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Business SA submission: *Fair Work Amendment (Supporting Australia's Jobs and Economic Recover) Bill 2020*

Senate Education and Employment Legislation Committee

February 2021

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Introduction

Business SA, South Australia's Chamber of Commerce and Industry, was formed in 1839 and has approximately 3,500 members from across of the breadth industry sectors. We represent micro businesses right through to listed companies, although the vast majority of our members are small businesses employing less than 20 people. We are a not-for-profit business membership organisation which works on behalf of members and the broader business community in pursuit of economic prosperity for both South Australia and the nation. Business SA is also a founding member of the Australian Chamber of Commerce and Industry and on national issues we work through ACCI to advance the interests of businesses across the nation.

Business SA supports the detailed submission of the Australian Chamber. This submission, albeit more concise, focuses on the primary issues facing South Australian businesses. There is little question of the impact of COVID-19 on the South Australian and Australian economy. With temporary protection measures related to leasing and insolvency protections recently lifted, and JobKeeper coming to an end on 28 March, we are likely to see a substantive uplift in business casualties over the next 12 months.

Despite the imminent role out of the vaccine, we are far from out of the woods. Measures are still needed to ensure significantly affected businesses have the opportunity to survive. While some businesses have benefited from perverse shifts in demand during the pandemic, many have been profoundly affected. This is why reforms targeted at suffering businesses, such as the reforms in this Bill, are critical to ensure as many South Australian businesses as possible remain viable, keeping their staff gainfully employed. Accordingly, Business SA supports, with some suggested amendments, the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*.

Business SA surveys of members

For several decades, Business SA has conducted a quarterly survey of business expectations (SOBE) and each quarter, we ask businesses several supplementary questions on topical issues. In our June quarter 2020 SOBE, which solicited over 360 responses, we asked businesses a range of questions in relation to their views on workplace relations reforms and the impact of currency policies on businesses. We followed this up with further questions in a January 2021 survey eliciting over 250 responses from local businesses. From Business SA's perspective as an independent business membership organisation, it is important for us to convey what the business community actually thinks about workplace relations, and any policies that are designed to change the workplace relations environment.

This paper contains survey results pertaining to the South Australian business community's views on required workplace relations reform.

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Casual Employment

Meaning of Casual Employment

Business SA is supportive of a definition of casual employment being inserted into the *Fair Work Act 2009*. The recent decisions of Workpac v Skene and Workpac v Rossato resulted in some South Australian businesses, that rightly believed they were engaging employees as casuals, to face the prospect of paying annual leave in addition to the casual loading already paid. The potential 'double dipping' created by the decision was the result of a departure from the long-standing understanding that a casual was one who was engaged and paid as such. If there is one thing businesses want to see from an industrial relations system, it is certainty. When surveyed only 19.1% of respondents indicated they would not incur a liability, or the issue wasn't relevant to their workplace. A significant number, 37.4%, of businesses were unsure of their liability and 43.6% believed they had a liability.

While some commentators have taken the view that the facts from Skene and Rossato are limited by the facts of the case and the industry, many industrial relations experts believe that there is no reason why the reasoning in these cases would not be applicable to a small business in other industries. And until this is tested in the courts, this type of uncertainty puts small businesses at an unacceptable risk.

15A (2) of the Bill sets out the list of factors that need to be considered when determining if an employee is casual:

> *(2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following considerations:*
>
> > *(a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;*
> >
> > *(b) whether the person will work only as required;*
> >
> > *(c) whether the employment is described as casual employment;*
> >
> > *(d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.*

This definition contains an exhaustive list of factors to determine if an employee is casual. It is Business SA's view that an exhaustive list is critical in providing certainty to businesses. A non-exhaustive list will allow the courts to interpret the legislation to include additional factors. Businesses need certainty, simplicity and clarity, which cannot be provided if additional factors are later included through court interpretations.

