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Submission to the Education and Employment Legislation Committee for Inquiry from Master Grocers Australia

Fair Work Amendment

(Supporting Australia's Jobs and Economic Recovery)

Bill 2020

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Submission to the Senate Education and Employment legislation committee for Inquiry by Master Grocers Australia Ltd

1. Master Grocers Australia Ltd (MGA/TMA**)** is an employer association registered with the Fair Work Commission of Australia and welcomes the opportunity to comment on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (the Bill). The Bill "aims to improve the operation and usability of the national industrial relations system"[1]that hopefully will result from amendments to the Fair Work Act 2010. The Bill has been debated in the House of Representatives, it has moved on to the Senate and the provisions of the Bill are now the subject of a Senate Inquiry and comments have been called for in respect of the contents. MGA/TMA welcomes the opportunity to respond on the contents of the Bill.

About Master Grocers Australia Ltd

2. MGA/TMA is a national employer industry association representing independent grocery, liquor, and other retail outlets including timber and hardware, in all States and Territories. These businesses range in size from small, to medium and large, and make a significant contribution to the retail industry, accounting for approximately $15 billion in retail sales.

3. There are 2,700 branded independent grocery stores, trading under brand names such as: Supa IGA, IGA, IGA Xpress, Drakes, Farmer Jacks, FoodWorks, Foodland, Friendly Grocers and SPAR, with a further approximately 1,300 independent supermarkets trading under their own local brand names. In addition, there are numerous independent liquor stores operating throughout Australia and trading under names such as: Cellarbrations, The Bottle O, Bottlemart, Duncans, and Local Liquor, which are either single or multi-store owners. Our members also own independent hardware stores that trade under brand names including Mitre 10, Home Timber and Hardware, Thrifty Link and True Value Hardware. These stores which collectively employ more than 120,000 staff are comparatively much smaller when juxtaposed against the large supermarket chains of Coles, Woolworths and Bunnings, which combined represent approximately 80 per cent of the retail supermarket, liquor and hardware industries.

4. MGA/TMA, as a member of the Council of Small Businesses Organisations of Australia (COSBOA), participated in the many employer/union discussions and forums that were held in 2020, at the initiative of the Attorney General, the Hon. Christian Porter M.P, to consider options for reforming the current Australian industrial relations system. MGA/TMA has had the opportunity to review the contents of the Bill and is pleased to present the attached comments on the Bill that has resulted from that initiative.

[1] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 Outline House of Representaitves – Outline pf amendments

Executive Summary

5. MGA/TMA is supportive of the proposed amendments to the Fair Work Act 2010 (as amended). This submission addresses the need for flexibility and simplification of the award system and emphasises that there are awards that may be categorised as "distressed awards". It is these awards that require change to stimulate the economy.

6. This submission will address issues such as the importance of legislating to define the role of a casual employee, to provide prospects for permanent employment. One of the important aspects of the reform measures is to provide more employment opportunities by removing the inhibiting aspects of part time employment, which would result in greater flexibility that would provide more hours of work. An employer should never have to hesitate providing a part time employee with additional hours of employment whereas they may have done so in the past. An amendment to the Act would change this hesitancy.

7. MGA/TMA is strongly of the view that the enterprise bargaining system requires reform. By considering the reform of the current "better off overall test" there will be greater opportunities for making agreements that are within the capacity of small businesses. The process for improvement to the making and approval of new enterprise agreements would be welcomed by MGA/TMA. Whilst MGA/TMA would never condone the deliberate and wilful avoidance of paying correct wages there is hesitancy in supporting the criminalising of wages underpayments.

MGA/TMA welcomes the opportunity to address these proposed reform measures in this submission.

Introduction

8. The need for changes to the industrial relations system became one of increased concern in early 2020, as the coronavirus pandemic (COVID19) spread to Australia. The country was already experiencing the impact of the early 2020 bushfires and the economic repercussions were causing wide-spread hardship for many Australians. The economic damage was then exacerbated even further by the subsequent effects of COVID19.

