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28 November 2024

Professors Mark Bray and Alison Preston
C/- Secure Jobs, Better Pay Review Secretariat
Department of Employment and Workplace Relations

Dear Professors Bray and Preston,

Submission by the Council of Small Business Organisations of Australia (COSBOA)
Independent statutory review of the Fair Work Amendment (Secure Jobs, Better Pay) Act 2022 (Secure Jobs, Better Pay Review)

Thank you for the opportunity to provide feedback as part of the independent statutory review of the *Fair Work Amendment (Secure Jobs, Better Pay) Act 2022 (Secure Jobs, Better Pay Review)*

ABOUT COSBOA

Small businesses in Australia are the backbone of the economy. The Council of Small Business Organisations of Australia (COSBOA) is a member-based not-for-profit organisation with the exclusive mandate of representing the interests of Australia's 2.5 million small businesses. COSBOA's fundamental strength resides in its capacity to aggregate member perspectives and achieve policy consensus.

The Secure Jobs Better Pay legislative amendments have a significant effect on small businesses and COSBOA seeks to pursue an equitable and streamlined policy framework that provides for less regulation, complexity and fosters employment growth and improvements in productivity.

EXECUTIVE SUMMARY

COSBOA has conducted a comprehensive review of the Fair Work Amendment (Secure Jobs, Better Pay) Act 2022 and its impacts on small businesses. This submission highlights significant concerns regarding unintended consequences and operational challenges faced by the small business sector.

Key findings include:

- Multi-employer bargaining has become the default mechanism across industries, undermining enterprise-level negotiation and disadvantaging small businesses.
- Union Enterprise Agreements have increased by 69% while Non-Union Enterprise Agreements have declined by 17%.
- Small businesses face disproportionate burdens in navigating complex bargaining processes without adequate resources.
- The Better Off Overall Test (BOOT) modifications continue to create uncertainty for businesses.
- Fixed-term contract restrictions fail to account for legitimate small business operational needs.
- Expanded small claims jurisdiction exposes small businesses to increased financial risks.

Key recommendations:

- Implement exemptions from multi-enterprise bargaining for businesses with up to 50 full-time equivalent employees
- Strengthen global BOOT assessment methodology
- Remove fixed-term contract restrictions for small businesses
- Reduce small claims thresholds
- Maintain operational flexibility for casual employment arrangements

COSBOA INDUSTRAL RELATIONS POSITION

As a matter of policy, COSBOA advocates for the:

- implementation of measures that streamline the current industrial relations framework for small businesses and their employees; and
- preservation of small business autonomy regarding engagement with the industrial relations system

As a matter of policy, COSBOA opposes:

- the disproportionate advantage extended to unionise small business
- mandatory sector-wide or industry bargaining, including compulsory multi-employer bargaining
- pattern bargaining
- any provisions that facilitate or increase the likelihood of industrial action within organisations, sectors, or across business groups

The current industrial relations framework presents substantial navigational challenges for small businesses, which typically lack internal resources for interpreting complex awards and conducting worker negotiations, thereby inhibiting their ability to compete effectively with larger enterprises.

CONSULTATION WITH MEMBERS ABOUT THE SECURE JOBS BETTER PAY CHANGES

We note that without limiting the scope what may be considered, the review must:

- consider whether the operation of the amendments is appropriate and effective
- identify any unintended consequences of the amendments
- consider whether further amendments to the Fair *Work Act 2009*, or any other legislation, are necessary to improve the operation of the amendments or rectify any unintended consequences that are identified.

We further note that at consultation meetings, DEWR emphasised the requirement for "evidence" to support the case for change. However, four significant constraints exist regarding the evidence requirement:

- The restricted implementation period of the amendments and subsequent extent to which certain overreaching elements of the legislation will impact, but have yet to affect, the small business community.
- The limited capacity of small businesses to allocate time for empirical evidence collection while managing their enterprises.
- The constrained timeframe available to peak membership associations such as COSBOA for comprehensive member consultation and evidence gathering.

