Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

Senate Education and Employment Legislation Committee

October 2023

MOTOR TRADES ASSOCIATION OF AUSTRALIA

ABOUT MTAA

The Motor Trades Association of Australia (MTAA) is Australia's peak national automotive association. MTAA's membership includes the Victorian Automotive Chamber of Commerce, the Tasmanian Automotive Chamber of Commerce, the Motor Traders' Association of New South Wales, the Motor Trade Association of South Australia and Northern Territory, the Motor Trade Association of Western Australia, and the Motor Trades Association of Queensland.

MTAA represents new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialists, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture), tyre dealers and automotive dismantlers and recyclers.

The automotive industry is a vital contributor to Australia's economy, employing approximately 385,000 people across 13 sectors and 52 trades, and contributing 2.1% of Australia's Gross Domestic Product (GDP). The automotive industry is also one of the largest employers of apprentices and trainees nationally, and the majority of automotive businesses (97%) are small and family-owned enterprises.

As the national-level body, MTAA represents the unified voice of Australia's automotive industry, identifying and monitoring issues affecting the automotive sector, and informing and advising Government on relevant industry impacts, trends, and proactively participating in the development of sound public policy on issues impacting the retail motor trades, small business and consumers.

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INTRODUCTION

1. This submission is filed on behalf of the Motor Trades Association of Australia (MTAA) to help inform the Senate Education and Employment Legislation Committee (the Committee) on the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (the Bill).

2. Through the Victorian Automotive Chamber of Commerce (VACC), MTAA has had the opportunity to contribute to the formation of the submission made by the Australian Chamber of Commerce and Industry (ACCI) to the Committee. Accordingly, MTAA wishes to acknowledge its in-principle support of ACCI's submission. MTAA would also like to take the opportunity to highlight to the Committee aspects of the Bill that are of particular significance to its automotive industry membership (and its small business members in particular), which is provided with the benefit of member feedback.

3. In assessing the Bill, MTAA notes that to be effective any legislative response must be practical, objective and able to be implemented across a diverse range of workplaces, including those of small businesses. Consistent with the objectives of the *Fair Work Act 2009* (FW Act), it must also be fair – and provide a balanced framework for cooperative and productive workplace relations[1]. In this context, MTAA notes that in their current form, the amendments proposed by the Bill clearly fail this test. The practical consequences of these amendments in practice, will lead to outcomes that are uncertain, complex, unfairly punitive and unworkable – for small businesses in particular.

4. Good public policy requires workplace relations reforms that act in the best interests of employers, employees, independent contractors and the broader Australian economy. Good public policy outcomes also require an informed assessment of the practical impact proposed regulatory reform will have on stakeholders prior to seeking to pass such legislation into law. The Bill is a radical departure from such an approach and should therefore be understood as the antithesis of good public policy.

5. Whilst MTAA therefore strongly opposes the Bill in its current form, it does however support the initiative shown by Senator David Pocock and Senator Jacqui Lambie to take the non-contentious elements out of the Bill to enable proper scrutiny of the remainder of the Bill. Accordingly, MTAA is supportive of the four private senators' bills released for consultation on the asbestos safety and eradication agency, strengthening protections against discrimination, support for first responders, and the small business redundancy exemption.

6. Given the unreasonably short period of time afforded to make the submission, MTAA's submission to the Committee is necessarily limited to those parts of the Bill most relevant to its members in the automotive industry. In doing so, MTAA notes that on its analysis of the Bill, the title would appear to be a misnomer, unless the 'loopholes' to be closed are:

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[1] *Fair Work Act 2009*, section 3.

- the ongoing viability of small businesses;
- casual employment opportunities;
- the ability for a business to make and rectify errors; and
- freedom of association, representation and effective issue resolution.

IMPACT ON SMALL BUSINESS

7. MTAA reminds the Committee that small businesses remain the dominant building blocks of the Australian economy, with *"97.3% of all Australian businesses were small businesses in June 2023."*[2] This is also reflected in the automotive industry and by MTAA's membership, of which approximately 97% are small businesses.

8. MTAA notes the FW Act's objective of fairness and its acknowledgement of the special circumstances of small and medium-sized businesses[3]. MTAA submits the need to recognise these special circumstances is self-evident. It is well established that small businesses are disproportionately adversely impacted by regulation because small businesses have fewer resources than larger businesses and are unable to take advantage of economies of scale in order to understand, comply with and benefit from regulation. As noted by a 2017 Paper published by The Treasury, a recognition of this fact by the adoption of a tiered approach to regulatory policy can increase the net benefits of regulation:

> "*Reducing the burden of regulation and making it easier to comply with will typically increase the net societal benefits of small business regulation by increasing compliance rates while reducing the costs of compliance. In designing tiered approaches, policy makers should take into account possible incentive effects of different thresholds and minimise the complexity of the overall regulatory system by selecting simpler options for dealing with policy problems, regardless of which size business is affected, and regularly reviewing the burden of regulation as a whole. Eliminating excessive regulation and reducing complexity will disproportionately benefit small business, even where regulatory reforms are not 'tiered' or targeted at small business, and would also benefit large businesses."*[4]

9. In addition to gaining better compliance outcomes, a tiered approach also recognises the practical realities of running a small business. A reality in which the need to 'do it all' to keep the business afloat, including keep up with changes to government regulations, has directly contributed to what may be described as a mental health crisis for small business operators. As a recent survey conducted for the Australian Government found:

> *"The 2022 Survey results indicate that small business owners continue to experience high levels of mental ill-health. Twenty-two per cent – just over 1 in 5 – small business respondents reported having been diagnosed with a mental ill-health condition by a doctor*

[2] Australian Small Business and Family Enterprise Ombudsman, *Number of small businesses in Australia*, Australian Government, August 2023, page 2.
[3] Op. Cit., sub-section 3(g).
[4] Douglas, J and Pejoska, AL, *Regulation and small business*, Australian Government Treasury, August 2017, page 14.

or health professional in recent months … These survey results may underrepresent the prevalence of mental ill-health conditions in the small business sector … Of the 1,007 small business owners surveyed, 58 per cent said that they would not consider turning to a GP, psychologist, counsellor, or other mental health professional."[5]

Small business operators have also been recognised as a priority "high risk" group for workplace mental health intervention by work health and safety regulators such as WorkSafe Victoria.[6]

10. MTAA notes the complete lack of consideration of these issues in the current Bill. The Committee is therefore encouraged to consider the impact of the changes the Bill will have on small business operators in particular, including their mental health. A Bill that seeks to increase complexity, subjectivity and uncertainty for all employers in how they comply with the law (see casual employment commentary below); threatens to imprison or bankrupt businesses if they get it wrong (see 'Wage Theft', 'serious contravention' and 'honest mistake' commentary below); and to re-introduce an antiquated, adversarial approach to workplace issue resolution (see 'Workplace Delegate' commentary below).

11. In this context, the proposed exemptions for small businesses in relation to the Bill are embarrassingly tokenistic. The Bill references "small business" a grand total of 20 times in 284 pages of proposed legislation. Notably, half of those references are in relation to removing the current small business redundancy exemption from businesses who should not be considered small businesses – i.e. due to head count reduction arising as a result of the insolvency process (something which MTAA does not oppose). In fact, only 2 of the references to small business in the Bill may be considered genuine (albeit limited) exemptions: an exemption from the proposed "regulated labour hire arrangement orders" for a small business host (but not a small business labour hire provider); and a small business exemption from having to pay a union nominated "workplace delegate" for "related training" during normal working hours (but seemingly still being required to provide the employee time off for such training during working hours).

