MARITIME INDUSTRY AUSTRALIA LIMITED

Submission to Education and Employment Senate Committee regarding Fair Work Amendment (Equal Pay for Equal Work) Bill 2022

12 September 2022

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 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 strong, thriving and sustainable maritime enterprise in the region.

2. Purpose of this submission

2.1. MIAL has reviewed the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (Bill) along with the supplementary explanatory information. MIAL makes the submission as a peak body whose members are covered by the Maritime Offshore Oil and Gas Award 2020 (MOOGA) and the Seagoing Industry Award 2020 (SIA), which are two of the awards that this Bill highlights as industries to which this legislation intends to apply. Based on the explanatory material, MIAL cannot identify what perceived issue has been identified that would justify legislative intervention of this nature. MIAL does not support this Bill and takes this opportunity to explain why this proposal is utterly without justification at least in so far as it seeks to apply to the Maritime Offshore Oil and Gas Industry and the Seagoing Industry.

2.2. MIAL makes the following observations based on the Explanatory Memorandum (EM) published by Senator Malcom Roberts that accompanies the Bill.

2.2.1. The EM states the Bill is "designed to limit the use of labor hire contracts by removing the incentive for employers to do so, which is lower wages." To suggest that the use of labour hire is on the basis that wages are lower is overly simplistic and fundamentally misunderstands the use of crewing management companies for the provision of labour in the seagoing and maritime offshore industries, as well as the terms and conditions provided to employees of specialist crewing service providers.

2.2.2. The explanatory material together with the amending provisions seems to suggest that the Bill (which purports to amend Part 2-9) effectively mandates the inclusion of what it describes as an "equal pay for equal work" provision to be included in enterprise agreements under certain awards, in some cases with no justification or attempt to identify an issue in those industries. It also gives no consideration to terms negotiated and agreed between bargaining parties that have passed the Better Off Overall Test.

2.2.3. The EM suggests there has been a failure of balanced market power and that the provision can be utilized to restore fairness – however it further seems to suggest that the selection of a small number of specific awards is based on the fact that those awards do not contain a provision for casual employment. MIAL notes the statement "acting to prevent the potential for labour hire contracts to affect industries covered by awards that do not provide for casual employment" appears to be a concession that there is no known issue and that the legislation proposed will not address any known issue in the seagoing industry or the maritime offshore oil and gas industry. That the EM does not mention the classification of relief employees which exists in both awards and provides for pro-rata entitlements compared to full time employees suggests a lack of awareness as to how these industries operate.

2.2.4. The legislation as drafted is likely to cause confusion for those providing crewing services in the industry. It seems that this legislation is aimed at ensuring people working side by side doing the same job will not receive a different wage. This does not happen in the Australian maritime industry. However, the vague drafting of the provisions means that it is unclear whether this "same work same pay" principal would apply to different vessel types where traditionally (and as recognised in awards) pay rates are different. Which rate is the right rate?

3. The Maritime Industry

3.1. Companies involved in the seagoing industry and the maritime offshore oil and gas Industry in Australia employee Australian seafarers who are highly skilled, subject to certification by the Australian Maritime Safety Authority (AMSA) and are well renumerated. They generally live on board the vessel that they work on (for between 4-8 weeks on average) and accrue leave (that is a day off without loss of pay) equal to (or in the offshore slightly more generous than 1:1) the time they spend working on board a vessel.

3.2. Often, seafarers are employed by a company that specializes in providing maritime crew to owners of ships, or charterers of ships. This is because its recognised that seafarers are highly specialized and must comply with regulatory requirements that are often mandated by the International Maritime Organization as well as AMSA. There is a finite number of internationally qualified seafarers in Australia and there is considerable time and financial investment required to train people to achieve these qualifications – this tight labour market ensures high wages for those who hold these qualifications regardless of their employing entity.

3.3. Its clear that the Bill is targeted at industries other than the maritime industry, as the concept of a shipowner being a "host employer" is not consistent with how the industry generally operates, particularly in Australia. A ship owner may have no intention of employing crew – in many cases they will own the asset and contract it (known as chartering) to another party, who may or may not have actual control of the ships operations. Operating a vessel requires technical and practical expertise which owners may or may not have. The technical operation of the vessel may be done by one organisation with that expertise, and they may also provide the crewing (i.e. the seafarers who physically work on board the ship) or another organisation may provide the crewing. There is often a significant amount of work involved in auditing qualifications and experience and ensuring that the correct certifications and endorsements

are held for the vessel on which an employee is engaged to work. This is one of the reasons why a third party employer of labour may be an attractive prospect for operators who do not have the resources to conduct these checks themselves.

