Submission to Secure Jobs Better Pay Review

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1. About MIAL

1.1. Maritime Industry Australia Ltd (MIAL) is the voice and advocate for the Australian maritime industry. MIAL is at the centre of industry transformation, coordinating and unifying the industry and providing a cohesive voice for change.

1.2. MIAL represents Australian companies which own or operate a diverse range of maritime assets from international and domestic trading ships; floating production storage and offloading units; cruise ships; offshore oil and gas support vessels; domestic towage and salvage tugs; scientific research vessels; dredges; workboats; construction and utility vessels and ferries. MIAL also represents the industries that support these maritime operators – finance, training, equipment, services, insurance and more. MIAL provides a full suite of maritime knowledge and expertise from local settings to global frameworks. This gives us a unique perspective.

1.3. We work with all levels of government, local and international stakeholders ensuring that the Australian maritime industry is heard. We provide leadership, advice and assistance to our members spanning topics that include workforce, environment, safety, operations, fiscal and industry structural policy.

1.4. MIAL's vision is for a prosperous Australia with strong sovereign maritime capability.

1.5. MIAL's overarching position concerning maritime policy in Australia is that we ought to have a sustainable, viable maritime industry. This activity can occur anywhere – coastal, offshore and international. This maritime activity should encompass anything – freight, tourism, passenger movement, port and harbour services, offshore oil and gas, construction, scientific/research, essential services, and government services.

1.6. MIAL is an advocate for a fiscal and regulatory regime that makes it attractive for shipping and maritime businesses to exist in Australia and affords those Australian businesses every opportunity to compete for work and participate in maritime activity worldwide.

2. Overarching Comments

2.1. MIAL welcomes the opportunity to provide feedback on behalf of its members into the Secure Jobs Better Pay Review. The *Fair Work Amendment (Secure Job Better Pay) Act 2022* (SJBP Act) was introduced after a period of truncated consultation. When the opportunity was afforded during various committee investigations into the changes when they were originally proposed as part of various stages of proposed reforms to the *Fair Work Act 2009* (FW Act), MIAL provided responses focused on areas that were anticipated to be of interest to MIAL members.

2.2. This review comes a short period after the introduction of these reforms, meaning there is a limited sample size to review and understand any direct impacts. Many of the changes for example were targeted towards bargaining. For businesses who routinely bargain, given when changes have taken effect and their bargaining cycle driven by impending expiry of existing agreements, there are likely many businesses who have not experienced the affect of these changes at this point in time. Notwithstanding the limited time exposure, there are some areas where feedback may provide a valuable perspective.

3. Intractable Bargaining Disputes

3.1. The new provisions dealing with intractable bargaining disputes introduced under the SJBP Act have not yet been in place 18 months, and since then, further changes have been introduced to ensure employees will be better off in relation to terms subject to an intractable bargaining determination. It is difficult to provide a comprehensive assessment as to whether they have acted as an incentive for parties to reach agreement, have facilitated fair and reasonable enterprise outcomes. Or, as has been the concern of MIAL, that they have resulted in an imposition a practice, liability or commitment to which they have not agreed of their own volition.

3.2. This pursuit of an intractable bargaining determination should be the last possible resort when both parties agree they cannot move forward. That amendments allow one party to effectively seek to have an issue determined without the consent of other parties through that process, effectively through the effluxion of time, is not conducive to a productive bargaining process.

3.3. Subsection 274(3) determines that an intractable bargaining determination shall include any agreed term made:

An agreed term for an intractable bargaining workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at whichever of the following times applies, agreed should be included in the agreement:

(*a) if there is a post-declaration negotiating period for the intractable bargaining declaration to which the determination relates—at the end of the post-declaration negotiating period;*

(b) otherwise—at the time the intractable bargaining declaration was made.

3.4. Most enterprise agreements negotiations involve a level of compromise. Depending on the industry this could include high levels of flexibility to scale up and down workforce requirements that enhance and optimize productivity in return for benefits whether they be financial or non financial which are of benefit to employees either on an individual basis or collectively. It is not uncommon, nor should it be unexpected, that parties proceed on the basis "all is agreed or nothing is agreed". Therefore, the thinking is that the parties will negotiate until each claim is either agreed, compromised upon or withdrawn.

