From: s 22(1)
To: s 22(1)
Cc: Burke, Tony (MP); s 22(1)
Subject: AREEA Letter - Same Job, Same Pay and contractor issues
Date: Friday, 9 June 2023 3:34:08 PM
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Dear s 22(1)
Please find attached a letter from AREEA s 22(1) , thanking Minister Burke for his time in meeting our delegation of contractor member representatives last week.
The correspondence also reiterates AREEA's key position in relation to *specialist contracting companies* in the context of 'Same Job, Same Pay', and sets out a refined *multifactor test* for defining working arrangements within that policy coverage.
We look forward to further engagement with the Minister, yourself and the DEWR team on this important policy issue.
Best regards,

s 22(1)
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09 June 2023

The Hon. Tony Burke MP
Minister for Employment and Workplace Relations
PO Box 6022
Parliament House
CANBERRA ACT 2600

Dear Minister Burke,

Thank you / Multifactor Test for Determining 'Same Job, Same Pay, Coverage

AREEA thanks you for meeting with the delegation of mining and energy contracting member companies whom we brought to Canberra last week to discuss 'Same Job, Same Pay' (**SJSP**).

As acknowledged during our meeting, AREEA accepts your government's firm plans to legislate the SJSP policy. The primary interest of AREEA's membership is to ensure SJSP obligations appropriately capture circumstances where labour hire arrangements may be utilised to undercut enterprise agreement terms agreed between host / client businesses and their direct workforces.

Our concern is the ambiguous definition of 'labour hire' proposed within the Department's IR consultation papers risk capturing a far broader array of specialist contracting services within Australia's mining and energy industries. While a minority of services provided by those companies can be similar to labour hire, and therefore we accept may be captured by SJSP, the vast majority of the services they provide are very different to labour hire.

For this reason, AREEA endorses the development of a *multifactor test* for defining what arrangements should, and should not, be considered 'labour hire' for the purpose of SJS entitlements and obligations. This concept featured within AREEA's recent submissions to DEWR. We have further refined the criteria and resubmit this to you at page 2 of this correspondence.

Without such a test that would guide the Fair Work Commission when assessing SJSP applications before it, a range of specialist 'non-labour hire' contracting services that in many respects are the lifeblood of Australia's resources projects may be wrongly defined as labour hire and unduly burdened by administrative complexities, regulatory red-tape and increased costs.

It is not an exaggeration to forecast that such an outcome could be devastating for contracting businesses similar to those represented in last week's AREEA delegation – employers providing highly paid work, training and upskilling opportunities for many thousands of Australians.

AREEA looks forward to continued engagement with you on SJSP and other IR policies. We also wish to advise that AREEA may become more active in its public advocacy, respectfully, in support of appropriate exclusions for true 'non-labour hire' contracting models from SJSP.

Best regards,

s 22(1)

Australian Resources and Energy Employer Association (AREEA)

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‘Same Job, Same Pay’ Policy Development

Proposed ‘Multifactor Test’ for determining coverage

AREEA proposes to the Government that a *multifactor test* be developed for the purpose of ensuring regulators have consistent criteria for assessing commercial and workforce arrangements between two entities for the purpose of defining that arrangement as labour hire or non-labour hire.

AREEA’s Proposed Multifactor Test for Defining Labour Hire Arrangements

a) The primary characteristic or nature of the business providing employee/s into the workplace of another business:

- Is the employing entity a provider of contingent labour, or is it performing independent scopes of work?
- Are there any relevant historical factors relating to the performance of the contract and/or commercial arrangement (e.g. has the maintenance work for a major resources and energy project always been outsourced?)

b) The primary characteristic or commercial relationship between the two businesses:

- Are the contractual terms for delivery of labour, or delivery of a scope of work, project or service, including in relation to commercial risks.
- For avoidance of doubt, commercial risks contemplated include but are not limited to statutory obligations (such as WHS); design, delivery and maintenance of the outcome; industrial relations risks unique to the contractor and so forth.

c) Are employees of the contracting company using the host/client’s tools, equipment, machinery and/or plant?

d) Are employees of the contracting company performing their work under the direct supervision of employees of the host/client? Or are the supervisory structures provided by the contracting company?

- If contractor employees are performing work under the direct supervision of employees of the host / client, is it for major and substantive parts of their work or for discrete portions on an ad hoc basis?

e) What are the lines of management relevant to the contractor employee? Would an issue around performance of work, or leave arrangements, be considered a workforce management issue for the host/client, or a matter for the contracting employer?

- Which party (contractor or client) would need to deal with disputes that may arise in the employment relationship, such as unfair dismissals, general protections claims and/or unprotected industrial action?

f) Do the contractor and its employees have a level of autonomy / control over delivery of their work separate to that of the host/client and its employees?

- Who is setting rosters, hours of work and making other day-to-day workforce management decisions?
- Is work being charged on hourly or day rate bases, or at fixed prices related to a commercial or contractual outcome?

g) What is the composition of the immediate team or working group of the contractor employee/s? Do they form their own work group or are they integrated with teams of client/host employees?

- If contractor and client employees are working within integrated teams, to what extent or duration is this occurring? Is it a major and substantive part of how contractor employees complete their work?
- Does the contractor working group have a separately nominated Work Health and Safety representative (required under WHS legislation to be chosen by distinct work groups)?

h) Are the contractor employees *fully immersed* within the host/client employees' technology processes and systems of work?

- Are the employees exclusively engaged on the particular project or site, or can (and do) they work at other locations as / when required by their employer?

It should not be the case that any single or subset of the above considerations would necessarily be determinative. Rather, the multifactor test would see regulators weigh up a variety of considerations that lead to a *reasonably clear conclusion* that a particular workforce arrangement is labour hire for the purpose of 'Same Job, Same Pay'.

AREEA's preferred regulatory model would see this test applied by a Full Bench of the FWC when considering an application made by an employee or union representative for 'Same Job Same Pay Orders'.

NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

Document 3

Agenda Item: 1
Meeting Date: 8 June 2023
Paper Author: Department of Employment and Workplace Relations

Additional talking points

Item 1: Welcome

s 22(1)

Contact Officer: s 22(1) Phone: s 22(1)
Clearance Officer: s 22(1) Safety and Industry Policy Division Phone: s 22(1)
Document Version Date: Friday, 8 December 2023

s 22(1)

NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

Document 3

Agenda Item: 2
Meeting Date: 8 June 2023
Paper Author: Department of Employment and Workplace Relations

Additional talking points

Item 2: The Government's workplace relations reforms

Overarching points

Member Concern (What is the issue, who will raise and why?)	**Member Position** (Who supports the position?)	**Handling** (What is our response and what is the alternative the Minister can offer?
Consultation Participants may raise concerns that the consultations that have occurred are not genuine	s 47G(1)(b)	As I have detailed, the department has undertaken an intensive consultation process on the measures that would become the Protecting Worker Entitlements Bill before the Parliament, and the measures to be introduced in the second half of this year. Consultations are currently ongoing, and for some measures, have been underway since 2022. Any feedback we receive is considered, and any requests for consultation are met. The details that have been made available through this process are an enormous improvement on the consultative efforts of the previous government.
Fair Work Commission Participants seeking clarity on expanded powers of the Fair Work	s 47G(1)(b)	I understand that some participants are concerned about the role of the FWC under these measures.

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Document Version Date: Friday, 8 December 2023

Document 3

NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

Member Concern (What is the issue, who will raise and why?)	**Member Position** (Who supports the position?)	**Handling** (What is our response and what is the alternative the Minister can offer?
Commission under the proposed reforms.	s 47G(1)(b)	The expansion of the FWC's jurisdiction will be limited to the functions necessary for the operation of the following measures: • Standing up for casuals • Same Job, Same Pay • Extend the Powers of the Fair Work Commission to Include 'Employee-Like' Forms of Work • Give Workers the Right to Challenge Unfair Contractual Terms • Allow the Fair Work Commission to Set Minimum Standards to Ensure the Road Transport Industry is Safe, Sustainable and Viable • Issuing model terms for enterprise agreements The policies have been carefully designed to ensure that there is no overlap between the measures in terms of new roles and responsibilities. These measures will be discussed in more detail in the meeting on 16 June.
Measures go beyond election commitments or Jobs and Skills Summit outcomes	s 47G(1)(b)	Our Government remains committed to implementing our election commitments and the Summit outcomes in as practical and responsible a form as possible. The measures have been designed to meet the commitments, while taking into account policy considerations and stakeholder concerns.

Document 3

NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

Member Concern (What is the issue, who will raise and why?)	**Member Position** (Who supports the position?)	**Handling** (What is our response and what is the alternative the Minister can offer?
Business peaks seeking clarity on **the problem to be solved** on many of the proposed reforms.	s 47G(1)(b)	I note that the Department has published summaries outlining the issues and considerations for each measure, as well as detailed consultation papers for the more complex measures, outlining the issues for each measure. Further, the measures being brought forward are election commitments or come out of the Jobs and Skills Summit. I will invite the department to provide an outline of the problem and the intent for each measure in resolving them at the meeting on 16 June.

NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

Document 3

Emerging measures

Member Concern (What is the issue, who will raise and why?)	Member Position (Who supports the position?)	Handling (What is our response and what is the alternative the Minister can offer?
Consultation Organisations may raise a concern about the new measures to be introduced as some have not been the subject of consultation to date	s 47G(1)(b)	Decisions on which measures are to be brought before Parliament are a matter for Government, and consequently, there are limitations on what can be discussed with stakeholders. I am raising these measures with you now, to seek your feedback on the high-level detail. The department will discuss additional detail on these measures on 16 June.
Access to representation for safety and compliance issues at work Delegates' rights (Protections and rights for employees who are delegates of an industrial association registered under the Registered Organisations Act)	s 47G(1)(b)	This measure will safeguard the important work undertaken by workplace delegates in representing and educating employees. I am proposing that the Fair Work Commission be empowered to prepare model modern award and enterprise agreement terms providing rights to delegates to access training, use workplace facilities, and use a reasonable amount of paid time to undertake this important work.
Definition of employment	s 47G(1)(b)	• There have been strong representations on this issue from all sides and my department is working through the implications of that. • My view across these reforms is that I don't want to see a significant shift toward any work category – they should be broadly neutral, and where workers are genuinely contractors or genuinely

NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

Document 3

Member Concern (What is the issue, who will raise and why?)	Member Position (Who supports the position?)	Handling (What is our response and what is the alternative the Minister can offer?
	s 47G(1)(b)	employees, the law should recognise that. A number of stakeholders have expressed concern that the contract-centric approach brought about by recent High Court decisions is not consistent with that view. While a final decision has not been made, I share some of those concerns and I am giving close consideration to how they should be addressed.

