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Committee Secretary
Senate Education and Employment Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Sent by online Portal

Dear Secretary,

Inquiry into the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*

The Australian Hotels Association (**AHA**) is a registered employer organisation representing the interests of over 5,000 member Hotels in each Australian state and territory. The AHA welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee (**Committee**) during its inquiry into the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**Bill**).

The AHA also confirms it can appear at the Committee's scheduled public hearings and consents to this submission being made public. The AHA has limited its submission to a selection of key issues that it has identified on review of the Bill.

EXECUTIVE SUMMARY

The new meaning of casual employment within proposed section 15A is a fundamental shift away from the valid and legitimate participation of casual workers in our workforce. As drafted, section 15A unfortunately ignores the fact many casual employees prefer a regular pattern of work, want to retain flexibility to reject shifts, and want to be paid casual wage loadings.

Any existing security of employment held by casual employees will be extinguished by the proposed section 15A. Any choice on the part of the casual worker as to their own employment status will be removed. There are also conflicts between the intent of this Bill and existing casual worker benefits in the Act, for example employees with a disability and unpaid parental leave. The AHA proposes an alternate definition that will appropriately balance the legitimate role of casual workers in the labour market.,

Of utmost importance in section 359A, the AHA proposes that where an employer mistakenly represents an employment relationship as casual, when it should have been permanent, an employer who rectifies the error by converting the employment to permanent should not be exposed to civil penalties.

CASUAL EMPLOYMENT (SECTION 15A)

1. Part 1 of the Bill proposes to introduce a new definition of casual employment and additional pathways to permanent employment. The stated objective of the proposed amendments is to close the loophole of "permanent casual employment" and to open up a new pathway for eligible workers to seek permanency should they wish to do so.[1]

2. In effect, the new definition will fundamentally change the way casual employees participate in the Australian workforce. Employers will be exposed to significant potential penalties should they continue to employ regular casual employees, nearly all of whom wish to remain casual.

3. The AHA supports the improved pathways to permanent employment. However, it is the AHA's position that such a significant change to the definition of casual employee is not necessary to close this loophole.

Outcomes sought by the AHA

4. It is AHA's first preference that the current definition of casual employee detailed in the existing section 15A of the *Fair Work Act 2009* (Cth) (**the Act**) be retained.

5. *In the alternative*, AHA seeks for the proposed section 15A of the Bill be amended, as set out in **Annexure A**.

6. The amended definition proposed in AHA Annexure A strikes a healthier balance between the genuine and appropriate participation of casuals in our workforce, without encroaching on the improved pathways to permanent employment.

7. It also streamlines what is a complex multi-factorial test that speaks more to what a casual employee *isn't*, than defining what a casual employee *is*, requiring employers to disprove a negative to defend their employment decisions. We have proposed a plainer English definition so that the average employer has some chance of understanding it. For example in section 15A(2) we have reduced the words "real substance, practical reality, and true nature" to just using the words "practical reality".

Unintended consequences of the Bill's proposed section 15A

8. The Bill's proposed definition undermines the legitimate role of casual employees in our workforce. The proposed definition makes it almost impossible for an employer to engage a casual worker in any meaningful way without exposing themselves to the real risk of being found to have breached the proposed section 359A.

9. The unintended consequences of the proposed amendments will change how employers employ casual workers in order to mitigate their risk, decreasing the desired certainty for many employees in the process.

10. If the proposed definition remains in its current form, existing casual employees will have even less employment security than they have at present as:

    a) Employees will lose the certainty of working on particular days, as the employer is compelled to adopt a sufficiently disrupted pattern to ensure employment is irregular.[2]

[1] As per Minister Burke's statement of 24 July 2023.
[2] As per proposed section 15A(2)(c)(iv).

b) Employees lose their ability to plan their week and will instead be reliant on a daily phone call/message to offer a shift, as the employer wouldn't be able to place a casual employee on a weekly roster.[3] This fragmented single day employment relationship disproportionately impacts longer-term casuals who remain casual by choice.

c) Due to the constraints in employment practices and associated risks with longer service, the logical step is to limit the engagement of casuals for short-term periods, leaving the casual worker to always be searching for future employment.

