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12 May 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'), following the Department's release of the four additional consultation papers.

Further to the submissions the AHA previously provided to the Department on the proposed measures, dated 6 April 2023, the AHA wishes to provide the following additional feedback.

Same Job, Same Pay – Consultation Paper 1

1. The AHA is concerned that these current proposed amendments may have significant unintended consequences for the legitimate use of labour hire services, such as safeguarding industries against staffing shortages and to address genuine work surges and short-term needs. These consequences are compounded for small businesses who rely on the use of labour hire as a staffing solution to shortages, allowing them to continue to conduct their business.

2. The AHA does not agree with the suggested comparator of a directly engaged employee who is performing the 'same job', for the purposes of calculating the 'same pay'. This fails to consider pay diversity in the workplace and may unfairly disadvantage directly engaged employees by comparison.

Calculating the 'Same Pay'

3. Calculating 'same pay' with reference to 'full rate of pay' within the meaning provided in section 18 of the FW Act is not appropriate and should not be adopted as part of the Government's policy.

4. The AHA contends that it would be more appropriate, albeit less aliterate, to refer to '**usual pay'**; not 'same pay'. Usual pay should be determined by the applicable industrial instrument with coverage of the workplace and that is closest to the position considered the 'same job' (i.e. the relevant Modern Award).

5. Usual pay should only take into consideration quantifiable time-based payments (i.e. overtime and penalty rates).[1]

6. Attraction and retention schemes, incentive-based payments and bonuses, merit-based progression arrangements within a classification structure and the payment of certain allowances (i.e. higher rates of pay for employees with an AQF level qualification) are all beneficial renumeration options for directly engaged employees to negotiate with their employer and should not be used as a comparator for labour hire workers.

7. The AHA offers the example of the skill and staffing shortages many hospitality venues continue to experience with respect to trade qualified chefs. Many businesses are having to pay well above Award/Agreement rates to attract and retain the calibre of chefs needed to operate their venues and to remain commercially viable. This is a reciprocal relationship with employees who also investing in the success of the business.

8. The annual salary under the *Hospitality Industry (General) Award 2020* for the highest wage level assigned to a Cook (tradesperson) Grade 5 is **$53,383.20**. In 2022, the National average salary for the same role was **$66,321** plus additional superannuation contributions above the statutory minimum and non-financial compensation and other additional allowances.

9. To look to the role of an Executive Chef, the 2022 National average salary was **$107,104**; an increase from **$101,585** in 2019. Majority also had a bonus scheme built into their renumeration package, receive additional superannuation contributions, private health insurance and additional non-financial compensation and other allowances.

10. In the hypothetical scenario that an Executive Chef is injured at work and is in receipt of workers' compensation payments, the employer may need to bring in a labour hire worker as replacement for the limited period of time the Executive Chef is absent. Requiring that labour hire worker to be renumerated at $107,104 p.a. is exorbitant and would make the utilisation of labour hire untenable. Forcing a host employer to provide to a labour hire provider commercial in confidence material for the purposes of establishing the renumeration package provided to their directly engaged employee is also not appropriate.

11. Although these proposed amendments focus on the 'same pay', various mention to the 'same terms and conditions' are made throughout the paper. It would be entirely unreasonable for the host employer to have to provide to the labour hire worker, by way of the labour hire provider, the same terms and conditions they provide to their directly engaged Executive Chef, including factors like additional superannuation contributions above the statutory minimum, private health insurance etc.

12. Further, not all directly engaged employees receive the same pay for performing the same duties as another directly engaged employee, for entirely legitimate reasons. This includes seniority, qualifications and experience, tenure, recognition of contributions/work output or due to initial contract negotiations. It is unfair by comparison to have a labour hire worker receiving the same

[1] If the labour hire provider and its employees have bargained for an enterprise agreement, the terms and conditions of that agreement should continue to apply to the labour hire worker, irrespective of who their host employer may be.

pay as the highest paid directly engaged employee, with other directly engaged employees being paid less, irrespective of the same work being performed.

