Fair Work Legislation Amendment (*Closing Loopholes*) Bill 2023

SUBMISSION TO THE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

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SUBMISSION CONTENTS

1. EXECUTIVE SUMMARY

1. Australian Resources and Energy Employer Association (**AREEA**) is the national employer association for Australia's mining, oil and gas and service contracting sectors. AREEA is the largest and most diversified representative of the resources and energy industry and is also the sector's industrial relations (**IR**) specialist group.

2. AREEA represents our members on the National Workplace Relations Consultative Committee, Council on Industrial Legislation, and has had a significant role in all IR developments and reforms since Australia's federation.

3. AREEA and its members share the Australian Government's vision for a "dynamic and inclusive labour market in which everyone has the opportunity for secure, fairly paid work and people, businesses and communities can be beneficiaries of change and thrive".[1] This can only be achieved with a workplace relations system that is agile, flexible and efficient in order to support competitive, productive and profitable businesses.

4. On those principles, AREEA firmly and fundamentally opposes the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (hereafter 'Closing Loopholes Bill').

5. The Closing Loopholes Bill represents the most significant proposed changes to Australia's employment regulation since the *Fair Work Act* took effect in 2009. All of these changes – except a handful of non-contentious parts that should be split out and treated separately – would add enormous complexity, costs, risk and uncertainty for employers.

6. None of the 16 substantive parts of the Closing Loopholes Bill have anything to do with increasing the productivity and competitiveness of Australian enterprises, making Australia a more attractive market for job-creating investment, or promoting greater harmony and cooperation between employers and employees in Australian workplaces.

7. AREEA and its members – covering the entire resources and energy sector – are greatly concerned about impact the proposed changes will have on productivity, costs, and flexibility, and urge the Senate Committee to oppose passing the Bill into law. Specific concerns include:

    a) **Contractors of all types will be captured by proposed labour hire laws**

    Despite public assurances made by Minister Burke, the 'Contractor Test' (at subsection 8(b) of Division Two of Part 6 of the Closing Loopholes Bill) does not provide an immediate and clear exemption for genuine service contractors.

    Rather, applications could be made against service contractors and the business would be subjected to a reverse onus of proof to convince the Fair Work Commission (**FWC**) that they are providing a service, not labour. Even then, a business that is found to be a service contractor would still need to persuade the FWC that it would not be 'fair and reasonable' to make an order capturing their service arrangements.

    Under such a model, specialist contractors of all types will have no certainty that they will not be pulled into a complex and costly IR administrative process. Even if they have their own enterprise agreement in place, they will be unable to tender for work with clients with enterprise agreements with any certainty the rates they quote will be the rates they will be required to pay.

    This will undermine the key role of competitive tendering – a process critical to the nation's productivity performance. If legislated, the repercussions of this unnecessary new red tape and compliance burden would flow through the entire resources and energy supply chain, having significant adverse effects on nationally significant mining and hydrocarbons projects.

[1] Working Future: The Australian Government's White Paper on Jobs and Opportunities, 25 September 2023

b) **Labour hire will be killed off by absurd red tape and administrative burden**

Even if the regulation was to apply strictly to labour hire businesses and not service contractors, there are many unresolved issues with the proposed new obligations on labour hire firms that would at the very least disincentivise use of their services and at worst send many bankrupt. This would lead to significant job losses.

The Bill would require labour hire employers to pay out leave (including long service leave) and redundancy entitlements at clients' rates of pay and give labour hire workers incentives, bonuses and other enterprise-specific payments provided to direct employees of the host business – all oncosts not contemplated or costed by the direct employer.

These expectations are unreasonable and will devastate competitive and flexible labour hire services that the resources sector, and many other industries, rely upon to be productive, efficient and competitive.

c) **Employers will be forced to fund union activism in their own workplaces**

The proposed new rights and protections for union workplace delegates are unjustified. The Government is effectively legislating to empower workplace delegates to be de facto union officials. Expecting employers to foot the bill for members of their own workforce to be industrial activists is entirely unreasonable.

Further, by allowing for a single union member to purport to represent the industrial interests of all employees in that workplace, union members or not, the proposal is fundamentally inconsistent with freedom of association principles both within the Objects of the *Fair Work Act 2009* (**FW Act**) and in international labour conventions to which Australia is a party[2].

d) **Unions can demand access to pay records with no notice**

There is no justification for allowing union officials to come knocking at employers' premises, without notice, to inspect pay records.

