Australian Industry Group

Applications by the Mining and Energy Union

(C2024/3846, C2024/3847, C2024/3848, C2024/3849, C2024/3850, C2024/3851, C2024/3853, C2024/3856, C2024/3857 and C2024/3858)

Applications by the Australian Manufacturing Workers' Union

(C2024/3859, C2024/3860 and C2024/3861)

Outline of Submissions

10 December 2024

C2024/3846 & ORS

APPLICATIONS BY THE MINING AND ENERGY UNION & ANOR

1. INTRODUCTION AND BACKGROUND

The Applications

1. The Full Bench has issued Directions permitting The Australian Industry Group (**Ai Group**) to file an outline of submissions as to any matter of legal or general principle arising in the matters.

2. The Mining and Energy Union (**MEU**) has made application for regulated labour hire arrangement orders (**RLHA Orders**) in respect of work performed by employees of WorkPac, Chandler MacLeod, OS ACPM and OS MCAP (together, **OS**) employer entities at three black coal mine sites in central Queensland – Peak Downs, Goonyella Riverside and Saraji (**the Mines**). The MEU contends that, for the purposes of section 306E of the *Fair Work Act 2009* (Cth) (**the Act**), the regulated host is BHP Coal Pty Ltd (**BHP Coal**) and the covered employment instrument is the *BMA Enterprise Agreement 2022* (**BMA Agreement**). The Australian Manufacturing Workers' Union (**AMWU**) has also applied for RLHA Orders in respect of employees of OS ACMP working at each of the Mines, identifying the same regulated host and covered employment instrument as the MEU applications.

3. On the basis of submissions filed by the Unions and respondent parties, there does not appear to be a contest in relation to the matters of which the Commission would need to be satisfied for the purposes of section 306E(1). The controversy in these matters turns on whether section 306E(1A) or section 306E(2) of the Act is engaged, such that the Commission must not make the orders.

4. In respect of the Unions' applications for RLHA Orders covering the OS employer entities (**OS Applications**), the respondents submit that the Commission cannot be satisfied that the work of the OS employees "*is not or will not be for the provision of a service, rather than the supply of labour*" having regard to the exhaustive matters set out at section 306E(7A). If the Commission is not satisfied that the requirement of s.306R(1A), it follows that the Commission must not make the order in respect of the OS Applications.

5. In respect of the MEU applications for RLHA Orders covering the WorkPac and Chandler MacLeod employer entities, the respondent employers submit that the Commission should be satisfied "*that it is not fair and reasonable in all the circumstances*" to make the order, having regard to matters in section 306E(8) in relation to which the respondent employers have made submissions. If this submission is accepted, it follows that the Commission must not make the order in the relevant applications: section 306E(2).

Part 2-7A of the Act

6. Ai Group was heavily involved in the development and passage of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (**Closing Loopholes Act**). Among other things, the Closing Loopholes Act inserted the new Part 2-7A into the Act to enable the Commission to make RLHA Orders on application by a relevant party. Part 2-7A commenced operation on 15 December 2023.

7. These matters represent the first occasion on which the Commission will hear and determine contested applications in which the operation of either of the following key provisions of Part 2-7A of the Act is at issue:

   (a) section 306E(1A), which probits the Commission from making an order unless it is positively satisfied that the performance of the work for the host is not or will not be for the provision of a service, rather than the supply of labour; or

   (b) section 306E(2), which prohibits the Commission from making an order if satisfied that it would not be fair and reasonable in all the circumstances to do so, having regard to submissions from affected parties.

8. Part 2-7A does not establish a presumption in favour of making a RLHA Order. Satisfaction as to the requisite jurisdictional facts stipulated at section 306E(1)(a)-(c) does not lead automatically to the conclusion that a RLHA Order must issue. The Commission must be positively 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 (section 306(1A)).

9. The Commission must not make a RLHA Order if satisfied that it is not fair and reasonable in all the circumstances to do so, having regard to submissions regarding any relevant matters arising under section 306E(8) (section 306E(2)).

10. It is trite to observe that development and passage through of the amendments now found in Part 2-7A was highly contentious. It is notorious that there was significant concern ventilated on behalf of industry over the potential for the then proposed changes to disrupt contracting arrangements not constituting labour hire arrangements, or that they may operate unfairly and unreasonably for a raft of reasons. The provisions that we identify at paragraph 7 operate to place limitations on the context in which orders can be made as a guard against such outcomes. It is important that the Full Bench not interpret these provisions in a manner that unduly narrows the protections that are intended to be afforded by their operation.