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Casual Conversion

Business SA does not support the casual conversion provisions proposed in the Bill. Due to the flexibility it provides, casual employment is an important factor in ramping up businesses post pandemic. Currently, 111 Awards have casual conversion provisions. Of which, 85 were inserted as part of the 2017 Casual Conversion Case before the Fair Work Commission (operative 1 October 2018) and 26 from the 2008 AIRC award modernisation process. The 2017 case before the Fair Work Commission was debated and argued by both sides, resulting in a clause that has now been tested by employers and employees over the last two and a half years. The clause contained in the Bill is significantly different and, unfortunately more complex than the version contained in the Awards. Business SA recommends greater consideration of the casual conversion clause that resulted from the 2017 Casual Conversion Case.

Considering the inclusion of casual conversion in the modern award system and the low uptake of conversion by casuals, Business SA questions the need to insert alternative provisions in the *Fair Work Act.* Our survey results indicate that 52% of South Australian employers do not engage regular and systematic casuals, 33% employ regular and systematic casuals and have offered casual conversion, and 15% regular and systematic casuals but have not offered conversion.

When asked why the employees do not want conversion, the following reasons were provided:

Don't want a reduction in hourly pay	66.1%
Want the flexibility of casual employment	67.9%
Need to look after children/dependants	24.2%
Other (please specify)	8.5%

Our survey results show that, even when provided with the ability to convert, many employees choose to remain casual. In fact, for two thirds of employers, only a third or less of their staff accepted casual conversion while for nearly half the employers, it was less than 10% of employees.

Double Dipping

Since the decision in Skene v Workpac employers have faced continued uncertainty regarding their casual workers. The concern about 'double dipping' arises when casual employees working regular and systematic hours, are paid a casual loading, and subsequently make claims for annual leave.

Business SA supports the provisions in the Bill that address the issue of double dipping. However, the wording requires amendment to ensure that is covers past, as well as present, employees. Business SA supports a change to the wording in s545A(1)(a)&(b) from "is employed" to "is or has been employed" outlined as follows:

(1) This section applies if:

a. A person is or has been employed by an employer in circumstances where the employment is or was described as casual employment; and

b. The employer pays or has paid the person an identifiable amount (the loading amount) paid to compensate the person for not having one or more relevant entitlements during a period (the employment period); and

c. During the employment period, the person was not a casual employee; and

d. The person (or other person for the benefit of the person) makes a claim to be paid an amount for one or more of the 28 relevant entitlements with respect to the employment period.

The impact of the double dipping on small businesses in South Australia cannot be underestimated. In a time when many businesses are already facing financial hardship, the additional liability of paying annual leave to employees who have already been paid a 25% loading, may be financially crippling.

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Modern Awards

The measures in Schedule 2 dealing with changes to Modern Awards are mainly a temporary measure but necessary step that Business SA supports. As businesses attempt to not only recover from the pandemic but also survive any further inevitable outbreaks, the inflexibilities of our workplace relations system need to be addressed.

Schedule 2 of the Bill has proposed changes to a specific list of Modern Awards. These Awards cover a number of industries that have been directly impacted by the pandemic, of which a large proportion are small businesses. The Awards listed are:

- Business Equipment Award
- Commercial Sales Award
- Fast Food Industry Award
- General Retail Industry Award
- Hospitality Industry (General) Award
- Meat Industry Award
- Nursery Award
- Pharmacy Industry Award
- Restaurant Industry Award
- Registered and Licensed Clubs Award
- Seafood Processing Award
- Vehicle Repair, Services & Retail Award

In South Australia there a number of businesses that have been significantly affected by COVID-19 who have not been included on the Modern Award list. Business SA believes the following key industries have been affected by the challenges of COVID-19 and ongoing government restrictions and therefore should be considered for inclusion:

Amusement, Events and Recreation Award 2010

Car Parking Award 2020

Dry Cleaning and Laundry Industry Award 2020

Fitness Industry Award 2010

Funeral Industry Award 2010

Hair and Beauty Industry Award 2010

Live Performance Award 2010

Sporting Organisations Award 2020

Travelling Shows Award 2020

Social, Community, Home Care and Disability Services Award 2020

Supported Employment Services Award 2020

Business SA has numerous members in the entertainment, conference and live performance industries. Arguably, this has been one of the worst impacted industries in the State. The vast majority of organisers of business conferences and functions have cancelled their events. Of those businesses that have gone ahead in the latter part of 2020, they have faced the uncertainty of border closures and not being able to bring in overseas guests or participants. There have been a handful of live performances that have occurred, but numbers have been significantly reduced due to social distancing requirements.