The existing 24 hours' notice requirement is already an onerous requirement in the context of most resources sector operations. Given the resources sector's strict work health and safety protocols and remote location of many operations, it is impractical if not impossible to facilitate unnotified entry by union officials.

No reasonable case has been put forward for this change, outside of the wishes of union officials to perform a de facto role as Fair Work Ombudsman inspectors and find novel new ways to force entry into private sector businesses.

Further, there is no right of appeal or capacity of the employer to interrogate the veracity of the evidence adduced by unions to exercise this new, additional and unnecessary privilege. Practically, this could only occur once the right was exercised, meaning there is no balance to this proposal in the form of a right of response and/or appeal.

e) **New employment definitions are complex and will result in widespread litigation**

The Bill inserts new, ambiguous and fluid definitions on concepts already settled by the High Court and could be inconsistent with taxation, superannuation and state contracting law.

[2] The right to freedom of assembly and association is contained in articles 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR) and article 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Source: Attorney General Department guidance sheet.

The proposed new definition of casual employee means the legal status of certain employees will not be determined easily by reference to signed terms of an employment contract. Employees may argue they are/were casual to access higher rates of pay, and argue they are/were permanent to access certain entitlements.

This will reopen the prospect of casual employees initiating disputes with their employers over the status of their employment and any back-paid leave entitlements.

f) **'Wage theft' laws fail to address the complexity of the system**

The Bill seeks to impose severe penalties on wage underpayments, including new criminal charges, a five-fold increase in civil penalties and liability for company directors, without any attempt to resolve the cause of most underpayments - Australia's outdated and absurdly complex awards system.

8. If the Closing Loopholes Bill is passed into law, the productivity and cost impacts on the resources and energy industry will be enormous. Operations could close, leading to jobs lost, regional communities adversely impacted, investment diverted overseas, and state and federal tax and royalty revenues forgone.

9. The Government should be reminded that the recent Federal Budget surplus of more than $22 billion was delivered on the back of record resources export volumes, royalties and taxation revenues. These receipts are integral to public investment in the services all Australians need.

10. Notwithstanding AREEA's overall opposition to the Closing Loophole Bill, there are some parts that are non-contentious and could be split out from the current omnibus bill and passed immediately. These include measures relating to family and domestic violence leave, PTSD, asbestos management and small businesses redundancy exemptions.

11. AREEA notes proposals by Crossbench Senators to bring forward consideration of those four measures separately from the rest of the Closing Loopholes Bill and is supportive of that sensible approach.

2. LABOUR HIRE REGULATION (PART 6)

12. AREEA members are greatly concerned by Part 6 of the Closing Loopholes Bill. While named 'Closing the Labour Hire Loophole', Part 6 seeks to legislate Labor's highly controversial 'Same Job Same Pay' policy.

2.1 'Same Job Same Pay' is fundamentally bad policy

13. Whether called 'Same Job Same Pay' or 'Closing the Labour Hire Loophole', Part 6 of the Closing Loopholes Bill is fundamentally bad policy.

14. The policy basis, when applied to the resources and energy sector specifically, demonstrates a severe lack of understanding about the complexities of workforce arrangements, pay and conditions, enterprise-specific efficiencies, supply chain interdependencies and workplace relativities at mining and oil and gas projects. For instance:

    a) It is common for individuals in the resources sector to hold the same qualifications and perform similar basic work tasks as a colleague but be paid differently. This is due to a variety of factors including experience, business operational knowledge, length of service with their employer, qualifications, performance assessments and other differentiating, merit-based factors;

    b) Enterprise agreements reached by asset owner/operators and/or incumbent contractor workforces are typically forged through the longstanding efforts, skills and experience of those existing workforces. These factors often justify a difference in wages, recognising and rewarding longstanding employees for their service and expertise, compared to temporary labour hire employees engaged to supplement those permanent workforces;

    c) In the resource industry, enterprise agreements made by sophisticated labour hire businesses are almost always reached with unions and must be signed off by the FWC as lawful and resulting in employees being better overall off than under applicable award conditions. These employers offer well-above award rates of pay and present a strong employee value proposition that has attracted thousands of workers in a highly competitive labour market. Everyone has a right to be paid fairly and lawfully in accordance with awards and enterprise agreements, but it is appropriate that some employers will decide to pay more as a premium, including to attract and retain particular talent; and

    d) Employees of any one labour hire or contractor business could feasibly provide services to (and tender for work at) hundreds of worksites in the resources and energy sector. It is unrealistic to expect major resources projects to continue to operate with historic levels of productivity and efficiency – which has delivered significant national revenues – if the industry's supply chain is to become shrouded in insurmountable levels of employment, payroll and administrative red tape.