13. The AHA submits that reference to the applicable industrial instrument; preferably the Modern Award, is the most industrially sound and consistent approach to ensuring labour hire workers receive the minimum safety net of a fair renumeration that is enforceable under the FW Act. This ensures consistency and regularity in the pay of the labour hire worker.[2]

Implementing Same Job, Same Pay entitlements and obligations

14. The AHA supports a positive obligation on the part of labour hire providers to take reasonable steps to ensure the direct entitlement is paid to the labour hire worker. However, AHA submits that host employers must be exempt from any such obligation.

15. Except in the case of a host employer who makes use of a labour supply provider who is a related entity within the same corporate group of companies (i.e. in-house labour hire provider), the vast majority of host employers do not have a direct contractual or employment relationship with a labour hire worker. These host employers therefore have a very limited ability to have any influence or oversight of the employment relationship between the labour hire worker and the labour hire provider. The host employers are not in the position to meet any positive obligation to ensure a direct entitlement is paid to the labour hire worker, given they are not responsible for payment to the labour hire worker.

16. The compliance risk must be owned by the labour hire providers, and never the host employer.

Dispute Resolution

17. The AHA agrees that, if the relevant Modern Award is used to establish the 'same pay', that the Fair Work Commission's existing powers to deal with disputes in accordance with the expressed authorisation to do so would be sufficient to deal with a Same Job, Same Pay dispute. The same parameters should apply as existing dispute resolution provisions (i.e. the parties must first try to resolve the dispute at the workplace level, before a dispute is referred to the Fair Work Commission for an agreed process to be followed in dealing with the dispute, including mediation, conciliation and consent arbitration).

Enforcement

18. Allowing the Fair Work Ombudsman to retain their role in educating industry and providing advice to affected parties about Same Job, Same Pay obligations and entitlements is a sound strategy with respect to these proposed measures.

19. Enforcement action should only apply to the compliance obligations of labour hire providers, and not the host employer.

[2] As opposed to the uncertainty and irregularity posed by a labour hire employee whose terms and conditions of employment are set by different instruments each time they move from host employer to host employer, each with their own applying enterprise agreement, or who is Award reliant. There is no certainty or regularity in such an arrangement. There is certainty, regularity and security, if the labour hire worker is always guaranteed the minimum safety of fair renumeration as governed by the relevant Modern Award.

Criminalising Wage Theft - Consultation Paper 2

Wage underpayment offence

20. The AHA submits that it is only knowledge-based wage underpayment offences ('wage theft') that should be subject to a criminal offence for wage underpayment. This is option 1 detailed within the consultation paper.

21. Option 1 reserves a potential criminal offence for the most serious and egregious instances of wage underpayment, where an employer dishonestly engages in a systematic pattern of knowingly, deliberately and wilfully underpaying one or more employees, and who do not engage with the Fair Work Ombudsman to resolve issues once identified.

22. This position is supported by recommendations 5 and 6 of the Report of the Migrant Workers' Taskforce (below). The position aligns with the comments made by Assistant Treasurer Stephen Jones in relation to 'pay day superannuation', that the failure to pay superannuation is a form of wage theft, of stealing money from employees, must be treated as seriously as any other form of theft.

    Recommendation 5

    It is recommended that the general level of penalties for breaches of wage exploitation related provisions in the Fair Work Act 2009 be increased to be more in line with those appliable in other business laws, especially consumer laws.

    Recommendation 6

    It is recommended that for the most serious forms of exploitative conduct, such as where that conduct is clear, deliberate and systemic, criminal sanctions be introduced in the most appropriate legislative vehicle. .

23. The AHA submits a definition of a knowledge-based wage underpayment, or to use the term 'wage theft', must reflect ***deliberate, intentional behaviour*** from employers who ***knowingly and wilfully*** withhold pay or entitlements to one or more employees. Doing so is consistent with existing wage theft provisions in State legislation,

    a. Section 391 of the Queensland Criminal Code[3], in the definition of stealing, includes ***deliberate, intentional behaviour*** leading to under or non-payment of entitlements as a criminal offence. Underpayments brought on by an honest mistake or delay cannot attract criminal penalties under Queensland's system.

    b. Victoria's wage theft laws[4] establish criminal liability for employers who ***deliberately and dishonestly*** underpay or withhold entitlements to employees, and explicitly carves out honest mistakes made by employers who exercise due diligence in paying wages and entitlements from exposure to a potential criminal charge.

