Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Legal Aid NSW submission to Senate Education and Employment Committee

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Legal Aid NEW SOUTH WALES

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited, and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

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Introduction

Legal Aid NSW welcomes the opportunity to comment on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (the **Bill**). Our comments are confined to Schedules 1, 2 and 5 of the Bill.

Legal Aid NSW has extensive experience assisting disadvantaged workers with employment law matters. In the 2018/19 financial year, we provided over 4,200 employment law services.[1] The most common employment problems that our clients seek assistance regarding are consistently unfair dismissal and underpayment of wages.

Legal Aid NSW regularly provides advice to clients who have been substantially underpaid. In many instances, these clients have not been provided with pay slips or have been issued pay slips that do not comply with the Fair Work Regulations 2009 (Cth). Frequently, such clients also have difficulty obtaining access to their employee records, often because their employer has not kept the required records.

Between March 2020 and January 2021, we provided over 500 employment law services relating to issues arising from the COVID-19 pandemic.

A significant number of our clients are employed as casuals, and many are also vulnerable workers including migrant workers and young people.

Recommendations

Legal Aid NSW recommends the following amendments to the Bill:

1 The Bill include provisions similar to those in Part 3-1 Division 6 *Fair Work Act 2009* (Cth) (the **FW Act**) relating to sham arrangements so that it is unlawful for an employer to misrepresent that a role, that is in substance permanent employment, is casual employment or to make a statement that an employer knows is false to induce or persuade the employee to enter into an employment relationship.

2 The proposed new additional hours agreements for part time employees are not included.

3 However, if the provisions regarding additional hours agreements for part time employees are enacted, that additional safeguards regarding the documentation requirements are introduced to ensure that:

   a) the employee and the employer genuinely agree to any simplified additional hours agreement

   b) the employer is required to ensure that any simplified additional hours agreement sets out how the agreement may be terminated by the employee or the employer

[1] Including all service types (advice, minor assistance, extended legal assistance and grants of aid). Due to a transition to a new database, statistics for the 2019/20 financial year are not currently available.

c) the employer is required to ensure that any simplified additional hours agreement must be in writing and signed, and

d) The employer is required to ensure that a copy of any simplified additional hours agreement is given to the employee.

4 If the provision in relation to additional hours agreements for part time employees is enacted, that the provisions sunset one to two years after the Bill receives royal assent.

5 Employers should be required to provide notice and consult about each flexible work direction given to an employee.

6 The Fair Work Commission be accorded discrete powers under the FW Act to conciliate and, if necessary, arbitrate disputes relating to flexible work directions.[2]

7 Part 2 of Schedule 2 of the Bill sunset after a period of one year instead of two years.

Comments on The Bill

Schedule 1 Casual Employment

Determining who is a casual employee

Legal Aid NSW welcomes amendments to the FW Act to clarify the definition of casual employment. However, it is important that the definition adopted is appropriate.

The Bill states that a person is a casual employee if an offer of employment is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, and the person accepts the offer on that basis, and is employed on the basis of that acceptance.[3]

A substantial number of clients who seek employment law advice from Legal Aid NSW do not have a written contract of employment, and many do not have detailed discussions with their employer at the time of making an agreement about the terms and conditions of their employment. We often see clients who tell us that the only discussion that they had with their future employer before commencing employment was about pay. In this circumstance, all other terms of employment are left to be inferred by a course of conduct. Thus, a focus on what occurs at the time of formation of an employment contract is out of step with the reality of the way that many employment relationships begin.

The Bill sets out an exhaustive list of matters to be considered when determining whether, at the time of making an offer, the employer makes no firm advance commitment to continuing work according to a pattern of work. It is not unusual for employment relationships to bear indicia of both permanent and casual employment. Thus, despite the criteria set out in the Bill, there will still be work for courts and tribunals to do in resolving competing factors to determine whether employment is casual or permanent.

[2] Subject to potential constitutional limitations i.e. *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
[3] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 15A.

