13 November 2022

Committee Secretary

Senate Education and Employment Committees

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Parliament House

Canberra ACT 2600

via email: eec.sen@aph.gov.au

Dear Secretary

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

The opportunity to comment on the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (the Bill) is valued and appreciated.

It is acknowledged that several measures in the Bill are uncontentious from a small and family business perspective and that amendments to the Bill have been made in the House. However, we urge the Senate to consider and address several specific issues directly impacting small and family businesses. This would assist to make the Bill more suitable for small and family businesses within the aim of the Bill to reinforce security of employment and increase employee pay in the context of a rules-based system.

Section 3 of the *Fair Work Act 2009* (the Act) sets out the objects of the Act *"…to provide a balanced framework for cooperative and productive workplace relations that promotes national prosperity and social inclusion"*, including subsection 3(g) *"…acknowledging the special circumstances of small and medium-sized businesses".* This submission focuses on how these 'special circumstances' can and should be recognised, reflected in the Bill to make measures more responsive to the needs of small businesses.

Our recommendations are framed to provide for the features of small businesses that relate to workplace regulation and include:

- Small businesses are more likely than not to involve an 'owner operator', working 'in' the business alongside staff where communication is person-to-person, open and immediate.
- Small businesses tend to employ staff known to the owner, another team member or by someone known by the owner, which can often be a family member or friend or family member of existing staff. This means the workplace generally operates based on collaboration with a high degree of 'give and take', rather than via complex hierarchy and formality.
- The closeness and familiarity amongst staff and proximity to the owner can amplify the impact when things go wrong, which can escalate to unworkability faster than in a larger organisation. This means that a timely, practical, and nuanced response is more critical than in a larger business.

- Small business owners/operators or their partner (life or business) are 'generalists' responsible for strategy, operations/customer service, book-keeping, HR, IT, compliance, and a range of other commercial matters. Specialisation and subject-matter expertise tends to follow scale, with sophisticated knowledge and capacity emerging when large enough to employ specialist staff or to 'buy-in' expert advice and know-how.
- Small businesses are experiencing margin pressure, according to the ATO Tax Stats for 2019-20, 45% of small businesses[1] are not making a profit and are eating into whatever personal reserves they have, to pay bills and service debts. The Australian Bureau of Statistics reported that 35% of small businesses[2] had lower cash on hand than usual in January 2022. This has since deteriorated, with the Reserve Bank noting that SMEs cash balances have been falling over 2022.
- There traditionally has, and still is, a low level of union membership in small and family businesses. These businesses and their employees are not seeking an increase in union activity and influence.
- Noting that even very large, and sophisticated employers have made errors implementing workplace laws and obligations. Small businesses aim to do the right thing but typically do not have a detailed understanding of current employment standards and key obligations nor are able to reference modern awards to answer a specific question.

Small businesses are not simply smaller versions of complex big businesses. This is recognised in many areas of public policy. An example is the creation of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) to provide dispute resolution (acknowledging power imbalances and resource/capacity limitations), policy advocacy and information services in support of small and family businesses with up to 100 employees (by FTE).

Through this lens, further consideration is needed to ensure the 'special circumstances' of small and family businesses are appropriately reflected in workplace relations reform, and other complex regulatory environments do not provide a barrier to productive Australian smaller workplaces.

The following recommendations are offered:

1. **Consideration should be given to delaying the passage of the Bill, or 'splitting' the Bill to separate out the multi-employer bargaining measures, to allow for adequate review by all stakeholders of the legislation and amendments.** The proposed multi-employer bargaining measures in the Bill are not formulated with consideration of smaller employers and their 'special circumstances'. These changes to the bargaining framework are a substantial shift from the existing provisions within the Act and require further assessment, particularly regarding the impost it creates for smaller employers and the likelihood of unintended consequences.