9. The effects of the pandemic had serious consequences for many businesses. Many employers found themselves struggling to provide work for their employees, many were forced into business closures or downsizing. Despite the efforts of Government to provide support to businesses the effects of COVID 19 continued its impact on the economy and revealed many flaws in our industrial relations system. The industrial awards have undergone modernisation over the past 10 years, but they contain many clauses that could be simplified and therefore make the system easier for employers, which might in turn provide more hours of work for employees as they become available. We need a system where each employee and employer is treated fairly and there are increased job opportunities to restore confidence and ensure economic growth. In introducing the amendment Bill that is currently being proposed to the Parliament, the Attorney General said, "These reforms address known

problems in the industrial relations system and will be crucial to securing Australia's economic recovery and safeguarding the workplace for future generations."[2] The reforms proposed by the Attorney General in the Bill are the result of extensive discussions held with employer associations, union representatives and other employment organisations. The discussions held over many months revealed problems that exist in several of the awards, which have been referred to as the, 'distressed awards', namely the General Retail Industry Award and the Hospitality Award. The need to make amendments to these awards has become apparent and also the need to make amendments to the Fair Work Act 2010.

10. The proposed reforms include, inter alia, a statutory definition of a casual employee which does not include any ongoing certainty of work and a legislative provision for conversion to a permanent role. Also proposed is the introduction of award flexibility that will provide greater access to additional hours of part time work, especially in awards that have been particularly adversely affected. Further, interest in the enterprise bargaining system has declined over the last few years due to the stringency of the "better off overall test" (BOOT) and it is hoped that reform of the enterprise bargaining system generally will inspire a greater interest in bargaining agreements that will ultimately lead to greater workplace flexibility and benefits for both employers and employees. There will also be provision for greater emphasis on compliance measures to avoid serious underpayment of wages problems, plus the introduction of a criminal offence for blatant, dishonest avoidance of wages entitlements.

Proposed reform measures in the Bill

Introduction

11. There are many reforms proposed in the Bill that will be addressed by MGA/TMA which would, if they are passed into law, have a significant effect on employment growth and economic recovery following the damaging effects of the last year. These reforms would be far reaching and would stimulate economic growth into the future. They include reforms to the use of casual labour, improving the operation of the award system by affording greater workplace flexibility, reforming the enterprise bargaining system, and penalising those who do not comply with our industrial laws.

12. MGA/TMA submits that unless these reform measures are implemented our economy will continue to stagnate. Reform of the industrial relations system is imperative. There is already strong opposition to the suggested reforms and if the opposition is successful then our prospects for recovery will result in further economic decline.

13. The proposed changes will not result in loss of wages, they will not cause further unemployment and employees will not suffer any deprivation. The intention of the reforms is to provide opportunities to progress. The awards and the law have become far too complex for the average employer to follow and rather than run the risk of making a mistake in interpreting the award an employer will simply

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[2] House of Representatives Wednesday 9th December 2020 Porter Christian MP

not employ more staff. The award and the legislation are far too complex for the average employer to understand when all they want is to pay their staff correctly and follow the rules. Therefore. there is a desperate need for the lawmakers to ensure this can happen.

Casual employment in Australia

14. Casual employment in Australia has become an accepted and entrenched part of our 'employment system' despite the fact that there is currently no definition of a 'casual employee' in the Fair Work Act (FWA). Casual employment is not a new concept, but exponentially it has clearly become an accepted and important form of employment which has grown in some industries, particularly the retail industry. In 2005 the Federal Government commissioned a report to consider casual employment in this country[3] and it was found then that there was a significant growth in the use casual labour in the Australian market.[4] It has continued to grow and in 2019 there were approximately 2.6 million casual employees in Australia with retail, accommodation and food services accounting for the major portion of those numbers.[5]

15. The Federal Government has highlighted major concerns with the way in which casual employment operates within our labour structure and strongly believes that this process needs to be addressed in order for the economy to return to ongoing prosperity. One of these concerns is the confusion and uncertainty that surrounds this major segment of the workforce There are three specific areas highlighted by the Government that need to be addressed and these include, firstly, the requirement for a statutory definition of a 'casual employee', secondly, the requirement for all casual employees to have the ability to convert to permanent employment and thirdly, the need to provide security of employment.

Current Award classification of a 'casual'.

16. Currently the General Retail Industry Award refers to a casual employee at Clause 11.1 as "a casual employee is an employee engaged as such." And further at Clause 11.2, "An employee who is not covered by Clause 9- Full time employees or Clause 10 – Part time employees must be engaged as and paid as a casual." Therefore, a casual employee is one who does not fall into one of the categories specified in the same award and there is no clear definition. The only 'defining' difference is that the casual is paid an additional 25% which compensates for the non- payment of annual leave and personal leave.

