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5 February, 2021

The Secretary
Senate Education and Employment Legislation Committee
By email: eec.sen@aph.gov.au

Submission on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Overview

The Franchise Council of Australia (the FCA) is pleased to make a submission to the Senate Education and Employment Legislation Committee (the **Committee**) on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (the **Recovery Bill**).

The FCA is the peak industry association for the $184 billion franchise sector in Australia. There is a franchise operating in almost every type of business category, with varying levels of complexity and market share. Prior to the onset of Covid-19, the Australian Franchise sector represented nearly 600,000 Australian jobs, with over 1,300 outlets underpinned by nearly 90,000 outlets.

The majority of franchisees are small to medium businesses even though some operate major brands. The majority of franchisors are also small to medium businesses. It is these small and medium businesses that provide significant employment and stimulate economic activity throughout Australia. These thousands of franchise businesses across Australia create and sustain employment and will have a major role in contributing to Australia's economic recovery.

This submission is informed by feedback on industrial relations matters from the FCA's broad membership base.

Background to this submission

Industrial relations is a major pressure point for small and medium businesses and the FCA provides this submission to assist the Committee in its consideration of the Recovery Bill. The Australian economy relies on small business to succeed. Small business provides over 40% of Australian jobs. Where these businesses survive and thrive, they are a source of employment and economic activity, and play a leading role in supporting local communities, particularly in regional Australia. Conversely, where regulation, rigidity and impracticality impede a business' ability to adapt and survive, everyone stands to lose.

The impact of COVID-19 on Australian businesses has highlighted how close many small and medium enterprises hover between a point of viability and failure. The current economic situation provides an opportunity to shift the paradigm on how industrial relations is debated, discussed, and regulated, and move away from the predictable, and polarising approach that industrial relations is a zero-sum exercise where either business or workers win or lose.

The FCA strongly supports any moves towards sensible reform and it is hoped this submission constructively contributes to industrial relations reforms that are fair and equitable – in equal measure – to those who work in enterprises, as well as to the proprietors of businesses who, through their significant personal efforts and taking on significant economic risk, create and run the businesses which provide that employment.

Overview on the Recovery Bill

The FCA broadly supports all proposed reforms to the industrial relations system in the Recovery Bill. The proposals are sensible and balanced but are, however, very modest and there remains significant scope for real modernisation and improvement in the industrial relations system.

The introduction of the JobKeeper flexibility amendments to the *Fair Work Act 2009* in 2020 in response to the impact of COVID-19, as well as the efficient and practical temporary changes made to Modern Awards by the Fair Work Commission last year, acknowledge implicitly, if not expressly, that the current balance in the industrial relations system is tipped too far towards rigidity and prescription rather than agility and co-operation.

Passage of the Recovery Bill would be an important first step towards promoting a more balanced system that allows enterprises to be agile to changing circumstances and demands. The FCA broadly supports all measures in the Recovery Bill and provides the following submission on certain specific measures. Not all measures in the Recovery Bill are expressly dealt with in this brief submission; this does not indicate a lack of support for that measure.

Schedule 1 - Casual employees

The FCA supports the measures in Schedule 1 in relation to casual employees. Casual engagements have long been a feature of the employment landscape and the FCA supports steps to ensure employees and employers are able to continue to access the mutual benefits of casual employment and do so on a clearly defined and predictable basis. The uncertainty, complexity, and confusion caused by recent Federal Court decisions that extended paid leave entitlements to some casuals is a matter of concern for FCA members.

The FCA strongly supports the measures to provide clarity and certainty on the definition of casual employment and the treatment of entitlements that lawfully apply to it – both historically and into the future.

Definition of casual employment and conversion

The measures in Schedule 1 codify what is the well understood lay position on casual employment. Suggestions that Schedule 1 'strips away' or 'cuts' casuals entitlements are misleading, unfair, and ignore two critical facts: firstly, that the addition of paid leave to some casuals is a recent development, and secondly, that the concept of casual employment has long been well understood by the general public as not including paid leave (in lieu of which a casual loading is paid).

The FCA considers that whilst there are far simpler and less complex definitions of casual employment than those proposed in the Recovery Bill, that definition and its related provisions are sensible and practical, and they give clarity and certainty.

The casual conversion provisions provide an appropriate safety net and protection for employees, whilst allowing both employees and employers the flexibility to determine between themselves how they want to work together.