3.5. There is a very small sample size on which to draw, given EAs can last anything up to 4 years and many maritime industry employers have taken the approach to try to negotiate maximum term EAs in light of the considerable internal resources that the bargaining process typically consumes. However, certainly the feedback and concerns expressed by members are that there is a risk that through trying to achieve an agreement on a range of matters, the provision of in-principal agreements on certain matters in the expectation accommodations can be reached on others will see any intractable bargaining determination treat bargained outcomes agreed in isolation before proceeding to determine matters through an arbitrated process.

3.6. In the *Fair Work Amendment (Closing Loopholes No.2) Act 2024* (CL No.2), further adjustments were made to the making of intractable bargaining determinations. A new section 270A stipulates:

270A Terms dealing with matters at issue

(1) This section applies if, immediately before the determination is made, an enterprise agreement applies to one or more employees who will be covered by the determination.

(2) A term that is included in the determination to comply with subsection 270(3), and that deals with a particular matter, must be not less favourable to each of those employees, and any employee organisation that was a bargaining representative of any of those employees, than a term of the enterprise agreement that deals with the matter.

(3) If a term to be included in the determination is not less favourable to a class of employees to which a particular employee belongs, the 20 FWC is entitled to assume, in the absence of evidence to the 21 contrary, that the term is not less favourable to the employee.

(4) Subsection (2) does not apply to a term that provides for a wage increase.

New 274(3) Agreed term for an intractable bargaining workplace determination

(3) An agreed term for an intractable bargaining workplace determination is:

(a) a term that the bargaining representatives for the proposed enterprise agreement concerned had agreed, at the time the application for the intractable bargaining declaration concerned was made, should be included in the agreement; and

(b) any other term, in addition to a term mentioned in paragraph (a), that the bargaining representatives had agreed, at the time the declaration was made, should be included in the agreement; and

(c) if there is a post-declaration negotiating period for the declaration—any other term, in addition to a term mentioned in paragraph (a) or (b), that the bargaining representatives had agreed, at the end of the period, should be included in the agreement.

3.7. Given the recency of these further amendments, it is difficult to speculate as to the impact without having the exposure of a negotiating round across a particular business. No two businesses are identical, notwithstanding some elements of the laws introduced in recent IR reforms seek to treat them as such.

3.8. Whilst MIAL recognises the Review is targeted at the changes introduced by the SJBP Bill, these changes particularly in regards to intractable bargaining disputes cannot be viewed in isolation from changes that have taken place as part of the CL No.2 Act. Critically it appears that these changes provide less incentive for bargaining parties to reach any kind of agreement or compromise. Whilst the parameters of bargaining parties needing to genuinely be trying to reach agreement remain, these are a very low bar, and union bargaining parties are often effectively assumed to have met it.[1] This ensures that there will be no deviation from existing EA terms notwithstanding the very principal of bargaining for an EA is to pursue improved conditions, allow flexibilities specific to advancing productivity in that particular enterprise.

3.9. Trends emerging from the limited sample seem to be:

[1] JJ Richards & Sons Pty Ltd v TWU FWAFB 9963

3.9.1. Uncertainty about what constitutes an agreement, and whether a conditional agreement of some terms subject to agreement on others leads to these being included in an intractable bargaining workplace determination.[2]

3.9.2. Concern that an employer will always be exposed to a less favourable outcome in an intractable bargaining determination as employees must be better off. It is therefore more attractive to unions not to agree and seek an arbitrated outcome knowing their position can only be improved in the process, regardless of what has happened in bargaining to that point.

3.9.3. Allows one bargaining party to seek to bind another to a matter which after intensive negotiations they have not agreed, with a third party decision maker in the FWC whose expertise is interpretation of the FW Act and industrial instruments. The FWC understandably has limited or no knowledge of the internal business operating strategy of an organisation on whom they will impose an obligation. To require a business to through formal submissions prove to the decision maker why they should not agree to a claim being made by another party is resource intensive and unreasonable in circumstances where they have not sought the FWC's assistance in this way.

