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

Sent by online Portal

Dear Secretary,

Inquiry into the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*

The Australian Hotels Association (**AHA**) is a registered employer organisation representing the interests of over 5,000 member Hotels in each Australian state and territory. The AHA welcomes the opportunity to make a submission the Senate Education and Employment Legislation Committee (**Committee**) in its inquiry into the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**Bill**).

The AHA also confirms it is able to appear at the Committee's scheduled public hearing on 15 November 2022 and consents to this submission being made public.

From the outset, the AHA notes the significance and breadth of the Bill. Its 29 Parts traverse amendments to a number of discreet parts of the *Fair Work Act 2009* (Cth) (**FW Act**) which will likely be subject to a volume of submissions to the Committee from other parties, including the Australian Chamber of Commerce and Industry which the AHA is a constituent member of. The AHA has accordingly limited its submission to a selection of key issues that it has identified on review of the Bill.

Executive Summary

The AHA submits to the Committee:

1. In respect of the proposed multi-employer bargaining, the requirement of an employer to be party to an enterprise agreement with multiple employers should:

    a. be with the consent of each employer involved only; or in the alternative, small and medium sized businesses (up to 100 employees) be exempt;

    b. be subject to a refined "common interest test", to minimise as far as is practicable current ambiguity in its application; and

2. The bulk of the proposed changes to the flexible work arrangement requests are unnecessary, however should these proceed:

a. The newly imposed obligations on employers to attempt to reach genuine agreement with an employee on a flexible work request made by them should also be imposed on the relevant employee; and

b. Any orders that the Fair Work Commission (**FWC**) will have to grant a request or otherwise specify how an employer is to conduct its operational arrangements must be subject to a review process, and any orders granted should automatically lapse if the employee's underlining need for the flexibility ceases.

3. The proposed sunsetting of "Zombie" agreements presents as a streamlined and resource saving alternative to their individual termination, however the proposed powers to extend their operation should not be used to frustrate any new bargaining processes.

4. Given the significance of the Bill's proposed reform, the AHA sees merit in the splitting of the Bill (particularly those Parts relating to multi-employer bargaining), to allow its more contentious and complex aspects to be subject to a more fulsome review outside of current time constraints.

Multi-Employer Bargaining

5. The AHA notes that at present, under section 236 of the FW Act, an employee organisation can already compel an employer to engage in enterprise bargaining in a single employer setting. Accordingly, there are existing mechanisms for employee organisations to initiate bargaining, even against the employer's preference.

6. Parts 20 and 21 of the Bill propose a supported bargaining stream and simplified means for single interest bargaining orders to be obtained by employee organisations. In effect, these reforms would see multiple employers brought together to negotiate with employee organisations on a single agreement, in a manner and scale far beyond the FW Act's current single interest bargaining provisions.

7. The AHA holds a number of concerns about the practicality, efficiency and effectiveness of such an approach to bargaining.

Multi-Employer bargaining with each employers consent only

8. Primarily, the AHA is concerned that the proposed reforms remove flexibility and choice from employers, as the proposed approach is predicated on employee representatives compelling employers to the bargaining table with multiple other employers, irrespective of the respective employers' preferences or circumstances.

9. Such circumstances could result in a range of issues for employers including:

a) Being taken out of the day hands on running of their business for unlimited and undefined periods at times unsuited to them;

b) Not having the adequate resources (e.g., dedicated HR, industrial relations or legal functions) to be able to fairly engage in the multi-employer bargaining process;

c) Needing to unnecessarily divulge information about operational practices with competitor employers who are also subject to the relevant bargaining order;

d) Making concessions or agreeing to terms that do not suit their particular workplace that they would not have done so if bargaining at a single-enterprise level;

e) Facing difficulties in implementation of any agreement once it is approved and operative, as any given employer may have different time and attendance, payroll and rostering systems that may or may not able to easily be programmed with the agreement's terms.

10. Consequently, the AHA considers it appropriate that employers should only be included in multi-employer bargaining by consent only, or in the alternative at least those employers with 100 employees or less be exempt. This will ensure the bargaining regime is able to operate as intended and will assist in meeting one object of the FW Act, being that of "*achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations*". [1]

11. The AHA submits that only having those employers who are willing to participate in the multi-employer agreement making processes will result in more engaged and more positive bargaining and outcomes.

Common Interest Test

12. The AHA holds serious concerns as to what is currently proposed to be the common interest test, which would be used by the FWC in determining whether it is appropriate for employers to have to bargain together.

13. The AHA contends that the clearly identifiable common interests set out in the proposed sections 243(2) and 216DC are entirely too broad and subjective to be capable of application a consistent or fair manner.

14. At its extreme, relying upon a common "*regulatory regime*" could encompass all hotels subject to the same liquor laws. As these are dealt with on a state-by-state basis, conceivably all hotels within a state could be argued to hold a common interest.

"Small and medium" business should be exempt

15. Whilst the AHA holds optimistic views regarding the proposed changes to the BOOT [2] and expansion of the cooperative workplaces bargaining stream, [3] without the benefit of foresight to ascertain the effectiveness of such changes, it remains the case that the enterprise bargaining process is a complex and resource intensive one. Small and medium sized businesses without dedicated HR, industrial relations or legal resources may not be equipped with the ability to deal with bargaining (and the potential complexities set out above).

16. For this reason, it is the AHA's position that if multi-employer bargaining proceeds in a manner where employers may be participating without consent, small and medium sized business must be exempt (defined by 100 employees or less).