Whether it is Not Fair and Reasonable in All the Circumstances to Make the Order

10. Section 306E(2), in conjunction with s.306E(8), operates to limit the circumstance in which a RLHA Order may be made. It also requires that the Commission has regard to certain matters when determining whether to make a RLHA Order when submissions have been made about them. The provisions state:

> (2) Despite subsection (1), the FWC must not make the order if the FWC is satisfied that it is not fair and reasonable in all the circumstances to do so, having regard to any matters in subsection (8) in relation to which submissions have been made.
>
> …
>
> *Matters to be considered if submissions are made*
>
> (8) For the purposes of subsection (2), the matters are as follows:
>
> (a) the pay arrangements that apply to employees of the regulated host (or related bodies corporate of the regulated host) and the regulated employees, including in relation to:
>
> (i) whether the host employment instrument applies only to a particular class or group of employees; and

(ii) whether, in practice, the host employment instrument has ever applied to an employee at a classification, job level or grade that would be applicable to the regulated employees; and

(iii) the rate of pay that would be payable to the regulated employees if the order were made;

(c) the history of industrial arrangements applying to the regulated host and the employer;

(d) the relationship between the regulated host and the employer, including whether they are related bodies corporate or engaged in a joint venture or common enterprise;

(da) if the performance of the work is or will be wholly or principally for the benefit of a joint venture or common enterprise engaged in by the regulated host and one or more other persons:

(i) the nature of the regulated host's interests in the joint venture or common enterprise; and

(ii) the pay arrangements that apply to employees of any of the other persons engaged in the joint venture or common enterprise (or related bodies corporate of those other persons);

(e) the terms and nature of the arrangement under which the work will be performed, including:

(i) the period for which the arrangement operates or will operate; and

(ii) the location of the work being performed or to be performed under the arrangement; and

(iii) the industry in which the regulated host and the employer operate; and

(iv) the number of employees of the employer performing work, or who are to perform work, for the regulated host under the arrangement;

(f) any other matter the FWC considers relevant.

11. The combined operation of section 306E(2) and (8) places a restriction on the FWC's capacity to make a relevant order. The Commission "must not" make the order if reaches the relevant form of satisfaction.

12. The legislative scheme reflects a deliberate departure from a potential alternate regulatory approach that would have imposed upon labour hire providers an absolute obligation to provide equal or greater pay to labour hire workers than they would have received under a host employer's enterprise agreement. It creates a scheme under which parties may seek an order in a context where the the grant of any such remedy may not be given. Indeed, the Commission is

barred from making the order if satisfied that making it would not be fair and reasonable in all of the circumstances.

13. The focus of section 306E(2) is an assessment of the fairness and reasonableness of the making of the order. This will encompass a consideration of any unfair or unreasonable impacts that its making would foreseeably have on a party or parties, including but not limited to the employer or host. It would encompass any 'unfair and reasonable' because of adverse impacts that the order may indirectly have on other parties, including for example employees of a labour hire employer that may lose their employment or work opportunities because of impact of a RLHA Order. This may include employees of the labour hire employer who may receive the benefit of a higher rate of remuneration but may not receive the same volume of work because of its operation. It may also include a consideration of the impact on other staff of the labour hire employer whose employment or, at the very least job security, may be jeopardised because of the damaging impact that an order may have on the commercial position of the employer.

14. Section 306E(2) requires a holistic assessment of the fairness and reasonableness which is not unduly coloured by what might be portrayed as a policy objective of the Government derived from an examination of extrinsic material the development and content of which was inevitably shaped by political processes and considerations. The reference to "all of the circumstances" in section 306E(2) ensures that the assessment to be undertaken is broad. It is an assessment that may require a consideration of the unique or specific factual context of each particular application.

15. Section 306E(2) necessitates that the Commission has regard to certain matters if submissions are directed towards them. This is a safeguard that ensures due regard is had to such potentially pertinent considerations. The assessment of what is 'fair and reasonable' should be approached with conscious recognition that the Parliament has established a scheme that contains a safeguard against the implementation of orders in some circumstances. The statutory scheme reflects acknowledgement by the Parliament that circumstances may exist where

the grant of an order is not fair and reasonable, even if the other conditions precedent to making an order have been satisfied. Any view that there is a statutory presumption in favour of the making of an order in contexts where regulated workers receive less than they would if the order was granted, that should guide the exercise the discretion exercised by the Commission under section 306E(2), would be erroneous.

16. The scope of the safeguard comprised by the combined operation of section 306E(2) and (8) is broad, given the reference in section 306E(8)(f). If the Commission considers a matter relevant to the matters contemplated by section 306E(2), it must be considered. In any event, reference to section 306E(8) in section 306E(2), does not operate as a limitation on the scope of matters that can be considered in assessing the fairness or reasonableness of making the order.

