New Zealand Law Society
Te Kāhui Ture o Aotearoa

Employment Relations Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

12 August 2025

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Employment Relations Amendment Bill (**Bill**), which seeks to make various amendments to the Employment Relations Act 2000 (**Act**).

1.2 This submission has been prepared with input from the Law Society's Employment Law Committee.[1] It largely focuses on improvements to the clarity and the workability of what is being proposed in the Bill. We do not comment on the merits of the underlying policy proposals and objectives, except where they raise access to justice and constitutional issues.

1.3 The Law Society **wishes to be heard** in relation to this submission.

2 Amendments relating to specified contractors (clause 4)

2.1 Clause 4 of the Bill will amend section 6 of the Act to specify that the definition of 'employee' does not include an individual who is a 'specified contractor'. The amendments have been described as a 'gateway test'[2] that a worker must overcome before they can challenge their status, by considering the 'real nature of the relationship' (as required under section 6 and in *Bryson*).[3] These amendments seek, among other things, to "provide greater certainty for contracting parties".[4]

2.2 A key issue arising from these amendments is that they are unclear as to whether the criteria in new section 6(7) are intended to be contract-centric (i.e., assessed by reference only to the written agreement between the parties), or assessed based on how their relationship operates in practice. The reference to 'arrangements' in clause 4 suggests a less contractual approach may be intended here, which would leave room to deviate from anything set out in a written agreement between the parties.

2.3 If that is the case, there may be significant overlap between the gateway test and the analysis currently required under section 6, which also focuses on the 'real nature of the relationship'. This would mean the courts and the Authority will first need to consider the gateway test proposed in the Bill prior to embarking on the existing section 6 analysis. Given the application of the gateway test will require the decision-maker to delve into the facts of the case, it is unlikely that the gateway test will be dealt with as a preliminary matter; it will simply become another aspect of the overall legal test to be applied in each case. This is likely to lengthen the time and costs involved in the hearing of these matters, and present another hurdle for those who wish to bring a claim before the Authority and the courts.

2.4 If a more contract-centric approach is intended here, workers who are described as 'independent contractors', but nevertheless meet the definition of 'employee' under

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1 See the Law Society's website for more information about this committee: www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/employment-law-committee.

2 Hon Brooke van Velden "Increased certainty for contractors coming" (Beehive Releases, 16 September 2024).

3 *Bryson v Three Foot Six Limited* [2005] NZSC 34.

4 Explanatory Note of the Bill.

current section 6, would now be excluded from employee status if they meet the definition of 'specified contractor'. As a result, these workers may no longer be entitled to key employment rights and protections such as minimum wage, holiday pay and other forms of leave, protection against unjustified dismissal, and collective bargaining rights. This could heighten the risk of exploitation of these workers (and in particular, vulnerable workers).

2.5 We also note that, if these are likely to be real consequences of these amendments, the Employment Court may adopt a similar approach to that in *Smith v Stokes Valley Pharmacy (2009) Ltd* where, in dealing with the interpretation of the (then) newly enacted trial period provisions in the Act, it considered that "legislation that removes previously available access to courts and tribunals should be strictly interpreted and as having that consequence only to the extent that this is clearly articulated."[5]

2.6 While this concern may be ameliorated here by the fact that specified contractors can access the courts of general jurisdiction (which employees dismissed under the trial period provisions do not), we nevertheless note this here, given the ambiguities arising from the drafting of clause 4 (which we discuss below). In their current form, the amendments to section 6 are equivocal and open to legal debate, and unlikely to provide greater certainty for contracting parties until the courts have had the opportunity to provide guidance on how those provisions are to be interpreted.

Meaning of 'natural person'

2.7 New section 6(7) states that a 'specified contractor' means a natural person (person A) who has entered into an arrangement to perform work for another person (person B). This creates ambiguity as to whether providing services through a legal entity (for example, a company) disqualifies a person from being a specified contractor.

2.8 If that is the case, businesses may avoid hiring through contracting companies or labour hire firms, and insist on contracting directly with individual workers in order to ensure they are entering into an arrangement with a 'specified contractor'.

