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Committee Secretary
Senate Education and Employment Committee
Department of the Senate
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Canberra ACT 2600

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Dear Secretary

WAHHA Submission regarding *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*

The Western Australian Hotels and Hospitality Association Incorporated (Union of Employers) (**WAHHA**) welcomes the opportunity to comment on the Senate Education and Employment Committee on the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Bill)*.

Introduction

WAHHA is the peak industrial employer body for accommodation, hotel and hospitality businesses in Western Australia. This body has a relationship with the Australian Hotels Association (WA Branch) which is a branch of the national Australian Hotels Association.

The businesses WAHHA represent range from accommodation hotels, eco-resorts, boutique hotels, and serviced apartments, through to family run pubs and taverns, small bars and restaurants.

Western Australia's hotels and hospitality businesses employ around 100,000 people who play a critical role in the state's economic success and are an essential component of the communities in which we live.

Executive Summary

Our submission is focussed on the proposed changes to the casual definition at 15A of the Bill and the proposed civil remedy provision regarding misrepresentation of casual employment as outlined at section 359A of the Bill.

We believe the amendments fundamentally change and negatively impact the way casual employment is used in the hospitality sector in Western Australia.

Casual employment is critical for the effective operation of most accommodation and hospitality businesses in WA. Fundamental changes to the definition will detrimentally impact both employers and importantly, those workers who seek out such employment arrangements.

The current definition of casual employee, as outlined in section 15A of the *Fair Work Act 2009* (Cth) (**Act**), operates well with sufficient safeguards for employees and should remain unchanged.

We respectfully recommend section 359A of the Bill be removed.

Western Australia – the unique situation

1. Casual employment is a critical component in Western Australia's seasonal hospitality industry. Employers heavily rely on the ability to engage casual employees. Similarly, many people rely on the ability to obtain gainful and flexible casual employment within the hospitality industry. This is particularly the case in WA, given the dominance of the resources and mining industry. In a very competitive labour market, mining companies have the ability and means to be able to poach, attract and incentivise candidates, far more, than the average pub, tavern or small bar. In response, employers in the hospitality sector rely on offering casual employees the higher casual rate in the *Hospitality Industry General Award 2020 (HIGA)*, as a means of remaining competitive with other industries.
2. The importance of casual employees cannot be overstated, as it allows hospitality operators to flexibly scale their operations to meet the fluctuating demands of tourists throughout the year.
3. Western Australia is home to several distinct tourism regions that are highly susceptible to seasonal fluctuations.¹ Hotels and hospitality businesses in these regions require additional staff during the peak periods to meet increased demand. This includes positions such as front of house staff, cleaners, kitchenhands, service staff, chefs and maintenance personnel. When tourist arrivals surge, casual workers provide essential support in hotels, restaurants and other hospitality businesses.
4. Conversely, in the low season, casual employees assist our members to scale down their operations. This adaptability and flexibility are key to sustaining the tourism industry's vitality and ensures Western Australia remains a premier destination for travellers year-round.
5. For example, during the peak periods of WA's North West and South West regions, many thousands of casual employees temporarily relocate to Broome or Margaret River to answer the demand for labour. Those who take the opportunities offered by seasonal work in these regional areas need to be able to afford temporary accommodation and other living expenses, and therefore require some form of commitment to "*continuing and indefinite work*" for the period of the season.
6. Importantly, many local community members also take advantage of job opportunities in the peak season to gain additional income. These same workers deliberately seek out such work to benefit from the high number of hours and additional loading that accompanies casual employment. Further, the increase in business activity within the accommodation and hospitality sector during the seasonal peak delivers benefits to a variety of other associated sectors including local suppliers and service providers. In short, the ability for the hotel and hospitality sector to scale up benefits the broader economy.
7. The proposed changes to the casual definition will change and negatively impact the way legitimate casual employment is used in the hospitality sector in Western Australia.

¹ The seasonality is characterised by the north of the State being busy during the May and September season and the South West in the October to April seasons.

Definition of casual employment

Current framework

8. Section 15A of the Act states an employee's employment status is determined based on the offer and acceptance of casual employment, and that the employer makes '*no firm advance commitment to continuing and indefinite work*'.²
9. In determining the nature of casual employment, the legislation expressly recognises it is the intention of the parties at the time the relationship is entered into. The subsequent conduct of the parties to the contract is not relevant in assessing whether an employee is indeed a casual employee.³
10. Importantly, existing casual conversion entitlements provide a critical safeguard for employees. If the nature of the initial employment arrangement was to subsequently change (for example, by way of conduct) there is legal recourse to vary or change an employee from casual to permanent.
11. We submit the current framework provides both the employer and employee with certainty and clarity and wholly resolves the ambiguous and problematic issue with defining casual employment. This is further balanced by the entitlement to casual conversion.

