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6 April 2023

Martin Hehir
Deputy Secretary, Workplace Relations
Department of Employment and Workplace Relations

Sent via email to WRSubmissions@dewr.gov.au

Dear Mr Hehir,

Re: Consultation in relation to the Government's workplace relations reforms

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 to the Department of Employment and Workplace Relations, in relation to various proposed amendments to the *Fair Work Act 2009* (Cth) ('FW Act').

With reference to the issues and questions posed in your correspondence of 23 March 2023, the AHA provides the following feedback.

The AHA also confirms it is able to participate in a consultation meeting with the Department in relation to the measures detailed below.

Item 1: Stand up for casual workers

AHA holds concerns that amending the statutory definition of casual employee to allow consideration of post-contractual conduct will not achieve the Government commitment to provide a clearer pathway to permanent work.

The AHA contends that the consideration of post-contractual conduct would be better considered as a key criterion for casual conversion, a process that already exists in the FW Act, and not as part of the definition of casual employee.

Existing Casual Conversion framework

Currently, section 66B of the FW Act requires the employer to offer casual conversion if the following can be satisfied:

(1) Subject to section 66C, an employer must make an offer to a casual employee under this section if:
   a. The employee has been employed by the employer for a period of 12 months beginning the day the employment started; and
   b. During at least the last 6 months of that period, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or part-time employee (as the case may be).

Section 66C outlines the reasonable grounds for an employer deciding not to make an offer for casual conversion. This includes:

- whether the employee's position will cease to exist within the next 12 months, or
- there is likely to be a significant reduction in the hours of work the employee is required to perform within that period.

These exceptions are all future-focused, based on reasonable grounds that are either known at the time of the offer, or that are likely to arise in the period of 12 months after the time of deciding not to make the offer.

Amending Casual Conversion framework

AHA submits that inserting the requirement to consider post-contractual conduct between parties into the already established legislative criteria for casual conversion will better achieve the goal of establishing a clearer pathway to permanent work.

AHA recommends amending sections 66B(1) and 66C(2) of the FW Act.

With respect to section 66B(1), this would be beneficial for a casual employee who has been employed for multiple years with their employer, however due to personal circumstances, has not had a regular pattern of hours for the previous six month period for the purposes of section 66B(1)(b). Under the current criteria, this may prevent an offer of conversion. However, by introducing the consideration of post contractual conduct, the entirety of casual service for that employee could also be considered.

Further, by introducing the consideration of post-contractual conduct into section 66C(2) of the FW Act, and requiring that the consideration of future conduct occur within the context of past performance, a more equally weighted determination can be made as to whether or not an offer of conversion is made by the employer.

The AHA refers to the flexible part-time provisions of the *Hospitality Industry (General) Award 2020* ('the HIGA') that support this exact scenario. Where an offer of conversion to permanent employment is made by the employer, the casual employee could accept the offer of permanent part-time employment but retain the flexibility to set their guaranteed hours and availability, ensuring flexibility for both employers and employees alike.

Further Feedback to DEWR proposal to amend definition

As this stage, the consultation material does not set out how the proposed change to the definition and consideration of post-contractual conduct is intended to be used by either party after the time of initial engagement.

The consultation material does not set out the avenues of redress available to employees if they form the view that they have been incorrectly classified as a casual, or an employer's ability to challenge such a claim.

Where the framework is intended to ensure certainty and fairness for both employees and employers, at this stage, AHA is concerned that the amendments to the current definition could result in significant unintended consequences, if not appropriately scoped and defined.

It would appear to be more efficient to emphasise the importance of casual conversion for any employee seeking employment security, which will also go a long way in avoiding the potential for a 'double dipping' scenario, acknowledging that an application to the courts for an exercise of the statutory offset mechanism may be a time intensive and costly exercise for small and medium sized employers in particular.

The AHA submits that the exclusion provided in the current section 15A(4) of the FW Act should be retained. The question of whether a person is a casual employee is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.

Retaining the existing definition of casual employee provided by section 15A of the FW Act provides the requisite level of certainty about employment arrangements, including the rights and obligations of both parties, without any prejudice to the pathway to permanent employment.

To that end, the AHA is also supportive of a new dispute resolution pathway for casual conversion decisions. A stand-alone appeal right to the Fair Work Commission may be more 'user-friendly' than the existing ability to bring about a dispute related to casual conversion, where there is a dispute resolution procedure set out in a relevant contract, enterprise agreement or applicable modern award.

Where any dispute regarding this item arises, the AHA seeks for the amendments to remove any risk of 'double dipping'. A clear offset mechanism, with reference to section 545A of the FW Act, must be given with any amendments proposed by this item.

Item 3 – Compliance and enforcement: criminalising wage theft

The AHA strongly supports the consideration that criminal penalties should not apply to employers who make an honest mistake and take steps to fix it.

For the avoidance of doubt, the AHA would seek for this carve out for honest and inadvertent mistakes from employers who take steps to positively engage with the Fair Work Ombudsman to fix any issues, and who ensure workers are repaid in a timely manner, to be inserted into any subsequent legislative amendment.

Conduct that falls short of deliberate underpayment should not be subject to a wage underpayment offence. The AHA believes criminal penalties should be reserved for employers who dishonestly engage in a systematic pattern of knowingly underpaying one or more employees and who do not engage with the Fair Work Ombudsman to resolve issues once identified.

Item 4: Extend the Powers of the Fair Work Commission to include 'Employee-Like' forms of work.

The detailed consultation paper to be circulated may provide clarification on this point. However, the AHA's initial concern for this Item is **who** will be considered the 'Employer' for 'Employee-Like' forms of work.

The AHA broadly supports all workers receiving the same rights and protections afforded by the FW Act. However, with those rights comes consequential obligations for Employers. Where a business had engaged an independent contractor, they only have so much say in how work is performed, who performs the work and who holds ultimate financial responsibility and risk in relation to that work. Where a business has limited capacity to influence on a particular right or industrial process for an independent contractor, caution should be exercised in treating that business as the 'Employer' for the 'Employee-like' worker.

Item 7 – Provide stronger protections against discrimination, adverse action and harassment

The AHA does not consider that reforms are necessary to the existing anti-discrimination and adverse action framework in the FW Act.

The FW Act already provides for the prohibition on adverse action for a discriminatory reason and an express prohibition against workplace sexual harassment. It is not clear why there would need to be stronger protections than an absolute prohibition.

As has been detailed in the issues paper, there is already a range of other legislation that speaks to anti-discrimination laws at the Commonwealth level, in addition to the legislation applicable in each State and Territory. Caution should be exercised before disturbing the existing provisions.

Item 8 – A single national framework for labour hire regulation

The AHA sees merit in a harmonised national framework for labour hire regulation.

However, the AHA is concerned with the prospective obligations for labour hire providers (LHP) and hosts. Host employers should not face enforcement action for matters they have no control over (i.e. if the LHP has failed to make superannuation contributions for its labour hire workers, any enforcement action should be taken in relation to the LHP only; not the host). For the avoidance of doubt, where enforcement or compliance action is necessary, this should apply only with the LHP.

Item 10 – Reforms to strengthen enterprise bargaining and close loopholes

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

The Fair Work Commission is likely better placed than the Minister to issue model terms, given that they see the operation of these terms as part of their standard business.

The AHA sees benefit in standard consultation procedures being followed with key stakeholders in the FWC exercising this function (i.e. circulating draft model terms for feedback prior to publication).

Thank you for the opportunity to have made this submission.

STEPHEN FERGUSON
NATIONAL CEO