[1] *Australian Taxation Office, Taxation Statistics 2019-20, Table 6, Accessed 5 November 2022. Small businesses are defined as companies with turnover of less than $10 million.*
[2] *Australian Bureau of Statistics, 'Business Conditions and Sentiments', January 2022, Table 8, Accessed 13 November 2022. Small businesses are defined as businesses with less than 20 employees.*

2. **The existing definition of small business under the Act is insufficient for the proposed applications in the Bill and identifying exemptions to multi-employer bargaining.** It has been asserted on numerous occasions that small and family businesses are not the focus of multi-employer bargaining measures. It is necessary to increase the defined size of small business in the Act so it is calibrated to recognise those businesses that should be regarded as small and allow access to key exemptions as necessary.

   There are currently several alternate definitions used for small business across the Commonwealth that warrant consideration. The ABS, Safe Work Australia, ATO (Small Business Superannuation Clearing House) and the Reserve Bank (for liaison purposes) all use the definition of less than 20 employees. ASBFEO's legislation defines a small business as either any business with less than 100 employees (by FTE) or an annual turnover of less than $5 million.[3] The two parts of the ASBFEO definition are alternates so that, say, a business with an annual turnover of over $5 million but employees by FTE of less than 100 is considered a small business. The current Act definition of 15 employees by head count used to exempt some small businesses from specific multi-employer bargaining provisions, leaves too many small businesses exposed to the complexities contained in bargaining measures.

   To benefit all parties to obtain durable employment and a robust business, it is important that these laws are appropriately targeted. Firstly, the laws should be targeted to businesses with sufficient competence and capacity to meaningfully engage in the proposed multi-employer bargaining system. Secondly, they should be appropriately targeted to address applications to be included in pre-existing multi-employer enterprise agreements.

   Further, there is likely to be some utility in not only addressing the small business definition for 'exemptions', but also recognising a smaller employer definition for those small businesses bound by the 'multi-employer' provisions and supported by 'right sized' process provisions and accommodations.

3. **Smaller businesses, outside those exempt from 'multi-employer' provisions, need safeguards from being roped-in or joined to an enterprise agreement while never actually bargaining themselves.** The single interest bargaining stream risks smaller employers being included based on a low threshold for establishing *'clearly identifiable common interest'* perhaps based on industry, sector, customer base, geography, or shopping centre/commercial precinct. Across a 'common interest', small businesses will be operating different structures, business models, cost bases, market strengths, customer preferences, margins, and profitability. This diversity of circumstances and capacity to absorb additional costs under a proposed enterprise agreement means that small businesses are likely to end up in the conciliation and arbitration path. Smaller employers are less well equipped to engage in the section 240 mechanisms and those proposed in Part 18 'Bargaining disputes' of the Bill. The imposition of an agreement via the section 275 arbitration process on a small business that has not actually been involved in bargaining or has limited capacity to absorb the proposed terms and conditions should only occur after capacity has been established and productivity benefits have been proven. Before imposing a multi-employer agreement on a smaller employer, section 275 should be amended to require the Fair Work Commission (FWC)

[3] *Australian Small Business and Family Enterprise Ombudsman Act 2015 (Cwlth).*

to be satisfied that there is capacity to absorb the terms and conditions, and that there are operational efficiencies and demonstrable productivity benefits.

We note a smaller employer might not be engaged in any bargaining or agreement making process but can still be bound by the original multi-employer bargaining authorisation. The 'roping-in' provisions in proposed section 216DC allows a trade union with a 50%+1 vote across all workplace employees to simply apply to have smaller businesses joined to a pre-existing multi-employer enterprise agreement. This creates a seemingly anomalous situation where a smaller employer is joined to an enterprise agreement while never actually bargaining themselves. If these provisions are retained in the Bill, the modest tests for an application to 'rope-in' smaller workplaces should again be dependent on the FWC being satisfied that there is capacity to absorb the terms and conditions, and that there are operational efficiencies and demonstrable productivity benefits. A fairer way to manage smaller employer 'roping-in' would be to:

a. allow a smaller employer to defend being roped-in to a multi-employer enterprise agreement on the basis that they commence to bargain themselves for a single enterprise agreement

b. give a smaller business employer who is roped-in an opportunity to contest conditions in the multi-employer enterprise agreement through arbitration.