12. Of the remainder, 2 of the small business references relate to the proposed "employee choice" casual conversion pathway, in which a small business employer may be forced to accept a casual employee's conversion notification after 12 months (rather than 6 months for non-small businesses). The final 6 references relate to a proposed Voluntary Small Business Wage Compliance Code, that the Minister may (or may not) declare in future by legislative instrument – and which may (or may not), at the discretion of the Fair Work Ombudsman, provide a 'safe harbour' from criminal, but not civil, prosecution.

13. MTAA considers this to be manifestly inadequate. It is not hyperbole to state that the amendments proposed in this Bill, if passed, may literally be the final nail in the coffin for many small businesses. Feedback from MTAA's predominately small business membership is

[5] Australian Government Treasury, *Mental health and the small business sector*, December 2022, pages 4-5.
[6] WorkSafe Victoria, *Mental Health Strategy 2021-2024*, November 2021.

equally clear: the impact of the changes will have an extremely damaging effect on small businesses in the automotive industry – and will result in a reduction in staff levels, a scaling down of businesses and business closures.

14. **MTAA submits that the Bill is fundamentally flawed and represents the wrong step at the wrong time for small businesses. Accordingly, whilst MTAA has provided a number of recommendations in its submission in an attempt to mitigate the damage that will be caused by passage of the current Bill, the most appropriate approach would be to start again – following a genuine (and independent) regulatory impact analysis and a genuine (rather than perfunctory) industry consultation process.**

IMPACT ON CASUAL EMPLOYMENT OPPORTUNITIES

Proposed New Casual Definition

The current definition of casual employee under the Fair Work Act is, consistent with common law, objectively and clearly defined solely by reference to the terms of the employment contract. Under the proposed changes, this definition will be replaced by one that was firstly, rejected (for being in error) by the High Court of Australia; and secondly, entirely at odds with the pre-existing statutory framework under the Fair Work Act. The result is unnecessary uncertainty, subjectivity and complexity.

15. Under the proposed changes, the current definition of casual employee under the Fair Work Act (FW Act) will be replaced by one that considers the entirety of the employment relationship to determine its so-called "real substance, practical reality and true nature". In doing so, the proposed amendments would legislate an approach to common law interpretation that was found to be in error by the High Court of Australia in *Workpac v Rossato*[7]. It is an approach that is also at odds with the pre-existing statutory framework which expressly recognised long term casuals[8], which included a definition of casual employee as *"one engaged and paid as such"* in many modern awards.

16. The result, despite the erroneous claims to the contrary made in the Explanatory Memorandum (EM), is a definition that is inherently uncertain and subjective – with determining indicia including such factors as whether there is a "regular pattern of work" (which can include fluctuation or variation over time); whether it is "reasonably likely" that there will be "future availability" of continuing work of the kind usually performed; and whether there are full-time or part-time employees performing the "same kind of work".

17. In tacit acknowledgement of how unworkable the proposed definition of casual employee will be in practice, a deeming provision has been added at proposed section 15A(5) that claims to ensure that an employee who commences employment as a casual employee remains a casual employee until the occurrence of a "specified event" (e.g. the employer offers, and the

[7] *WorkPac Pty Ltd v Rossato [2021] HCA 23*, paragraphs 57 and 66.

[8] Op. Cit., section 12 (prior to March 2021): "long term casual employee", which included entitlement to request flexible work arrangements (section 65(2)(b)(ii), parental leave (section 67(2)(b)) and protection from unfair dismissal (section 384(2)(a)."

employee accepts, casual conversion to full-time or part-time employment under existing NES provisions[9]). That is, they remain a casual employee even if they are not (otherwise) a casual employee under the new determining indicia – e.g. there is a regular pattern of work, due to factors such as the employee's availability.

18. However, even with this deeming provision at section 15A(5), there is no certainty – as under the new definition of casual employee under section 15A, the test of whether there is an "*absence of a firm advance commitment to continuing and indefinite work*" includes such subjective and uncertain indicia as "*mutual understanding or expectation*"[10], rather than being limited to the objective terms of the employment contract.

19. In doing so, it seeks to legislate the very error identified by the High Court of Australia as leading to "… *the decent into the obscurantism that would accompany acceptance of an invitation to enforce 'something more than an expectation' but less than a contractual obligation…"* [11] As also noted by the High Court of Australia, this flawed 'obscurantist' approach ultimately leads to an outcome whereby: *"… the parties could not know what their respective obligations were at the outset of their relationship and would not know until a court pronounced upon the question…"* [12].

20. Accordingly, even if it is assumed that there is no "specified event" to trigger casual conversion (as employees will rarely voluntarily seek to convert from casual employment to full-time or part-time employment), an employee may still be retrospectively deemed not to have commenced employment as a casual employee. This will occur where subsequent conduct indicates that (contrary to the intentions of the employer and casual employee and the terms of the contract) there was 'a firm advance commitment to continuing and indefinite work' at the time of engagement. This fact is stated categorically in the proposed section 15A(3)(a), which states that a mutual understanding or expectation of a firm advance commitment to continuing and indefinite work:

> *"… may be inferred from conduct of the employer and employee after entering into the contract of employment or from how the contract is performed;"*

21. Therefore, contrary to what is claimed in the EM[13], the proposed new subsection 15A(5) does not provide certainty – as the test of whether the employee was correctly classified as a casual on engagement within the meaning of new subsections 15A(1)-(4) is a retrospective one. Accordingly, if an employer is (retrospectively) deemed to have misclassified an employee as a casual employee at commencement of the employment relationship, *"… the employee would never have been a casual employee …"* [14]

22. MTAA further notes that under the proposed amendments, an employer is also prohibited from *"… changing the usual pattern of work, reducing or varying the hours of work, or*

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[9] See 66B, 66F
[10] 15A(2)(b)
[11] Op. Cit., paragraph 63.
[12] Ibid., paragraph 99.
[13] See paragraphs 298 and 299.
[14] EM, paragraph 299.

terminating the employment of a casual employee as a means of avoiding their rights and obligations under new Division 4A of Part 2-2"[15], which includes the new 'employee choice' casual conversion pathway (see following section). This means that an employer, who is concerned their casual employee's pattern of hours are becoming indicative of being a non-casual employee under the new definition, could be found to be in contravention of the FW Act if they change that employee's pattern of hours, as this might prevent the casual employee from exercising a (future) right to convert their employment status.

23. Notably, the EM claims (at paragraph 345) that this amendment is:

> *"… necessary to reflect the meaning of casual employee in new section 15A, in particular the requirement to have regard to whether there is a regular pattern of work for the employee when assessing whether there is an absence of a firm advance commitment to continuing and indefinite work (new subparagraph 15A(2)(c)(iv)). The existence of a regular pattern of work is an important indicator of the presence of a firm advance commitment, although it would not be solely determinative of an employee's status."*

24. Hence, under the proposed new casual definition, an employer may find themselves in contravention of the FW Act and subject to a general protections claim if they <u>do not</u> vary a casual employee's regular pattern of work (if deemed to have misclassified employment status and/or entered into a sham casual arrangement), and in contravention of the FW Act and subject to a general protections claim if they <u>do</u> (under proposed 66L anti-avoidance provisions) vary a casual employee's regular pattern of work. In short, employers are damned if they do and equally damned if they don't under the proposed amendments to casual employment that, quite literally, set employers up to fail.

