29th September 2023

By Email: eec.sen@aph.gov.au

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Department of Employment and Workplace Relations,

Re: Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

We are pleased to provide a submission in response to the government's proposed Fair Work Legislation Amendment (Closing Loopholes) Bill 2023.

ABOUT US

The Restaurant and Catering Industry Association (R&CA) is a national industry body representing the interests of over 57,000 restaurants, cafes, and catering businesses in Australia. The café, restaurant & catering sector is vitally important to the national economy, generating over $37 billion in retail turnover each year as well as employing 450,000 people. Over 92 per cent of businesses in the café, restaurant and catering sector are generally small businesses, employing 19 people or less, including those with casual employment.

R&CA delivers tangible outcomes to small businesses within the hospitality industry by advocating for policy and regulatory reforms that reflect the impact to the sector's operating environment.

R&CA is committed to ensuring the industry is recognised as one of excellence, professionalism, and sustainability.

This includes advocating the broader social and economic contribution of the sector to industry and government stakeholders, as well as highlighting the value of the hospitality experience to the public.

OUR RESPONSE

The R&CA will focus on the following:

- Casual Employment
- Wage Theft
- Union Right of Entry
- Labour Hire Arrangements
- 'Employee-like Workers'

CASUAL EMPLOYMENT

Casual employment provides broader employment opportunities for both employees and employers alike. Casual employment arrangements benefit a range of lifestyles and circumstances that require the flexibility to accept work, or be paid a higher rate for only limited times that an employee may be available.

Flexible arrangements often benefit those who may be early entrants into employment such as students with limited time to work, and those who may seek to expand on their employment options, such as pursuing a different career path. However, with the increase in cost of living and associated financial pressures, it is common for casual employment to be specifically sought in addition to primary employment for the purpose of 'making ends meet'.

R&CA has concerns that both employees and employers will be confused with the mechanics of the legislation. For example, small businesses, who will remain exempt from the requirement to offer casual conversion to their employees after 12 months; would then be faced with the possibility of an employee, who believes they no longer meet the definition of a casual employee, to seek a conversion to a form of 'permanent' employment that is not 'permanently casual'.

However, as summarized by the Fair Work Ombudsman (FWO), it can be generally understood that no firm advance commitment comprises of 4 factors that determine whether an employer's offer doesn't include a firm advance commitment. They are:

- whether the employer can choose to offer the employee work and it's the employee's choice to work or not
- whether the employee will be offered work when the business needs them to work
- if the employment is described as casual
- if the employee is paid a casual loading (a higher rate for being a casual employee), or a specific pay rate for casual employees.

The proposed changes reflects the 'regular pattern of work' element by which the employee would have the sufficiency to understand, and seek to transfer to a permanent arrangement.

While the sequence for conversion from casual to a permanent arrangement exist regardless if the initiation of the conversion is from the employer or the employee, the onus is entirely on the employer to provide any reason for a refusal.

If a small business owner was to initiate the casual conversion, and the employee was to reject the offer, the employer will not know the reason.

The ‘real substance, practical reality and true nature of the employment relationship’ by way of offer, consideration, and outcome; is established by the conduct of the casual employee refusing the permanent employment, and therefore, is likely to be regarded as a casual from there onwards.

Casual employees are not required to be provided a notice of termination, and if there is the acceptance by way of conduct that the employee is a casual employee, there would be the affirmation of an absence of a firm advance commitment to continuing and indefinite work.

Now, at this stage, the employee is a casual employee of a small business who is likely to be working on a regular and systematic basis, and has a reasonable expectation of continued employment, is protected from unfair dismissal. Under the general protections, the employer may potentially be subject to a claim in the event that there may be a change in the employment of the casual employee.

It also establishes the timeline for a ‘revolving door’ of those who may be permanently casual. The Closing Loopholes Bill further expands on the disparity for employers who are seeking to successfully operate a small business and may need to hire employees who are casual for what is now a clear timeline – less than 12 months.

