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To whom it may concern

Inquiry into Corporate Avoidance of the *Fair Work Act 2009* (Cth)

The Employment Law Centre of Western Australia (Inc) (**ELC**) welcomes the opportunity to make a submission to the Senate Education and Employment References Committee (**Committee**) in relation to its inquiry (**Inquiry**) into the incidence of, and trends in, corporate avoidance of the *Fair Work Act 2009* (Cth) (**Act**).

ELC is a community legal centre that specialises in employment law. It is the only not-for-profit legal service in Western Australia offering free employment law advice, assistance and representation. ELC assists approximately 3,000[1] callers each year through our Advice Line service and provides approximately 400 employees each year with further assistance.

ELC would be happy to provide further information in relation to the Inquiry if required.

Yours faithfully

Jessica Smith
Principal Solicitor

[1] Note that this number has fluctuated in recent years due to funding cuts.

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1. ELC's recommendations

ELC recommends as follows:

Recommendation 1 - unfair dismissal protections extended to labour hire employees

Unfair dismissal protections should be extended so that labour hire employees can make unfair dismissal claims against host businesses, in appropriate circumstances.

Recommendation 2 - Bridging visas

Temporary work visa holders who have been dismissed and have lodged a claim against their employer in relation to the dismissal should be entitled to a bridging visa for the duration of the proceedings.

Recommendation 3 - Expedited procedures in courts and tribunals

The various courts and tribunals that deal with employment law claims relating to dismissal (e.g. Fair Work Commission, Federal Circuit Court, Federal Court) should have an expedited procedure for claims made by temporary work visa holders.

This would allow these matters to be resolved more quickly, therefore increasing the likelihood that a temporary visa holder seeking reinstatement could resolve the matter before the 90 day period has expired.

This would also reduce the period for which temporary work visa holders might need a bridging visa to pursue proceedings.

Recommendation 4 - Visa sponsorship obligations

The Fair Work Commission, Federal Circuit Court and Federal Court should be able to order reinstatement of an employer's visa sponsorship obligations, in addition to the power to order reinstatement of the employee's employment.

Recommendation 5 - Funding of services to visa holders

The federal government should allocate additional funding to providing services to visa holders, particularly in the area of employment law advice.

Recommendation 6 - Interpreters

The federal government should ensure that visa holders and the service providers who assist them have free access to interpreters. The government should maintain funding to the Translating and Interpreting Service.

Recommendation 7 - Information sharing

There should be enhanced information sharing between the Department of Immigration and the Fair Work Ombudsman.

For example, where a temporary work visa holder is deported in circumstances which indicate a potential breach of employment laws, the Department of Immigration should be required to provide information about the circumstances of the deportation to the Fair Work Ombudsman (for example, the visa holder was dismissed and was unable to find another sponsor).

This would enable the Fair Work Ombudsman to better address breaches of employment laws in respect of temporary work visa holders.

Recommendation 8 - Ability to participate in proceedings from overseas

The various courts and tribunals that deal with employment law matters (e.g. Fair Work Commission, Federal Circuit Court, Federal Court, Australian Human Rights Commissions) should have procedures for allowing claimants to pursue claims more easily even where they are not in Australia.

For example, this could involve allowing claimants to participate in conciliations, mediations and hearings by phone or by video-link. This already occurs to some extent in the Fair Work Commission, for instance.

This would allow temporary work visa holders to seek redress against their former employers for breaches of Australian employment laws even where they have been forced to leave the country.

Recommendation 9 - Special maternity leave

Pregnant employees should be entitled to special maternity leave regardless of their length of continuous service.

Recommendation 10 - extension of unpaid parental leave

Penalties should apply where an employer refuses a request for extended unpaid parental leave other than on reasonable business grounds.

Recommendation 11 - refusal of flexible working arrangements

Penalties should apply where an employer refuses a request for flexible working arrangements other than on reasonable business grounds.