Addressing back pay of leave entitlements

The FCA strongly supports the measures in Schedule 1 that address the offsetting of any paid casual loading against leave entitlements for those 'casual' employees who are entitled to historical leave accruals.

FCA members have not generally made financial provision for the potentially very significant back accrual and payment of paid leave to casual employees if these important measures are not passed. Any 'double dipping' of leave after a loading had been paid would increase the financial strain and burden on employers at this already difficult time and reduce confidence in the stability and fairness of the industrial relation system.

Whilst there could be a simpler and less complex approach to past accrued entitlements in the Recovery Bill, the FCA considers what is proposed provides a fair and balanced approach for employees and their employers. The FCA strongly supports the passage of this aspect of the Recovery Bill.

Schedule 2 – Part 1: additional hours for part-time employees

The FCA supports the measures in Schedule 2 Part 1 of the Recovery Bill, but notes that the measures are unnecessarily restricted to a few industries and should instead be extended to all industries and workplaces. These measures provide useful, but limited, additional flexibility to employers and employees and the availability of co-operative flexibility should not be restricted.

Concerns are often expressed about casualisation and insecure employment. One significant way to address these concerns and reduce insecurity is to increase the flexibility of permanent part-time employment. These measures would address issues of income security for employees while providing employers with the flexibility they need.

A number of FCA members would be likely to employ more staff on a part-time basis if these measures were passed and allowed for employees to be provided with a guaranteed base of minimum weekly hours (and the provision of paid leave), but the ability to deploy staff to cover additional hours in a meaningfully flexible and economically viable way.

Specific matters – *identified modern award*

In this context, it is unclear why this important measure is restricted only to certain *identified modern awards* and is not being made freely available to employees and employers in all sectors. The FCA submits that, whist the current proposals are supported, a much more universally beneficial and useful approach would be to extend this measure (and its inherent protections) to all industries, all employers and all part-time employees.

It is difficult to see why it is acceptable for employees and employees in some select industries to be permitted to work together in an agile and flexible way, but employees and employers in all other industries are prevented from doing so.

The protections in proposed s 168Q in relation to payment and the treatment of hours are appropriate and important. Given these important protections will be legislated, there is no reason why this flexibility should be denied to workplaces operating under a non-identified modern award.

Specific matter – 16 hour threshold

The 16 hours threshold is arbitrary, impractical and unnecessary. The FCA submits that there should be no limitation placed upon an employee's ability to agree with their employer to an additional hours arrangement based on the number of hours they otherwise work in a week or period (less than full time hours).

The circumstances that call for the flexibility of an additional hours arrangement arise from business conditions and other factors which are entirely separate from the number of hours a part-time employee happens to be called upon to work each week or period. The 16 hour limit is in that context, arbitrary. The focus of when an employee and employer can agree to an additional hours agreement is whether there is a need for the additional hours to be worked and a preparedness by the employee to do that work, rather than whatever the base number of hours for that particular employee might be.

This is also not a matter of employee protection; the key practical employee protection – which the FCA supports – is the minimum 3 continuous hour requirement in proposed s 168P. This protection has a clear and practical application. The 16 hour threshold does not.

The FCA submits that this unnecessary restriction be removed from the Recovery Bill and part-time employees and employers be allowed to work together on an additional hours agreement as they see fit and can agree (subject to the other proposed protections).

Schedule 2 - Part 2: Flexible work directions

The FCA supports Schedule 2 Part 2 of the Recovery Bill, including specifically the pay level protections, but notes that these measures would be uncontroversial to most independent lay observers and there is no reason or justification for their application to be limited, either in time, purpose, or industry.

These are sensible arrangements that provide for a very basic flexibility. There is little rational reason in a modern workplace for an employer to not be permitted to require an employee to do a task that is reasonable, safe, within the employee's skill and competence, and where the employee's pay is protected and the direction is not intended to promote deskilling.

The suggestion that modern Australian workers will – as a general approach – 'work to rule' or only do a very limited and specific set of tasks according to a description in an industrial award and nothing else, is antiquated and antithetical to the collaborative and co-operative approach of most Australian workers and employers.

That legislative action is, and has been, required to expressly clarify and allow for this most basic flexibility suggests the current system is far too rigid and based on the outdated and false assumptions that employees – as a general group – are helpless, disengaged and disempowered, and employers – as a general group – are hard, unfeeling and callous towards their often most valuable asset, their workforce.

