# CONSULTATION:
# WORKPLACE RELATIONS MEASURES BEING CONSIDERED FOR THE SECOND PART OF 2023

**APRIL 2023**

BUSINESS NSW

Australian Business Industrial

**CONFIDENTIAL SUBMISSION**

## INTRODUCTION

Business NSW is the state's peak business organisation with nearly 100,000 business members in NSW and Australia, from businesses spanning all industry sectors and sizes. Operating across metropolitan and regional NSW, we field senior local leadership and teams throughout the state, representing the needs of business to all levels of government.

For nearly 200 years Business NSW (formally the NSW Business Chamber) has been advocating to create a better NSW and Australia by representing the needs of businesses to create the economic conditions that allow our members to grow and drive NSW and the nation forward.

Our experience has proven that planning and delivering with Government increases prosperity, creates new jobs, and builds better communities for everyone.
We work closely with our members, partners, stakeholders, local, state and federal government to advocate for practical policy solutions to ensure Australian businesses of all sizes can prosper.

ABI is the industrial relations affiliate of BNSW. ABI is federally registered under the *Fair Work (Registered Organisations) Act 2009* and engages in policy advocacy on behalf of its membership as well as engaging in industrial advocacy in State and Federal tribunals.

## 1. CASUAL EMPLOYMENT

1. It is trite to identify that 'certainty' provides the ideal conditions for businesses and consumers alike to thrive and contribute to a productive economy. Uncertainty breeds anxiety, hesitancy and ultimately can stifle productivity, creativity and business growth.

2. For a considerable period prior to the introduction of s15A of the *Fair Work Act 2009*, the characterisation of an employee's status as casual or permanent was riddled with uncertainty that began to impose significant limitations on a business' confidence to engage workers. That uncertainty was extinguished with the introduction of s15A and it is important that any reforms in this space do not unravel all the progress made.

3. Employers must have certainty to be able to determine who is and who isn't a casual employee, thus allowing the employers to determine entitlements with confidence and to set stable and clear pricing as well as other business terms and conditions.

4. For this reason, if there is to be any change to the existing s15A of the *Fair Work Act*, such changes should align as closely as possible with the common law definition of casual employment clarified by the High Court in *WorkPac Pty Ltd v Rossato* [2021] HCA 23 - which itself can be capable of reasonably certain operation.

Post contractual conduct

5. To the extent that the Federal Government wishes to introduce reforms regarding the characterisation of casual employment that consider post contractual conduct, such an approach is opposed by BNSW and ABI as it is not only contrary to the established common law principles of contractual interpretation, but would also allow for the legal character of a relationship between two parties to be affected by the 'unilateral' conduct of one party unbeknown to the other.

6. Such an approach risks leaving a significant number of employers and employees in a precarious position of uncertainty as to their rights and obligations. It also causes significant confusion regarding the specific point of time that the employee's character as a casual employee was changed to permanency.

Double-dipping

7. Should the Federal Government introduce reforms removing s15A of the Fair Work Act, then it is critical that:

   (a) Even if employees are misclassified, such employees should not be able to "double-dip" by receiving both casual loadings (which compensate for the loss of permanent entitlements to leave, redundancy, notice of termination, etc) and then being able to make a claim for these same entitlements. For this reason, the existing method of offsetting any permanent employment liabilities against casual loadings paid (pursuant to section 545A of the *Fair Work Act 2009*) must be maintained. It would be inconsistent with Australia's long held adherence to the concept of a "fair go" for employees to be paid a casual loading in lieu of certain entitlements but to later able to sue for those very entitlements without the payment of the casual loading being taken into account in determining an employer's liability.

   (b) Employees should not be denied the right to freely choose to contract as casual employees.

   (c) Employees who reject offers of casual conversion should be barred from pursuing claims for misclassification as a "casual" employee and any association claims for monetary relief on the basis that their conduct prevented the employer from treating the relationship as a permanent one.