Document 3

Key measures

Member Concern (What is the issue, who will raise and why?)	Member Position (Who supports the position?)	Handling (What our response and what is the alternative the Minister can offer?
National labour hire regulation Members may seek an update on development of a national labour hire licensing scheme.	s 47G(1)(b)	• I would like to thank those members who participated in consultations on a national labour hire licensing scheme. • I am currently considering this measure further in collaboration with my state and territory counterparts and have not proposed it for further discussion today, but would be happy to take any further feedback on national labour hire regulation. If necessary / If pressed: I will provide further details on this measure in a future meeting.
Same Job, Same Pay Business and industry peaks have raised concerns that the measure is a broad response to a narrow and confined issue.	s 47G(1)(b)	Our Government remains committed to implementing our election commitments in as practical and responsible a form as possible. Concerns about the use of labour hire to undercut bargained wages have existed long before the May 2022 election. Business and industry are well aware of what the issue is and that the Government has always promised to take strong action to close the labour hire loophole. This measure is an appropriate response to ensure enterprise agreements are not undercut by the use of labour hire, and to ensure that where an employer has agreed

Member Concern (What is the issue, who will raise and why?)	Member Position (Who supports the position?)	Handling (What our response and what is the alternative the Minister can offer?
		the value of work in an enterprise agreement, labour hire workers are not paid less than that. Our response must be comprehensive to ensure this loophole is closed.
Employee-like: Extend the powers of the FWC to include 'employee-like' forms of work	s 47G(1)(b)	• This measure is about providing minimum standards for gig workers. • We're still working through the detail of the final scope of the measure – we want to ensure the Government's aims are met, both now and as business models develop, but don't want to stifle innovation. • We want to provide clarity and certainty about this measure applying to the gig economy, while ensuring the Fair Work Commission has the flexibility it needs to set appropriate and relevant minimum standards as the gig economy evolves. That will be about the scope of the legislation, but also about the guardrails and objectives so the Commission can focus on the areas of greatest need, such as where gig workers are receiving less than the minimum wage.
Allow the FWC to set minimum standards to ensure the road transport industry is safe, sustainable and viable	s 47G(1)(b)	• This is a new reform, intended to address the challenges the road transport industry faces today. • Pressures on viability and sustainability have grown, and the gig economy has emerged as a major competitor to some parts of the traditional road transport industry. • So there is a need for reform, but also a need to move in a careful way to avoid unintended consequences.

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Document 3

Member Concern (What is the issue, who will raise and why?)	Member Position (Who supports the position?)	Handling (What our response and what is the alternative the Minister can offer?
	s 47G(1)(b)	The initial focus should be those sectors and on those issues where the need for action is clearest.
Give workers the right to challenge unfair contractual terms	s 47G(1)(b)	• Existing processes to challenge unfair contracts under the Independent Contractors Act have been little used and ineffective – many contractors simply won't have the time or financial resources to litigate in the Federal Court. • This measure is about creating a faster, lower cost process to deal with these disputes. In relation to gig workers, I note there is a degree of consensus around the need for protections of some sort in relation to deactivation and my department is working through the views that have been put about what that should look like.
Compliance and enforcement: criminalising wage theft Members may seek further detail on the range of conduct intended to be captured by the offences.	s 47G(1)(b)	• Underpayment harms workers and gives businesses who don't comply with the law an unfair advantage. • These reforms are designed to ensure that the compliance and enforcement framework in the Fair Work Act has a graduated scale of penalties and tools to address the range of culpable conduct that results in underpayment, from a failure to take steps to do the right thing to deliberate non-compliance. • Unfortunately, the evidence shows that wage underpayment problem continues to be endemic. We need to

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Member Concern (What is the issue, who will raise and why?)	Member Position (Who supports the position?)	Handling (What our response and what is the alternative the Minister can offer?
	s 47G(1)(b)	take a different approach to ensure that employers take seriously their obligation to pay their employees their correct entitlements, and to create a level playing field for businesses that do the right thing. • There will be a due diligence defence available to put beyond doubt that employers who take reasonable steps to do the right thing won't face criminal sanctions. • For conduct that doesn't fall within the scope of the new criminal regime, the Fair Work Act will offer increased maximum penalties for wage exploitation related contraventions of the Act. This will allow the FWO to seek, and the Courts to order, penalties that are more easily able to reflect more serious instances of non-compliance. • The FWO's compliance and enforcement strategy will also be adjusted to reflect the creation of the new criminal offence.
Access to representation for safety and compliance issues at work Strengthening right of entry for wage underpayment	s 47G(1)(b)	I propose to strengthen the right of entry provisions of the Fair Work Act for the investigation of wage underpayments. Following stakeholder consultations on wage underpayments, it has become clear that right of entry permit holders need additional capacity to effectively investigate suspected underpayment of wages.

NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

Document 3

Member Concern (What is the issue, who will raise and why?)	**Member Position** (Who supports the position?)	**Handling** (What our response and what is the alternative the Minister can offer?
		The proposal will amend the current Fair Work entry permit holders requirements so that the Fair Work Commission must issue an exemption where there is a reasonable belief of wage underpayments, and remove restrictions regarding the location of interviews and discussions, and the route permit holders take to those locations. • Work health and safety and other right of entry requirements must still be complied with.
Access to representation for safety and compliance issues at work Right of Entry permit technical amendments	s 47G(1)(b)	I propose to streamline the process for replacing lost, stolen or destroyed Fair Work entry permits, and to remove the requirement to return an expired entry permit once the 3-year expiry period has passed. • The changes are minor and technical in nature.
Compliance and enforcement Sham contracting Members may seek further detail on the nature of the amendments to the defence to sham contracting.	s 47G(1)(b)	• We are acting on recommendations by the Productivity Commission, Black Economy Taskforce and Grattan Institute to amend the defence for sham contracting from a test of subjective knowledge or recklessness to a more objective test of 'reasonable belief'. • There is no change to what is and isn't a sham contracting arrangement. • An employer will not be liable for sham contracting if they reasonably believed the worker was a contractor, not an employee.

NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

Document 3

Member Concern (What is the issue, who will raise and why?)	Member Position (Who supports the position?)	Handling (What our response and what is the alternative the Minister can offer?
	s 47G(1)(b)	• This reform strikes the right balance and ensures that the provisions are fair for both workers and businesses.
Casuals Participants seeking clarity on government's approach to introducing post contractual conduct on definition of a casual employee and what this means for rest of framework. *Members may seek copy of a draft definition.*	s 47G(1)(b)	We've been listening to stakeholder feedback through the consultation process and are continuing to refine a model. The Government remains committed to amending the definition of a casual employee to include post contractual conduct and ensuring eligible employees can choose permanent employment if they want it. We have also heard the desire to limit change in the current conversion framework from all stakeholders. We are considering how to enable this, along with giving employees a meaningful ability to pursue change of status where they no longer think they meet the definition, including through the Fair Work Commission. • We have also heard the need to provide employers who act in accordance with

NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

Document 3

Member Concern (What is the issue, who will raise and why?)	Member Position (Who supports the position?)	Handling (What our response and what is the alternative the Minister can offer?
		their legal obligations with certainty of liability with associated wages and conditions.

Document 3

Other measures

Member Concern (What is the issue, who will raise and why?)	**Member Position** (Who supports the position?)	**Handling** (What our response and what is the alternative the Minister can offer?)
Anti-discrimination Changes being progressed under the Stronger Protections measure to include 'experiencing family or domestic violence' as a protected attribute in the Fair Work Act are unnecessary	s 47G(1)(b)	• The right to ten days of paid family or domestic violence leave, and the protection of this workplace right under the Fair Work Act is significant. • The Government is committed to doing everything in its power to support victims and survivors of family or domestic violence. • This amendment is intended to ensure that victims and survivors of family or domestic violence have less reason to fear discriminatory attitudes in the workplace when seeking to avail themselves of their entitlements.
Small business redundancy exemption in insolvency Changes to small business redundancy exemption should be dealt with through the Fair Entitlements Guarantee Scheme and not in the Fair Work Act.	s 47G(1)(b)	• The Fair Entitlements Guarantee (FEG) is currently only accessed in less than 20% of corporate insolvencies The amendment needs to address the anomaly for all employees who lose their job due to insolvency to ensure fairness and equity in how redundancy pay is preserved, regardless of whether employees need to rely on FEG to be paid their owed entitlements. • The NES redundancy entitlement and the small business redundancy exemption are both created under the Fair Work Act – it is appropriate that this anomaly is also addressed in the Fair Work Act to maintain the integrity of the small business redundancy exemption.

Small business redundancy exemption in insolvency Small business redundancy exemption should not apply to a small business if at any point in 12 months prior to redundancy the employer was a large business.	s 47G(1)(b)	Implementation of the ACTU proposal may interfere with businesses ability to fluctuate in size in response to commercial imperatives. This would be inconsistent with the policy intent to address this anomaly only in circumstances of insolvency (liquidation or bankruptcy).
Small business redundancy exemption in insolvency Changes to small business redundancy exemption create new employee entitlements and obligations on employers	s 47G(1)(b)	The changes will only affect entities that are already in liquidation or bankruptcy and do not affect viable (ongoing) employers. Liquidators will determine an employee's redundancy entitlements as part of the processes of realising the former employer's debts and assets and distributing them among the creditors. The changes do not create a new entitlement, it preserves an existing entitlement by closing down an unintended and unfair legal loophole for affected employees in insolvency.
Bargaining reforms There should not be any new model terms for enterprise agreements.	s 47G(1)(b)	Model terms in enterprise agreements are meant to flexible and reflect best practice workplace relations. Providing for the independent and expert Fair Work Commission to make model terms with this in mind is appropriate. The Fair Work Act does not include any rights for the important role and work of a workplace delegate. It's about time that these rights were recognised and protected.

Bargaining reforms There has been no consultation on changes to the Better Off Overall Test and changes will reintroduce significant complexity into the system.	s 47G(1)(b)	Last year, I made clear that single enterprise bargaining remains the focus of the enterprise bargaining framework. At the time, and even as recently as a few weeks ago, business and industry peaks asked for the ability to come off multi-enterprise agreements onto single enterprise agreements at any time. This measure answers those calls and does just that. The Government wants to ensure that at the same time as giving business what its asked for, workers do not go backwards. If a business voluntarily engages in bargaining with its workers to make a single enterprise agreement that is better for business and better for workers, I want to let them.
Bargaining reforms Reintroducing the previous single-interest bargaining stream is not at all tailored to the problem that was identified by previous users of the stream.	s 47G(1)(b)	The Government has made clear that it will reinvigorate enterprise bargaining to allow businesses to improve productivity and get wages moving again. I want to ensure that businesses and workers have options to engage in bargaining and that those options are suited to their needs. Some businesses and workers have successfully used the single-interest bargaining stream already; in some cases for several bargaining rounds. I don't want to stand in the way of this stream continuing to deliver bargained outcomes.

s 47G(1)(b)	s 47G(1)(b)	I am considering the structure of transitional arrangements for matters that are currently on foot.
s 47G(1)(b)	s 47G(1)(b)	I understand members may have concerns about this measure. Officials from my department will consult with stakeholders on this measures during June and July. These reforms are necessary to strengthen delegates' representative role in the workplace. However, I am conscious that a 'one size fits all' approach to delegates' rights may not be appropriate as requirements may vary across industries and different sizes of employers. I look forward to engaging with all stakeholders to ensure that the new protections strike the right balance.