Recommendation 12 - eligibility to request flexible working arrangements

It should not be necessary for an employee to have completed 12 months of continuous service before being eligible to make a request for flexible working arrangements.

Recommendation 13 - consultation about changes to rosters or working hours

Section 64 of the Fair Work Act should be amended to include the consultation clause in section 205(1A) of the Fair Work Act, so that it applies to non-award and non-agreement employees.

Recommendation 14 - requirement to take annual leave

Section 94(5) of the Fair Work Act should be amended to limit the amount of leave that an employer can require an employee to take at a particular time that suits the employer but does not necessarily suit the employee. We suggest that the limit be set at 50% of the annual leave entitlement each year (i.e. 2 weeks' annual leave).

Recommendation 15 - definition of immediate family for the purposes of compassionate leave

The definition of immediate family" in s 12 of the Fair Work Act should be extended to include stepsisters and stepbrothers, so that an employee is entitled to take compassionate leave where their stepbrother or stepsister dies or suffers from a life-threatening illness or injury.

Recommendation 16 - Casual employees' eligibility for unfair dismissal

Casual employees should not be automatically excluded from making unfair dismissal claims.

Instead, the fact that an employee is a casual employee should be a relevant consideration in determining whether a dismissal is harsh, unjust or unreasonable.

Recommendation 17 - Fixed term employees' eligibility for unfair dismissal

The Fair Work Act should be amended so that employees whose contracts are terminated at the end of a fixed term are protected from unfair dismissal in the same way as other employees.

2. Responses to the Terms of Reference

ELC has chosen to respond to the following Terms of Reference:

> (f) the effectiveness of any protections afforded to labour hire employees from unfair dismissal;
>
> (h) the extent to which companies avoid their obligations under the *Fair Work Act 2009* (Cth) (**Fair Work Act**) by engaging workers on visas;
>
> (i) whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions; and
>
> (l) any other related matters.

Each of the above Terms of Reference is addressed in turn below.

2.1 The effectiveness of any protections afforded to labour hire employees from unfair dismissal

Labour hire arrangements have become more prevalent in the workforce in recent years. Labour hire workers receive a lower level of protection than other employees under the Fair Work Act.

In a labour hire arrangement, a labour hire agency engages a worker (typically as a casual employee or as an independent contractor) and enters into a contract with another entity – the "host business" – to provide that worker's services to the host business. There is usually no contract between the worker and the host business. For this reason, the worker is generally not regarded as an employee of the host business.

Where a host business informs a worker that it no longer requires his or her services, this may not necessarily be viewed as a termination of the person's employment, particularly if he or she appears to remain an employee of the labour hire agency and it is a term of his or her employment with the labour hire agency that he or she can be assigned to different host businesses.[2]

This is a potentially significant limitation on the rights of labour hire workers to make unfair dismissal claims under the Fair Work Act, even where they have been treated very unfairly by the host business.

The below case study serves as an illustration of this point.

Case study 1

Emma[*] worked in manufacturing. She was employed by a labour hire agency, which contracted her to work for a host business as a casual employee.

After working for the host business for over a year, Emma was told by the labour hire agency that the host business had ended her contract. When Emma asked the host business why they terminated the contract, her supervisor refused to tell her. Her supervisor had previously stated that he wanted all the workers to be Indian or Asian. This led Emma to believe she had been discriminated against.

When Emma approached ELC for advice, she was technically still employed as a casual employee by the labour hire agency. However, the labour hire agency had not offered her any other work since her contract with the above host business had been terminated.

Emma was very frustrated and wanted to know why she had been dismissed. Emma also wanted to hold the host business or the labour hire agency to account for the way she had been treated.

A permanent employee in Emma's situation could seek reasons for dismissal and redress for the employer's conduct by making an unfair dismissal claim against the employer. Unfortunately, because Emma was employed in a labour hire arrangement as a casual employee, she faced potentially insurmountable obstacles in making an unfair dismissal claim against either the host business or the labour hire agency.

