentiate an employer offering a casual employee the regular hours previously performed by a part-time employee and an employer offering an employee a part-time position that constitutes an alternative offer of employment. The provisions are likely to introduce uncertainty about the nature of the relationship and the entitlements that derive from the work performed.

22. In DMIRS' experience, employers often do not have written contracts of employment at the commencement of employment and are even less likely to execute a new written contract for changes to employment status throughout the relationship. This is particularly the case in small businesses, and these provisions are likely to cause confusion and uncertainty in those relationships.

Summary

23. To summarise, the Western Australian Government's concerns with the proposed definition of casual employee are as follows:

    a) an employer may consider they have offered casual employment to a person but, if they have failed to meet the prescriptive terms in proposed s 15A, the employment will be permanent by default. This is likely to lead to significant confusion among employers and employees about their employment relationship and the entitlements that derive from the characterisation of the relationship;

    b) the focus on the offer of casual employment and acceptance of that offer, and not the subsequent conduct of the parties, will also result in confusion. The Bill provides for the content of the initial contract of employment to override the subsequent conduct of the parties, even if that subsequent conduct is entirely inconsistent with the terms of the initial contract. That initial contract then forms the basis of the employment entitlements of the employee, irrespective of changes to the pattern of work;

    c) the definition fails to take into account the need for employers and employees to have the flexibility for their relationship to evolve as needed, with entitlements that accurately reflect the true nature of their relationship at a particular time;

d) in deeming an employee to be a casual employee irrespective of actual work patterns, the proposed provisions overturn precedent as to the fundamental character of casual employment arrangements. As Professor Andrew Stewart of the University of Adelaide has observed, the provisions would "institutionalise the idea of a permanent casual…this gives a green light to employers to treat anyone as a casual regardless of how casual or temporary or uncertain the job really is";[1]

e) there is ambiguity and uncertainty regarding what will and will not constitute an alternative offer of employment; and

f) less secure forms of employment have an adverse impact on workers, their families and the wider community. There is a legitimate place for genuine casual employment arrangements, but any legislated definition of casual work should not encourage artificial characterisations of positions that in reality are regular, ongoing and long-term.

B. ENFORCEABLE RIGHT FOR CASUAL CONVERSION TO PERMANENCY

24. Proposed s 66B of the FW Act requires an employer to make an offer of permanent employment to an eligible casual employee within 21 days of the employee having been employed for 12 months. Proposed s 66C(1) provides that an employer does not, however, have to make an offer if there are reasonable grounds not to make the offer and the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of deciding to make the offer. The 'reasonable grounds' are set out in proposed s 66C(2).

25. Proposed s 66H similarly provides that, where an employee has requested a conversion to permanency, an employer may refuse the request on reasonable grounds.

26. It is submitted that it could be very difficult for an employee to challenge the grounds in proposed s 66C(2) and s 66H(2) – for example, where an offer is not required or a request is refused because the employee's hours of work will be significantly reduced in the next 12 months. This is information to which only the employer can attest and may be founded on little more than an employer's assertion that their decision was based on facts that are reasonably foreseeable.

27. The parties to a dispute regarding an employer's refusal to offer conversion or agree to an employee's request to convert must attempt to resolve the matter under a dispute settlement procedure in a fair work instrument, contract of employment, other written agreement or proposed s 66M.

[1] 'Backdated casual claims fix facing snag', Australian *Financial Review*, 10 December 2020

28. The only mandated requirement in the dispute settlement procedure in proposed s 66M and in awards is that, in the first instance, the parties must attempt to resolve the dispute at the workplace level. It is then discretionary as to whether a party refers an unresolved dispute to the FWC. Furthermore, the FWC cannot arbitrate the dispute unless the parties agree to arbitration.

29. The casual conversion provisions fall within the NES and, with the exception of requests for flexible work arrangements (s 65(5)) and extensions to unpaid parental leave (s 76(4)), the NES are legally enforceable under s 44(1) of the FW Act. It is noted that the Bill does not amend s 44(2) of the FW Act to provide that a (court) order cannot be made in relation to an alleged contravention of s 66B or s 66H.