4. Multi-Employer/Single Interest Bargaining

4.1. There is a limited sample size and comparatively short period that these provisions have been in effect. Many organisations have not been exposed to bargaining periods in an environment where unions have many more levers to pull. A more complete review of these provisions (or at least a second review) should be undertaken after the cycle of "in term" agreements have expired. MIAL does appreciate that this review is a result of a legislative requirement, however the impacts of these changes to date are more pronounced in other industries, at this stage.

4.2. MIAL continues to hold the concerns it had at review stage of the SJBP Bill, including in relation to provisions that allow an enterprise to be bound notwithstanding it has had no involvement in the bargaining of terms and conditions to which it must then adhere.

4.3. It seems that the Government has attributed the limited use of the previous ability for parties to voluntarily enter into muti employer enterprise agreements as indicative of some failing on the

[2] Network Aviation Pty Ltd as Trustee for The Network Trust T/A Network Aviation Australia v Australian Federation of Air Pilots, Australian and International Pilots Association, Transport Workers' Union of Australia [2024] FWCFB 308 (12 July 2024)

part of those provisions, rather than the much more likely scenario that employees of an enterprise and their employer seek to agree terms that are specific to their workplace, organisation and enterprise rather than adopt wholly or substantially "industry conditions". In industries where competitive tendering and innovation are critical components of business capacity to thrive and survive, a business being effectively forced to bargain (and likely have significant pressure exerted on it to agree to) conditions for a range of business who can loosely be considered in the same industry is cause for concern. Businesses need to innovate and differentiate in key areas. Providing unions in industries where the majority of operating costs relate to labour, the capacity to apply to include businesses in multi-employer bargaining (and place considerable pressure on those businesses) risks the viability of these businesses.

4.4. The SJBP Act permits employers and employees to be covered by single interest/EAs that have already been made. This can be done either via the new employer and its employees applying to vary the single interest/multi-employer agreement for an employer (and relevant employees) to be added or by an employee organisation to apply for an employer to be added. While MIAL understands why employers and their employees may wish to seek to vary an agreement so that they are covered by it (although it would seem equally as simple to make such an agreement as a single enterprise agreement on identical terms), MIAL is concerned about the capacity for an employee organisation to be able to apply to vary an existing agreement to cover an employer with a degree of commonality, notwithstanding the employer has not necessarily had the opportunity to bargain for conditions that might better suit their business.

4.5. The requirements around the capacity to obtain a single interest employer authorisation, the different rules as they apply to businesses of a certain size, the ability to establish a business is sufficiently common and the ability for employers and employees of these employers to determine they no longer wish a single interest authorisation to apply to them is complex. Even the guidance provided on the FWC website is hard to follow. While it is possible that some industries and entities would benefit from the capacity to bargain together, this is where there are clear drivers and resource efficiencies that can be gained. But, much like no two businesses are the same, neither are any two industries. Similar characteristics will certainly reveal themselves but industries have to adapt to survive. Based on MIAL's observations, industries such as mining have in these first months of operations been subject to single interest employer authorisation applications. Accordingly, the experiences in that industry may provide some insights for the review panel to contemplate.

4.6. Conceptually employers that have a common interest will also be competitors within a market. To have competitors required to bargain collectively will presumably see an alignment in operating costs (or at least a large part of them being workforce costs), which on its face is counter to the objectives of competition law around the country.

4.7. The practicalities of multi enterprise bargaining are likely to see delays in reaching agreements with a range of different workforces (even from an administration perspective the logistics of communication, explanation of the terms of the agreement including ensuring employees genuinely agree). Accordingly, such agreements will likely take significantly longer to conclude than a single enterprise agreement, depriving the enterprise and its workforce from its benefits if other bargaining parties cannot reach agreement.

