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Education and Employment Legislation Committee
Inquiry into the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*

Thank-you for the invitation and opportunity to make a submission to the above inquiry.

Manufacturing Australia (MA) represents some of Australia's largest manufacturing companies: AdBri, BlueScope, Brickworks, Capral, Cement Australia, CSR, DuluxGroup, Incitec Pivot, Orora, Rheem, Sims and Tomago Aluminium.

MA's member companies provide direct and indirect employment to more than 100,000 Australians, operate more than 500 manufacturing plants or smaller facilities around Australia and support more than 25,000 downstream suppliers.

Relevant to this consultation, MA members have a strong track record of successful bargaining at the enterprise level. This track record of successful enterprise bargaining has typically delivered:

- wages growth over the decade to 2022 above consumer price index and wage price index.
- high levels of full-time employment, with 84% of manufacturing employees employed on a full time basis (69% higher than the national average).
- Employment tenures and retention significantly higher than the national average.

Manufacturing Australia's position: In summary
In the manufacturing sector, single enterprise bargaining is an effective and appropriate way to reach agreements based on an understanding of customer, employee and business needs at the local business unit level.

It is our experience that agreements reached at the enterprise level lead to higher and more sustainable wage growth, productivity and innovation, alongside the ability to consider and adapt to local needs of the enterprise and the necessary flexibility and dynamism to remain competitive with imported manufactured products.

We therefore welcome and support Minister Burke's statement that: *"bargaining at the enterprise level delivers strong productivity benefits and is intended to remain the primary and preferred type of agreement making''*.

However, we are concerned that the bill, as drafted, will have the reverse effect and lead to the unintended consequence of undermining the status of enterprise level bargaining as the primary and preferred type of agreement making.

Specifically, Manufacturing Australia does not support, in its current form, Part 21 of the Bill, being the proposal to create new streams of multi-employer bargaining:

- It is unclear how the bill would prevent a shift away from enterprise level agreements, which have worked successfully to obtain good wage outcomes for employees in manufacturing industries. This runs counter to the above position that enterprise-level bargaining delivers the best outcomes for employees and employers.
- Opportunities for consultation and parliamentary scrutiny of this substantial change to employment law have been entirely insufficient. In particular, the commencement of parliamentary hearings and proposal of legislative amendments before the submission due date has made considered and thoughtful response to the proposed legislation impossible. As a result, the risk of unintended or unforeseen consequences is unacceptably high.

It is therefore Manufacturing Australia's primary recommendation in this submission that the proposed bill be split, and Part 21 of the bill and associated elements be excised from the draft legislation in order that it can be properly considered and subject to reasonable scrutiny in the 2023 parliamentary year.

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Areas for further consideration

In addition to the above, MA submits that the following elements of the bill warrant further and more meaningful parliamentary scrutiny. Given the very limited scope of consultation and the fact that amendments have been made even while submissions are being prepared, this should not be considered exhaustive, and rather a statement of key areas of concern for further scrutiny.

Protection for single enterprise bargaining

- The Outcomes Statement from the Jobs & Skills Summit stated that the bargaining system would "*allow businesses and workers who already successfully negotiate enterprise-level agreements to continue to do so*."
- However, MA submits that the bill, as drafted:
    - provides an insufficient level of protection to active enterprise level bargaining;
    - Risks negotiations becoming protracted as a way to gain entry to the multiple employer bargaining stream;
    - Ignores the interests of the employer by enabling the FWC to add an employer to a multi-employer agreement through the variation mechanism in the Bill;
    - In relation to supported bargaining authorisations, undermines the relevance or value of an in-term single enterprise agreement in its entirety.

Majority Support Test

- The bill proposes that the FWC must be satisfied a majority of **'employees employed by the employer'** want to bargain, when considering a single interest or supported bargaining authorisation application.
- Typically in MA member companies, single enterprise agreements do not cover multiple work locations. Rather, numerous single enterprise agreements have been tailored over numerous years for the specific workplace location or site. However, all employees at the various single enterprise agreement locations may be employed by the same employing entity. Those single enterprise agreements are also likely to have various nominal expiry dates.
- Therefore the proposed wording of the majority support test does not sufficiently protect single enterprise bargaining at a specific work location as the primary mechanism for agreement making. It should limit its meaning to:
    (a) employees employed within the scope or classification structure of the proposed authorisation; and
    (b) employed at a specific workplace, site or geographic location specified in the proposed authorisation; and
    (c) who is employed by an employer who the authorisation is proposed to cover.

