IN THE FAIR WORK COMMISSION

Matter Nos:	C2024/3846, C2024/3847, C2024/3848, C2024/3849, C2024/3850, C2024/3851, C2024/3853, C2024/3856, C2024/3857, C2024/3858, C2024/3859, C2024/3860, C2024/3861
Applicants:	Mining and Energy Union and Australian Manufacturing Workers Union
Respondents:	OS MCAP Pty Ltd; OS ACPM Pty Ltd; BHP Coal Pty Ltd

OUTLINE OF SUBMISSIONS OF THE MINERALS COUNCIL OF AUSTRALIA

PART A: BACKGROUND, STATUTORY FRAMEWORK AND ISSUES ARISING

A.1 The Applications

1 The Mining and Energy Union (**MEU**) and the Australian Manufacturing Workers Union (**AMWU**) (together the '**Unions**') have filed the above listed applications (**Applications**) for regulated labour hire arrangements orders (**RLHA Orders**) under s 306E of the *Fair Work Act 2009* (Cth) (**Act**) with the Fair Work Commission (**Commission**). The Applications seek RLHA Orders that variously apply to the following:

(a) OS ACPM Pty Ltd (**OS Production**), OS MCAP Pty Ltd (**OS Maintenance**), WorkPac Pty Ltd, WorkPac Mining Pty Ltd, Ready Workforce (a Division of Chandler Macleod) Pty Ltd and Chandler Macleod Group Limited as the employers;

(b) employees of the above employers who perform work at three black coal mine sites in Queensland, being the Goonyella Riverside Mine, the Peak Downs Mine, and the Saraji Mine (together the **Mines**), are the employees; and

(c) BM Alliance Coal Operations Pty Ltd (**BMACO**) (which is a BHP Coal Pty Ltd) operates the Mines, and is the proposed regulated host identified in each application.

2 The Minerals Council of Australia (**MCA**) is the peak industry body advocating on behalf of a large number of employers operating in, or with a direct interest in, the Australian minerals industry. The MCA has 120 members, including the proposed regulated host which is the subject of the Applications.

3 On 27 September 2024 the MCA sought permission from the Commission to intervene and be heard in these matters pursuant to s 590 of the Act, in relation to issues of legal or general principle arising in

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these matters. On 30 September 2024 the MCA was granted permission by His Honour President Hatcher, to intervene and file submissions.

A.2 Statutory framework

4 Part 2-7A of the Act provides for the making of regulated labour hire arrangement orders. Part 2-7A was inserted into the Act by the *Fair Work Legislation Amendment (Closing the Loopholes) Act* 2023 (Cth). Division 2 in Part 2-7A provides for the Commission to make RLHA orders, and for the obligations of "employers and "regulated hosts" when an RLHA order is in force. As required by the opening words of s 306E(1), applications have been made by the MEU and AMWU, who are entitled under s 306E(7) as relevant employee organisations to apply for an order under s 306E(1). "Employee" in s 306E means a national system employee.[1]

5 Section 306E(1) imposes a duty on the Commission (and gives the Commission power) to make an RLHA order only if the Commission is satisfied in the particular circumstances that the jurisdictional prerequisites in paragraphs (a), (b) and (c) of s 306E(1) are each met, subject to the Commission's countervailing duties that it must not make an RLHA order:

(i) unless the Commission is satisfied that the performance of the work under s306E(1) is not, or will not be, for the provision of a service, within s 306E(1A), rather than for the supply of labour, having regard to the matters in s 306E(7A);

(ii) if the Commission is satisfied for the purposes of s 306E(2), it is not fair and reasonable in all the circumstances to make an RLHA order, having regard to any matters in s 306E(8) in relation to which submissions have been made.

6 The relevant statutory provisions are set out below.

7 Section 306E(1) provides:

FWC may make a regulated labour hire arrangement order

Regulated labour hire arrangement order

(1) The FWC must, on application by a person mentioned in subsection (7), make an order (a regulated labour hire arrangement order) if the FWC is satisfied that:

(a) an employer supplies or will supply, either directly or indirectly, one or more employees of the employer to perform work for a regulated host; and

(b) a covered employment instrument that applies to the regulated host would apply to the employees if the regulated host were to employ the employees to perform work of that kind; and

(c) the regulated host is not a small business employer.

[1] Act ss 306B, 13, 14.

Note: the FWC may make other decisions under this Part which relate to regulated labour hire arrangement orders: see Subdivisions C (short-term arrangements) and (alternative protected rate of pay orders) of this Division, and Division 3 (dealing with disputes).

8 Section 306E(1A) (the **'Service Exception'**) provides:

> *(1A) Despite subsection (1), the FWC must not make the 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).*

9 Section 306(7A) sets out five matters that the FWC must consider for the purpose of satisfying itself under s 306E(1A):

> *Matters that must be considered in relation to whether work is for the provision of a service*
>
> *(7A) For the purposes of subsection (1A), the matters are as follows:*
>
> *(a) the involvement of the employer in matters relating to the performance of the work;*
>
> *(b) the extent to which, in practice, the employer or a person acting on behalf of the employer directs, supervises or controls (or will direct, supervise or control) the regulated employees when they perform the work, including by managing rosters, assigning tasks or reviewing the quality of the work;*
>
> *(c) the extent to which the regulated employees use or will use systems, plant or structures of the employer to perform the work;*
>
> *(d) the extent to which either the employer or another person is or will be subject to industry or professional standards or responsibilities in relation to the regulated employees;*
>
> *(e) the extent to which the work is of a specialist or expert nature.*

10 Section 306E(2) provides as follows:

> *(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.*

11 Section 306E(8) sets out the following matters for the purpose of s 306E(2):

> *(8) For the purpose of subsection (2), the matters are as follows:*
>
> *Matters to be considered if submissions are made*
>
> *(a) The payment 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:*
>
> *(iii) whether the host employment instrument applies only to a particular class or group of employees, and*

(iv) 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

(v) 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.

A.3 Issues in the proceedings

12 The issues in these proceedings are directed towards the scope of s 306E(1A) and (2) of the Act. In that respect:

(a) OS Production, OS Maintenance and BHP Coal Submissions dated 4 October 2024 (**OS/BHP Submissions**) (with OS Production and OS Maintenance as the employer of some of the regulated employees, and regulated host respectively) contest the making of the RLHA Orders sought by the Unions in respect of OS Maintenance and OS Production pursuant to s 306E(1) on the basis that s 306E(1A) has not been met.

(b) WorkPac Pty Ltd and WorkPac Mining Pty Ltd (together, **WorkPac**) and Ready Workforce (a Division of Chandler Macleod) Pty Ltd and Chandler Macleod Group Limited (together, **Chandler Macleod**) (as employers of some of the regulated employees) do not contest the RLHA Orders being made in relation to their respective employees pursuant to s 306E(1A) but do contest the making of the RLHA Orders on the basis that it is not fair and reasonable in the circumstances to do so pursuant to s 306E(2) (the **Fair and Reasonable Exception**).

