



Submission to Review of Closing Loopholes Legislative Amendments

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About MIAL

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.

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.

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.

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

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.

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.

1. Overarching comments

- 1.1. MIAL welcomes the opportunity to provide a submission to the independent review of the Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (Closing Loopholes Act) and Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024 together with the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Family and Domestic Violence Leave Act).
- 1.2. At the time the initial legislation was proposed and subsequently passed through the combination of Closing Loopholes Act and Closing Loopholes No.2 Act, MIAL made a submission on behalf of members in relation to the Bill as originally presented. For the context of the independent reviewer, MIAL members own, operate or crew vessels operating in the Australian industry and employees working on these vessels are overwhelmingly covered by enterprise agreements. MIAL member workforces in some sectors have high levels of union membership, and union involvement at the workplace levels, and others less so.
- 1.3. MIAL does not intend to comment on every element of these three pieces of legislation but instead directs comments to the areas of most immediate concern to our members and those which have had or are likely to have the biggest impact from the perspective of employers of Australian seafarers.

2. Regulated labour hire arrangements

- 2.1. The purpose of a party to be able to apply for a regulated labour hire arrangement order (RLHAO), as we understand it, is to ensure that a negotiated wage outcome in a workplace or business is not subsequently undermined through the use of a labour hire provider to provide workers at the business or worksite on appreciably different terms and conditions.
- 2.2. Prior to the legislations' introduction initially, significant reforms to the legislation were made, with assurances publicly made by the Government as to the intention of the legislation. There remains a high level of uncertainty from industry as to when an applicant may be eligible to apply for a RLHAO and how such an order may be applied in the workplace. It was understood that short term and genuine specialist contracting services would not be subject to the new provisions.
- 2.3. To date the Australian maritime industry has not been the subject of applications for RLHAO directly. Employers of Australian crew do remain concerned as there is a lack of certainty as to

whether applications would be made and how any RLHAO order would operate, particularly in the context of an employer providing remuneration as an incentive to retain workers and keep corporate knowledge within the business though higher rates of pay dependent on length of service with the Company. How this would translate as compensation for a worker without that same level of company service and without the dual purpose of retaining long standing employees who serve in certain positions within the seafaring hierarchy remains unclear.

- 2.4. Presently there is dispute before the Fair Work Commission as to the protected rate of pay for a worker at a Whitehaven Coal's Blackwater open cut coal mine, under the enterprise agreement. As reported in Workplace Express¹, Minister Rishworth has sought to intervene in proceedings where it is argued that the service of a worker before the agreement applied to her (with the agreement applying when the RLHAO was granted) ought to be considered when determining the pay rate to apply.
- 2.5. Clearly, there remains uncertainty as to how the laws are to apply, and in some cases, there is a suggestion that they operate to override the express terms of an enterprise agreement specifically designed to reward long term employees with the employer and support retention.
- 2.6. As MIAL foreshadowed in its original submission, the provisions are broad and the contest that has been raised in response to applications is indicative of business being uncertain as to the scope and breadth of the laws. This includes the purported exclusion of specialised contracting arrangements which were the subject of specific discussion during the consideration of these changes. MIAL members are not convinced that the exclusion has been found to operate as intended and note that provisions related to the contractor exclusion are the subject of an application for special leave to appeal to the High Court².

Exception from requirement to pay the protected rate of pay

- 2.7. The legislation as currently drafted contains limited exceptions from the requirement to provide the protected rate of pay which are:
- 2.7.1. If a training arrangement applies to the employee in respect of the work;
 - 2.7.2. Certain short-term arrangements.
- 2.8. It is critical that there is clarity around the exception related to training arrangements, as to capture people inadvertently gaining on the jobs skills and experience as part of a training regime

¹ Workplace Express Article "Rishworth intervenes in first SJSP pay dispute", published 18 February 2026

² BHP Coal Pty Ltd v Mining and Energy Union [2025] FCAFC 194 – reported special leave to appeal sought on 16 January 2026

will further exacerbate already significant skills shortages in the maritime industry. Training in the maritime industry necessitates on the job experiences supplemented by training and guided study. It is critical to an individual in achieving their certification in the industry (certificate of competency under a Marine Order.)³ It's imperative that training arrangements⁴ for the purposes of the exception be afforded its broadest possible meaning.

- 2.9. In relation to the exemption for short term arrangements, many operations in the maritime industry operate on an even time roster, meaning (for example) a 4-week period of work followed by a four-week period of leave – this is the case for permanent and shorter terms relievers or casuals in large parts of the industry. MIAL submits that for the purposes of calculating a period when a protected rate of pay should not apply to a worker, calculation of that period should relate to time worked and exclude any period when a workers is a scheduled period of leave, to ensure industries with unique working arrangements are reflected in what is genuinely a short term engagement for a worker in the context of the industry in which they work.