- The necessity to acknowledge that small businesses and their member associations, operating at the forefront of managing complexity changes, possess superior capability to provide substantive anecdotal feedback regarding unintended consequences and modification requirements.

Notwithstanding these constraints, COSBOA's member consultation approach regarding the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* and its unintended consequences has encompassed detailed discussions with representatives from multiple member organisations, including:

- The Australian Meat Industry Council
- The Institute of Certified Bookkeepers (**ICB**)
- The Newsagents Association of NSW and ACT (**NANA**)
- Master Grocers Association (**MGA**), and
- Pharmacy Guild of Australia.

COSBOA's fundamental role encompasses broad member consultation, attention to their concerns, and collaboration to comprehend and articulate to government the impacts of current issues upon the Australian small business sector. This submission reflects our members' perspectives, our consultation process, and our extensive engagement with small business enterprises throughout Australia.

With COSBOA receiving both direct and indirect feedback regarding the unintended consequences of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, our submission shall address the negative impacts and proposed remedial solutions.

CONSIDERATIONS AND ISSUES

Bargaining and Agreement Making

As a comprehensive summary of the key issues associated with the changes, COSBOA contends that employers now find themselves involuntarily engaged in bargaining processes with Union bargaining positions and powers experiencing substantial enhancement.

Notably, these modifications encompass:

- involuntary incorporation into multi-employer bargaining, or subsequent inclusion in multi-employer agreements post-implementation
- mandatory participation in replacement single-enterprise agreement negotiations upon demand
- vulnerability to industrial action within multi-employer bargaining contexts, potentially arising from matters unrelated to specific operational circumstances
- enhanced Fair Work Commission involvement in bargaining processes, particularly through mandatory conciliation procedures preceding industrial action, authority to arbitrate intractable bargaining disputes, and discretionary powers to unilaterally modify agreements during the approval phase
- limitations on the termination of expired enterprise agreements, particularly during bargaining periods, or the implementation of proposed multi-employer agreements without union consent
- introduction of additional principles and considerations impacting the agreement approval methodology

These modifications present identifiable risks to employers and their bargaining objectives, particularly affecting employers lacking adequate resources like small businesses.

These factors impose a severe impost on a small business notwithstanding the increase in the threshold of employers that are affected to above 20 in headcount. This still impacts over 97% of all businesses in Australia.

Consequently, COSBOA seeks substantive amendments to the Bill, particularly regarding the mandatory "rope in" provision for bargaining participation, which eliminates opt-out rights.

In our view the key unintended consequences of the Bill include:

- Multi-employer bargaining's emergence as the default mechanism across all industries, negating the fundamental productivity driver of enterprise-level negotiation.
- While maintaining legitimate societal standing, unions now possess authority beyond their representative constituency, with the Act enabling union-initiated bargaining prior to demonstrable majority employee support.
- The absence of demonstrated justification for union veto rights regarding agreement terms subject to employee vote, or union veto authority over employee-supported withdrawal from multi-employer agreements.
- The Act's effective transfer of ultimate decision-making authority to the Fair Work Commission through the elimination of employer capacity to negotiate terms and conditions optimally suited to specific operational environments and workplace cultures.

The Multi-Employer Bargaining provisions result in substantial encroachment upon enterprise-level bargaining within Australia.

The table below illustrates that as a result the number of Union Enterprise Agreements has increased a staggering 69% as compared to Non-Union Enterprise Agreements declining by 17%.