(c) None of the parties contest that the requirements for s 306E(1) are not met.

13 This submission addresses issues of legal or general principle arising in respect of s 306E(1A) and (2), but not in respect of s 306E(1) as that is not contested by the parties.

PART B: JURISDICTIONAL FACT – LEGAL PRINCIPLES

B.1 Sections 306E(1), 306E(1A) and 306E(2) - Jurisdictional fact

14 Like many statutory provisions imposing a duty, s 306E(1) impliedly also confers a power, to make an RLHA order.

15 The power conferred by s 306E(1) requires the Commission to form a state of satisfaction as to whether paragraphs (a) to (c) are each met, subject to the state of satisfaction the Commission is required to form under ss 306E(1A) and (2), framed in a negative way. Exercise of that power requires a discretionary evaluation as to whether the tests in those paragraphs are met. The existence of a discretion in determining whether to make an order is reinforced by the broad discretion given by the words "fair and reasonable" in s 306E(2), to which s 306E(1) is made subject (as discussed below).

16 The state of satisfaction the Commission is required to form under each of ss 306E(1), 306E(1A) and 306E(2) constitutes a "jurisdictional fact". The expression "jurisdictional fact" identifies a criterion the satisfaction of which enlivens the exercise of a statutory power, or engages a statutory duty.[2] If the criterion is not satisfied then the decision purportedly made in exercise of the power is made in excess of jurisdiction. This principle as to jurisdictional facts is well established ,and has been re-affirmed by the High Court in the most recent leading cases on jurisdictional error.[3] The "jurisdictional fact" need not be a "fact" in the ordinary sense, but may consist in a question of law, a question of fact, or of fact and law, or "a complex of elements".[4] Where the precondition whose existence enlivens the power is a state of mind, expressed in words such as "is of the opinion that" or "is satisfied that", it is described as a subjective jurisdictional fact, as distinct from an objective

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2 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 148; *Gedeon v New South Wales Crime Commission* (2008) 236 CLR 120 at 139[43].

3 *Craig v South Australia* (1995) 184 CLR 163 at 177; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 570[64], 574[72].

4 *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54 at 90-1; *Corporation of City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 148[28] per Gleeson CJ, Gummow, Kirby and Hayne JJ. See also *Plaintiff M70/2011 v Minister for Immigration and Citizenship (Malaysian Declaration case)* (2011) 244 CLR 144 at 179[57] per French CJ, 195[111] per Gummow, Hayne, Crennan and Bell JJ.

jurisdictional fact.[5] In *Minister for Immigration and Multicultural Affairs v Eshetu*[6] Gummow J recognised that in s 65(1)(a) and (b) of the *Migration Act* 1958 (Cth) the question whether the Minister was, or was not, "satisfied" that the statutory criteria were met was a subjective jurisdictional fact whose existence determined whether a duty to grant the visa, or a duty to refuse it, was enlivened.

17 Whether a statutory provision contains a jurisdictional fact is a matter of construction. Ordinarily the words "if the decision-maker is satisfied" followed by a conferral of a power or the imposition of a duty, is construed as constituting a jurisdictional fact, as in *Eshetu*.[7] In *Application by the Mining and Energy Union*[8] (**Batchfire**), the Commission recognised that s 306E(1) contains a jurisdictional fact, referring to the judgment of Gummow J in *Eshetu*.

18 In a trilogy of cases, decided between 2003 and 2010, the third being *Minister for Immigration and Citizenship v SZMDS*[9] a test of illogicality and irrationality was developed in judicial review of subjective jurisdictional facts. The test of irrationality or illogicality of a subjective jurisdictional fact is distinct from the test of legal unreasonableness in *Minister for Immigration and Citizenship v Li*[10] which applies to the substantive exercise of the power (once the jurisdictional fact has been established). Legal unreasonableness is established where a decision lacks an evident and intelligible justification,[11] and this ordinarily constitutes jurisdictional error. The test of illogicality and irrationality applied in review of subjective jurisdictional facts, has not yet been subsumed under *Li* unreasonableness.

PART C: SECTION 306E(1A) – SERVICE EXCEPTION

C.1 Section 306E(1A): Jurisdictional fact

19 Section 306E(1A) provides that the Commission must not make an order under s 306E(1) unless it is satisfied that the work performed by employees of an employer is not, or will not be, for the provision of a service, having regard to the matters in s 306E(7A). The word "unless" in s 306E(1A) means the Commission must not make an order pursuant to s 306E(1) unless it has reached a "positive state of

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5 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430 per Latham CJ; *Sutherland Shire Council v Finch* (1969) 123 CLR 657 at 663, 666; *Helman v Byron Shire Council* (1995) 87 LGERA 349; *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 63-4[37]-[38]; *Corporation of City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 149-150[[33]-[34];.

6 (1999) 197 CLR 611 at 651[130], 654-5[139]-[140]. See also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S20/2002*, (2003) 77 ALJR 1165, (2003) 198 ALR 59 at [54], [59]-[60] per Gummow and McHugh JJ; *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at 188-9[34].

7 A jurisdictional fact analysis has in some cases been adopted in the construction of provisions for appeal to the Full Bench of the Commission: *Australian Postal Commission v D'Rozario* (2014) 222 FCR 303 at 307-8[8]-[14] per Besanko J, 323-4[64]-[66] per Jessup J (contra 330-2[95]-[104] per Bromberg J); *Knowles v Bluescope Steel Ltd* [2021] FCAFC 32 at [27], [52]-[54] per Flick J (Logan J agreeing, Kerr J dissenting). Cf *Linfox Australia Pty Ltd v Fair Work Commission* (2013) 240 IR 178 at 189-190[40]-[42]; *Baker v Patrick Projects Pty Ltd* (2014) 226 FCR 302 at 308-9[31]-[36] per Katzmann J (Dowsett and Tracey JJ agreeing).

8 [2024] FWCFB 299 at [10] fn 7.

9 (2010) 240 CLR 611 at 625[40]. *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S20/2002*(2003) 77 ALJR 1165 at 1172, 1175, 1194; (2003) 198 ALR 59 at 67[37], 71[52], 98[173]; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 998[38]; (2004) 207 ALR 12 at 20[38].

10 (2013) 249 CLR 332.

11 (2013) 249 CLR 332 at 367[76] per Hayne, Kiefel and Bell JJ.

satisfaction" that the performance of work by the employee is not, or will not be, for the provision of a service, rather than the supply of labour.[12] Section 306E(1A) is a jurisdictional fact conditioning the Commission's power to make an order under s 306E(1). Unlike the jurisdictional fact in s 306E(1), it is framed in the negative, prohibiting the making of an order if the required state of satisfaction is not reached.

20 A practical onus lies on the applicant to persuade the Commission that it can be satisfied that the work is not (and will not be) for the provision of a service, in order that the Commission's power to make an order is engaged.

C.2 Section 306E(1A): The performance of the "work" is not, or will not be, "for" the provision of a service

21 The meaning of the words "work" and "for" in s 306E(1A) are first considered. The "work" referred to in s 306E(1A) is the work that is the subject of the application under s 306E(1). This is implicit in the opening words of s 306E(1A), "[d]espite subsection (1)", and the use of the definite article "the".