3.4. Generally an organisation specializing in the provision of maritime crew will either provide the entire crew, or the crew for a particular department (departments are often separated into Deck Officer, Engineer Officer and Ratings). Such arrangements will generally be long term, although the provision may be put to tender by the client who needs the service performed.

3.5. It is possible for a third party (or forth party such is the demand for these skills, on occasion) employer to provide a "relief employee" for a short period, it is quite rare in practice and usually only where there is an inability to source labour directly as a reliever. It may well have occurred during the recent pandemic where borders were closed and there was restrictions on travel, particularly to WA. However MIAL is not aware of suggestions that the terms on which these people were engaged were substantially less favourable that others in the industry performing the same work.

3.6. Seafarers in the Seagoing and Maritime Offshore Oil and Gas industries are highly specialized and sought after. Currently the industry is suffering from a severe skills shortage. There is not nor has there historically been a practice whereby employers of crew will utilize a 3rd party provider which pays their employees substantially less than employees working on a particular type of vessel engaged in the seagoing or offshore industries Additionally, there is traditionally high numbers of union memberships which sees similar "industry" terms and conditions contained in enterprise agreement regardless of whether a seafarer would be considered (using the terminology utilized in the Bill, notwithstanding that it does not adequately describe the industry structure) employed by a host employer or a labour hire employer.

3.7. The purpose of the Bill is to limit the use of labour hire contracts by removing the incentive for employers to do so, which is lower wages (para 3 of the Explanatory Memorandum). This statement does not hold true in respect of work covered by the SIA and MOOGA. Maritime crew who work in these industries are skilled and require certification to an international standard. There is currently a severe shortage of qualified seafarers to service vessels in the seagoing and offshore oil and gas industries. The wage differential for workers on similar vessel types is small if it exists at all and often arises from a negotiated enterprise outcome and the timing of when enterprise agreement (which are prevalent in these industries) are beyond their nominal expiry dates. Even a cursory glance at enterprise agreements in these industries, whether they are vessel owner operators or providers of crewing services (sometimes described as labour hire) demonstrates consistently high wages with deviations being minimal and usually attributable to some other employment benefit. The intent of the legislation will not be realized through its application to the SIA or MOOGA.

4. Maritime Offshore Oil and Gas Sector

4.1. There are a range of different types of vessel in the offshore oil and gas sector, however the crewing function for these vessels is either done by the operator of the vessel (or a related entity) or a dedicated company providing maritime crew. Irrespective of whether the operator

of the vessel directly employs the crew, or they utilize a professional crewing company, the base rates of pay are the same or similar.

4.2. This is usually the result of bargaining occurring across the sector. There are of course exceptions to this as some enterprise negotiations are concluded faster than others, with the conclusion of such negotiations usually resulting in a pay increase on approval by the Fair Work Commission. If some companies do not reach an agreement as quickly as others, this is where there is likely to be a difference in wages. Often, this is because an agreement has expired and there will be no further increases until a new agreement is made.

4.3. For the purposes of this submission MIAL reviewed the classification of Integrated Rating (IR), as there are multiple IR's employed on board a vessel at one time, where as most other classifications (such as Master or Chief Engineer) there is only one person employed in that role on board at any one time (although each vessel will usually operate with at least two crews, one crew on leave while the other is working).

Company	Wage for Integrated Rating (Support Vessels @100%)*($)
DOF (operator)	131,276
Solstad (operator)	131,251
SIEM (operator)	131,276
Maersk Supply Services (operator)	131,276
Swire offshore/Tidewater (operator)	131,276
Atlas Professionals (crewing company)	133,253
Australian Offshore Solutions (crewing company)	133,253
GO Offshore (chartering and crewing company)	134,532 (as at approval of EA)

* These figures are obtained from publicly available Enterprise Agreements (EA) published at www.fwc.gov.au and are the most recent wage figures in each EA. Vessel operator agreements listed have all past their nominal expiry date.

4.4. As this sample from EA's in the industry shows, workers engaged by crewing companies (or labour hire providers to use generic terms) do not tend to receive a lower base wage. Wages across the industry are very similar and any disparity can usually be attributed to whether an EA is on the verge of renegotiation or it has been approved. Apart from the lower base wages, the terms and conditions in each EA, whether for an operator or crewing company are strikingly similar, although there may be some minor provisions negotiated at an enterprise level.