Proposed framework

12. The proposed definition under the Bill sees a fundamental shift from the current framework under the Act and is a significant departure from the High Court case of *WorkPac Pty Ltd v Rossato (Rossato)*.⁴ Rather than focussing on the contract of employment, the proposed definition shifts the focus to the conduct of the parties.
13. The proposed definition refocuses the assessment of '*the firm advance commitment to continuing and indefinite work*' through the lens of "*the basis of the real substance, practical reality and true nature of the employment relationship*".⁵
14. The proposed section 15A(2) of the Bill provides a complex test for assessing what a casual is not, rather than providing a positive definition for what a casual is. In other words, employers are required to make an assessment on a negative through positive indicia.

Concerns with the proposed definition – legal considerations

15. We submit, the proposed definition removes the fairness and objectiveness of the existing legal framework and instead proposes a new test which is unclear, problematic and subjective to the person(s) or institutions assessing the relationship. The ambiguity associated with the new framework could inevitably lead to increased tension, conflict and disharmony in the workplace, along with a substantial increase in complex regulatory compliance for employers.

² *Fair Work Act 2009* (Cth), section 15A(1)(a).

³ *Fair Work Act 2009* (Cth), section 15A(4).

⁴ *WorkPac Pty Ltd v Rossato* [2021] HCA 23.

⁵ Proposed 15A(2)(a). Test is taken from the approach in *Workpac Pty Ltd v Skene* [2018] FCAFC 13 at [180].

16. The proposed definition is a fundamental departure from the existing definition of casual employee and creates the following legal issues:

Primacy of the employment contract:

- 16.1. The current legal framework draws on the long held legal precedent of the primacy of contract and the ability for parties to expressly agree to enter into such an arrangement. As outlined by the High Court of Australia in *Rossato* there is nothing precluding the ability for an employer and employee to enter a contract of employment on a casual basis.⁶
- 16.2. We have serious concerns regarding 15A(2)(b) of the Bill, as it appears to deem the issuing of an employment contract as a commitment to continuing and indefinite work.
- 16.3. This means if an employer issues a contract of employment to a casual employee, the employer would be in breach of the general rule proposed in 15A(1) of the Bill. As a means of mitigating this risk, we expect those employers still willing to engage casual workers will likely not offer employment contracts.
- 16.4. Employment contracts are critical to any employment relationship regardless of whether they are casual or permanent. The absence of an employment contract may have significant and far-reaching consequences. It would create legal insecurity, an increase in employment related disputes and inherent distrust between employers and employees.
- 16.5. Furthermore, employers apprehensive of issuing 'anything' to an employee for fear of creating a commitment, may inadvertently leave the employer in breach of:
- 16.5.1. the *Fair Work Regulations 2009* (Cth) (**Regulations**);⁷ and
- 16.5.2. the HIGA.⁸
- 16.6. Finally, we turn to the to the exemption at 15A(4) of the Bill. The exemption allows for casual employees to be engaged on a fixed term contract on the basis the period is identified by "reference to a specified season", however the Note at 15A(4) of the Bill clarifies:
- ... an employee on a fixed term contract for a specified season or an employee engaged on a shift by shift basis may be a casual employee if the requirements of subsections (1) to (4) are otherwise satisfied.*
- (underline added).

⁶ *WorkPac Pty Ltd v Rossato* [2021] HCA 23, [58].

⁷ Regulation 3.32 outlines the required content records employers are required to make and keep. Practically, these are recorded on an employee's employment contract at the time of commencement of employment. Regulation 3.34 deals with the manner employers are required to keep records of overtime.

⁸ Clause 8.2 of the HIGA provides the following "At the time of engaging an employee, the employer must inform the employee of the terms of their engagement, including whether they are engaged on a full time, part time or casual basis."

- 16.7. Therefore, while an employer can engage a casual employee on a fixed term contract, the casual employee and their engagement is still subject to the requirements of 15A (1) to (4).
- 16.8. We submit this exemption would have limited applicability because it still does not exempt an employer from the general rule at 15A or the indicia at 15A(2). Further, it does not protect an employer from the 'misrepresentation' and penalty provisions. Therefore, this exemption does not provide a practical solution for employers in the WA regions who have the fluctuating demands of working in seasonal areas.

Preclusion of 'long term casuals' from legislative entitlements:

- 16.9. The Explanatory Memorandum of the Bill provides:

A firm advance commitment could be identified, for instance, on the basis of ongoing work performed on a regular, systematic, stable or predictable basis performed over a sufficient length of time.

(underline added).