Legal Aid NSW is concerned that the new provision, with its focus on the formation of the employment relationship[4], will allow unscrupulous employers to engage employees under written contracts which in form meet the criteria outlined in clause 15(2), but where the relationship in substance amounts to permanent employment.

Legal Aid NSW recommends that provisions similar to those in Part 3-1 Division 6 of the FW Act relating to sham arrangements should apply. This would make it unlawful for an employer to misrepresent that a role, that is in substance permanent employment, is casual employment or to make a statement that an employer knows is false to induce or persuade the employee to enter into an employment relationship (**Recommendation 1**).

Offers and Requests For Casual Conversion

Legal Aid NSW welcomes that the Bill proposes a casual conversion clause that will form part of the National Employment Standards and impose an obligation on all national system employers to make an offer of casual conversion in the specified circumstances.

However, we consider that proposed section 66B(1)(b) is a missed opportunity to provide the parties with clearer guidance by defining some key terms. An employer must make an offer of casual conversion to a casual employee if the employee has been engaged for a period of 12 months.[5] The Explanatory Memoranda states that a person who is engaged to perform an afternoon of casual work in March and then another afternoon in the following April will not have been employed for a period of 12 months.[6] This hypothetical example is at the far outer limits of when it might be alleged that a 12 month period began and it is the only guidance provided. It is unclear whether the period would have begun if the employee worked their second shift for example two, or four or even six months after their first.

An employer must make an offer of casual conversion to a casual employee who has worked a regular pattern of hours on an ongoing basis for 6 months of a 12 month-period.[7] Thus the 12-month period does not begin at the commencement of the employee's 'regular pattern of hours'. We suggest that the Bill should provide greater certainty as to when the 12-month period which triggers the obligation to offer permanent employment begins.

Further, the Bill does not define a 'regular pattern of hours' for the purpose of eligibility for casual conversion.[8] This term is adopted from the Fair Work Commission's model casual conversion term.[9] Given that there is little available judicial guidance on the meaning of a 'regular pattern of hours', it is a lost opportunity that clause 66B(1)(b) of the Bill does not provide the parties with guidance on the meaning of this expression.

When Offers Not Required

An employer is not required to make an offer under clause 66B of the Bill if there are reasonable grounds not to make the offer, which are based on facts known or reasonably foreseeable at the time of deciding not to make the offer.[10]

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[4] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cls 15A(1), (3) and (4).
[5] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 66B.
6 Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs And Economic Recovery) Bill 2020, 26.
[7] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 66B(1)(b).
[8] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 66B(1)(b).
[9] Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs And Economic Recovery) Bill 2020, 26.
[10] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 66C.

The Bill provides a list of reasonable grounds for deciding not to make an offer of permanent employment. The list is broad and non-exhaustive. It is likely that for many employers, the post COVID-19 pandemic climate will be difficult to predict. Employers could take a pessimistic view of whether, for example, a contract will be renewed, or profits will increase.

Legal Aid NSW considers that allowing employers to refuse to make an offer of casual conversion based on 'reasonably foreseeable' circumstances provides employers with too broad a latitude to refuse to make an offer of casual conversion.

We welcome that employees will have the certainty of written notice regarding whether the conversion is to full time or part time employment, the employee's hours of work after the conversion takes place and the day that conversion takes effect.[11]

Employee Request for Conversion to Permanent Employment

A casual employee who has worked a regular pattern of ongoing hours in 6 of the preceding 12 months may request conversion to permanent employment. This right arises only if, in the 6 months preceding the request, the employee has not: refused an employer offer of casual conversion, received notice from the employer that there are reasonable grounds not to make an offer, the employer has not refused an employee request and the offer is made within the 21 days in which the employer is required to make an offer of casual conversion.[12]

Thus, if an employer refuses to make a request under section 66B or makes a request which the employee considers unsatisfactory and so refuses, the employee cannot make a request for casual conversion.

Given the confined nature of the employee's right to request casual conversion, it is welcome that the Bill proposes a dispute resolution clause to deal with disputes about the operation of the division.[13] However, Legal Aid NSW has concerns about the proposed dispute resolution mechanism.

