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Australian Business Industrial

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1 February 2013

Our reference

443180-1

The Secretary,
House Standing Committee on Education and Employment
Parliament House
Canberra ACT 2600

Dear Secretary,

RE: *Fair Work Amendment (Tackling Job Insecurity) Bill 2012*

I am writing on behalf of Australian Business Industrial to advise its opposition to the *Fair Work Amendment (Tackling Job Insecurity) Bill 2012* (the Bill).

ABI is registered under the *Fair Work (Registered Organisations) Act 2009* and is also the industrial relations affiliate of the New South Wales Business Chamber which, with its affiliated network of regional and local chambers of commerce, is one of the largest employer organisations in Australia.

ABI thanks the House Standing Committee on Education and Employment for providing the opportunity to comment on the Bill.

The bill proposes to amend the *Fair Work Act 2009* (the Act) by inserting a new Part 2-7B, "Secure Employment Arrangements", which essentially provides that individuals or unions can apply to the Fair Work Commission for a Secure Employment Order (SEO). A SEO can apply to an individual, workplace or more widely up to the coverage of a modern award. A SEO would prevail over inconsistencies in the contract and any industrial instrument applying to the employment of a person covered by it.

A SEO can be applied for by an employee or union following a refusal by an employer, or a list of employers who were served with a claim, to grant a request for secure employment arrangements, or a SEO can be applied for by a union without any request having been made. These union application processes are akin to serving logs of claims or applying to vary one or more awards with respect to its coverage or part of it. In both cases the claim could cover the union's members and those eligible to be members. Such applications would not be subject to the Fair Work Commission's ordinary award making or variation rules.

Under the Bill SEOs can apply to the employment of casuals (excepting those engaged by an employer employing fewer than 15 employees over a span of less than 12 months) and "rolling contract employees". A "rolling contract employee" is an employee engaged on a contract which ends on a specified date or after a specified period who an employer has previously employed on a contract which ended on a specified date or after a specified period. There is some imprecision here in the case of seasonal employees, and the specific wording or operation of a contract may be determinative, but it

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is clear that agency, non-continuous casuals and replacement employees covering absences for parental leave, as well as those recognizably under fixed term contracts, are potential applicants as "rolling contract employees".

ABI's main objection to the Bill arises from its impact on business flexibility and the promotion of productivity and economic growth. Employers already spend more time than in the past working out how to manage their workforce and deal with the diversity of their employees' needs fairly and lawfully. Increasing the costs or potential costs of decision making does not assist good decision making nor efficiency. Many employers, particularly smaller employers, are inhibited from taking decisions or action because they are uncertain about what they can do without breaching their award or the Act. As well as for uncertainty, employers regularly forego their rights in order to avoid the costs and disruption of proceedings before the tribunal.

This can be seen most clearly in the case of dismissals. The incidence of "go away" money is significantly more widespread than its contribution to the proportion of Commission matters which are settled would indicate because "go away" money is paid outside the system in the face of a possible application as well as in situations where an application has been made under sections 365 or 394 of the Act. In much the same way as the cost or potential cost of defending an action supports "go away" money where a dismissal is, or may be, contested, employers often defer where tribunal processes can be invoked. The perception that conversion to secure employment is a right would give rise to employers taking pre-emptive self-protective action with consequent effects on the level of employment, and on who gets employed.

As well, ABI has other reasons for opposing the Bill's passage.

The proposed amendments are inconsistent with the policy objectives of the Fair Work Act and its mechanisms.

Proposed Part 2-7A shares structural characteristics with Part 2-7 of the Act. Part 2-7 of the Act provides for the making of equal remuneration orders (EROs) to redress instances of gender based unequal remuneration. EROs are orders requiring that the employees subject to it are paid to at least the floor provided by the ERO. Part 2-7 is a distinct mechanism for addressing the requirement in both the modern awards objective and the minimum wages objective that there be equal remuneration.

Part 2-7 operates in a uniquely distinct manner from the remainder of the Act and prevails over many of the Act's usual processes and relationships. One of the features of unequal remuneration is that an entity which sets rates which do not provide equal remuneration might well be doing so unconsciously and without any intention to establish unequal rates infected by gender bias. Putting aside the question of the balance and fairness of Part 2-7, its underlying policy objective is to address the effects of unconscious cultural assumptions about the worth of different types of work and skills.

Part 2-7B proposes that SEOs have the same status of EROs. It could not be said that determining the nature of an engagement is subject to the same cultural assumptions as is setting equal remuneration.

The Bill would increase confusion about rights and obligations. It is clear that many employers and employees do not understand many aspects of the Act or modern awards. The Bill would add to misconceptions and confusion, none of which would assist meeting the objects of the Act or facilitating productive and thriving workplaces.

Proposed Part 2-7B would operate to create something akin to the Act's current right to request which is provided in Part 2-2, "the National Employment Standards".

The policy behind the right to request flexible working arrangements (Part 2-2, Division 4) is to encourage discussion between the employee and the employer. The policy decision to not make the

result of a request-based discussion subject to external review was deliberate, as was the decision to allow for more specific provisions appropriate to local workplace conditions to be the subject of bargaining. In part 2-2, Division 4, the formal grounds for declining, or modifying a request for flexible working arrangements must be "reasonable business grounds". If efficient and productive workplaces are the goal, flexible arrangements must work for the employer's business as well as the employee's needs.

Unlike Part 2-2, Division 4, proposed Part 2-7B is not directed towards encouraging a discussion. It provides for enforceable requests which, were the applicant or union insistent, could be declined only in the rarest of circumstances.

The Bill does not prescribe the legitimate grounds for refusing an application, which is unhelpful, but it could be inferred that they are to be understood from the requirement for the Commission to consider "...an employer's capacity to use arrangements that are not secure employment arrangements in cases where this is genuinely appropriate having regards to the needs of the business". This formulation is not immune from ambiguity, but it is clear that the Bill proposes that there should not be many circumstances in which business needs should intrude on the right to secure employment arrangements nor the issue of SEOs.

This almost certain right to secure employment arrangements which in part looks like a right to request and superficially resembles the Act's existing right to request arrangements (which is actually a right for a request to be considered) will be confused. Indeed, some requests could fall within both sets of provision.

The fundamental thrust of proposed Part 2-7 is to provide increased capacity on the part of "insecure" employees to require their employer to engage them on an indefinite basis and the capacity of unions to seek restrictions on non-indefinite employment without either bargaining or normal award variation rules.

The evidence is against the view that SEOs would enhance job security, particularly of marginal employees. Rather, legislating access to SEOs is likely to reduce the propensity of employers to engage new non-essential employees, or to re-engage such individuals, because of the threat that a contract could be altered during its term. It is ABI's view that the Bill also fails to take account of the fact that even in times of relatively abundant labour supply employers strive to retain valuable employees because of the continuing mismatch in local labour markets between skills on offer and skills required.

ABI thanks the Committee for its consideration of the matters raised in its correspondence.

Yours faithfully,

Dick Grozier
Director Industrial Relations.