[3] Transitions from Casual Employment in Australia Project 09/05 Hielke Buddelmeyer, Mark Wooden and Suzan Ghantous Melbourne Institute of Applied Economic and Social Research

[4] Ibid page 1

[5] COVID-19: Impacts on casual workers in Australia—a statistical snapshot8 May 2020Geoff Gilfillan
Statistics and Mapping

17. As specified in the Regulatory Impact Statement -Casual Reforms, there is no statutory definition of a 'casual employee', which has led to confusion and uncertainty, particularly as the status of an employee may change from time to time. The recent 'Workpac' cases involving two casual employees, namely Skene and Rossato[6], have drawn further attention to the confusion and concerns about the lack of clarity as to exactly how a casual should be defined.

18. The Skene and Rossato cases also raised questions about whether a casual employee should always be treated as such and is there a point in time when the status should change. Also, whether the terms of the employment lend themselves to consideration of what the status of the employee should be. There are many situations where casual status is a great disadvantage, especially where employees remain as casual employees all their working lives. An example is where a business is sold after a casual has worked there many years and the employee is left without any redundancy payment because of their status. They may receive 25% additional loading all their working lives as a casual employee and receive the appropriate penalties, but they have no legal standing compared to the status of the permanent employee.

19. There is a clear requirement to clarify the statutory position of the casual employee and to this end a statutory definition is proposed that provides such a definition. There is also a need to provide a statutory right for an employee to obtain permanent employment should that be their choice.

Proposed Statutory definition of a casual

20. Section15A (2) of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (the Bill) proposes a definition of a casual employee into the FWA which specifies that, "the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person". Clause 15A(2) goes on to list four considerations that must be taken into account at the time the offer is made including at Section 15 A(2):

(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 work is described as casual employment;

(d) whether the person will be entitled to casual loading or a specific rate of pay for a casual under the terms of the offer or a fair work instrument.

21. The section makes it clear that a regular pattern of work is not indicative of continuing employment but that the arrangement revolves around the offer and the acceptance of the work. The employee is employed as a casual and will remain as such until conversion to full or part time status. Provision for

[6] Workpac Pty ltd v. Skene (2019) FCAFC 131 and Workpac Pty ltd v. Rossato (2020) FCAFC 84

conversion to permanent status is provided for in the Bill by amending the National Employment Standards (NES).

Statutory Casual conversion to permanent status

22. The Fair Work Commission already provided an opportunity to casual employees to convert to permanent employment in the General Retail Industry Award (GRA), however the Act will provide a legal requirement to make such an offer as defined in Section 66 B. The right to convert to permanency is to be available after service of regular employment as a casual employee for a period of 12 months. The employer may only refuse on 'reasonable grounds' which may include:

- significant adjustment to the hours of work as the employee was not a true 'regular casual';
- the hours of work are likely to change in the next 12 months;
- there is likely to be a reduction of work; and
- it is known that the work is not likely to be required in the next 12 months.

If the employee does not accept the employer claims, then this may give rise to a dispute in the FWC.

23. The Act will also guard against providing casual employees with fixed term contracts that could be temporary. There are also provisions that will guard against terminating a casual employment contract in order to avoid offering a permanent contract to an employee. The employer will have the right to claim that it is 'unreasonable' to offer permanency at a particular time and there no doubt will be discussions around what is reasonable in the circumstances for refusing the offer of permanent status.

24. Section 125A will provide and prepare a Casual Information Statement that sets out information on the offers and requests for casual conversion and this must be given to the employee as soon as practicable after the commencement of employment (Section 125B)

25. Since the right to casual conversion was introduced in the GRA in 2018 there have been requests by casual employees opting for permanent status. However, it often the case that even though employers offer casual conversion there is a significant number of employees who prefer to remain as casual employees. The basis for this decision for many employees is that they prefer to have the additional 25 % loading instead of having access to annual and personal leave and any other benefits. It should be noted that many casual employees are students, especially weekend students who receive the higher weekend penalties and who regard the work as transient. This raises the question of whether casual conversion should be optional, or alternatively provided only for two years from the date of commencement unless there is a compelling reason not to do so.