Parties may contract out of dispute resolution by the Fair Work Commission.[14] An employment contract could state that disputes about casual conversion are to be dealt with by, for example, human resources. This would mean that an employee would have no mechanism to raise a dispute about failure to offer casual conversion with an external body.

Casual Employment Information Statement

Legal Aid NSW supports the requirement for employers to give employees a casual employment information statement prepared by the Fair Work Ombudsman (the **FWO**) when they commence casual employment.[15] It is vital that the statement be: written in plain English, fully accessible to people with disabilities and available in a number of community languages.

Orders Relating to Casual Loading Amounts

Where an employee is found to be a permanent employee but has been paid an identifiable loading to compensate the employee for not having one or more of those entitlements during

[11] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 66E.
[12] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 66F.
[13] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 66M.
[14] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 66M(2).
[15] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 125B.

the period, clause 545A of the Bill will allow the court to set off the loading against any amount owed to the employee.

Legal Aid NSW welcomes that the court cannot make orders reducing any amount owing to an employee to below nil,[16] and that there are limited factors that the court may consider when determining the proportion by which it may reduce a claim.[17]

Other amendments

The Bill will amend section 384(2)(a)(i) of the FW Act relating to unfair dismissal to replace reference to engagement 'on a regular and systematic basis' with engagement as a 'regular casual employee'. However, the new section 15A defines 'casual employee' and not a 'regular casual employee'.

The question of what constitutes casual employment on a 'regular and systematic basis' has been a vexing question for the Fair Work Commission.[18] There is no guidance on the meaning of this term in the Explanatory Memoranda. If the Bill is passed in its current form, the Fair Work Commission will need to determine the difference, if any, between employment as a casual employee on a regular and systematic basis and being a regular casual employee.

Schedule 2- Proposed Changes to the Modern Award System

New Additional Hours Agreements for Part-Time Employees

Part 1 of Schedule 2 to the Bill introduces part-time flexibility provisions that will enable certain part-time employees who work at least 16 hours per week to agree to work additional hours at their ordinary rate of pay by entering into a 'simplified additional hours agreement' with their employer.[19] These provisions will be introduced into 12 'identified modern awards' in the hospitality and retail sectors.[20] While overtime will still be payable in limited circumstances, additional agreed hours are generally to be paid without overtime.[21] Any agreed additional hours will generally be treated as ordinary hours of work for the purposes of paying penalty rates and calculating leave entitlements.[22]

The Explanatory Memorandum notes that the proposed provisions are necessary and proportionate to ensure a successful economic recovery from the COVID-19 pandemic.[23] The policy focus on the hospitality and retail sectors acknowledges these sectors have experienced acute distress during the COVID-19 pandemic and are particularly Award-reliant.[24]

The proposed provisions also appear to be a response to broader calls by industry groups in recent years to 'simplify' the Modern Award system. The Explanatory Memorandum states

[16] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, cl 545A(2).
[17] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, cl 545A(3).
[18] See, for example, *Bronze Hospitality Pty Ltd v Hansson* (No 2) [2019] FCA 1680.
[19] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 168M.
[20] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 168M(3).
[21] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cls 168Q(2) and (3).
[22] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 168Q(4).
[23] Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs And Economic Recovery) Bill 2020, 31.
[24] Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs And Economic Recovery) Bill 2020, 31. See also Fair Work Commission, *Information Note – Small Businesses and Modern Awards*, (Report, 31 August 2020).

that the COVID-19 pandemic has highlighted limitations in the Modern Award system which restricted businesses in responding to the COVID-19 pandemic effectively, and which had to be addressed by expedited, temporary award variations by the Fair Work Commission (COVID schedules) and JobKeeper flexibilities in the FW Act.[25] It also notes that Award complexities disincentivise employers from engaging part-time employees to work additional hours and the proposed changes will increase employer confidence to engage part-time employees, rather than rely on contract employment such as casuals for additional hours.[26]

Legal Aid NSW acknowledges the significant and unprecedented challenges the COVID-19 pandemic has presented for workers and employers, particularly small businesses. During 2020, we experienced a considerable increase in demand for our specialist employment law advice service due to the pandemic.[27] Legal Aid NSW therefore welcomes reforms that promote stable employment opportunities for workers by assisting distressed businesses to recover from the economic impacts of the COVID-19 pandemic.