Addressing the concern about smaller businesses, outside those exempt from 'multi-employer provisions, needing safeguards against being roped-in or joined to an enterprise agreement while never actually bargaining themselves is reasonably straight forward. It could be simply addressed by varying section 275 so the FWC "…must ensure that any enterprise agreement increases the productivity, promotes flexible modern work practices, the efficient and productive performance of work and/or operational efficiency of the employer at least commensurate with the cost of wages or improvements to condition of employment".

4. **There is no small business carve out for either the supported bargaining authorisation process (proposed section 243) or the supported bargaining roping-in process (proposed section 216BA). If this is to be retained in the Bill, allowing individual smaller employers to initiate bargaining themselves or being heard in an arbitration should be included as set out in section 3 above.** While smaller employers in the funded sector may hope that any multi-employer agreement will be funded, a perennial challenge is whether funding will cover all costs and be on-going. Variations in scale are evident amongst employers in the funded sector, with a multitude of smaller operators amongst a limited number of very large operators. The economics of these varying scaled operators are materially different and warrant consideration via mechanisms that can address the special circumstance of smaller employer/operators.

5. **The small business exemption should extend to arbitration of flexible work requests.** The Bill overhauls the existing flexible work requests regime by strengthening employees' rights in making a request and in the process of considering such a request. As noted earlier, smaller businesses generally operate on the basis of collaboration with a high degree of 'give and take', rather than via complex hierarchy and formality. Drawing in the FWC to mediate, conciliate or make a recommendation may offer some useful solution-focussed discussion at the workplace, but the imposition of work arrangements represents a significant shift in the regulatory framework. Arbitration risks disrupting the person-to-person relationships in a small business and with the compulsion to change how the workplace is arranged away from what was put in place to meet operational demands. This imposition seeks to apply a process on small business designed for well-resourced and well represented larger employers.
6. **Small business should be excluded from the 'Fixed Term Contracts' and 'Pay Secrecy' offence provisions.** Small businesses infrequently use fixed term (extended period) contracts for employment purposes and are unlikely to be aware of the need to provide a Fixed Term Contract Information Statement. Exposing small businesses to the risk of prosecution for yet another administrative task is excessive and unnecessary. Similarly, close associations between the team in a small business means employees generally know what each is paid. Requiring small businesses to not use employment contracts with clauses that say pay is confidential under the threat of prosecution is another administrative task with a disproportionate penalty for error.
7. **The new 'false advertising' offence should specify that the 'reasonable excuse' defence includes a small business state of knowledge and intent**. This would ensure that an inadvertent error arising from a lack of knowledge was an acceptable defence on the basis that small business can only be exposed to an offence in knowingly committing it.
8. **Making the 'Fair Work' regime work better for small business.** The Bill misses opportunities to support small businesses or to introduce a reasonable tailored reform for small business. While it is recognised the Bill is aimed squarely at increasing employee's pay and reinforcing a particular understanding of rules-based job security, the opportunity has been missed to better support small businesses aligned to their competency and capacity. Instead, the Bill is designed to force the round small business block into the square hole of the Fair Work system.

The Committee may be interested in exploring the merits of:

- a small business code (the Code) that sets out minimum standards for employment based on an amalgamation of what is currently the Miscellaneous Award 2020 and the simplified version of the National Employment Standards
- the Code, and practice guide being made available at the time of a business being registered for employing people in a small business
- creating a FWC Small Business Division (or a Small Business Commissioner) to provide a simpler/streamlined jurisdiction, ensure 'right sized' processes and procedures, a support and educative posture to engagement and comprising people who have had direct small business experience and understanding
- creation of small business annexures or schedule to Modern Awards directed by legislation simplifying and reducing award content, administrative burdens, and the need for expert advice to interpret and implement

- implementing early triage/filtering of unfair dismissal and general protections (adverse action) application and active case management practices like the approach adopted for the anti-bullying jurisdiction.

Thank you for the opportunity to comment, if you would like to discuss the matter further, please contact Mr Cameron Dyson-Smith on 02 5114 6105 or *Cameron.Dyson-Smith@asbfeo.gov.au.*

Yours sincerely

The Hon. Bruce Billson
Australian Small Business and Family Enterprise Ombudsman