22 The word "for" in s 306E(1A) indicates the Commission's attention must be directed towards the purpose or reason for performing work of that nature. The word "for" in s 306E(1A) operates differently from the word "for" in s 306E(1)(a). In the context of subsection (1A), the explanatory definition in s 306D(2) and (3) is inapplicable because subsection (1A) is not concerned with the meaning of "work performed for a person". Subsection (1A) is concerned with identifying the nature of the work and seeks to do that by asking for what purpose the work is performed. Is it performed "for", or for the purpose of, providing a service, or for the purpose of supplying labour? However, the question must be posed, and the answer given, in the negative. As held in *Batchfire*,[13] the Commission must be "positively" satisfied that the work is <u>*not*</u> for the purpose of, the provision of a service, rather than for the purpose of the supply of labour.

23 The fact that the work under s 306E(1) is (or will be) performed by employees *for* a regulated host is not determinative of the matters required to be decided under s 306E(1A). Nor are the following:

(a) whether the employees of the employer are provided *for* the performance of work;

(b) whether the employees of the employer perform the same work or same kind of work as employees of the regulated host; or

(c) whether a covered employment instrument would apply to the work if the employees performing the work were employed directly by the host pursuant to s 306E(1).

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[12] *Application by the Mining and Energy Union* [2024] FWCFB 299 (***Batchfire***) [15]; applied in *Applications by The Australasian Meat Industry Employees Union* [2024] FWCFB 388 at [9], [12]; *Application by Nicholas Driver* [2024] FWCFB 394 at [5], [8].

[13] *Batchfire* [15].

24 As outlined in the OS/BHP Submissions assessing what the performance of the work is "for" under s 306E(1A), there is a "binary choice" for the Commission,[14] in the sense that the section requires the Commission to be satisfied that the performance of work is not (or will not be) for the provision of a service, "rather than" the supply of labour. If the work is (or will be) performed for the provision of a service, then it cannot be said that the work is performed for a supply of labour and an RLHA order must not be made.

25 Equally if the Commission is unable to satisfy itself that the performance of the work is not (and will not be) *for* the provision of a service under s 306E(1A), rather than the supply of labour, because it is unable to make a positive finding either way, then the Commission can go no further and is prohibited by s 306E(1A) from making an order under s 306E(1)(a).

C.3 Section 306E(1A) and (7A): "For the provision of a service" and duty of "having regard to the matters in subsection (7A)"

26 Section 306E(1A) provides that in forming a state of satisfaction as to whether work is not, or will not be, for the provision of a service, the Commission is to "hav[e] regard to the matters in subsection (7A)". Although subsection (7A) simply states that "the matters are as follows", rather than that the matters "include", it is clear that the matters in subsection (7A) do not constitute an exhaustive list. The Commission's overarching task in s 306E(1A) is to construe and apply the phrase "for the provision of a service". The construction and application of that expression involves an exercise of discretion (in the course of reaching a state of satisfaction in relation to the presence or absence of the relevant jurisdictional fact) in which the Commission may take into account other relevant matters. The OS/BHP Submissions also make this point, noting that there may be additional considerations in a given case beyond those set out in subsection (7A) which are relevant in assessing whether particular work is for the provision of a service or for the supply of labour.[15]

27 Where a statutory provision states that in exercising a power a decision-maker is to "have regard to" or "take into account" a matter or factor, the decision-maker must take into account that matter and give it weight or consideration as a fundamental element, or central element, or focal point, in making the decision.[16] This requires having regard to the matter in a real sense, rather than giving it cursory examination only in order to put it to one side.[17] Where more than one matter is enumerated, it may be difficult to see how all of them can be fundamental or central. A decision-maker must actively engage with and give weight and genuine consideration to each of the matters to which it is

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14 OS/BHP Submissions at [2](a) relating to "supply of labour" in s 306E(1A) describes subsection (1A) as erecting a "binary choice".

15 OS/BHP Submissions [12].

16 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 (***Sean Investments***) at 329 per Mason J (Gibbs J agreeing); *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 (***Meneling Station***) at 333, 338; *Zhang v Canterbury City Council* (2001) 51 NSWLR 589 at 601-2[64], [71], [75] per Spigelman CJ (Meagher and Beazley JJA agreeing).

17 *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at 244[52] per Gleeson CJ, Heydon and Crennan JJ; *Tickner v Bropho* (1993) 40 FCR 183 at 192-3 per Black CJ, 209 per Lockhart J (French J dissenting).

required to "have regard", without having to determine that one is to be given "fundamental weight" as opposed to others.[18]

28 Consistently with these authorities, in *Application by the Mining and Energy Union* (**Batchfire**)[19] the Full Bench considered the words "having regard to the matters" in s 306E(1A) and concluded that the matters in subsection (7A) must be treated as matters of significance in the decision-making process and given weight in determining whether work is performed for the provision of a service. The Full Bench in *Batchfire* observed that to be satisfied that the work is performed for the provision of a service there must be "something more than simply the performance of work by employees supplied to the regulated host".[20] The matters in subsection (7A) are directed towards identifying this "something more".

29 Before turning to the matters in subsection (7A), the general meaning of "provision of a service" should be considered. This expression is not defined in the Act,[21] although its meaning is suggested indirectly by s 306E(7A). There is a well-known distinction between a contract of service and a contract for services.[22] In the course of determining whether a person was an employee or an independent contractor, the High Court has said that a focus on a multifactorial check list of features of a contract may not be the best way to determine which side of the distinction a case falls upon.[23] Attention should be given to whether the contractual relationship indicates the putative employee's work was so subordinate to the employer's business that it can be seen to have been performed as an employee rather than as part of an independent enterprise.[24] The Court rejected an approach of looking at the "reality" of who has power to control what the worker does and how the worker does it, and said that the gravamen of control lies in the contractual authority to exercise control, not in its practical exercise.[25]

30 A similar analysis applies to the distinction between the provision of a service and a supply of labour. To determine which side of the distinction a case falls upon, the focus should be upon contractual authority to control what an employee does and how it is done and the contractual purpose for which the work is performed.

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18 *Telstra Corporation Ltd v Australian Competition and Consumer Commission* (2008) 171 FCR 174 at 200-202 [112]-[121], 212-3[184]-[186], 214[190], 196; *Telstra Corporation Ltd v Australian Competition and Consumer Commission* (2008) 176 FCR 153 at 182-3[109]-[110] (appeal allowed on another ground: *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2008) 176 FCR 203); *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at 363-4[45] (Griffiths, White and Bromwich JJ); *Kumar v Minister for Immigration and Border Protection* (2020) 274 FCR 646 at 669[82]-[84] per Derrington and Thawley JJ (Logan J agreeing).

19 [2024] FWCFB 299 at [15], citing in note 9 inter alia, *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56] where *Sean Investments* and *Meneling Station* were cited.

20 *Batchfire* [15].