WHS measures

Member Concern (What is the issue, who will raise and why?)	**Member Position** (Who supports the position?)	**Handling** (What our response and what is the alternative the Minister can offer?)
Industrial manslaughter and increase to Category 1 penalties	s 47G(1)(b)	*Industrial manslaughter* • Industrial manslaughter is a feature of the model laws. It has been long standing policy of governments on both sides to remain harmonised with the model laws. No fallback. *Increased Category 1 penalties* • It is important that the Category 1 penalties reflect the seriousness of the offence and are proportionate to the industrial manslaughter penalty. The model penalties are a floor. • If necessary: I will consider adopting the increase to the model penalties rather than a higher increase. Proposed/model penalties: • $15m/$10.425m for a body corporate $3m/$2.085m for an individual PCBU or officer • $1.5m/$1.042m for any other individual • 15 years/10 years imprisonment for an individual)
First responders Initial consultation in 2022 on the proposal to implement presumptive provisions for first responders with PTSD under the SRC Act indicated disparate views on which	s 47G(1)(b)	*What is the basis for the proposed scope for the presumptive provisions?* • The proposed scope reflects recommendations of the Senate Education and Employment References Committee 2019 report, *The people behind 000: mental health of our first responders*, and recent updates to Safe

NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

Member Concern (What is the issue, who will raise and why?)	**Member Position** (Who supports the position?)	**Handling** (What our response and what is the alternative the Minister can offer?)
occupations should be eligible for presumptive provisions. Unions advocated for a broad scope of coverage beyond 'traditional first responders'.		Work Australia's Deemed Diseases in Australia list. • Additional occupations may be captured following a review of the operation of the provisions.
Amendments to Asbestos Safety and Eradication Agency Act The ACTU supports amendments that give the agency 'teeth' and enable the agency to take a more proactive stance on reporting and actions taken to address the silica issue.	s 47G(1)(b)	• We are providing the agency with a stronger policy function so that it can provide advice to Government on silica-related issues. • We are exploring options to strengthen reporting requirements to ensure consistency and quality of data so that the agency can better measure progress and ensure all parties are on the right track towards eliminating these diseases. Consultation on the scope of proposed reporting is ongoing.

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NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

Document 4

Agenda Item: 1
Meeting Date: 8 June 2023
Paper Author: Department of Employment and Workplace Relations

Chair Brief

Item 1: Welcome

Talking Points

s 22(1)

Contact Officer: s 22(1) Phone: s 22(1)
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Document Version Date: Friday, 8 December 2023

Attachment A – Key Attendees and Apologies

Union and employer group attendees

Name	Organisation
s 22(1)	Australian Resources and Energy Employer Association

s 22(1)

s 22(1)

Housekeeping

- All views expressed during this meeting are to be kept confidential.

  However, this does not prevent you from reporting within your organisation.

- I do not intend to publicly disclose the details of our discussions today. I ask that you do the same.

- To ensure that everyone has had an opportunity to speak when I seek comments, I propose to first seek comments from those on the videoconference.

- I will then go around the room and seek comments from participants in turn.

- My department will take notes, and I may call upon them to answer any questions if required.

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Other business

- I note that the main agenda item for today is Item 2:
  - The Government's workplace relations reforms

- Proposed measures and the year ahead

s 22(1)

Agenda Item: 2
Meeting Date: 8 June 2023
Paper Author: Department of Employment and Workplace Relations

Chair Brief

Item 2: The Government's workplace relations reforms

Talking Points

Consultation process

- Since our meeting on 8 February 2023, significant and comprehensive consultation has been ongoing for the measures being considered for introduction to Parliament in the second half of this year, as well as the measures introduced in the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023*.

- As you know, some of these measures, such as extending the powers of the Fair Work Commission to include employee-like forms of work, have had ongoing consultation since mid-2022.

- The deliberations on what will be contained in the WR legislation for introduction in the second half of the year is based on the commitments we took to the election, and a number of Jobs and Skills Summit outcomes.

- Genuine, robust consultation is a priority for me. We have actively consulted with stakeholders on workplace reform measures since forming government last year.

- Between February and May this year alone, the department has held over 80 consultation meetings and received over 200 written submissions. The response to requests for written submissions and to meet with the department has been significant.

- I would like to thank everyone in the room for your willingness to engage with our consultation processes; for your flexibility in making yourselves and your officers available for consultation; for providing your feedback, outlining your concerns and those of your membership; and for the suggestions you made on improving the approach for particular measures.

- It is important to note that I continue to consult on these measures, and that the final detail and timing of the legislation are a matter for Government.

- Does anyone have any comments they wish to make on the consultation process to date?

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Proposed measures and the year ahead

- There is a small number of measures that are being considered for introduction that have emerged as a result of the consultation process.
- The first measure is the introduction of specific **rights and protections for employees who are delegates** of an industrial association registered under the Registered Organisations Act. The amendments would:
  - introduce a definition of a 'delegate'
  - create protections against key forms of adverse action taken against delegates, such as refusing to deal with, misleading or hindering and obstructing delegates, and
  - empower the Fair Work Commission to make terms for modern awards and enterprise agreements that give effect to particular primary and ancillary delegates' rights (including, for example, the right to represent employees during disputes in the workplace, and reasonable access to workplace facilities to discharge delegate duties).
- The second measure being considered is the establishment of a **new avenue for employers and employees to bargain for agreements** that suit their needs and operations
  - We heard during consultations that employers and employees are looking for more ways to bargain for single enterprise agreements that suit their needs, even if they are covered by a multi-enterprise agreement. I want to provide more opportunities for bargaining to these parties.

- We are proposing to amend the Fair Work Act to allow employers and employees to bargain for a single enterprise agreement to replace a multi-enterprise agreement at any time, so long as the single is more beneficial than the multi.

- I want to encourage bargaining, but also want to ensure employees are no worse off if an employer wants to leave a multi-enterprise agreement and be covered by a more tailored single enterprise agreement instead.

- The third is to introduce a **definition of employment**

  - I have received representations from a number of stakeholders that there should be a definition of employment as part of this reform package.

  - I am giving strong consideration to these views, including the representations that have been made by state and territory officials to my department.

  - Broadly, stakeholders have expressed concern about the contract-centric approach brought about by recent High Court decisions and proposed changes to address that. While a final decision has not been made, I share some of those concerns and I am giving close consideration to how they should be addressed.

- I will pause at this point for any comments or questions you have on these measures, before discussing the measures that have been previously flagged for introduction in the second half of this year.

NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

Document 4

s 22(1)

Key measures

- I will now run through the measures that have been the subject of our comprehensive consultation process at a high level.
- I would like to note at the outset that in relation to national labour hire regulation, I am considering this measure further in collaboration with my state and territory counterparts and will provide an update at a later time.
- As a result, I am not proposing we discuss this measure further today but I would be happy to take any further feedback on national labour hire regulation that you may have.
- You are all familiar with the measures that my department has been consulting on at a high level.
- I want to focus on the four key measures we are seeking to progress, and then open up for discussion.
- These key measures are **Same Job, Same Pay**, criminalising **wage theft**, standing up for **casual** workers, and expanding the powers of the Fair Work Commission to include **'employee-like'** forms of work (including related reforms setting minimum standards for the Road Transport Industry and giving independent contractors the right to challenge **unfair contractual terms**).
- The remaining measures we have been consulting on are generally less complex and controversial, and so I'm not planning to discuss them in detail today; but happy to take any questions at the end.

- First is the **Same Job, Same Pay** measure, which aims to prevent enterprise agreements from being deliberately undercut by the use of labour hire. The Same Job, Same Pay measure has been the subject of consultation, with the following principles kept front of mind:
    - business should be able to access labour hire for genuine, short term work surges
    - labour hire workers should be paid at least the same full rate of pay under host enterprise agreements as directly engaged employees doing the same work
    - disputes should be dealt with quickly, economically, and fairly in the Fair Work Commission
    - targeted anti-avoidance measures are needed to protect Same Job, Same Pay entitlements and ensure long lasting behavioural change.
- Second, I am proposing to extend the powers of the Fair Work Commission to include **'employee-like'** forms of work, allow the Fair Work Commission to set minimum standards to ensure the **Road Transport** Industry is safe, sustainable, and viable; and give independent contractors the right to challenge **unfair contractual terms**.
- These measures will ensure all workers have access to appropriate minimum rights and protections, regardless of whether they are characterised as an employee or independent contractor, while also promoting innovation and ensuring business are able to benefit from a level playing field.

- Third, I will be introducing **criminal offences for wage theft** and record-keeping misconduct, and other compliance and enforcement reforms.
    - It's become apparent through consultations on this issue that the Fair Work Ombudsman simply does not have the resources or the capacity to identify every instance of wage underpayment or non-compliance with the Fair Work Act that is occurring; and what we are seeing in the media is just the tip of the iceberg in terms of these issues. In this context, we are considering whether the capacity for union officials who hold right of entry permits, to detect and investigate underpayments, could be strengthened.
- The fourth key measure is the legislation of an objective test to determine when an employee can be classified as **casual**, so people have a clearer pathway to permanent work where they want it.
    - An objective definition would include consideration of the terms of the contract of employment, and also consider the nature of the relationship post contract.
    - Consultations highlighted that conversion from casual to permanent employment should be driven by employee choice and, and where employers act in accordance with their legal obligations they should have certainty of employment status and the associated wages and conditions, until and unless circumstances change that justify an employee seeking to convert to permanent employment.
- I will now open the meeting up for comments and questions on these key measures. If you have any questions or comments to raise on the other less

complex measures that have been the subject of consultation, you are welcome to raise those now as well.

s 22(1)

- As you know, my department has been consulting on more measures. There are also a number of safety reforms I intend to progress.

- The measures that I will not highlight today are less complex. However, I note that my department will provide more detail on all these measures at stakeholder meetings later this month.

- I intend to progress a number of work health and safety and workers' compensation measures. Some of you will have participated in targeted consultation processes that the department has conducted for these measures. The measures are as follows:

- Introducing an **industrial manslaughter offence** into the Commonwealth jurisdiction, to punish and deter the most egregious breaches of a work health and safety duty that cause death; and

- **Significantly increasing the Category 1 offence penalties**, to ensure that the penalties reflects the seriousness of the offence and are proportionate to the industrial manslaughter penalties

- I also intend to introduce a presumption in the *Safety Rehabilitation and Compensation Act 1988* that if a 'first responder' suffers post-traumatic stress disorder (PTSD), the PTSD will be taken to have been caused by their employment.

- Finally, I intend to amend the Asbestos Safety and Eradication Agency Act to expand the functions of the Asbestos Safety and Eradication Agency to include silica dust, and position the agency as a central point of coordination, monitoring and reporting on national action to eliminate the

incidence of silicosis and other silica-related diseases in workers in Australia.

- Consultations to date with state and territory work health and safety and health authorities, and key stakeholders, some of which are present here, have been broadly supportive of this important proposal, and consultation on the detail of the proposal is ongoing.

- I will now open the meeting up for comments and questions.

s 22(1)

Next steps

- As I said at the outset, I am still consulting on these measures. I have met with a number of you and your members since the department's latest consultation process concluded.

- As is normal practice, we expect to convene a Committee on Industrial Legislation (CoIL) to enable NWRCC member organisations and additional participants to review the draft WR legislation. Further details on timing will be made available closer to the time.

- In the meantime, I will be convening confidential meetings on 16 June to discuss the measures to be introduced in Parliament later this year. Concurrent separate meetings of business and union representatives are proposed.

- The purpose of these meetings is to have the department outline further details on the current preferred options being considered for draft legislation. I will also attend the final session of each meeting to hear your feedback on the details shared.

- We are looking to introduce legislation into the Parliament in the second half of the year – we have not yet determined the specific date.

- The legislation will be subject to Senate inquiry processes.

- I would like to open up the floor for questions and comments, starting with those who are on the videoconference.

NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

Document 4

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NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

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NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

Document 4

Agenda Item: 3
Meeting Date: 8 June 2023
Paper Author: Department of Employment and Workplace Relations

s 22(1)

Australian Government
Department of Employment and Workplace Relations

MS23-000476
Ministerial Submission
Routine/Low Complexity

To **Minister for Employment and Workplace Relations**

Subject **National Workplace Relations Consultative Council (NWRCC) – Draft Statement of Outcomes – 8 June 2023**

Sent to the MO **06 July 2023**

Action date s 22(1)

Recommendations - That you:

1) **agree** to the draft statement of outcomes from the meeting of the NWRCC held on 8 June 2023 — **agreed/ not agreed**
2) **agree** that the Department of Employment and Workplace Relations circulates the draft statement of outcomes to meeting participants for out-of-session endorsement, s 22(1) — **agreed/ not agreed**

Signature:

_____ ___ /___ / 2023

MO Comments

Executive summary

1. The department seeks your agreement to circulate the draft statement of outcomes to participants provided at Attachment A.
2. s 22(1)

Key points

3. You chaired an in-person meeting of NWRCC on 8 June 2023, at Parliament House in Canberra.
4. The draft statement of outcomes are at Attachment A for your agreement.
5. Once agreed, the department will circulate the draft statement of outcomes via email to the meeting participants, for their out-of-session endorsement.
6. s 22(1)

Government policy issues and impact on other portfolios

7. The purpose of the meeting was to provide an update to the NWRCC members as key stakeholders on the proposed workplace relations reforms being considered for introduction later in 2023.
8. s 22(1)

Key risks and mitigation

9. Although the confidential nature of discussions at NWRCC was emphasised at the meeting, there is a risk that members might leak confidential information, including the draft statement of outcomes.
10. To mitigate this risk, the draft statement of outcomes clearly states that the paper is confidential, and cannot be shared outside of the 8 June 2023 NWRCC meeting participants.

Stakeholder consultation

11. Department executives have reviewed the draft outcomes.
12. NWRCC participants will have the opportunity to review the draft outcomes when they are circulated for out-of-session endorsement.

Attachments

Attachment A NWRCC Draft Statement of Outcomes – 8 June 2023

s 22(1)

Clearance

Primary Contact Officer: s 22(1) s 22(1)
Workplace Relations Consultation Branch Ph: s 22(1)
| WR | Safety and Industry Policy Mobile: s 22(1)
Clearance Officer: s 22(1) s 22(1)
| WR | Safety and Industry Policy Ph: s 22(1)

NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL
OFFICIAL

Meeting Date: 8 June 2023
Paper Author: Department of Employment and Workplace Relations

Draft Statement of Outcomes – 8 June 2023

Note on confidentiality: Discussions at the National Workplace Relations Consultative Council (NWRCC) are held in-confidence. As such, this paper is distributed in-confidence, and cannot be shared outside of NWRCC members.

Attendees

Name	Organisation
The Hon Tony Burke MP (Chair) Minister for Employment and Workplace Relations	Australian Government
s 22(1)	s 22(1)
	Australian Resources and Energy Employer Association
	s 22(1)

NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL

OFFICIAL

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DEPARTMENT OFFICIALS

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s 22(1)

Item 2 – The Government's workplace relations reforms

The Chair reflected on the breadth of consultations held this year, along with the importance of good consultation practice going forward.

Key measures

The Chair outlined the key measures that have been discussed during the comprehensive consultation process at a high level:

- Closing labour hire loopholes

NATIONAL WORKPLACE RELATIONS CONSULTATIVE COUNCIL
OFFICIAL

- Expanding the powers of the Fair Work Commission to include employee-like forms of work (including related reforms setting minimum standards for the Road Transport Industry and giving independent contractors the right to challenge unfair contractual terms)
- Criminalising wage theft
- Amending the definition of a 'casual' employee.

The Chair noted that an update to the national labour hire regulation measure would be provided following consideration of this measure with state and territory counterparts.

Proposed measures and the year ahead

The Chair outlined measures being considered for introduction in Parliament in 2023, which have emerged as a result of the consultation process:

- Introduction of specific rights and protections for employees who are delegates of an industrial association registered under the *Fair Work (Registered Organisations) Act 2009*
- Establishment of a new avenue for employers and employees to bargain for agreements that suit their needs and operations
- Clarifying the definition of 'employment'.

The Chair stated that the remaining measures are less complex, requiring a less detailed discussion, however welcomed members' questions and comments on those issues.

Safety measures

The Chair raised his intention to progress the following work health and safety and workers' compensation measures, with more detail to be provided at stakeholder meetings this month:

- Introducing an industrial manslaughter offence in the Commonwealth
- Significantly increasing the Category 1 offence penalties in the Commonwealth
- Introducing a presumption in the *Safety Rehabilitation and Compensation Act 1988* covering 'first responders' in the event of post-traumatic stress disorder
- Expanding the functions of the Asbestos Safety and Eradication Agency to include silica dust.

Further consultation

The Chair noted that two confidential meetings will be convened – one with business representatives and one with union representatives – on 16 June 2023 to discuss the measures being considered for introduction to Parliament later this year.

Following this, the Chair expects to convene a Committee on Industrial Legislation (CoIL) prior to introducing legislation to Parliament, in the second half of 2023.

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Australian Government

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Australian Government
Department of Employment and Workplace Relations

MS23-000476
Ministerial Submission
Routine/Low Complexity

To **Minister for Employment and Workplace Relations**

Subject **National Workplace Relations Consultative Council (NWRCC) – Draft Statement of Outcomes – 8 June 2023**

Sent to the MO **6 July 2023**

Action date s 22(1)

Recommendations - That you:

1) **agree** to the draft statement of outcomes from the meeting of the NWRCC held on 8 June 2023 — **agreed/ not agreed**
2) **agree** that the Department of Employment and Workplace Relations circulates the draft statement of outcomes to meeting participants for out-of-session endorsement, s 22(1) s 22(1) — **agreed/ not agreed**

Signature: Tony Burke 9 / 8 / 2023

MO Comments

Executive summary

1. The department seeks your agreement to circulate the draft statement of outcomes to participants provided at Attachment A.
2. s 22(1)

Key points

3. You chaired an in-person meeting of NWRCC on 8 June 2023, at Parliament House in Canberra.
4. The draft statement of outcomes are at Attachment A for your agreement.
5. Once agreed, the department will circulate the draft statement of outcomes via email to the meeting participants, for their out-of-session endorsement.
6. s 22(1)

Meeting Date: 16 June 2023

Minister Talking Points

Stakeholder Meeting – Business

Morning – Opening remarks (10.30am-10.40am)

- Thank you all for travelling to Canberra to be part of this important discussion.

- This meeting is being held in confidence, but I hear your concerns on sharing some of the information with trusted advisors. That is why we have provided an updated Deed of confidentiality.

- If you have any questions on this, please speak to someone from my Department.

- Last year, this Government demonstrated our commitment to improving Australia's workplace relations framework through the Paid Family and Domestic Violence Leave Act and the *Secure Jobs, Better Pay Act*.

- This year, I introduced the Protecting Worker Entitlements Bill to make further necessary improvements to the system.

- I am now considering the introduction of a package of reforms in the Spring 2023 sittings, to close loopholes in the workplace relations system that disadvantage workers and create unfair market conditions.

- There are a number of measures that aim to address job insecurity – reforms to better protect gig and labour hire workers in particular will demonstrate our seriousness about stamping out insecurity and unfairness in all parts of the labour market.

- There are three key objectives to this package of proposed measures.

- First, leveling the playing field for workers and businesses.

- For some workers, self-employment, contract and gig work is the preferred working arrangement, as it allows them to maintain a high level of control over their hours and how they participate in the workforce.

- The proposed measures will aim to level the playing field for workers by restoring security and fair wages for non-traditional forms of work.

- They will level the playing field for business by closing the loopholes that can incentivise a race to the bottom on labour costs, while retaining the flexibility available to businesses in using these types of work.

- The second objective is further safeguarding fair pay and security for employees.

- Business and workers need to trust that the workplace relations system is working to support them.

- Establishing proper safeguards and deterrents in the system means workers have a guarantee they will be fairly paid and businesses can be confident

they are not competing against businesses who use exploitation to gain an unfair competitive advantage.

- Third, I am aiming to better ensure safe working conditions with this package.

- Work-related injuries pose a significant burden on individuals, society and the economy. All workers, regardless of their occupation or how they are engaged, have the right to a healthy and safe working environment.

- Workplaces that promote physical and psychological wellbeing regardless of the industry or type of work are vital to keep the Australian economy functioning.

Next steps

- My department will now provide detail on the measures that I am considering for introduction later this year.

- Later today I will return to listen to your feedback.

- Thank you again for taking the time to participate in today's discussions – your views and consideration is an important part of the consultation process.

- I will now hand over to my department colleagues.

INSTRUCTION: HAND OVER TO s 22(1)

Afternoon – Minister Discussion (2.30pm-3.30pm)

- I am eager to hear your thoughts on the policy proposals you have heard today.

- As a reminder, all views expressed during this meeting are to be kept confidential.

- We have an hour allocated to go through your feedback. I suggest we discuss the measures starting with closing labour hire loopholes.

- First off though, does anyone have a brief general comment they'd like to make?

INSTRUCTION: Ask for brief general comments (10 minutes), then run through each measure discussed seeking specific feedback (50 minutes).

Note – refer to **additional talking points table** for suggested responses to expected questions.

- I'd now like to target our discussion. I'll start with comments on closing labour hire loopholes.

    1. Closing labour hire loopholes
    2. Definition of employment
    3. Employee-like
    4. Road transport
    5. Unfair contractual terms
    6. Standing up for casual workers

7. Criminalise wage theft and make changes to civil framework
8. Strengthening rights of entry to investigate underpayments
9. Enhancing delegates' rights

- Thank you again for your time today – I appreciate your sharing your views on these proposals.

- I will leave you with the Department to run through the rest of the proposed measures, and look forward to hearing any feedback you may have on these.

End

Documents 7 to 22 (pages 61 to 85) redacted under section 47C FOI Act

s 22(1)

26 July 2023

The Hon Tony Burke MP
Minister for Employment and Workplace Relations
Member for Watson
Parliament House
Canberra ACT 2600

By email: minister.burke@dewr.gov.au

Dear Minister

Proposed workplace relations changes

We refer to the next tranche of workplace relations legislation currently under consideration by the government.

As Australia's leading business representatives, who represent businesses employing millions of Australians, we seek to ensure any changes to the workplace relations system preserve productive and harmonious workplaces that provide secure jobs with sustainable wage increases.

We appreciate the time that you, your office and your Department have taken to meet with us.

Whilst there has been some recognition of business concerns in certain areas, and this is welcomed, we remain deeply concerned that even after consultation, the legislation may not address many of the issues businesses have raised, and key details of the government's intent remain unclear.

For this reason, we request that no final decisions be made on the proposed legislation, and that any legislation not be introduced to Parliament until there is a thorough analysis of the potential implications.

These proposed changes will impact the entire economy and it is therefore not just a workplace relations issue.

We request that further consultation is undertaken in an open and public manner so as to achieve constructive solutions. We are concerned that the lack of public engagement, has limited the ability of your ministerial colleagues and other sectors to fully comprehend the potential impact of these reforms.

We look forward to further engagement and trust this letter will contribute to a more informed debate on the impending policy decisions on workplace relations for the prosperity of all Australians.

Yours sincerely

s 22(1)

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s 22(1)

From: s 22(1)
To: s 22(1) DEWR - Minister.Burke; DEWR - WRConsultations
Cc: s 22(1)
Subject: AREEA letter to Minister Burke - Closing loopholes bill
Date: Tuesday, 22 August 2023 3:18:04 PM
Attachments: image001.jpg
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2023_08_22_AREEA_letter_Minister_Burke_Closing_loopholes_bill.pdf

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Dear s 22(1)
I hope this email finds you well.
Find attached a letter to Minister Burke outlining AREEA's concerns in relation to four technical drafting matters within the 'Closing the Labour Hire Loophole' section of the forthcoming WR Amendment Bill.
These were key matters picked up and discussed in COIL with DEWR officials.
AREEA appreciates and welcomes any opportunities to consult further prior to the introduction of the legislation to Parliament.
Please don't hesitate to contact me if required.
Best regards,

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South Brisbane QLD 4101
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AREEA
AUSTRALIAN RESOURCES & ENERGY EMPLOYER ASSOCIATION

22 August 2023

The Hon. Tony Burke MP
Minister for Employment and Workplace Relations
PO Box 6022
Parliament House
CANBERRA ACT 2600

Dear Minister Burke,

Closing the Labour Hire Loophole – Concerns r.e. drafting, unintended consequences

AREEA thanks you, your ministerial staff and department officials for consulting on the development of the proposed *Fair Work 'Closing the Loopholes' Amendment Bill 2023*.