24. For the removal of doubt, the AHA strongly opposes recklessness-based wage underpayments being subject to a criminal offence. Honest and inadvertent mistakes from employers who take

[3] *Criminal Code Act 1899* (Qld).
[4] *Wage Theft Act 2020* (Vic).

steps to positively engage with the Fair Work Ombudsman, and who ensure workers are repaid in a timely manner, must not be subject to any potential criminal penalties.

Election to charge multiple offences as a course of conduct

25. The AHA considers it appropriate to charge multiple offences of the same kind as a course of conduct rule.

Liability

26. The general requirement of *mens rea* should also apply as an essential component of any criminal wage underpayment offence. Criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences their actions may have, where they have chosen the course of behaviour and consequences.

27. It is uncontroversial to say that any person knowingly exposes themselves to potential criminal liability for a knowledge-based wage underpayment offence when they knowingly take an action to deliberately withhold pay and entitlements to an employee, and who does not believe honestly and on reasonable grounds that the circumstances of performing that act are such to make that act innocent.

Criminalising record-keeping misconduct

28. The AHA submits that criminal offences for record-keeping misconduct should only be introduced to complement a criminal offence for knowledge-based wage underpayment. Evidence must exist that shows an employer has ***falsified an employee record*** with a view to dishonestly obtain a financial advantage, or to prevent the exposure of a financial advantage obtained by the employer. This aligns with section 7 of Victoria's *Wage Theft Act 2020*.

29. It is agreed that both types of non-compliance detailed in the consultation paper must be present in order to pursue the criminal offence, where the person is also charged with a criminal offence for knowledge-based wage underpayment.

30. A criminal offence for record-keeping misconduct should only be brought forward in conjunction with a criminal offence for knowledge-based wage underpayment (i.e. it should not be treated as a standalone criminal offence).

Reforming the defence to sham contracting

31. The AHA considers that the existing defence provided in section 357(2) of the FW Act (*where the employer did not know and was not reckless as to whether the contract was a contract of employment rather than a contract for services*) is sufficient. A 'reasonable belief' is often no more ambiguous than what the test of 'recklessness' may be at present. It is noted that no evidence or factual detail has been set out as to why the proposed amendment (a reasonable belief) will be more effective at deterring sham contracting than the existing s. 357(2). For that reason, the AHA considers no change is necessary and that s. 357(2) should remain as it is currently drafted in the Act.

'Employee-Like forms of work and protections for independent contractors - Consultation Paper 3

32. Following review of this consultation paper, the AHA is concerned that the introduction of '*employee-like'* forms of work into the Act would essentially be creating a third category of engagement, in addition to the existing *employee* (contract of service) and an *independent contractor* (contract for service).

33. Respectfully, we believe this proposal is entirely unnecessary and would not be required in order to "*close the key loophole*" that is "*the significant difference between the rights and protections afforded to employees compared to workers who perform work as independent contractors*."

34. AHA is concerned that the introduction of a third category of engagement is likely only to give rise to further confusion for employers who may already struggle with the differences between 'employee' and 'independent contractor'. The proposal will complicate the variety of multi-factor tests already in place to determine a contracting engagement. 'Muddying the waters' with a third unknown category of engagement simply will not afford the high degree of certainty to all parties that is a guiding principle for this consultation paper.

35. AHA is of the view that the two existing categories of '*employee*' and '*independent contractor*' should be retained, and for there not to be a third category of 'employee-like' forms of work introduced into legislation. How a worker is engaged (i.e. through a digital platform) does not preclude them from proper characterisation as independent contractors or as employees.