21 Section 22 of the Act defines a "period of service" rather than "provision of a service", and so does not assist, as recognised in *Batchfire* [15].

22 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 at 185[39] per Kiefel CJ, Keane and Edelman JJ. Cf per Gageler and Gleeson JJ, holding that regard can also be paid to what in fact occurs in the performance of the contract, but nonetheless agreeing that there was a contract of employment in this case.

23 *Personnel Contracting* (2022) 275 CLR 165 at 185[39].

24 *Personnel Contracting* (2022) 275 CLR 165 at 185[39].

25 *Personnel Contracting* (2022) 275 CLR 165 at 201-2[88].

C.4 Section 306E(1A) and (7A): Matters in subsection (7A)

31 Section 306E(1A) requires the Commission to have regard to the matters in subsection (7A) for the purpose of the assessment of whether the work performed is not for the "provision of a service" undertaken in s 306E(1A).

32 While the Commission must have regard to each of the matters in subsection (7A), the factors are relevant only to the extent they inform the Commission's decision as to whether the work performed by employees of the employer for the regulated host is not (and will not be) *for* the provision of a service.

33 The matters in subsection 306E(7A) are directed towards and require consideration of the employer's role and activities, not those of the regulated host. In that respect, the matters in paragraphs (a), (b), (d) and (e) of subsection (7A) direct the Commission's attention to the employer's role in the performance of the work. Paragraph (c) in subsection (7A) refers to both the employer and the employee. None of the matters in subsection (7A) is concerned with the role or responsibilities of the regulated host.

34 The MEU's submissions relating to subsection (7A) in contrast focus on the role and activities undertaken by the regulated host, including its policies and procedures, and any of its equipment that is used.[26] That approach invites the Commission to focus on the role of the regulated host (rather than the role of the employer and the regulated employees) in paragraphs (a) to (e) of subsection (7A), potentially leading the Commission into error.

35 Paragraph (a) of subsection (7A) requires consideration of the employer's "involvement", while paragraphs (b) to (e) require consideration of the "extent" to which the employer has responsibility for or provides for various matters. For each matter that is relevant in the circumstances, the Commission is to reach an evaluation as a matter of degree, and have regard to that in determining whether the performance of the work by the employee is not, or will not be, for the provision of a service. Subsection (7A) does not require the Commission to make a factual finding in respect of each factor in subsection (7A)(a) – (e). The weight the Commission ascribes to a relevant matter in any of paragraphs (a) to (e) is for the Commission, focusing on the contractual relationship between the employer and the employee. As noted in the OS/BHP Submissions, a finding of fact in respect of one or more of these matters will weigh in favour of a conclusion that the employee's work is for the provision of a service[27], and "must be treated as matters of significance".[28] An example is provided in the Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Closing Loopholes) Bill* 2023, which notes that if an employer directs, supervises, or controls work being performed by the employee, that weighs in favour of the Commission finding that the work is for the provision of a service, rather than for the supply of labour.[29]

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26 Mining and Energy Union Submissions, dated 2 August 2024 (**MEU Submissions**) [46], [91]-[319].

27 OS/BHP Submissions at [16].

28 OS/BHP Submissions [2(a)].

29 Revised Explanatory Memorandum [634]-[635].

(i) Section 306E(7A)(a): Involvement of the employer in matters relating to the performance of the work.

36 Contrary to the MEU and AMWU Submissions, subsection (7A)(a) is not limited to the employer's actual supervision of the performance of work by an employee at the regulated host's site.[30] It instead requires a broad holistic assessment of the employer's "involvement" in "matters relating to" the performance of the work, not the employer's involvement in *the work* that is actually performed.

37 These include matters as to how the employer ensures its contractual or other service criteria in respect of the work are to be met; how it engages, directs and allocates its workforce to perform the work; the nature of the arrangements (contractual or otherwise) in place which contribute to and direct the performance of work; what those arrangements say about the involvement of the employer in matters relating to the performance of the work; and arrangements required to be in place at the site to inform or contextualise the employer's involvement in *the work* performed.

(ii) Subsection 306E(7A)(b): The extent to which, in practice, the employer or a person acting on behalf of the employer, directs, supervises or controls (or will direct, supervise or control) the regulated employees when they perform the work, including by managing rosters, assigning tasks, or reviewing the quality of the work.

38 Section 306E(7A)(b) requires consideration of "the extent" to which the employer (or a person acting on the employer's behalf) directs, supervises or controls the regulated employees when they perform the work.

39 If it is established on the evidence that the employer supervises the employees performing the work in any capacity, that should weigh heavily in favour of a conclusion that a service, and not just labour, is being provided.[31] Any form of supervision by an employer of employees in respect of the performance of work, is antithetical to a finding that it is simply the employee's labour that is being supplied to the regulated host. Such supervision could include the promulgation of policies and procedures by the employer with which the relevant employees must comply when performing their work.

40 In contrast, the fact that a regulated host may also have policies and procedures which it requires the employees of the employer to follow while performing the work on site, including standard operating procedures and other systems of work, or utilises technology to monitor compliance, or requires employees to follow the instructions or directions of other personnel when on site, is to be expected in light of the regulated host's obligations to provide a safe workplace to all persons on site, including visitors (in this case the requirements of *Coal Mining Safety and Health Act 1999* (QLD) (**CMSH Act**)). For that reason these activities of the regulated host are irrelevant to the Commission's consideration of s 306E(7A)(b) for the purpose of s 306E(1A). That is, the sole focus of this subsection is on *the employer or a person acting on their behalf*, not on the regulated host.

30 MEU Submissions [46](c); AMWU Submissions [23]-[25], [30]-[31].

31 Batchfire [21](b).

(iii) Section 306E(7A)(c): The extent to which the regulated employees use or will use systems, plant or structures of the employer to perform the work.

41 Paragraph (c) in s 306E(7A) requires the Commission to have regard to the extent to which the regulated employees will use the systems plant or structures of the employer to perform the work.

42 As noted in the OS/BHP Submissions,[32] the supply of plant, structures of equipment used or maintained at mine sites by a coal mine operator is an unremarkable feature of the black coal mining industry (or indeed any other mining industry), as mining requires the use of expensive and capital intensive equipment as a matter of course.[33] Accordingly, it will often be the case that employees are required to use systems, plants or structures of the coal mine operator rather than their employer. This does not take the analysis as to whether the employer is in fact providing a service any further. For that reason in the circumstances little weight should be given to the matter in s 306E(7A)(c). What is relevant is the nature of the use, which turns on the factual matters at the site.

43 The employer's safety systems are a "system" for the purposes of s 306E(7A)(c), as outlined above. The statutory duty of regulated employees to comply with the regulated host's overall safety system for the mine site is simply a consequence of the statutory regulatory scheme. It does not shed further light on the issue at hand.