15. Labour hire is a small part of the national resources and energy sector workforce, but where utilised it offers important flexibility in managing fluctuating labour demands and maintaining the commercial viability of projects through various stages of the commodity cycle.

16. Conversely, 'non-labour hire' contracting arrangements are widespread and critical to maintaining operations through delivery of specialised services and skills unique to that of their clients. While very different in practice, both labour hire and contracting arrangements are critical in maintaining the commercial viability of mining and energy operations.

17. The supply chain is also the central hub for innovation in Australia's resources and energy industry. Australia's mining equipment, technology and services (METS) sector is worth $92 billion in gross value added to the Australian economy and directly and indirectly employs half

a million people[3]. These are exactly the types of businesses the Closing Loopholes Bill threatens to stifle and suffocate with anti-competitive and entirely unnecessary red tape.

18. Part 6 of the Closing Loopholes Bill seriously threatens all forms of service supply in the resources and energy industry. The outcome of legislating this policy would devastate productivity in Australia's resources and energy industry, which generates $464 billion in annual export earnings and approximately $46bn in annual tax and royalty revenues[4].

2.2 Contractors will be smashed by risk and uncertainty

19. AREEA has a deep concern about the ability for applications and orders to be made against businesses that are not labour hire businesses.

20. To that end, the Bill appears to be inconsistent with assurances made by Minister Burke that the policy is not intended to capture genuine service contractors[5], and that the impacts of the policy would be confined to a small portion of labour hire employees (circa 66,000 according to the Explanatory Memorandum[6]).

21. AREEA consulted regularly with Minister Burke and DEWR officials over the past several months seeking an express and sensible exemption for service contractors from any new labour hire regulation. Examples of the types of service contractors that are clearly 'not labour hire' businesses, even though they employ employees in relation to the provision of the services, include:

    a) *Contract mining services*, where asset owners engage a specialist contractor (or a number of specialist contractors) to undertake all or part of the operations at their mine site. Contract mining services have been described in the following terms:

        - *Industry Definition [of] Contract Mining Services Industry in Australia: Firms carry out core stages of a mining operation as third parties on a fee or contract basis. Contract miners supply both machinery and skilled employees to undertake mineral and resource extraction activities at Australian mining sites.*[7]

        - *The main difference between contract mining and owner mining is normally based on who has the most control over that particular mining operation. These operations include rock breakage (drilling and blasting), loading and hauling of ore and waste, mine design, equipment maintenance, scheduling and budgeting. This is most clearly demonstrated by which party owns and operates the mining equipment.*[8]

        - *There are many scenarios that might result in a mine owner looking for assistance from a contract miner… (including) considerations such as: operating experience; in house capability (or "bench strength"); resources (people and equipment); attitude to risk; geographic location; and financial capacity – to name just a few.*[9]

[3] https://metsignited.org/australian-mets-sector/
[4] $43.2bn in mining royalties and company tax payments (link) and $2.5bn in forecast PRRT payments (link)
[5] See "Labor poised to cut deal on 'same job, same pay' laws", *The Australian* 12/06/23; and "Mining union open to carve-out on same job, same pay laws", *The Australian Financial Review*, 12/06/23
[6] See page 3 of Annexure C to the Bill's Explanatory Memorandum
[7] Contract Mining Services in Australia – Market research report, IBISWorld, 26-10-2022, sourced at this link.
[8] Suglo, R. S., (2009), "Contract Mining versus Owner Mining – The Way Forward", Ghana Mining Journal Vol. 11, pp. 61 - 68. Sourced at this link.
[9] MEC Miing 17-11-2017, *Contract Mining: What's your style?* Sourced via this link.

b) *Hydrocarbons production services*

Similar to contract mining services, petroleum production services involve specialist contracting firms delivering a range of supporting services in relation to the extraction and processing of hydrocarbons.