- 16.10. The proposed definition, and the reasoning provided in the Explanatory Memorandum above, prohibits an employer from rostering employees in a regular and systematic manner without risking significant penalties for misrepresentation and other related claims.
- 16.11. This means, casual employees, will either no longer be employed in a long-term manner, or their rosters will be so disrupted they would no longer be eligible to receive a number of statutory entitlements under the Act, which require a casual to be 'regular and systematic' including:
- 16.11.1. requests for flexible working arrangements;
 - 16.11.2. unpaid parental leave;
 - 16.11.3. casual conversion at 12 months; and
 - 16.11.4. long service leave under the relevant State legislation.
- 16.12. In addition, the access to Family and Domestic Violence Leave (**FDVL**) would be significantly hindered, as payment for FDVL is at a casual employee's full rate of pay, calculated as if the employee had worked the hours in the period for which the employee was rostered. Where an employer cannot roster a casual employee – there are no rostered hours for the purposes of FDVL.

Concerns with the proposed definition – practical considerations

17. If the proposed definition remains in its current form, it will create a number of practical concerns including:
- 17.1. At the point of engagement, most employers will ask employees "when can you work?" The response to the question is more often: "I can work XYZ". Arguably, at this point, there is (at the very least) a firm advance commitment to ongoing and indefinite work on the basis work will be offered on 'XYZ' and not 'ABC'. The effect of this is employers will be less likely to engage casual employees because of the risk associated with "misrepresentation of casual employment" and the associated civil penalties.

- 17.2. Any rostering system (whether weekly, fortnightly or monthly) can be considered a firm advance commitment to ongoing and indefinite work and expose an employer to potential claims and civil penalties. Therefore, as a means of mitigating this potential risk, employers would likely look to completely remove casual employees from their rosters and rostering systems. Employees will lose the certainty of working on particular days, as employers will be compelled to adopt a sufficiently disrupted pattern to ensure employment is irregular.
- 17.3. Individuals will miss out on being gainfully employed, on a long-term basis, because employers will look to limit the engagement of casual employees to short and sharp periods of employment, because of the associated risks with having a casual employee “long-term”. This will undoubtedly have a significant flow on effect to the unemployment rate, with casual employees consistently looking for further gainful employment.
18. If the proposed definition is introduced employers will undoubtedly move away from casual employment altogether due to the uncertainty and risk associated with the relationship.
19. For many prospective employees, casual employment is the preferred means of engagement as it provides the flexibility and responsiveness they are seeking. In addition, under the HIGA a higher hourly rate is attributed to casual employment, in lieu of permanent entitlements such as annual leave and personal leave. Many individuals place greater importance on these attributes than being engaged on a permanent basis. This is evidenced by the very low rates of casual conversion reported within WA’s hotel and hospitality industry, despite the provision being in place since March 2021.
20. Other key examples of where casual employment is critical for both employers and employees include:
- 20.1. Tertiary students: for many tertiary students in Western Australia, the most practicable way to earn extra money whilst they are studying, is to accept casual work in a local pub or bar. Many tertiary students are looking for employment which will pay them the most amount of money for the least amount of commitment but with the greatest amount of flexibility. Commonly, tertiary students work nights and weekends, enabling them to balance their education commitments such as exams, as well as varying timetable requirements from semester to semester.
- 20.2. Working parents: many working parents who are the primary caregiver and/or secondary income earner of a family, choose to enter the workforce on a casual basis, often working evening or night shifts in a local restaurant or hotel when the other parent or caregiver is home. Again, this is favourable to many employees, because the casual employment relationship provides greater flexibility with their carer’s responsibilities as well as a higher hourly rate under the HIGA attributed to the casual loading.
- 20.3. Mature age workers: are increasingly recognised as an important component of Australia’s workforce, with new incentives available for this cohort to return to work via a \$4,000 credit to their *Work Bonus Income Bank*. The majority of those seeking a few additional hours would do so through casual employment.

21. Under the proposed definition, the above-mentioned examples will no longer be considered legitimate casual relationships. This will have a detrimental impact on the hospitality industry in Western Australia.
22. Legitimate casual employment is the linchpin of the hospitality industry which enables it to maintain operational efficiency and meet the ever-changing demands of its customers.

Misrepresentation of casual employment

23. We oppose the introduction of section 359A in its entirety.
24. We submit any “misrepresentation of casual employment” should only apply to intentional and/or reckless behaviour and only to those industries where this has been identified as an issue.
25. The proposed definition, coupled with the introduction of section 359A makes it almost impossible for an employer to engage a casual employee in a meaningful way without exposing themselves to the real risk of being found to have breached the “misrepresentation’ section.

Outcome sort by WAHHA

26. It is WAHHA’s submission the current definition of casual employee outlined in section 15A of the Act remain unchanged.
27. Further, we respectfully recommend section 359A of the Bill be removed.

We thank you for the opportunity to provide a submission on an issue so critical to WA’s accommodation, hotel and hospitality industry. We respectfully request you carefully consider the implications of the Bill as introduced into the Parliament and the implications it will have on the employers and employees who rely on casual employment being accessible, practical and functional.

Yours faithfully

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WAHHA