2.9 To provide greater clarity for parties involved in such arrangements, we suggest amending the Bill to specify whether an arrangement with a legal entity could also come within the meaning of 'specified contractor'.[6]

Meaning of 'arrangement'

2.10 The term 'arrangement' in the Bill appears to contemplate a broader range of working relationships than a contractual one, and, on a plain reading, it could extend to other forms of non-employment relationships such as voluntary work, internships, or religious or charitable work where living expenses are subsidised.

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5 *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111 at [48].

6 It is worth noting that section 16 of the Legislation Act 2019 provides that words denoting a natural person by referring to a gender (for example, "he or she") or words referring to persons generally (for example, "someone" or "people") can include a corporation sole, a body corporate, or an unincorporated body. However, this does not extend to the term 'natural person'.

2.11 The relationship between an 'arrangement to perform work' and a written agreement required under new section 6(7)(a) also gives rise to uncertainty: while an arrangement must *include* a written agreement, it is unclear whether the entire arrangement must be in writing, or whether it is sufficient for there to be a broader informal arrangement which includes a written agreement stating the worker is an independent contractor.

2.12 Where a clear definition is absent in legislation, the courts will be required to interpret its meaning. The select committee may therefore wish to consider whether it would be preferable to define the term 'arrangement' in the Bill to clarify how these provisions are intended to operate.

2.13 We also note the term 'independent contractor' in new section 6(7)(a) has generally been understood to mean a self-employed person who agrees to provide services for another party under a contract for services. However, the Bill makes no requirement for the 'arrangement to perform work' to be a contract for services, and the flexibility offered by new section 6(1)(d) may encourage the mislabelling of non-employee workers as independent contractors, despite the real nature of their relationship not being a contract for services (for example, volunteers or ministers of religion).

New section 6(7)(b)

2.14 This new section does not address whether the restriction on performing work for others must be a stated requirement of the arrangement, or whether those restrictions can be a practical or de facto consequence of how the arrangement operates.

2.15 It is also unclear what level of restrictiveness would see an arrangement fall afoul of this clause. A feature of recent proceedings brought under section 6 of the Act has been that the workers have worked full-time hours for one business, meaning that, in reality, they faced practical restrictions in working elsewhere – for example:

(a) In *Leota v Parcel Express Ltd*,[7] any ability for Mr Leota to work elsewhere was considered illusory given he was fully occupied five days a week and taking further driving jobs may have placed him over the maximum allowable driving hours.

(b) In *Barry v C I Builders Ltd*,[8] the Employment Court found that, while there was no express prohibition on working for others, it was unrealistic given Mr Barry was working a physical job 40-hours per week over three years, had three children, and was required to do a three-hour roundtrip commute.

2.16 It is possible that the courts will adopt a similar approach to whether a person is 'restricted from performing work' as provided under this Bill.

2.17 The Law Society also understands many businesses include standard restraint provisions in agreements with contractors in order to prevent them from dealing directly with clients they are introduced to through an engagement. Including those

7 *Leota v Parcel Express Ltd* [2020] NZEmpC 61 at [64] and [65].
8 *Barry v C I Builders Ltd* [2021] NZEmpC 82 [36]–[39].

provisions would mean they would not be able to benefit from any protections or the certainty offered by the gateway test.

New section 6(7)(c)(i)

2.18 This section states that person A is not required to perform, or be available to perform, work for person B at a specified time or on a specified day or for a minimum period. It does not address whether the requirement must be overt, or whether it is sufficient for person A to be available at certain times, noting that in many industries, workers may not be contractually obliged to work specific hours, but in practice must do so to maintain income, access to shifts, or continued engagement.

2.19 The wording could be improved to make clear that any disqualifying requirement must come from person B, for example, by stating that 'person A is not required *by person B* to perform, or be available to perform, work for person B at a specified time or on a specified day or for a minimum period'.

New section 6(7)(c)(ii)

2.20 As above, there may be a distinction between the degree to which an employee is 'allowed' to subcontract their work, and the extent to which practicalities and the worker's circumstances enable them to do so.