30. If the workplace level attempts to resolve the matter have failed, there does not appear to be any impediment to an employee instituting legal proceedings alleging that the employer's decision was not made on reasonable grounds. However, it is not clear how the dispute settlement procedures are intended to operate in conjunction with enforcement action and whether an employee could take legal action to enforce proposed s 66B or s 66F, regardless of whether action has been taken under a dispute settlement procedure.

31. The Western Australian Government draws the Committee's attention to s 38B of the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act). Section 38B regulates the obligation on an employer to agree to an employee's request to extend a period of unpaid parental leave or to return to work on a modified basis after a period of parental leave unless there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of the employer's operations or business and those grounds would satisfy a reasonable person. Although s 38B relates to parental leave and proposed s 66B of the Bill relates to casual conversion, the provisions are analogous in that they regulate employee requests and the grounds on which an employer can refuse them.

32. Section 38B(5) of the MCE Act goes on to provide that, if a request is made under one of the relevant sections, the subject matter of the request may be enforced (in the Industrial Magistrate's Court) as a minimum condition of employment and, in any enforcement proceeding, **the onus lies on the employer to demonstrate that the refusal was justified on reasonable grounds** (emphasis added).

33. It is therefore submitted that the Bill be amended to clarify that the entitlement to conversion to permanency is an enforceable NES with the onus on the employer to demonstrate that there were reasonable grounds to not make an offer of conversion or to refuse an employee's request to convert. The purpose of the reverse onus is to cast upon the employer the onus of proving that which lies peculiarly within their own knowledge. Without a reverse onus, the 'right' to convert from casual to permanent employment may in effect be illusory.

34. In addition, the Bill should be amended to allow the FWC to arbitrate a dispute regarding conversion without a requirement for both parties to agree to arbitration. There is recent precedent for this: the Federal Government's JobKeeper amendments to the FW Act enable the FWC to arbitrate a dispute about a JobKeeper enabling direction without both parties agreeing to the arbitration: s 789GV. Given the significance of an employer's decision not to convert a casual employee, the arbitral jurisdiction of the FWC is appropriate.

35. Such provisions would additionally help prevent perpetuating contrivances in how an employee is employed under proposed s 15A. That is, if the reality of a particular employment relationship is not casual employment (because the employee works a regular pattern of hours on an ongoing basis), an **enforceable** obligation to offer the employee permanent employment will ensure that the true nature of the employment relationship is ultimately recognised.

C. AGREEMENTS THAT DO NOT PASS THE BOOT

36. Schedule 3, Part 5 of the Bill inserts new s 189(1A) into the FW Act to enable the FWC to approve an enterprise agreement that does not pass the BOOT if it is appropriate to do so taking into account, amongst other things, the impact of COVID-19 on the enterprise/s to which the agreement relates.

37. It is noted that s 189(2) of the FW Act currently allows the FWC to approve an agreement that does not pass the BOOT if it satisfied that, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest.

38. Section 189(3) provides that an example of such a case is where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement.

39. It is submitted that proposed s 189(1A) is an unnecessary amendment and, furthermore, significantly dilutes the fundamental protection of the BOOT. Section 189(2) currently enables the FWC to approve an agreement that does not pass the BOOT if it is satisfied that, because of the exceptional circumstances of the impact of COVID-19 on an enterprise, the agreement is not contrary to public interest. Proposed s 189(1A) should therefore be deleted.

D. AUTOMATIC TERMINATION OF PRE-FW ACT AGREEMENTS

40. In September 2019, the Western Australian Minister for Industrial Relations wrote to the Federal Minister for Industrial Relations seeking the automatic termination of federal agreement-based transitional instruments. The Western Australian Government therefore welcomes the automatic termination of agreements made prior to the commencement of

the FW Act and during the FW Act 'bridging period' of 1 July to 31 December 2009. However, the date of automatic termination is not until 1 July 2022.

41. The age of transitional instruments can be upward of 10 or more years. The parties to such instruments have therefore had ample time in which to negotiate replacement agreements.