3. Workplace Delegates Rights

- 3.1. MIAL does not see how these changes, in anyway, support fair and productive workplaces in Australia. Union membership and election of delegates is something over which the employer has no control, and, in many cases, employers do not know (or care) if their employees are members of a union. However, economy wide union membership sits around 13.1%,⁵
- 3.2. The maritime industry is extremely diverse – some parts of the industry are heavily unionised, and unions and employers work very closely on a range of matters beyond the terms of an enterprise agreement. In other parts of the industry employers negotiate directly with their employees for terms and conditions of employment, visits by union representatives occur infrequently if at all and the employer does not necessarily know if employees are represented by a union as these employees don't use union representatives in their discussions.
- 3.3. The proposal to mandate the inclusion of a delegate's right term within an enterprise agreement to whom the delegate applies was a retrograde step which does nothing to promote efficient, productive and harmonious workplace. The mandatory inclusion of a workplace delegates' rights

³ Marine Orders are subordinate legislation made under the Navigation Act 2012. Marine Order 70,71,72,73 and 505 set out requirements for certificates of competency issued by AMSA.

⁴ **training arrangement** means a combination of work and training that is subject to a training agreement, or a training contract, that takes effect under a law of a State or Territory relating to the training of employees. S13 Fair Work Act 2009

⁵ [Trade union membership, August 2024 | Australian Bureau of Statistics](#)

clause whether the parties want it or not seems purely aimed at promoting unions and giving union delegates extended rights which could conceivably override their obligations to engage in the duties for which they are employed. A recent decision of the Federal Court showed that even a model clause determined by the Fair Work Commission provided limitations that were not permissible under the terms of the FW Act as included by the Closing Loopholes Act.⁶

3.4. MIAL suspects that the recent decision of the Federal Court in respect of model clauses in 9 modern awards has been brought to the reviews attention and so it is unnecessary for this submission to delve into the detail of that decision. That the decision suggests that:

3.4.1. A union delegates rights extend to being able to contact workers not within the employ of that person's employer but anyone within the workplace and who are eligible to be a member of that union (irrespective of whether they are)

3.4.2. That communications to this much broader cohort need not be limited to "for the purposes of representing" but are much broader in concerning a right of reasonable communications in relation to their industrial interests.

3.4.3. The obligation for delegates not to hinder, obstruct or prevent the normal performance of work now only applies when delegates are exercising their entitlements under the delegates' rights term and not more broadly.

3.5. To elevate workplace delegates rights over and above any employee who is entitled to represent their own interest in such an overt and explicit way is unreasonable and unjustifiable. It is something readily able to be negotiated where the circumstances warrant it. Further, the decision to extend the rights of delegates within the workplace goes far beyond what are reasonable representation rights in respect of the employer and employee cohort who the union delegate represents, as has been recently found by the Federal Court, is unjustifiable. That the Fair Work Commission, the independent workplace arbiter, was unable to craft a clause that complied with the legislation on the Federal Court's reading, how can businesses be expected to understand the breadth of activities that a person who is their employee but also a union delegate, may engage in. This decision highlights the need for urgent review to these provisions to ensure workplace delegates can genuinely exercise their right to represent those who elect them to be their representative while not unreasonably disrupting operational requirements of an enterprise.

⁶ [Construction, Forestry and Maritime Employees Union v Australian Industry Group \[2025\] FCAFC 187](#)

- 3.6. s350C further seeks to specify the types of rights which would likely form the mandated term in an enterprise agreement, including, at s350(C)(3)(b)(ii) reasonable access to paid time off during normal work hours for the purposes of related training. A workplace delegate is a voluntary position, no employee is compelled to undertake that role, and should a person elect to do so they are already afforded sufficient protections based on their lawful industrial activity. Mandating this for all workplaces where a workplace delegate is employed (except for small businesses) can only be designed to promote trade unions as it serves no other logical purpose given that provisions such as rights of representatives of employees are already capable of negotiation and in many cases (particularly in maritime industry enterprise agreements) already exist under the current framework. Generically described rights such as paid time off fail to grasp the nuances of specific industries and workplaces and is likely to see significant arguments around what constitutes “reasonable” (s350C (5)).