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Business SA acknowledges that there are a number of other industries that may wish to be included in the list, however the additional Awards suggested above are from industries our members have directly indicated are facing financial hardship in South Australia. As such this may not be an exhaustive list of affected industries.

Business SA supports *The Bill* being amended to include additional awards which will better reflect the economic distress felt in South Australia.

Part Time Employment

Business SA supports changes to the part-time provisions that will allow for the negotiation of increased contracted ordinary hours, although has concerns regarding how the provisions will be implemented through Simplified Additional Hours Agreements. Current part-time provisions are too rigid. Without flexibility in the part-time arrangements, businesses, especially as they move to recover from the pandemic are more likely to engage casual employees, which is contrary to the provisions proposed by the Bill which will implement casual conversion. When surveyed regarding the proposed changes to part-time provisions, 50% of businesses thought that changes to the would be beneficial. Survey respondents stated the following in regard to casual employment and part-time work:

> *"Guidance on what is systemic and regular would be great. Also, when there are regular and systemic shifts BUT they vary in hours converting someone to permanent part time is very difficult with the penalties that apply if they go over their contracted hours but also businesses can't afford to put them on greater hours just to avoid that penalty. Part time just doesn't work for a variety of industries."*

> *"If the award was more flexible for PT employees we would encourage more staff to move to PT conditions."*

If unions truly wish to discourage casual employment and increase permanent work, then having part-time provisions that are overly restrictive and unnecessarily cost businesses money, only pushes in the opposite direction of the desired outcome.

The Clerks (Private Sector) Award is a general occupation award that covers a high proportion of female and part-time workers. The part-time provision of this award states:

> *10.6 All time worked in excess of the number of ordinary hours agreed under clause 10.2 or as varied under clause 10.3 is overtime and must be paid at the overtime rate in accordance with clause 21—Overtime (employees other than shiftworkers)*.

This is a typical example of the restrictive terms contained in Modern Awards. A system the prevents employers from offering part-time employees additional hours is non-sensical. An employer is more likely to engage additional casual workers to cover extra hours, rather than offering them to part-time employees if the additional hours for part-timers are cost prohibitive. If these changes within the Bill are passed, not only are part-time workers likely to receive additional hours, as they will be ordinary hours, entitlements such as annual leave and superannuation payments will also accrue.

In industries where there is ongoing uncertainty due to the COVID-19 operating environment, a change to the part-time hours provisions is essential. It is important to note that this proposed change is not without precedent. The Hospitality Industry (General) Award 2020 and the Registered and Licensed Clubs Award 2020 were varied in 2017 to improve part-time employment flexibility. The Fair Work Commission recognised that in those industries, in order to encourage part-time work, greater flexibility is required. Leading out of the pandemic, Business SA believes these flexibilities will be required in many more industries.

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Simplified Additional Hours Agreement

Business SA's concerns with the Simplified Additional Hours Agreement (SAHA) are that it can be terminated with 7 days' written notice or at any time agreed between the parties. Many Business SA members have indicated that they run rosters over a fortnight. If an employee is able to terminate the SAHA with only 7 days' notice, this has implication for the roster already in place. The employer will be forced to either pay overtime rates for the hours already rostered or reduce the agreed hours, which in some circumstance may be a breach of the Award.

Business SA recommends the SAHA can only be cancelled with 14 days' notice or prior to the start of the roster/period of work. A SAHA must identify the additional agreed hours to be worked on one or more days and must be entered into before the start of the first period of those hours.

Another issued faced by employers in implementing a SAHA is that additional hours may not always be known at the time of the SAHA being signed. For example, if an employee calls in sick and additional hours are up for grabs, a part-time employee will not be offered those hours as they have not been specifically included in the SAHA.