	Union Enterprise Agreements	Non-Union Agreements
Year (H2)	No. Approved	No. Approved
2022	377	2003
2023	582	2057
2024*	640	1664

- Period measured is H2 of each year as FWC does not have published statistics for H1 2022
- 2024 figures are adjusted as data is only available up until 18 October so an annualised formula to extract for the full second half period has been applied.
- Source: FWC https://www.fwc.gov.au/work-conditions/enterprise-agreements/about-enterprise-agreements/statistical-reports-enterprise

Not only does multi-employer bargaining effectively unionise workplaces by stealth as demonstrated by the above data, but the Australian industrial relations system also increasingly relies on arbitrated outcomes. This fails to generate equivalent required productivity gains as well as wage outcomes achievable through enterprise-level agreement tailored to individual circumstances.

This transition toward pattern bargaining lacks productivity orientation and proves unsuitable for individual employer and workforce circumstances. Such artificial standardisation will ultimately precipitate business closures and employment reduction. This system predominantly benefits large enterprises capable of effectively excluding smaller competitors through imposition of unsustainable pay rates and conditions.

COSBOA member feedback demonstrates that compelling diverse employers to engage in collective bargaining has particularly adverse effects on small and medium enterprises, specifically because:

- It necessitates small business proprietors, typically engaged in direct business operations, to dedicate substantial time away from operational responsibilities for joint bargaining position negotiation with disparate businesses, followed by employee and union representative negotiations, where other parties possess significantly greater time resources. Consequently, negotiation responsibilities default to larger employers within the group, as smaller enterprises lack adequate time and resources for meaningful engagement.
- The bargaining process culminates in multi-employer agreements implementing "one-size fits all" approaches incompatible with specific business requirements, thereby generating operational complications.

The second consideration holds relevance for small businesses, as resource and time constraints regarding bargaining engagement frequently result in acquiescence to the better-resourced businesses' position in the negotiation of terms and conditions. This imbalance heightens the risk of final agreements that are poorly aligned with small business operational requirements as well as unsustainable wage rates or workplace arrangements that are suboptimal for business operations.

This issue intensifies for small businesses (notwithstanding the minor increase to employee threshold requirements) by compelling employers to join existing single-interest employer agreements. In such instances, employers and employees are deprived of opportunities to influence agreement terms.

Ill-suited collective agreements significantly restrict business owner operational flexibility, potentially compromising long-term business viability. The elevated risk of industrial action across multiple employers demonstrates particularly adverse effects on small and medium enterprises.

Furthermore, minimal prospect exists that lowest common denominator bargaining will establish foundations or incentives for enhanced productivity, efficiency, or enterprise resilience. The process offers no tangible benefits for employer participation in such bargaining mechanisms. We submit these changes are an overreach and recommend a higher portion of businesses be exempt.

Recommendation:

1. *Businesses up to 50 full time equivalent employees be **excluded and exempted** from the single-interest and multi-enterprise bargaining stream.*

Better off Overall Test (BOOT)

The legislation implemented comprehensive modifications to the BOOT process effective 6 June 2023.

Of particular significance, Section 191(a) empowers the Commission to implement agreement modifications during the approval process. This modification's underlying rationale partially addresses the reduction of undertakings which may generate interpretation complexities.

Modifications may be implemented where the Commission identifies BOOT compliance concerns. When executing such modifications, the Commission must obtain perspectives from the employer, award-covered employees, and all bargaining representatives to establish modification "necessity" regarding the identified concern.

While the employer consultation requirements do provide reassurance in the progress, and the Commission's intended constructive collaboration with parties appears indicated, practical implementation remains at a “line by line” level increasing undertaking requests despite employer objections regarding necessity.

The new section 193A introduces several BOOT modifications:

- implementation of 'global' rather than 'line-by-line' assessment methodology
- Commission requirement to consider expressed views from employer(s), award-covered employees, and bargaining representative(s)
- Commission obligation to prioritize 'common view' of employers and registered union bargaining representatives regarding BOOT compliance (excluding Greenfields agreements)
- Commission restriction to consideration of "reasonably foreseeable" work patterns, kinds, or employment types at test time, relative to enterprise nature

The prescribed global BOOT implementation provides certain employer reassurance. However, this prescription neither reduces assessment diligence nor precludes evidence suggesting line-by-line assessment implementation continues despite global requirements.