Lack of security of employment currently associated with casual employment

26. The pandemic revealed the current uncertainty and insecurity that comes with casual employment. According to the Australian Bureau of Statistics casual employees suffered the greatest

losses from the effects of COVID 19 early in 2020[7]. The statistics show that casual employment fell from 2.6 million to 2.1 million in 3 months and although there has been a recovery later in the year the numbers show there is still significant loss of employment.

27. It is inevitable that where there is lack of security in a position that those who are more vulnerable will be the first to lose their positions. The job losses that were experienced in 2020 will affect the economy for some time and illustrates the weakness that exists in uncertain casual employment.

28. Job security should be an essential aspect of employment but because casual labour is a deeply entrenched part of the Australian industrial relations system and it is so insecure it was inevitable that casual jobs would be the first ones to disappear when the pandemic struck. The massive job losses demonstrated the vulnerability of this sector of the workforce. Many employees in the retail industry want casual work, including tertiary students, school students, home carers, retirees and those who are hoping to transfer to permanent employment at some future date. Some casual employees simply do not intend to remain in casual employment as they hope to move on to permanent jobs. Whatever the intention of these employees might be, defining the legal status of casual employment is essential as currently the role is swathed in uncertainty and confusion. Therefore, providing a legal definition as provided in the proposed legislation will lay the foundations of future job security for thousands of employees.

Policy Options for Casual Employment

29. MGA/TMA has considered the three Policy Options proposed in the Regulatory Impact Statement and supports Policy Option 2 because as claimed it, "..delivers a balanced approach for employers and employees seeking certainty around their obligations and entitlements , as well as a genuine pathway for casual employees seeking to convert to permanent employment."[8]

30. The proposed process as outlined in Option Two recognises the importance of having a statutory definition of a casual employee, the right of a casual employee to convert to permanent employment status, the legal duty of an employer to offer permanent employment and the legal right of the employee to refuse the offer with the option of requesting permanency at a future date.

31. MGA/TMA supports the objective of casual conversion as it will provide employers and employees with a clear understanding of their respective positions in determining the process for casual conversion and providing for mutual beneficial outcomes.

A. Part-time Flexibility Part- Time Employment Problems

32. Part time employment is intended to provide an employee with the security that comes with the status of being permanent. It provides the security of knowing there are hours of work available on a regular basis and being entitled to leave entitlements, albeit on a pro rata basis. There may also be

[7] "Casuals hardest hit by job losses in 2020" media release. Australian Bureau of Statistics 11/12/2020
[8] Fair Work Amendment (supporting Australia/s Jobs and Economic Recovery) Bill 2020 Regulatory Impact Statement page xx1v

opportunities to obtain additional hours of work and in some awards these additional hours are paid at overtime rates and in some they are available at the ordinary rates of pay but, in any event, whatever procedure is available it is not always a convenient way of operating for the employer. This only adds to the complexities and complications of the award process. In the Retail industry it is far easier to simply use a casual employee and this cuts out the requirement to engage in more paper-work and figure out the additional payments to be made. Hence, we have a retail industry that is overflowing with casual employees simply because it is deemed to be 'easier' to manage the process.

33. The GRA has become classified as a 'distressed award' and based on the reactive hesitancy of employers that surrounds many of its operations the description is justified. No employer who is time poor, in a small business, is going to bother to draw up paper-work every time s/he would like to give an employee a few additional hours or work before the employee can continue stacking shelves on a Friday night. The simple solution for an employer is to perform the task personally. The system itself discourages providing additional work. It is clear that to provide additional hours of work to a part time employee without having to stop and draw up the necessary paperwork is burdensome and clumsy. This could be overcome if the award was structured to provide the employer with the right from the commencement of employment to give additional hours at the ordinary rate of pay as such hours become available. This could alternatively be provided in the contract of employment to reflect the ability of the employer to offer such additional hours when they are available, payable at the ordinary rate of pay.

34. In order to alleviate the complexity for the employer in the event of additional hours becoming available for a part time employee it is proposed to introduce a 'Simplified Additional Hours Agreement' that would provide for an extra number of hours to be worked above the employee's contracted hours, paid at the ordinary rate. The requirements include that the part time employee works a minimum of 16 hours each week and agrees to work additional hours at the ordinary rate and will not attract any other award benefits (Sections 168M, N, P, Q, R). It is suggested that the 16 hours could be reduced to 10 hours to widen the scope of opportunity to provide for part time employment opportunities. The recognition of the need for change in the system and the proposed simplification will align with the need of employers to have a flexible and realistic approach to offering additional hours of work.