As has been previously expressed, AREEA disagrees with the Government's reasons for many of the key changes within. However, accepting your stated plans to move forward with these policies, we appreciate the opportunity to work with you on matters of technical implementation.

In that spirit, following last week's COIL meeting AREEA wishes to raise four important technical issues related to the 'Closing the Labour Hire Loophole' policy that could be rectified through relatively minor drafting amendments.

1. Position of the 'contractor test'

AREEA and our delegation of contractor members were grateful for your time in June to brief you on the important distinction between labour hire arrangements and specialist service contracting arrangements in our sector.

We note you genuinely heard, understood and acted upon our concerns, by confirming shortly thereafter that the Government did not intend for service contracting arrangements to be caught up in the implementation of the 'Same Job, Same Pay' policy.

We further welcome that AREEA's proposal for a 'multi-factor test' appears to have been picked up by the Government to assist the Fair Work Commission to identify and consider these nuances when considering applications made before them for labour hire orders.

There is, however, an issue with where these provisions currently sit within the draft bill.

Specifically, the 'contractor test' sits at Division Two, subsection 8(b) of the draft exposure bill viewed by AREEA at last week's COIL meeting. This falls under the heading *"Matters to be considered if submissions are made"* and places the 'contractor test' alongside five other considerations that the FWC may take into account when assessing applications for orders.

As a result of this, the 'contractor test' does not provide an express exemption for service contracting arrangements and rather could be outweighed on balance by the FWC for other matters they may find relevant.

This outcome would not provide certainty and confidence for specialist contractors when tendering for critical work in the resources and energy sector (and all others).

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Email: vicareea@areea.com.au ABN: 32 004 078 237 Web: www.areea.com.au

AREEA's position is the identification of an arrangement as a genuine service contracting arrangement and not that of labour hire, should provide an immediate and unambiguous exemption for those arrangements.

This could be achieved by firming up the 'contractor test' in the drafting to expressly direct the FWC to not make an order should an arrangement be found as principally for provision of a service and not for provision of labour to work for the regulated host.

2. Subjective judgements on outsourcing arrangements

Also regarding the 'contractor' test currently at Division Two, subsection 8(b), AREEA is concerned by the final criteria item numbered VI, which states:

> *VI. The extent to which, in the circumstances, the regulated host employs, has previously employed, or could employ employees to whom the host employment instrument applies, applied or would apply.*

While the other factors (I – V) within the 'contractor test' require the FWC to make objective, factual findings about the nature of the commercial and employment arrangements subject to the application, this final criteria item is not aligned with those principles.

Rather, it opens the door for FWC members to make subjective determinations about the capacity, strategy or general appropriateness for the client or host business to have outsourced that function to a service contractor in the first place.

Technically, any business *could* employ anybody, provided their industrial instruments allow for it, but there are myriad commercial and operational reasons as to why they might choose to outsource that function for a specialist contracting business to perform.

Deleting this criteria item would restore the 'contractor test' to an objective determination on facts of the arrangements before the FWC, and avoid the tribunal becoming a forum in which businesses routinely have to justify their reasons for engaging service contractors to perform outsourced functions.

3. Treatment of leave payments

At COIL, Department officials confirmed it was the intent of the legislation that employers subject to a 'Regulated Labour Hire Arrangement Order' would be required to pay all forms of leave payments at the 'Protected Rate of Pay'.

This is highly problematic and may result in severe unintended consequences including on the market values of both publicly listed and private companies.

As you are well aware, some types of leave (annual leave and long service leave) are accrued throughout an employee's employment and then held over to be paid at a future point in time. Businesses are required to account for this untaken leave balance as a contingent liability in their financial statements.

If these types of leave were to be required to be paid at the 'Protected Rate of Pay', the making of any 'Regulated Labour Hire Arrangement Order' would instantly lift the value of liabilities being carried by that particular business, markedly impacting its balance sheet and affecting the market value of that business.

Considering some of the larger labour hire firms have thousands of employees on their books and carry multiple millions of dollars in leave liabilities, such a change in market value could be drastic. If that firm was publicly listed (of which many are), the Government's policy in relation to labour hire pay orders could have the unintended impact of distorting public markets.

Further reasons this approach is highly problematic include:

a) Long service leave and annual leave is paid-out upon an employee ceasing to be employed with a particular business. Labour hire companies are required to pay this amount – it does not fall upon the responsibilities of any prior host employer of that employee, and any unexpected cost increases is not recoverable by labour hire firms from current or former clients.

   It would be a perverse outcome if labour hire employers were required to pay significant lump sums for any accrued LSL, annual leave and (potentially) redundancy entitlements on the enterprise agreement rates of affected employees' most recent hosts. If the variability was large enough, this could send some firms insolvent.

b) In the (relatively common) scenario a labour hire employee works for several host businesses in any one year, it would be very difficult for their direct employer to ascertain the rate of pay that their annual leave be paid in the event they took leave or had their accrual paid out at termination of their employment.

   No payroll system in the country is configured to account for differing rates of pay within an annual period of any other period. They simply calculate leave accrued against hours worked, via historical practices. There would be no practical way a labour hire firm could account for that variability, leading potentially to non-compliance issues.

c) If the legislation does intend for leave to be paid at the Protected Rate of Pay of the most recent host business, this would likely drive unproductive behaviour. For instance, an employee planning to take a long holiday or planning to leave the employment of a labour hire firm, might wait until they are deployed to a 'high paying host' before executing that action to maximise the value of their leave payments.

In summary, the proposed approach is simply unworkable.

There are some forms of leave that practically work as an entitlement provided at the time it is taken – namely, personal leave (sick / carer's leave) and family and domestic violence leave. AREEA believes it is appropriate for these types of leave to be paid at the Protected Rate of Pay, due to the underlying principle that those leave types are paid as if the employee was at work.

However, it is AREEA's position that payment for annual leave and LSL must revert to the rate of pay found within the industrial instrument that directly underpins the employment of that individual.

For most labour hire workers, this would mean they receive the higher rate of pay for hours actually worked (and when sick or taking FDV leave) and receive their 'normal' rate of pay when taking and/or cashing out annual leave and LSL.

4. Non-monetary benefits captured in 'Protected Rate of Pay'

At COIL, Department officials also clarified that the 'Protected Rate of Pay' will be taken to mean the 'Full Rate of Pay' as defined within s 18 of the Fair Work Act.

Referring to that definition, this would include (a) incentive-based payments and bonuses; (b) loadings; (c) monetary allowances; (d) overtime or penalty rates; (e) any other separately identifiable amounts.

AREEA urges you to consider the use of "base rate of pay, plus any clearly identifiable loadings and penalties" as a more appropriate basis for labour hire pay orders.

Should you choose to move forward with 'Full Rate of Pay', we have concerns about "(e) any other separately identifiable amounts" being included within the definition of 'Protected Rate of Pay'.

We also have serious concerns about the following provision found at 4(b) and 5(b) in relation to the 'Meaning of Protected Rate of Pay':

> *Includes the amount of money that is reasonably equivalent to benefits (other than an entitlement to a payment of money) that would be provided to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee.*

AREEA believes this is an extreme and unnecessary overreach and will cause significant complication and confusion.

When asked to explain the intent of this provision, in COIL a Department official confirmed the expectation was labour hire employers would be required to assess any non-monetary benefits paid to direct-hired employees of the host business, calculate a monetary value for that benefit, and include that in the pay of the labour hire employee.

The example used was that of a labour hire firm being required to work out the monetary value of shares in a private business, in the event the comparable direct-hired employees of the host were partially paid in shares.

Frankly, that expectation is ludicrous.

While we accept it would be unusual for something like employee share schemes to be included in an enterprise agreement, those types of terms are not unheard of. The employers at COIL were stunned at the Department's assertion that it was a reasonable expectation that a labour hire firm could be required to calculate the monetary value of something as fluid as shares in a private company, at every pay cycle for each employee.

AREEA believes fairness for labour hire workers would clearly be achieved if they were entitled to everything under the definition of 'Full Rate of Pay' except for "(e) any other separately identifiable amounts".

We recommend clarifying that in the draft legislation, as well as removing the draft provision found at 4(b) and 5(b) under 'Meaning of Protected Rate of Pay'.

AREEA thanks you for your consideration of these proposed technical amendments. I can be reached on s 22(1) or via s 22(1) to discuss.

Best regards,

s 22(1)

Australian Resources and Energy Employer Association (AREEA)

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s 22(1)

16 October 2023

Dear Members of Parliament and Senators

We seek your support in opposing the government's Fair Work Amendment (Closing the Loopholes) Bill 2023.

As Australia's leading business groups, representing the employers of millions of people, we are united in our concern that the proposed changes will hurt the very people the government says it wants to support. They will:

- Shut down small businesses and take away the rights of contractors to be their own boss;
- Drive up the cost of living and housing;
- Reduce the take home pay of casual workers, and cut the number of casual jobs;
- Hamper our economic recovery efforts; and
- Reduce competition, productivity and innovation.

The business community is united in its view that the Bill is unworkable. No amendments will fix this Bill.

Splitting non-controversial and unrelated matters from the Bill as has been proposed by some Senators is supported as these matters deal with specific issues for which there is a clear problem to be solved.

We encourage you to reiterate this position as the Bill comes for debate in the parliament.

We are also concerned that there are many unanswered questions about the Bill, which puts the parliament in a difficult position when attempting to make an informed decision. The Regulatory Impact Statement is fundamentally flawed, and the real scope of the Bill cannot be determined as hundreds of key decisions are left to regulations, the Fair Work Commission, yet to be determined codes or the unilateral power of the Minister.

If the government believes there are loopholes that need fixing, then it must:

- Be open and transparent about the problems it aims to solve;
- Work with all parties in a public way to find solutions; and
- Undertake a thorough and independent impact analysis for workers and businesses of any proposed changes.

Only when those steps have been taken, can the parliament be certain it has the full information before it on which to make an informed decision. To be clear, the parliament should not entertain consideration of the Bill in the absence of these steps. Further, the Government must not attempt to undermine the already inadequate consultation process by putting the Bill before the Senate this year.

We want to deliver sustainable wage increases, more jobs and collaborative workplaces, but this Bill is the wrong step at the wrong time.

Yours sincerely

s 22(1)

s 22(1)

s 22(1)

Australian
Resources and
Energy Employer
Association

s 22(1)

JOINT EMPLOYER GROUP LETTER

Joint letter from:

s 22(1)

Australian Resources and Energy Employer Association

s 22(1)

13 November 2023

Dear Members of Parliament

We, Australia's leading employer organisations, express our disappointment in the Federal Government's decision to prevent the passage through the House of Representatives of legislation which passed the Senate last week.

We fear the Government will not pass these bills this week despite them being a carbon copy of their own legislation, including:

- Support for first responders (police, firefighters, paramedics) suffering PTSD;
- Enhanced protections from discrimination for workers experiencing domestic violence;
- Small business redundancy exemptions in insolvencies; and
- Extending the role of the Asbestos Safety and Eradication Agency to cover silica and silicosis.