Flexible Work Direction

Business SA supports the provisions in Schedule 2, Part 2 of the Bill which temporarily continue flexible work directions for businesses that have been affected by the pandemic and the employer believes that the flexible work arrangements are a necessary part of a reasonable strategy to assist in the revival of the employer's enterprise.

These provisions are an important step in ensuring employees return to work after businesses have been affected by the pandemic and are important for economic recovery and job retention. Employers and employees would rather negotiate flexible arrangements than be forced, by Award provisions, to terminate the employment or breach the Award.

In order to ensure employees are protected, safeguards have been retained, which Business SA also supports. These safeguards include:

- The directions not to be unreasonable [1]
- The directions must assist with the revival of the enterprise [2]

Business SA supports an amendment to the provisions that allow an employer to utilise these strategies in response to government restrictions, such as a lockdown or changes to the density provisions in the hospitality industry. Again, without these provisions, employers will look towards casual employment in times of uncertainty. Employers will not feel confident committing to permanent workers knowing they could face a sudden change to business conditions due to government implemented restrictions.

Duties

Business SA supports the new section 789GZG which allows for an employer to direct an employee to perform duties that are within their skill and competency.

Again, Business SA recognises that the safety net in place ensures that employees are not exploited. Section 789GZN(1) requires an employer to continue to pay the employee what they would have received, had the Direction not been given. Employees cannot be financially worse off.

[1] s789GZJ
[2] S789GZK

If the employee performs duties that are at a higher level than their classification, then the employee must be paid the applicable higher duties allowance.

Location

The pandemic has seen a change to where employees conduct their duties. During the SA lockdown many employees were required to work from home. The ability to change the location of work is also important for the recover process post lockdown. Employees may be relocated to different sites to ensure they can continue to provide hours and as such, this provision should be retained as an important recovery measure.

Reduction in hours/days

For the businesses that are affected by lockdowns and the subsequent restrictions in trading that inevitably follow the lockdown, such as the hospitality industry, reduction in hours/days provisions are one of the critical provisions for employers to ensure the continued operation of their businesses. As we experienced in South Australia in the response to the November lockdown, State and Federal governments to date have been unwilling to provide financial support for businesses heavily impacted by short-term, snap lockdowns. With the end of JobKeeper on 28 March, should businesses face further lockdown or restrictions, the ability to temporarily reduce hours/days is critical to businesses' managing the associated financial impact.,

Business SA recommends flexibilities be considered that allow for reduction in hours/days that can be implemented by businesses in deeply impacted situations, however we acknowledge that provisions must have appropriate employee protections.

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Enterprise Bargaining

The purpose of enterprise agreements is to provide flexibility in the workplace and allow for direct negotiations between employees and employers. This is not the reality, demonstrated by the drop in the number of agreements negotiated. Business SA members mostly report that enterprise agreements are too difficult to negotiate and do not provide enough flexibility. Now more than ever businesses need flexibility in the workplace to re-establish themselves after the pandemic, and to survive further outbreaks and associated restrictions.

Of members surveyed, only 15.3% had an enterprise agreement in their workplace and of that 15.3%, 34.6% were not intending on renegotiating the agreement at the end of the nominal expiry date. This indicates that SA businesses are losing confidence in the agreement making system. The following are the reasons provided for not pursing or renegotiating an agreement (noting members could chose more than one option):

Concerned it will result in a higher wage bill	14.5%
Don't believe it will increase workplace flexibility	25.3%
Don't believe it will increase workplace productivity	31.8%
Don't want to negotiate with Unions	26.7%
Prefer the applicable award	41.2%
The process is too complex and difficult	39.5%
Other (please specify)	19.9%

When asked to provide views on the enterprise agreement system, businesses made the following comments:

> *"Fair Work is slowly eroding any mutual benefit by its application of BOOT and tending to focus on a better off clause by clause test resulting in previously "traded" items being reinstated. For an employer this often means something that has been paid out is put back in negating the benefit."*
>
> *"We are only small and the legal costs would outweigh the benefits."*
>
> *"Too expensive to undertake for the size of the workforce at this time."*
>
> *"Workers are making so many demands that they will close our business. The EBA is so contradictory."*
>
> *"Used to have one but terminated."*
>
> *"There's nothing left to bargain."*

Business SA members, through our workplace relations consulting team, are frustrated with the time and money it takes to negotiate a enterprise bargaining agreement. The process it too complex and it is difficult to for a business to undertake the process without legal support. As such, Business SA supports the variation to s 173(3) to increase the notice timeframe from 14 days to 28. This timeframe is beneficial to both employers and employees. It provides greater scope for employers to get the process requirement correct. Further, it disadvantages both parties if an agreement is not approved due to a technical error.