d) In prohibiting a regular pattern of hours, there can be no "***regular casual employee***" as currently defined in the Act. This is because the employer is fundamentally prevented from employing a casual employee on a "regular and systematic basis" without exposing themselves to risk of ongoing liability for misrepresentation. Consequently, the casual employee would lose their access to any beneficial entitlement provided by the National Employment Standards, where there is a requirement for the casual employee to have been employed on a "regular and systematic basis" in order to access. This would include:

   i. The ability to access unpaid parental leave pursuant to section 67(2) of the Act.

   ii. The ability to seek a flexible working arrangement pursuant to section 65(2)(b) of the Act.

   iii. Likely ineligibility for casual conversion at 12 months pursuant to section 66B(1)(b) of the Act.[4]

   iv. Difficulties in accessing long service leave under relevant State or Territory Legislation.[5]

e) There may also be a barrier to a casual employee accessing paid family and domestic violence leave ('FDVL'). Payment for paid FDVL in accordance with section 106BA of the Act, is paid at the casual employee's full rate of pay, worked out as if the employee had worked the hours in the period for which the employee was rostered. Where an employer cannot roster a casual worker, there are no rostered hours to enliven the payment of FDVL, and no requirement for the employer to pay the casual employee otherwise.[6]

11. The AHA is further concerned that the legitimate use of casual employment arrangements in the examples below will not be permissible under an amended Act:

    a) **University Students**

[3] As per proposed section 15A(2)(c)(ii), a roster is akin to a finding that it is reasonably likely there will be a commitment for future work.

[4] As the casual employee would not have worked for their employer for 12 months with the requisite regular pattern of hours.

[5] For example, under the *Industrial Relations Act 2016* (Qld), a casual employee's continuity of service is broken by more than 3 months between engagements. Under the proposed amendments, a fragmented and disrupted pattern of work is necessary to keep within the definition of casual employment however may unintentionally break continuity of service for the purposes of long service leave eligibility.

[6] Section 106BA(3) provides an option for a casual employee to take a period of paid FDVL that does not include hours for which the employee is rostered to work, however the employer is not required to pay the employee in relation to such a period.

The example that continues to be offered as the portion of the casual workforce who "*do not want a permanent job*", as they are "*students working a casual job to make some money*" and so "*these changes won't matter to*"[7] are university students.

As any pub, club, café or restaurant in any University town in Australia will attest to, it is all too common for university students to accept casual work to earn some extra money while they study, often limiting their availability to peak trading times that do not interfere with their university schedules (i.e., Friday and Saturday nights). The employer will then offer the university student shifts in accordance with their advised availability during peak trading times (every Friday and Saturday night), creating a regular pattern of hours for the casual employee which is prohibited by the proposed section 15A.

The employer in these circumstances would need to deviate from that regular pattern that suited both parties to the employment relationship, and instead adopt a sufficiently disrupted pattern.

For the casual employee who chooses to limit their availability whilst they manage university commitments, they will lose the certainty of working within their limited availability each week and the certainty in regular renumeration they have previously received. The AHA seeks for this choice on the part of the university student to remain a choice they are able to exercise under the provisions of section 15A.

b) **Employees with Disability**

The Supported Wage System (SWS) that operates within the Australian industrial relations framework increases employment opportunities for persons with a disability by providing for work productivity assessments for people whose work productivity is reduced as a result of their disability, to obtain employment.

People with disability who access the SWS retain the same employment conditions as their fellow employees however their wage rate is identified by way of the assessed percentage of productivity. Casual employees being paid a supported wage receive a percentage of the minimum hourly rate for their classification, plus the full casual loading.[8]

Applications for SWS require a number of conditions to be met including that the job being offered is for a minimum of eight hours per week. Conditions also often include the need to accommodate a support person.

Significant concern arises from the proposed section 15A prohibiting an employer from making any firm advance commitment to continuing work, including in the form of a commitment to offer the person with disability a job for a minimum of eight hours per week. This applies also to the inconvenience for a support person who is then tied to uncertain days and times of when they can be in support, compounded if they provide support to multiple clients.