4.8. The potential for industrial action across a large part of a single industry is enlivened through these changes. MIAL does not intend to repeat the significant media commentary around this. The significance of industrial action even against one employer, in the maritime industry, where each individual asset or operator can be critical to an entire operation such that industrial action has enormous potential for harm. A case in 2023 where action would have threatened the supply of gas in Victoria was the subject of urgent FWC meetings with only the agreement to supply glycol to ensure gas could move the pipelines preventing a critical shortage in Victoria and the South Eastern Australian gas market.[3] In that case, it appeared that the only outstanding issue and the reason action was taken was because the employer was unable to obtain insurance under a commonwealth seafarers workers compensation scheme (not unwilling, actually unable to obtain the insurance required by the legislation) shows the willingness of unions to pursue action to make a statement to the broader industry through a claim not able to be agreed by the individual employer against who action was taken. This action was taken in the full knowledge the employer could not obtain insurance under the scheme (because private insurance wasn't offering it) despite it threatening the gas supply of South Eastern Australia. To allow action to be taken across multiple enterprises in the same industry give unions the ability to inflict significant economic harm to businesses directly and indirectly the broader Australian community.

[3] See workplace express article "FWC holds urgent talks on offshore dispute" dated Wednesday, June 21, 2023, 7:48pm FWC holds urgent talks on offshore dispute

5. Changes to the BOOT and Agreement Approval

5.1. In the majority of enterprise agreements that are made by MIAL members, the terms and conditions on offer comfortably exceed those applying in the underlying industry awards. The Seagoing Industry Award and the Maritime Offshore Oil and Gas Award and to a degree the Marine Towage Award recognise the nature of working on vessels on a swing cycle, meaning that an overtime component is already factored into the salary under the Award. Most enterprise agreements in these industries comfortably exceed award salaries (often more than double the award salary) in addition to more generous entitlements.

5.2. In most cases it is rare that an enterprise agreement in these industries is ever challenged on whether it passes the BOOT. However, there are range of businesses covered by other awards (such as the Ports Harbours and Enclosed Water Vessel Award and the Marine Tourism and Charter Vessel Award) which may coverer smaller operations. Our experience is that a number of businesses who may be covered by the award operate in a markedly different way to those who it appears the award was designed to cover. This is not necessarily a criticism but an observation that the concept of the modern award system is that they will cover such a broad range of businesses, many of whom likely had no input into their design, it can be challenging to make an assessment for the purposes of the BOOT. This is due to the significant variation in how businesses loosely ascribed an industry by a modern award but who operate differently in terms of staff, rosters and hours of business operation.

5.3. While the observations above remain valid, MIAL suggests that the operation of the changes are working largely as intended to the benefit of the bargaining parties.

6. Termination of Enterprise Agreements

6.1. Enterprise agreements made under the FW Act must contain a nominal expiry date not more than 4 years after having been approved by the FWC. They may of course contain an expiry date for a period less than 4 years and frequently do. In practice, the terms and conditions in such agreements continue until they are replaced (by a newly made enterprise agreement) or terminated.

6.2. The changes made by the SJBP Act narrowed the circumstances where an organisation may successfully apply to terminate an agreement. This is despite there being no requirement to have an EA in place nor ever bargain for one unless a majority of employees seek it.

6.3. MIAL submits that the proposed changes put employers at a significant disadvantage in terms of needing to consider the likely operating environment over the course of multiple EA terms, as historically once a condition is agreed in any future negotiations are based on a position that a term must be "bought" out, regardless of the operating environment. This is even more the case due to the introduction of intractable bargaining dispute determinations, as discussed above, which will see a higher bar again for employers to change existing arrangements. The impact of this is two-fold:

6.3.1. Employers will be reluctant to include terms which may be acceptable in current conditions on the basis that it will be virtually impossible to revisit if a change to business operations is required.

6.3.2. Businesses won't be able to access relief from an agreement that no longer meets their needs and only when the business is on the verge of closing will they have any chance of terminating an enterprise agreement.

6.4. By including criteria that requires such a high bar to establish that the conditions threaten viability may mean that by the time the bar is met, it may be too late to recover.

7. Sexual Harassment and Discrimination

7.1. MIAL members have not reported any particular concerns with the introduction of new provisions, and we are not aware of members having been subject of proceedings with the FWC to deal with a dispute about sexual harassment. MIAL is supportive of initiatives by the Government which promote gender diversity together with protections against discrimination and harassment. In terms of the mechanics of the process introduced, MIAL is unable to draw on experiences from within its membership. MIAL would suggest that there is an opportunity to provide guidance to workforce participants to assist in meeting the policy agenda intended by these amendments. This could ensure that employers, employees and their representatives understand their obligations and expected behaviour standards in a workplace and that there is a shared obligation and commitment to eliminate as far as possible sexual harassment in the workplace.