4.5. While the table above relates to wages, most terms and conditions across EA's in the maritime offshore oil and gas industry are similar, in terms of allowances. There may be service bonus for longstanding employees which would be different, and it is unclear whether such entitlements would, under this proposed Bill, would also be received by a third party employee notwithstanding they would not necessarily have an entitlement if they were employed directly by the host employer. Again, this would be an example of a situation not appearing to have been contemplated within the Bill.

5. Seagoing Industry

5.1. A characteristic of most vessels that would be covered by the SIA is that they would either be crewed by the owner of a ship, or by a professional crewing provider. In most but not all cases the specialist crewing provider would provide all crew on board. There are some exceptions although usually this applies to a particular department (i.e ratings and catering staff, deck officers or engineer officers). It is relatively rare to have different employers employ persons of the same classification on a vessel. It may happen in the event of an emergency situation due to crew illness and an additional person is required to lawfully fulfil regulatory requirements of the minimum number of qualified people on board, but this would usually involve the entity that normally engaged the crew engaging a reliever (similar to a casual) for the required period.

5.2. MIAL is not aware of instances where persons employed on lower wages are engaged to work side by side with those on higher wages on vessels in the Australian seagoing industry. Certainly wage rates on different vessels may be different, but this is a feature of enterprise negotiations, as well as established understandings within the industry that different types of vessels due to their size, power, area of operation or the relative rarity of the skills required to work on them, attract different pay rates.

5.3. A comparison of EA's that apply in the SIA is less instructive than in the those under the MOOGA due to the variety of vessels in the seagoing industry. There are instance of similar vessels involved in the same operation (for example, six vessels for three different operators carry cargo across bass strait) , but in these operations, the employees in each department are employed by the operator or specialist crew manager, and not a mixture of both, so there are generally not instances of two people on at the same workplace performing the same job and employed by different entities.

5.4. The issue that this legislation purports to address is not a feature of the SIA. That the SIA does not contain a provision for casual employment (but provides for reliever employment, which have similar characteristics to casual employment) in no way justifies the imposition of this legislation which is specifically targeted to certain industries.

6. Type specific experience

6.1. The EM asserts that the lack of a casual provision in the SIA and MOOGA (amongst others) is due to the safety issues inherent in each industry and the need to have settled trained staff. While MIAL agrees with the statement that the industry needs trained staff, as demonstrated by certification requirement, there is a complete lack of reference to the reliever position which does permit the very short term replacement of staff (usually illness, injury or other extended absence). Such replacements, particularly in senior roles as very hard to come by and they will often be engaged for multiple relief roles on the basis they have experience with the type of vessel.

6.2. Vessels operating in the seagoing and offshore industry are subject to strict and rigorous safety regimes both through AMSA and the "flag state" (Vessels are flagged in a country which is

responsible for ensuring that the vessel meetings the minimum standards of international conventions as well as the requirements for that country). This regime includes a safety management system, which will most likely detail the competencies and experience required for any crew to operate the vessel. Those companies that own or operate vessels in these industries will need to have complete confidence in their crew who in turn must have the required certification to work on board. It is simply not possible to use unqualified and cheaper labour to replace qualified and well renumerated seafarers in these industries.

7. On board hierarchy

7.1. MIAL's understanding of the issue that the proposed bill is attempting to address is one where employees working on a site, employed directly be the operator of that site are paid a different wage to others who might be working on that same site, performing the same job function, who are employed by a third party. As the legislation appears clearly directed towards mine sites, MIAL makes the observation that the number of people employed at any time on a ship will be significantly less. For the officers in particular, no one person will have the same level of responsibility on board, which is reflected in the "relativities" provided in the award (and usually maintained in EAs). The cohort of ratings, usually integrated ratings in the seagoing and offshore industries is different in that there will be multiple people performing the same or similar job functions, although there is usually one more senior person who directs these activities (Chief IR/Bosun).

7.2. MIAL is not aware of any reported instances of persons working along side each other on different terms and conditions while performing the same functions. In almost all cases this cohort would be employed by the same employer and covered by the same enterprise instrument either as a full time permanent employee or a reliever. Again, this Bill appears directed at a problem that does not exist for the seagoing or maritime offshore industries.