This antiquated approach may be consistent with the political narrative being advocated by some in the industrial relations debate but this does not reflect the reality of the significant majority of Australian workplaces in 2021, nor does it is reflect the co-operation and collaboration between employers and employees seen in 2020 in dealing with COVID-19.

The two questions that need to be honestly and faithfully grappled with are:

a) *"Why was this level of common sense flexibility and agility previously restricted and not already part of a modern Australian workplace relations system?"* and

b) *"Is there really a viable justification to remove this flexibility and take away the ability for enterprises to be agile and adaptable, once the COVID-19 situation is* 'fixed'*?"*

The FCA suggests amendments to the proposals for consideration. The first is that these express measures should be extended to all workplaces, rather than only those covered by the limited identified awards. The second is that use of such basic flexibilities not be limited to circumstances directed to the '*revival*' of a workplace (proposed section 789GZK). This limitation is unduly restrictive.

If there is to be any restriction on accessing this common sense flexibility (which the FCA suggests there should not be), the FCA submits as an alternative that the provision use a more appropriate threshold, namely, that it can be utilised as "part of a reasonable strategy to address or prevent a decline in the employer's enterprise" (cf proposed s 789GZK(1)).

Schedule 3 – Enterprise agreements .

The FCA strongly supports moves to simplify and streamline systems relating to the making and approval of enterprise agreements that focus on fairness and matters of substance rather than hypothetical exercises and issues of form and procedure. Further, the FCA fully accepts there is a need for a better off overall test (or similar) to ensure an independent expert assessment is made that any agreement does not undercut the established safety net.

However, a problem with the current framework is the rigid application of the BOOT in a way that seeks to predict and cater for an almost infinite number of hypothetical permutations. This undermines the system it is applying rather than promote it. The FCA strongly supports moves to avoid this artificial and impractical approach and make fairness (and the will of a workplace who voted for an agreement) the key determinants on whether a proposed agreement should be approved and the approach to the better off overall test.

The problem with the current system and application of the current test is that it imposes on the expert members of the Fair Work Commission the obligation to – in effect – merely apply a static formula and equation and denies them the ability to exercise the discretion and judgment that is the very reason they were appointed to a specialist industrial tribunal.

Members of the Fair Work Commission are appointed because they are experts in the application of industrial norms. They are in the best position to independently assess whether an agreement, which has been successfully voted on by employees, provides a fair arrangement as against the reference award.

It is incongruous that members of the Fair Work Commission determine the safety net when they review Modern Awards, but those same members are not empowered with a broad discretion to consider what might be a fair application of that safety net at a particular workplace.

The proposed amendments in respect of the Fair Work Commission's approach to the BOOT are an important and common sense improvement. As to the situation of Agreements that do not pass the BOOT, in the context of COVID-19, the very limited proposed reforms are sensible and moderate, but unlikely to the utilised to any significant extent.

It is regrettable that the reaction to these minor and measured reforms has, from some, been exaggerated and aimed at polarising the debate rather than progressing a consideration of matters of substance. In any event, the expert members of the Fair Work Commission will still be the ultimate check and protection as to whether it is appropriate to approve such an agreement.

Schedule 3 – Part 7 – Franchise agreement variations

The FCA supports the proposed reforms on franchise agreements.

The proposals allow for a practical and sensible process for employees of a new franchise to be asked whether they agree to be covered by an enterprise agreement without requiring voting processes at all other franchise operations currently covered by that agreement.

However, whilst these reforms are a welcomed improvement to cater for the very important franchise sector, the underlying problems with the difficulty and complexity of bargaining and approval processes are not solved by this amendment alone. The FCA supports this change with the other improvements to enterprise bargaining proposed in the Recovery Bill.

Schedule 3 Part 9 – How the FWC may inform itself

The FCA strongly supports the proposals in Schedule 3 Part 9 of the Recovery Bill. These are sensible reforms which reduce the potential complexity and added delay from parties external to an enterprise and a bargaining process from imposing themselves and interfering with an agreement approval process.

Whilst the proposals still sensibly allow for such external parties to be permitted to be involved in approval processes, this will occur in only exceptional circumstances. This is appropriate and is consistent with an acceptance that responsibility for applying the system rests principally with the independent industrial tribunal.