Better off Overall Test

Reasonable foreseeability

The interpretation of s193 of the Fair Work Act by the Fair Work Commission has resulted in the expectation that employers consider scenarios well beyond what is reasonable for their business in order to receive approval. This results in employers making undertakings for scenarios that will never apply in the workplace.

Members of Business SA have raised the issue that these impractical undertakings delay the approval process, sometimes by a considerable amount, cost the organisation money in redrafting and making undertakings and delay the application of the Agreement which may affect employees.

The proposed s 193(8)(a)(ii) addresses this issue in a practical manner by remaining applicable to prospective employees but only reasonably foreseeable scenarios. Business SA supports this variation as a practical solution to an issue that has been raised numerous times.

Emergency/Crisis Response Agreements

The Bill proposes approval of agreements that do not pass the BOOT in limited circumstances. Business SA supports this provision on the basis that there are suitable protections in place. It will not be possible for all businesses to negotiate these agreements. These important safety nets include meeting the public interest test, and requiring the support of a majority of employees to show cause to the FWC that the agreement is necessary to maintain the survival of the business.

These agreements will be the exception to the rule and Business SA has no doubt that the FWC will closely scrutinise any application.

There has been significant negative media coverage regarding these agreements that are either factually incorrect or choose to ignore some of the facts. It is important to remember that these agreements will only last fortwo years, with specific sunset clauses, and the FWC will not pass them unless the organisation satisfactorily proves that the agreement is necessary to protect jobs and employment security. The agreements will only be implemented in scenarios where they are needed to save the jobs of the employees.

Compliance

Unfortunately, the Bill does not tackle the complexity of the workplace relations system. Instead, it approaches the issue through punishment, rather than change. It is Business SA's view that there needs to be a significant increase in 'on the ground' education and policing, publicity, and promotion. The Government needs to proactively work with the business community to ensure businesses know of their obligations.

Business SA, which represents a significant number of small businesses, highlights how often they get lost in the debate surrounding large corporates. The penalties, for a small business, are already significant. These penalties went up 10-fold in 2015 and now the Bill is looking to implement another significant increase. If a business can no longer operate, this not only affects the owners but also the employees.

It should be made clear that Business SA does not condone any intentional underpayment of wages, nor do we believe that businesses that intentionally underpay employees should get away with it. However, we have significant concerns on the equity of practical implications of Schedule 5, when related to criminalisation of intentional underpayment of wages. As previously mentioned, South Australia's economy is mostly comprised of small businesses, more so than most other states. In fact, 97.6 per cent of South Australian businesses employ less than 20 staff. The proposed changes to criminalise the intentional underpayment of wages will unfairly target small businesses, while larger businesses will continue to hide behind the corporate veil. Further, the same provisions do not apply to Government entities.

The legislation does not resolve how the corporate veil will be lifted if a large organisation intentionally underpays wages. Who will be criminally charged? Will it be the payroll officer who is following directions, manager, CEO, Chair of the Board? The further up the corporate ladder, the harder it will be to prove intent. While the crown is currently excluded, if included, would it be the CEO of a Government department or agency ultimately responsible for the intentional underpayment of wages, or the relevant Minister? While this may seem to be a long bow to draw, the intentional underpayment of wages has the same impact of employees no matter what the nature of their employer is.

Business SA is also concerned that businesses that misinterpret an Award will be caught up in criminal charges.

If the small business community is to face the prospects of criminal charges for intentional underpayment of wages, then it needs to apply across all employers in Australia, including Government. It is unfair that private employers face this prospect, yet the Bill has intentionally been drafted to exclude government, while it is likely to have a vastly different impact on individuals within listed companies.