25. MTAA notes that in the automotive industry, special provisions for casual employees were first introduced over 50 years ago in the *Vehicle Industry Repair, Services and Retail Award 1970*. These award provisions reflect the unique operating conditions that apply to employees working in the fuel retailing essential service area and currently provide a casual loading to employees of 31.75%. MTAA notes that it has long been recognised that *"… the vast majority of console operators are employed as casual employees and that this arrangement is relevant to the industry and suitable to both employees and employers."*[16] The uncertainty and complexity inherent in the proposed changes would have a devastating impact on this critical automotive sub-sector, for employers and casual employees alike.

26. **The proposed flawed casual definition, with its deliberate incorporation of an approach found to be in error by the High Court of Australia, must be rejected. At a minimum, the definition must be amended to reflect that the terms of the employment contract are determinative – and that post-engagement conduct (other than where such conduct is wholly inconsistent with terms of the casual employment contract – i.e. a genuine sham) is not considered in determining whether the employee commenced employment as (or is otherwise) a casual employee.**

[15] EM, paragraph 343.
[16] Australian Industrial Relations Commission, Decision Print P4839, page 24.

Proposed New ‘Employee Choice’ Conversion Pathway

The proposed new ‘employee choice’ casual conversion pathway enables an eligible casual employee to exercise an effective unilateral right to convert to full- or part-time employment in circumstances where the employer has reasonable business grounds to refuse.

27. The proposed new ‘employee choice’ casual conversion pathway at Subdivision B of Division 4A of Part 2-2 effectively provides a unilateral right of conversion, with the only exclusion, in practice, being for public sector employers[17]. For private sector employers, including small businesses, there is no genuine exclusion. That is, unless the private sector employer succeeds in proving that the employee remains a casual employee under (what MTAA views as a fundamentally flawed) new casual employee definition, the only exemption available is where an employer successfully demonstrates that they would be contravening the terms of an applicable fair work instrument (e.g. modern award) if the employee converted (unless substantial changes were made).

28. As confirmed by the EM[18], this will effectively be limited to instances where a casual employee is engaged less than the minimum hours of engagement for part-time employees. However, under many modern awards (including those in the automotive industry), the minimum engagement terms are not higher for part-time employees[19] – meaning no exemption will apply in practice to such private sector employers.

29. MTAA notes that under the current arrangements, there is no credible evidence[20] which suggests that employers are refusing casual conversion requests from their employees. Further, in the rare instances they do, it is almost invariably because they have (and can demonstrate) reasonable business grounds for doing so[21]. The effect of the introduction of this ‘employee choice’ pathway is that an employer will no longer have an ability to refuse on reasonable business grounds. This means that an employer can be forced to convert an employee even if they cannot reasonably accommodate the conversion.

30. In turn, this means that an employer who is forced to convert a casual employee in such unreasonable circumstances is likely to find themselves in the position of not being able to sustain the role, leading to the converted (to full-time/part-time) role becoming redundant and the employee terminated as a result. The employer will then face the prospect of having to defend a general protections claim (where there is a reverse onus of proof) made by the terminated employee on the grounds that an operative reason for their termination was that they had exercised their workplace right to ‘employee choice casual conversion’.

31. The EM’s suggestion that the new casual conversion framework addresses the needs of employers as it would *“protect employers against repeated attempts by a casual employee to*

[17] See proposed section 66AAC(4)(c).
[18] See paragraph 311.
[19] See for example, *Clerks – Private Sector Award 2020*, clauses 10.5 and 11.4.
[20] See for example, *Fair Work Commission Annual Report 2021-2022*, page 27.
[21] See for example, *Tony John Sacchetta v GrainCorp Limited [2022] FWC 2339*.

convert their employment status within a six month period" [22] is therefore manifestly inadequate. What employers need is protection from attempts by a small minority of casual employees who will look to 'game the system' and convert their employment status in circumstances that are unreasonable and contrary to the operational requirements of their business.

32. MTAA notes that it has been suggested that employees of small businesses do not have the right to request casual conversion under current NES provisions. This is factually incorrect. Like other businesses, small business employers may only refuse a request made by an eligible casual employee on reasonable business grounds. Where an employee wishes to contest the genuineness of their employer's claimed reasonable business grounds, there is a clear issue resolution procedure administered by the Fair Work Commission (FWC). If an employee believes that they have suffered adverse action (e.g. reduced shifts or termination of employment) they have access to not only general protections claim, but also unfair dismissal protections. Accordingly, it is difficult to understand what 'loophole' the Bill is genuinely trying to close.

33. **The proposed 'employee choice' casual conversion pathway provisions are therefore both unnecessary and unfair – and should accordingly be rejected. At a minimum, MTAA submits that an additional exemption be added to proposed section 66AAC(4), being the ability for an employer to not accept the notification on reasonable business grounds – and that small businesses be exempted altogether from this pathway**.

34. **Given the administrative burden, limited resources and limited capacity to accommodate conversion requests, there should only be one straightforward process for small business employers (and their employees) to follow. That is, in keeping with the existing NES, an eligible casual employee can request conversion after 12 months, with their employer only able to refuse on reasonable business grounds.**

Proposed New 'Sham Casual Contracting' Prohibitions

The proposed new casual 'sham contracting' provisions will see employers risk prosecution and unfair penalties for continuing to engage a casual employee who was eligible to, but chose not to, convert to full- or part-time employment in accordance with the NES. This would also apply to an employer who offers casual employment to a full- or part-time employee whose role has been made redundant.

35. MTAA notes that contrary to what is intimated in the EM[23], the statutory review did not recommend that these provisions be added in addition to the proposed new casual definition (nor did the review suggest that they were necessary). Rather, the statutory review observed that if there was a concern with the current objective definition (i.e. terms of the employment

[22] See paragraph 319.
[23] See paragraphs 7, 53 and 54.

contract), these could be addressed by adding a prohibition into entering into sham arrangements.

36. MTAA notes that it is clear from the statutory review recommendations, that this recommendation of 'consideration' was prefaced on both further meaningful research to determine *"whether additional prohibitions are necessary"*[24] (which has not been done) and on the basis that it was an alternative to changing the casual definition[25]. That is, it was a potential option if the current casual employee definition under the FW Act was retained in its current form.

37. Under the proposed changes, an employee who commences employment as a casual employee, and who continues to be a casual employee under both common law and the current (and historical) definition under the FW Act[26], will no longer be performing the work of a casual employee under the proposed new definition if they have a regular pattern of work and other elements of the proposed indicia test are met (e.g. there is a part-time employee at the workplace performing similar work).

38. Whilst the casual employee will ostensibly be entitled to continue to enjoy the benefits of being a casual employee by not electing to trigger the occurrence of a specified event (per section 15A(5)), the employer remains subject to civil penalty prosecution for being retrospectively deemed to have failed the proposed new casual employee (on commencement) test per proposed section 15A(3); and/or for mispresenting the work being performed as casual employment under the proposed new casual 'sham contracting' prohibitions.

