AUSTRALIAN HOTELS ASSOCIATION

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17 February 2023

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

Dear Mr Hehir,

Industry consultation in relation to amendments the Fair Work Act 2009 (Cth)

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 confidential submission to the Department of Employment and Workplace Relations (**DEWR**) in relation to various proposed amendments to the *Fair Work Act 2009* (Cth) (**FW Act**). With reference to the issues and questions posed in the attachment to your correspondence of 13 February 2023, the AHA provides the following feedback.

Item 1: Insert a right to superannuation in the National Employment Standards

The AHA supports the introduction of a right to superannuation in into the National Employment Standards (**NES**), and does not consider the need for any variation of existing superannuation rules as necessary to achieve this. However, the AHA is concerned with the prospective implementation of this change at a regulatory level, and submits that as far as possible, regulatory responsibility should remain with the Australian Taxation Office (**ATO**).

Superannuation law is an area which is technically complex, with the ATO having established expertise and processes for issuing interpretive guidance to employers (e.g. by way of public and private rulings). With the Fair Work Ombudsman (**FWO**) not having equivalent existing expertise, our concern in the FWO taking on a significant or dual role in regulation lies in potential unintended consequences such as:

- Unnecessary delays or public expense in resolving claims that are being investigated by both the FWO and the ATO separately at the same time;
- The risk of the FWO and ATO having opposing views on a particular complaint or matter. For example, an employer could be investigated by the FWO with no non-compliance being identified, and then separately by the ATO who may reach a different outcome if a different interpretation of the relevant law is taken.
- Confusion from both employees and employers about which entity to go to with their concerns, feedback or guidance.

Item 2: Reform of the 4-yearly review of superannuation default fund provisions

The AHA see's merit in the position that annual performance testing by the Australian Prudential Regulation Authority reduce the utility and relevance of the 4 yearly review provisions set out in section 156A of the FW Act.

Item 3: Clarify the application of Fair Work Act protections to temporary migrant workers

The AHA supports a clarifying amendment to the FW Act, confirming that temporary visa status does not alter the application of the FW Act. This position is already established and is the basis for advice given by the AHA to its members generally, and when being consulted upon in relation to a proposed industry or company specific labour agreement.

The AHA has no view on the preferable form for such an amendment, other than that it's effect must be limited to a clarifying purpose only, and not one of unintentionally expanding the FW Act's meaning of *employee* or *national system employee*.

Item 4: Provide stronger access to unpaid parental leave so families can share work and care responsibilities

The AHA is supportive of measures which enable flexibility for employees to attend to parental and care responsibilities, subject to these being implemented in fair manner which balances reasonable business requirements.

The AHA acknowledges that the expansion of flexible leave days from 30 – 100 may render the existing notice period of 30 as no longer appropriate. Notwithstanding, the AHA maintains that the relevant notice period needs to allow a time frame for an employer to make appropriate arrangements to cover a particular shift that an employee has elected to take as flexible leave.

As a matter of practical necessity, this would need to be at least a period that an employer requires under a relevant industrial instrument to direct a unilateral roster variation to cover the shift. Noting that under the *Hospitality Industry (General) Award 2020* this period is 7 days (see clause 15.6 (a)), the AHA submits a period of 10 – 14 days as being an appropriate minimum, should the existing period be reduced.

In relation to the expansion of flexible days that can be taken more generally, it is the AHA's position that consideration must be given to the unique needs of small and medium sized business, which may face difficulties in accommodating flexible leave taken on days given at the direction of the employee alone.

A particular scenario where this may arise, that is anecdotally not uncommon in hotels, occurs where both parents accessing leave are working for the same employer. More broadly, impacts on other employees working arrangements and/or inabilities to find temporary or replacement staff are also key concerns.

For this reason, where more than 30 flexible days are taken by an employee working in a small or medium sized business, the AHA considers merit in the position that such days should be subject to an employer refusal, should the employer have reasonable business grounds (as set out in section 65 (5A) of the FW Act in relation to flexible work requests) to do so.

Item 5: Clarify that when a workplace determination comes into effect, the enterprise agreement will no longer operate

On the information available, the AHA does not consider there to be unintended consequences that could arise in the implementation of this measure.

Item 6: Making pay deductions for authorised purposes an easier process for workers and businesses

The AHA submits that the existing requirement for deductions authorised by employee agreement pursuant to section 324 (1) (a) of the FW Act provide adequate and appropriate safeguards to employees. In particular, the need for an employee to agree to a specific amount for a deduction ensures that the employee is both aware of and has control over deductions as they occur, and will not be left in a position where they are bound to a higher threshold which may not reflect their current financial circumstances.

The AHA is not aware of any issue that has been taken by its members as to an administrative burden arising from variable deductions. As the proposed amendment requires an employer to issue notification of a change, the reduction of administrative burden is questionable in any event. Accordingly, the AHA does not see the need for, and accordingly does not support the proposed changes in relation to authorised deductions.

Item 7: Ensure that casual workers are treated no less favourably than permanent employees within the black coal mining industry

With reference to this proposed amendment only impacting the black coal mining industry, the AHA has no view on the proposed changes.

Thank you for the opportunity to have made this submission.

Yours faithfully,

STEPHEN FERGUSON
NATIONAL CEO