Same-Job, Same-Pay, and Net Zero

Adam Walkaden, National Legal Director

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Brief recap: FWC must make RLHA Order

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FWC **must** make RLHA Order if satisfied of four facts:

1. (Labour hire) employer supplies (or will supply) at least one employee to perform work for the 'regulated host': s.306E(1)(a)

    - Supply can be direct or indirect – not defined by formal legal arrangements;
    - No requirement for direct agreement between (labour hire) employer and 'regulated host';
    - Work for 'regulated host' is defined broadly, and extends to enterprise carried on by person; or joint venture or common enterprise engaged in by person: s.306D(2).

FWC must make RLHA Order (cont.)

2. ‘Covered employment instrument’ must apply to ‘regulated host’ and would apply to ‘regulated employees’ (if employed by ‘regulated host’): s.306E(1)(b)

    - ‘Covered employment instrument’ defined in s.12 and includes most relevantly, an enterprise agreement.

    - This is a hypothetical question requiring consideration of work performed by the ‘regulated employees’ by reference to the coverage of the ‘covered employment instrument’.

3. ‘Regulated host’ is not a ‘small business employer’: s.306E(1)(c)

    - That means less than 15 employees (‘regular casual employees’ – i.e. casuals engaged on a regular and systematic basis – are counted): s.23.

FWC must make RLHA Order (cont.)

4. The work performed by the 'regulated employees' must not be for the provision of a service, it must be the supply of labour: s.306(1A). This is determined by multi-factor test in s.306(7A), which requires consideration of:

   - Involvement of (labour hire) employer in performance of work;
   - *Extent*, *in practice*, the (labour hire) employer or person acting on their behalf directs, supervises or controls the 'regulated employees';
   - *Extent* to which 'regulated employees' use systems, plant and structures of the (labour hire) employer;
   - *Extent* to which (labour hire) employer is subject to industry or professional standards or responsibilities in relation to 'regulated employees';
   - *Extent* to which work of the 'regulated employees' is specialist or expert.

Additional consideration: fair and reasonable

If satisfied of those four facts, FWC must make RLHA Order, unless FWC is satisfied that is not fair and reasonable to make the order: s.306E(2). This additional consideration only arises if submissions are made on this issue.

Non-exhaustive list of factors for FWC to consider, including:

- Pay arrangements of employees of ‘regulated host’ and ‘regulated employees’, including whether host agreement has ever applied with respect to work performed by ‘regulated employees’;
- History of industrial arrangements between ‘regulated host’ and (labour hire) employer, and corporate relationship between the two entities, including any engagement in joint venture or common enterprise;
- Period of the engagement, location where work is performed, industry in which work is performed, and number of ‘regulated employees’ performing work for the ‘regulated host’.

Effect of RLHA Order

If RLHA Order is made, (labour hire) employer must pay the protected rate of pay (**PROP**): s.306F(2).

- That is the ‘full rate of pay’ that would be payable to ‘regulated employees’ if host agreement applied.
- Full rate of pay is defined at s.18 to include all incentive-based bonuses and payments, loadings, monetary allowances, overtime or penalty rates, and any other separately identifiable amounts.

Applications determined / resolved

To date, one application for RLHA Orders has been determined by FWC, and another application withdrawn following labour hire workers being converted to permanent employment with the host. Both applications were made by the MEU.

1. Callide Mine operated by Batchfire in Central Queensland.

- Production workforce: approx. 237 production workers employed by host, approx. 324 employed by WorkPac.
- Work performed was clearly for supply of labour: see [6] of *Application by the Mining and Energy Union* [2024] FWCFB 299.
- Application not contested by host employer or labour hire company.
- FWCFB Decision issued on 1 July 2024: RLHA Order made.
- Will result in pay increases of $10K - $20K for each WorkPac employee.

Applications determined / resolved (cont.)

2. Mt Pleasant Mine operated by Thiess in Hunter Valley.

- Smaller group of production workers – approx. 30.
- Material filed by MEU, which clearly demonstrated that the work performed was for supply of labour.
- Host employer offered permanent employment to all labour hire workers that would have been covered by the RLHA Order.
- MEU application withdrawn on that basis.
- Will result in pay increases of at least $25K for each labour hire worker + other superior EA conditions + stronger job security.

Applications in progress

MEU has applications for RLHA Orders at 11 coal mines that are currently before the FWC:

	Mine	Labour Hire Companies	Approx number of L/H	Approx pay gap
1	Rix's Creek	WorkPac	47	$40K
2	Goonyella Riverside	OS, WorkPac	300	$10K - $40K
3	Saraji	OS, WorkPac	600	$10K - $40K
4	Peak Downs	OS, WorkPac, Chandler Macleod	600	$10K - $40K
5	Boggabri Coal	One Key	80 - 100	$15K - $35K

Applications in progress (cont.)