8. Different vessels attract different terms and conditions

8.1. The Bill does not seem to make any distinction between the traditional differences in pay for vessel types or when particular vessels perform a certain type of work. In the seagoing industry (and as reflected in the SIA) there are different pay rates prescribed for different vessel types. This Bill simply refers to the type of work and the hours of work. It is entirely likely that where employers operate or provide crew for a different range of vessels, the rate of pay for those vessels in identical classifications (for example, as Master) would vary depending on the vessel.

8.2. This does not mean they are performing substantially different work. The person still performs work as a master; however the *type specific* skills and experience (and quite often the demand) are such that the negotiated pay rate will be different. It cannot be the intention of the Bill that merely because a person works on a vessel operated by an entity which also operates a different vessel on which higher wages have been negotiated and are paid, that person would receive that wage even where the vessel on which they are performing work would attract a lower wage if they were employed directly by the operator entity. This outcome is perverse and surely unintended, also suggesting that including the SIA and MOOGA demonstrates a

fundamental misunderstanding of how the industry operates and the negotiated pay structures within it.

9. Selection of Awards

9.1. The selection of awards to which this Bill would purport to apply lacks any objective justification. The limited explanatory materials that accompany this Bill seem to clearly identify coal mining and to a lesser extent the airline industry as the targets of this legislation, alleging the practices in those industries are evidence as to why legislative reform is necessary. As outlined in part 2 of this submission, the material concedes that the inclusion of the SIA and MOOGA is on the basis that the awards do not provide for casual employment (not withstanding the category of relief employee provides for short term temporary employment).

9.2. There is no justification to target two maritime awards purely on the basis they do not contain provisions for casuals. No other justification is provided in the explanatory material and it is indeed conceded that there may not be any issue that requires addressing. It appears an arbitrary decision by the drafters of the private members Bill to select these awards and these sections of the maritime industry in the absence of any empirical evidence that there is a need for government intervention.

10. Application to Temporary licensed vessels

10.1. In addition to its application in the Australian industry the SIA and in particular Schedule A applies to (foreign) ships, who engaged foreign crew, employed by foreign companies. For the purposes of the *Fair Work Act 2009* (as determined by the *Fair Work Regulations 2009)* a temporary licensed ship is a vessel that undertakes more than 2 voyages under a temporary license in a 12 month period.[1] The Bill makes no distinction within the SIA, meaning its application would likely extend to foreign ships on which foreign crew are employed. This would, in MIAL's view, be unworkable from an inspection and enforcement perspective. There does not appear to have been any consideration as to how this would be given effect for vessels to which Schedule A of the SIA applies.

11. Unjustified burden on employers

11.1. While the drafting of the Bill is not particularly specific in terms of the expectation on labour hire providers, its presumed that they would need to make enquiries of the "host employer" as to the wages (and various allowances) they pay persons performing similar jobs roles (its unclear whether this would be limited to single workplace or any workplace where the host employers directly employs employees). Where those wages are lower than that paid by the host employer, then despite the provisions of the employees contract or any EA, the (third party) employer must pay that worker the same amount. There is further reference to a range of other financial entitlements which must be calculated. This is despite these terms not being a feature of the third party employers terms and conditions, may not be part of their existing

[1] 12.15B of the *Fair Work Regulations 2009* defines a temporary licensed ship. Reg 1.15E extends the Application of the *Fair Work Act 2009* to temporary licensed ships in the EEZ and waters above the continental shelf.

payroll functionality and is likely to require significant dedicated resources to calculate what if any difference exists. This additional burden cannot be justified. In fact, the explanatory material has not even attempted to justify the basis on which this additional burden should be imposed on employers in circumstances where an issue has not been shown to exist.

12. Conclusion

12.1. Despite giving no indication that the proposer of this Bill considers that a problem exists, or indeed has given any indication to the nuances of how the employment of internationally certified seafarers in the seagoing or offshore oil and gas industries is traditionally structured (as a product of crew being specialized, training and highly sought after), this Bill seeks to impose a burden on employers of crew who may not be the owner or operator of the vessel on which they are sailing. There does not appear to be any thought given to the diverse range of vessels that a “host employer” may operate, nor is it clear whether the Bill would distinguish between vessel types given the unspecific nature of the terminology within it. The likely unintended consequences of this legislation, far outweighs any benefit (MIAL cannot identify a benefit) to either employees and employers in the seagoing or maritime offshore oil and gas industries.