42. The age of these agreements means their provisions are increasingly outdated and could not, if negotiated today, be registered under the FW Act due to inconsistencies with modern award conditions. This perpetuates unfairness in the treatment of employees working within the same industry.

43. Lastly, the continued existence of transitional instruments for a further 18 months has commercial implications and undermines the notion of a level playing field where national system businesses are able to compete equally.

44. It is submitted that a shorter time be included in the Bill for the automatic termination of these agreements.

E. PROHIBITION ON ADVERTISING EMPLOYMENT WITH A RATE LESS THAN THE NATIONAL MINIMUM WAGE

45. Proposed s 536AA of the FW Act provides that an employer must not advertise, or cause to be advertised, employment with the employer specifying a rate of pay less than the national minimum wage set by a national minimum wage order.

46. In June 2020, the Western Australian Government introduced the *Industrial Relations Legislation Amendment Bill 2020* (IRLA Bill) into the State Parliament. Clause 54 of the IRLA Bill proposed to insert new s 97H into the *Industrial Relations Act 1979* (WA). This provided that a person must not advertise the availability of employment at a rate of pay that is less than the minimum wage applicable to the position under the MCE Act, an award, an order of the Western Australian Industrial Relations Commission (WAIRC) or an industrial agreement.

47. The MCE Act minimum rate of pay is set each year by the WAIRC as part of the State Wage case. It is therefore akin to the national minimum wage set by the FWC in the national Annual Wage Review.

48. New s 97H arose from the recommendations of the 2019 Inquiry into Wage Theft in Western Australia (Inquiry into Wage Theft).[2] This provision, in effect, requires an employer

[2] The Inquiry covered both the State and national industrial relations systems and was undertaken by Mr Tony Beech, former Chief Commissioner of the WAIRC (the Inquirer). The Report of the Inquiry into Wage Theft is available at www.dmirs.wa.gov.au/wagetheft.

to establish the correct industrial instrument and therefore the correct minimum rate of pay before advertising the position. The intent is to deter contraventions of minimum entitlements from the outset of employment. Simply requiring compliance with the MCE Act minimum rate of pay would not result in compliance with the minimum rate of pay in an applicable award or agreement.

49. The same point can be made with respect to compliance with the national minimum wage. If a modern award rate should be paid to the employee, there is risk that by advertising for payment of (only) the national minimum wage, that the lower amount is paid and there is then a contravention of the award with the associated adverse consequences for the employee (loss of lawful entitlements) and the employer (exposure to legal action and penalties) .

50. There are numerous sources of free information from which an employer can obtain advice on the correct wage rate for an employee. Employers should reasonably obtain this information prior to engaging the employee i.e. when advertising the position.

51. It is therefore submitted that proposed s 536AA be amended to prohibit an employer from advertising employment specifying a rate of pay that is less than the minimum wage applicable to the position under an award, enterprise agreement or the national minimum wage set by a national minimum wage order.

F. CRIMINAL OFFENCE PROVISIONS

52. The Western Australian Government welcomes the Federal Government's wish to deal with issues of dishonest and systematic underpayment of employees.

53. Currently, s 553 of the FW Act provides a stay of proceedings for a pecuniary penalty order against a person for a contravention of a civil remedy provision if criminal proceedings are on foot and the offence is constituted by conduct that is substantially the same as the conduct in relation to which the civil remedy order would be made.

54. A court may make a reparation order following the criminal conviction of an employer and so enable a prosecutor to seek orders for loss of wages so that affected workers do not need civil proceedings to recover unpaid wages. However, the reality of criminal prosecutions is it may take a considerable period of time before a court would make such an order. This situation may create significant disadvantage for the employees concerned due to delays in receiving unpaid wages.

