

28 September 2023

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

To the Committee Secretary

Submission on Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

Thank you for the opportunity to make submissions on the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (the Closing Loopholes Bill)*.

This submission is jointly made by WEstjustice Community Legal Centre, South-East Monash Legal Service (**SMLS**), and JobWatch Inc. We are each members of Community Legal Centres Australia, the Federation of Community Legal Centres (Victoria) (**FCLC**), the National Employment Law Network and the FCLC Victorian Employment Law Working Group (**VELWG**).

About our services

Our Centres are partners in delivering targeted employment law services to international students in Victoria as part of the International Students Employment and Accommodation Legal Service (**ISEALS**). Since 2016, we have jointly supported over 1,150 international students to understand and enforce their work rights and responsibilities.

WEstjustice, SMLS and JobWatch provide employment and discrimination law education, advice and ongoing assistance to a diverse range of communities across Victoria. However, we note that those individuals that make up our client base tend to represent some of the most marginalised and disadvantaged communities - exploitation and discrimination is a common feature of their employment.

Our submissions

Casual employment

We refer to and rely on our previous submissions on workplace relations measures being considered for 2023, specifically [“Stand up for casual workers” regarding the definition of casual workers, the casual conversion process and dispute resolution for casuals](#), submissions made 06/04/2023.

For the reasons set out in those submissions, we welcome the Closing Loopholes Bill’s characterisation of casual employment by reference to “*the basis of the real substance, practical reality and true nature of the employment relationship*”, and the expansion of the Fair Work Commission’s powers to arbitrate disputes about the nature of an employment relationship.

Employee-like work

We refer to and rely on our previous submissions on workplace relations measures being considered for 2023, specifically [Employee-like forms of work and stronger protections for independent contractors](#) submissions made 18/05/2023.

We welcome the Closing Loopholes Bill's definition of "employment" at section 15AA which focusses on the essence, practical context, and actual nature of the relationship between the involved parties. However, we also re-state our primary position that if the Government is prepared to recognise that there is a class of independent contractors engaged in employee-like work, those workers should be treated as employees.

The Closing Loopholes Bill creates a definition of "regulated worker", being those performing employee-like work in the road transport industry and on digital platforms, and provides for a new jurisdiction for the Fair Work Commission to define minimum standards for these regulated workers. We re-iterate our previous recommendations with respect to this definition and jurisdiction, and urge the Government to adopt a broader scope beyond these two industries. The clients we see working in the gig economy include many who do not work in the road transport industry or through a digital platform – they include cleaners, aged care workers, labourers and babysitters. These gig workers, who are often among the most vulnerable, will not be protected by the narrow scope of the proposed "regulated worker" definition.

Discrimination

We refer to and rely on our previous submissions on workplace relations measures being considered for 2023, specifically [Updating the Fair Work Act 2009 to provide stronger protections for workers against discrimination](#), submissions made 18/05/2023.

While we welcome the inclusion of 'subjection to family or domestic violence' as a protected attribute, we urge the Government to consider the extensive recommendations provided in our previous submissions for strengthening anti-discrimination protections in the *Fair Work Act 2009* including:

1. The FW Act should expressly prohibit indirect discrimination and should include specific provisions relating to the Respondent's burden of proof.
2. The FW Act should require the employer to make reasonable adjustments for employees with disabilities and reasonable accommodation for employees with family or carer responsibilities.
3. A new complaints process should be established through the FWC to conciliate discrimination related claims, and FWC conciliators in this new complaints process must be appropriately trained on sensitive responses to claims of discrimination, including trauma informed and culturally-safe practice. This process should have no filing fee, consistent with the AHRC complaints process.
4. Vicarious liability in relation to discrimination under the FW Act should be consistent with federal anti-discrimination laws.
5. Special provisions or a guidance note should be included in section 351 to address common forms of family and domestic violence discrimination.

6. Any reforms must ensure that the FW Act operates broadly enough to provide victim/survivors sufficient legislative protections to enable them to effectively respond to family and domestic violence.
7. The time limit for bringing general protections involving dismissal should be extended to 24 months to align with federal anti-discrimination laws.
8. Federal anti-discrimination legislation should be amended so that a person is barred from making a claim only if 'the matter has been adequately dealt with by a court or tribunal'.
9. The following additional attributes should be included for protection under section 351 of the FW Act: homelessness; visa status; spent conviction; and irrelevant criminal records.

Labour hire loophole

We refer to and rely on our previous submissions on workplace relations measures being considered for 2023, *"Same job same pay" regarding the pay and conditions for labour hire workers*, submissions made 18/05/2023.

We consider the Bill's proposed "same job, same pay" provisions in relation to labour hire workers to be a positive step. However, in our view these don't address a major loophole associated with labour hire: avoidance by the host of employment obligations, including exposure to dismissal claims and liability for accrued entitlements based on length of service. This is especially unfair for workers who work continuously for the same host, but are employed by a series of labour-hire companies in such a way that they do not accrue entitlements such as redundancy and long service leave.

While there may be room to argue that some labour-hire workers are employees of the host under the proposed new definition of employment as "determined by ascertaining the real substance, practical reality and true nature of the relationship", our primary position is that labour-hire workers should also be **expressly deemed** employees of the host for the purposes of the Fair Work Act 2009 (and potentially long service leave legislation), if the work they do is a normal part of the ordinary business operations of the host; in other words, when the workers' relationship with the host is "employee-like".

At the very least, these workers should have access to the same or similar processes and Fair Work Commission powers to those proposed elsewhere in the Bill for "employee-like" workers, e.g. "unfair termination".

Funding

The Government should provide increased funding following reforms to the FW Act. Specifically, there is a need for significant funding for:

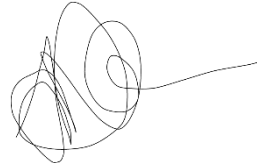
1. CLE for employers to understand the changes in the FWA and their obligations,
2. CLE for employees to understand their rights,
3. The FWC to manage the increased workflow arising from its new powers under the reforms, and
4. Community Legal Centres in anticipation of increased demands on our services including to manage advice and assistance in understanding the reforms and representation in matters to uphold employee rights.

We would be happy to discuss our submission and recommendations further with the Committee and can provide further case studies or information on request.

Yours sincerely,



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