[2] See for example, *David Tse v Ready Workforce Pty Ltd* [2010] FWA 8751.
[*] Names have been changed to protect client confidentiality.

In ELC's view, unfair dismissal protections should be expressly extended to labour hire employees.

Recommendation 1 - unfair dismissal protections extended to labour hire employees

Unfair dismissal protections should be extended so that labour hire employees can make unfair dismissal claims against host businesses, in appropriate circumstances.

2.2 The extent to which companies avoid their obligations under the Act by engaging workers on visas

ELC appeared before the Senate Education and Employment References Committee Inquiry into the Impact of Australia's Temporary Work Visa Program in July 2015.

As part of that inquiry, ELC made a number of comments that are equally applicable to the current Inquiry, which relate to the extent to which companies avoid their obligations under the Fair Work Act by engaging workers on visas. Those comments are re-stated below.

ELC reviewed instances in our client records in which we had assisted temporary visa holders. Our client records revealed cases where:

- temporary work visa holders received less favourable pay and conditions than Australian workers;
- temporary work visa holders were exploited on threat of deportation – e.g. they had been required to pay for vehicle damage for which they were not responsible or which could have been recovered on insurance;
- temporary work visa holders were subjected to assaults, underpayment of entitlements, threats of deportation, unreasonable working hours and other forms of mistreatment;
- employers demanded that clients repay visa fees and other associated costs if they left their employment within a certain period of time;
- clients were selected for redundancy and considered that they were selected because they were temporary work visa holders;
- clients on temporary work visas decided against enforcing their entitlements or making a claim because they were concerned about losing their job and being deported.

Some more detailed case studies are provided below.

Case study 2

Ms A was on a 457 visa. Her annual salary according to the contract should have been around $60,000. However, she was not paid this amount.

Ms A was given a cheque once a week for just under $1,000. Ms A's employer required Ms A to deposit the cheque into her bank account to meet the requirements of her 457 visa and then withdraw and return the payment to her employer.

Ms A injured her arm at work and took time off work. She was dismissed because she took this time off work.

Case study 3

Mr B holds a 457 visa. He was involved in a car accident at work and took time off work to recover. He made a workers' compensation claim in respect of the injuries sustained in the accident.

Mr B contacted the employer about returning to work after his recovery. The employer told him that it had hired another person on a 457 visa and that Mr B's role had been made redundant.

Mr B believes he was dismissed because of his temporary disability or absence from work due to injury.

Case study 4

Mr C is on a 457 visa. He is consistently paid late and he has not been paid any superannuation.

Mr C wants to resign, but is concerned that if he resigns within two years of starting employment, under his contract, he is required to repay visa and relocation expenses to his employer.

Mr C feels extremely vulnerable as he has no other relatives in Australia and has to support a wife and child.

Case study 5

Ms D is on a 457 visa. When she started work, she signed a letter stating that if she left the employer within two years, she would repay several thousand dollars in visa sponsorship costs to her employer.

Ms D started looking for other work as she discovered that she was being paid less than other employees who weren't on 457 visas.

When the employer became aware that Ms D was looking for other work, Ms D was asked to resign and her entitlements (including annual leave and notice) were withheld in lieu of repayment of the visa sponsorship costs.

Case study 6

Mr F was on a 457 visa. English is his second language and he has dependants. Mr F experienced problems at work after he made a complaint about another staff member who wasn't doing their job properly.

He was isolated after this, and accused of misconduct and breaching confidentiality. Mr F was then dismissed. He was told it was a redundancy but he believes it was because he made a complaint.

Mr F lodged an unfair dismissal claim. If this does not succeed, he may be deported.

Case study 7

Mr G worked full-time on a 457 visa. His employer would frequently demand that he give them money as repayment for bringing him to Australia.

The employer told him that if he didn't pay them this money, the business would close and Mr G would have to return to his home country.

After informing his employer that he had recorded an instance during which the employer demanded money from him, Mr G believes he has been targeted for dismissal.