However, we are concerned that the proposals go beyond the immediate COVID-19 economic response and seek to normalise employer flexibility at the expense of employee entitlements. The proposal could dilute part-time employees' access to overtime rates. Overtime rates help to subsidise employees who often work part-time to balance commitments outside of work including caring responsibilities and education. These changes will disproportionately impact female workers and workers that already experience disadvantage, including young people and migrant workers.[28]

We note that while the proposed changes are currently limited to the 12 identified Awards, it is unclear whether the intention is to eventually expand the additional hours for part-time employee provisions to other industries and Modern Awards.[29] It is also unclear whether further simplified pay mechanisms such as 'loaded rates' will be implemented into certain Modern Awards. Given Australia has one of the highest shares of part-time employment across OECD countries, accounting for nearly one-third of total employment,[30] and a majority of award-reliant workers are employed part-time,[31] any further extension of the proposed changes will impact a large portion of working Australians.

Legal Aid NSW therefore considers that the proposed changes, as currently drafted, will have broad long-term impacts on employee entitlements which go beyond addressing the immediate policy objectives of responding to the COVID-19 pandemic. We submit that the

[25] Sweeney Research on behalf of the Fair Work Commission, *A Qualitative Research Report On Citizen Codesign With Small Business Owners* (Report, 13 August 2014) 25.
[26] Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs And Economic Recovery) Bill 2020, 29.
[27] As at 30 June 2020, 33.6% of matters were employment, out of 938 clients helped with COVID civil matters. Legal Aid NSW, *Annual Report 2019-2020* (Report, November 2020), 22.
[28] Women account for a majority (approximately 55%) of workers in both the retail and hospitality sectors, and account for 68.7% of all part-time employees. Workplace Gender Equality Agency, *Gender Segregation In Australia's Workforce* (Report, 17 April 2019) <https://www.wgea.gov.au/data/fact-sheets/gender-segregation-in-australias-workforce>.
[29] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 168M(3)(m).
[30] Australian Bureau of Statistics, *Headline Estimates Of Employment, Unemployment, Underemployment, Participation And Hours Worked From The Monthly Labour Force Survey December 2020* (Report, 28 January 2021) <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia/latest-release#employment>.
[31] Roger Wilkins and Federico Zilio, *Research Report, Low-Paid Employees* (Report 2020) < https://www.fwc.gov.au/awards-agreements/minimum-wages-conditions/annual-wage-reviews/annual-wage-review-2019-20/research>.

erosion of hard-fought for employee entitlements, particularly when considered in combination with other provisions in the Bill are simply not worth it – particularly when the overall net regulatory saving is only estimated to be up to around $4 million over 10 years.[32] We recommend that the proposed new additional hours agreements for part time employees not proceed. We submit that the status quo should be maintained, and other measures implemented instead to help businesses recover from the COVID-19 pandemic, without further undermining employee entitlements and protections (**Recommendation 2**).

In the alternative, if the proposed provisions are adopted, we consider it preferable to incorporate additional safeguards. While we welcome some of the proposed employee safeguards already included in the Bill, including under the general protections in the FW Act,[33] we consider the documentation requirements in relation to entering into a simplified additional hours agreement needs to be strengthened. As currently drafted, a simplified additional hours agreement must only identify the additional agreed hours to be worked on one or more days and be entered into before the start of the first such period of additional agreed hours.[34] An employer must inform the employee that the agreement is a simplified additional hours agreement before the employee agrees to it, and if the agreement is not in writing the employer must make a record of the agreement in writing before the end of the first period of additional agreed hours worked under the agreement (and keep a copy of the record).[35]

The Explanatory Memorandum states that a written record need not be formal and may be electronic (such as an email or text message).[36] Legal Aid NSW considers that this level of informality is undesirable. It is preferable that an agreement clearly identify employee protections. This aligns with existing safeguards in similar award-based processes such as agreements to enter into individual flexibility arrangements.[37] We recommend that the following additional requirements should also be met when entering into a simplified additional hours agreement:

1 That the employee and the employer genuinely agree to any simplified additional hours agreement
2 The employer is required to ensure that any simplified additional hours agreement sets out how the agreement may be terminated by the employee or the employer
3 The employer is required to ensure that any simplified additional hours agreement must be in writing and signed, and
4 The employer is required to ensure that a copy of any simplified additional hours agreement is given to the employee. (**Recommendation 3**)

Legal Aid NSW also recommends that the Bill includes a sunset provision to ensure the changes are repealed 1-2 years after the Bill receives royal assent. This would enable stakeholders to monitor the efficacy of the changes in the interim and, if necessary, propose any amendments. This approach accords with the related Part 2 of Schedule 2 to the Bill

[32] Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs And Economic Recovery) Bill 2020, xxxix.
[33] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 168T.
[34] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 168N(1).
[35] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 168N(2).
[36] Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs And Economic Recovery) Bill 2020, 28.
[37] *Fair Work Act 2009* (Cth) s 144; cited as example in Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs And Economic Recovery) Bill 2020, 29.

regarding 'Flexible Work Directions' (discussed below) and provides a measured response that is proportionate to the post-COVID-19 economic recovery (**Recommendation 4**).

Flexible Work Directions

Part 2 of Schedule 2 to the Bill introduces "flexible work directions". The flexible work directions extend existing JobKeeper flexibilities in the FW Act concerning duties and location of work to all employers and employees covered by the 12 identified Modern Awards[38] within the hospitality and retail sectors.

The policy rationale behind extending the JobKeeper flexibilities focuses on ensuring flexibility for employers in distressed sectors such as the hospitality and retail sectors as they recover from the COVID-19 pandemic.[39] A direction will be of no effect unless the employer had information before it that leads it to reasonably believe that the direction was a necessary part of a reasonable strategy to assist in the revival of the employer's enterprise.[40] Further, the Part will be repealed two years from the passage of the Bill.[41]

The proposed changes operate subject to certain safeguards including:

- A minimum rate of pay guarantee,[42]
- Consultation[43] and documentation[44] requirements,
- Dispute resolution through relevant award dispute procedures,[45] and
- Consideration by an employer that the duties or location of an employee's work subject to a direction are, for example, safe and reasonable in all the circumstances.[46]

While Legal Aid NSW acknowledges the challenges ahead in the post-pandemic economic recovery, we are concerned that the safeguards are not sufficient to protect employees from potential exploitation by unscrupulous employers. Given the hospitality and retail sectors are particularly award-reliant and have a high representation of workers already experiencing disadvantage, it is vital that the safeguards are strengthened to prevent potential exploitation.

We consider that the proposed consultation requirements are insufficient as presently drafted. For example, once an employer has discharged the consultation requirements in relation to a flexible work direction given to an employee, the employer would not be required to provide notice or consult about any further flexible work directions given to the same employee.[47]

Rather, the employer would only need to consider any views expressed by the employee in relation to any previous direction for which consultation was required.[48] This approach is contrary to the Part's requirement that an employer assess whether a direction is, among other

[38] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cls 168M(3) and (4).
[39] Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs And Economic Recovery) Bill 2020), ii; See also Commonwealth, *Second Reading Speech*, Senate, 9 December 2020, 46 (Christian Porter, Attorney-General, Minister for Industrial Relations and Leader of the House).
[40] *Fair Work Amendment Bill* (n 3) cl 789GZK.
[41] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, sch 2, Part 3.
[42] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 789GZN.
[43] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cls 789GZL(1) and (2).
[44] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cls 789GZM and 789GZL(3).
[45] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 789GZO(3)(b).
[46] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cls 789GZG and 789GZH.
[47] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 789GZL(2).
[48] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl789GZL(2)(b) and (c).

things, safe and reasonable at the time the direction is made. A lack of consultation about further directions could therefore compound undisclosed or emergent issues (e.g. direction to work from home where not safe to do so, for example, where the person is experiencing domestic violence). We recommend that an employer should be required to provide notice and consult about each flexible work direction given to an employee. (**Recommendation 5**).