Those include drilling, well maintenance, completion, production, supply, and logistical support services, provision of specialist equipment (including vessels), both onshore and offshore.

c) *Mining / petroleum maintenance service contractors*

In both the mining and petroleum (oil and gas) sectors, it is very common for project owners (including owner-operators) to outsource the ongoing maintenance of their assets to specialist engineering and maintenance firms, with direct-hired employees focusing solely on regular production and processing operations.

d) *Shutdown service providers*

Shutdown projects are planned outages of an entire or substantial sections of a mining or hydrocarbons project for the purpose of large-scale maintenance works, upgrades and refurbishing. Contract service providers on shutdown projects employ workers with similar skills to regular maintenance service contractors (engineers, technicians, trades etc) however with specialist experience in planning, managing and executing fast turnaround, high pressure projects. They are not part of the day-to-day workforces, and their tenure is of limited duration.

e) *Facilities management and support services*

These contractors provide specialist facilities management services on major resources projects including accommodation camp design, build and operating – involving cooking, cleaning, laundry services, building maintenance, health services, security, grounds maintenance, mailing services, waste management and more.

22. Unfortunately, there is no exclusion in the Bill for these types of service contractors. The Government's response to AREEA's concerns has been to include provisions in the Bill that direct the FWC to consider if an arrangement is 'wholly or principally' for provision of a service rather than 'wholly or principally' for the supply of labour, when determining whether it is 'fair and reasonable' to make an order. That means service contractors are still subject to the proposed labour hire regime and may have orders made against them – even if they are not labour hire businesses.

23. The current design of the Bill involves two very serious drafting issues that result in Part 6 capturing service contractors as well labour hire businesses, as set out below.

2.2 (a) The 'contractor test' is relegated to an afterthought

24. AREEA's position made clear to Minister Burke and DEWR officials is that an appropriately designed 'contractor test' could provide an objective and clear distinction between labour hire and service contracting arrangements, and that where an arrangement was found to not be labour hire, the FWC would not be able to consider an application for orders.

25. Another benefit of the 'contractor test' being a threshold issue is that it will have the very real and practicable benefit of reducing unnecessary litigation and cost for all parties.

26. Part 6 of the Closing Loopholes Bill does not align to this position. Rather than provide an express exemption for service contractors based upon an objective test, the Bill allows for applications to be made against businesses that are not labour hire businesses, and in that circumstance, the onus would be on the business to demonstrate that it is providing a service in order to try to persuade the FWC not to make an order. Even if the employer can establish it is not a labour hire business an order may still be made.

27. This is a critical issue - the 'contractor test' should be a threshold question to be determined, not a mere factor in an overall assessment.

28. The fundamental design problem arises due to the placement of the 'contractor test', namely at subsection 306E(8)(b). The 'contractor test' is merely a consideration for the FWC after it has already satisfied itself of the threshold issues listed at subsection 306E(1).

29. Stepping this through:

- Subsection 306E(1) states the FWC *must* make an order if it is satisfied of certain things, namely whether an employer supplies or will supply employees to perform work for a regulated host; that an employment instrument applies to the regulated host that would apply to the employees of the employer if they were employed directly by the host; and that the host is not a small business employer.
- Subsection 306E(2) states the FWC must not make an order if it is not 'fair and reasonable' to do so, having regard to matters listed at subsection 306E(8) (although, curiously, only if submissions are made).
- Subsection 306E(8)(b) contains what AREEA would describe as the 'contractor test', namely, six factors relevant to whether the performance of the work is wholly or principally for the provision of a service rather than the supply of labour, but that test is merely one of six matters that the FWC must have regard to when determining whether it is 'fair and reasonable' to make an order.

30. As a result, the assessment of whether the arrangement is for provision of a service (i.e. a contractor) as opposed to supply of labour (i.e. labour hire), would be relegated to an afterthought for the FWC after it has already decided to consider making the order, and would require submissions from the contractor and potentially its client/s to inform the FWC in its decision making – on that issue and also on the other factors listed in subsection 306E(8).