It should not be a consequence of these proposed amendments that an employer may need to turn away a person with disability from entering their workforce, due to the risks of misrepresentation.

c) **Employment of children**

The laws regulating child employment vary between each State and Territory however each stipulate the hours school aged and young children are permitted to work and set

[7] Including the Minister's own statements, as reported by the AFR on 24 July 2023, Burke rules out backpay for casuals made permanent (afr.com).

[8] As per the Fair Work Ombudsman Library - https://library.fairwork.gov.au/viewer/?krn=K600471

out the employer's obligations with respect to record keeping and parental/guardian consent.

Victoria's *Child Employment Act 2003* requires an employer to obtain a permit prior to a child obtaining employment. An application for a permit must contain, amongst others, a statement by the prospective employer on the intended workplace of the child, the business carried on at the workplace, the duties it is intended that the child will perform and importantly, the intended hours of employment, date of commencement and completion and whether any of the employment will be performed during a school term.

The very act of submitting an application for a permit that is required by law to state the intended hours will be interpreted as the employer making a firm advance commitment to continuing work within the meaning of the proposed section 15A(2)(b), meaning the employment relationship will be seen to be misrepresented as a casual employment relationship.

Denying school-aged and young people the opportunity to enter the workforce in a casual capacity, to learn the soft skills of employment that they will take with them through their working lives, should not be prevented as a result of these proposed amendments.

12. The AHA is also concerned by the proposed section 15A(2)(b), which equates the provision of a contract of employment with the employer providing a firm advance commitment to continuing and indefinite work. The logical conclusion from this subclause is that an employer who wishes to legitimately engage a casual worker must not issue them with a contract of employment, as doing so contravenes the general rule in proposed section 15A(1)(a).[9]

13. The absence of a contract of employment means an absence of binding contractual terms and conditions of employment, and an inability to seek the enforcement of those legal obligations. This cannot be of any benefit to the casual employee, to be denied the benefit and minimum level of security afforded by a validly executed contract of employment. Not having a contract of employment will also impact many workers who need to provide evidence of employment for a range of functions including, for example, renting a home or taking out a loan.

14. For the employer, the *Fair Work Regulations 2019* (the Regulations) set out the employer's obligations in relation to employee records and pay slips; most of which are civil remedy provisions. If the proposed section 15A were to be introduced into the Act, it is difficult to reconcile the employer's obligation to keep specific records that establish the employment relationship with the apparent obligation not to provide a firm advance commitment to continuing and indefinite work as per proposed section 15A(2)(b).

15. The Minister has stated,

> *"Many casuals won't want a permanent job. If you're a student or just working a casual job to make some money, this change won't matter to you."*

16. Respectfully, these changes will have far reaching impacts on all casual workers, irrespective of whether they want a permanent job or not. The AHA supports there being

[9] Not providing a contract of employment to casual employees may also cause issues for the employer. Modern Awards require an employer, at the time of engaging an employee, to inform the employee of the terms of their engagement, including whether they are engaged as a full-time, part-time or casual employee (clause 8.2 of the *Hospitality Industry (General) Award 2020*). If an employer cannot provide a casual employee with a contract or a letter of offer, it is difficult to know how they will fulfil their obligation under clause 8.2 of the Award.

a choice available to casual employees who seek permanent employment.[10] However "choice" is the operative word. There must be an acknowledgement in the legislation of the valid place that legitimate casual workers have in our workforce and support for the thousands of casual workers who elect to remain casual and to retain their existing terms and conditions of employment as currently defined.

'EMPLOYEE CHOICE' FRAMEWORK (DIVISION 4A OF PART 2-2)

Outcome sought by the AHA

17. The AHA submits that the casual conversion provisions provided for in Division 4A of Part 2-2 of the Act already establish a clear pathway to permanent employment for any eligible employee who seeks employment security. The casual conversion provisions should be preferred over the proposed introduction of a new 'employee choice' notification framework.

18. This is particularly important for small and medium-sized businesses who are now familiar with the casual conversion process and would be the most impacted if yet another complex industrial process is introduced into the Act.