4. Exemption Certificates for Suspected Underpayment

- 4.1. MIAL members have not routinely reported permit holders having notified right of entry based on suspected underpayment, the industry more frequently is subject to right of entry to hold discussions. MIAL members have reported not infrequent instances of entry notifications for entries that never eventuate. Such occurrences are inherently disruptive due to the secure nature of terminals, ports and vessels and various security and safety arrangements that need to be facilitated for entry into a terminal or onto a vessel.
- 4.2. Allowing permit holders to be granted an exemption certificate from providing 24 hours’ notice of entry in suspected underpayment cases does not seem to be contingent on the FWC reasonably believing that advanced notice of the entry notice might result in the destruction, concealment or alteration of relevant evidence.
- 4.3. Given that entry is predicated on a breach of entitlements as under the existing regime, why would the underpayment of wages or other entitlements be any less identifiable on the provision of 24 hours’ notice *unless* there was reason to suspect that evidence might be destroyed or concealed. As MIAL understands it, many cases of underpayment are because of misinterpreting overly complicated awards, and a much smaller number are systemic breaches which are designed to be concealed from regulators.
- 4.4. MIAL is concerned decoupling the exemption from notice from a reasonable belief that evidence will be concealed and destroyed will lead to a misuse of exemption certificates to further

industrial agendas rather than a legitimate means of ensuring employees are not underpaid their entitlements. In providing this additional reason for exemption, the FWC should still be satisfied the exemption of notice is justified on the suspicion of destroying or concealing evidence, and this should be clear on the face of the legislation.

5. Civil Penalty Provisions

- 5.1. MIAL and its members support enforcement mechanisms which encourage compliance and deter recidivism. MIAL makes every effort to support its members in their efforts to comply with Australia's workplace relations law within an increasingly complex legislative framework.
- 5.2. While MIAL does not take a specific view regarding the increase in the maximum fines payable for breaching the civil penalty provisions in the FW Act, it reiterates its comments that a number of the proposals actually make an employer's obligations less clear than they currently are. The sum effect is, there is a potentially significantly heavier penalty for failing to comply with requirements that are less clear. That the FWC itself could not correctly identify the extent of delegates rights clearly demonstrates complexity involved with interpreting Australia's workplace relations system.

6. Underpayment

- 6.1. It has been MIAL's experience that disputes regarding the application of particular awards and the interpretation of enterprise agreement provisions are largely responsible for disputes relating to pay. Many maritime businesses negotiate terms and conditions which are significantly in excess of those contained in awards, which in many cases due to the nature of the business, described in annual terms inclusive of overtime and allowances and having been assessed by the FWC.
- 6.2. Accordingly, while MIAL urges caution in imposing punitive financial penalties where any underpayment is due to a genuine error or mistake and is rectified without delay, it acknowledges that a deterrent is critical, and that strong punishment should follow deliberate and systematic breaches of the law and underpayment of an employee's rightful wages.

7. Entry to Assist Health and Safety Reps

- 7.1. Changes to legislation which allow any person or union official, not just a person holding a right of entry permit, to be asked to assist an HSR in the performance of their duties at a worksite is open to abuse for those whose presence on worksites has been found to be undesirable.

- 7.2. Union officials as a matter of course hold right of entry permits where they are eligible to do so. The test, that a person is a fit and proper person is a reasonable safeguard for an employer to require and is not a difficult bar to meet. Notwithstanding the recommendation of an independent review of model WHS laws, there have been several recent examples of persons with union affiliations accessing worksites for unlawful purposes. This change makes it easier for that to occur. The ability to obtain a right of entry permit is not onerous and subject to a character assessment. Where people are unable to meet the level set to hold a permit, or have otherwise had their permit removed, this is a clear indication that person is unsuitable to enter a worksite either to assist an HSR in the performance of their duties or for any reason.

8. Definition of Employment

- 8.1. The High Court was unequivocal in its decisions clearly articulating the contracts express terms to be determinative as the status of a worker.⁷
- 8.2. MIAL understands that the Government does not agree that the contract entered between two parties should be the sole determining factor in an employment relationship (or contracting relationship). The changes introduced elements of uncertainty into the relationship therefore increasing the chances of incorrect payments particularly where a person incorrectly applies the test. This change has resulted in:
- 8.2.1. Raising the bar for defending an allegation of sham contracting where an arrangement is mischaracterised.
 - 8.2.2. Significantly increasing penalties across the breadth of civil penalty provisions including for underpayments characterised as wage theft.
- 8.3. In effect, it could be said the change makes it harder for an employer to understand the right thing and dishes out larger potential penalties if an employer gets it wrong.

9. Other Matters

- 9.1. Overall, MIAL suggests complex provisions which were meant to “close the labour hire loophole” but have evidently morphed into a broad jurisdiction which will be subject to the FWC’s interpretation of what is fair and reasonable, ought to be revisited and subject to significant

⁷ *CFMEU v Personnel Contracting Pty Ltd* [2002] HCA and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2

refinement to target the framework flaw that they are attempting to cure. From the limited case law to date, there is clear a high level of confusion about when employees are entitled to apply for a RLHAO order, the circumstances of when a RLHAO will or will not be granted and event how and from what point a protected pay order is calculated and implemented.

- 9.2. Additionally, changes that will create uncertainty where contemporary decisions by Australia's High Court have added certainty and clarity are undesirable. MIAL is also of the view that provisions that seek to elevate the role of a workplace delegate for reasons that bear no relevance to protecting a workers' right to be represented and encouraging productive and harmonious workplaces, should be removed from legislation.



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