39. MTAA notes the absence of any statutory note or sub-section in the Bill providing clarity on how the proposed new section 359A will interact with the proposed section 15A – and sub-section 15A(5) in particular. Further, MTAA notes that the only 'clarity' provided in the Bill or EM relates to how employers, FWC and courts can (potentially) determine whether the employer's belief that the contract was a contract for employment as a casual employee was reasonable in the circumstances. That is, the EM appears to take the view that employers will routinely contravene the provision, with the only question being as to whether they can successfully use the 'reasonable belief' defence.

40. MTAA further notes in this regard, that neither the Bill nor EM provide any comfort that an employer will be able to successfully use the 'reasonable belief' defence – given none of the considerations provided in proposed section 359A(3) have weight beyond a matter to be regarded; i.e. they are not determinative, either singularly or in aggregate.

41. As a result, an employer that provides their casual employee a notice of casual conversion in accordance with the current NES requirement, and whose employee chooses not to convert, risks being deemed to have engaged in sham casual contracting if they continue to offer the

[24] KPMG, *Review of the Fair Wok Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)*, October 2022, page 72.
[25] Ibid., pages 71 and 72.
[26] Op.Cit., section 12 definition of "regular and casual employee" (and its predecessor, "long term casual employee").

employee work on the same terms (i.e. same pattern of work). The employer also risks being unable to use the 'reasonable belief' defence as, by providing the notice of casual conversion, the FWC or court may determine that the employer was (or should have reasonably been) aware that the casual employee was no longer a casual employee under proposed new definition (per section 15A(1)-(4)). Therefore, by continuing to offer those hours, the employer may be deemed to have been aware that they were offering employment for work that was no longer that of a casual employee. Again, the proposed provision is setting employers up to fail.

42. The complete inappropriateness of the apparent 'cut and paste' of existing sham contracting provisions[27] to casual employment, is further underscored by the proposed prohibition under section 359B of dismissing a full- or part-time employee to engage as a casual employee. Under the proposed prohibition, an employer who makes a full or part-time role redundant and terminates the incumbent employee as a result, may be deemed to have contravened the FW Act if they offer the employee ad hoc casual employment (as often occurs as a means of helping the employee continue to earn an income whilst they look for other work). Additionally, the employer would be in breach if, as part of the consultation process prior to making the final redundancy decision, they offer employees the option of casual employment as a means of achieving a 'voluntary' redundancy.

43. In both instances, the employer could be said to have dismissed, or threatened to have dismissed, the employee in order to persuade or influence the individual to enter into a casual employment contract. This is because an employer is deemed to offend this prohibition if the reason for termination (or threatened) termination includes the purpose of engaging the individual as a casual employee. Again, a reverse onus applies to this offence – meaning that an employer will need to prove that the employee's engagement as a casual employee was not an operative reason for their termination as a full- or part-time employee.

44. **Employers should not face prosecution in such circumstances, nor should they face harsh penalties if they fail to convince the FWC or Court that they either held a 'reasonable belief' or did not get it wrong. The attendant risk will result in employers being forced to limit (or entirely eliminate) casual employment opportunities in their workplaces – to the detriment of productivity, the customer, and their employees who rely on the additional income and flexibility that casual employment affords them.**

[27] MTAA also notes that under the proposed changes to sham contracting, the defense available to the deemed 'employer' will be significantly eroded. MTAA notes that the introduction of a more 'objective' test per commentary at paragraph 781 of the EM might be more legitimate if the new definition of 'employee' was not seeking to circumvent common law and the High Court of Australia, and the test (and offence) was in relation to the initiator of the 'sham' arrangement, rather than the deemed employer (who in practice may be coerced or unduly pressured into the arrangement by the other party).

Regulatory Impact Analysis

The Regulatory Impact Analysis Equivalent performed by DEWR claims that the total cost of the introduction of these changes for employers is 15 minutes[28] of their time. This might be considered laughable if it were not so serious. It demonstrates the urgent need for a genuine regulatory impact analysis prior to any amendments being passed.

45. MTAA questions the view expressed by the Department of Employment and Workplace Relations (DEWR), that:

> *"the Senate Select Committee on Job Security, and the review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth) – can be certified as equivalent to an impact assessment process."*[29]

46. MTAA notes in this regard, that DEWR's view is particularly hard to reconcile with the serious concerns raised with the integrity of the Senate Select Committee's Job Insecurity Report. Perhaps the best example is provided by members of the Committee itself, with the Dissenting Report by Liberal and National Senators finding as follows:

> *"…It is concerning that the inquiry has amounted to little more than a political farce by the Labor – Greens Alliance … campaigning for big government and union control of Australians in the workplace – imposing more restrictions and intrusion upon both workers and businesses. Liberal and National Senators have passed down a dissenting report with each interim report and sought to improve the honesty and integrity of the inquiry whilst limiting the shameful partisanship exhibited by the Labor and Greens Senators. Unfortunately, Labor and Green Senators continued to engage from a hostile, predetermined ideological position, using many witnesses in a dishonest way to cherry-pick data and accounts that supported their negative narrative, whilst being dismissive of any alternative view…"* [30]

47. Given this damning Dissenting Report, MTAA suggests that the findings of the Job Insecurity Report have little, if any, to offer to a genuine impact assessment process. MTAA notes that concerns over the potential of such 'partisanship' adversely impacting the objectiveness of DEWR's analysis may be evidenced by statements such as:

> *"Casual employees can face significant negative impacts as a result of insecure work … increasing an individual employee's job security is linked to … physical and mental health…"*[31]

No justification is provided in support of this assertion. MTAA notes that whilst reference is made to the BETA findings[32], those findings do not make any specific reference to physical or mental health.

48. This is important as the link between casual employment and negative health outcomes is far from established in the academic literature. For example, MTAA notes the findings of a recent study of longitudinal data for Australia over the period 2001-2018, that:

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[28] Or 16 minutes, if you factor in the annual provision of the Casual Employment Information Statement.
[29] DEWR, *Standing up for casual workers (OBPR22-02412) Impact Analysis Equivalent*, page 4.
[30] The Senate Select Committee on Job Security, *The Job Insecurity Report*, February 2022, pages 195-196.
[31] Op.Cit., page 14.
[32] BETA, *Casual Employment: Research findings to inform independent review of SAJER Act*, 2022.

"For both men and women, health outcomes for casual workers were no worse than for permanent workers, and in some cases, were better. Even for the casual jobs that seem ex ante most likely to impact negatively on mental health – jobs with irregular hours where the worker reports having limited control over hours – there was no evidence of any negative impact … Policy makers contemplating the introduction of regulations designed to limit the spread of casual-like employment contracts should take into account that such interventions may have no positive impacts on worker health."[33]

49. Further, DEWR's Impact Analysis Equivalent also claims that:

"The proposed reforms would not create any new requirement for employers to initiate any process to change an employee's status to permanent … the kind of conversations and actions employers will need to engage in are not new – they are a normal part of being an employer…"[34]

However, as already outlined in our submission, the uncertainty, subjectivity and complexity of the proposed casual changes are clearly intended to result in a significant change in the way in which employers will need to engage with their casual employees. The suggestion that there will, in practice, be no new requirements and that it will remain 'business as normal' is patently false.