55. It is submitted that consideration be given to providing the courts with the discretion to enable civil proceedings instituted **solely** for the recovery of unpaid entitlements to commence or continue, notwithstanding the commencement or continuation of criminal proceedings that relate to substantially the same conduct. That is, where the civil proceedings do not seek the imposition of a civil penalty. Such discretion may help ensure that an employee is not left with unpaid entitlements for a significant period of time. In DMIRS' experience, it is not uncommon for employers to stop trading and/or go into bankruptcy or insolvency once enforcement proceedings are commenced against them. The longer the proceedings, the higher the risk that employees may ultimately be unable to recover their unpaid entitlements.

56. Proposed s 324B(2) provides that, for the purposes of proposed s 324B(1), an employer underpays an employee if the employer fails to pay the employee an amount payable to the employee in relation to the performance of work. The note to this subsection states that the amounts referred to in subsection (2) include leave payments.

57. Section 26 of the FW Act provides that the FW Act is intended to apply to the exclusion of all State and Territory industrial laws so far as they would otherwise apply to a national system employee. Section 27(1)(c) provides that s 26 does not apply to a law of a State or Territory so far as the law deals with a non-excluded matter. Section 27(2)(g) defines a non-excluded matter to include long service leave (except in relation to those who are entitled to long service leave under Division 9 of Part 2-2).

58. The Explanatory Memorandum to the Bill notes that the amendment to s 26 of the FW Act does not alter the current framework for excluding or preserving State and Territory laws, including those relating to long service leave.[3]

59. Notwithstanding this, the Western Australian Government submits that the drafting of proposed s 324B(2) could in fact capture a failure to pay an employee for long service leave, this being an amount payable to the employee in relation to the performance of work. This then has implications for those States that have introduced (or may want to introduce) criminal offences for non-payment of long service leave and the capacity for those States to criminally prosecute an employer for such a non-payment.

60. It is therefore submitted that proposed s 324B be drafted to explicitly exclude long service leave payments, except in relation to employees entitled to long service leave under Division 9 of Part 2-2.

[3] Pp 76-7.

RESOURCING FOR ENFORCEMENT OF EMPLOYMENT LAWS

61. The FW Act provisions for enforcement of all forms of employee underpayment should be supported by adequate funding and resourcing for the Fair Work Ombudsman (FWO) to enable increased detection and enforcement of wage theft and other underpayments.

62. The 2019 Inquiry into Wage Theft examined whether wage theft was occurring and made recommendations for strategies to assist workers and address wage theft. The Inquiry into Wage Theft found that wage theft is occurring in Western Australia and the forms of systematic and deliberate underpayments identified in the Report of the Inquiry into Wage Theft (Inquiry Report) are unpaid hours; non-payment of any wages or allowances for work performed; underpayment of wages and entitlements; unauthorised or unreasonable deductions; and non-payment of superannuation.[4]

63. The Inquiry Report identified the hospitality industry, particularly cafes and restaurants, contract cleaning, retail, and horticulture as areas where the likelihood of wage theft is higher.[5]

64. A total of 28 recommendations to address wage theft were made in the Inquiry Report. Broadly, the recommendations include strategies which aim to:

    a) increase awareness of employment rights and obligations in Western Australia;

    b) provide a pathway for employees who have been underpaid to obtain information and to seek redress; and

    c) provide for greater detection of underpayments and enforcement of employment laws.[6]

65. A major theme of the Inquiry into Wage Theft was the imperative for adequate resourcing for education and enforcement as a deterrent to underpayment. The Inquirer concluded that "one of the reasons, perhaps the most significant single reason, why wage theft is occurring is the lack of detection of non-compliance and of enforcement".[7]

66. The Inquiry Report notes that one common theme among submissions to the Inquiry from both employer and employee organisations was that the FWO should be given increased funding and resources for its work in Western Australia.[8] The Inquirer expresses agreement with those submissions and states:

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4 Report of the Inquiry into Wage Theft in Western Australia, p.7.
5 Ibid, p.7.
6 Ibid, pp.8-15.
7 Ibid, p.69.
8 Ibid, p.119.