19. Rather than the proposed 'employee choice' framework, the AHA suggests that the employee right to request casual conversion[11] be brought forward to allow a request to be made after the employee has completed six (6) months employment.[12] The decision-making timeframe and criteria for casual conversion are already provided for in Division 4A of Part 2-2 of the Act and would be supported by the new dispute resolution option the Bill would introduce.

MISREPRESENTATION OF CASUAL EMPLOYMENT (SECTION 359A)

20. AHA opposes the introduction of section 359A.

21. As the proposed section 359A would be a civil remedy provision under Part 4-1 of the Act, the AHA believes that it is appropriate for this subdivision to apply only to intentional behaviour and only in the industries where this has been identified as an issue.

Outcomes sought by AHA

22. In the first instance, AHA seeks that the proposed section 359A be removed from the amending legislation.

23. *In the alternative*, the AHA submits it is appropriate to constrain the application of the new provision to the industries it is intended to address. The following carve out is reflective of the Minister's stated intent for these provisions to capture industries **other than** the hospitality, accommodation and retail industries,

    At the end of Division 6 of Part 3-1, insert after the proposed Subdivision B – Casual Employment:

    Subdivision C – Limits on scope of this Division

[10] As per BETA's Casual Employment: Research findings to inform independent review of SAJER Act, 63% of long-term casual employees would prefer to remain in their current casual role at the relevant time.

[11] Pursuant to section 66F of the Act.

[12] 12 months for small business.

Employers and employees not covered by this Division.

(1) Subdivision B does not apply to an employee working in, or an employer who operates in, the hospitality, accommodation and retail industries.

24. Should the above carve out not be suitable, then ***in the further alternative***, the AHA suggests amendments be made to the proposed section 359A, as set out in **Annexure B**.

25. The AHA acknowledges the importance of employers taking appropriate steps, commensurate with their experience, the nature of their enterprise and the context of the operating environment of their industry, to understand how they are engaging an individual before entering a contract of employment.

26. However, as currently drafted, the meaning of section 359A(1) is incapable of being understood by the ordinary person. The AHA proposes a plain English form of words that states, "when the practical reality of an employment relationship is permanent, the employer must not misrepresent the employment relationship as casual."

27. Employers who are notified of a situation whereby they have inadvertently misclassified a worker as a casual employee and who then take immediate action to remedy their error (i.e., by converting the worker to permanent), should not be exposed to civil penalties.

28. The proposed amendments will ensure the early resolution of disputes and will promote harmonious, productive and ongoing working relationships between employee and employer. This will provide ease of mind for small and medium sized businesses who will struggle with their understanding of the new multi-factorial test in the proposed section 15A and who will be at a distinct disadvantage if they are exposed to costly litigation in order to demonstrate their belief was reasonable, pursuant to section 359A(2).

Backpay

29. The AHA seeks for the legislation to make clear that any change in employment status as a result of the 'employee choice' framework, casual conversion and a corrected misrepresentation will only change prospectively. The possibility of any backpay must be excluded in the legislation and not merely offset. Doing so is in accordance with the Minister's commitment.[13]

Application and Transitional provisions

30. The Bill's Application of Amendments section outlines the application of the definition of casual employee.[14]

31. The AHA seeks an additional subclause (c) be added to subclause (2), to make clear:

(c) Conduct and representations of an employer that occurred before commencement is to be disregarded for the purposes of a claim made pursuant to section 359A.

32. Any representations of an employment relationship made prior to the commencement of the amended Act would have been made on the basis of the understanding of the meaning of casual employment as provided in the current section 15A. An employer should not be

[13] Burke rules out backpay for casuals made permanent (afr.com)
[14] Part 15, Division 2, s. 93 of the Bill.

found to be in breach of the new section 359A on the basis of representations made prior to the commencement of the amended Act.

PENALTIES FOR CIVIL REMEDY PROVISIONS (PART 11)

33. Part 11 of the Bill proposes to increase maximum penalties for underpayments by amending the civil penalties and serious civil contravention frameworks, and adjusting the threshold for what will constitute a serious contravention.

34. The AHA does not support the lowering of the threshold for serious contraventions to include reckless errors or simple mistakes.