50. For completeness, MTAA also notes that the SAJER review[35] also confirmed that *"neither the BETA research nor the ABS data considered the operation of the statutory definition in any detail."* That is, no consideration of the current statutory definition – and no consideration of the statutory definition proposed by the Bill. MTAA further notes that the SAJER Review was limited to the current statutory definition, of which it could not come to a concluded view in the absence of further data.[36]

51. The resultant regulatory costings, quantified by DEWR using the Australian Government's Regulatory Burden Measurement framework, are prefaced on a number of flawed assumptions that helps explain what MTAA views as a material underestimation of cost. These include:

- the use of the ABS Characteristics of Employment Survey, despite acknowledging that *"there is no explicit alignment between the statutory provisions and this data set"*[37] *and that the "application of the definition to an employee will be assessed on a case-by-case basis"*[38]; and

- that despite the assessment of whether an employee is a casual employee under the proposed definition being *"a holistic assessment of all relevant factors in the practical reality of the employment relationship, including understandings or expectations that occur after entering into the initial contract of employment*"[39], the "*process followed by an employer in responding to a casual employee notification of conversion through*

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[33] Hahn MH, McVicar D, Wooden M. *Occup Environ Med 2021*; 78: 15-21, page 15.
[34] Op. Cit., page 13.
[35] KPMG, *Review of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth),* October 2022, p 69.
[36] Ibid., see for example, pages 70 and 71.
[37] Op. Cit., page 22.
[38] Ibid.
[39] Ibid., page 22.

the employee choice definition pathway is assumed to mirror that for the casual conversion steps"[40] under the current provisions.

52. As a result, DEWR's regulatory costings arrives at a grand total of 15 minutes of an employer's time to address a notification from an employee under the proposed new casual arrangements. DEWR notes that this is slightly higher than the 10-minute assumption used in the SAJER Regulatory Impact Statement, *"to reflect that the definition based pathway is a holistic assessment …"*[41]. MTAA further notes that the time impost from an employer in relation to the proposed changes is estimated by DEWR to be less than that of an employee, which DEWR has calculated to take 20 minutes.

53. Accordingly, the full costing of the impact of the proposed casual employee changes has been based solely on 15 minutes of the employer's time to:

    - *"acknowledge and consider the notification from a casual employee for conversion AND*
    - *notify the employee of the decision and discuss it with the employer if the employer disagrees with the notification OR*
    - *notify the employee of the decision if the employer agrees, plus time for discussion with the employee, drawing up a new contract and updating payroll and other systems."*[42]

54. MTAA notes that no consideration has been given to the costs associated with an ongoing assessment requirement on an employer to ensure that the casual employee remains a casual employee for the purposes of the new definition in order to manage the risk of being deemed to have contravened the proposed new sham casual contracting prohibitions. Nor has the impact of the intended reduction in casual employees over time[43] , including through forced conversion been considered, in circumstances where it is not reasonable based on the operational requirements of the business.

55. Perhaps most telling of all, is DEWR's justification for excluding from the regulatory burden cost analysis, any consideration of costs incurred in court and tribunal processes. MTAA notes that whilst initially insinuating that issue resolution costs through the FWC under the new arrangements are akin to 'non-compliance and enforcement costs', DEWR ultimately notes:

    > *"Given the inherent uncertainty in how independent parties will respond to this policy and the employee choice definition pathway is a new jurisdiction, the department has determined that estimations of the dispute costs would not be sufficiently robust to contain a meaningful estimate of the costs."*[44]

56. **MTAA agrees that the inherent uncertainty of the proposed casual changes prevents a meaningful estimate of the regulatory burden on employers, particularly when modelled on two reports that did not directly address the proposed amendments at all. Accordingly, MTAA submits that it is evident that the quasi-analysis provided by DEWR is, in its entirety, insufficiently robust to contain a meaningful estimate of the costs employers will incur as a result of the proposed casual changes.**

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[40] Ibid., page 25.
[41] Ibid.
[42] Ibid.
[43] Ibid., page 24.
[44] Ibid., page 35.

57. **Whilst MTAA can confidently state that the real cost in time, will be multiples of the 15-minute 'guesstimate' (or 16 minutes, if you include provision made for the Casual Employment Information Statement[45]) provided by DEWR, the inherent uncertainty, subjectivity and complexity of the proposed changes makes it impossible for MTAA to provide an exact costing. Such an assessment is best left to a genuine and independent regulatory impact analysis process, which MTAA recommends should occur as a matter of urgency before any vote on such contentious legislative amendments occur.**

<u>Feedback on the proposed amendments provided from MTAA member businesses:</u>

- *"[We would have to] offer permanent contracts to employees who do not want them. It would add to recruitment shortages."*

- *"[We would] stop providing some services that rely on casual employees to our customers which will negatively impact our revenue and brand."*

- *"[We would] consider not hiring casuals and make do with our permanent employees. This will impact customer satisfaction and possibly burn out our permanent employees."*

- *"[It] would reduce flexibility … increase stress on owners, make business less viable."*

- *"… I won't hire casuals again."*

Recommendations:

1. Undertake a genuine regulatory impact analysis of the real cost of these misguided changes prior to putting the Bill to a vote.
2. Retain the current objective casual employee definition under the FW Act.
3. If sham 'casual' contracting provisions are to be introduced, they must reflect the legitimacy of casual employment. An employer should not be subject to misrepresentation offence where the individual is a casual employee at common law, nor should they be subject to prosecution for offering a full- or part-time employee casual employment in a redundancy situation.
4. If the Government is going to introduce an exemption for itself in relation to refusing new 'employee choice' casual conversion pathway, private sector employers must have a right to refuse on reasonable business grounds.
5. Small business employers (and their casual employees) should not have to deal with multiple conversion pathways – it must be limited to the current ability to request conversion after 12 months, with the ability for an employer to refuse on reasonable business grounds.

[45] Ibid., page 33.

IMPACT OF 'WAGE THEFT' AND INCREASE IN PENALTIES FOR CIVIL REMEDY PROVISIONS

'Wage Theft'

Under the proposed changes, an employer who is found to have deliberately not paid the full amount owing to an employee on, or before, their pay day, will face penalties of up to 10 years imprisonment and/or fines of up to $7.825 million for a business. This could apply even if the underpayment was a one-off occurrence that was received in full by the employee the following day.

58. Under the proposed new 'wage theft' offence, an employer who is deemed to have engaged in conduct (i.e. either doing an act, or omitting to perform an act) that results in a failure to pay the required amount to an employee *"in full on or before the day when the required amount is due for payment"*[46] will have committed a criminal offence subject to 10 years imprisonment and/or fines of up to $7.825 million for a business, if the conduct is found to have been intentional.

59. MTAA notes, for example, that the *Clerks – Private Sector Award 2020* enables an employer who pays their employee wages by cash or cheque to pay the employee no later than the working day *immediately after payday* if the employee has a day off on payday due to the arrangement of their ordinary hours[47]. Under the proposed changes, an employer who intentionally complies with this reasonable modern award provision may be imprisoned for 'wage theft' for up to 10 years.

60. MTAA notes that the EM, again erroneously, claims that these changes give effect to the Migrant Workers Taskforce Report. They do not. The Report recommended that criminal sanctions be introduced in the most appropriate legislative vehicle (which they recognised might not be the FW Act), *"for the most serious forms of exploitative conduct, such as where that conduct is clear, deliberate and systemic…"*[48]. The Report did not recommend that an employer should face imprisonment for a one-off late payment, whether deemed "intentional" or not.