Further, Legal Aid NSW is concerned that the proposed changes would make it difficult for employees to effectively dispute unreasonable flexible work directions. Unlike the JobKeeper provisions, which had special dispute resolution provisions,[49] disputes about flexible work directions will be determined by the Fair Work Commission in accordance with the dispute resolution mechanism in the relevant award.[50] This process can be complex and time-consuming, particularly for self-represented applicants. It could also lead to uneven outcomes as some Modern Awards only provide for consent arbitration at the Fair Work Commission.

While Legal Aid NSW acknowledges that various provisions of the Bill increase the already busy workload of the Fair Work Commission, we recommend that the Fair Work Commission be accorded discrete powers under the FW Act to conciliate and, if necessary, arbitrate disputes relating to flexible work directions.[51] This approach is consistent with the related JobKeeper provisions and would enable the reasonableness of a flexible work direction upon an employee, and an employer's rationale for employing a direction, to be assessed more efficiently and consistently than would be possible under the varied dispute procedures of each of the identified Modern Awards (**Recommendation 6**).

Finally, Legal Aid NSW is concerned that the two-year operation of the Part is excessive. Further, where a flexibility direction has been in place for two years and has proven effective, at the conclusion of the direction the employer may seek to vary an employee's employment contract in accordance with the direction. This may result in the employee being redeployed into the position he or she was performing under the flexibility direction or being made redundant. Shorter flexibility directions may be less likely to cause employers to rearrange their business in accordance with the direction.

We recommend that the Part instead sunset after a period of one year (**Recommendation 7**). This approach, while providing a measured response proportionate to the COVID-19 economic recovery, would enable stakeholders to monitor the efficacy of the extended measures in the interim and, if necessary, propose any amendments or further extensions

Schedule 5 – Compliance and Enforcement

Schedule 5 to the Bill introduces various compliance and enforcement measures including a new criminal offence for dishonest and systematic wage underpayments, while increasing the value and scope of certain civil penalties and orders that can be imposed for non-compliance.

The Schedule also increases the cap for amounts that can be awarded in small claims proceedings from $20,000 to $50,000 and enables the Federal Circuit Court and magistrates courts to refer small claims matters to the Fair Work Commission for conciliation and, if conciliation is unsuccessful, enables the Fair Work Commission to arbitrate such matters with

[49] See *Fair Work Act 2009* (Cth) s 789GV.
[50] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 789GZO.
[51] Subject to potential constitutional limitations i.e. *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

consent of the parties.[52] The policy rationale behind these changes is to allow employees to '*more easily, quickly and cost-effectively recover any other payments owed to them'*.[53]

Legal Aid NSW supports the strengthening of measures designed to deter employers from intentionally underpaying employees and avoiding obligations under the FW Act. We regularly assist clients with small claims matters, some of which involve systematic and egregious underpayments. While we welcome efforts to assist employees enforce small claims, we note the following concerns.

Firstly, while we support the increased cap for small claims proceedings, we note that there is no publicly available data on the number of small claims filed in the Federal Circuit Court where the amount claimed is between $20,000 and $50,000. Accordingly, it is unclear how many additional claims will be drawn into the small claims process.

Secondly, while increasing the cap will inevitably permit more employees to utilise the small claims jurisdiction, it may indirectly dilute the deterrent effect of enforcement measures for underpaying employers. Pecuniary penalties are unavailable in small claims proceedings.[54] This appears contrary to the Schedule's overall objective of strengthening compliance and enforcement because the Schedule both provides a simplified mechanism for making an underpayment of wages claim of up to $50,000 and reduces an employers' exposure for underpayments of up to $50,000.

Thirdly, although we support employees being provided an additional avenue to resolve underpayments claims (through the Fair Work Commission), we are concerned the proposed approach may in practice prove slow and complex for self-represented employees. For example, the Federal Circuit Court states that it aims to minimise the number of events needed to dispose of small claims applications, sometimes finalising such matters on the first hearing date.[55] Ultimately, the proposal's efficacy will depend on how the referral power is utilised by the courts, including at which stage of a small claim proceeding the courts decide whether to refer a matter to the Fair Work Commission for conciliation,[56] and whether the Fair Work Commission implements achievable timeliness benchmarks.