New section 6(7)(d)

2.21 It appears that this new section is directed at workers who have some degree of freedom and are not under the level of control considered to be typical of an employment relationship. Of course, the ability to accept and decline work in this way is not solely indicative of a contracting relationship: casual employees can also decline offers of work. The Court of Appeal has noted (citing the UK Supreme Court's decision in *Aslam*) that "the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the person is … an employee, at the times when he or she is working".[9] Care should therefore be taken in treating the ability to decline work without consequence as being contra-indicative of employment.

2.22 It is also unclear what is meant by 'termination' in this context – does it refer to an automatic and/or proactive termination of the arrangement by person B, or would it extend to a failure to offer any further opportunities for work under the arrangement?

2.23 It also appears that the 'arrangement' in this context is some form of overriding agreement. Given the use of the term 'arrangement' appears to refer to something separate to a contractual relationship, the reference to termination is presumably intended to refer to any steps taken to bring it to an end, as opposed to any strict contractual meaning.

2.24 New section 6(7)(d) also fails to take into account the potential for control being exercised through informal retaliation, such as reduced future work or loss of favourable

9 *Rasier Operations BV v E Tū Inc* [2024] NZCA 403 at [189], citing *Uber BV and others v Aslam and others* [2021] UKSC 5 at [91].

assignments. By way of example, there was evidence in the *Uber* decisions regarding a rewards system whereby drivers who did not frequently accept rides would not have access to information that allowed them to make an informed decision about accepting a ride.[10]

2.25 Finally, the clause applies only to 'additional' work beyond what was originally agreed. This opens the door for a narrow definition of agreed work in contracts, and for presenting future tasks as 'additional', thus satisfying the clause without granting the worker any meaningful autonomy.

2.26 We invite the select committee to consider these matters, and to any necessary amendments to these provisions to clarify how they are intended to operate.

New section 6(7)(e)

2.27 In interpreting the law regarding trial periods, the Employment Court has taken a strict approach to compliance with statutory requirements to offer opportunities to seek independent advice. It noted in *Blackmore v Honick Properties Ltd* that:[11]

> …the law also requires that an intending employee must have an opportunity to consider and take independent advice about an employment agreement before he or she enters into it. What that opportunity amounts to temporally will depend upon the circumstances of the case. However, realistically, an employer will not be entitled in law to insist upon immediate execution of a form of employment agreement after its presentation to a potential employee. Nor, probably, its signed return within less than a few days or even more, depending upon the circumstances (including the time of year, the whereabouts of the parties and the like), fulfil the employer's statutory obligations.

2.28 As noted at [2.4] – [2.5] above, the courts and the Authority are likely to adopt a similar approach here.

3 Amendments relating to remedies for personal grievance if contributing behaviour by employee (clauses 5 to 8)

3.1 If enacted, the amendments in clauses 5 to 8 of the Bill would mean that:

(a) no remedies would be available to an employee whose actions amount to 'serious misconduct';

(b) the remedies of reinstatement and compensation under section 123(1)(c) of the Act would not be available to an employee whose actions 'contributed' to the situation that gave rise to the personal grievance; and

(c) a 100% reduction of lost wages would be permissible where the employee contributed to a situation that gave rise to the personal grievance.

3.2 It is unclear to the Law Society whether, and to what extent, these legislative changes are necessary, given case law already enables the reduction of remedies in certain

10 *Rasier Operation BV v E Tu Inc* [2024] NZCA 403 at [192(a)].
11 *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152 at [64].

circumstances. As the Regulatory Impact Statement (**RIS**) relating to these changes explains:[12]

> The principles, tests and thresholds that the Authority and Court use to determine contributory behaviour, and the levels of remedy reductions, have developed through case law. In addition, a variety of highly specific tests that cover a broad range of behaviours and situations has emerged through case law, which the Authority and Court uses to determine the extent of the contributory behaviour and the appropriate level of remedy reductions.

3.3 We presume the provisions in the Bill are intended to capture actions that fall outside of those currently identified in case law; however, the Bill does not offer any insights into what these actions might be, or offer:

(a) a definition or a test for determining whether an employee's actions amounts to 'serious misconduct',[13] and

(b) any clarity about whether there is a threshold at which an employee's actions 'contribute' to the situation that gave rise to the personal grievance.