8. Industrial Action

8.1. Changes to the provisions relating to industrial action in the SJBP Act were more modest than proposed in the original Bill. MIAL members have no specific observations as to whether the requirement to attend a compulsory conference has resulted in industrial action being averted.

9. Initiation of Bargaining

9.1. A fundamental premise of the concept of enterprise bargaining and the concluding of an agreement is that it is sought by the employer and a majority of employees. The changes to the FW Act whereby a union can unilaterally initiate bargaining without the need to establish that a majority of employees wish to barging flies in the face of this concept.

9.2. That this option is only available where an existing or an agreement that has expired within 5 years does little to assuage MIAL of these concerns. Businesses change as does the relationship with employees. The role of employees is to represent the will of employee members – in order to do this, it must be clear what that will is (or it must be established though a majority support determination). This change places the actions of employee representatives as the central determining factor in whether parties will be bargaining, a position fundamentally counter to the role as a representative of employees.

10. Fixed Term Contracts

10.1. In MIAL's experience the majority of its members workforce are permanent employees, however in some sectors of the industry, where project work is more prevalent and vessels follow the work (i.e., don't permanently operate in Australia, but rather travel around the world servicing projects at different stages of construction/production) fixed term, relief and casual workers can be utilised. Fixed term engagements tend to be utilised in the following circumstances:

10.1.1. A training arrangement whereby a cadet or trainee is engaged for the length of the training period which is either expressed as a time period or until they obtain the relevant certificate of competency (in the maritime industry it is this certificate which allows a person to perform certain specified duties on board a vessel – not necessarily directly linked with an educational outcome (i.e advanced diploma)).

10.1.2. The duration of a specific project (or a phase of a project).

10.1.3. Where there is some other business uncertainty and there is an immediate need but a lack of certainty as to whether the role is needed in the future (in MIAL's experience this reasoning is rarely utilised given the skills are so in demand and employees who are seek a permanent position are able to find them).

10.2. One of the current exemptions is set out below in relations to time bound tasks

the employee is engaged under the contract to perform only a distinct and identifiable task involving specialised skills;

10.3. MIAL submitted through the Committee review and now reiterates its point that the exemption is extremely narrow and is concerned that it does not adequately capture some circumstances that arise in the maritime industry. For example, it is usually a specific vessel (rather than individual employees) that is charted to perform a specific task for a specific period as part of a phase of a much larger project. While in many cases the workforce on such ships will be permanent employees, it is not inconceivable that a fixed term arrangement for work on the vessel for a defined period exceeding 2 years may be offered. In some but not all cases the salary on offer would exceed the high-income threshold. MIAL suggests that wording needs to contemplate the engagement of an asset (rather than an individual) to perform a specific specialised task or change the wording to ensure that persons engaged for the duration of a project are captured.

10.4. The inclusion of training arrangements is of some comfort to members, provided that it is clear that such arrangements need not necessarily be formal apprenticeship arrangements but include the time taken for both study and practical experience to obtain a certificate of competence (which in the maritime industry for some new entrant training to internationally qualified levels can take more than 3 years). Training in the maritime industry, unfortunately, does not neatly fit within vocation or higher education norms.

10.5. Currently, the FW Act includes a definition of training arrangement as set out below:

training arrangement means a combination of work and training that is subject to a training agreement, or a training contract, which takes effect under a law of a State or Territory relating to the training of employees.

10.6. In the maritime industry, cadetships and traineeships are often not conducted specifically under the law of a state or territory as the practical component of the training does not form part of the Australian Qualification Framework but is rather a requirement of the Australian Maritime Safety Authority (AMSA) before they will issue a licence to perform work on board a ship. MIAL is

concerned that the current drafting may not capture such arrangements and would urge that the description of training arrangements be broadened to include:

> *anyone undertaking a period of learning or practical experience required to obtain a licence to work, where such licence is required under the law of a state or territory or the commonwealth to work in positions related to the training undertaken.*

10.7. As a general proposition, these provisions set out specific inclusions and MIAL suggests it is unlikely that all foreseeable consequences have yet be appreciated. Under existing provisions of the FW Act there are high income thresholds which have made the assessment that certain provisions of the Act will not apply to employees whose earnings exceed a certain threshold. MIAL thinks the restriction on fixed term contracts is one such example where employees exceeding a certain income threshold (for example the high income threshold for unfair dismissal) ought be excluded from the provisions.