61. As noted in the EM, *"a failure to make a payment, for example, due to a banking error would not be caught by the provision"*.[49] It is bizarre that an employer is supposed to be comforted by the fact that they are not deemed a criminal or subject to imprisonment for a one-off late payment due to a banking error. MTAA notes that the EM provides a further example of conduct that would not see the employer imprisoned, being where:

> *"an employer genuinely misclassifies an employee and pays them an hourly rate of $25 per hour instead of $30 per hour (for the correct classification), the resulting failure to pay the required amount ($30 per hour) was not intentional and would not be caught by the provision."*[50]

[46] Proposed section 327A(d)

[47] See clause 17.3. (See also 'waiting time' provisions such as clause 20.4 of the *Joinery and Building Trades Award 2020* and clause 20.5 of the *Building and Construction General On-site Award 2020*).

[48] *Report of the Migrant Workers Taskforce*, March 2019, Recommendation 6, page 10.

[49] Paragraph 886.

[50] Paragraph 890.

What this example fails to mention is that whilst such conduct will not be caught by the criminal 'wage theft' provision, it would most likely be captured by the proposed new 'serious contravention' civil penalty definition (and if not, new penalties for ordinary civil penalty contraventions that will be sufficient to bankrupt many small businesses).

62. MTAA provides the following example, not included in the EM, of an instance that would meet the proposed 'wage theft' offence:

> *Gus is an employee of a small business and works overtime during a particularly busy period. Gus fails to put the hours down on their timesheet in accordance with company policy. Gus informs the small business owner, Mckenzie, of the overtime hours worked just as the owner has completed the pay run. Mckenzie advises Gus that she has completed the pay run and that as a result the overtime will be put through in the next pay period. Gus commits to ensuring that their timesheet is completed on time in future. Gus receives his overtime payment, in full, the following pay week.*

Under the proposed 'wage theft' offence, Mckenzie risks imprisonment as she was aware that Gus had worked additional hours and failed to ensure they were paid in full for the hours worked on or before their pay day. Mckenzie's unwillingness to undertake a separate pay run for Gus, demonstrates the conduct was intentional – and neither the fact that Gus failed to complete their timesheet within the required time, nor the fact that Gus was paid in full the next pay period, is a relevant consideration.

63. **MTAA strongly recommends that the proposed 'wage theft' amendments be rejected in their current form. An employer should not risk imprisonment for a one-off underpayment that is fully rectified in the next pay period. Such an approach is wholly inconsistent with the concept of 'a fair go all round' – and indicative of policy making conducted in an echo chamber, without any genuine concern given to the practical realities of running a business.**

64. MTAA is also particularly concerned by the proposed 'voluntary small business wage compliance code'. MTAA notes that special consideration is clearly necessary for small businesses – as due in part to their lack of sophistication and resources, they are likely to be overrepresented in 'wage theft' prosecutions[51]. This is particularly the case, given the unfairly low bar envisioned for the proposed criminal offence. However, it will be cold comfort for most small business employers to learn that whilst they will not be referred for criminal prosecution in relation to a failure to pay an amount in full by pay day if they succeed in satisfying the Fair Work Ombudsman (FWO) that they have complied with the voluntary code, that *"compliance otherwise with the voluntary code does not affect the power of an inspector to institute or continue civil proceedings…"*[52] That is, if a small business goes to the FWO and demonstrates their compliance with the voluntary code, they may avoid imprisonment, but may instead be prosecuted by FWO and bankrupted as a result of the unreasonable increase to civil penalties proposed by the Bill .

65. Similarly, the proposed 'cooperation agreements' at proposed Subdivision DE of Division 3 of Part 5-2 offers the same cold comfort for employers. They may avoid criminal prosecution by

[51] See for example, the 94 criminal charges filed by Wage Inspectorate Victoria against a small business under the Victorian *Wage Theft Act 2020*: https://www.vic.gov.au/restaurant-and-officer-face-criminal-charges-under-victorian-wage-theft-laws-australian-first
[52] EM, paragraph 912.

self-reporting if the FWO is satisfied that they have *"made a voluntary, frank and complete disclosure of the conduct…"*[53], but risk bankruptcy through civil prosecution proceedings taken against them by the FWO as a result of the self-report. MTAA considers that for many employers, the proposed measures will be viewed more "entrapment" than "safe harbour".

66. Employers who rectify an unintended underpayment immediately after they become of aware of it, should not be subject to prosecution (or enforceable undertakings) for alerting the FWO to the issue – whether as part of a voluntary small business code or as a cooperative agreement. In addition to being manifestly unfair, such an approach discourages employer engagement with the FWO and is inconsistent with issue resolution procedures contained in modern awards (and enterprise agreements) which require disputes (including in relation to pay) to be resolved, wherever possible, at the workplace level in the first instance.

67. MTAA further notes that this underscores the unfair approach taken by these proposed changes, particularly for small businesses. It sets the bar for contravention so low, that it appears intended to make all employers feel that they are criminals. This is poor public policy. If employers feel that the law is unfair and that they may find themselves in contravention no matter what they do, then the risk is that they will cease trying to do the right thing and instead focus on not getting caught. The focus of any criminal 'wage theft' offence should be on ensuring that any business that **intentionally, systematically and permanently** deprive employees of their wage entitlements are prevented from doing so ever again. The proposed changes should be amended accordingly.

68. MTAA notes that the Albanese Government has attempted to justify the proposed changes by stating that:

> *"If a worker steals from the till, it's a criminal offence – as it should be. But in many parts of the country if an employer steals from a worker's pay packet, it's not. It's time to end this double standard once and for all."*[54]

Putting aside the fact that the proposed 'wage theft' changes going far beyond the prevention of an employer 'stealing from a worker's pay packet', MTAA notes that if a worker 'steals' from the employer by intentionally claiming hours that they have not worked or refusing to return overpayments made to them in error, it's not a criminal offence either (in fact, it is not even a civil penalty offence). Following the introduction of a criminal 'wage theft' offence against employers, a future Government may find it time to end that double standard too.

[53] EM, paragraph 930.

[54] The Hon Tony Burke MP, *Albanese Labor Government to criminalise wage theft,* Media Release, 3 September 2023.

Serious Contraventions

Under the proposed changes, an employer who is found to have recklessly (rather than intentionally) not paid the full amount owing to an employee on, or before, their pay day, will face penalties of up to $4.695 million (or 3 times the underpayment amount, if higher) for a business and $939,000 (or 3 times the underpayment amount, if higher) for an individual under new 'serious contravention' amendments. This applies even if the underpayment was a one-off and the payment was received, in full, the following day.

69. MTAA notes that whilst the proposed criminal 'wage theft' penalty covers offences that may actually be less serious than the current serious contravention civil offence (i.e. which captures knowing and systematic underpayments) – the intent is to cover the most serious, high end contraventions. Despite this, the amended 'serious contravention' offence has increased penalties for employers (including small businesses) to up to $4.695 million for underpayment contraventions (including where payment is in full, but late) in circumstances that may be both non-intentional and one-off.