44 With respect to paragraph (c) regarding the extent to which in practice the regulated employees use or will use systems, plant or structures of the employer to perform the work, the MCA agrees with the OS/BHP Submissions that supply of equipment used and maintained at mining sites is an unremarkable feature of the black coal mining industry, given the capital intensive equipment required.[34] Many contractors for service will be involved in the use and maintenance of equipment of the mine operator (such as BMACO). To the extent that BMACO (or any mine operator's) safety system could be said to be "systems" within paragraph (c), MCA adopts the same reasoning as outlined above.

(iv) Section 306E(7A)(d): The extent to which either the employer or another person is or will be subject to industry or professional standards or responsibilities in relation to the regulation of employees.

45 The Commission's consideration of paragraph (d) in s 306E(7A) should be directed to the extent to which the employer (or another person) is or will be subject to industry or professional standards or responsibilities in relation to the regulation of employees.

46 The subsection does not refer to the regulated host. Nor does it require the Commission to consider what standards or responsibilities apply to the regulated employees in performing work for the regulated host. Rather, the Commission is required to consider whether the employer or another person is subject to industry or professional standards or responsibilities in relation to the regulation of the employees.

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32 OS/BHP Submissions [3](c).

33 OS/BHP Submissions [3](b), [61].

34 OS/BHP Submissions [3](c).

47 Subsection 306E(7A)(d) is also not directed towards legislation that applies universally to all participants at the workplace. As noted in the OS/BHP Submissions,[35] the fact that relevant safety legislation requires that certain site safety rules and operating procedures be universally applied at the relevant mines is a feature of the statutory scheme which applies to *all* site attendees. The subsection is instead directed towards considering the industry or professional standards or responsibilities of the employer in relation to the regulation of employees.

48 With respect to paragraph (d), the MEU submits that:

> *…the Full Bench in the Batchfire Case held that the regulated hosts [sic] obligations under the Coal Mining Safety and Health Act 1999 (QLD) in relation to the safe operation of the mine and maintenance of a safety health and management system that applied to the employees <u>were matters falling under this provision.</u>* (emphasis added)[36]

49 This appears to be something of an overstatement. In *Batchfire* the Full Bench simply stated that:

> *There is no evidence that WorkPac is or will be subject to industry or professional standards or responsibilities in relation to the production employees it supplies to Batchfire, apart from its usual statutory work health and safety obligations as an employer. Batchfire has obligations under the Coal Mining Safety and Health Act 1999 (Qld) as to the safe operation of the Mine and, for that purpose, maintains a Safety and Health Management System which applies to the production employees supplied by WorkPac.*[37]

50 Here Batchfire's obligations under the CMSH Act are simply noted by the Commission without further comment. As discussed further below in relation to paragraph (e), in *Batchfire* the Commission made a finding as to paragraph (d) in circumstances where no evidence on the matter was provided, and the factual issue was not contested and was conceded by Workpac.

51 Certain matters relating to industry standards for health and safety in the coal mining industry may well be a relevant consideration for the purpose of 306E(7A)(d), Some are found in s 43 of the CMSH Act.[38] However the mere existence of statutory obligations of the employer or the regulated host do not take the exploration of this matter any further, and should not be given undue weight by the Commission.

(v) Section 306E(7A)(e): The extent to which the work is of a specialist or expert nature.

52 When considering whether the work is of a specialist or expert nature, within paragraph (e) of s 306E(7A), the Commission's inquiry should be directed to whether the work being performed is not part of the primary business of the regulated host.

53 The Revised Explanatory Memorandum clarifies that:

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35 OS/BHP Submissions [3](b).

36 MEU Submissions [46](f).

37 *Batchfire* [21].

38 OS/BHP Submissions [67].

For the purposes of these new subsections, higher education qualifications would not be required for work to be considered specialist or expert. For example, employees of a catering service employer contracted to provide catering for a regulated host whose primary business is not the provision of catering services may be found to be undertaking work of a specialist or expert nature, even where the host's covered employment instrument provides for the performance of work of the type provided by the catering service provider. [39]

54 In *Batchfire* the Commission made a finding that "the production work performed [by WorkPac employees] at the Mine, which involves the use of plant and equipment, is not of a specialist or expert nature".[40] As submitted in the OS/BHP Submissions,[41] this was a factual finding specific to those proceedings. Further, the point was conceded in that case, without argument from WorkPac, and without evidence put on by WorkPac to the contrary.

C.5 Reliance on the *Coal Mining Safety and Health Act* 1999 *(Qld)*

55 The MEU makes a number of submissions with respect to the work, health and safety arrangements and mine planning processes on each relevant site, and how those arrangements can be said to interact with the list of factors in s 306E(7A).[42] In particular, the MEU submits that the obligations and requirements imposed by the CMSH Act are material, as BMACO must, as a matter of statutory obligation, exercise substantial and significant control over the performance of work by employees of BHP Coal, OS Production, OS Maintenance, WorkPac and Chandler Macleod at the mines.[43]

56 The MCA agrees with the OS/BHP Submission that the MEU's analysis inappropriately conflates BMACO's superintendence as a mine operator under the CMSH Act with the proper inquiry required by s 306E(7A)(b) as to the extent to which the employer directs and supervises work on mine sites.[44]

57 The MEU's analysis has potential unintended consequences for the wider mining industry. As noted in the parties' various submissions, the CMSH Act requires that certain site safety rules and operating procedures be universally applied at the relevant mines. This is a feature of the statutory scheme which applies to *all* site attendees, including any contractor, and indeed visitor, of the site. This statutory primary duty of care and the requirements of mandatory mine safety plans should not therefore be relied on to suggest that the employer has not retained supervision or control of employees on a mine site. Focussing on the outworkings of these statutory requirements to suggest the employer does not exercise supervision, or give direction, deflects attention away from the critical analysis which is focussed on the extent to which the employer exercises supervision.

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39 Revised Explanatory Memorandum [637].

40 *Batchfire* [21](e).

41 OS/BHP Submissions [71].

42 MEU Submissions [42] –[46], [77] –[90].

43 MEU Submissions [90].

44 OS/BHP Submissions [3](b).

58 A myriad of workers and contractors will be present on a mine site at any one time, and will be subject to the same overarching safety obligations, regardless of whether they could be said to be present by reason of a labour hire arrangement. The MEU's analysis regarding the obligations under the CMSH Act therefore does not provide any useful differentiating factors to assist in the characterisation of whether work is being performed for the provision of a service or for the supply of labour.

C.6 Section 306E(1A): "Supply of labour"

59 Section s 306E(1A) draws a distinction between the performance of work for the provision of a service and the performance of work for the "supply of labour". As discussed above, determining that work is not performed "for the provision of a service" does not discharge the task of determining whether or not an employer supplies or will supply, either directly or indirectly, employees of the employer to perform work for a regulated host, within s 306E(1)(a) which is a separate jurisdictional fact. The expression "supply of labour" needs to be considered in the context of s 306E(1A). The Act does not define "supply of labour". The purpose of Part 2-7A of the Act is to provide for the making of "regulated labour hire arrangement orders". A "supply of labour" appears to be the same as, or a type of, "labour hire" within a labour hire context.