Policy Options Part -time Employment

There are 3 options for consideration and MGA/TMA supports the adoption of Option 2.

35. Option 2 32. provides that employees who are employed for a minimum of 16 hours per week and minimum 3 hours per shift may be offered additional hours, beyond their nominal hours at their current rate of pay. They have a 'general protection' right to refuse any additional hours. An employee would still have a right to receive an option for overtime and other penalty rates that would otherwise be payable. The option of additional hours of work in addition to the ordinary hours may result from

a verbal agreement but would be signed by the parties at a later time. The provision for this arrangement would be legislated and would not necessarily displace award provisions that may be suited to the parties' needs.

36. Option Two is suited to the needs of the Retail industry. Both employers and employees will undoubtedly benefit from this proposed Option. Employers often spontaneously find they need immediate additional assistance, but they cannot afford to pay for the additional time worked at overtime rates and nor do they have the time to prepare paperwork that may be needed to strike up an arrangement with an employee. Added to this is the fact that in most cases the employee does not require to be paid at overtime rates. This proposed law provides flexibility and incentive to adjust an employee's hours by request by either party. Similarly, an employee is often looking for additional hours and is quite prepared to take the extra hours at the ordinary rate of pay. It is unlikely that there could be any adverse action as a result to a refusal of a request to work additional hours but the reinforcement that a request to work additional hours is protected is appropriate.

37. The award is currently full of complexities when it comes to whether or not the offer of additional hours at the ordinary rate is available. Even where it is argued that the additional hours are already available there is complexity about the paperwork that is required. Furthermore, the various clauses and their placings within the award in order to determine whether overtime is payable or not is confusing to an employer and open to error. Therefore, this important issue should be legislated and Option Two is the preferred choice.

B. Enterprise Bargaining Reform

38. The agreement making system in Australia was flourishing between 2008 and 2012 and had enjoyed a relatively popular role for employers and employees for some time. However, in recent years there has been a decline in the uptake of new agreements due mainly to the stringency of the BOOT. Also, where an employer has an agreement, even though it may have been made several years ago, it still remains operational until it is terminated. Many employers continue to operate on these agreements that have expired because they do not want to cope with making a new agreement that may not pass the BOOT.

39. The smaller business division of the Retail sector is particularly reticent when it comes to agreement making despite the rush to engage in this process when the agreement making system was initially introduced. Larger employers have of course been much more enthusiastic about making agreements than smaller business operations and there is evidence that they have been able to gain a number of flexibilities to their satisfaction as they have renewed agreements over the past 10 years. It should be borne in mind that larger retail businesses are in the fortunate position of being able to offer additional monetary payments that meet the requirements of the BOOT. Unfortunately, smaller businesses do not have the ability to pay even slightly higher wages or grant other non- monetary benefits that may meet the BOOT.

40. It therefore is difficult, due to the constraints of the BOOT to make a new agreement. There is no current incentive for an employer to make an agreement with employees. The first question the employer asks is what benefits there are for both parties on entering into an agreement? Invariably, the employer is happy to provide incentives for improved work objectives but there has to be a trade-off to the benefit of all and more, which in most cases for an employer the cost is far too high. The current system has proven to be procedurally deficient, which has included overcoming the possible unintended errors that could be made when drawing up the agreement and providing the correct information to employees during the approval process. The need to follow precise technical detail has been regarded as cumbersome and time consuming and finally not worth pursuing further.

41. Although there have been some attempts to overcome the drawbacks the system is still regarded with scepticism but one of the biggest drawbacks has been the BOOT. It emphasises the complexity of reaching an agreement and it is perceived as a definite barrier to making an agreement. It places demands on a small to medium businesses that invariably they cannot afford, so the answer is to remain covered by the award. The award covers all the basic requirements, it provides for basic wage rates, penalties at appropriate times, overtime rates if necessary, allowances when required and any other costs that may be incurred. Unless the employer is in a position to pay additional monies or grant significant benefits to satisfy the BOOT requirements, then the majority of employers see no reason to introduce an alternative method of engaging with staff for work performed. However, what is overlooked is that enterprise bargaining can result in increased economic growth, with higher productivity and innovation and ultimately that means employment growth, higher wages, and job security in the future.