Based on our experience assisting temporary work visa holders, ELC is of the view that the temporary work visa program creates some systemic problems which make it easier for employers to avoid their obligations under the Act by engaging workers on visas. Our specific observations are as follows:

1. In theory, temporary work visa holders have access to the same workplace rights and entitlements as other Australian workers.

2. However, in practice, temporary work visa holders often do not enjoy the same workplace rights and entitlements as other Australian workers.

3. Temporary work visa holders are more vulnerable to exploitation and mistreatment than other Australian workers because:

    (a) They must be employed by a sponsor employer to stay in Australia. If their employer breaches employment laws and the visa holder complains, the employer can simply fire them.

    The employee then has 90 days to:

    - find another employer to sponsor them;
    - get another visa; or
    - leave Australia.

    In practice, it is difficult for a temporary visa holder to find a new sponsor employer within 90 days.

    (b) Temporary work visa holders are often unfamiliar with Australian employment laws. They may not realise that they are being underpaid, that it is unlawful to dismiss them for taking a sick day or that they have a right not to be sexually harassed at work.

    (c) Temporary work visa holders often do not know where to go for assistance if they are not being treated fairly at work. They may have limited support networks and may not be aware of the key government and other agencies responsible for employment issues, such as the Fair Work Ombudsman, WorkSafe and community legal centres.

    (d) Temporary work visa holders often do not speak English as a first language. This acts as a major barrier to accessing assistance and enforcing their rights.

4. Temporary work visa holders may be less likely to enforce their rights for all these same reasons – i.e. because:

    (a) They must be employed by a sponsor employer to stay in Australia.
    If a temporary visa holder is dismissed, they only have 90 days in which to find a new sponsor employer, otherwise they will have to leave the country.

    Their focus is likely to be on finding new employment rather than lodging a claim against their former employer.

    (b) They are unfamiliar with Australian employment laws.

    (c) They do not know where to go for assistance.

    (d) They do not speak English as a first language.

5. Temporary work visa holders may be less likely to enforce their rights because they may only be in Australia for a short period of time. It is very difficult to make a claim against the employer if they have left the country.

6. In practice, it has been our experience that many temporary work visa holders do not receive the same conditions and entitlements as Australian workers because they are vulnerable to exploitation and they face barriers in enforcing their rights.

Recommendation 2 - Bridging visas

Temporary work visa holders who have been dismissed and have lodged a claim against their employer in relation to the dismissal should be entitled to a bridging visa for the duration of the proceedings.

Recommendation 3 - Expedited procedures in courts and tribunals

The various courts and tribunals that deal with employment law claims relating to dismissal (e.g. Fair Work Commission, Federal Circuit Court, Federal Court) should have an expedited procedure for claims made by temporary work visa holders.

This would allow these matters to be resolved more quickly, therefore increasing the likelihood that a temporary visa holder seeking reinstatement could resolve the matter before the 90 day period has expired.

This would also reduce the period for which temporary work visa holders might need a bridging visa to pursue proceedings.

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There should be enhanced information sharing between the Department of Immigration and the Fair Work Ombudsman.

For example, where a temporary work visa holder is deported in circumstances which indicate a potential breach of employment laws, the Department of Immigration should be required to provide information about the circumstances of the deportation to the Fair Work Ombudsman (for example, the visa holder was dismissed and was unable to find another sponsor).

This would enable the Fair Work Ombudsman to better address breaches of employment laws in respect of temporary work visa holders.

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The various courts and tribunals that deal with employment law matters (e.g. Fair Work Commission, Federal Circuit Court, Federal Court, Australian Human Rights Commissions) should have procedures for allowing claimants to pursue claims more easily even where they are not in Australia.

For example, this could involve allowing claimants to participate in conciliations, mediations and hearings by phone or by video-link. This already occurs to some extent in the Fair Work Commission, for instance.

This would allow temporary work visa holders to seek redress against their former employers for breaches of Australian employment laws even where they have been forced to leave the country.

