6 April 2023

Mr Martin Hehir
Deputy Secretary
Department of Employment and Workplace Relations
By email: WRSubmissions@dewr.gov.au

Dear Mr Hehir

Submission on additional workplace relations measures being considered for 2023: Stand Up for Casual Workers

Thank you for the opportunity to make a submission on the workplace relations measures being considered for the second part of 2023.

This submission is jointly made by WEstjustice Community Legal Centre, South-East Monash Legal Service (**SMLS**), 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

WEstjustice, SMLS and JobWatch 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. As at July 2022, we had recovered more than $867,000 in unpaid entitlements and compensation for our ISEALS clients.

WEstjustice is a community legal centre providing free legal help, financial counselling and support to people in the Western suburbs of Melbourne. Our community is one of the fastest growing areas in Australia and is highly diverse, comprising many newly arrived refugee and migrant communities, significant representation from Asia, Africa and the Pacific Islands, and a growing Aboriginal and Torres Strait Islander community. WEstjustice believes in a just and fair society where the law and its processes don't discriminate against vulnerable people, and where those in need have ready and easy access to quality legal education, information, advice and casework services. The Employment and Equality Law Program at WEstjustice was established in 2014 and offers legal and work rights education to international students, young people, newly arrived migrants and refugees, and people experiencing family violence. See www.westjustice.org.au

Established in 1973, **SMLS** is a community legal centre that provides free legal advice, assistance, information, and education to people experiencing disadvantage in our community. SMLS also undertakes significant community development, as well as policy and law reform. Our vision is a fair and inclusive community where people can access the resources, networks and support they need to resolve legal issues and overcome barriers to social, cultural, and economic inclusion and participation. We provide employment law advice in relation to the full range of employment issues, and we operate a duty lawyer outreach service at the Fair Work Commission in partnership with Job Watch in response to ongoing need within our local community for free employment law assistance. See www.smls.com.au

JobWatch is an employment rights, not-for-profit community legal centre. We are committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. JobWatch was established in 1980 and is the only service of its type in Victoria, Queensland and Tasmania. Our centre provides the following services:

- Information and referrals to workers from Victoria, Queensland and Tasmania, via a free and confidential telephone information service (TIS);
- Community legal education, through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
- Legal advice and representation for vulnerable and disadvantaged workers across all employment law jurisdictions in Victoria; and
- Law reform work aimed at promoting workplace justice and equity for all workers.

The vast majority of JobWatch's callers and clients are not union members and cannot afford to get assistance from a private lawyer. See www.jobwatch.org.au.

Scope of submission

This submission focuses on item 1 of the workplace relations measures being considered for the second part of 2023, namely:

- the definition of casual employee under the *Fair Work Act 2009* (FW Act)
- the casual conversion process; and
- dispute resolution mechanisms in relation to casual employment.

Through the work of our individual legal services and our involvement in ISEALS, our centres have developed an intimate understanding of employment law and related legal issues experienced by the most disadvantaged workers in Australia.

Job security is an issue of primary importance. Many of our clients are in precarious or insecure jobs and working in low-paying industries. We have been advocating for changes in these areas for many years and have repeatedly made calls for changes to employment and migration law to improve the situation for workers, particularly migrant workers and, specifically, international students. In our recommendations below, we link to these past submissions for ease of access. Our past submissions (linked below) outline case studies from our clients and draws on our experience.

The issue of insecure work

Through our work, we help some of the most marginalised and disadvantaged members of the community. On the ground, we see that migrant workers, temporary visa holders, women, young workers, workers who speak English as another language and workers with a disability are disproportionately over-represented in low-paying and precarious jobs. Many of our clients also have children and other family members that rely on their income. They also face higher barriers to accessing remedies.

Insecure work can be harmful to vulnerable workers in many ways. Insecure work often means that workers have unpredictable hours and income, making it difficult to plan for the future or make long-term financial commitments. This can lead to high levels of stress and anxiety, which can negatively impact workers' mental and physical health. Insecure work can also make workers more vulnerable to exploitation, as they may be less likely to speak out about unsafe or unfair working conditions for fear of losing their job. While flexibly can be seen as an advantage of insecure work, our clients rarely have any savings or supports to fall back on if they lose their job or as wages fail to keep up with the cost of living.