31. An example of how this would play out in practice, follows:

IN PRACTICE: How contractors will be captured in labour hire applications

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

The Contractor is required to provide evidence to the FWC that it has been engaged to perform work that is or will be wholly or principally for the provision of a service and not for the supply of labour. This involves submissions and evidence demonstrating alignment to the factors relevant to the 'contractor test' in subsection 306E(8)(b), in effect, proving the business is a service contractor, and not a labour hire business, for the purpose of the application.

Even if the Contractor can successfully prove that it is not a labour hire business, the Contractor will still be required to make submissions and present evidence to respond to arguments made by the union that has applied for the order regarding the other matters listed in subsection 306E(8).

So even if the Contractor passes the 'contractor test', the FWC may still not be satisfied that it is *not fair and reasonable* to make an order, and may still make an order.

32. The above scenario appears to be how the Government sees the 'contractor test' working in practice. Applications could be made against contractors and the contractor effectively has a 'reverse onus of proof' to avoid an order being made. Not only does a contractor need to prove they are indeed a service contractor, the FWC would need to be convinced that, on balance, and including having regard to the arguments put on the other matters by the applicant for the order, it is 'not fair and reasonable' to make an order.

33. As a result of this proposed system, a contractor that deploys workers into a client's workplace to deliver its services – which is basically all contractors - will have an omnipresent risk that, if the client has an enterprise agreement in place, the contractor could have an application made against the business – no matter how speculative or vexatious that application may be – and be required to defend it before the FWC.

34. The effects of the mere risk of this occurring could see every contractor in the country required to provide any prospective client that has an enterprise agreement in place, with an assessment of this risk, and how they would deal with such an application if it eventuated (including how they would deal with the implications of an order being made, such as the administrative burden), as part of the tendering process. Further, contractors would be unable to tender for such work with any certainty the wage rates they quote will be the rates incurred.

35. Businesses that have some of their own employees under an enterprise agreement but rely upon contractors to deliver efficient, specialist services may be forced to insource to mitigate risk, which, in turn, could put contractors out of business. This would be a hammer blow to productivity and efficiency across the economy.

36. Further, the performance of specialist contracting services by businesses seeking to mitigate risks associated with potential orders, may result in employers performing tasks and work where they have little or no past expertise or track record. The requirement for those businesses to learn and implement safe methods of work and undertake specialist work in small volumes, where in the past they would employ contractors which turn over such work in larger volumes, would likely drive sub-optimal outcomes, inefficiency and considerable costs.

2.2 (b) 'Catch all' clause in the contractor test

37. Another serious problem with the drafting of Part 6 is that the final item in the proposed 'contractor test' will work as a 'catch all' clause, effectively allowing the FWC to give less weight to, and perhaps in some circumstances disregard, objective evidence that a commercial arrangement is for provision of a service and not principally for supply of labour, and to instead make an order based upon subjective judgements about the appropriateness of outsourcing in the first place.

38. The last of the six factors under Part 6, Division 2, Section 306E(8)(b), is set out as follows:

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

39. This final factor in the 'contractor test' adds nothing to a true determination of whether an arrangement is for supply of labour or provision of a service. It is markedly different in nature to the first five factors (I – V) all of which require the FWC to make objective, factual findings about the nature of the employer's business and its employment arrangements.

40. In stark contrast, this final factor (VI):

- Would involve the FWC needing to determine subjective matters that it is not necessarily well equipped to assess. Seemingly, this includes assessing the operational requirements or general appropriateness of the regulated host to use a contractor to perform a particular function – that has nothing to do with the nature of the contractor's business;
- Would involve information that would not necessarily be readily available to the employer (contractor), and which almost certainly would require input from the client (or potential 'regulated host') to determine;
- Would invite analysis of historical employment and insourcing/outsourcing activities of the client/host, that are likely not relevant to the immediate party or parties subject to the application; and

- If a host has an enterprise agreement in place that could apply to the types of employees delivering a contract – which it must have for the FWC to get this far in its determination - then this 'box' will always be ticked.

IN PRACTICE: The 'catch all' clause sees orders made against a contractor

A service Contractor is engaged by an offshore oil and gas producer to provide a specialist service. An application is made by a relevant union for a RLHA Order on the basis the producer has an Enterprise Agreement in place that could cover the employees of the Contractor directly and the Contractor is not a small business.