2.3 Whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid these obligations

In ELC's view, the National Employment Standards (**NES**) as a whole strike a balance between the needs of both employers and employees, and generally act as an effective floor for wages and conditions.

In particular, we support the following components of the NES and submit that they should be maintained.

- *Family-friendly measures*[3] – ELC strongly supports the retention of these measures which, among other things, provide for parental leave, special unpaid maternity leave, a return to work guarantee and an entitlement for pregnant employees to be transferred to a safe job. These measures give flexibility to employees with family responsibilities, improve their retention in the workforce, and assist to ensure that such employees are not unfairly disadvantaged in the workplace.

- *Maximum weekly hours of work*[4] – Specifying maximum weekly hours of work for employees is a work health and safety issue that should be strongly protected.

- *Paid personal leave*[5] – Allowing employees who are unfit for work due to illness or injury to take leave is also a work health and safety issue that must be protected. Also, carer's leave is vital for employees who have family responsibilities and must be maintained.

- *Notice of termination or payment in lieu*[6] – This provision allows employers to manage their business and staff, while ensuring that an employee whose employment is terminated is not unduly disadvantaged by that termination and has time to plan for the end of their employment and to find alternative employment.

However, it is ELC's view that the NES should be strengthened in the areas discussed below.

2.3.1 Family-friendly measures

(a) Special maternity leave

ELC supports the retention of unpaid special maternity leave to enable employees to be able to take leave if they are suffering from a pregnancy-related illness or if the pregnancy ends unexpectedly without resulting in the birth of a living child.[7]

However, at present, a pregnant employee is only entitled to unpaid special maternity leave if she has completed at least 12 months' continuous service.[8]

[3] Fair Work Act, Part 2-2, Divisions 4 and 5.
[4] Fair Work Act s 62(1).
[5] Fair Work Act s 96.
[6] Fair Work Act s 117.
[7] Fair Work Act s 80.
[8] Fair Work Act s 67 and s 80 note 1.

In our view, all employees who meet the other eligibility criteria should be entitled to this leave, irrespective of their period of service.

Otherwise, pregnant employees who have been working for an employer for less than 12 months could be left in a situation where they are suffering from severe and debilitating symptoms resulting from their pregnancy but do not technically have an entitlement to take time off – for example, because they are casuals or because they have not accrued sufficient paid personal leave at that time.

Extending special maternity leave entitlements to employees who have completed less than 12 months' continuous service should not be unduly onerous for employers, given that the leave is unpaid leave in any case and given that the number of employees who would potentially be entitled to this leave will be necessarily limited.

Recommendation 9 - Special maternity leave

Pregnant employees should be entitled to special maternity leave regardless of their length of continuous service.

(b) Parental leave

While employees have a right to request an extension of unpaid parental leave for a further 12 months, this right is unenforceable and without remedy, and no sanctions apply if the employer refuses the request, even if the refusal is not on reasonable business grounds.[9]

An employee who has been refused an extension for reasons other than reasonable business grounds cannot take any action against the employer, despite the employer's breach of section 76(4) of the Fair Work Act.

Recommendation 10 - extension of unpaid parental leave

Penalties should apply where an employer refuses a request for extended unpaid parental leave other than on reasonable business grounds.

(c) Right to request flexible working arrangements

The right to request flexible working arrangements is similarly limited. No penalties apply if the employer refuses the request, even if the refusal is not on reasonable business grounds.[10]

Further, only employees who have completed 12 months of continuous service are entitled to request flexible working arrangements.[11]

ELC is of the view that the right to request flexible working arrangements should be strengthened by introducing sanctions where the employer refuses the request other than on reasonable business grounds. Further, it should not be necessary for an employee to have

[9] Fair Work Act s 76.
[10] Fair Work Act s 76
[11] Fair Work Act s 65(2).

completed 12 months' service before being able to request flexible working arrangements. Taking into account the stated purpose of this entitlement, which is to assist parents or carers of a child under school age with the care of the child,[12] this entitlement should be available to all employees, irrespective of their length of service.