60 The expressions "supply of labour" and "labour hire" have been interpreted in other statutory contexts.[45] In *Victorian WorkCover Authority v Divadeus Pty Ltd (in Liq)*[46] (**Divadeus**) the Victorian Court of Appeal considered the meaning of "supply of labour" in a WorkCover premiums order made under the *Accident Compensation (WorkCover Insurance) Act* 1993 (Vic). The expression "labour hire" was defined in the order to mean "the supply, whether directly or indirectly, of the labour of one or more workers employed by the employer, not being a supply of labour in connection with: (a) the performance by the employer of a specified task; (b) the discharge by the employer of a specified function; or (c) achievement by the employer of a specified outcome." The Court concluded that an employer carrying on a business of providing security services to tertiary education institutions was not providing "labour hire", but fell within the item in the order for "investigation and security services". The Court reasoned as follows:

> *[109] It is evident that the obligations of Divadeus to its clients extended beyond the mere provision of suitable labour. Divadeus was obliged to provide security services as extensively* ***provided for in the contracts****. In requiring Divadeus to provide security services, and not merely to provide suitable labour to enable the client to have security-related work performed, the contracts specified tasks or functions within the meaning of paragraphs (a) and (b) of the definition of 'labour hire'. And, as the definition requires, the contracts stipulated that the tasks or functions were to be performed or discharged by Divadeus.*

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45 *Victorian WorkCover Authority v Divadeus Pty Ltd (in Liq)* [2016] VSCA 81 (**Divadeus**); *Marketform Managing Agency Ltd* v *Ashcroft Supa IGA Orange Pty Ltd* [2020] NSWCA 36.

46 [2016] VSCA 81.

…

[111] …. the starting point is to ask what constitutes the arrangement for supply and here it was the contractual arrangements existing between Divadeus and its clients.

…

[113] The fact that its employees were subject to direction or control by the clients in undertaking the performance of the contracted services, and that such direction or control was regularly exercised by clients, does not detract from the existence of the obligation of Divadeus. It remained contractually bound to provide the services and could be sued for any failure to do so. It is not remarkable that the client would provide directions to staff supplied to perform tasks that their employer had agreed to perform or functions that their employer had agreed to discharge, particularly when Divadeus' workers were located at the clients' premises. In this regard, the tasks or functions of a Divadeus security officer were likely to vary depending upon the location of the work performed and the time of day or night when it was performed. A worker may perform a task or discharge a function of their employer even when those actions are subject to direction by someone other than their employer. In truth, the giving of directions to the Divadeus staff took place within a contractual framework under which Divadeus was at all times performing tasks or discharging functions for its clients.

…

[115] When the definition of labour hire is applied, it is clear that Divadeus supplied labour in connection with its performance of tasks and its discharge of functions for its clients. Therefore, the supply of that labour was not 'labour hire'...

61 The Court's reasoning indicates that:

(a) the contract between the employer and the client universities was central to determining whether the employer was providing security services or labour hire;

(b) where the contract provides for the employer's employees to perform tasks or discharge functions of the employer's business, there is unlikely to be a labour hire relationship with the client;

(c) how the contract itself is performed in practice is unlikely to be a relevant consideration, unless no contract exists at all.

62 In the present context there is no definition of "labour hire", or "supply of labour" but the meaning of "performance of a service" in s 306E(1A) points in the same direction as this reasoning.

63 The meaning of "labour only services" has been considered in the context of an exclusion clause in an insurance policy, where the expression was not defined. The NSW Court of Appeal held that a contract to provide not only labour but also services of recruitment, vocational training, management, payroll, administration services, and occupational health and safety inspections was not a "contract

… for the provision of labour only services".[47] The Court reasoned that the contract provided for the employer to provide services additional to the mere supply of labour.[48] That reasoning is applicable in the present context. The distinction drawn in s 306E(1A) between "supply of labour" and "provision of a service" indicates that a "supply of labour" is a mere supply of labour, without the provision of any additional service.

64 That a "supply of labour" in s 306E(1A) is a supply of labour only, and nothing more, is supported by the observations made by the Full Bench in *Batchfire*.[49] It is also supported by the purpose of the Act, which does not seek to capture work at large,[50] but has as its foundation the regulation of employment relationships (or employee-like relationships),[51] for which the Act mandates a guaranteed safety net of fair, relevant and enforceable minimum terms, and conditions. Consistently with that purpose, the Commission's jurisdiction under s 306E(1A) arises only where the work that is or will be performed is for a "supply of labour", which is the supply of labour *only*. In those circumstances, the Commission has power to regulate the minimum terms and conditions of the persons whose labour is supplied. This construction is consistent with the purposes of the Act and is to be preferred. as it best achieves the purposes of the Act.[52]

PART D: SECTION 306E(2) – "FAIR AND REASONABLE IN ALL THE CIRCUMSTANCES"

D.1 Section 306E(2): Jurisdictional fact

65 Section 306E(2) is again a jurisdictional fact (discussed in paragraphs 14-18 above). If the Commission reaches a state of satisfaction that making an RLHA order is not "fair and reasonable in all the circumstances", having regard to any matter in s 306E(8) in relation to which submissions have been made, the Commission has a duty not to make the order (the **Fair and Reasonable Exception**).

66 Section 306E(8) specifies list of matters which must be considered if submissions have been made about them. The Commission is only required to consider a matter where it is the subject of submissions.[53] That means that submissions have been made by a party about a matter in s 306E(8) before the Commission makes its decision.

67 Submissions have been made in relation to some matters in s 306E(8), by WorkPac, dated 4 October 2024 (**WorkPac Submissions**) and by Chandler Macleod, dated 9 October 2024 (**Chandler Macleod**

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47 *Marketform Managing Agency Ltd* v *Ashcroft Supa IGA Orange Pty Ltd* [2020] NSWCA 36 (***Marketform Managing***) at [68]-[72].

48 *Marketform Managing* [2020] NSWCA 36 at [69].

49 *Batchfire* [15].

50 Act s 3; *Fair Work Ombudsman v Valuair Ltd (No 2)* [2014] FCA 759 at [74] and [80]; *Barnett v Territory Insurance Office* (2011) 196 FCR 116 at [24] and [40]; *Fair Work Ombudsman v Chia Tung Development Corp Ltd* [2016] FCCA 2777, [48].

51 That position is similarly reflected in other relevant legislation which sets minimum terms and conditions, such as the *Superannuation Guarantee (Administration) Act* 1992 (Cth) which deems persons performing work under a contract that is wholly or principally for the labour of that person, to be an employee of the other party to the contract, but does not deem persons performing work under a contract for the provision of a service to be an employee.

52 *Acts Interpretation Act* 1901 (Cth) s 15AA.

53 *Batchfire* [16].

Submissions). Chandler Macleod[54] and WorkPac[55] rely on the matters in paragraphs (a), (c), (d), (e) and (f) of s 306E(8). MCA makes the following submissions with respect to the Fair and Reasonable Exception, referring to relevant paragraphs of s 306E(8).