These four Bills have broad support from, business groups, political parties and workers.

The splitting out of these four Bills has wide community support.

Research undertaken by Master Builders Australia has found more than 60 per cent of people polled supported the separation of these non-contentious parts of the Fair Work Amendment (Closing the

Loopholes) Bill 2023. The survey also found that nearly two-thirds of people agreed that the government is attempting to introduce too many workplace relations changes all at once.

Passing these Bills now will ensure that these urgent issues are dealt with, and that further time is permitted to scrutinise the remaining parts of the Government's major workplace relations reforms.

The remainder of the Government's Bill remains fundamentally flawed.

Making amendments to the Bill, whilst well intentioned, will likely add to the complexity of the legislation and make it harder for businesses to understand and apply.

That means more administration and complexity for businesses and higher costs for customers, which will come at a time when they are least affordable.

We urge you to support the four Bills that have passed the Senate and support measures to pass them through the House of Representatives.

From: s 22(1)
To: s 22(1)
Subject: Response to Workplace Relations Minister Tony Burke
Date: Thursday, 31 August 2023 3:40:30 PM
Attachments: 20230831_MEDIA_RELEASE_Response_to_Workplace_Relations_Minister_Tony_Burke.pdf

Hi s 22(1)

Hope you are well.

Below is a copy of the media release we just released in response to Minister Burke's National Press Club address earlier today.

Looking forward to engaging post the bill being introduced on Monday. Please let me know if there is anything we can assist with in terms of consultation in the meantime.

Cheers,
s
22(1

MEDIA RELEASE

THURSDAY, AUGUST 31, 2023

Response to Workplace Relations Minister Tony Burke

Statement by Chief Executive Officer Steve Knott AM, Australian Resources & Energy Employer Association:

AREEA acknowledges Workplace Relations Minister Tony Burke's comments at the National Press Club today in relation to consultations and engagement with our association and members on the forthcoming industrial relations amendment bill.

AREEA has been involved in official and unofficial consultations with Minister Burke, his office and the department for several months to ensure the employment and operational interests of Australia's resources and energy sector are well understood during development of the Albanese Government's next suite of IR policies.

This included meeting with a delegation of CEOs representing specialist contracting service member companies, to ensure the clear distinction between traditional labour hire arrangements and specialist contracting would be reflected in the "Same Job, Same Pay" policy.

AREEA does not support the policy in principle. However, Minister Burke's reception and response to the needs of AREEA's service contractor members – who are the lifeblood of the resources and energy sector – has been encouraging.

We will reserve our judgment until we see the Bill and look forward to a robust policy debate.

No doubt some elements of the Bill will be better for AREEA's engagement and representation with Minister Burke on behalf of members.

MEDIA CONTACT: Matt Fynes-Clinton, 0409 781 580 or media@areea.com.au

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From: s 22(1)
To: s 22(1)
Cc: s 22(1)
Subject: AREEA examples/scenarios
Date: Thursday, 14 September 2023 4:38:04 PM
Attachments: image001.jpg
image002.jpg
image003.jpg
image004.jpg
image005.jpg
image006.png
image007.png
image008.png
image009.png
2023-09-14_Examples_Closing_LH_Loopholes_AREEA.pdf

Hi s 22(1)

Thanks for the opportunity to provide these examples / scenarios.

Need a bit more time to provide you examples that highlight our concerns on the 'anti-avoidance' as we are still consulting members.

We are available to meet you and the DEWR team if useful to go through.

Cheers.

s 22(1)

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s 22(1)

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s 22(1)

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BRIEF: ‘Closing the labour hire loophole’ Selection of Practical Issues

This document contains a selection of practical issues that would arise from the drafting of *Part 6: Closing the Labour Hire Loophole* within the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023.*

It is intended to be a high level, general summary and not exhaustive of AREEA’s concerns with this Part or the entire Bill.

Issue 1: Placement of the ‘contractor test’

Problem:

‘Closing the Labour Hire Loophole’ allows for applications to be made against businesses that are not labour hire businesses, and in that circumstance, the onus would be on the business to demonstrate that it is providing a *service* in order to avoid an order being made.

In Practice:

- A service contractor is engaged by a mine operator to provide a specialist service. An application is made by a relevant union for a Regulated Labour Hire Arrangement Order on the basis the mine operator has an Enterprise Agreement in place that could cover the employees of the contractor directly and the contractor is not a small business.

  The Contractor is required to provide evidence to the FWC that it has been engaged wholly or principally for the provision of a service and not for the provision of labour. This involves submissions demonstrating alignment to the test factors in the Act, proving the business is a contractor, not a labour hire operator for the purpose of the application.

  The FWC is satisfied that it is *not fair and reasonable* to make an order based on meeting the ‘contractor test’. The application is dismissed.

- This scenario appears to be how the Government sees the ‘contractor test’ working in practice. Applications can be made against contractors and the contractor effectively has a ‘reverse onus of proof’ to avoid an order being made. Not only does a contractor need to prove they are indeed a contractor, the FWC would need to be convinced that, on balance, this is enough to deem it ‘not fair and reasonable’ to make an order.

- As a result, specialist contractors *cannot* tender for work with certainty that the rates they quote will be the rates incurred. More broadly, this trend damages productivity and efficiency across the economy.

Solution

Add new subsection 1(d) to Section 306E stating “The employer is not a Services Business”. Move the factors from subsection 8(b) to the new subsection 1(d) as criteria indicative of a Services Business.

This would mean the FWC would need to be satisfied a workplace arrangement is not wholly or principally for the provision of a service before it could move forward with making an order.

This would make the ‘contractor test’ a threshold issue instead of a ‘consideration’ of what is ‘fair and reasonable’. It would also send a clearer message to parties who would make applications, that these provisions of the Act are narrowly intended for labour hire arrangements only.

Issue 2: There is a 'catch all' clause in the contractor test

Problem:

The final criteria item in the proposed 'contractor test' will work as a 'catch all' clause, effectively allowing the FWC to disregard any evidence that a commercial arrangement is for provision of a service and not principally for provision of labour, and to instead make subjective judgements on the appropriateness of outsourcing in the first place.

The final factor (VI) under Part 6, Division 2, Section 306E, is set out as follows:

> *VI. The extent to which, in the circumstances, the regulated host employs, has previously employed, or could employ employees to whom the host employment instrument applies, applied or would apply.*

In Practice:

- A service contractor is engaged by a mine operator to provide a specialist service. An application is made by a relevant union for a Regulated Labour Hire Arrangement Order on the basis the mine operator has an Enterprise Agreement in place that could cover the employees of the contractor directly and the contractor is not a small business.
- The contractor provides submissions that satisfy the FWC that it is 'wholly or principally providing a service' against the first five criteria items under subsection 8(b) – i.e. the objective test against supervision, control, statutory obligations, equipment and so forth.
- The FWC cannot assess the sixth criteria (VI) on the submissions of the contractor alone. It requests submissions from the client (or 'host') about its historical business practices, previous employment at its workplace, history of outsourcing, and any other information it may find relevant.
- Despite finding the business is providing a 'service' to the client, the FWC nonetheless decides it is "fair and reasonable" to make an order, because the client used to employ people directly to do that work several years ago and could still do so under its existing EA.
- This scenario appears to be what 8(b)(vi) is intended to achieve - allowing the FWC to override the fact a business is providing a service and not labour hire, but make an order based on subjective views about the appropriateness or otherwise of outsourcing the function.
    - To that end, 8(b)(vi) will result in outcomes that are not aligned to the policy intent. It corrupts the 'contractor test' from being an assessment of the service being provided to instead be a moral judgement on why the service was engaged in the first place.

Solution

Remove factor (VI) from the criteria for determining whether an arrangement is for labour or for a service. It is clunky, confusing, adds nothing and undermines the entire purpose of the 'contractor test'.

Issue 3: Treatment of leave

Problem:

The expectation is that labour hire employers (or contractors) subject to 'Regulated Labour Hire Arrangement Orders' would pay out all forms of leave, including annual leave and long service leave, at the 'Protected Rate of Pay'.

The result of this is labour hire businesses will never be able to calculate with any degree of certainty what the value of leave liabilities in their business is. It will also drive unproductive behaviours such as employees waiting to be deployed to a 'high paying' site before taking all their leave (or resigning and cashing out their leave entitlements).

In Practice:

Company A is a large labour hire company. It has 5000 employees covered by 5 different EAs. Company A is also subject to a number of Regulated Labour Hire Arrangement Orders in various workplaces where the host also has EAs that could cover Company A employees directly.

The following scenarios are all encountered by Company A:

- An employee is a permanent who has been working for Company A for 10 years. During that time they have been moving around various sites. Since the new labour hire provisions took effect, they have worked at 4 different sites all with orders in place. That employee resigns from employment with Company A, requiring 10 weeks of long service leave and 6 weeks of accrued annual leave to be paid out. Various problems arise for Company A:
    - What rate of pay should the entitlements be paid out? There are five different rates to consider (the employee's actual EA terms + varying terms of four different clients). No payroll system ever developed is able to allocate different rates of pay against different hours of leave accrued. Even if a system was able to do so, how does Company A account for LSL which is an entitlement based upon 10 years' service?
    - For most of the employee's time with Company A, they have been charged out at a rate reflective of Company A's labour costs at the time (as per its own EA). Now the employee is leaving employment, Company A is required to pay entitlements at the rates of pay within client enterprise agreements, making the employee's time working with Company A unprofitable for the company. This puts in jeopardy the employment of others within Company A as it makes engaging them uncommercial.
- Another employee is a permanent who has also worked for Company A for 10 years and is planning on leaving employment. They request to be transferred to a client site subject to a more attractive Regulated Labour Hire Arrangement Order, and then resign one day after commencing there. As a result, Company A is required to payout the entitlements at the higher rates of pay, even though the employee had only spent one day at the site.
- Another permanent employee wants to take a four-week holiday to Europe. They await transfer to a higher paying client workplace before putting in their request for leave. This practice becomes common and, before long, there is a disproportionate number of employees requesting long periods of annual leave from higher paying client workplaces than lower paying client workplaces.
- Company A has 380,000 hours of accrued leave liability (average of 76 hours or two weeks per employee). Under the terms of its own enterprise agreements (paying $50 per hour on average), the liability was recorded on Company A's balance sheet as $19 million. Company A now has 12 LH Arrangement Orders made against it. How does Company A account for the value of its leave liability? Company A is listed on the ASX as a public company, how does the market calculate its true value with such great variability in its liabilities?

Solution

Amend the legislation to clarify that:

- Personal leave (sick / carer's leave) and family and domestic violence, leave should be paid at the Protected Rate of Pay, due to the underlying principle that those leave types are paid as if the employee was at work; and
- Payment for annual leave and LSL reverts to the rate of pay found within the industrial instrument that directly underpins the employment of that individual.

Issue 4: Full Rate of Pay

Problem

Relying on the 'Full Rate of Pay' as defined in the Fair Work Act creates issues with 'double dipping' as well as complexities for employers in breaking down all relevant payment types with host's enterprise agreements.