## 2. "SAME JOB, SAME PAY"

8. ABI and BNSW oppose the implementation of a *"same job, same pay"* policy for labour hire.

9. Labour hire provides an alternative source of labour that assists business with maintaining productivity across multiple industries, particularly when demand for services fluctuates markedly. More recently, labour hire has become a critical resource in supplementing employer workforces as employers have found it more difficult to recruit and retain labour.

10. Given the labour shortages currently being experienced by multiple industries, introducing substantial regulation that makes it more difficult for labour hire operators to run their businesses is likely to be inimical to the smooth and productive running of many businesses in Australia.

11. To the extent that the Government proceeds to regulate in this space, ABI and BNSW urge that the following be taken into consideration:

    (a) Firstly, the obligation to match a host employer's pay should be limited to matching the applicable wage rate specified for the relevant work in the host employer's industrial instrument. It would not be possible to require actual rates paid to employees to be identified and matched because in many cases the labour hire provider may not know what is actually being paid to employees. Moreover, a host employer may remunerate a number of employees performing the same work at different levels based on discretionary and performance-based considerations. How would a labour hire provider determine which discretionary pay point it should match if discretionary pay rates were utilised as the basis for matching "same pay". Indeed, it would likely be unfair to a number of host employees if they received a rate of pay lower than a labour hire employee, merely because an attempt was made by the labour hire provider to match a labour hire employee's pay with another arbitrarily selected employee within the host employer. For this reason, the only practical way to remunerate labour hire employees under a "same job, same pay" commitment would be to match the relevant rate of pay prescribed by the host employer's industrial instrument (or relevant award) for the relevant work.

    (b) Secondly, the benefits provided should be limited to pay and not extended to other conditions. This is because, in many cases, a labour hire provider may not be able to provide the non-monetary conditions or benefits offered by a host employer. There could be many reasons why a host employer has ability to offer non-monetary benefits that a labour hire provider would find difficult or impossible to match. These reasons could include:

        (i) that the size of the labour hire provider is materially different to that of the host employer so it cannot access the same benefits for employees at the same cost;

        (ii) the host employer may have other businesses or provide other services within its corporate group that enable the host to offer free or subsidised services or benefits the labour hire provider does not have access to;

        (iii) the host employer can justify the provision of certain benefits by reason of the fact that it expects its permanent workers to remain

working for host at the host's site for an ongoing or indefinite period of time; the same does not often apply to labour hire workers; and

(iv) the host controls the site it operates and accordingly can provide benefits or conditions specific to the site (eg. canteens, gym facilities, etc.) that a labour hire provider may not contractually be able to secure.

(c) Thirdly, care needs to be taken to ensure that legitimate forms of contracting are not subject to unnecessary red tape associated with labour hire regulation. By way of example, many businesses engage tradespersons to conduct work who are genuinely and legitimately viewed by society as independent contractors. If the definition of labour hire is cast too widely, there is a danger that these legitimate forms of contracting could be burdened by unnecessary regulation increases the cost to service host employer sites with limited accompanying policy benefit.

## 3. CRIMINALISATION OF WAGE THEFT

12. ABI and BNSW do not oppose the criminalisation of wage theft in circumstances where employers have deliberately and systematically underpaid employees.

13. Given this proposal involves the application of serious criminal sanctions to the workplace, significant care must be taken to ensure that an appropriate threshold is adopted to warrant the finding of a criminal offence.

14. Moreover, given that the policy is intended to criminalise wage "theft", its breadth must not capture conduct that cannot be considered "theft". This means that the elements of the crime should reflect those that exist for the crime of larceny - which itself involves theft.

15. This means that for wage theft to be criminally prosecuted, any reforms implemented should require that the employer to have a subjective intention to permanently deprive an employee of their wages. This would be in accordance with the criminal elements of larceny.

16. Inadvertent and non-deliberate underpayment should not be treated in the same manner as deliberate underpayment and would not ordinarily constitute what society would consider to be 'criminal conduct'.