Outcome sought by the AHA

35. The status quo in the current section 557A must be maintained, so that there remains a clear distinction between knowingly engaging in a systematic pattern of conduct to intentionally contravene a provision of the Act, and the circumstances whereby an employer was simply reckless as to whether a contravention would occur.

36. Recklessness would still be captured by the civil remedy provisions of the Act and will expose an employer to significant penalties that are increasing fivefold under this Bill. These increased civil penalties will be an effective deterrent for the mid-tier contraventions the Bill proposes be addressed by the lower threshold and should effectually improve compliance with the workplace relations system.[15]

37. To have an established threshold for serious contraventions is to have the ability to clearly identify and address the most egregious of contraventions, which are the high-level knowing, organised, systematic and ongoing contraventions, in a way that is proportionate to any harm caused.[16] The current section 557A achieves this goal and so should be maintained.

WAGE THEFT (SECTION 327A)

38. Further to the proposed subsections 327A(8)-(10) and the 'course of conduct' sentencing rule for the offence of wage theft, the AHA is supportive of introducing offence-specific course of conduct charging rules into the Act, as they relate to wage underpayments.

39. Taking distinct incidents involving a wage underpayment that would separately satisfy the elements of the criminal offence and treating them as a course of conduct to charge as a single offence is a more appropriate use of resources for the Crown and for the parties in expending any legal fees, allowing for a more effective and efficient conduct of prosecutions.

WORKPLACE DELEGATES (SECTION 350C)

Outcomes sought by AHA

40. The AHA seeks two amendments to be made to the proposed section 350C. The amendments we propose are normally negotiated as part of enterprise bargaining efforts however as the proposed section 350C legislates rights outside of the collective bargaining

[15] Paragraph 814 of the Explanatory Memorandum.

[16] Consistent with the Principled Regulation: Federal Civil and Administrative Penalties in Australia, Australian Law Reform Commission Report 95, Chapter 26.

process, the amendments are necessary to positively balance workplace delegates' rights with the effective running of an employer's business.

41. The first amendment is to insert into proposed section 350C(3) (with emphasis):

> (3) The workplace delegate is entitled to:
>
> (a) reasonable communication with those members, and any other persons eligible to be such members, in relation to their industrial interests; and
>
> (b) for the purpose of representing those interests:
>
> (i) reasonable access to the workplace and workplace facilities where the enterprise is being carried on, provided it does not prejudice efficient operation or disrupt service provision; and
>
> (ii) unless the employer of the workplace delegate is a small business—reasonable access to paid time, during normal working hours, for the purposes of related training, provided that service delivery and work requirements are not unduly affected.

42. Such caveats are usual inclusions in workplace delegates clauses in enterprise agreements across industry, with a wide coverage of unions as bargaining representatives. For example:

- Target Australia Retail Agreement 2022, clause 49.6, approved 8 February 2023, Australian Workers' Union and the Shop, Distributive and Allied Employees Association as bargaining representatives.
- NAB Enterprise Agreement 2024, clause 69, approved 14 September 2023, the Finance Sector Union of Australia as bargaining representative.
- Queensland State Government Entities Certified Agreement 2019, Part 13, approved 9 June 2020, thirteen (13) Unions party to the Agreement.
- Ingrams Australia Pty Ltd Southern Queensland Correctional Precinct Stage 2 Project Greenfields Agreement, clause 37.5, approved 4 May 2023, Construction, Forestry, Maritime, Mining and Energy Union party to the Agreement.
- Australian Regional and Remote Community Services (ARRCS) Enterprise Agreement 2023, clause 28.3, approved 15 September 2023, the Australian Nursing and Midwifery Federation and the United Workers Union as bargaining representatives.
- Compass Group - ESS Offshore Oil & Gas (MODU) Enterprise Agreement 2023, clause 38.1, approved 18 September 2023, Australian Workers Union as bargaining representative.