Further, we note the Fair Work Commission consent arbitration powers appear to be modelled on comparable powers for general protection applications involving dismissal.[57] Given the very low take-up rate by employers in those matters,[58] we consider it unlikely that Fair Work Commission arbitration will be widely available to applicant employees for underpayment matters.

Finally, our client experience indicates that many self-represented litigants engaging with the Fair Work Commission, Federal Circuit Court and related bodies do not clearly understand the processes involved. It is therefore vital that self-represented parties are given clear information

[52] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cls 548A – 548E.
[53] Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs And Economic Recovery) Bill 2020), 20; Commonwealth, *Second Reading Speech*, Senate, 9 December 2020, 46 (Christian Porter, Attorney-General, Minister for Industrial Relations and Leader of the House).
[54] *Fair Work Act 2009* (Cth) sub-s 548(1A).
[55] Federal Circuit Court of Australia, *Annual Report 2019 – 2020* (Report, 2020) 49.
[56] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cls 548B(3) and (4).
[57] Compare Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020cl 548D with *Fair Work Act 2009* (Cth) s 369.
[58] Fair Work Commission, *Annual Report 2019 – 2020* (Report, 2020) 63.

about the Fair Work Commission referral process and conciliation process. A Fair Work Commission Benchbook and resources for culturally and linguistically diverse parties, would help limit uncertainty and confusion.

Schedule 5 Part 7 Criminalising Underpayments

Under the Bill, an employer commits an offence if the employer dishonestly engages in a systematic pattern of underpaying one or more employees. The penalty for an individual is imprisonment for 4 years or 5000 penalty units or both and the penalty for a corporation is 5000 penalty units.[59]

Proceedings may only be commenced by the FWO, the Commonwealth Director of Public Prosecutions or, for certain matters, the Australian Building and Construction Commissioner.[60]

Legal Aid NSW's practice experience is that underpayment of wages is widespread and is often a deliberate and central part of an employers' business model.

Further, even when an employee has navigated the complicated court processes required to bring an underpayment of wages claim, and has succeeded in obtaining judgment against an employer, the employee will frequently be unsuccessful in reclaiming the underpaid wages because an individual employer may declare bankruptcy or a company may go into liquidation. Thus, an employer is able to underpay with relative impunity.

However, Legal Aid NSW notes that deprivation of liberty is the most serious criminal sanction available to decision makers and it is important that this sanction is applied only in the more serious cases. It is also important that the introduction of a criminal offence does not obviate the need to address underlying causes of underpayment of wages and the particular vulnerability of young and migrant workers in the Australian employment system.

In that context, we welcome an offence provision that targets cases where underpayment is both dishonest and part of a systematic pattern. We note that the FWO has a range of compliance and enforcement mechanisms available to it.[61] The FWO states that litigation is generally reserved for more serious cases of non-compliance.[62] This is an appropriate limit on the use of the proposed criminal litigation powers.

To further ensure that criminal prosecutions for underpayment of wages are limited to the more serious of cases, we suggest that the list of factors that a court may consider in determining whether the employer engaged in a systematic pattern of underpaying one or more employees in proposed section 324B (5) of the Bill, include whether the employer has failed to comply with any FWO requirement or direction.

The Bill does not make clear whether company directors can be held liable under clause 324B for the acts of employers that are bodies corporate. Note 3 to clause 324B(6) does not answer this question. If company directors cannot be found to be criminally liable under section 324B, this would provide employers, even sole traders, significant incentive to incorporate to avoid liability.

[59] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 324B.
[60] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 cl 324C.
[61] *Fair Work Act 2009* (Cth) s 682.
[62] Fair Work Ombudsman, 'Compliance and Enforcement Policy', *Fair Work Ombudsman Our Policies* (Internet, 2020) <https://www.fairwork.gov.au/about-us/our-policies>.