



**Parliament of Australia**

**Senate Parliamentary Business**

**Submission to the Education and Employment Legislation Committee for  
Inquiry from Master Grocers Australia**

**Fair Work Legislation Amendment**

**(Closing Loopholes) Bill 2023**

**September 2023**

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## **Submission to the Senate Education and Employment Legislation Committee for Inquiry by Master Grocers Australia Ltd**

1. Master Grocers Australia Ltd (**MGA**) is an employer member organisation registered with the Fair Work Commission and welcomes the opportunity to comment on the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (the Bill)*. The Bill seeks to amend the *Fair Work Act 2009* (Cth) (**FW Act**) and other legislation to modify existing provisions or to introduce new provisions. The provisions of the Bill are now the subject of a Senate Inquiry and submissions have been called for in respect of the contents. MGA welcomes the opportunity to comment on the contents of the Bill.

### **About Master Grocers Australia Ltd**

2. MGA is a national employer industry member based organisation representing independent grocery, liquor, and other retail businesses including timber and hardware outlets, in all States and Territories. These businesses range in size from small, to medium and large, and make a significant contribution to the retail industry, accounting for approximately \$15 billion in retail sales.
3. There are approximately 2,700 branded independent grocery stores with MGA membership, trading under brand names such as: Supa IGA, IGA, IGA Xpress, Drakes, Farmer Jacks, FoodWorks, Foodland, Friendly Grocers and SPAR, with a further approximately 1,300 independent supermarkets trading under their own local brand names. In addition, there are numerous independent liquor stores operating throughout Australia and trading under names such as: Cellarbrations, The Bottle O, Bottlemart, Duncans, and Local Liquor, which are either single or multi-store owners. Our members also own independent hardware stores that trade under brand names including frame and truss manufacturers, Mitre 10, Home Timber and Hardware, Thrifty Link and True Value Hardware. These stores, which collectively employ more than 120,000 staff, are comparatively smaller when juxtaposed against the large supermarket chains of Coles, Woolworths and Bunnings, which combined represent approximately 80 per cent of the retail supermarket, liquor and hardware industries. Although MGA's members face

similar industry challenges to the major supermarket and hardware chains, they have significantly less resources and face the fierce competition of such chains. A significant portion of MGA's members are family operated businesses who face the same economic and financial pressures of the average Australian.

4. MGA is a member of the Council of Small Businesses Organisations of Australia (**COSBOA**) which has also actively engaged in respect of the Bill and has made its concerns known to the Australian Government and the Australian Parliament.

## Executive Summary

5. This submission outlines MGA's concerns with and opposition to aspects of the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (the Bill)*.
6. MGA is concerned that if passed into law, measures contained within this Bill will increase the complexity, cost and administrative burden of Australia's industrial relations system with no measurable increase to productivity, and further, act as an active disincentive to employ or engage workers in Australian businesses.
7. With the immense and ever-increasing regulatory burden and spiralling cost of business inputs reported by MGA members, the provisions within the Bill will unfairly and unnecessarily place additional downward pressure on businesses during what are already difficult trading conditions. The cost and complexity of compliance with the provisions in the Bill will lead to members facing a direct threat to the ongoing viability of their businesses.
8. If the Bill is passed into law, some communities may need to contend with the closure of their local independent grocery, liquor, timber or hardware store. This could potentially lead to a decrease in competition, increase in the cost of essential goods, loss of employment opportunities and the destruction of communities. The ultimate victims of the unintended consequences contained within this Bill will be consumers who ironically are the very workers the Bill is attempting to protect.
9. MGA's member businesses are the cornerstone of Australian society and the economy, providing employment and essential services to all Australians. An attack on these businesses, is an attack on Australian employees and consumers.
10. Contrary to the objects contained within the FW Act of increasing job security, the Bill will decrease job security by making it less attractive to employ workers, thereby denying individuals employment opportunities and in the worst-case scenario, lead to job losses through the closure of businesses unable to cope with the cost and complexity of compliance.
11. The Bill contains measures which are likely to fundamentally damage Australian businesses and the Australian economy.

12. MGA urges this Senate committee to recommend the provisions identified within this submission are deleted from the Bill and accordingly, do not proceed to become law, or alternatively are modified to reflect the recommendations within this submission.