‘Global’ assessment benefits employers where entitlement reduction corresponds with alternative entitlement introduction or enhancement. Such scenarios potentially enable mutual mitigation producing global BOOT satisfaction.

Presumably addressing union concerns regarding adverse BOOT relaxation effects, new Division 7A of Part 2-4 enables Commission BOOT reconsideration during enterprise agreement duration and Unions now possess authority to request Commission BOOT compliance reassessment.

We acknowledge retrospective agreement modification provides employer protection from pecuniary penalties regarding breaches non-existent prior to modification implementation.

We further acknowledge non-mandatory Commission agreement modification; alternatively enabling undertaking acceptance incorporated as agreement terms. The reconsideration process's rationale permits agreement adjustments solely addressing Commission concerns

However, potential Commission agreement adjustment may incorporate party perspective consultation, aligned with initial BOOT assessment modification capabilities. Consequently, uncertainty exists throughout its duration, creating extremely problematic uncertainty and disruption for small businesses. Accordingly, COSBOA supports the position from other peak employer associations around the application of the BOOT process.

Recommendation:

1. *Rules associated with the application of the BOOT are adjusted to reinforce the "global" context and any application for a line by line or individual assessment be prohibited.*

Fixed Term Contracts

COSBOA opposes restrictions on employer capacity to engage employees through multiple consecutive fixed-term contracts or for durations exceeding 2 years. These limitations present significant challenges for small business across multiple industries.

Numerous small businesses operate within gig economies, where contractors actively choose such arrangements to secure self-determination, flexibility, and frequently enhanced compensation. Examples include Locums, participants in small enterprise or sole trader dominated industries such as film and television, and software engineers recently transitioning to contracting for income enhancement.

Specified maximum contract duration or quantity limitations have resulted in increased contractor turnover, resulting in experience and business connection deterioration. Industry-specific current practice examination and targeted worker protection solution development would prove more beneficial.

While section 333F provides certain exemptions that do nothing but add complexity, contract utilisation across numerous small business sectors inevitably results in circumstances falling outside exemption parameters. COSBOA expresses concern regarding the additional complexity in worker engagement processes, with both businesses and workers experiencing restriction of suitable fixed-term contract utilization for specific circumstances.

In short, a general exemption should apply across the board for small business to encourage operational flexibility.

Recommendation:

1. *Businesses up to 50 full time equivalent employees be **excluded and exempted** from the fixed term contract provisions.*

Small Claims

The legislation has introduced substantial modifications to small claims processes for employment-related matters, with significant implications for small business operations:

Increased Claim Limit

The maximum claimable amount through small claims processes has experienced significant elevation from $20,000 to $100,000. This modification enables employees to pursue substantially larger claims against employers through this streamlined process.

Expanded Jurisdiction

The small claims process now encompasses an expanded and substantial range of employment-related matters which has serious implications for small businesses.

The elevated claim limit and expanded jurisdictional scope expose small businesses to increased employment-related claims through this process. This modification potentially escalates legal and financial exposure.

Moreover, there are enhanced compliance requirements for small business where risk mitigation necessitates comprehensive small business compliance with employment legislation and maintenance of precise documentation regarding wages, working hours, and additional entitlements.

The significant increase in maximum claim amount from $20,000 to $100,000 for small claims processes introduces several considerations:

- Small businesses face exposure to substantially larger financial claims
- Enhanced employee incentivization to pursue claims given increased claim thresholds through simplified procedures

So, while designed for enhanced accessibility and efficiency, the elevated claim limit potentially generates increased legal expenses for small businesses with:

- More complex or higher-value claims necessitating legal representation despite small claims process utilization
- Expanded jurisdiction encompassing additional employment-related claims potentially generating increased case volume, escalating aggregate legal expenses.