43. The second amendment sought is to limit the number of workplace delegates to **two from any one workplace** who are able to access paid work time, during normal working hours, for the purposes of related training, pursuant to proposed section 350C(3)(b)(ii).[17] This is not to encroach on any delegate's ability to participate in union training but simply so that

[17] If not a specific number to be introduced into the proposed section 350C(3)(b)(ii), then at least the ability for an employer and a relevant union who has coverage of the workplace to negotiate a maximum number of delegates to receive paid time off for union training per year.

to place a reasonable limitation on the number of employees the employer is now obligated to release and pay for their attendance at union activities.

44. The following are some example clauses from recently approved agreements which provide for such a limitation:

    - The Target Australia Retail Agreement 2022, clause 49.1 limits the maximum number of team members attending a course for the purpose of trade union training leave shall be two (2).
    - The Concrite Concrete Truck Divers Agreement 2022, clause 8.2.1 limits the release of up to two authorised Union delegates for a maximum of two days per annum.
    - The NAB Enterprise Agreement 2024, clause 66.1 limits leave to two colleagues from the same workplace.

Thank you for the opportunity to have made this submission.

STEPHEN FERGUSON
AHA NATIONAL CEO

Annexure A – Section 15A

Annexure A contains two versions of the amended definition AHA proposes; a "marked up" version that tracks the changes to the Bill's proposed section 15A and a "clean" version with the amendments made.

1. "Clean" version of amended definition

15A Meaning of casual employee

General rule

(1) An employee is a casual employee of an employer only if:

a. The employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and

b. The employee would be entitled to a casual loading or a specific rate of pay for casual employees under the terms of a fair work instrument if the employee were a casual employee, or the employee is entitled to such a loading or rate of pay under the contract of employment.

Note: An employee who commences employment as a casual employee remains a casual employee until the occurrence of a specified event (see subsection (5)).

Indicia that apply for purposes of general rule

(2) For the purposes of paragraph (1)(a), a firm advance commitment to continuing and indefinite work is to be assessed:

a. on the basis of the content of the contract of employment; and

b. on the basis of the practical reality of the employment relationship; and

c. having regard to the following considerations

i. whether the employer can elect to offer work and whether the employee can elect to accept or reject work ;

ii. whether there is a regular pattern of work for the employee, except a pattern established by the employee's own requirements, advised availability or at their request.

(3) To avoid doubt, the considerations referred to in paragraph (2)(c) must all be considered but do not necessarily all need to be satisfied for an employee to be considered as other than a casual employee.

Exceptions to general rule

(4) Despite subsection (1), an employee is not a casual employee of an employer if:

a. the contract of employment includes a term that provides the contract will terminate at the end of an identifiable period (whether or not the contract also includes other terms that provide for circumstances in which it may be terminated before the end of that period); and

b. the period is not identified by reference to a specified season or the completion of the shift of work to which the contract relates.

Note: This means an employee on a fixed term contract for a specified season or an employee engaged on a shift by shift basis may be a casual employee if the requirements of subsections (1) to (4) are otherwise satisfied.

Employees engaged as casual employees remain so until the occurrence of a specified event

(5) A person who commences employment as a casual employee within the meaning of subsections (1) to (4) remains a casual employee of the employer until:

a. the employee's employment status is changed or converted to full-time employment or part-time employment under Division 4A of Part 2-2; or

b. the employee's employment status is changed or converted by order of the FWC under section 66MA or 739; or

c. the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis.

2. "Marked-Up" version of amended definition

15A Meaning of casual employee

General rule

(1) An employee is a casual employee of an employer only if:

a. The employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and

b. The employee would be entitled to a casual loading or a specific rate of pay for casual employees under the terms of a fair work instrument if the employee were a casual employee, or the employee is entitled to such a loading or rate of pay under the contract of employment.

Note: An employee who commences employment as a casual employee remains a casual employee until the occurrence of a specified event (see subsection (5)).