## **Introduction**

13. MGA is deeply concerned about the potential consequences that the Bill may have not only on the current Australian industrial relations landscape, but also to the lives and wellbeing of everyday Australians. The proposals are complex and voluminous, and MGA is concerned the proposals are poorly understood by the community. MGA is concerned that the wide-ranging likely harm to the Australian economy, businesses and MGA members have not been adequately considered.
14. MGA, through its members, is acutely aware of the significant economic and financial pressures being endured by Australian businesses and consumers during the current cost of living crisis. Especially small to medium family owned and operated businesses who have been severely burdened in recent times by soaring interest rates, rising costs of transport and fuel coupled with significant energy cost increases. Members able to withstand those increased cost pressures must regrettably consider the unfortunate practical necessity of increasing the cost of consumer goods to remain viable, which only exacerbates the cost-of-living crisis.
15. The Bill represents a fundamental increase to the complexity of Australia's industrial relations laws. MGA is concerned this added complexity will lead to compliance uncertainty and result in increased and unnecessary litigation.
16. MGA is disappointed that rather than address a multitude of business challenges faced by MGA members, the Bill only further adds unnecessary cost, complexity and stress to operating a business in Australia.

## **Proposed reform measures in the Bill**

17. MGA is concerned with many of the proposed reforms in the Bill and addresses those of significant concern below. These industrial relations reforms are amongst the most significant that Australia has seen in recent times and will fundamentally complicate business operations.

## Changes to Casual Employment

18. MGA is concerned that the provisions in the Bill regarding casual employment will undermine the confidence of businesses to flexibly roster casual employees as and when required, in agreement with the employee.
19. The practical assessment of a casual employment relationship by consideration of the 'real substance, practical reality and true nature of the employment relationship' creates uncertainty and ambiguity and will likely result in extensive time consuming and costly litigation to determine.
20. The Bill's definition of casual employment being characterised by an absence of a firm advance commitment to continuing and indefinite work is vague and open to interpretation. The lack of clarity is likely to result in significant uncertainty for businesses and act as a disincentive to engage casual employees out of fear of misinterpreting the definition.
21. MGA is concerned the provisions in the Bill will not advance the objects of the FW Act to increase job security. Rather MGA considers the Bill will weaken job security across the Australian economy and particularly in the sectors within which MGA members operate. The Bill's provisions will likely disincentivise businesses from offering casual employment to workers.
22. The reduction of casual employment opportunities will adversely impact the lifestyle and unique flexibility needs of a large segment of the population - students, carers, parents and amongst many others may find that their employment options and standards of living will materially decline if the Bill passes into law in its current form.
23. Recommendation  
MGA recommends all casual employment reforms in the Bill are abandoned, allowing current law to continue operation.

## Amendments to the definition of "employee"

24. The Bill's introduction of a legislated definition of employment unnecessarily complicates a currently well understood arrangement.
25. The provisions seek to displace the recent High Court decisions in *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty*



*Ltd* [2022] HCA 1 (**Personnel Contracting**) and *ZG Operations & Anor v Jamsek & Ors* [2022] HCA 2 (**Jamsek**). These cases created a simple and clear understanding of the nature of an employment relationship by looking to the contract between the parties. Where there is a contract between two parties which explicitly stipulates the terms between those parties, there is no requirement to determine the true relationship between the parties or the intention of the parties through a ‘multi-factorial test’.

26. The provisions seek to cover already traversed ground. The Australian judicial system, through the High Court, has already determined that the preferred and better approach is to understand the intention of the parties by reference to what they agreed to in writing.
27. MGA is disappointed that the Bill seeks to undermine case law that has provided a source of reliable clarity in favour of provisions that complicate Australia’s industrial relations landscape. These provisions will compromise commercial decisions made between parties at the outset of their relationship. Should parties wish to enter into contracts with explicit terms, a court or tribunal should not have the power to make orders requiring parties to contract in an alternate manner. Rather, the extent of a court or tribunal’s power should be to enforce the commercial arrangements agreed to between the parties.
28. The provisions regarding the definition of employment may lead to vexatious claims against employers. Some individuals may choose to enter into commercial arrangements in bad faith whereby they had no intention to be bound by certain contractual terms and then seek to litigate an alternative legal interpretation.

29. Recommendation

MGA recommends that the Australian Government abandon its proposal for a legislated definition of employment and instead implement a definition of employment that is reliable and consistent by adopting the principles from Personnel Contracting and Jamsek. An employment relationship should be what the parties intended it to be when entering into arrangements through explicit terms in a written contract and the parties should look to the contract, rather than a multi-factorial test, when there are disputes about the nature of the employment relationship.