17. The Commission is not limited by the scheme of the Act to only taking into account matters about which submissions are advanced. When faced with an application, there may be circumstances that are sufficiently apparent to the Commission on the face of the material put before it by the Applicant to enable it to be satisfied that it would not be fair and reasonable to grant the order. In other instances, the operation of section 577 and section 578 may necessitate that the FWC use its powers pursuant to section to section 590 to inform itself of matters potentially relevant to its determination of whether it would be fair and reasonable to grant the order. The performance of the Commission's functions under section 306E are not immune to the operation of these provisions; they must be undertaken within the context of the broader framework of the Act.

18. A determination of whether it will be fair and reasonable to grant the order in any specific application must take into account the matters identified in section 578, including the objects of the Act. What flows from this will undoubtedly vary from application to application.

19. In the applications relating to the WorkPac and Chandler Macleod employer parties, making a RLHA Order would disturb arrangements entered into at arm's length from BHP Coal and without foreknowledge of the provisions of the Closing

Loopholes Act. In determining whether it is not fair and reasonable to make an order, the Commission must not be constrained by any perceived legislative indifference to the potential impact of the order on the employer. Nor should the Commission be guided by an assumption that it is desirable that the host employment instrument trump an enterprise agreement applying to the employer and regulated employees. We address below matters arising from the submissions of WorkPac, Chandler Macleod and the MEU in relation to section 306E(2) and 306E(8).

Whether the Performance of Work is Not for the Provision of a Service

20. The requirement for the Commission to be positively satisfied that the performance of work by the regulated employees is not or will not be for the provision of a service, rather than the supply of labour, is a significant constraint on the scope for intrusion of Part 2-7A into the employment and commercial arrangements of employers and employees that, but for the making of a RLHA Order, would remain strangers to the host employment instrument.

21. A number of the submissions advanced by the MEU, with which we deal further below, would have significant implications for any business providing on-site services to a coal mine operator if accepted. The MEU invites the Commission to adopt an impermissibly narrow approach to section 306E(1A), by seeking to disregard aspects of the commercial and legislative context for the performance of work by the regulated employees, which bear materially on section 306E(7A) matters.

2. WHETHER IT IS NOT FAIR AND REASONABLE IN ALL THE CIRCUMSTANCES TO MAKE AN ORDER

Employer Submissions

22. Ai Group submits that the following matters raised by WorkPac tell in favour of a conclusion that it would not be fair and reasonable to make the orders sought by the MEU in respect of the BMA Agreement:

    (a) The history of bargaining for enterprise agreements covering WorkPac and its employees in the black coal mining sector, including the class of regulated employees that would be covered by the RLHA Orders sought by the MEU.[1] This is plainly a matter arising for consideration under section 306E(8)(c), which directs attention to the history of the industrial arrangements not only of the regulated host, but of WorkPac as the employer.

    (b) The integrity of the operation of an enterprise agreement made under the Act – the WorkPac 2019 Agreement – that covers and applies to WorkPac and the WorkPac regulated employees would effectively be negated by the making of the RLHA Orders.[2] The classification structures, rates of pay, and criteria for pay grade progression differ fundamentally between the WorkPac Agreement 2019 and the BMA Agreement.[3] These matters are relevant under both section 306E(8)(c) and section 306E(8)(f). Further, as WorkPac submits, the Act's objects relevantly include "*achieving productivity and fairness through an emphasis on enterprise-level collective bargaining*".[4] WorkPac's enterprise encompasses (among other things) provision of recruitment, labour hire, training and related services to the coal mining industry at large. The WorkPac 2019 Agreement covers work directly connected with the day-to-day operation of black coal mines in all

[1] Outline of Submissions on Behalf of Workpac, at [10]-[12].

[2] Outline of Submissions on Behalf of Workpac, at [4] and [19a.].

[3] Outline of Submissions on Behalf of Workpac, at [12.2].

[4] The Act, Section 3(f).

States and Territories of Australia.[5] That the terms differ substantially from those of the BMA Agreement is unsurprising in light of the significantly different character and history of WorkPac's enterprise, relative to that of BHP Coal. The Commission should not lightly discard arrangements, reflected in the WorkPac Agreement 2019, adapted to the needs and circumstances of WorkPac's enterprise.

(c) The potential impact on bargaining for a replacement enterprise agreement covering WorkPac employees in the black coal mining sector, including whether employees covered by the RLHA Order would have a sufficient interest in the terms of the replacement agreement for the purposes of section 188(2)(a) of the Act.[6] This is a relevant consideration arising under both section 306E(8)(c) and section 306E(8)(f). It is entirely foreseeable that that the making of RLHAOs is likely to effectively frustrate, for practical purposes, WorkPac's ability to make a new enterprise agreement with the same coverage as the WorkPac 2019 Agreement.