Schedule 3 Part 10 – Time limits on determining applications

The FCA strongly supports Schedule 3 Part 10 and any moves to provide for a more streamlined and efficient process in considering approvals of enterprise agreements.

Schedule 3 Part 11 – FWC Functions

The FCA supports Schedule 3 Part 11 of the Recovery Bill but suggests that mere “recognition” of the outcome of bargaining is not enough to adequately safeguard the will of employees and an employer at an enterprise.

Where employers and employees have gone to the time and effort of bargaining and have reached agreement, by a free, fair, and democratic vote, that outcome should be preferred, protected, and promoted to the greatest extent possible. The FCA suggests that the proposal should positively require the FWC to protect, and give primacy to, the outcome of bargaining rather than merely recognise it.

Schedule 3 Part 13 – Cessation of instruments

The FCA supports the provisions that terminate very old legacy agreements.

The FCA suggests that whilst it is a welcome improvement to end so-called 'zombie' agreements, the process for terminating an enterprise agreement should be simplified and made more accessible to allow for agreements to be ended before they become a 'zombie'.

Allowing for a more accessible and sensible refresh of agreements will promote appropriate bargaining and allow for a prudent periodic check of workplace arrangements at a workplace against the appropriate safety net at the relevant time. It also allows for agility in an ever-changing and increasingly unpredictable world.

Schedule 5 – Compliance and enforcement

The FCA strongly supports the need for vigilant compliance and enforcement of deliberate non-compliance and moves to address the very small number of employers who deliberately and dishonestly do the wrong thing.

The FCA also supports moves to remove potential state-based differences and provide for a nationally consistent approach to workplace relations matters, including those outlined in Schedule 5 Part 7.

The significant penalties proposed in the Recovery Bill appropriately indicate the importance of complying with employment obligations. The FCA supports Schedule 5 Part 4 and the codification of when the Fair Work Ombudsman (**FWO**) will consider an enforceable undertaking as the appropriate regulatory outcome. However, this clarity, whilst not insignificant, does not address the far more important issue of helping employers get compliance right in the first place before needing to address inadvertent non-compliance after the fact.

The current system is complex, overly technical, and often unclear, and much of the non-compliance with employment obligations is 'innocent' and inadvertent. That is, it is not motivated by malice or recklessness but is a direct consequence of the inherent complexity in the system. The number of enforceable undertakings being accepted by the FWO in recent months (compared to the number of prosecutions) demonstrates this is a prevalent type of non-compliance by employers.

The FCA suggests that greater compliance and enforcement outcomes might be achieved if greater compliance resources were directed at facilitating and assisting those who are trying to do the right thing to positively achieve compliance. This focus on compliance and regulation should be not be on only providing education in the abstract (for example, by reciting what an award says), but to also provide real and practical guidance on implementation which business can rely on to facilitate compliant practices.

The FCA considers that greater overall compliance would be achieved if the FWO took a greater role in assisting employers resolve uncertainty in how to interpret and apply specific awards in their particular circumstances. One suggestion from amongst the FCA membership is the idea of having the FWO provide public or private rulings on the interpretation and practical application of Modern Award or the National Employment Standards, similar to the way the ATO administers compliance with taxation laws. Where the FWO gives a ruling and that is complied with, the employer is deemed to have complied with their obligations and is, accordingly, protected.

It is accepted that the FWO cannot make judicial determinations about the status or interpretation of awards or the Act and this remains principally the role of the Courts. The FCA suggests that even where the authoritative legal interpretation changes and this alters a FWO ruling, conduct engaged in, in reliance of a FWO ruling, remains protected until the date of the legal clarification.

The codification in the Recovery Bill of when an enforceable undertaking may be considered by regulators is important, but a system of proactive assistance on which business can confidently rely and act, is more important. This would give business greater assistance and confidence in achieving and maintaining compliance.

Conclusion – support for the Recovery Bill

The FCA supports the Recovery Bill and the measures contained within it, including those not specifically addressed in this submission. The industrial relation system needs to the fair and equitable – in equal measure – to those who work in enterprises, as well as to the proprietors of those enterprises who, through their significant personal efforts and taking on significant economic risk, create and run the businesses which provide that employment and contribute to the Australian economy.

It is hoped this brief submission on certain aspects of the Recovery Bill assist the Committee in its consideration of these important, though modest and limited, reforms.

Sincerely

Mary Aldred
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