The Contractor provides submissions that satisfy the FWC that it is 'wholly or principally providing a service' against the first five criteria under subsection 306E(8)(b) – i.e. the objective test including relating to supervision, control, statutory obligations, and equipment.

The union makes assertions about the sixth criteria (VI). The Contractor does not have information about the client's (or 'host's') historical business practices, previous employment at its workplace, history of outsourcing, or other relevant information , and must involve its client in the proceedings in order to refute the union assertions.

Despite finding the first five factors in subsection 306E(8)(b) indicate that the business is providing a 'service' to the client, the FWC nonetheless decides it is "fair and reasonable" to make an order, including because the client used to employ people directly to do similar work several years ago and could potentially do so again.

41. The above scenario appears to be what paragraph 306E(8)(b)(vi) is intended to achieve – to allow the FWC to override objective factors relating to the nature of a business that indicate that the business is providing a service and is not a labour hire business, but make an order based on subjective views about the appropriateness or otherwise of outsourcing the function.

42. To that end, paragraph 306E(8)(b)(vi) will result in outcomes that are not aligned to the policy intent. It corrupts the 'contractor test' from being a relatively objective assessment of the service being provided by a contractor, to instead be a more subjective, and even moral, judgement regarding why the host made the choice to obtain the service in the first place.

43. As a matter of principle, if the issue is determining the character of a contractor, it should be accepted that the client or host's arrangements for its work are not a good measure – the test should focus on the contractor and the work it does, not what the client does, did or could do.

2.2 (c) Exempting contractors from labour hire regulation

44. The best way to avoid these pernicious effects is to <u>not legislate</u> Part 6 of the Closing Loopholes Bill. This Part, and the Bill overall, is beyond salvageable.

45. Should the Government press forward and ignore the widespread warnings and concerns of the business community, Part 6 would require a wholesale redrafting to provide an unambiguous and express exemption for service contracting businesses, assessed by reference to the contractor's business, including to disincentivise parties from making applications outside of clear labour hire arrangements.

46. Ways in which this could be considered include:

    a) A wholesale redrafting of Part 6 so that the FWC would need to be satisfied a workplace arrangement is wholly or principally for the supply of labour, and is not for the provision of a service, *before* it could move forward with considering whether to make an order (i.e. adding this as a 'threshold issue' at Section 306E, subsection (1));

    b) Providing definitions of labour hire and service contracting businesses and making it clear that only the former types of employers can be subject to applications, and the latter cannot;

c) Placing the burden of proof on the party making an application that a workplace arrangement aligns to the definition of labour hire in order to satisfy the FWC that it should consider the application; and

d) Removing the final factor (VI) from the 'contractor test' to ensure the focus of the test is on objective facts relating to the contractor's business, and the nature of the work the employees are performing for the contractor.

2.3 Pay obligations are completely unworkable

47. Even if Part 6 was considerably redrafted to ensure service contractors are not captured in the scope of RLHA Orders, the obligations that would be imposed on labour hire businesses captured by such orders would be completely unworkable in practice.

48. In addition to the general administrative burden created by the need to plan for potential orders (including providing for such risk in tenders) and the impacts on the attractiveness of utilising labour hire services, AREEA's labour hire members have identified the following issues.

2.3 (a) Full Rate of Pay

49. Relying on the 'Full Rate of Pay', as defined in s 18 of the FW Act, as the basis for the 'Protected Rate of Pay' creates issues with 'double dipping' as well as complexities for employers in breaking down all relevant payment types with the host's enterprise agreements.

50. Referring to the definition in the Act would mean the 'Protected Rate of Pay' must account for (a) incentive-based payments and bonuses; (b) loadings; (c) monetary allowances; (d) overtime or penalty rates; and (e) any other separately identifiable amounts.

51. AREEA has particular concerns about "(e) any other separately identifiable amounts" being included within the definition of 'Protected Rate of Pay', and the complexities this will create for employers to comply with pay orders.

52. Another issue is the potential for double dipping, and in particular where the employer (labour hire business or contractor) has an enterprise agreement in place (although in any event when the employer is covered by an Award).

53. Unlike a 'normal' enterprise agreement situation (where an Award or an earlier expired agreement does not apply if an enterprise agreement applies), two instruments will apply and the employer will need to comply with both. It is very common for employers to take quite different approaches on what, and to what extent, extra payments like allowances and penalties are included in the rates payable under an enterprise agreement. Rolled up rates are no 'loophole'.