(d) The adverse financial impact on WorkPac of a RLHAO, arising from the un-provisioned uplift in accrued personal leave and annual leave liabilities.[7] This is a matter arising under section 306E(8)(a), to the extent that the financial impact arises from the pay arrangements that currently apply to the regulated employees, when compared to rates that would be payable pursuant to the RLHA Orders. It is also a relevant matter section 306E(8)(f).

(e) Rates payable to WorkPac under the Services Contract can only be adjusted at the discretion of the client, with the result that it may not be commercially viable for WorkPac to continue placing its employees at the Mines if the relevant client does agree to adjust rates to reflect the increased costs arising from the RLHA Order.[8] This is a relevant matter under section 306E(8)(f).

[5] WorkPac 2019 Agreement, clause 1.5.

[6] Outline of Submissions on Behalf of Workpac, at [19].

[7] Outline of Submissions on Behalf of Workpac, at [17(a)-(c)].

[8] Outline of Submissions on Behalf of Workpac, at [17(d)-(e)].

(f) The prospect that increased rates would lead the Mines to reduce their use of WorkPac employees.[9] This is a relevant matter under section 306E(8)(f).

(g) The prospect that increased costs, un-provisioned leave liabilities, and/or reduced revenue, may result in a reduction of employment and service provision in other areas of WorkPac's business.[10] This is a relevant matter under section 306E(8)(f).

23. Chandler Macleod has put submissions to similar effect, reflecting the specific circumstances of the employer entities and the applicable enterprise agreement. The submissions and material filed by Chandler Macleod draw attention to the potential uncertain application of classification criteria under the BMA Agreement to its employees.[11] In order to ascertain, for the purposes of section 306F, the protected rate of pay payable to a regulated employee, the employer must be in a position to identify the classification to which the regulated employee would be assigned if the host employment instrument applied.[12] It would be unfair and unreasonable to make an order if there was a material level of uncertainty over how the protected rate of pay for a relevant employee would be calculated. The availability of a dispute resolution mechanism under Division 3 of Part 2-7A should not be viewed as serving to mitigate the unfair and reasonable consequences of such uncertainty.

24. Submissions about the adverse impact of a RLHA Order in circumstances where the labour hire employer's enterprise agreement, rates of pay for staff (including associated leave liabilities), and contractual arrangements with the host have all been struck or evolved prior to the commencement of the new statutory scheme (of even its passage through Parliament), should attract particularly significant weight. In such circumstances the RLHA Order would not operate to 'close a

[9] Outline of Submissions on Behalf of Workpac, at [17(f)].

[10] Outline of Submissions on Behalf of Workpac, at [18].

[11] Submissions of Chandler Macleod, at [19] and [33]; Statement of Steven Shepherd, at [25]-[27] and [48].

[12] Section 306F(4) of the Act.

loophole' but would instead unfairly and unreasonably move the goal posts for an employer.

MEU Submissions

25. The MEU seeks that the Commission disregard, or give little or no weight to, employer submissions going to:

    (a) the operation and history of an enterprise agreement that already applies to the employer and regulated employees, on the basis that in practice the regulated employees are paid at rates higher than the rates specified in the applicable enterprise agreement;[13]

    (b) the employer's assessment of the consequential impact of a RLHA Order on the profitability and financial viability of the employer's business;[14] or

    (c) the potential consequences of the making of a RLHA Order on the prospects or process for negotiation of a new enterprise agreement covering the employer and the regulated employees.[15]

26. All matters raised in submissions relating to section 306E(8) should be considered and accorded due weight. There is no basis to construe Part 2-7A of the Act as evincing a legislative intention that the impact of a RLHA Order on the profitability or viability of the labour hire provider is irrelevant.[16] There is no basis to accord the outcomes of enterprise bargaining between the regulated host and its employees any greater status (under section 306E(2) and 306E(8)) than the outcomes of enterprise bargaining between the labour hire provider and its employees. The apparent intent of the legislature is that the Commission give appropriate weight to all matters raised and make an overall assessment as to

[13] MEU Reply Submission, at [59] and [71]; see also Outline of Submissions on Behalf of Workpac, at [12] and Submissions of Chandler Macleod, at [16]-[17] and [35].

[14] MEU Reply Submission, at [61] and [77]; see also Outline of Submissions on Behalf of Workpac, at [17] and Submissions of Chandler Macleod, at [42(a)-(c)].