17. It would be unfair and unnecessary to expose small and medium sized businesses to the risk of being compelled to bargain with multiple employers, when existing provisions allow for employee organisations to commence negotiations for a single-employer agreement, that

[1] *Fair Work Act 2009* (Cth), section 3 (f)
[2] Part 16
[3] Part 23

would be far better suited to the nature of the workplace than a multi-employer agreement could be.

18. Furthermore, it is the AHA's view that basing any exemption on the FW Acts existing definition of small business, being fewer than 15 employees, [4] is not based on any logic or consideration of the skills available in different sized businesses. A business with a greater number of employees still faces the same challenges as set out above, and a higher threshold of 100 employees would be more likely to have the skills required to participate fairly in multi-employer negotiations.

19. Such an exemption is consistent with the FW Act's objective of "*acknowledging the special circumstances of small and medium-sized businesses*." [5]

Flexible Work Arrangements

20. The AHA acknowledges the importance of employers being able to provide flexible work, in a manner that adequately balances individual needs and circumstances against those of the employer.

21. This is suitably reflected in the FW Act's current flexible work request provisions, where the employees right to make a request is considered against an employer's reasonable business considerations; including cost impact, the practicality of recruiting new employees to accommodate another employee's request, efficiency, and impact on customer service. [6]

22. The existing provisions already have the safeguards to ensure that if a request is refused, an employer must provide the reasons behind the refusal in writing. [7] Furthermore, given the circumstances which give rise to the ability to make a flexible work request, remedy against an egregious refusal may well be able to be obtained under existing state or federal anti-discrimination law. [8]

23. AHA members have expressed concerns about being able to support various and competing requests for flexible work made by eligible employees and worry about the potential to be brought before the FWC if they aren't able to provide arrangements to the satisfaction of the employee.

24. For these reasons the AHA does not accept that the proposed changes in Part 11 of the Bill are generally necessary. [9]

25. Notwithstanding, if Part 11 of Bill proceeds, the AHA submits that amendments are required in two areas.

Employee should also be obliged to genuinely reach agreement

26. The new subsection 65A (3) would impose new obligations on an employer to, *inter alia* "*genuinely* [try] to *reach an agreement with the employee about making changes to the employee's working arrangements*." Notably, this obligation sits only on the employer and it

[4] *Fair Work Act 2009* (Cth), section 23. Noting this includes employees of an employer's associated entities.
[5] *Fair Work Act 2009* (Cth), section 3 (g)
[6] *Fair Work Act 2009* (Cth), section 65 (5) – (5A)
[7] *Fair Work Act 2009* (Cth), section 65 (6)
[8] For example, if the refusal treated an employee differently on the basis of a characteristic protected under the relevant legislation.
[9] Noting that the AHA does not oppose part 11 of the Bill in relation to its proposed amendments at Division 1 and 2.

would be open for an employee after making a request, to not move from their initial position in any discussions on the matter.

27. The AHA considers that where new obligations to attempt to reach an agreement are being introduced on an employer, these should also be equally imposed on the employee.

28. Doing so would ensure both parties are open to genuine discussion to avoid the unnecessary escalation to the proposed dispute resolution processes.

Review of FWC Orders

29. The proposed section 65B would empower the FWC to intervene in flexible work request disputes, ultimately arbitrating the matter, if necessary, with the ability for the FWC to make orders for the request to be granted and/or other specified changes to working arrangements. [10]

30. The significance of such an order cannot be understated. Such orders conceivably include the FWC determining, at the individual level, how work is to be performed and/or allocated. Such matters may be complex, impacting multiple distinct employees (e.g., by way of consequential rostering changes) and require consideration of various industry and workplace specific matters.

31. For these reasons, the AHA submits that the proposed powers of the FWC under 65C (e) and (f) need to be subject to a review mechanism. The AHA proposes that this should include an ability for the employer to apply to the FWC to have the orders reviewed at a certain point after they are made (e.g., 3 or 6 months), at which point the FWC could assess their appropriateness against any evidence of their impact on the business during their operation, and either confirm, revoke, or amend them accordingly.

32. Finally, the AHA also notes that an order made under section 65C should be deemed ineffective (without any further involvement of the FWC) if the employee's circumstances change insofar as they would no longer qualify to make the request on the basis it was made. [11]

Termination of Enterprise Agreement's and Sun setting of "Zombie" Agreements

33. Parts 12 and 13 of the Bill propose changes in relation to the termination of enterprise agreements that have passed their nominal expiry date, and in the case of '*Zombie*' agreements, by many years.

34. The current provisions in the FW Act for the termination of enterprise agreements beyond their nominal expiry date enable an employer to do so by application to the FWC, which must then consider if termination is appropriate into account all the circumstances, including the views and circumstances of each employee, employer and employee organisation covered by the agreement. [12]

35. The less protracted and simpler alternative in Part 13 of the Bill of sunsetting Zombie agreements will likely be of assistance to employers, saving the need for separate application

[10] At the proposed section 65C (1) (f)
[11] E.g. If the request was made on the basis of carer's responsibilities and the employee ceased to have such responsibilities
[12] *Fair Work Act 2009* (Cth), sections 225 and 226; *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), items 15 and 16 of Schedule 3

to be made to the FWC. The AHA accordingly does not oppose in principle the provisions within Part 13 of the Bill.

36. Notwithstanding the above, the AHA notes that an application for an extension of the default period made under sub item 7 [13], should not be used by an employee organisation frivolously or made purely to frustrate the ongoing bargaining process.

Thank you for the opportunity to have made this submission.

STEPHEN FERGUSON
AHA NATIONAL CEO

[13] Of item 20 of Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)