11. Flexible Working Arrangements

11.1. MIAL generally supports accommodating flexible working arrangements wherever possible including the change to those eligible to make requests under the Act. The proposed changes focus on employer response to such requests. As the Government will no doubt be acutely aware, the capacity for an employer to respond positively to such request will largely be effected by business operational needs together with the flexibility being sought.

11.2. While transparency with the employee (including proposals regarding what alternative accommodations may be available) is welcome, empowering the FWC to deal with a dispute including the potential to arbitrate and order that an employer grant the request is not supported.

11.3. The FWC does not and cannot have a detailed understanding of how a business operates and the business judgements that must by made to run a viable enterprise. Employers must be able to make judgements about how work is performed within their enterprise on reasonable business grounds.

11.4. The nature of the maritime industry in many cases is such that unfortunately there are occasions where flexible working arrangements simply cannot be accommodated due to the 24/7 nature of the industry and the stringent regulator requirements to which it is subject. It is an unreasonable burden to require employers whose business judgement is challenged,

notwithstanding its obligation to explain its decision, to then have to educate a FWC member as to why this decision is necessary for their business.

12. Closing Loopholes Bill – HSR assistance

12.1. As part of this review, the panel is asked to consider changes that permit employees/officials of a registered organisation to enter a workplace at the request of a Health and Safety Representative (HSR) for the purposes of assisting a HSR in performing their duties, where the employee/official does not hold a right of entry permit under the FW Act or other industrial law.

12.2. While MIAL understands that this was a recommendation arising out of a review of WHS laws published in 2020, there seems to be little evidence to suggest that requiring assistance where sought by an HSR from a union official, it was a significant difficulty that such an official also hold a right of entry permit. The process for obtaining such a permit is not onerous and is routinely undertaken by union officials. MIAL understands there is no cost and the application is relatively streamlined. It is therefore not immediately clear why it is unreasonable that a union official who may expect that assisting an HSR performing their duties might be reasonably a part of their job, why they then cannot apply for a right of entry permit.

12.3. MIAL surmises that the only objection would be that if a union official did not meet the criteria of a right of entry permit holder, including whether that person is a fit and proper person to exercise right of entry powers. It is not in MIAL's view unreasonable that a person assisting an HSR in performing their duties, an HSR having already received training to be able to perform the role as HSR, be a fit and proper person. The ability for any union official even where they have had their permit refused or revoked, to enter a worksite to *assist* an HSR appears an obvious way to circumvent the right of entry process and permit requirements. It is not even restricted to cases of serious or imminent risk to health and safety but could theoretically be invoked to assist in any task, whether or not assistance is genuinely required. If this is not already being used as a way for officials who are not able to obtain a permit for accessing worksites to gain access to them, there is a significant risk that it soon will be. MIAL would be very concerned that the very legitimate and important role played by HSR's be undermined though using the capacity to assist an HSR to circumvent well understood right of entry provided for in other parts of the Fair Work Act. MIAL does not suggest that an HSR should not be able to access the support they need to perform their role as this can be a critical mechanism to ensure health and safety in the workplace. These changes are unnecessary to achieve that outcome. They indeed risk undermining the role of the HSR.

12.4. This Review comes at a time when a number of disturbing allegations against the Construction, Forestry, Maritime and Energy Union (CFMEU) including allegations of criminality and corruption have been made in the media. To lower the bar on the behaviour standards of those allowed to enter a workplace seems inconsistent with attempts currently being made to ensure criminality and corruption is expelled from registered organisations and banished from worksites.

12.5. If it is the view of the panel that the scope of the review cannot overcome recommendations out of reviews of WHS legislation, at the very least a recommendation that officials who have had their permits cancelled, revoked, or have made applications that have not been granted should be ineligible to assist HSRs in the performance of their duties.