Clubs Australia Submission
Closing Loopholes Bill 2023

Clubs Australia welcomes the opportunity to provide feedback on the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (the Bill).

Clubs Australia represents over 6,000 licensed, not-for-profit clubs which directly employ more than 140,000 people. All clubs are owned by their members and take various forms and sizes, including sporting, returned service and bowling clubs.

Clubs have a diverse workforce which includes hospitality workers such as bar attendants and chefs, as well as those working in areas ancillary to the hospitality operations, such as greenkeepers, leisure attendants, fitness instructors and child care workers.

The Registered and Licensed Clubs Award covers most club employees and many clubs operate under their own enterprise bargaining agreement (EBA).

Clubs Australia has also been consulted by the Department of Employment and Workplace Relations on a number of the proposed amendments in the Bill. Clubs Australia is grateful for the Government's consultative approach and we welcome further opportunities to work with Government on reforms.

RECOMMENDATIONS

Clubs Australia:

- **Recommends retaining the definition of 'casual' under the Fair Work Act (the Act) to create certainty for employers or, if this position is not accepted, modifying the indicia that apply in assessing an advance commitment to continuing and indefinite work, as follows:**
  - **Account for the content in the employment contract;**
  - **Do not consider whether there is a regular pattern of work if the employee chooses to work a regular pattern; and**
  - **Do not consider whether an employee will have continuing work, or whether there are permanent employees performing the same work.**

- **Recommends retaining the provisions in the Act for casual conversion, however if employees acquire further rights to initiate a casual conversion:**
  - **ensure employers can refute claims for genuine business reasons, and**
  - **remove the Fair Work Commission's ability to arbitrate.**

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- **Supports criminalising wage theft only where the employer intentionally engages in conduct. However, we are concerned about criminalising late payments outside of an employer's control and the fact the Bill does not override State and Territory laws relating to underpayments.**

- **Recommends retaining the existing provisions in the Act concerning union right of entry and not expanding right of entry for suspected underpayments.**

- **Recommends against implementing the proposed workplace delegate rights.**

- **Supports exempting small businesses in certain parts of the Bill to ensure they are not unfairly disadvantaged.**

- **Recommends further consideration be given to the administrative and compliance costs of the proposed amendments to businesses.**

MEANING OF CASUAL EMPLOYMENT

Clubs across Australia engage casual employees as a key stream of workers. There are mutual benefits to this arrangement, as casual employees have access to flexible working hours, and clubs have access to workers they can roster on a demand basis.

In the High Court decision on the matter *WorkPac Pty Ltd v Rossato [2021] HCA 23*, findings were handed down in relation to the definition of a casual employee, namely:

- It is entirely within the nature of casual employment to have a reasonable expectation of continuing employment on a regular and systematic basis.
- The true nature of the employment relationship is to be found only in the contract (where it is wholly in writing).

In line with these findings, if a written contract states there is no firm advance commitment for ongoing employment, the employment relationship is casual.

The High Court decision was preceded by a prolonged period of uncertainty. While the decision, coupled with subsequent legislation, created certainty, the Bill would modify the prevailing position once more and require further changes to current practices.

The Bill would result in clubs needing to consider whether:

- there is an ability of the employer to elect to offer work or an inability of the employee to elect to accept or reject work;
- having regard to the nature of the employer's enterprise, it is reasonably likely that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee;

- there are full-time employees or part-time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee;
- there is a regular pattern of work for the employee.

The proposed amendment to the definition of 'casual' under the Bill and the introduction of a multi-factorial test creates uncertainty for clubs in their capacity as an employer. Clubs would be required to look beyond the written terms of the contract to determine whether an employee is an actual 'casual employee'.

Casuals will frequently have a regular pattern of work for reasons outside the employer's control. For instance, a student may work three days per week during the semester on a casual basis and scale up or down their hours during exams and holiday periods. Under the amendments in the Bill, the employer may be required to make the employee permanent, which may deter employers from agreeing to a regular pattern of work, even where the employee chooses this arrangement.

Clubs Australia notes that, if the meaning of casual employee indeed changes, further weight should be given to an employee's choice to be casual or work regular hours. Such an approach would provide a fairer set of factors which better reflects the actual relationship and engagements between an employer and a casual employee. For instance, where an employee chooses to be casual and work regular hours, certain factors should be less applicable, such as a comparison with other permanent employees or the availability of continuing work.