70. MTAA notes that such offences are referred to as "mid/upper-tier contraventions"[55] in the EM, despite the EM acknowledging that the new offence:

> *"adds an alternative 'recklessness' element to the provision, and omits the requirement in existing paragraph 557A(1)(b) that 'the person's conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other persons'."*[56]

71. MTAA notes that the EM does not provide an illustrative example of the types of conduct that would be deemed a serious contravention under the new definition. Returning to the example provided in the EM with respect to "banking error" cited above, MTAA provides the following example as one that may be of assistance:

> *Through various media reporting, Mckenzie, a small business employer, becomes aware that her bank is experiencing intermittent system difficulties and receives last minute advice that some outgoing payments may be delayed by up to 24 hours. Despite being aware that there was a substantial risk that her payments might be delayed, Mckenzie (due to cashflow issues) processes the payroll run as normal. Mckenzie advises her employees that there is a chance that their pay might be delayed by up to 24 hours due to issues with her bank, and to advise her if this would create any unreasonable hardship for any of them. Her three employees are understanding (as Mckenzie has previously always paid on time) and each advise that there will be no hardship as long as it is in their respective accounts within 48 hours of pay day (due to direct debit commitments). The employees receive full payment in their accounts 18 hours after their established pay day.*

72. Under the proposed changes, Mckenzie will have committed a serious contravention of the FW Act on the grounds of 'recklessness' and will be subject to penalties/pecuniary penalties of up to $4.695 million (or if higher, 3 times the underpayment amount which in this case is zero) – enough to bankrupt her many times over. This is because Mckenzie was aware that by not processing the pay earlier, there was a substantial risk that the employees would not be

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[55] Paragraph 820.
[56] Paragraph 822.

paid on time; and that having regard to the circumstances (e.g. alternative, albeit limited, actions available) it was unjustifiable to take the risk. Under the proposed changes, it is not relevant that it was a one-off late payment, that the payment was processed on time, that she had consulted with her employees to ensure no unreasonable hardship from the potential delay, and that payment was received in full by her employees less than 24 hours after it was due.

73. Indeed, the manifest unfairness and unreasonableness is effectively acknowledged in the EM by the attempt to justify the introduction of a "subjective belief" test *"that is typically used in criminal law"*[57] for recklessness, as a "*higher evidentiary bar"* [58] intended to reflect:

> *"the seriousness of these kinds of contraventions, which attract relatively high civil pecuniary penalties under the FW Act."*[59]

However, as the above example illustrates, it still results in employers being treated as criminals for minor infractions.

74. **MTAA submits that the only way to effectively 'raise the bar' in practice, is to restore the current test for serious contravention so that the offence is actually reflective of a serious contravention – i.e. knowing and systematic underpayments (rather than one-off late payments). At the very least, if a reckless offence is to be introduced it should only apply if it relates to systematic underpayments.**

Penalties for honest mistakes and/or matters beyond the employer's control

Under the proposed changes, an employer who is found to have not paid the full amount owing to an employee on, or before, their pay day, will face penalties of up to $469,500 (or 3 times the underpayment amount, if higher) for a business and $93,900 (or 3 times the underpayment amount, if higher) despite not being due to deliberate, knowing, or reckless conduct. This applies even if the underpayment was a one-off and the payment was received, in full, the following day and was the result of an honest mistake or matters reasonably beyond the employer's control.

75. Using the illustrative example provided in the previous section, the proposed new definition of "underpayment amount" and penalty structure would mean that in the situation where the employees' receipt of payment was delayed due to a cyberattack that occurred after Mckenzie had processed the payroll (rather than as a result of intermittent system issues that Mckenzie had been advised of), Mckenzie would still face penalties of up to $469,500:

> *Mckenzie, a small business employer, is unaware that her bank has been subject to a cyberattack that has resulted in outgoing payments being delayed by up to 24 hours. Mckenzie is notified by the bank after she has completed the payroll run. Mckenzie advises her employees that their pay will be delayed by up to 24 hours due to the cyberattack, and to advise her if this would create any unreasonable hardship for any of them. Her three*

[57] Paragraph 824.
[58] Ibid.
[59] Ibid.

employees are understanding (as Mckenzie has previously always paid on time) and each advise that there will be no hardship as long as it is in their respective accounts within 48 hours of pay day (due to direct debit commitments). The employees receive full payment in their accounts 18 hours after their pay day.

76. Again, this is a result of the proposed new "underpayment amount" definition at new section 546A that relates to conduct (including omitting to perform an act – e.g. paying each employee in cash as soon as she becomes aware) that *"results in a failure to pay the required amount to … the employee if full on or before the day when the required amount is due for payment"*[60]

77. **MTAA again notes that the potential penalty for an honest mistake (or matter beyond the employer's control) of $469,000 for a body corporate is simply unfair. The suggestion made in the EM[61] that the proposed increase in penalties applying to such matters implements recommendation 5 of the Migrant Workers Taskforce is simply inaccurate. Such conduct is not "wage exploitation" – nor for that matter, is it akin to "unconscionable conduct" under Australian consumer law[62].**

Feedback on the proposed amendments provided from MTAA member businesses:

- *"If this were to occur it would be incredibly damaging to the business as well as the staff employed. Payroll is a very fluid and moving process each week and mistakes are almost guaranteed to be made. Despite them being unintentional and easily rectified, this proposed change would make a very simple administrative error into a business ruining exercise and potentially leave many people out of work as businesses close."*

- *"A fine of that size would cause me to scale down business, reduce staff to just myself, or just close the business."*

- *"Expensive for an honest mistake and $100k would close our business let alone $400k."*

- *"$469,000 for an honest mistake. Lets destroy businesses!"*

Recommendations:

1. If a criminal offence for 'wage theft' is to be introduced, it is wholly inappropriate for it to apply in relation to a one-off event, or a delayed payment, that is expeditiously rectified. Rather, it should relate to conduct that intentionally, systematically and permanently deprives employees of their wage entitlements.
2. The serious contravention civil offence needs to be amended to ensure that it only applies to knowing or reckless, systemic conduct – with the broader civil underpayment offence amended to prevent an employer from being prosecuted simply because an employee receives full payment a day late.

[60] Proposed sub-section 546A(1)(c)
[61] See paragraph 813.
[62] Op Cit., see pages 87 and 88.

3. The proposed voluntary small business code needs to be broadened to provide 'safe harbour' from both criminal and civil prosecutions. The proposed cooperative agreements should be amended in the same manner.
4. Penalties need to be reduced from that proposed to reflect that the most serious contraventions are now subject to criminal penalties, with penalties applicable to a small business to be brought in line to those that apply to individuals.

IMPACT OF 'WORKPLACE DELEGATE' RIGHTS AND CHANGES TO UNION RIGHT OF ENTRY

Under the proposed changes, union nominated "workplace delegates" will be given special rights in workplaces, not available to non-union employee representatives, in clear disregard of basic freedom of association principles. The changes include enshrining this special status in modern awards applying to private sector employees, where 92% of the workforce have not chosen to be a union member.

76. The MTAA is disappointed that the proposed amendments seek a return to an antiquated, adversarial approach to workplace issue resolution that is wholly inconsistent with a legislative objective of providing *"a balanced framework for cooperative and productive workplace relations"* and *"providing accessible and effective procedures to resolve grievances and disputes"*[63] – particularly when 92% of private sector employees have not chosen to be members of a union.