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	Mine	Labour Hire Companies	Approx number of L/H	Approx pay gap
6	Bengalla	CoreStaff, Skilled	110	$40K - $50K
7	Poitrel	WorkPac	80 - 100	$60K
8	Coppabella	WorkPac, Protech	25	$10K - $20K
9	Daunia	WorkPac	20 - 40	$10K - $15K
10	Tahmoor	RStar Mining	270	$15K - $30K
11	Capcoal O/C	WorkPac, Mobilise	70	$45K - $55K

General comments

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1. (Provided the first three facts discussed above can be satisfied), applications that are clearly for the supply of labour – i.e. unquestionably labour hire – should be relatively straightforward:

    - Opposition likely to be focused on fair and reasonable criteria, which involves exercise of discretion.

    - As early applications have demonstrated, many of those applications may not be contested.

    - In such circumstances, might be more productive to have dialogue with the union about the practical consequences of the order, such as matching up the labour hire workers to the applicable classification in the host EA.

General comments (cont.)

2. Key test of these laws is the MEU application concerning BHP:

   - Case is before FWC: MEU has filed extensive evidence and submissions.
   - Key issue in that case is whether the work is for supply of labour or provision of a service.
   - Four of the five factors that require consideration under s.306E(7A) are focused on the *extent*. That is, the assessment of those factors is one of degree. They are not cast in absolute terms.
   - Those factors are to be assessed in light of the practical reality of the working arrangement.

General comments (cont.)

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3. Too early to show up in data, but there has been significant increase in permanent employment in coal industry: which shows that these laws are working as intended:

   - 1996: 94.1% of coal workforce in Queensland was directly employed.
   - 2017: 45% in O/C directly employed. 48.5% in UG directly employed.
     (source: Queensland Coal Mining Board of Inquiry Report, Part II, May 2021, pages 373 – 374).
   - Some mines there were majority labour hire are now majority directly employed by mine operator: we expect that trend to continue.

4. Expect to see many more applications for a RLHA Order in the coal industry, and other industries.

Net Zero Economic Authority Bill

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Unique legislative scheme confined to coal-fired and gas-fired power stations that is currently before the Parliament. 17 of the 19 coal-fired power in Australia have announced closure dates by 2050. Only 4 gas-fired power stations that employ more than 40 employees, and 1 of them has announced closure date in 2026:

- ‘Closing Employer’ as defined by the Bill is a constitutional corporation that owns and / or operates a coal-fired or gas-fired power station and has given a closure notice to the market regulator.

- ‘Dependent Employer’ as defined by the Bill is a constitutional corporation that has a commercial relationship with a ‘Closing Employer’, or the captured coal mine, and a substantial part of the business carried on at the power station, or the captured coal mine, or in same geographic area, is likely to cease as a direct result of the closure of the power station.

- ‘Receiving Employer’ as defined by the Bill is a constitutional corporation that opts into the community of interest process (**CoI**).

Part 5: Energy industry jobs plan

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Notification of a closure to the market regulator triggers Part 5 of the Bill, which includes the following sequential steps:

1. CEO of the Net Zero Economic Authority must undertake a CoI process, which requires identifying employers as closing employers, dependent employers, seeking EOIs from receiving employers, collecting information about the employees of closing employers and dependent employers, and consulting including with relevant unions and employer organisations.

2. CEO may apply to FWC for a 'community of interest determination' (**CoI Determination**).

3. FWC may make a CoI Determination. To be determined by reference to criteria in s.57. The CoI Determination will specify the Closing Employers and the Dependent Employers

Part 5: Energy industry jobs plan (cont.)

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4. CoI Determination results in the closing employer and dependent employers being required to comply with the general obligations of s.58, which essentially require the seeking of EOIs from affected employees, the provision of information to employees and cooperation with NZEA.

5. COI Determination also results in other actions to be taken by closing employer and dependent employers. These actions are geared around supporting the employees to retrain and/or redeploy those employees, including into employment with receiving employers that opt into the scheme. These actions include:
   - facilitating career planning and financial advice;
   - facilitating engagement with employee organisations;
   - facilitating employees to participate in training;
   - facilitating relevant employees taking up employment with receiving employers;
   - assisting with attendance by employees at recruitment-related activities

Part 5: Energy industry jobs plan (cont.)

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- The Bill encourages the parties to agree on the specific terms of those other actions. Any such agreement is then registered as a determination by the FWC, is required to contain a dispute settlement procedure and is enforceable.

- In the absence of any such agreement after a negotiating period of 3 months, application can be made to the FWC to arbitrate as to the specific terms of those other actions. The result of the arbitral exercise is a determination, which is required to contain a dispute settlement procedure and is enforceable.

General comments

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- The Bill offers meaningful support to workers affected by the energy transition that is underway.
- Redeployment opportunities likely to be created through pooled retirement and redeployment scheme, and also participation by receiving employers.
- Success of the Bill requires good consultation and cooperation by all stakeholders.