[15] MEU Reply Submission, at [66]; see also Outline of Submissions on Behalf of Workpac, at [19].

[16] MEU Reply Submission, at [63].

whether it would not be fair and reasonable in all the circumstances to make the order.

27. The MEU criticises as conjectural the WorkPac and Chandler Macleod submissions and evidence regarding the potential financial, commercial and operational impacts of a making a RLHA Order.[17] Without endorsing this characterisation in the current context, we observe that absent knowledge of the client regulated host's response to the making of a RLHA Order, a labour hire provider's assessment of such matters will often, by necessity, be somewhat conjectural or speculative. That does not mean that they can be simplistically ignored.

28. The MEU also refers to the "*somewhat precarious nature of Chandler Macleod's engagement*" under its services contract with BMA, observing that there is no guaranteed revenue or volume of work.[18] It is not disputed that neither WorkPac nor Chandler Macleod has discretion to unilaterally increase rates. A labour hire employers' lack of commercial leverage or bargaining power vis-à-vis the regulated host is a factor telling against the fairness and reasonableness of making an order.

    The MEU submits that the fact that WorkPac has not opposed the making RLHA Orders in other applications detracts from the employer's evidence and submissions regarding the potential impact on WorkPac of making the orders here sought by the MEU. There is no material upon which the Commission could infer that the circumstances of applications opposed in these proceedings are materially the similar. Without seeking to speculate as to the reason for the position adopted by WorkPac in other matters, we contend the Commission should be mindful that there could be myriad reasons why an employer may adopt different positions in the context of different applications. It is trite to observe that the attitude and position of a regulated host, or the nature of the commercial arrangement between the employer and regulated host, may have a significant bearing on a labour hire employer's pragmatic decision to consent to

[17] MEU Reply Submission, at [62] and [77].

[18] MEU Reply Submission, at [75].

an application in particular circumstances. The Commission should not draw adverse inferences in these proceedings based on WorkPac's position in unrelated RLHA Order proceedings.

3. WHETHER PERFORMANCE OF WORK IS NOT FOR THE PROVISION OF A SERVICE

29. The MEU submits that, in characterising the performance of work by regulated employees for the purposes of section 306E(1A) and 306E(7A), it is not permissible for the Commission to have regard to contractual and operational arrangements as between the employer and regulated host, pursuant to which the work is performed.[19] This approach should be rejected. The nature and content of commercial and operational arrangements between the OS employers and BHP Coal form part of the material context and background against which the matters in 306E(7A) fall to be considered for the purpose of characterising the performance of work. It would be perverse if the Commission, in characterising the purpose of the performance of the work pursuant to section 306E(1A), was prevented from having regard to the relevant commercial context.

30. The MEU further contends that:

    (a) in considering, for the purposes of section 306E(7A)(c), the extent to which the regulated employees use the systems of the employer to perform the work, the genesis of the requirement to use the regulated host's safety and health management systems, being industry-specific state coal mine safety legislation, is irrelevant;[20] and

    (b) for the purposes of section 306E(7A)(d), the fact that the employer and regulated employees are required to work within the safety and health management system of the regulated host (being the operator of a black coal mine), in circumstances where such an approach is effectively mandated by industry-specific state coal mine safety legislation applicable to all contractors and workers on a coal mine site, is a powerful circumstance pointing against the employer providing a service.[21]

[19] MEU Reply Submission, at [2a]; see also Outline of Submissions of OS Production, OS Maintenance and BHP Coal, at [18]-[32].

[20] MEU Reply Submission, at [2h]; see also Outline of Submissions of OS Production, OS Maintenance and BHP Coal, at [66] and [68].

[21] MEU Reply Submission, at [39]-[40].

31. The fact that the Queensland coal mining safety legislation imposes specific obligations on BHP Coal as the coal mine operator is a significant contextual factor qualifying the degree to which use of the regulated host's safety systems (section 306E(7A)(c)) and imposition of industry safety responsibilities on the regulated host (section 306E(7A)(d)) can be regarded as telling against a conclusion that the performance of the work is for the provision of a service. If the MEU's contention is accepted, the same or analogous analysis would apply to all employers whose employees are engaged in providing services on site at black coal mine sites in Queensland. This is because the contractors' employees would be subject to the same requirement to use the coal mine operator's safety systems (section 306E(7A)(c); and the coal mine operator would be subject to the same coal mining industry safety responsibilities vis-à-vis the contractor's employees (section 306E(7A)(d)). This would tend to frustrate the apparent legislative intent to exclude from Part 2-7A arrangements pursuant to which the performance of work is for the provision of a service.