## **New rights for union delegates and union right of entry**

30. MGA is alarmed by provisions in the Bill to establish new rights for union delegates.
31. The provisions do not address the wage costs that increased delegate activity and additional entitlements (such as paid leave whilst performing union activities) will have on employers. Employers will not only be required to pay for a resource that is not contributing to its business but will be required to cover that resource with additional resources. MGA reiterates that many of its members are small to medium sized businesses that are already struggling to compete with major retail chains such as Coles, Woolworths and Bunnings, and paying the cost of additional resources may be the difference between a profit (albeit minor, or simply breaking even) or a loss on any given day. The addition of these resources to small and medium sized businesses, on top of already crippling expenses, will make running a business, particularly in rural towns of Australia, untenable. The only logical means in absorbing the increased cost of resources, is an increase in the cost of goods for consumers.
32. The provisions do not identify any issues with, or reasons for supplementing, the current right of entry laws for permit holders. Union officials are already provided generous right of entry entitlements for a suspected contravention of the FW Act or related instruments. The current right of entry laws do not prevent union officials from entering a workplace for a suspected contravention involving the underpayment of wages.
33. The provisions will create an imbalanced arrangement not only between employees and employers, but between employees who are, or are perceived to be, union and non-union affiliated employees. Providing greater protection and entitlements to a union delegate simply because of their association with a union and/or union activity is not necessary, especially in circumstances where the need for such rights has not been articulated. The provisions will mean that employers may be subject to significant penalties for unreasonably failing to deal with a union delegate without adequately elucidating who exactly a union delegate could be, how many delegates there may be in a single workplace, what

acting in a delegate's capacity actually means and what it means to 'unreasonably deal' with a delegate. As a result, some employees will receive differential treatment based on their actual, or perceived, union or non-union status. This is likely to create disharmony amongst employees in the workplace, which will in turn diminish the productivity and output of all employees.

34. Most MGA members cannot afford to fund union activity and it is unreasonable to expect them to do so.

35. Recommendation

MGA recommends that the provisions regarding new union delegate rights and enhanced union right of entry be abandoned.

### **Wage theft and penalties**

36. MGA members are committed to paying employees in accordance with their applicable industrial instruments.

37. MGA is cognisant of the fact that the complexity of industrial instruments, including modern awards, can result in administrative errors. These errors are in almost all circumstances not intentional and are the direct result of the ever-increasing complexity of the industrial relations system. A large portion of MGA members do not have in house legal or financial experts, nor do they have the funds to appoint financial and legal experts to assist them with the ongoing interpretation of industrial instruments or the calculation of complex employee entitlements.

38. MGA is concerned that the proposed criminal penalties for underpayment are not targeted towards only deliberate and systemic underpayments by the worst repeat offenders.

39. The focus of the provisions should not be on punishing employers, rather the provisions should focus on implementing educational, learning opportunities to correct errors and to reduce the likelihood of further errors occurring in the first place.

40. Heavy-handed criminal penalties which have the ability to significantly impact the lives of managers will establish a fear in employers of making errors. This will likely instil a hyper cautionary approach by employers which could cause a

decrease in employment opportunities for employees out of fear of employing them in the first place.

41. Recommendation

The Australian Government should acknowledge the complexity of complying with the current industrial relations system and should instead implement further programs to educate and assist employers in correcting errors and maintaining compliance to reduce errors from happening in the first instance rather than imposing criminal sanctions.

## **Conclusion**

42. MGA urges the Australian Parliament to carefully consider the serious implication of matters raised within this submission.

43. MGA urges the Australian Parliament to consider methods in simplifying Australian industrial relations legislation rather than creating legislation which increases complexity, uncertainty and the likelihood of non-compliance.

44. Unfortunately, the Bill appears unconcerned by the cost that the provisions will impose on Australian businesses and the already unsustainable economic circumstances that businesses are attempting to navigate. The Bill will likely hurt small to medium sized Australian businesses particularly, and in turn employees and consumers by decreasing employment opportunities and increasing the cost of consumer goods.

45. MGA urges the Australian Parliament to amend or otherwise abandon elements of the Bill in accordance with this submission.

46. MGA thanks the members of the Inquiry for the opportunity to make this submission.