It is these vulnerable workers who have the greatest need for protection from a robust workplace relations system.

Drawing on the experiences of our clients, over the last few years our Centres have published numerous submissions and reports highlighting the detrimental effects of insecure and precarious employment on people's lives. These include:

- Submission to the Senate Select Committee Inquiry into Temporary Migration, Joint submission by WEstjustice, Springvale Monash Legal Service and JobWatch, July 2020

- *Ignorance is NOT Bliss: The barriers to employment outcomes for young people in Melbourne's West and how to overcome them*, WEstjustice, September 2021

- Submission to the Senate on the Inquiry into the impact of insecure or precarious employment on the economy, wages, social cohesion and workplace rights and conditions, SMLS, 31 March 2021

- Submission to the Senate Select Committee on Job Security, Jobwatch, April 2021

What our casework and research make clear is that precarious work leaves workers - particularly those already experiencing other forms of disadvantage – in financially precarious situations, vulnerable to exploitation and often powerless to complain or exercise their rights, for fear of losing their jobs.

Summary of our recommendations

1. **A more accurate definition of casual employee**
a. Amend the definition of casual employee to ensure a focus on the real substance, practical reality or true nature of the relationship by including a consideration of post-contractual conduct.
2. Strengthen compliance and promote secure work through an enhanced casual conversion process
a. Casual conversion provisions should be mandated after a shorter period of employment (e.g., 6 months) b. Make sections 66B(1), 66B(2), 66C(3), 66G, 66H(1), 66H(3) and 66L(1) of the FW Act civil remedy provisions. If an employer contravenes these sections, we recommend that the employee be entitled to seek all entitlements owing plus penalties and costs.
3. Provide effective mechanisms for the FWC to deal with disputes about employment classification and casual conversion
a. Grant the FWC automatic jurisdiction to arbitrate disputes about casual conversion or employment classification under section 66M of the FW Act without first requiring the consent of both the parties

Standing up for casual workers

1. A more accurate definition of casual employment

Section 15A of the FW Act's limited focus on the offer/acceptance stage of employment in characterising casual employment is inherently unfair due to the extreme imbalance of power between employers and prospective employees.

For our clients, whether employment is to be casual or ongoing is often not explicitly discussed at the time of entering into an employment relationship, and indeed many of our ISEALS clients are unaware of what 'casual employment' actually entails and how casual employment differs from permanent employment. This makes them vulnerable to accepting and/or staying in insecure work arrangements.

The current exclusion of the consideration of post-contractual conduct allows employers to classify workers in a manner that does not reflect the true nature of the relationship and removes key protections and entitlements for employees.

In many cases, particularly for our young clients, clients from non-English speaking backgrounds and newly arrived migrants, section 15A allows employers to mischaracterise employees as casual and thereby enjoy the benefit of long-term casual workers with regular and systematic hours of work, whilst also avoiding the entitlements and obligations associated with permanent employment.

CASE STUDY: SONJA

Sonja, was engaged as a casual operations officer. Despite being provided with 'no firm advance commitment of ongoing work', she worked full time hours for her employer for 2.5 years until she became pregnant and had to take unpaid maternity leave. As a result of COVID-19, Sonja's role was made redundant after being with her employer for 5 years. However, because Sonja was a long-term casual she was not entitled to any redundancy pay. We calculated that, had she been treated as a permanent employee, Sonja would have been entitled to more than $18,500 in annual leave, notice of termination, redundancy and payment for public holidays, which far outweighs the quantum of the casual loading she had earned during her period of employment.

For many of our ISEALS clients, we also see the converse situation: our clients are offered part-time employment and they may be told that they will work a certain number of hours per week, but they then must check a roster each week or they are sent daily or weekly messages with their hours for their upcoming week/days.

They also tend not to be provided with annual or sick leave entitlements in accordance with the relevant Award/agreement. In these circumstances, the employers label our clients as permanent employees as a justification for paying a lower pay-rate, whilst really treating the employees as casuals. In these situations, it is generally in our clients' best interests to be classified as casual employees as they often are in Australia for a short amount of time and are seeking the flexibility to schedule shifts around their study commitments.