68 The matters listed in s 306E(8) are non-exhaustive, given that paragraph (f) provides for the Commission to have regard to "any other matter the FWC considers relevant". As discussed in paragraph 42 above, the requirement to "hav[e] regard to" is a requirement to treat any matter in the paragraphs of s 306E(8) on which a submission has been made, as a focal or central consideration in determining what is "fair and reasonable". This includes any matter which is the subject of a submission pursuant to paragraph (f) in s 306E(8), and which the Commission considers to be relevant. Similarly to the matters in s 306(E)(7A), a finding that any of the individual matters in s 306E(8) would, in the context of all the relevant circumstances, lead to unfairness or unreasonableness to any person should be treated as a matter of significance.

D.2 Section 306E(2): The meaning of "fair and reasonable in all the circumstances"

69 The expression "fair and reasonable in all the circumstances" is not defined for the purposes of Part 2-7A of the Act. Its meaning was not considered in *Batchfire*.

70 The expression needs to be construed in accordance with ordinary principles of statutory construction. The starting point is the text of the statute, while at the same time regard is had to its context and purpose.[56] The primary object of statutory interpretation is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.[57] The interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.[58]

71 The object of the Act, in s 3, is relevantly as follows:

> ***3 Object of this Act***
>
> *The object of this Act is to provide a balanced framework for co-operative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:*
>
> *(a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and*
>
> …

54 Chandler MacLeod Submissions [31]-[42].

55 WorkPac Submissions [9]-[20].

56 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368[14] per Kiefel CJ, Nettle and Gordon JJ.

57 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381.

58 *Acts Interpretation Act 1901* (Cth) s 15AA.

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

72 Part 2-7A does not contain a particular objects clause for the Part. Turning to extrinsic material, the object of Part 2-7A is to:

> *positively engage the right to the enjoyment of just and favourable working conditions by protecting bargained rates in enterprise agreements*[59]
>
> *[close the loophole that allows] the undercutting of bargained rates*[60]

73 The notion of fairness identified in the objects of the Act concerns allowing the provisions of the Act to operate, in particular by its provision for enterprise-level collective bargaining. It could not be an intention of the Act that Part 2-7A be utilised to undermine or hinder the pursuit of these objects. According to the extrinsic material, the object of closing the loophole is consistent with that object. Part 2-7A is not a means for undermining or destroying bargained enterprise agreements. The loophole is the absence of coverage of the regulated employees by a bargained enterprise agreement. As stated in the Revised Explanatory Memorandum:

> *[Part 2-7A] would positively engage the right to the enjoyment of just and favourable working conditions by protecting bargained rates in enterprise agreements, or other covered employment instruments …, from being undercut by the use of labour hire. While many employers negotiate enterprise agreements with their employees that set minimum rates, the FW Act currently allows employers to engage workers through a labour hire company, who are often paid less than those agreed rates*.[61]

74 Significantly, Part 2-7A makes no provision for any existing enterprise agreement to cease to cover the regulated employees when an RLHA order is made. The RLHA order is required to specify the matters set out in s 306E(9) and (10). By contrast, provision is expressly made for orders varying or revoking an RLHA order, in ss 306EA, 306EB 306EC, 306ED and 603. This points to a legislative intention that Part 2-7A is not available in circumstances where the regulated employees are covered by an enterprise agreement (or other "covered employment instrument" within s 12 of the Act). Alternatively, the legislative intention may be that the regulated employees will be covered by two different and inconsistent enterprise agreements. That is to accept a legislative intention to effect an absurd and unworkable outcome. At the minimum, there is a legislative intention that in circumstances where the regulated employees are covered by an enterprise agreement, it would not be fair and reasonable to make an RLHA order. This aligns with the position under s 58 of the Act which, subject to limited exceptions, none of which are relevant, provides that only one enterprise agreement can apply to an employee at a particular time.

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59 Revised Explanatory Memorandum of the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**Revised Explanatory Memorandum**) [75].

60 Revised Explanatory Memorandum [76].

61 Revised Explanatory Memorandum [75].

75 Having regard to the objects of the Act and of Part 2-7A the following matters should inform the Commission's assessment of whether the making of an RLHA order is "fair and reasonable" in the circumstances:

(a) the economic impact (including economic hardship) of the order on the employer of the regulated employees;

(b) the impact on bargaining in the employer's enterprise;

(c) the extent of uncertainty and complexity that may be potentially created for the determination of pay rates at the employer by making the order given differences in the industrial arrangements between the regulated host and the employer; and

(d) the extent to which wage rates at the employer undercut bargained wage rates (and thereby de-emphasise "*enterprise-level collective bargaining*").

76 The Commission should be satisfied that the making of an RLHA order is not fair and reasonable in the circumstances where:

(a) there is an established enterprise agreement which applies to the regulated employees supported by a history of bargaining in the enterprise and there is no suggestion that the enterprise agreement has been negotiated to undercut wage rates;

(b) the commercial arrangements which regulate the performance of the work were negotiated prior to the commencement of Part 2-7A of the Act and there is no ability for the employer to "pass on" the increase in costs arising from higher rates of the protected rate resulting from the regulated labour hire arrangement order;

(c) the making of the RLHA order would otherwise have a material adverse economic impact or impose economic hardship on the employer.

77 MCA submits that the Commission should have regard to the following matters in paragraphs (a), (c), (e) and (f) of s 306E(8).

D.3 Section 306E(8)(a) – the pay arrangements that apply to the employees of the regulated host including the rates that would be paid to regulated employees if the order were made

78 Paragraph (a) in s 306E(8) matter should involve a consideration of:

(a) the economic impact of the rate required to be paid to regulated employees on the employer;

(b) the degree of difference between the rates of pay and classifications between industrial arrangements which apply to the regulated host and the employer of the regulated employees.

79 Both Chandler Macleod and WorkPac submit that an order under s 306E(1) will have a material adverse impact on their business.

80 In the case of WorkPac, the making of an order:

(a) will have significant adverse consequences on its revenue, leading to further adverse implications on the viability of its commercial arrangements and business as a whole;[62] and

(b) would jeopardise its ability to maintain the current size of its workforce generally, and provide employment opportunities on an ongoing basis, in light of the economic consequences of an order.[63]

81 In the case of Chandler Macleod, the making of an order:

(a) will result in its commercial arrangements becoming unviable due to elevated labour costs and a modest profit margin;[64] and

(b) will have detrimental consequences for its business on account of the elevated costs, including a likely reduction in its headcount, difficulties in attracting and retaining employee talent, and a disgruntled workforce due to disparities in rates of pay amongst workers at different locations who are ultimately performing similar work.[65]

82 The degree of difference between the rates of pay and classifications between the industrial arrangements of the regulated host and the employer of the regulated employees also goes to considerations of fairness and reasonableness.

83 WorkPac's submission highlights the uncertainty which would flow from an RLHA order because the classification structure under the *WorkPac 2019 Agreement* (**WorkPac 2019 Agreement)** does not align with *BMA Enterprise Agreement 2022* (**BMA Agreement**).[66] This mismatch introduces ambiguity as to what entitlements the employees should receive.