Recommendation 11 - refusal of flexible working arrangements

Penalties should apply where an employer refuses a request for flexible working arrangements other than on reasonable business grounds.

Recommendation 12 - eligibility to request flexible working arrangements

It should not be necessary for an employee to have completed 12 months of continuous service before being eligible to make a request for flexible working arrangements.

2.3.2 Working hours

(a) Consultation about changes to rosters or working hours

The Fair Work Act provides that modern awards and enterprise agreements must contain a term requiring employers to consult with employees about changes to regular rosters and ordinary hours of work.[13]

Currently, there is no corresponding provision requiring employers to consult with non-award and non-agreement employees regarding changes to rosters and working hours.

For many such employees, particularly those with family or carer's responsibilities, changes to regular rosters or ordinary hours can be a serious issue, and may affect their ability to continue working. Such employees have all of the same requirements as award/enterprise agreement covered employees in relation to changes to rosters and working hours. They may need to consult with family members in relation to any changes, make alternative childcare or other arrangements, and restructure other aspects of their lives in order to accommodate these changes.

It is therefore important for such employees to be consulted in advance about such changes so that they can make alternative arrangements if required. It is also important for employees to be involved in any decision-making processes regarding such changes so that employers can take into account any employees' ideas regarding alternatives to the proposed change.

Recommendation 13 - consultation about changes to rosters or working hours

Section 64 of the Fair Work Act should be amended to include the consultation clause in section 205(1A) of the Fair Work Act, so that it applies to non-award and non-agreement employees.

[12] Explanatory Memorandum, Fair Work Bill 2009 (Cth).
[13] Fair Work Act s 205(1A).

2.3.3 Leave entitlements

(a) Annual leave

Under section 94(5) of the Fair Work Act, an employer may require an award/agreement free employee to take annual leave where reasonable to do so.

While we accept that an employer should be able to require an employee to take annual leave in certain circumstances, the existing legislation arguably does not prevent an employer from requiring an employee to take their entire annual leave at a time that suits the employer but which does not suit the employee.

For example, some businesses close over Christmas and require employees to take annual leave over this time. An employer could potentially require an employee to take their entire 4 weeks of annual leave over this period and it may be arguable that this is reasonable if the business closes for this period. However, this may be quite unfair for employees who wish to take annual leave at some other time of the year, particularly if they do not celebrate Christmas.

In our view, there should be a limit to the amount of annual leave that an employee can reasonably be asked to take at a time that suits the employer but does not necessarily suit the employee. We suggest that the limit be set at 50% of the annual leave entitlement each year.

Recommendation 14 - requirement to take annual leave

Section 94(5) of the Fair Work Act should be amended to limit the amount of leave that an employer can require an employee to take at a particular time that suits the employer but does not necessarily suit the employee. We suggest that the limit be set at 50% of the annual leave entitlement each year (i.e. 2 weeks' annual leave).

(b) Compassionate leave

Under section 104 of the Fair Work Act, an employee is entitled to 2 days' paid compassionate leave for occasion when a member of the employee's immediate family or household:

(a) contracts or develops a personal illness that poses a serious threat to his or her life;

(b) sustains a personal injury that poses a serious threat to his or her life; or

(c) dies.

The term "immediate family" is defined to include:[14]

(a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or

(b) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee.

[14] Fair Work Act s12.

One omission from this list of people is stepsisters and stepbrothers – i.e. if an employee's stepsister or stepbrother were to pass away, there would appear to be no entitlement to compassionate leave.

In our view, there is no reason to exclude stepsisters and stepbrothers from the definition of "immediate family".

Recommendation 15 - definition of immediate family for the purposes of compassionate leave

The definition of immediate family" in s 12 of the Fair Work Act should be extended to include stepsisters and stepbrothers, so that an employee is entitled to take compassionate leave where their stepbrother or stepsister dies or suffers from a life-threatening illness or injury.