36. As the Consultation Paper has identified, if the Department holds concerns about a worker's status being defined by the terms of their contract, rather than the outcome of a process of reviewing the whole of the conduct of the parties once the contract has been established, it seems counterintuitive to suggest a third 'status' of worker to be introduced into the Act on the basis of how they are engaged initially to perform work; specifically whether that is through a digital platform.

37. It is acknowledged that, due to emerging forms of work and contemporary business practices, that modern working arrangements must be capable of evolving. The definitions of 'employee' and 'independent contractor' must be capable of evolving. We submit that this can occur without the introduction of a third 'employee-like' form of work.

38. If the goal of this proposal is to ensure independent contractors receive a safety net of minimum conditions that apply to employees, albeit with some limited exceptions[5], strengthening the existing provisions regarding independent contractors should be the option preferred over the introduction of an 'employee-like' status.

Stronger protections against discrimination, adverse action and harassment - Consultation Paper 4

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

40. No contemporaneous issues in need of addressing have been detailed in this paper, so it is unclear what the problem/s are that the Department is seeking solutions to by way of this consultation process. This makes it very difficult to provide meaningful feedback, except to say that the AHA

[5] Page 6 of the Consultation Paper.

feels strongly that the existing anti-discrimination framework established in Commonwealth and State/Territory laws should not be disturbed without valid justification, supported by logically probative evidence, and in light of real demonstrative gaps in the law.

41. We do not believe this to be the case currently and consequently, believe none of the proposed options for reform should be progressed. It is suggested that any attempt to 'fix' issues in discrimination law is best achieved by amending those pieces of legislation and not by way of amending the FW Act

Indirect discrimination

42. Section 351 of the FW Act already provides for the prohibition against adverse action for a discriminatory reason, and it is well-established that this would include both direct and indirect discriminatory conduct.

43. Given this, the AHA is not opposed to an additional Note being inserted into section 351 to clarify that 'discrimination' is intended to include both direct and indirect discrimination.

Defining 'disability'

44. The AHA supports the *Disability Discrimination Act 1992* (Cth) remaining the authority on all matters of discrimination on the basis of disablement or impairment, assisted by the established case law where required.

45. The FW Act does not require a definition of 'disability' to be inserted into the Act, noting the DDA provides for a definition, the FW Act refers to the DDA in section 351(3), and the case law is well established with respect to discrimination protections under the FW Act.

46. The FW Act does not provide for a definition of any of the 15 other protected attributes so there is no demonstrated requirement[6] or pressing need for the FW Act to insert a definition of disability now, when that would be a deviation from the rest of the discrimination provisions that are not explicitly defined.

Inherent requirements exemption

47. Similarly, the AHA opposes the amendment of the inherent requirements exemption in the FW Act.

48. The Commonwealth and state/territory legislation generally overlap and prohibit the same type of discrimination. However the laws apply in different ways and have different obligations employers must comply with. An exemption or exception under one Act does not mean employers are exempt under another Act, where regard must be had to each individual matter on a case-by-case basis, and the statutory provisions underpinning each respective claim.

[6] It is noted that page 6 of the Consultation Paper mentions criticism around the lack of definition in the FW Act however no practical or 'real-life' data is provided to evidence this criticism. The experience of advocates involved in discrimination claims involving disability or impairment in both State and National systems, before the FWC, Human Rights Commissions and before the courts have not identified the lack of a definition provided in the FW Act to be an issue in practice, acknowledging well-established case law acting as authority in all instances.

49. The AHA is of the view that existing provisions set out in the FW Act should not be disturbed, and that there is no need to amend the existing exemption, noting the areas of discrimination covered by the FW Act are discrimination, via adverse action, in employment. In the event that a claimant were to bring forward an application under the DDA, it is then that the provisions of the DDA will apply.

50. There is no comparison to be made with workers compensation laws for businesses with respect to workplace rehabilitation and reasonable adjustments. Workers' compensation legislation provides a separate and distinct statutory scheme applying only to the insurance scheme, often with strict restrictions on the use of any documents or information for employment purposes.[7]

51. Conflating one legislative scheme with another is likely to lead only to confusion, and disparate approaches to such matters. Caution should be exercised before disturbing the existing provisions.