The financial risk mitigation associated with these modifications not only requires small businesses to invest in enhanced employment law and regulation compliance, the elevated claim limit and potential claim frequency increase may affect small business cash flow by necessity for enhanced contingency fund allocation for potential claims with a significant impact of unexpected substantial payouts on small business financial stability

Consequently, COSBOA submits that the threshold needs to be lowered to reflect a more accurate definition of a “small claim”.

Recommendation:

1. *The threshold for small claims be lowered to $30000 limit and indexed annually for inflation*

Powers of the Fair Work Commission

Among the more substantial modifications within the Secure Jobs Better Pay amendments, the legislation empowers the Fair Work Commission to arbitrate disputes regarding employer flexible work arrangement refusals.

Current *Fair Work Act* provisions establish employee request rights, with limited refusal contestation capability unless enterprise agreements explicitly grant enforceable contestation rights. The legislation enables employees to initiate Commission disputes regarding employer working arrangement modification refusals and, absent resolution, empowers Commission arbitration and potential employer request compliance orders.

These modifications generate increased flexible work arrangement disputation during a period when employers address post-pandemic workplace challenges.

COSBOA maintains that employers should retain autonomous negotiation rights regarding enterprise-specific flexible workplace arrangements through employee consultation, without arbitrary Commission-imposed arrangement implementation.

This is particularly onerous in cases where casual employees seek conversion if is not agreed, the commission has the power to arbitrate. COSBOA seeks to remove this inflexibility to allow casual employees (who choose to remain so) to work regular shift patterns subject to the written agreement of their employer.

Accordingly, COSBOA submits that small businesses should retain operational flexibility particularly in respect to casual employment where both the employee and employer agree.

Recommendation:

1. *Businesses up to 50 full time equivalent employees be exempt from the casual conversion process to give small business the operational flexibility of engaging casual employees on a regular or semi-regular shift pattern basis if agreed, in writing, by both parties.*

CONCLUSION

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* has generated substantial operational challenges for the small business sector. Our consultation and analysis demonstrate significant unintended consequences that fundamentally impact small business viability.

The key issues identified through our submission include:

- The implementation of mandatory multi-employer bargaining, which undermines enterprise-level negotiation and disadvantages small businesses lacking resources for complex bargaining processes. It also unfairly compels an employer to not only bargain but also accept a result that may not be in the best interests of their single enterprise effectively being "roped into" a multi-employer agreement. This is manifestly unfair for employers.
- Modifications to the BOOT test that continue to present practical challenges in implementation and create ongoing uncertainty for agreements.
- Restrictive provisions regarding fixed-term contracts that fail to acknowledge legitimate small business operational requirements and industry-specific practices.
- Substantial and unnecessary expansion of small claims jurisdiction and thresholds.
- Enhanced Fair Work Commission powers regarding flexible work arrangements that potentially compromise small business operational autonomy.

We seek on behalf of small business the following:

1. Exemption from multi-enterprise bargaining for employers with up to 50 FTE's
2. Reinforcement of "global" BOOT assessment methodology
3. Exclusion from fixed-term contract restrictions
4. Reduction of small claims thresholds to more manageable levels
5. Restoration of operational flexibility regarding casual employment arrangements

The cumulative effect of these legislative modifications has been to introduce unprecedented complexity into the industrial relations framework. Small business proprietors, typically operating without dedicated industrial relations, human resources, or legal advisory resources, now face substantial additional compliance burdens while managing existing operational obligations.

COSBOA maintains that effective industrial relations reform must balance worker protections with practical business operational requirements. The current legislative framework, however, imposes disproportionate regulatory burden on small businesses without demonstrable benefit to overall employment outcomes or economic productivity.

We strongly urge consideration of our recommended modifications to establish an industrial relations framework that genuinely supports small business growth while maintaining appropriate workforce protections.

Please do not hesitate to contact me directly at mike@cosboa.org.au should you require any additional information or clarification on these matters.

Yours sincerely,

Mike Sommerton
Head – Industrial Relations
COSBOA