Indicia that apply for purposes of general rule

(2) For the purposes of paragraph (1)(a), ~~whether the employment relationship is characterised by an absence of~~ a firm advance commitment to continuing and indefinite work is to be assessed:

a. on the basis of the content of the contract of employment; and

b. on the basis of the ~~real substance,~~ practical reality ~~and true nature~~ of the employment relationship; and

~~c. on the basis that a firm advance commitment can be in the form of the contract of employment or, irrespective of the terms of that contract, in the form of a mutual understanding or expectation between the employer and employee not rising to the level of a term of that contract (or to a variation of any such term); and~~

c. having regard to ~~, but not limited to,~~ the following considerations ~~(which indicate the presence, rather than an absence, of such a commitment):~~

i. whether ~~there is an inability of~~ the employer ~~to~~ can elect to offer work and whether ~~or an inability of~~ the employee can ~~to~~ elect to accept or reject work ~~(and whether this occurs in practice);~~

~~ii. whether, having regard to the nature of the employer's enterprise, it is reasonably likely that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee;~~

~~iii. whether there are full-time employees or part-time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee;~~

ii. whether there is a regular pattern of work for the employee except a pattern established by the employee's own requirements, advised availability or at their request.

(3) To avoid doubt, the considerations referred to in paragraph (2)(c) must all be considered but do not necessarily all need to be satisfied for an employee to be considered as other than a casual employee.

~~a. for the purposes of paragraph (2)(b), a mutual understanding or expectation may be inferred from conduct of the employer and employee after entering into the contract of employment or from how the contract is performed; and~~

~~the considerations referred to in paragraph (2)(c) must all be considered but do not necessarily all need to be satisfied for an employee to be considered as other than a casual employee; and~~

~~b. a pattern of work is regular for the purposes of subparagraph (2)(c)(iv) even if it is not absolutely uniform and includes some fluctuation or variation over time (including for reasonable absences such as for illness, injury or recreation).~~

Exceptions to general rule

(4) Despite subsection (1), an employee is not a casual employee of an employer if:

a. the contract of employment includes a term that provides the contract will terminate at the end of an identifiable period (whether or not the contract also includes other terms that provide for circumstances in which it may be terminated before the end of that period); and

b. the period is not identified by reference to a specified season or the completion of the shift of work to which the contract relates.

Note: This means an employee on a fixed term contract for a specified season or an employee engaged on a shift by shift basis may be a casual employee if the requirements of subsections (1) to (4) are otherwise satisfied.

Employees engaged as casual employees remain so until the occurrence of a specified event

(5) A person who commences employment as a casual employee within the meaning of subsections (1) to (4) remains a casual employee of the employer until:

a. the employee's employment status is changed or converted to full-time employment or part-time employment under Division 4A of Part 2-2; or

b. the employee's employment status is changed or converted by order of the FWC under section 66MA or 739; or

~~c. the employee's employment status is changed or converted to full-time employment or part-time employment under the terms of a fair work instrument that applies to the employee; or~~

c. the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis.

Annexure B – Section 359A

Annexure B contains two versions of the amended section; a "marked up" version that tracks the changes to the Bill's proposed section 359A and a "clean" version with the amendments made.

1. "Clean" version of amended section

359A Misrepresenting employment as casual employment

(1) When the practical reality of the employment relationship is permanent, the employer must not misrepresent the employment relationship as casual.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer reasonably or mistakenly believed that the contract was a contract for employment as a casual employee.

(3) In determining, for the purpose of subsection (2), whether the employer's belief was reasonable:

a) regard must be had to the size and nature of the employer's enterprise; and

b) regard may be had to any other relevant matters.

(4) Upon being notified of a mistaken representation, an employer who rectifies the error by converting the employment to permanent, will not be exposed to civil penalties.

2. "Marked-Up" version of amended section

359A Misrepresenting employment as casual employment

~~(1) A person (the ***employer***) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for casual employment under which the individual performs, or would perform, work other than as a casual employee.~~

(1) When the practical reality of an employment relationship is permanent, the employer must not misrepresent the relationship as casual.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer reasonably or mistakenly believed that the contract was a contract for employment as a casual employee.

(3) In determining, for the purpose of subsection (2), whether the employer's belief was reasonable:

a) regard must be had to the size and nature of the employer's enterprise; and

b) regard may be had to any other relevant matters.

(4) Upon being notified of a mistaken representation, an employer who rectifies the error by converting the employment to permanent, will not be exposed to civil penalties.