3.4 This lack of clarity could lead to litigation on these points, and therefore cost, for both employers and employees. They may also encourage parties to make other types of claims, including those for breach of good faith, which will remain available to employees. Lawyers have also raised concerns that, at a practical level, employers who are confident that an employee has engaged in 'serious misconduct' may be encouraged to take a firm stance, and undertake only a brief or inadequate employment process on the basis that, even if there are grounds for a grievance, no remedies will be available to the employee.

3.5 While it may not be practicable to specify every action that could be considered to amount to 'serious misconduct', the select committee could consider including a definition or test to guide parties in understanding what actions come within the scope of these amendments. In doing so, the select committee would need to take care to ensure these amendments align with the underlying policy objective of these reforms to "maintain access to justice".[14] We note here that the amendments in new sections 123B and 123C already present "significant access to justice issues"[15] – therefore, any further amendments (for example, to prescribe a threshold for actions that 'contribute' to a situation, or to define 'serious misconduct') should be carefully drafted to ensure they do not place further, undue, limits on access to justice, contrary to the policy objective of these reforms.

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12 Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Strengthening consideration and accountability for employees' behaviour in the personal grievance process* (7 November 2024) at [27]. The body of case law referenced here includes, for example, *Xtreme Dining t/a Think Steel v Dewar,* where the Employment Court held the Court and the Authority have the ability to make no award for remedies under section 123 where the employee's conduct is "so egregious" or "outrageous" (*Xtreme Dining t/a Think Steel v Dewar* [2016] NZEmpC 136 at [216]).

13 We note the RIS contemplates, at [90], occasions where an employee "has acted in a destructive or fundamentally inappropriate manner" (which has a lower threshold than the status quo).

14 RIS at [67] – [69].

15 RIS at page 3.

3.6 It is also important to acknowledge that, by preventing employers who breach their good faith obligations from being held accountable to an employee by way of remedies, these changes make the overall legislative framework more favourable for employers. The select committee should ensure any further amendments to the legislation are consistent with the objective of the Act to "acknowledge and address the inherent inequality of power in employment relationships".[16]

4 Amendments relating to specified wages and salary threshold (clauses 9 to 11)

4.1 The amendments in clauses 9 to 11 of the Bill will remove the right to bring personal grievances for unjustified dismissal (the **PG exclusion**) for employees whose annual wages or salary meets or exceeds the specified threshold (referred to as **high income employees** in the Explanatory Note of the Bill). If these changes are enacted, an employer need not have a valid reason, or any reason at all, for dismissing the employee. The PG exclusion will effectively place the employment of affected employees 'at will' of the employer, similar to 'at-will' employment that prevails in the United States.[17]

4.2 These provisions raise a number of constitutional, access to justice, and drafting concerns, which we discuss below.

Constitutional and access to justice issues

4.3 The Employment Contracts Act 1991, which preceded the current Act, gave non-union employees not covered by Industrial Awards the right to bring personal grievances (which was, at the time, a new statutory cause of action).[18] These employees included many senior employees for whom a personal grievance was not previously an option. Prior to this, the only way for employees not covered by awards to challenge a dismissal was by a common law wrongful dismissal claim. The Employment Contracts Act 1991 created 'one law for all' approach, and this access to justice provision has been in place since 1991.

4.4 The common law wrongful dismissal cause of action was abolished by section 113 of the current Act. This common law right was removed expressly on the basis that the (then) new legislation gave *all* employees the right to bring a personal grievance for an unjustified dismissal.[19]

4.5 This raises the question of whether the proposal in the Bill to remove high income employees' rights to raise a personal grievance should be accompanied by reinstatement

16 Section 3 of the Act.

17 In the United States, all states except for Montana operate under at-will employment of some form. This means that, in these states, it is not unlawful for employers to terminate an employee for any reason (or no reason at all) – see: www.usa.gov/termination-for-employers.

18 See s 27.

19 See the part by part analysis for clause 126 (later renumbered to become section 113) during the first reading of the Employment Relations Bill 2000, which states: "clause 126 provides that if an employee who has been dismissed wishes to challenge the dismissal or any aspect of it in a court that challenge must be brought in the Employment Relations Authority under this Part as a personal grievance. The new clause accordingly removes the common law action of wrongful dismissal and all other courses (sic) of action in contract in relation to dismissals from employment."

of their right to sue for wrongful dismissals under the common law. Without such an accompanying amendment, the Bill would remove high income employees' rights to challenge a dismissal, yet allow the employers dismissing them to retain their common law rights (for example, to sue the former employee for damages for breach of contract, including breaches of duties of good faith and fidelity). In this regard, the amendments also appear to undermine the rule of law by preventing high income employees from resolving their disputes through the courts and tribunals, and preventing them from accessing justice through raising an unjustified dismissal claim.