Need for reform of the enterprise bargaining system

42. There is an opportunity to "simplify legislative requirements and streamline FWC procedures aiming to reduce red tape, complexity and timeframes currently impeding an efficient bargaining process."[9] The objective is to simplify the processes for agreement making because a revived agreement making process is ultimately one of the strongest measures to bring about both increased productivity and employment. In order to achieve these objectives, the bargaining system needs to be enlivened and incentivised.

43. While reforms may include amendments to the BOOT, consideration may also be given to limiting the ability of the FWC to consider only patterns of work currently used by award employees as there may be other considerations affecting employees that could be taken into account.

44. A significant question that has been considered is whether the agreement **must** pass all the tests to be approved? Should consideration be given to whether every single employee must support the agreement and whether overall, the benefits of the agreement outweigh any perceived disadvantage and whether there is a 'general support' for the agreement? It is a strong possibility that there will be

[9] Regulatory Impact Statement Enterprise bargaining reform *liv*

a minority of employees that disagree with some of the BOOT tests and this will continue to pose a problem if every employee must agree rather that the majority prevailing which will inevitably result in delays or failure of an agreement. Prior to the BOOT any new enterprise agreement had to pass the ‘no disadvantage test,’ this did not have the stringency or the rigidity of the BOOT but it did provide a degree of flexibility and fairness for both employers and employees. Replacing the BOOT with the former “no disadvantage test” would ensure that there was fairness to everyone.

45. MGA/TMA members need the ability to operate their businesses with confidence. Currently, they fear entering into agreements because they know the hurdles that they face in the system. Many have had experiences in the past where making an agreement was much simpler, where they were able to use the ‘no disadvantage test.’ This meant that employees were able to confidently know that their entitlements were secure, but also that there were additional benefits from the negotiations they had with the employer. MGA/TMA members have never, and will never, deny their employees their rightful entitlements and the intention of supporting reforms is to make changes to the system whilst making sure no employee suffers any ill effects from such changes.

46. Currently employers fear making a new agreement because they know they cannot overcome the hurdles that exist in the system. However, it is quite clear that we need these proposed reforms, they are desperately needed and despite what the sceptics might advocate about the detrimental effects of the reform proposals they should be conscious of the demonstrable fact, that unless they are implemented our workplaces will go backwards and more people will be unemployed. Reform measures must be implemented to stimulate change and confidence for both employers and employees.

47. MGA/TMA supports the following options as solutions to the problems that are currently inhibiting a successful bargaining system as proposed in the Regulatory Impact Statement:

a. Objects

MGA/TMA supports the reform of the enterprise bargaining system 1.1 to include providing for amendment of Parts 2-4 of the Act. This would include improving an employee’s representational rights, to extend and clarify genuine agreements requirements, amend the time frames for issuing the Notice of employee representational rights, reduce the prescription and red tape requirements as a part of the pre- approval requirements, allow casuals to vote for an agreement in certain circumstances and amend the Act to allow for minor errors and/or omissions.

b. Notice of Employee Representational Rights (NERR)

MGA/TMA supports Option 2.1 to amend extending the notice of consent to 28 days’ time frame and for the FWC to publicise the NERR on its website.

c. Pre- Approval requirements – genuine agreement

MGA/TMA is supportive of the view (Option 3.1) that where the employer and the employees have reached an agreement to proceed after employees have had a fair and reasonable opportunity to approve or not approve an agreement, and the employees are aware of their representational rights, then the process should be approved at that stage. This would avoid unnecessary prescription and red tape.

d. Voting requirements

Option 1 provides that the FWA should ensure there is clarity on the ability of casual employees to exercise their voting rights. If an employee has performed work in the 7 days before the voting is made then the casual employee should have the right to vote for the enterprise agreement. MGA/TMA supports this option,

e. Better off overall test (the BOOT)

MGA/TMA supports the Option 1 amendments to the 'better off overall test' (the BOOT) that:

- limit the FWC to considering only the patterns of work currently performed by the employee or those that are reasonably foreseeable at the time of testing the agreement.
- The FWC would be able to consider all benefits the employee would receive under the agreement (including non- monetary) when compared to the award.
- FWC to consider all views of employers and employees about whether the agreement passes the BOOT and
- Include additional provision to allow the FWC to approve an agreement that did not pass the BOOT where it is not contrary to the public interest, and takes into account the views of all employees, the employer and the bargaining representatives, the impact of COVID 19 and the extent of support of employees**.** (to sunset after two years) This action should not be prejudicial to the best interests of employees and should not permit any employee to be disadvantaged for the period of two years. The need for full agreement by all parties would be crucial to the approval of any such agreement.

f. National Employment Standards (NES)

MGA/TMA supports a provision in the FWA that an enterprise agreement must not exclude the NES or any provisions of NES. (Option 1)

g. Franchisee Agreements – no comments made here.

h. Termination of Agreements after nominal expiry date

MGA/TMA supports the view (Option1) that an Agreement expiry of at least 3 months after the nominal expiry date before a unilateral application to terminate the agreement may be made

i. How the FWC may inform itself.

MGA/TMA supports Option 1 in that the FWC should inform itself on any matter to approve an application to approve or vary an enterprise agreement and only on information that is publicly available. the FWC may consider information from a party not involved in the bargaining process but only in exceptional circumstances.

j. Time Limits

MGA/TMA supports Option 1 and agrees that as far as practicable an agreement should be approved within 21 working days and if this time frame is not practical then written notice to be provided to specified persons setting out the reasons for the delay. It is intended that this process will significantly reduce the red tape generally associated with the approval process.

k. Transfer of business

MGA/TMA supports Option 1 as this would enable an employee to transfer to the business of an associated entity and where the employee seeks such transfer to the new business the new employer would be allowed to take on the industrial instrument of the transferring employee, subject to this being entirely voluntary. This would provide for the continuing employment of the employees under their current terms and conditions.

Compliance and Enforcement

48. Schedule 5 to the Bill proposes a number of new enforcement provisions including a new Small Claims Procedure where an employee may initiate claims for remuneration for unpaid entitlements to the Small Claims Court and a Magistrate may refer the matter to the Fair Work Commission for conciliation and consent arbitration.

49. Part 7 of the Bill proposes criminalising underpayments of wages. A new Section 324B will make it a criminal offence for an employer to dishonestly engage in a systematic pattern of underpaying one or more employees. The proposed law is not intended to apply to a "one- off underpayment, genuine mistakes or miscalculations as the conduct must be intentional, dishonest and systematic."[10]

50. MGA/TMA does not condone underpayment of entitlements to employees and strives to ensure that correct wages calculations are provided to employers should there be any amendments to wages. Simplifying the wages system is undoubtedly one of the ways of avoiding underpayments of entitlements. There have been some businesses that have openly declared that they have made errors when paying their staff and it is acknowledged as wrong and unfortunate, but it is not a criminal act. There would therefore be a heavy onus of any prosecutor to prove that there was a deliberate intent on the part of an employer to underpay an employee. There are other ways to ensure compliance other than criminalising underpayments of wages and a process of more rigorous random audits may

[10] Regulatory impact statement para 407

be a more suitable approach than using the criminal law. Making the award system simple to operate would assist in avoiding errors in calculations of wages.

Conclusion

51. MGA/TMA submits that no one will experience any hardship or detriment from the proposed amendments to the Act. Any suggestion that employees will be worse off, or will suffer dire consequences from the proposed reforms, is unfounded. The reforms are for the common good and will make beneficial differences for all parties to the employment arrangements. Employers will benefit from operating their businesses with greater certainty and this will help them to become more productive, enabling them to offer more hours of work. No employee need fear loss of their job from these reform proposals, on the contrary they will bring about more opportunities. It is clearly wrong to suggest that this is likely to happen. The proposed reform amendments to the Act will stimulate the economy and restore confidence in employers to employ more employees. The coronavirus pandemic has devastated the lives of many Australians and brought hardship to many others. The need for significant changes to our industrial laws is a step towards recovery and, if the changes as proposed are embraced there will be greater opportunities and benefits for both employers and employees. These reforms are vital to our economic future because if they are not implemented then we will be turning our backs on an opportunity to move forward.

MGA/TMA thanks the members of the Inquiry for the opportunity to make this submission.

Jos de Bruin
CEO
Master Grocers Australia