54. Further, in a worst-case scenario, a host/client agreement could feasibly incorporate a modern award or many modern awards by reference. This would mean in practice that a RLHA Order could require an employer to ensure compliance with three or more industrial instruments, which has the potential to create significant payroll complexity and very real risks of mistaken underpayments and/or industrial disputation over terms and conditions.

55. Similarly, increasing some non-monetary benefits (like leave, or insurance cover) instead of paying higher rates, or vice versa, is a common approach in enterprise bargaining.

56. If an employer is bound to pay in accordance with its enterprise agreement, and then also bound to pay at least the full rate of pay (and perhaps more for other benefits) under someone else's enterprise agreement, there is a clear potential for the employer to end up having to provide the 'best of both worlds'. No ability would exist for an employer to rely on any 'trade offs' that were made in their own enterprise bargaining, or where the employer legitimately and lawfully opposed claims before reaching the bargain struck in good faith.

57. Overall, working through these complex scenarios would have enormous impacts on cost, productivity and efficiency throughout the resources and energy sector supply chain, and add further weight to the only reasonable conclusion that can be reached here - Part 6 of the Closing Loopholes Bill is unsalvageable and should be withdrawn.

IN PRACTICE: Administering 'full rate of pay' obligations

Example A – Productivity bonuses

Company B is a labour hire company subject to various RLHA Orders. Several mining clients have terms in enterprise agreements that set out (or refer to policies that set out) productivity bonuses. The following issues arise:

- Company B has hundreds of employees that transition in and out of its clients' workplaces for varying periods of work, on demand. Typically, anywhere from 2 weeks to 6 months. Because the orders are based upon 'full rate of pay' including "any other separately identifiable amount", Company B is required to account for the productivity bonuses paid by its clients to their direct employees, and somehow breakdown an amount that should be payable to Company B's employees.

- Some clients pay these bonuses to their employees at the end of every half year interval based upon the volume of commodity extracted within that period. Do all of Company B's clients have an obligation to advise Company B what those bonuses are at ever half year interval? How does Company B breakdown a half year bonus into an hourly rate or day rate?

- Some clients pay these bonuses monthly based on commodity volumes. Does Company B have to wait until it is advised of these bonus figures before it can proceed with its monthly payroll processes? What would this add, in terms of red tape and delays, in relation to Company B paying its own people?

Note: these types of issues arise when the same concepts are applied to other types of discretionary payments, not made within regular systematic payroll processes.

Example B – Rolled-up rates

Company C supplies hundreds of labour hire employees to dozens of client workplaces. All are subject to RLHA orders. All clients practise 'rolled up rates' in which the 'full rate of pay' is accounted for in a single dollar figure and not split out in their Enterprise Agreements.

As a result, Company C must make hundreds of additional calculations within each payroll period to ensure they are paying their people the exact amounts they are entitled to, including because Company C is covered by an award.

2.3 (b) Treatment of Leave

58. The expectation that labour hire employers subject to RLHA Orders would pay out all forms of leave, including annual leave and long service leave (**LSL**), at the 'Protected Rate of Pay' is extremely problematic.

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

60. Some types of leave (annual leave and LSL) are accrued throughout an employee's employment and then held over to be paid at a future point in time.

61. Businesses are required to account for this untaken leave balance as a contingent liability in their financial statements.

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

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

64. Further reasons this approach is highly problematic include:

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

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

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

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

    e) Applying wide variances in rates of pay will have significant and largely unknown impacts on the administration and funding of the Coal Long Service Leave scheme.

       The Scheme currently has over $2.1 billion in funds to cover future LSL entitlements. Approximately 40% of that accrued entitlement is estimated to come from labour hire and contracting (non-principle) businesses. This will add significant new complexities to an already-complex scheme, making administration even more difficult.

65. Examples of the issues created by the proposed treatment of leave follow on the next page.

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

67. However, it is AREEA's position that payment for annual leave and LSL must revert to the rate of pay found within the contract or employment, enterprise agreement or award that applies to the employer and directly underpins the employment of that individual.

