

9 November 2023

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Committee Secretary
Senate Education and Employment Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
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Dear Sir/Madam

FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES) BILL 2023

I refer to the Senate Committee's enquiry into the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Bill)*.

During hearings on 3 October 2023 and 6 October 2023, some questions have referred to comments I have previously made regarding the casual employment provisions of the Bill and, specifically, comments regarding the proposed s15A(5).

The questions have inferred that I am personally supportive of the casual employment amendments generally, aside from the proposed s15A(5).

This is not the case because what has not been identified are the following concerns I hold (and have expressed) about other aspects of the Bill:

1. The proposed definition in the Bill creates greater uncertainty regarding the determination of an employee's engagement status. It is less preferable than the existing definition in the Act.
2. The Bill proposes to introduce a new section 359A into the Fair Work Act that will create a civil penalty for misrepresenting an ongoing employment relationship as casual employment.

The introduction of this new penalty is highly problematic. This is for two reasons:

- (a) As already identified, there remains subjectivity and ambiguity in relation to the application of the new casual definition. This means there will inevitably be a number of employers that will still inadvertently mischaracterise their employees and this new offence simply increases their exposure to liability.
- (b) The offence undoes the ground that has been made in removing the threat of 'double dipping'. If an employer incorrectly engages an employee as a casual, the existing Fair Work Act provisions ensure any casual loading paid can offset liability for the non-payment of entitlements, thereby preventing employers unwittingly

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being exposed to large liabilities they were unaware existed. This benefit is lost if the employer is still ultimately subject to an extensive pecuniary penalty (which can be multiplied where numerous employees are involved) for an inadvertent mischaracterisation of a person as a casual.

Section 359A represents a significant step backwards for businesses and will likely make them more hesitant to employ casuals to meet variable work flows.

Yours faithfully

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