In Practice:

- Company B is a labour hire company subject to various Regulated LH Arrangement Orders. Several mining clients have terms in enterprise agreements that set out (or refer to policies that set out) productivity bonuses.
    - Company B has hundreds of employees that transition in and out of their clients' workplaces for varying periods of work, on demand. Typically, anywhere from 2 weeks to 3 months. Because the orders are based upon 'full rate of pay' including "any other separately identifiable amount", Company B is required to account for the productivity bonuses paid by their clients to clients' direct employees, and somehow breakdown an amount that should be payable to Company B's employees.
    - Some clients pay these bonuses to their employees at the end of every half-year period based upon the volume of commodity extracted within that period. Do all of Company B's clients have an obligation to advice Company B what those bonuses are at ever half year interval? How does Company B breakdown a half year bonus into an hourly rate or day rate?
    - Some clients pay these bonuses monthly based on commodity volumes. Does Company B have to wait until it is advised of these bonus figures before it can proceed with its monthly payroll processes? What would this do, in terms of red tape and delays involved in paying its own people?
- Note: these types of issues arise the same concepts are applied to all types of discretionary payments not made within regular systematic payroll processes.
- Company C supplies hundreds of labour hire employees to dozens of client workplaces. All are subject to LH orders. All clients practice 'rolled up rates' in which the 'full rate of pay' is accounted for in a single dollar figure and not split out in their Enterprise Agreements. As a result, Company C must make hundreds of additional calculations within each payroll period to ensure they are paying their people the exact amounts they are entitled to.

Solution

- Require the FWC to set out which pay components in the nominated Regulated Host enterprise agreement would form the 'Protected Rate of Pay' when making orders.
- As a default, the FWC should be directed to consider base rates of pay PLUS any clearly identifiable penalties, allowances and other payments that can be reasonable and efficiently passed on to the labour hire employees.

From: s 22(1)
To: s 22(1)
Cc: s 22(1)
Subject: AREEA position on service contractor amendments
Date: Tuesday, 14 November 2023 6:43:56 PM
Attachments: image001.jpg
image002.jpg
image003.jpg
image004.jpg
image005.jpg
image006.png
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Dear s 22(1)

Thanks for your time this morning.

s 47G(1)(a)

Red line issues

AREEA's "red line issues" are as follows:

1. Moving the 'contractor exemption' from subsection 306E(8)(b) to subsection 306E(1)(d) – confirmed, as per the drafting amendments you shared with us today.

2. In the amended drafting there are two 'factors' that must both be removed in their entirety:
   a. What would be the new 306E(7A)(f), which states *"the extend to which, in the circumstances, the regulated host employs or has previously employed employees to whom the host instrument applies or applied;*
      and
   b. What would be the new 306E(7A)(g), which states *"any other matter the FWC considers relevant".*

You indicated the Government may be willing to remove factor (f) – that would be necessary to get AREEA's support.

Having had some time to think about (g)… this is a new 'factor' added in, which literally and practically will allow the FWC to consider anything it finds relevant. This may very well include the types of host/client workforce practices, both historic and future, that we are seeking to avoid by removing factor (f).

Our position is the 'multifactor test' must be confined to the existing first five factors which are clearly defined and represent objective analysis of the specific working

arrangement.

We are unable to accept the new factor (g) and the inclusion of such a broad discretionary term would undermine the intent of the rest of the test. It would erode any certainty that would be provided to service contractors by the first five factors.

If we can achieve the above AREEA can move forward with the Government and provide a draft statement asap.

Secondary matters

Definition of labour hire

For additional context as to why we need to keep the multifactor test 'tight'… some key AREEA members are asking why a 'clear definition' of labour hire cannot be included in the provisions – such as the definition used in the Victorian LHL laws (endorsed by Andrew Stewart before the Committee on Friday). In their view, the 'ideal' approach would be to include a clear definition of labour hire and rely upon the multifactor test to guide the FWC to settle disputes.

To assist AREEA in managing the expectations of our members, could you please confirm the Government's view on inserting a definition of labour hire:

1. Did the Department consider this before landing on the current version of the bill?
2. Is inserting a definition of 'labour hire' something that could be revisited as part of these negotiations?

Very brief responses on the above would suffice.

Leave payments

The issue of leave is very significant for labour hire firms. While you are moving in the right direction, the fundamental issue has not been dealt with, namely that labour hire firms could not determine with any certainty, what the value of their contingent leave liability is on their balance sheets, at any one point in time.

We encourage the Government to continue investigating this issue and the commercial impacts on labour hire firms and their employees, should it not be adequately dealt with. In our view, a re-think is required on whether leave entitlements should or could practically be paid at the protected rate of pay upon termination, in any circumstances, without risking sending labour hire firms bankrupt.

Notwithstanding the above, AREEA considers the issue of leave an economy-wide (all sectors) issue and resolving this is not a condition on our support for the amendments made to exempt genuine contractors.

Kind regards,
s 22(1)

s 22(1)

s 22(1)

s 22(1)
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Level 3, 104 Melbourne Street
South Brisbane QLD 4101
www.areea.com.au

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From: s 22(1)
To: s 22(1)
Subject: **CONFIDENTIAL** AREEA draft statement - service contractors
Date: Wednesday, 15 November 2023 8:40:27 PM
Attachments: AREEA - draft statement - service contractors.docx

Hi s 22(1)

Draft statement attached.

Cheers,
s 22(1)

AUSTRALIAN RESOURCES & ENERGY EMPLOYER ASSOCIATION

MEDIA RELEASE

XX November 2023

DRAFT | CONFIDENTIAL | NOT FOR FORWARDING

***Subject to ongoing negotiations with Government**

Service contractors exempted from labour hire laws

Contracting businesses delivering services to mining, energy and all other sectors of the Australian economy will be exempted from proposed new labour hire regulation following negotiations between AREEA and the Albanese Government.

In significant amendments to the Government's "Closing Loopholes Bill", sighted by AREEA and set to be introduced to the Lower House of the Australian Parliament, the Fair Work Commission (FWC) will be unable to make labour hire pay orders where businesses are found to be providing a service to a client rather than supplying labour.

"This is the guarantee AREEA has fought long and hard for on behalf of the Australian resources and energy industry," chief executive Steve Knott AM, said.

"For 105 years AREEA has been the recognised industrial relations advocates for Australia's resources industry. This includes mining and energy producers, alongside all service contracting sectors that form the lifeblood of the resources sector's supply chain.

"With the Government committed to passing its "Closing Loopholes Bill" into law, protecting the resources and energy sector supply chain has been the overwhelming priority for AREEA and its broad national membership.

"The industry cannot operate without contract mining and petroleum production services, maintenance service contractors, shutdown service providers, facilities management providers and other specialist service providers – none of which are "loopholes" to circumvent client enterprise agreement rates.

"These contracting arrangements are essential to the resources and energy projects that account for 15% of national economic output, enabled the Federal Government to deliver its $22 billion Budget surplus and, according to the ATO, pay more tax than all other sectors combined."

The amendments to Part 6 of the "Closing Loopholes Bill" (relating to labour hire) will prevent the FWC from making a labour hire pay order where it finds a business is wholly or principally providing a service, rather than the supply of labour.

A tight criteria will direct the FWC to examine whether a business is providing a service or providing labour – focusing only on factual matters of supervision, control, provision of equipment, statutory obligations and whether the work is of a specialist or expert nature.

The improvements to the bill come after months of constructive talks with Employment and Workplace Relations Minister Tony Burke and department officials, where AREEA and key contracting members provided the Government with practical examples on the differences between service contracting and labour hire in the resources sector.

“AREEA’s century-long expertise in industrial relations was pivotal in consultations with Government as we brought forward a compelling case to carve out specialist service contractors from the proposed labour hire legislative reforms,” Mr Knott said.

“These negotiations have been complex, extensive and not without challenges. That said, AREEA and Minister Burke have engaged in such consultations in good faith with due regard for necessary confidentiality measures.

“The resulting amendments have been legally reviewed by both internal and external counsel, confirming the service contractor exemption provisions would be significantly improved and ensure only those businesses principally providing labour to clients could be captured by future orders.

“AREEA commends Minister Burke for responding to the concerns of our members that the Government’s labour hire proposals threatened to apply far more broadly and potentially devastate the resource sector’s supply chain.

“We trust the forthcoming amendments will remedy what the Minister has described as “unintended consequences” of the Closing Loopholes Bill for service contractors.”

MEDIA CONTACT: s 22(1) or media@areea.com.au

From: s 22(1)
To: s 22(1)
Cc: s 22(1)
Subject: **CONFIDENTIAL** AREEA - service contractors
Date: Friday, 17 November 2023 4:36:50 PM
Attachments: image001.jpg
image002.jpg
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Hi s 22(1)

As you know, AREEA has spent the past few days carefully canvassing the terms of our government negotiations with a select group of key members.

This selected group include some of the sharpest IR legal minds s 47G(1)(a)

This is made even more important given the firm language in our draft press statement, namely that our good faith negotiations have "delivered" the exemption our industry has been asking for.

We have the broad support of this group to proceed, on the basis that two significant drafting issues are addressed.

The current drafting at section 306E(8) is as follows. I've underlined the two parts that our members have issues with.

(b) whether the performance of the work is or will be wholly or principally for the provision of a service, rather than the supply of labour, to the regulated host, having regard to:

1. "Wholly or Principally"

   While not ideal, the use of this term is not a huge problem in the context of the current bill, given it all falls within the broad mix of what is "fair and reasonable". Because the amendments we have negotiated will move this provision up to be a "threshold issue" underneath subsection 1, the use of "wholly or principally" is too firm. The burden of proof would be too firmly on evidence that performance of work is for a service.

   We need this to reflect a more neutral / balanced consideration of service vs labour hire. In many circumstances, the FWC need to use its discretion on balance to make a decision about the nature of the work – "wholly or principally"

will always see them lean towards making an order.

Thus, "wholly or principally" needs to be removed.

2. "May have regard to"

As per the above, the current drafting directs the FWC to "have regard to" the factors in the multi-factor test. Our recollection from the amendment you shared with Tom and I, was that the new drafting says the "FWC may have regard to"…

It might be that "may" was used because of the new (and to be removed) factor "any other matters the FWC finds relevant…" May have been an innocuous change that made sense with that extra point.

We need this to say "will have regard to" not "may have regard to".

These technical drafting issues are very important to clear up – if not they will be exactly the sort of things "other stakeholders" will pull apart to try and make us look silly and our solution ineffective.

We trust these can be reflected in drafting available for us to view early next week.

Kind regards,

s 22(1)

s 22(1)

s 22(1)
s 22(1)

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www.areea.com.au

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From: s 22(1)
To: s 22(1)
Subject: For discussion
Date: Monday, 20 November 2023 2:32:31 PM
Attachments: MCA advice - Proposed amendments to the Fair Work Amendment (Closing Loopholes) Bill - 3 November 2023_Casuals.pdf

See bottom of page 2, start page 3, r.e. legislative notes.

Minerals Council of Australia

FAIR WORK LEGISLATION (CLOSING LOOPHOLES) BILL 2023

PROPOSED GOVERNMENT AMENDMENTS

3 November 2023

CASUAL EMPLOYMENT

The government has indicated that it will amend the Bill in three ways:[1]

1. Remove section 359A of the Bill – the "misrepresentation" penalty provision.
2. Amend the definition of casual at section 15(3)(b) to provide that no one factor in paragraph 15A(2)(c) is determinative of status
3. Add a note explicitly stating that it is possible under the provisions to be a casual with a wholly regular pattern of work; and also no firm advance commitment to continuing or indefinite work.

Each of these proposals is considered below.

1. Remove the "misrepresentation" provision

This amendment will remove a punitive penalty ($93,000 maximum), but does not address the underlying issue, which is the complexity of the definition.

- It removes the penalty for "unreasonable" misrepresentation of casual status, but all other restrictions in the Bill on casual employment remain, including those that apply to "accidental" mis-classification.
- The complex, 3-page, 15-factor definition of "casual employee" still remains.
- There is no reason to change the existing definition, which was introduced in 2021. The proposed new definition is inordinately more complex and will restrict the ability for business and workers to continue with their existing casual arrangements.