In order to prevent employers from utilising 'sham' employment classifications to avoid providing key benefits and entitlements employees, the FW Act requires an objective test for casual employment which focuses on the true nature of the relationship between an employer and employee having regard to post-contractual conduct. This is particularly necessary for employees who are unaware of the difference between casual and permanent employment, and/or who lack the power to bargain for an employment arrangement that suits their needs.

Recommendation 1a: Amend the definition of 'casual employee' to ensure a focus on the real substance, practical reality or true nature of the employment relationship, by mandating a consideration of post-contractual conduct.

This could be achieved by:

- Amending 15A(1) and (2) of the FW Act to focus on the conduct and substance of the relationship, rather than the offer/acceptance stage of employment, including:
    a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;
    b) whether the person works as required according to the needs of the employer;
    c) whether the employment is described as casual employment;
    d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument;
    e) Whether the person has regular and predictable hours of work;
    f) Whether there is a mutual expectation of ongoing work.

- Deleting subsections 15A(3) and (4).

2. Strengthen compliance and promote secure work through an enhanced casual conversion process

The current casual conversion provisions continue to entrench insecure work.

Firstly, in our view 12 months of employment is too long a period to access the right to casual conversion, and this timeframe merely incentivises employers to engage employees as long-term casuals rather than prioritising permanent work. Six months of working a regular pattern of hours for the same employer should suffice before the right to request conversion is triggered.

Secondly, there is a lack of any clear enforceable right for casual employees to transition to permanent employment. Indeed, the current provisions reward employers who fail to comply; if an employer fails to offer conversion in accordance with section 66B of the FW Act, then the employee will remain a casual employee unless they proactively take steps to request a change.

While employees can request conversion, our clients often have a low awareness of their workplace rights and responsibilities and/or are reticent to take any action that may jeopardise their employment. This is especially relevant to the clients we see who may have experienced long-term unemployment or for clients with limited job prospects. For temporary visa holders, there may be additional reluctance to pursue workplace rights if there is a perception (real or otherwise) that doing so may compromise their visa.

This is compounded by the fact that there are no penalties provided if an employer: fails to offer conversion to permanent employment as required by section 66B of the FW Act; fails to give written notice of why they are not offering conversion (per sections 66C(3), 66G, 66H); reduces or varies an employee's hours of work or employment to avoid any right or obligation to casual employment (per section 66L(1)), or fails to provide a casual employee the Casual Employment Information Statement.

To ensure compliance, there must be cost consequences for employers who fail to comply with their obligations.

Recommendation 2a: That an employee is eligible for casual conversion after being employed for a period of 6 months if the employee has worked a regular pattern of hours on an ongoing basis during that time.

Recommendation 2b: Make sections 66B(1), 66B(2), 66C(3), 66G, 66H(1), 66H(3) and 66L(1) of the FW Act civil remedy provisions. If an employer contravenes these sections, we recommend that the employee be entitled to seek all entitlements owing plus penalties and costs.

3. Provide effective mechanisms for the FWC to deal with disputes about employment classification and casual conversion

There is presently no meaningful way for employees to challenge employers who mischaracterise their employment, or who fail to comply with their obligations, given that the FWC cannot arbitrate unless the employer agrees to participate.

It is important that there is an appropriate avenue for employees to test refusals for casual conversion and hold employers to account.

If our recommendation 1a is accepted and implemented, this will also be an important avenue for employees who wish to challenge a mischaracterisation of their employment.

Recommendation 3a: Grant the FWC automatic jurisdiction to arbitrate disputes about casual conversion or employment classification under section 66M of the FW Act without first requiring the consent of both the parties

Conclusion

We thank the Department for considering these various issues concerning casual work and providing us with an opportunity to make this submission. It is imperative that the Government take this opportunity to increase access to secure employment for those who need it most through a strengthening of the casual provisions in the FW Act.

Please let us know if we can provide any further information or would like to discuss our recommendations.

Yours sincerely

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