In turn, this Bill clearly would have not been potent in providing an incentive to employers, rather, defining the risks in hiring casual staff from an ‘indefinite’ time period, to now, one that has a defined timeline.

Recommendation(s)

R&CA recommends that if an employee is empowered to approach an employer to seek a permanent employment, the ‘regular pattern of work’ definition needs to be clear and unambiguous. For instance, where there is the availability of an employee, and this leads to any appearance of a ‘pattern’, it may be outside of the scope of the intention of the Bill as its reliance on a ‘practical reality’ may lead to a contentious interpretation.

Further, R&CA provide for consideration the requirement for employees to provide a reason if they do not accept an offer for conversion, as this fundamental position exists only with the onus on an employer, and arguably, creates ‘the true nature of the employment relationship’.

DELEGATES RIGHTS

The proposal where a modern award must include a delegates rights term for workplace delegates inserts into modern awards the risks of individuals who are unlikely to be legally qualified to make statements that may negatively impact on a place of employment. The Fair Work Ombudsman already have in place,

suitably qualified staff and infrastructure to assist with employees enquiries as well as work related matters.

The burden of proof to establish what is deemed ‘reasonable’ conduct in dealing with the workplace delegate lies entirely on the employer. It suggests that the default position for conduct for a workplace delegate is reasonable, yet there is the failure to provide the parameters of reasonable conduct for workplace delegates. This is different from the activities of workplace delegates as without guidelines of reasonable conduct on behalf of a workplace delegate, an employer remains with an onus and burden of proof of what may be reasonable conduct.

Recommendation(s)

(1) R&CA recommend that the onus of proof be reversed and onto the workplace delegate(s);
(2) The term ‘workplace delegate’ be expressed as ‘union representative’;
(3) The reasonable conduct of a ‘union representative’ be established as part of the award; and
(4) Unions be responsible for compensation when their ‘union representatives’ act unreasonably and create a negative financial impact on a business.

RIGHT OF ENTRY

The R&CA is strongly opposed to the allowance for unions to apply to the Fair Work Commission (FWC) to remove the requirement to provide 24 hours’ notice to inspect employee wage records when there is a reasonable suspicion of wage underpayment.

The minimum 24 hours notice is a sufficient notice period for union entry. Union delegates are currently granted right of entry by the FWC when there is a reasonable suspicion of the concealment, destruction or tampering of evidence. If such a reasonable suspicion does not exist, there is no reason for union delegates to gain access to payment records.

The Fair Work Commission has the qualifications, expertise and authority to investigate wage underpayment and therefore be the sole arbitrator in investigating such matters.

WAGE THEFT

The R&CA supports criminal penalties for the conduct of employers who intentionally pay employees any amount inconsistent with entitlements. R&CA accepts that inconsistencies may occur, however, the intention to deliberately depart from the requirements and protections of employment should be met with the possibility of being found guilty of a criminal offence.

To ensure the legislation is fit for purpose, there must be assurance that the Fair Work Ombudsman is equipped to deliver essential communications surrounding these new requirements.

EMPLOYEE-LIKE WORKERS

The introduction of on-demand delivery platforms has benefited a broad range of Australian industries, by providing innovative ways of connecting clients and service providers through a model that is low-cost, efficient, and accessible. On-demand delivery platforms allow our members to reach a broader audience and increase revenue without the need for significant investment in additional infrastructure or employees.

R&CA research demonstrates that on-demand delivery has played an increased role in driving incremental growth for businesses, particularly throughout the COVID period and beyond. The use of on-demand food delivery services continues to be a crucial part of the survival of many of our members. Through its many partnerships and memberships, R&CA has visibility of the commercials of both on-demand delivery service providers and various hospitality businesses and can attest that across the board, margins are already low.

R&CA strongly believes any regulation should continue to promote healthy market competition for the benefit of small business and consumers. A dynamic and competitive market means restaurants have a greater degree of choice, with platforms currently competing through competitive rates, special promotions, marketing and more.