84 The employees of Chandler Macleod are covered by the *Chandler Macleod - Queensland Black Coal Mining Agreement 2020* (**2020 Chandler Macleod Agreement**).[67] Chandler Macleod submits that the making of an RLHA order would create uncertainty as to how its employees should be remunerated.[68]

85 These outcomes will add to complexity and inefficiency for the employer of the regulated employees. This complicates and disrupts arrangements where the employer has in place a negotiated enterprise bargaining agreement for the employees with rates required to be paid to the regulated employees.

86 An RLHA order will not be fair and reasonable in all the circumstances where it results in material adverse economic impact or economic hardship for an employer or additional complexity of the nature outlined above. These outcomes are not consistent with the object in s 3(a) of the Act of providing a balanced framework for co-operative and productive workplace relations that promotes national

62 Workpac Submissions [17]-[18].
63 Workpac Submissions [18].
64 Chandler Macleod Submissions [42].
65 Chandler Macleod Submissions [42].
66 Workpac Submissions [12.2]-[13].
67 Chandler Macleod Submissions [1].
68 Chandler MacLeod Submissions [33].

economic prosperity by promoting job security, flexibility for business and promoting productivity and economic growth.

D.4 Section 306E(8)(c): History of industrial arrangements applying to the regulated host and the employer

87 In relation to paragraph (c) in s 306E(8), the Commission should give significant weight to the history of bargaining at the employer and the potential impact an order may have on enterprise bargaining, when considering whether it would not be fair and reasonable to make an order. This clearly reflects the Act's object of promoting "*enterprise-level collective bargaining*".

88 Both Chandler Macleod and WorkPac have a history of enterprise bargaining. The regulated employees who would be subject to the proposed RLHA order are covered by enterprise agreements which have been negotiated with the MEU.[69]

89 WorkPac submits that the effect of an RLHA order would be to disturb and distort a longstanding enterprise agreement that it has developed in conjunction with its workforce over multiple successive instances of bargaining involving the active participation of the MEU, which the majority of WorkPac's workforce has approved.[70] WorkPac submits that the making of an order would "set at nought the enterprise level collective bargaining represented by the making of the WorkPac 2019 Agreement".[71] Further, bargaining for future enterprise agreements may become futile to the extent that WorkPac's employees vote on enterprise agreements that will not even ultimately provide for their entitlements.[72]

90 Chandler Macleod submits that it has longstanding enterprise agreements created in the context of productive bargaining with its workforce and the MEU.[73] Chandler Macleod submits that an RLHA order would inject considerable uncertainty into its own bargaining process, as it is unclear what the baseline starting point would be for commencing negotiations.[74] For example, should this be from Chandler Macleod's current enterprise agreement or the new protected rate under the covered employment instrument established by the RLHA order, which employees had no involvement in bargaining for?[75]

91 The rates which currently apply to both WorkPac and Chandler Macleod employees under these established enterprise agreements are bargained rates in the same way that the rates under the BMA Agreement which have been bargained with employees covered by the BMA Agreement. The rates have been agreed between Chandler Macleod/WorkPac and their workforces (represented by the MEU)

69 Chandler MacLeod Submissions [34]-[37]; Workpac Submissions [11]-[14].
70 Workpac Submissions, [10]-[11], [19].
71 Workpac Submissions [19](a).
72 Workpac Submissions [19]
73 Chandler Macleod Submissions [34]-[35].
74 Chandler Macleod Submissions [37].
75 Chandler Macleod Submissions [37].

and are not designed to undercut the wages of BMA employees. They have been negotiated in light of the circumstances and conditions of each relevant enterprise.

92 The differences in the rates under the Chandler Macleod and WorkPac enterprise agreements and the BMA Agreement are the product of the parties' respective bargaining positions. The employees have the continuing right to the "enjoyment of just and favourable working conditions by protected bargained rates in enterprise agreements" consistent with the purpose of Part 2-7A of the Act. These rates are contained in enterprise agreements approved by the Commission measured against the same underlying award (Black Coal Mining Award 2020) as the BMA Agreement.

93 The above factors are significant and deserve substantial weight in support of the Commission being satisfied that an order will not be fair and reasonable in the circumstances, in that an RLHA order:

(a) would override current enterprise agreements and adversely impact future bargaining which is inconsistent with object in s 3(f) of the Act of "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining";

(b) would not be consistent with the purpose of Part 2-7A of the Act of making orders that prevent the "undercutting of bargained rates".

D.5 Section 306E(8)(e): The terms and nature of the arrangement under which the work will be performed including the (i) period of the arrangement and (iii) the industry in which the regulated host and the employer operate

94 Paragraph (e) in s 306E(8) is concerned with the arrangement between the regulated host and the employer. The terms of the arrangement are relevant to the economic impact that an RLHA order may have on the employer (including the degree of economic hardship that may be suffered by the employer).

95 WorkPac's submissions highlight that it entered into its services contract with BMACO in the context of WorkPac's own enterprise agreement, and not the proposed RLHA order, and this was underpinned by its labour costs.[76] Furthermore, WorkPac's rates may only be adjusted at its client's discretion, with any increase tied to factors outside an increase to labour costs caused by a regulated labour hire arrangement order.[77] Consequently, unless these increased costs are recoverable, WorkPac's commercial arrangements are likely to become unviable.[78]

96 Chandler Macleod makes a similar submission in relation to its commercial arrangements with BMACO.[79] Chandler Macleod negotiated its commercial arrangements with the premise that its own enterprise agreement would underpin its labour costs, allowing for a small profit margin.[80] Since the

76 Workpac Submissions [17].
77 Workpac Submissions [17].
78 Workpac Submissions [17].
79 Chandler Macleod Submissions, [41]-[42].
80 Chandler Macleod Submissions, [42].

prices under its services contract are fixed unless increased by Chandler Macleod's client, Chandler Macleod submit that an increase in labour costs resulting from an RLHA order would make its contract unprofitable and therefore make it unsustainable for the business to maintain.[81]

97 The industry in which the regulated host and the employer are engaged is relevant to the extent of difference between employment conditions of the regulated host and the employer. The mining industry is a prime example of an industry that has bespoke industrial standards and conditions (including classifications and pay rates) that have been developed and negotiated over an extended period of time. Applying standard employment conditions from the mining industry to another could result in an unfair and unreasonable outcome. This is also a reason to limit orders to "true" supply of labour arrangements rather than services contracts entered into by contractors operating in different and distinct industries regulated by different modern awards (for example engineering and maintenance contractors regulated by the *Manufacturing Award* or electrical contractors regulated by the *Electrical, Electronic and Communications Contracting Award*).

D.6 Section 306E(8)(f): "Any other matter the FWC considers relevant"

98 The other matters to be considered by the Commission should be the objects and purpose of the Act. This includes the matters identified in paragraphs 71 - 74 above, to the extent they are not already considered elsewhere in these submissions.

King & Wood Mallesons
Solicitor for Minerals Council of Australia as intervenor in these proceedings

9 December 2024

[81] Chandler Macleod Submissions, [42].