4.6 It is also worth noting that these amendments fall short of what is recommended in the Legislative Design and Advisory Committee's *Legislative Guidelines*, which state:[20]

> The ability of the courts to review the legality of government action or to settle disputes is a key constitutional protection. Legislation that seeks to limit this right must be justified, and will generally be given a restrictive interpretation by the courts… [emphasis added]

Issues relating to broader good faith obligations

4.7 Good faith obligations of employers and employees are currently set out in section 4 of the Act. New section 67I(2) in the Bill now provides that "the employer, in making a decision whether to terminate the employee's employment agreement, is not required to comply with section 4(1A)(c) in observing the obligation in section 4 to deal in good faith with the employee".

4.8 Section 4(1A)(c) of the Act requires only that the employer provide information to an employee, and an opportunity to comment, before making any decision that may adversely affect their employment. However there are other, broader, obligations of good faith in section 4 of the Act, which are not addressed in the Bill. For example, the Bill is silent on what rights the employee may have if:

(a) the dismissal is made in bad faith; or

(b) there have been prior bad faith dealings with the employer, which have breached the employer's general good faith obligations leading up to the employee's dismissal (for instance, where an employer has attempted to undermine the employee by withholding information or duties, excluding them from meetings or decisions, and complaining of their poor performance).

4.9 The RIS relating to these amendments clarifies that "employees would be able to raise breach of good faith claims for breaches of other good faith requirements".[21] We suggest expressly noting this in the Bill to provide clarity for both employers and employees (perhaps by way of an amendment to new section 113A(3)).

Relationship with Protected Disclosures (Protection of Whistleblowers) Act 2022

4.10 It is unclear whether the amendments in clauses 9 to 11 of the Bill override section 21 of the Protected Disclosures (Protection of Whistleblowers) Act 2022 (**PDA**), which

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20 Legislative Design and Advisory Committee *Legislative Guidelines* (September 2021) at [4.6].

21 The Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Personal grievances: Introducing an income threshold for unjustified dismissal* (12 November 2024) at [125].

prohibits employers from dismissing employees who make, or intend to make, a protected disclosure. If the provisions in the Bill override section 21, it could potentially undermine the purpose of the PDA to facilitate the disclosure and timely investigation of serious wrongdoing, and to protect those who make disclosures in accordance with the PDA.[22]

4.11 We also note that, while an affected employee may be able to argue that the dismissal was a breach of good faith obligations outside of new section 67I(2) in the Bill, it could be challenging for the employee to make such an argument if they are prevented from accessing information relating to their dismissal.

4.12 We therefore invite the select committee to consider amending the Bill to clarify that the amendments in clauses 9 to 11 do not apply to the termination of employment of any employee who has made, or intends to make, a protected disclosure in accordance with the PDA.

The drafting of the definition of 'wages or salary'

4.13 The definition of 'wages or salary' in new section 67I(4) clarifies that the term does not include allowances, productivity-based bonuses or incentive payments (including commissions), payments for overtime, penal rates, and contributions to a superannuation scheme.

4.14 We note this definition is less inclusive than the equivalent provisions in Australian legislation:[23] while the Australian provisions capture earnings beyond salaries and wages (such as non-monetary benefits),[24] the legislation also contains a range of employee rights which are absent under New Zealand legislation (for example, high income employees in Australia may be covered by 'awards', which no longer exist in New Zealand).

4.15 As currently drafted, the Bill would enable (for example) an employee with annual total remuneration of $220,000 made up of $170,000 base salary and $50,000 in incentives to raise a personal grievance, but prevent an employee earning only $185,000 base salary from doing the same. We therefore query whether wider income sources should be captured. While the Law Society takes no position on this point, we note there are occupations where significant portions of remuneration flow from allowances and overtime and penal rates, which are effectively a regular and predictable part of the employee's income/remuneration.