17. It must be also be acknowledged that the safety net of industrial instruments applicable under the *Fair Work Act 2009* are complicated and often subject to disputation. Thousands of disputes are filed in the Fair Work Commission and in Courts each year regarding competing interpretations of provisions in industrial instruments.

18. The Government should ensure that any underpayment arising from mistaken (but genuinely held) beliefs as to how an industrial instrument operates does not result in employers being subjected to criminal prosecutions and sanctions.

## 4-6: EXTEND THE POWERS OF THE FAIR WORK COMMISSION TO INCLUDE 'EMPLOYEE-LIKE' FORMS OF WORK"

19. There is significant danger associated with attempting to define "*employee-like work*". If a definition is cast that is too broad, many legitimate forms of independent contracting

(including tradespeople utilised in domestic settings, contractors with specialist skill sets and sole traders that have traditionally operated with a level of financial and operational independence) could unwittingly be caught by this new regulatory framework.

20. If the definition adopted has the unnecessary consequence of roping in legitimate forms of contracting, there could be a significant cost impost on the broader economy for little accompanying policy benefit.

21. ABI and BNSW have given consideration as to whether a single definition could be adopted to accurately identify 'employee-like work' in all industries. Such a task appears next to impossible.

22. The better approach would be for the Federal Government to focus on those limited industries where it considers there has been exploitation or improper treatment of 'employee-like' workers and focus on regulating for those industries specifically. This would allow the Government the ability to regulate more specifically and accurately for the narrow number of industries where systemic issues have arisen and diminishes the prospect of damage to the broader economy.

## 7. STRONGER PROTECTIONS AGAINST DISCRIMINATION, ADVERSE ACTION AND HARASSMENT

23. Australia boasts a diverse range of anti-discrimination and freedom of association protections that span across all jurisdictions.

24. Presently, discrimination is prohibited under:

    (a) Anti-discrimination laws in each State and Territory;

    (b) Federal anti-discrimination laws;

    (c) Work health and safety laws;

    (d) Workers compensation laws; and

    (e) The Fair Work Act.

25. Employees have the ability to pursue claims in multiple jurisdictions and presently have the ability to choose between either 'costs jurisdictions' or jurisdictions that do not require payment of legal costs by the unsuccessful party.

26. The vast majority of the laws referenced above have the ability to provide significant relief including:

    (a) capped or uncapped compensation (again the employee can elect to choose their preferred jurisdiction in this regard);

    (b) the ability to obtain reinstatement orders;

    (c) the ability to obtain injunctions prohibiting unlawful conduct; and/or

    (d) pecuniary penalties.

27. ABI and BNSW do not consider that the existing regime is in need of strengthening. If anything, a streamlining of the existing laws into a single jurisdiction would be of assistance to businesses. However, BNSW and ABI understand that a nationalisation and rationalisation of the existing laws is not being proposed by the Government.

28. Having regard to the above, there does not appear to be any present need to reform this area and BNSW and ABI are unable to provide further comments on possible

reforms until the Government's proposed reforms are made clear.

## 8. NATIONAL LABOUR HIRE LICENCING

29. The labour hire industry is a small, yet integral part of the Australian labour market addressing short-term staffing needs, supporting surge demands, providing short-term specialised services and creating pathways to permanent work for many Australians.

30. ABI and Business NSW appreciate that the Federal Government is committed to establishing a national regulatory regime for labour hire.

31. Labour-hire licensing requirements currently exist in Victoria, Queensland, South Australia and the ACT. WA has also provided in principle support to introduce its own scheme. These existing schemes all vary in terms of approach, coverage, application, timing and reporting. As the Migrant Worker Taskforce report recognised, "*the schemes have high fees, extensive application processes for labour hire operations and ongoing obligations through periodic reporting and compliance with license conditions*".

32. Both the current inconsistent and disjointed approach to labour hire licensing across States and Territories and the significant regulatory burden they impose is the single largest barrier to labour mobility and job creation in the labour hire industry.