> In my opinion, a visit from a Fair Work Inspector is one of the most effective ways to counter wage theft; it is entirely consistent with my opinion that the number of Fair Work Inspectors in WA should be increased … This does not reflect upon the work the FWO already undertakes in WA; it recognises the size of the State and the inherent difficulties in having inspectors visit businesses throughout the State.[9]

67. The Western Australian Government supports the views expressed in the Inquiry with regard to the importance of FWO Inspectors enforcing employment laws in Western Australia, and has raised concerns about the limited number of FWO Inspectors operational in the field in Western Australia.

68. A substantial increase in the number of FWO Inspectors available to undertake pro-active inspections of workplaces, and to take enforcement action in response to employee complaints, is considered by the Western Australian Government as essential.

69. The Inquiry Report recommended that the State Government recommend to the Commonwealth Government that there be greater funding for the FWO's presence in Western Australia.[10] In December 2019, the Western Australian Minister for Industrial Relations wrote to the Federal Minister for Industrial Relations highlighting relevant recommendations of the Inquiry for the Federal Government's consideration, including the recommendation regarding increased funding for FWO.

70. At the State level, the Western Australian Government has provided funding for DMIRS to increase the number of industrial inspectors as part of a range of strategies to combat wage theft.

G. LONG SERVICE LEAVE NES

71. The FW Act contains a long service leave NES. This does not, however, create a new statutory entitlement but instead simply preserves long service leave conditions contained in a federal award that would have applied to the employee immediately before 1 January 2010 (a 'pre-modern award'), regardless of whether that award has been terminated.[11]

72. Where long service leave is derived from a pre-modern award under the NES, the State and Territory long service leave laws are excluded from applying.[12] However, the pre-modern award will not apply if the employee is covered by one of the following federal agreements that came into operation before 1 January 2010:

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9 Ibid, p.164.

10 Report of the Inquiry into Wage Theft, Recommendation 26(1), p.167.

11 'Award' is defined by s 113(7) of the FW Act and in turn the *Fair Work (Transitional Provisions and Consequential Amendments) Act* item 2 Schedule 3. It effectively refers to a federal award under the *Workplace Relations Act 1996.*

12 FW Act s 27(2)(g).

a) a workplace agreement (collective agreement or Individual Transitional Employment Agreement) made after 26 March 2006, regardless of whether it deals with long service leave;

b) an Australian Workplace Agreement (AWA) made after 26 March 2006, regardless of whether it deals with long service leave;

c) an enterprise agreement made after 1 July 2009 that expressly deals with long service leave;

d) a preserved State agreement made in the State system before 26 March 2006 that expressly deals with long service leave;

e) a workplace determination made by the FWC that expressly deals with long service leave;

f) a pre-reform certified agreement made before 26 March 2006 that expressly deals with long service leave;

g) a pre-reform AWA made before 26 March 2006 that expressly deals with long service leave;

h) a section 170MX award made before 26 March 2006 that expressly deals with long service leave;

i) an old IR agreement approved before December 1996 that expressly deals with long service leave.[13]

73. As the Committee may note, some of these 'legacy' instruments may be over 25 years old. Where long service leave is derived from one of these federal instruments, State and Territory long service leave laws are not excluded from applying.[14] Instead, it is necessary to refer to the interaction rules between these instruments and State laws as per s 29 of the FW Act (for enterprise agreements) and item 5A of Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act* (for other instruments).

[13] FW Act s 113(2).

[14] However, an employer can seek an order from the FWC concerning an enterprise agreement, collective agreement, pre-reform certified agreement or old IR agreement that contains a long service leave scheme applying in more than one State or Territory, that is overall more beneficial than the LSL Act. In this case, the LSL Act will be excluded from applying.

74. The long service leave NES was only intended to be a transitional entitlement, pending development of a uniform, national long service leave standard with the States and Territories.[15] It was therefore not the intent to indefinitely preserve such old instruments nor the complex web of interactions described above.

75. However, very little work has occurred to implement a national long service leave entitlement, notwithstanding the recommendation of the 2012 post-implementation review of the FW Act that 'Commonwealth, state and territory governments should expedite the development of a national long service leave standard with a view to introducing it by 1 January 2015'.[16]

76. In the experience of the Western Australian Government, there has been no meaningful discussion between State, Territory and Commonwealth departmental officials on the development of a national standard in many years. Consequently, the purportedly transitional NES with its aging instruments and complex interaction provisions has been allowed to continue to exist well beyond its intended application.