2.4 Other related matters

2.4.1 Casual employees

Under the Fair Work Act, casual employees are prevented from making unfair dismissal claims, irrespective of the harshness or unreasonableness of the dismissal.[15]

The only situation where a casual employee can make an unfair dismissal claim under the Fair Work Act is where the employee can demonstrate that he or she has worked on a regular or systematic basis and that he or she had a reasonable expectation of ongoing employment on a regular and systematic basis.[16] In other words, the employee must demonstrate that he or she is not a true casual employee, but tantamount to a permanent employee.

Under Western Australian legislation, casual employees are not excluded from making unfair dismissal claims. However, the WAIRC may nonetheless, and often does, take into account the fact that the dismissed employee is a casual employee in determining whether the dismissal is harsh, oppressive or unfair.[17]

In our view, it is preferable for casual employees not to be automatically excluded from making unfair dismissal claims under the Fair Work Act but instead for their casual status to be something that FWC takes into account in determining whether the dismissal was unfair.

Recommendation 16 - Casual employees' eligibility for unfair dismissal

Casual employees should not be automatically excluded from making unfair dismissal claims.

Instead, the fact that an employee is a casual employee should be a relevant consideration in determining whether a dismissal is harsh, unjust or unreasonable.

2.4.2 Fixed term employees

Section 386(3)(a) of the Fair Work Act prohibits fixed term employees from making unfair dismissal claims.

Employees on fixed term contracts often have no protection from unfair dismissal where the employer simply decides not to renew the employee's contract rather than terminating an existing contract. ELC has encountered a number of employees whose employers have engaged them on rolling fixed term contracts, conceivably for the purpose of making it easier to dismiss them without the employees having recourse to unfair dismissal protections.

In ELC's view, employees on fixed term contracts should be protected against unfair dismissal, in the same way as other employees. Employees on fixed term contracts are protected in this manner in the United Kingdom (**UK**).

Under section 95 of the *Employment Rights Act 1996* (UK) (**ER Act**), the situation where an employee's fixed term contract expires without being renewed is treated as a dismissal for the purposes of the Act. As a result, fixed term employees have the right to bring an unfair dismissal

[15] Fair Work Act s 384.
[16] Fair Work Act s 384.
[17] For example, *Brenzi v Marine Fire Security Pty Ltd* [2004] WAIR 12573; *Cumberbirch v Total Peripherals Pty Ltd* (1995) 75 WAIG 2862; *Despot v Valley View Restaurant & Function Centre* [2005] WAIRC 02601.

claim if the other criteria for the claim are met and there was not a fair reason for non-renewal (see sections 94-95(2) of the ER Act).

Further, the *Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002* (UK) (**FTE Regulations**) provide certain fixed term employees with:

- the right not to be treated less favourably than permanent employees of the same employer doing similar work on the ground that they are a fixed term employee,[18] unless this can be objectively justified;[19] and

- the right to be recognised as a permanent employee where they have been continuously employed for four years or more on successive fixed term contracts, unless renewal on a fixed-term basis was objectively justified. [20]

It is noteworthy that the FTE Regulations were developed in response to a broader European Union (**EU**) directive, which establishes minimum requirements in relation to the protection of fixed term employees across EU Member States (see Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP).

The ER Act and the FTE Regulations strike a desirable balance between protecting fixed-term employees, especially those on rolling fixed term contracts, and allowing employers to utilise fixed term contracts where they are necessary to meet genuinely temporary business needs.

Recommendation 17 - Fixed term employees' eligibility for unfair dismissal

The Fair Work Act should be amended so that employees whose contracts are terminated at the end of a fixed term are protected from unfair dismissal in the same way as other employees.

[18] FTE Regulations SI 2002/2034 r 4.
[19] FTE Regulations SI 2002/2034 r 3.
[20] FTE Regulations SI 2002/2034 r 8.