Attribute Extensions

52. The AHA does not support attribute extension provisions being included in the FW Act, for the same reasons detailed above. Existing Commonwealth legislation contains attribute extension provisions; there has been no information advanced to say why it would be necessary to extend those into the FW Act. Again, section 351 of the FW Act is sufficient in its prohibition against adverse action for a discriminatory reason in the employment context. Those provisions should not be disturbed.

Vicarious Liability

53. In order to establish vicarious liability, the existing Commonwealth legislation must also consider the burden and onus of proof, valid exemptions and exceptions and how a defence is specified for reasonable preventative action. It is noted that the four Commonwealth Acts are not entirely consistent on the elements of vicarious liability or even on their approach to defining a relationship giving rise to vicarious liability.

54. Where the tests for vicarious liability differ between the Acts, with different tests to establish liability and different defences applying, the AHA considers that it would only serve to further complicate matters if broad vicarious liability is entered into the FW Act.

55. We remain of the view that the statutory scheme applying to an individual claim made is where vicarious liability, if any, would be determined (i.e. if a claim was brought under the ADA, then the provisions of the ADA would apply to deciding that claim, including the specific test for vicarious liability to apply). This is consistent across all jurisdictions, including under the FW Act if a claim is brought forward under the new sexual harassment jurisdiction.

The 'not unlawful' exemption

56. This issue goes directly to the broader concern of applicants pursuing claims under the incorrect jurisdiction and/or legislation, and needing to abandon said claim, in favour of pursuing a fresh claim under the more appropriate jurisdiction. That was the case in the *McIntyre v Special Broadcasting Services Corporation* decision cited in the Consultation paper, whereby McIntyre had

[7] Referring to section 572A of the *Workers Compensation and Rehabilitation Act 2003* (Qld) as an example.

abandoned an earlier general protections application after it was found it could not be pursued under the applicable state anti-discrimination law.

57. Applicant error in selecting the most appropriate jurisdiction for their claim is not unusual and certainly should not form the basis of any subsequent legislative amendments, particularly not to the Commonwealth legislation, where an Applicant felt let down by the State jurisdiction where they first commenced their action. Had this been an amendment proposed to the NSW discrimination legislation to include 'political opinion', that would be one matter however it is not correct to say that employees in NSW do not have access to the general protections in relation to discrimination because of this attribute. It is more accurate to say that employees in NSW would need to be more selective in the jurisdiction they choose to commence legal action in. If the State jurisdiction would not allow for the remedy sought by an Applicant, the Applicant should turn their attention to the more appropriate jurisdiction for said claim. In that matter, McIntyre was not jurisdictionally barred from making an unlawful termination application under s. 774 of the FW Act.

58. The application of the 'not unlawful' exemption is not in need of clarification under the FW Act.

59. The unlawful termination provisions in the FW Act dealing with discrimination should not be repealed.

Multi-Attribute Discrimination

60. Although it is noted that the FW Act does not currently preclude a complainant from raising a single complaint which alleges discrimination on the basis of one or more protected attribute, the AHA does not oppose this amendment, for the removal of doubt and to streamline processes.

61. It is suggested that any practical issues with respect to multi-attribute discrimination complaints would be better addressed by making amendments to the Forms published by the Fair Work Commission.

Options for Reform – Adverse Action

62. It appears to be the Department's proposal to deviate from a fact-dependent assessment of the case when deciding disputes alleging adverse action due to participation in industrial activity, or membership of an industrial organisation.

63. The AHA strongly supports any tribunal, commission or court adopting a fact-dependent assessment when deciding any case before it, irrespective of the specifics of the claim. We cannot imagine that moving away from an objective assessment of the facts of the matter is in the interests of fairness of any party to a case, or to the integrity of the court or tribunal. Such an approach that deviated from a fact-dependent assessment would likely be subject to judicial review quite soon thereafter, rightfully so.

Thank you for the opportunity to have made this submission.

STEPHEN FERGUSON
AHA NATIONAL CEO