Clubs Australia recommends retaining the definition of 'casual' under the Fair Work Act to create certainty for employers or, if this position is not accepted, modifying the indicia that apply in assessing an advance commitment to continuing and indefinite work, as follows:

- **Account for the content in the employment contract;**
- **Do not consider whether there is a regular pattern of work if the employee chooses to work a regular pattern; and**
- **Do not consider whether an employee will have continuing work, or whether there are permanent employees performing the same work.**

RIGHT TO INITIATE CASUAL CONVERSION

Clubs Australia supports employers and employees having dialogue about their employment relationship and opportunities for career progression. However, Clubs Australia is concerned about the proposed casual conversion process in the Bill.

Clubs Australia believes that the current process under the Act for casual conversion is appropriate. If casual employees are given the ability to request conversion if they believe they no longer meet the statutory definition of "casual employee" as proposed in the Bill, employers should be able to refuse the request for conversion on reasonable business grounds.

As an example, a club located in a seasonal tourism area, such as the NSW South Coast, will require a different level of staffing throughout the year due to the fluctuation of demand from consumers. Clubs Australia is concerned that clubs may be unable to manage their operations efficiently and effectively if they are required to change the employment status of various casuals to part-time/full-time where the proposed casual conversion in the Bill would require them to.

Clubs Australia recommends retaining the provisions in the Act for casual conversion, however if employees acquire further rights to initiate a casual conversion:

- **ensure employers can refute claims for genuine business reasons, and**
- **remove the Fair Work Commission's ability to arbitrate.**

CRIMINALISING WAGE THEFT

Clubs Australia welcomes the removal of "recklessness" being included in the proposed criminal offence for wage underpayment. Clubs Australia supports that for an employer to be held criminally liable, they must intentionally engage in conduct which they intend to result in a failure to pay the required amount.

The Bill also proposes that where an employer identifies a genuine or inadvertent mistake that has led to an underpayment and reports it to the relevant authority, pathways will be provided to the employer to take reasonable steps to repay the amount of the underpayment. Clubs Australia supports that, in these circumstances, employers will not be unfairly prosecuted and criminally liable for reckless, accidental, or mistaken underpayments.

However, businesses can be subjected to significant penalties for a one-off accidental underpayments under the Bill. Part of the offence and civil provisions define an underpayment as conduct that "results in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment."

This may have severe consequences for businesses. There are genuine reasons that may lead to payments of wages being made after they are due. There are other reasons that may even be unsatisfactory, however, not worthy of attracting criminal penalties.

For example, the day that the required amount is due for payment may be determined by the relevant industrial instrument (e.g. an enterprise agreement). This can easily be breached due to banking error or if a payroll system is down, or if an employer is facing short-term cash liquidity issues. This type of conduct should not be criminalised.

In addition, many employers rely on what are known as “annualised salary arrangements”. These arrangements involve the payment of wages above the minimum amounts in a modern award to such an extent that other award obligations, such as requirements to pay overtime, are considered to be “set off”. It is possible that these arrangements create criminal liability for the employer. If the employer knows that the award requires the employee to be paid fortnightly and deliberately does not do so pursuant to the agreement with the employee, the offence may apply.

The Bill does not override State and Territory laws. Employers already face severe challenges managing complex workplace obligations to avoid underpayments – the creation of duelling offences in different jurisdictions for largely the same conduct creates needlessly burdensome complications.

Clubs Australia supports criminalising wage theft only where the employer intentionally engages in conduct. However, we are concerned about criminalising late payments outside of an employer’s control and the fact the Bill does not override State and Territory laws relating to underpayments.

UNION RIGHT OF ENTRY

Clubs Australia is concerned with the proposed amendment in the Bill to enable union representatives to enter an employee’s workplace without notice.

The existing provisions in the Act allow unions to access workplaces to investigate suspected breaches of workplace laws without notice, where such an act is endorsed by the Fair Work Commission. Clubs Australia is unaware of any case and/or reason which would justify any change the current provisions.

Allowing union representatives to access sensitive information without notice has the potential to interfere with business and operations. There are also significant privacy risks given the sensitive information employers are required to collect on employees.

This is another extension of power to unions, granting them the ability to enter worksites without notice, on permission of the Fair Work Commission, whenever there exist concerns that an underpayment has occurred. A permit holder must have a “reasonable suspicion” that contravention has occurred or is occurring. This phrase itself will be the cause of debate.