Even if penalties do not apply to "misrepresenting" a relationship as "casual", an employer will still be in breach of the legislation (and exposed to penalties) in the event they misclassify employees under the new definition (even if the employee wants to be casual). No responsible business would intentionally do this.

- First, any failure to provide benefits of permanent employment to a misclassified employee (e.g. annual leave, notice of termination and redundancy pay) will enliven the risk of an underpayment (particularly on termination of employment). Under the Bill's compliance and enforcement provisions, civil penalties for a breach of the NES would be increased fivefold to $93,900 per contravention (or $939,000 for a 'serious contravention', the test for which has been lowered by the Bill to one of mere 'recklessness').[2] In addition, if the contravention is associated with an underpayment, the pecuniary penalty could be increased fivefold again (i.e. $469,500, or $4,695,0000 for a serious contravention) or to three time the underpayment amount, whichever is greater.
- Second, employers may incur penalties for accidentally misapplying the unworkable definition even if no underpayment arises. This is because the general protections already provide that

[1] Email from Minister's Office, 30 October 2023
[2] *Fair Work Act 2009* (Cth), s 44; proposed new section 539(2), item 1 of the table.

a person must not make false or misleading representations about the workplace rights of another person (e.g. the fact that the person is a casual employee and does not receive certain entitlements as a result).[3]

- Third, under the new definition, employers may be exposed to claims that they misclassified employees as 'casuals' in order to prevent the exercise of workplace rights available to permanent employees, in breach of the general protections.[4] Perversely, it would be nearly impossible for employers to discharge the reverse onus of proof and rebut this claim. This is because, invariably, it will always be the case that a reason for classifying someone as a casual is to "prevent" them being treated as permanent.

The section of the Bill that will be removed is as follows:

> ***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.*
>
> *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 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.*

2. Amend the definition of casual at section 15A(3)(b) to provide that no one factor in paragraph 15A(2)(c) is determinative of status

- This amendment changes nothing. Section 15A(3)(b) of the Bill already states that:

> *"the conditions referred to in paragraph (2)(c) must all be considered but do not necessaily all need to be satisfied for an employee to be considered as other than a casual employee…"*

- The amendment therefore serves no purpose. The Department of Employment and Workplace Relations confirmed at Senate Estimates on 25 October 2023 that: [5]

> *"… at the end of the day the question really is: did you have a firm advance commitment? That isn't going to be answered by any one of these factors in (2)(c) individually, which is why I should note that paragraph (3)(b), on its present drafting, does say that **not all of the factors need to be satisfied**."* (emphasis added)

- In other words, the Bill already does what the amendment purports to do. The amendment is pointless.

3. Add a note explicitly stating that it is possible under the provisions to be a casual with a wholly regular pattern of work, and also no firm advance commitment to continuing or indefinite work.

- We understand that the "note" will simply be a legislative note in the Bill to this effect. Regardless of what the note says, it will be of no practical effect.

[3] *Fair Work Act 2009* (Cth), s 345.
[4] *Fair Work Act 2009* (Cth), s 340(1)(b).
[5] Stephen Still, Department of Employment and Workplace Relations, Senate Education and Employment Legislation Committee, 25 October 2023

- A legislative note is not actually part of the substantive provisions of legislation. The Office of Parliamentary Counsel states that: [6]

> *"Notes…. can be used to explain the purpose, origin or operation of a provision, or to refer the reader to related provisions or to definitions of terms used in the provision."*

- It is well-established that notes cannot change the substance of the legislation itself. If they contradict the legislation, the legislation must always prevail. For example, the Supreme Court of Victoria has said:[7]

> Although a note such as this forms part of the Act, it is subordinate to the substantive provisions, of which it is merely explanatory or illustrative.
>
> In some circumstances, a note such as this may be used as an aid to the construction of the substantive provision to which it relates. Thus, if two interpretations are open on the text of the substantive provision, a note might assist in determining which of the two interpretations was to be preferred. As observed earlier, however, if there is conflict between the substantive provision and the note, the note must give way.

- Further, a Full Bench of the Federal Court, in the context of the Fair Work Act, has said:[8]

> "… the fact that a note is part of the Act does not mean that it can govern the meaning of the Act. "

- As such, the note will only have any work to do if the definition in section 15A is ambiguous or if multiple interpretations are available.
- However, section 15A unambiguously provides that the presence of a regular pattern of work (even if it is not uniform and includes fluctuations) indicates the presence of a firm advance commitment. There is no ambiguity. There are no competing interpretations. So the note has no work to do. The note is an entirely redundant, token 'amendment' that changes nothing.
- This means that, under the Bill, it remains the case that *"an employee is a casual employee **only if**"* they meet the 15-factor test.[9] (emphasis added).
- If an employee does not meet that test then they are not a casual, regardless of what any legislative note says. The note does not change anything.
- The definition in the Bill will still mean that an employee **cannot** be a casual with a *"wholly regular pattern of work"*:[10]

> *(1) An employee is a casual employee only if:*
>
> *(a) The employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work …*
>
> *(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:*
>
> *(c) having regard to, but not limited to the following considerations (which indicate the presence, rather than the absence, of such a commitment)…*
>
> *(iv) whether there is a regular pattern of work for the employee*
>
> *(3) To avoid doubt:*

[6] https://www.opc.gov.au/sites/default/files/2023-01/s13ag320.v55.pdf, page 33
[7] *Director of Public Prosecutions v Walters* [2015] VSCA 303 at [50]-[51]
[8] *CFMEU v BHP Coal Pty Ltd* [2015] FCAFC 25 at [118]
[9] section 15A(1)
[10] section 15A

> *(c) "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 of various over time…"*

- Further, a Full Bench of the Federal Court, in the context of the Fair Work Act, has
- In other words, an employee is a casual only if they **do not** have a "firm advance commitment" that can include regular hours. Once they do have regular hours they have a firm advance commitment and will fall outside of the definition. Because the definition of casual is defined negatively - an *"absence of a firm advance commitment"* – then the presence of any such commitment (such as regular hours) is contrary to the definition.

Implications

The complex and restrictive definition of "casual employee" will remain and will be no different in practice.

- The definition in the Bill already has 15 separate factors. It is extremely unclear. All the amendment does is "clarify" that it is unclear.
- The legislative note makes it more complex by contradicting the definition – no business or worker will be able to rely on the note – it will simply create confusion.

The status of casual employees can still be changed:

- The Fair Work Commission will still have the power to arbitrate disputes. Because the definition is weighted in favour of permanent employment (a worker is a casual "only if" they meet the multi-factor test), the Commission will invariably convert more casuals to pemanent, as the legislation will require it to do so. This will mean that casuals will lose their 25% loading.

Existing casual arrangements will no longer be possible:

- A range of existing arrangements in which casual employees work "regular" hours with a "firm advance commitment" will no longer be possible. They will be in breach of the Act if they continue to be classified as "casuals".
- This will also have flow-through impacts on enteprise bargaining – no responsible business or union would agree to an agreement that allows for casual employment that is technically in breach of the definition.
- The Fair Work Commission could also not technically approve such an agreement. The restrictive nature of the definition means that thousands of existing casual arrangements will be rendered impossible. This will especially impact the Retail and Hospitality sectors.

From: s 22(1)
To: s 22(1)
Subject: For clarity
Date: Monday, 20 November 2023 2:39:28 PM
Attachments: image001.jpg
image002.jpg
image003.jpg
image004.jpg
image005.jpg
image006.png
image007.png
image008.png
image009.png

Hi s 22(1)

In our view, rather than adding the proposed legislative note, it would be far clearer if 306E(1) specified when the FWC must not make an order.

A simple change like this (changes in red):

"*The FWC must, on application by a person mentioned in subsection (7), make an order (a **regulated labour hire arrangement order**) if, and must not make an order unless, the FWC is satisfied that: …*".

s 22(1)

s 22(1)
s 22(1)

Level 3, 22 Cordelia Street
South Brisbane QLD 4101
www.areea.com.au

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From: s 22(1)
To: s 22(1)
Subject: Drafting problem
Date: Monday, 20 November 2023 7:06:09 PM
Attachments: image001.jpg
image002.jpg
image003.jpg
image004.jpg
image005.jpg
image006.png
image007.png
image008.png
image009.png

Hi s 22(1)

As discussed…

AREEA's internal legal counsel has a serious problem with the drafting in the proposed new section 1A.

According to my notes, the new section 1A (where we currently are) says this (emphasis added):

Despite subsection (1), the FWC must not make the order if the FWC is satisfied that the performance of work is or will be for the provision of a service, rather than the supply of labour, having regard to the matters in subsection 7(A).

This is quite a different emphasis to the earlier drafting that inserted a new subsection 1(d), that said this:

(d) the performance of work is not or will not be for the provision of a service, rather than the supply of labour, to the regulated host.

Plus a legislative note that said:

Note: The FWC cannot make a regulated labour hire arrangement order unless the FWC is satisfied that the performance of work is not or will not be for the provision of a service, rather than the supply of labour, to the regulated host (see paragraph (1)(d)).

AREEA prefers the standalone structure, but only if the emphasis reflects what was in the earlier round. This would lead to the new subsection 1A reading like this:

"*Despite subsection (1), the FWC must not make a regulated labour hire arrangement order unless it is satisfied that the performance of the work is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters in subsection (7A)*."

Could you please advise if the above is acceptable?

Thank you,

s 22(1)

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s 22(1)

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From: s 22(1)
To: s 22(1)
Subject: Amendments to Closing Loopholes - Confidential
Date: Tuesday, 21 November 2023 2:05:00 PM

Dear s 22(1)

Following detailed consultations and discussions with AREEA, the Minister commits to AREEA that he will amend the Closing Loopholes Bill to:

1. Add a new legislative provision after s 306E(1) clarifying that the FWC must not make a regulated labour hire arrangement order unless it is satisfied that the performance of the work is not or will not be for the provision of a service, rather than the supply of labour, having regard to the multi-factor test.

2. Delete the words "wholly or principally" from the multi-factor test (currently s 306(8)(b), but will be renumbered).

3. Delete the factor at what is currently section 306(8)(b)(vi), providing further certainty on how the multi-factor test will operate.

We will continue to consult with you as we progress these amendments.

s 22(1)

s 22(1) – Workplace Relations
Mobile: s 22(1)
Office of Tony Burke MP
Member for Watson
Minister for Employment and Workplace Relations
Minister for the Arts
Leader of the House of Representatives

From: s 22(1)
To: s 22(1)
Subject: RE: Amendments to Closing Loopholes - Confidential [SEC=OFFICIAL:Sensitive]
Date: Tuesday, 21 November 2023 2:34:07 PM

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Hi s 22(1)

Confirming receipt of your email and confirming the below points reflect the consultations and discussions to date.

Cheers,
s 22(1)

OFFICIAL: Sensitive

From: s 22(1)
Sent: Tuesday, November 21, 2023 1:05 PM
To: s 22(1)
s 22(1)
Subject: Amendments to Closing Loopholes - Confidential [SEC=OFFICIAL:Sensitive]

OFFICIAL: Sensitive

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Minister for Employment and Workplace Relations
Minister for the Arts
Leader of the House of Representatives

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From: s 22(1)
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From: s 22(1)
Sent: Tuesday, November 21, 2023 2:05 PM
To: s 22(1)
s 22(1)
Subject: Amendments to Closing Loopholes - Confidential [SEC=OFFICIAL:Sensitive]

OFFICIAL: Sensitive

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3. Delete the factor at what is currently section 306(8)(b)(vi), providing further certainty on how the multi-factor test will operate.

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s 22(1)

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