4.16 Without any refinements, the proposed definition of 'wages or salary' would result in unequal treatment among employees who earn 'an income' through one of these excluded categories, and those who do not. It could also result in attempts by some to move effective remuneration into the excluded categories so as to avoid the effects of the Bill.

22 PDA, section 3.
23 Fair Work Act 2009 (Cth), s 382.
24 Fair Work Act 2009 (Cth), s 332.

Impact on employee share schemes and other similar benefits

4.17 Employees working in the private sector may receive certain benefits based on whether they are considered to be a 'good leaver' or a 'bad leaver'. The Law Society understands employee share scheme agreements typically include such terms.

4.18 The Bill is silent as to whether an employee dismissed under the PG exclusion regime would be regarded as a 'good leaver' or a 'bad leaver'. This could lead to litigation if an employer dismisses an employee under this regime, and consequently classes the employee as a 'bad leaver' (thereby preventing them from accessing benefits they would otherwise have received). Such litigation would be, in substance, an unjustified dismissal claim.

4.19 One possible solution may be to specify that a dismissal under the proposed amendment shall not be treated for any purpose whatsoever as a 'dismissal for cause'.

Impact on severance agreements

4.20 There may be high income employees who have entered into severance agreements which provide that they will receive a severance payment in exchange for termination of their employment on a 'no-fault' or 'face-doesn't-fit' basis. The RIS acknowledges that "these severance agreements help to mitigate the impacts of job loss, allowing for a mutually beneficial agreement to removal of unjustified dismissal protection".[25] While such arrangements are unenforceable,[26] the Law Society understands that, provided the severance payment is sufficient, these arrangements are generally unlikely to be challenged.

4.21 The RIS notes that unjustified dismissal protection can provide senior executives with leverage to negotiate such severance agreements, and removing access to unjustified dismissal would shift this power balance and undermine this practice.[27]

4.22 The transitional provisions in the Bill should therefore expressly address whether such arrangements (existing or agreed in future) could be regarded as coming within new section 67J (and therefore, within the protection of the unjustified dismissal regime) in order to avoid undermining severance package arrangements.

Plain language explanations of available services

4.23 The Act currently provides that all employment agreements must include a plain language explanation of the services available to resolve an employment relationship problem, including a reference to the 90-day period for raising personal grievances under section 114.[28]

4.24 Where these explanations in existing employment agreements refer to the employee's ability to raise a personal grievance for unjustified dismissal, we query whether such references – if they remain unchanged –could be viewed as the parties 'opting in' to the current personal grievance regime for unjustified dismissals (as permitted under new

25 RIS, at [70].
26 See s 238 of the Act.
27 At [40].
28 Sections 54 (3)(a)(iii) and 65(2)(a)(vi) of the Act.

section 67J). We suggest clarifying this in the Bill (noting proposed clause 28 of Schedule 1AA does not directly and clearly address this point).

Interaction with notice provisions and requirements

4.25 The Bill is also silent on the following points:

(a) Whether the dismissal of high income employees should be on the terms set out in their employment agreement.

(b) The consequences of an employer dismissing a high income employee without giving notice of their intention to do so, and/or without paying the employee for the notice period.

(c) What remedies (if any) are available where the employer does not provide the required notice, and whether a remedy could potentially be a claim for recovery of wages.

(d) What happens if the employer dismisses the employee summarily (without notice), for example, on the basis of alleged serious misconduct.

4.26 Under the current legal framework, an employee may be entitled to significant notice for a non-summary dismissal, and the Law Society understands three to six month notice periods are not unusual for high income employees. An employee who is summarily dismissed without notice, but claims the employer should only have dismissed them on notice, will presumably need to make a claim for recovery of wages. In the course of that claim, the employee will need to argue that the employer was not justified in dismissing them summarily, despite being entitled to dismiss them under the provisions of this Bill. Effectively, this now becomes an unjustified dismissal claim.

4.27 We therefore recommend clarifying in the Bill the points we have identified at [4.25] above (in particular, whether any dismissal subject to the PG exclusion must be on notice, or whether a summary dismissal without notice (but unfair and unjustifiable as to its summary nature) can be challenged as to the notice aspect). One possible solution (as with the 'good leaver/bad leaver' issue) may be to specify that any such dismissal shall not be treated for any purpose whatsoever as a 'dismissal for cause'.