Recommendation(s)

R&CA understands major on-demand delivery platforms are supportive of reform and the Government's ambition to set minimum standards for workers, provided this is done in a way that is fit-for-purpose for the gig-economy and provides certainty and clarity for all industry participants.

R&CA has long advocated for changes to the gig economy to preserve the flexibility workers clearly want and for any new measures to adequately protect the industry, particularly small businesses. R&CA also believes any changes to this sector must be simple and national in scope. A patchwork of complicated regulations would be difficult for our industry to navigate and would create significant confusion and burden for small business owners. It's essential that the right details and focus are included in legislation to safeguard the industry and its future.

1. **Broad scope a risk for the industry**

R&CA understands the 'Closing Loopholes' Bill proposes to define gig economy workers as 'employee-like workers', with broad powers for the Fair Work Commission to set minimum standards for workers. R&CA is concerned the current broad scope could potentially have wide-ranging and significant

consequences for many of our members within the restaurant and catering industry.

R&CA's primary issue is that the broad and complex legislation could potentially have flow-on impacts for business and could in fact capture some business owners that use their own digital recruitment. Many restaurant businesses engage workers via platforms, however, some businesses engage their own drivers, who may be contractors or employees. It is essential that regulation is clear and simple to ensure restaurants are aware of their obligations and there is no unnecessary operational or administrative (and thus financial) burden on businesses already operating in a difficult economic climate.

The 2021-22 Industry Benchmarking Report by R&CA found that hospitality businesses are heavily reliant on delivery platforms as only 3.6% of respondents have the capacity, training ability and resources to retain an internal delivery function by a staff member. Self-delivery by employees or staff remains a miniscule minority due to the volatile fluctuations and unpredictability of consumer demands for delivery and takeaway. This highlights and reinforces the critical function of on-demand delivery platforms or contractors and the flexibility this provides businesses for takeaway options on an "as requested" basis. Therefore, contractors and delivery platforms remain the dominant avenue for restaurants to expand their offerings to consumers, and any unexpected changes affecting these providers will have unintended consequences on restaurants and cafes within the hospitality industry.

R&CA believes there would be numerous logistical challenges that would come with the introduction of standards, particularly as workers accept orders from numerous platforms at once, complete tasks on an ad-hoc basis and often use this type of work as supplementary income. This is why R&CA strongly encourages any standard to be set in consultation with the industry to ensure the right balance is struck and there are mutual benefits for both workers and the industry at large.

2. **Potential to stifle the industry**

The R&CA is highly concerned that gig economy reform could have the possibility to stifle our industry and the 24-hour digital economy in Australia because of the costs that would be incurred. Without proper consideration of the economic intricacies, it is very plausible regulation could have the potential to trigger a vicious cycle that leads to fewer orders by customers, fewer restaurants engaging third-party delivery services or even operating in general and ultimately less work for workers.

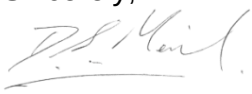
Needless to say that price increases for customers, particularly given the current cost-of-living crisis, would have an immediate impact on spending on takeaway food. We are already seeing customers pulling back on discretionary spending and as such, any additional motivation to do so would be disastrous for the restaurant industry. If costs rise significantly to 'price consumers out' of using these on-demand platforms, this will have a flow on impact to hospitality vendors, particularly small businesses, as the gig economy is largely interconnected with the foodservice economy.

R&CA urges the Government to take into consideration the current economic climate, delicate economic ecosystem of hospitality, and the already cautious spending habits of customers, alongside the inability for restaurants to take on increased costs.

Safeguarding compliance rather than punitive enforcement should be at the forefront of any industrial relations reform. Given the complexities of the Bill proposals, and the overarching context of sweeping changes to the Industrial Relations infrastructure, any proposed changes should be simple, fair and maintain business confidence.

We thank the Department of Employment and Workplace Relations for undertaking this consultation and considering feedback from our organisation. Should you have any further queries in relation to our submission, please contact Chris Alchian on ir@rca.asn.au thank you.

Sincerely,



Suresh Manickam
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Restaurant and Catering Australia