77. In September 2019, the Western Australian Minister for Industrial Relations wrote to the Federal Minister for Industrial Relations seeking the repeal of the long service leave NES. The key reasons for this are set out below:

    a) the development of a uniform national long service leave standard is improbable, particularly as the States and Territories have and will continue to make their own (and differing) improvements to long service leave;

    b) the long service leave NES, involving the interactions of different and ageing instruments with one another and State and Territory long service leave legislation is extremely complex. Understandably, this in turn leads to employers not understanding their obligations and consequent non-compliance; and

    c) long service leave entitlements in these instruments cannot keep pace with the minimum conditions contained in State and Territory legislation. This results in unfairness to employees who do not receive the same minimum entitlements as other employees in the same jurisdiction and an unfair competitive advantage to those employers who are lawfully providing a lesser entitlement.

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[15] Fair Work Bill 2008 Explanatory Memorandum, [4.37]; Fair Work Ombudsman, Long service leave, www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/long-service-leave

[16] R McCallum, M Moore and J Edwards, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (15 June 2012) 102.

78. The Explanatory Memorandum to this Bill makes the following observation regarding the preservation of agreements made under previous workplace laws:

> The continuing preservation of agreements made under previous workplace relations laws, or legacy agreements, is also a known problem of the current system, potentially harming employee interests and fair market competition between employers. Of particular concern are legacy agreements made under the former *Workplace Relations Act 1996* or other predecessor legislation that have been preserved under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009.*[17]

79. For the same reasons the Federal Government has recognised in the Bill that it is time to automatically terminate all 'legacy' agreement based transitional instruments, it is submitted the Government should also recognise that it is time to repeal the transitional long service leave NES and its legacy instruments. Once repealed, the State and Territory long service leave laws will apply or, alternatively, the parties can negotiate an enterprise agreement that includes long service leave.[18]

H. RECOMMENDATIONS

80. In light of the above and in summary, the Western Australian Government recommends the following amendments to the Bill:

a) amend the definition of casual employee to allow the subsequent conduct and substance of the employment relationship to override the offer and acceptance of casual employment from the relationship's outset;

b) clarify the operation of s 15A(5)(b) regarding what constitutes an agreement to change the employment relationship from casual to permanent;

c) amend Schedule 1, Part 1 of the Bill to clarify that the entitlement to conversion to permanency is an enforceable NES with the onus on an employer to demonstrate that there were reasonable grounds to not make an offer of conversion or to refuse an employee's request to convert;

d) allow the FWC to arbitrate a dispute regarding casual conversion without a requirement for both parties to agree to arbitration;

e) delete the insertion of proposed s 189(1A) into the FW Act;

f) amend Schedule 3, Part 13 of the Bill to replace 1 July 2022 with a shorter time period for the automatic termination of pre-FW Act and bridging period agreements;

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[17] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* Explanatory Memorandum, p *Iiii.*

[18] Which, as per s 29(2) of the FW Act, will apply subject to the relevant State or Territory long service leave laws.

g) amend proposed s 536AA to instead prohibit an employer from advertising employment specifying a rate of pay that is less than the minimum wage applicable to the position under an award or enterprise agreement or the national minimum wage set by a national minimum wage order;

h) amend the FW Act to provide the courts with discretion to allow a civil proceeding instituted **solely** for the recovery of unpaid entitlements to commence or continue, notwithstanding the commencement or continuation of criminal proceedings that relate to substantially the same conduct;

i) redraft proposed s 324B in a way which excludes long service leave payments, except in relation to employees entitled to long service leave under Division 9 of Part 2-2; and

j) repeal the long service leave NES.

81. To strengthen detection and deterrence of wage theft and other forms of underpayment, the Western Australian Government also recommends greater consideration be given to the adequacy of funding and resources for the work of FWO in Western Australia and across the country.