Currently, the only time the Fair Work Commission can provide entry without notice was in the instances where the provision of notice prior to entry could potentially lead to the destruction, concealment or alteration of evidence - so in the case of a suspected underpayment, it is unclear why an entry without notice be required in such a case if there is no risk that providing notice would lead to the destruction, concealment or alteration of evidence.

Clubs Australia retaining the existing provisions in the Act concerning union right of entry and not expanding right of entry for suspected underpayments.

WORKPLACE DELEGATES RIGHTS

Clubs Australia supports employees having access to resources and support through their union where they choose to be affiliated with one. However, the rights of unions need to be proportionate to ensure employees who choose not to be part of the union are not unfairly impacted.

The Bill does not propose to introduce any new criteria which would limit the Fair Work Commission's design of the new workplace rights in modern awards and industrial instruments. Accordingly, the Fair Work Commission's discretion would be essentially unfettered. This would deprive the Parliament of any real control over what new rights to which union delegates become entitled. The Bill therefore provides a protection against any unreasonable hinderance, obstruction, or prevention of delegate rights, but no say in what those rights are – which is entirely left to the Fair Work Commission.

The Bill does not propose any restrictions on how many union members in a workplace can be delegates and therefore become entitled to the additional rights. This matter is determined unilaterally by the union. This means that, theoretically, a union could allow for every single union member in a workplace to be a delegate and therefore those delegates would be entitled to obtain all the rights provided by the Bill.

Similarly, unions can unilaterally determine the amount of time required for training of delegates. This would subject the right to paid time off for training at the unions' discretion.

The above could have a seriously detrimental impact on businesses. It could require employers to pay large numbers of employees, as determined by the relevant union, to complete training over long periods, as determined by the relevant union. The only recourse for an employer would be to argue that the extent of paid time off for training was not "reasonable", leading to a workplace dispute against an organised trade union, as well potentially face general protections claims and associated penalties.

Clubs Australia is concerned about proposed obligations for employers to provide '*reasonable access to paid time, during working hours, for the purposes of related training'* for workplace delegates. Employers are required to balance competing business priorities, and there must be appropriate regard for employers to have discretion to approve an employee to undertake workplace delegate training. If unions are determining the amount of time required for training and there is not a clear definition of 'reasonable leave', this obligation will impact businesses unfairly.

Clubs Australia is also concerned about the proposed powers which would allow workplace delegates to interact with, and represent, potential eligible members.

Employees have a choice to join their union, and it would be inappropriate for a workplace delegate to perform roles for those who have chosen not to join, such as being involved in a dispute with their employer. Employee preferences should be protected to ensure that workplace delegates do not involve themselves in issues, with or without an employee's consent.

Clubs Australia also notes where employers do not have union representatives in the workplace, it would appear there is no justification for union delegate rights in their EBA.

Clubs Australia does not support the proposed workplace delegate rights.

OTHER MATTERS

Small Businesses Exemptions

Small clubs are often run by volunteer directors, with many only open one or two days per week in line with activities such as weekend sports. Small clubs are also generally more reliant on membership subscriptions as a form of revenue because they conduct limited commercial activities. Small clubs are therefore sensitive to increases in the cost of doing business, as they are not practically able to scale up their services.

Clubs Australia supports exempting small businesses so they are not disproportionately impacted. This extends to measures including the 'Voluntary Small Business Wage Compliance Code' to provide assurance to small business employers they will not be referred for criminal prosecution in relation to a failure to pay an amount to an employee.

Clubs Australia supports exempting small businesses in certain parts of the Bill to ensure they are not unfairly disadvantaged.

Compliance and Administrative Costs

Clubs Australia notes that many of these amendments will require changes in business operations and differing levels of administrative burden.

For example, a club may have to undertake different tests for each employee to determine their employment status. This has the potential to become expensive and cause significant administrative burden. The Government must consider how they support clubs in the transitional period through resources and/or financial considerations.

Clubs Australia recommends that the Government consider how they effectively support employer in the transition to these new requirements.

In conclusion, Clubs Australia appreciates the opportunity to provide a submission on the Bill. Should you wish to discuss this submission further, please contact Joanne Ede, Executive Manager of Workplace Relations, at jede@clubsaustralia.com.au.