33. Conversely, a properly executed single national regulatory approach for labour hire has the potential to enhance the ability of staffing firms to support and enhance workforce mobility, support business to grow and create jobs. To achieve this however, a far more sophisticated understanding and approach from policy makers and governments to the licensing of labour hire needs to be adopted.

34. A national labour hire licensing scheme must:

    (a) Genuinely operate nationally and cover the field. The maintenance of the current State and Territory schemes and simply "filling the gaps" with a national scheme is an unworkable solution which will only result in further confusion, excessive costs and further over regulation of the labour hire industry.

    (b) Be confined to licensing to actual 'labour hire' providers (e.g. the provision of workers by a labour hire agency to a host organisation to fill short-term vacancies or on a longer-term basis, to carry out seasonal work, to staff a particular business function).

    (c) Be targeted at those operating and supplying labour in high-risk industries where workers are at a greater risk of exploitation due to the low-skilled, labour-intensive nature of the work that they are engaged to undertake – such as horticulture, meat processing, cleaning, security and trolley collection. Such a scheme should have the capacity for it to be expanded to cover other industry sectors, or to be contracted in response to changing (improved) practices in the regulated industries.

    (d) Be administered by the Fair Work Ombudsman, including registration and compliance.

35. Finally, should a single national regulatory system not be achieved, ABI and Business NSW recommend the Federal Government work with State and Territory governments to enable Automatic Mutual Recognition across State and Territory labour hire licensing regimes as a matter of priority.

## 9. ADDRESS THE IMPACT OF THE SMALL BUSINESS REDUNDANCY EXEMPTION IN WINDING UP SCENARIOS TO SUPPORT EQUITABLE OUTCOMES FOR CLAIMANTS UNDER THE FAIR ENTITLEMENTS GUARANTEE (FEG)

36. BNSW and ABI do not oppose minor changes being made to the small business redundancy exemption within the *Fair Entitlements Guarantee Act 2012* to ensure that employees of a company with more than 15 employees can continue to receive statutory redundancy payments if:

    (a) they elect to remain with the company whilst it goes into administration; and

    (b) are ultimately made redundant after the company is liquidated.

37. The reforms should be entirely aimed at amending the way the Fair Entitlements Guarantee operates with respect to this specific class of employees and should not extend to all other insolvency scenarios. The reforms should accordingly be confined to the *Fair Entitlements Guarantee Act 2012.*

38. Appropriate safeguards to ensure that the changes do not adversely impact legitimate small businesses must be implemented. Specifically, it is important that any changes do not hinder genuine business attempts to restructure in order to save the business from insolvency.

## 10a. THE FAIR WORK COMMISSION ISSUING MODEL TERMS FOR ENTERPRISE AGREEMENTS

39. BNSW and ABI support providing the FWC with the power to issue model flexibility, consultation and dispute resolution terms for enterprise agreements, on the condition that:

    (a) the FWC is not provided with additional powers to issue other model terms for enterprise agreements that are not model flexibility, consultation and dispute resolution terms;

    (b) in their preparation, the FWC is required to consider a list of factors that closely resembles the modern awards objective in section 134 of the *Fair Work Act 2009*, noting that these factors guided the design of the modern award model terms, which would not apply to the design of the model terms for enterprise agreement unless stipulated in the legislation; and

    (c) peak councils and industry bodies should be involved in assisting the FWC to develop these model terms for enterprise agreements.

## 10b. PRESERVE ARRANGEMENTS FOR EMPLOYERS ALREADY USING SINGLE INTEREST AGREEMENTS

40. BNSW and ABI do not oppose introducing further transitional arrangements to the single interest bargaining stream.

## 11. REPEAL DEMERGER FROM REGISTERED ORGANISATIONS AMALGAMATIONS PROVISIONS

41. BNSW and ABI do not express a view in relation to this reform**.**

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