4.28 It is worth noting here that Australia's equivalent framework for high income employees contains notice requirements set by the National Employment Standards.[29] The legislation also provides for other minimum entitlements.[30]

The likelihood of an increase in other types of claims

4.29 It is possible that employees who are excluded from unjustified dismissal claims will reframe their claims to allege their dismissal is an instance of discrimination. They may also allege harassment and emotional damage, or raise disadvantage or other grievances based on those allegations. As a result, litigation will likely become more complex and expensive.

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29 Fair Work Ombudsman Australia "High income employees and ending employment" <library.fairwork.gov.au/viewer/?krn=K600354>.

30 See Fair Work Act 2009 (Cth).

4.30 In the United States, where the toughest 'at-will' employment provisions exist, claims of discrimination, harassment, or other breaches of civil rights entitlements often follow dismissals. These claims are frequent, complex, and can result in very large awards. Some have also cautioned that, under the Australian framework, the high income employee exclusion does not prevent those employees from pursuing other avenues for legal recourse, such as:[31]

(a) General protections claims: these relate to adverse action taken against an employee for exercising a workplace right (e.g., making a complaint or inquiry, or being discriminated against). There is no earnings cap for these claims.

(b) Discrimination claims: under federal or state anti-discrimination laws.

(c) Common law contract claims: for breaches of their employment contract.

(d) Breach of National Employment Standards claims: the NES apply to all employees, regardless of their income or award coverage.

Failure to agree to opt into current framework

4.31 Proposed section 67J allows affected employees and employers to negotiate whether the unjustified dismissal PG exclusion will apply to them. This must be done within one year, under new clauses 26 (1) and (2) of Schedule 1AA.

4.32 Such negotiations will likely require considerable work and expense, particularly in those fields where numerous employees earn above the income threshold specified in the Bill (for example, in fields involving medical professionals, airline pilots, or senior Police Officers). Our understanding is that most (if not all) of these groups are well-organised and accustomed to collective negotiations, and we anticipate they will seek to agree with employers that the PG exclusion does not apply.

4.33 It is unclear what would happen if these employees and their employers cannot agree on alternative arrangements within one year. The apparent intent of the bill is that if there is an impasse, the new exclusory provisions will apply by default. If that is so, there is an incentive for current employers not to agree to any change to their employment agreements knowing that, within a year, the PG exclusion will automatically apply by operation of the law.

5 Changes to the justification test (clause 19)

5.1 Clause 19(1) of the Bill adds another factor that the Authority or the court must consider when determining whether a dismissal or an action by an employer was justifiable: it now requires consideration of whether the employer was 'obstructed' by the employee from taking an action related to the factors specified in sections 103A(3)(a) to (d), and 103A(4).

5.2 There is a body of case law about whether an employee can indeed obstruct or get in the way of procedural requirements. Some cases suggest the employer must follow the

31 Business Chamber Queensland "Understanding the high income threshold: what it means for employers in 2025" (1 July 2024) <businesschamberqld.com.au/article/understanding-the-high-income-threshold-what-it-means-for-employers-in-2025>.

required processes, and any 'obstruction' by the employee is irrelevant. Other cases have noted that bad faith conduct by an employee *is* relevant, and this amendment makes the latter position clear.

5.3 However, we note the term 'obstruct', which can have multiple shades of meaning (for example, from preventing something to making it harder to achieve something), is not defined in the Bill.

5.4 As a result, it could be challenging to identify the types of behaviour that would meet the threshold of 'obstructed' – for example, would an employee be considered to be obstructive if they refuse to respond a proposal to terminate their employment until they have all requisite information to inform their response, or if they take reasonable time to respond (as provided under section 4(1A)(c)) of the Act)?

5.5 It may be that what is contemplated here is a situation where the employee is acting *unreasonably*, thereby impacting the employer's ability to fully or properly meet its requirements. If that is the case, we suggest amending clause 19(1) to refer to the employer being *unreasonably* obstructed by the employee.

David Campbell
Vice-President