Common interest test

- The bill proposes that, when considering a single interest authorisation or supported bargaining application, the FWC must be satisfied that there are 'clearly identifiable common interests' amongst the employers.
- The draft bill also removes the current Fair Work Act requirement that businesses operate cooperatively rather than competitively. This creates significant risk that MA members could be forced to bargain on a multi-employer agreement alongside competitors, heightening the risk of breaching the *Competition & Consumer Act 2010,* particularly where pricing information and other commercial information may be required to be disclosed or shared in order to justify or respond to certain proposals made during bargaining.
- Addressing these concerns will require:
    - Clear criteria be stipulated in the Bill that the FWC will consider in its common interests assessment, which includes contemplating whether the employer has a history of bargaining at the enterprise level; and
    - The ability for competitors to be forced to bargain together be removed given the serious risk of anti-competitive conduct.

Variation of Authorisations

- The draft bill proposes exceptionally narrow criteria under which a business could be removed from a single interest or supported bargaining authorisation.
- The Explanatory Memorandum states that "*A change in circumstances would need to be a substantial and operative change in the employer's circumstances and not merely a change of mind or preference. A relevant change could be, for example, that the employer no longer has any employees that would be covered by the scope of the proposed enterprise agreement*."

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- Such limitation would not enable a business and its employees to bargain for a single enterprise agreement, even when it could lead to improved terms and conditions in a new enterprise agreement.

- MA submits that a change in preference in relation to the type of bargaining agreement is a valid reason for the FWC to consider in varying authorisations, particularly if there has been a prior history of enterprise bargaining at the workplace.

Bargaining at the enterprise level while covered by a supported bargaining authorisation

- The proposed Bill prohibits employers from bargaining with employees for any other agreement while they are covered by the single interest or supported bargaining authorisation.
- MA submits that this prohibition could be counter-productive to enabling better wage outcomes for employees and should be removed. If an employer wishes to provide better terms and conditions under a single enterprise agreement when compared to the single interest or supported bargaining authorisation and/or when a majority of employees wish to come off the single interest or supported bargaining authorisation, bargaining for an enterprise agreement should be allowed.

Employee bargaining representative veto on multi-employer agreements

- The proposed Bill empowers an employee bargaining representative to act as 'gatekeeper' in that without approval of the employee bargaining representative, a multi-employer agreement:
  (a) cannot add an employer;
  (b) cannot have its terms varied;
  (c) cannot be put to a vote of employees; and
  (d) cannot remove an employer.
- These 'veto' or 'gatekeeper' powers are counterproductive to wage outcomes for employees, and create a risk that bargaining could be delayed until such time as endorsement is provided by an employee bargaining representative.
- It is also submitted that it is unnecessary for an employee bargaining representative to approve the removal of an employer and its employees from a multi-employer agreement before an application can be considered by the FWC. In addition to our comments regarding the definition of 'change in circumstances', it should be sufficient for the FWC to consider an application for removal based on the views of the parties without the requisite 'veto' or 'gatekeeper' step.

Multi-employer agreement genuinely agreed to by employees

- While it is noted that the FWC will issue a Statement of Principles on Genuine Agreement, MA is concerned that the proposed Bill's intention is that a multi-employer agreement will be approved and apply to each employer and their employees covered by the scope of the multi-employer agreement, even if the employees of a particular employer or workplace location of an employer do not approve the agreement.
- Similar to the revisions made to protected industrial action ballots, it is submitted that a multi-employer agreement should only cover and apply to an employer and its employees at a specific site or workplace location if the majority of employees employed by that employer at the specific site or workplace location vote in favour of the agreement.

Transfer of business and multi-employer agreements

- No consideration has been given to the interaction between a multi-employer agreement and single enterprise agreement in a transfer of business situation. In particular, the provisions relating to applications to the FWC for a transferring instrument to cover or not cover transferring employees or non-transferring employees have not been contemplated with a multi-employer agreement in mind. The implication here is that an employer will not be able to leverage the transfer of business provisions to streamline industrial instrument coverage within an enterprise or workplace.

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Supplementary Concerns on other elements of the legislation

- **Commencement of bargaining**: A single employee can require a company to bargain if covered by an EA in the last 5 years. The test should remain that there is majority support.

- **Enterprise agreement approval process**: The FWC being able to amend an enterprise agreement, both at original approval time and in a reassessment process, without the agreement of the employer fundamentally undermines basic agreement making principles and the certainty which making such agreements should provide.

- **Flexible work requests**: The requirement for employers to propose arrangements to accommodate the employee's circumstances does not also take into account the employer's operational needs or costs.

- **Fixed term contracts:** – While there may be a place for a higher bar for fixed term contracts beyond 2 years, the proposed exemptions do not adequately meet the reality of the flexibility required by business, examples include organisation wide change projects, large capital projects and facilities reaching their end of life. All of which are likely to run beyond a 2-year fixed period.