77. MTAA notes that the FW Act's current freedom of association provisions currently protects an employee's right to be, or not be, a member of a union. Under the proposed changes, employee representatives who are union members appointed as a "workplace delegate" will have a special status not available to non-union members. That is, the proposed changes discriminate against all employee representatives (whether formally or informally appointed) who are not union members and will therefore not be appointed by a union as a "workplace delegate".

78. This reality is completely misrepresented by the EM, which states at paragraph 715 that:

    > *"… Division 4 of Part 3-1 includes protections for freedom of association and involvement in lawful industrial activities. New section 350A would complement these existing protections by providing specific protections for workplace delegates."*

    MTAA notes that this statement would be true only if, contrary to the proposed amendments, a "workplace delegate" was one appointed by the employees in the workplace, rather than a registered trade union. In its current form, the proposed amendment is antithetical to freedom of association.

79. MTAA's concerns in this regard are further underscored by the proposed right of the union nominated workplace delegate to represent the industrial interests of non-union members eligible to be members, including in relation to disputes with the employer. The only clarification, of sorts,

[63] Op. Cit., section 3.

provided that this does not create an obligation on a person to be represented by a workplace delegate is by way of a statutory note. However, no clarity is provided as to how an employer is to determine who the workplace delegate is representing, or how a person is to exercise their right not to be represented by the workplace delegate. For example, is it intended to work like default union bargaining rights, where a union member will be represented by the union unless they formally appoint themselves or someone else in writing as their bargaining representative? Whilst the EM suggests otherwise[64], it remains unclear.

80. MTAA further notes that the proposed new protections provide unilateral prohibitions on employers from unreasonably failing or refusing to deal with a workplace delegate; knowingly or recklessly making a false or misleading misrepresentation to a workplace delegate; or unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate. However, inexplicably, there are no corresponding responsibilities on the workplace delegate in relation to the exercise of their proposed new rights; nor is there clarity on what, in practice, "any hinderance, obstruction or prevention" entails.

81. This failure can be contrasted with existing right of entry powers of union officials under the FW Act, which expressly prohibit union officials from: hindering or obstructing any person, or otherwise acting in an improper manner[65]; making misrepresentations about right of entry rights[66]; and making unauthorised disclosures of information or documents[67].

82. The provisions of rights without responsibilities is poor public policy, and particularly so in the current context where the rights to be exercised appear in practice to be broad and unfettered.

83. MTAA notes that the limitations on these proposed new protections are reverse onus – i.e. rather than the onus being on the workplace delegate to demonstrate that the employer has acted unreasonably under proposed section 350A(1), proposed section 350A(3) requires an employer to demonstrate that their actions are not unreasonable. As noted in the EM, whilst:

> *"employers would still be able to undertake reasonable management action, carried out in a lawful way … the burden for establishing that the conduct of an employer is not unreasonable is on the employer…"*[68]

84. Similarly, rather than the onus being on the workplace delegate to demonstrate that the proposed exercise of their workplace rights under proposed new section 350C(3) is reasonable, the EM makes clear that the onus will again be on the employer:

> *"All of the rights in new subsection 350C(3) are subject to a requirement of reasonableness, that is, an employer would only be required to provide facilities to the extent that this would be reasonable"*

That is, in practice, if an employer refuses to provide facilities, the onus will be on the employer to prove that the manner in which the workplace delegate sought to exercise their right was not reasonable.

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[64] See paragraph 729.
[65] See section 500.
[66] See section 503.
[67] See section 504.
[68] Paragraphs 718 and 719.

85. MTAA is further concerned that whilst the proposed section 350B(5) provides clear limitations on who may be appointed as a 'regulated worker' workplace delegate, no such limitation is provided in relation to a workplace delegate appointed under proposed section 350C(1). That is, the definition of workplace delegate does not require that the person appointed be an employee working for the particular enterprise in question. Accordingly, a union could potentially choose to appoint one of their own employees as a 'roving' workplace delegate as a means of circumventing right of entry obligations. Whilst the EM indicates that this is not the intention[69], section 350C(1) must make clear that the workplace delegate is an employee of that particular workplace.

86. MTAA therefore opposes the proposed insertion of union-nominated "workplace delegate" rights into modern awards (and as a default term in enterprise agreements) on the grounds that in addition to offending freedom of association and the legislative objectives of the FW Act[70], they are unnecessary. MTAA notes that modern awards already provide appropriate rights for employees to be represented in the workplace. For example, under the *Vehicle Repair, Services and Retail Award 2020*[71], employees have rights (and employers, corresponding obligations) to be represented by their chosen representative in relation to each of the consultation and dispute resolution provisions of the award. MTAA further notes the extensive protections already provided for employee representatives under the existing general protections provision of the FW Act, including in relation to "workplace rights"[72] and "industrial activities"[73]. MTAA submits that the Committee should therefore be satisfied that the proposed changes are unwarranted.

87. Similarly, the proposed changes to union right of entry are equally ill-conceived and unwarranted. Under current right of entry provisions under the FW Act, a union official who is a permit holder can, relevantly, already:

- enter a work premises to investigate suspected contraventions (section 481);
- exercise extensive rights whilst on the premises (section 482);
- require an affected employer to produce later access to a record or document (section 483);
- apply to the FWC for access to non-member records (section 483AA); and
- apply to the FWC for an exemption certificate for an entry to investigate suspected contraventions if they satisfy the FWC that advance notice of the entry might result in the destruction, concealment or alteration of relevant evidence (section 519).

88. The proposed changes would enable a union official to obtain an exemption certificate for simply satisfying the FWC that the suspected contravention/s involve underpayment of wages or other monetary entitlements[74] – for the purpose of avoiding the obligation to provide at least 24 hours written notice of entry detailing the suspected contravention/s. The EM suggests that certificates will be applied for and issued on an *ex parte*[75] basis without notification to the employer. The effect will be to enable union officials to enter work premises without any advance notice to the occupier. In addition to raising OHS concerns, this is completely inappropriate in the context of resolving alleged underpayment claims – not least of all because it will in practice prevent an employer from

[69] See paragraph 731.
[70] See section 3, and in particular, sub-section (e).
[71] See clauses 35, 36 and 37.
[72] See sections 340 and 341.
[73] See sections 346 and 347.
[74] In practice, the basis of entry under section 481 itself.
[75] See paragraph 809.

being able to conduct a preliminary assessment of the claim and obtain relevant paperwork to ensure the matter is dealt with expeditiously.

89. Ultimately, MTAA is concerned that taken together, these proposed changes will adversely impact the effectiveness of current dispute resolution terms contained in modern awards and enterprise agreements. MTAA notes that these terms are prefaced on a cooperative approach to resolving disputes in the workplace, by prioritising resolution as close to the source as possible (i.e. where practicable, directly between the employee and the relevant supervisor in the first instance). The proposed changes threaten to undermine, rather than assist, this best practice approach to issue resolution, through a return to an outdated, adversarial framework. Accordingly, MTAA submits that the Committee should be satisfied that the proposed amendments should be rejected.

Recommendations:

1. Employee representatives need to be appointed by employees in the workplace, not by a union.
2. Any additional employee representative rights need to be more clearly defined and subject to corresponding responsibilities.
3. An employer should have no obligation to pay (or to provide time off) for training undertaken by an employee representative acting in that capacity, unless the training has been approved by the employer.
4. Small businesses need to be exempted from any expansion of existing employee representative provisions.
5. There should be no change to existing right of entry provisions.

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