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

IN PRACTICE: Issues with current approach to leave payments

Company A is a large labour hire company. It has 5000 employees covered by five different enterprise agreements. Company A is also subject to a number of RLHA Orders in various workplaces where the host also has EAs that could cover Company A employees directly.

In this hypothetical, the following scenarios are all encountered by Company A:

- An employee has been working for Company A for 10 years. During that time they have been moving around various sites. Since the new labour hire provisions took effect, they have worked at four different sites all with orders in place. That employee resigns from employment with Company A, requiring 10 weeks of long service leave and six weeks of accrued annual leave to be paid out.

  Various problems arise for Company A:

  - What rate of pay should be applied when the entitlements are paid out? There are five different rates to consider (the employee's actual enterprise agreement terms + various terms of four different clients). Payroll systems have not been developed to be able to allocate different rates of pay against different hours of leave accrued. Even if a system was able to do so, how does Company A account for LSL which is an entitlement based upon many years' service?

  - For most of the employee's time with Company A, they have been charged out at a rate reflective of Company A's labour costs at the time (as per its own enterprise agreement). Now the employee is leaving employment, Company A is required to pay entitlements at the rates of pay within client enterprise agreements, making the employee's time working with Company A unprofitable for the company. This puts in jeopardy the employment of others within Company A as it makes engaging them uncommercial.

- Another employee has also worked for Company A for 10 years and is planning on leaving employment. They request to be transferred to a client site subject to a more attractive RLHA Order, and then resign one day after commencing there. As a result, Company A is required to payout the entitlements at the higher rates of pay, even though the employee had only spent one day at the site.

- Another permanent employee wants to take a four-week holiday. They await transfer to a higher paying client workplace before putting in their request for leave. This practice becomes common and, before long, there is a disproportionate number of employees requesting long periods of annual leave from higher paying client workplaces than lower paying client workplaces.

- Company A has 380,000 hours of accrued leave liability (average of 76 hours or two weeks per employee). Under the terms of its own enterprise agreements (paying $50 per hour on average), the liability was recorded on Company A's balance sheet as $19 million. Company A now has 12 RLHA Orders made against it. How does Company A account for the value of its leave liability? As Company A is listed on the ASX, how does the market calculate its true value with such great variability in its liabilities?

2.4 Further issues and concerns

2.4 (a) 'Same Job' is no longer considered

69. AREEA notes with concern that considerations of 'same job' or 'same work' have been entirely cast aside in the drafting of Part 6 of the Closing Loopholes Bill.

70. The justification for the ALP's longstanding 'Same Job Same Pay' policy has always centred around evidence (both formal evidence and anecdotes of Labor MPs) that two actual real workers doing what the ALP/unions consider to be the 'same job' have experienced a clear disparity in the pay rates they receive for that work. This was a key theme of inquiry and evidence heard by the *Senate Select Committee on Job Security* which was led by the ALP (then in opposition) throughout 2021.

71. The committee's third interim report, tabled in November 2021, focuses on 'labour hire and contracting' and states (emphasis added):

> *Evidence indicates that, in many cases, a host's enterprise agreement does not apply to their labour hire workers, resulting in differential treatment between these individuals and those directly employed by the host. Although commonly working side-by-side with each other, the committee is very concerned that labour hire workers frequently receive lower pay and conditions than their directly employed counterparts.*
>
> and
>
> *Workers who work side by side, doing the same job, should receive the same pay and labour hire must not be used to undermine better, and more secure jobs.*[10]

72. Emphasis on real workers doing the 'same job' or the 'same work' was also a substantial theme in then-Opposition Leader Anthony Albanese's policy rationale for the *Fair Work Amendment (Same Job, Same Pay) Bill 2021* – the ALP's private members' bill introduced by Mr Albanese to the Lower House in November 2021:

> *You end up with two Australians working side by side, doing the same hours and the same job, with the same qualifications; yet one gets paid less and has less security than the other.… Labor will uphold the principle that if you work the same job, you should get the same pay. It's not complex.*[11]

73. In a press release also issued in November 2021, then-Opposition Spokesperson for Employment and Workplace Relations, Tony Burke, said:

> *In Question Time today Labor asked Deputy Prime Minister Barnaby Joyce about two train drivers in the Bowen Basin who do the exact same job – but one gets paid $300 a week less because his job is outsourced to a labour hire firm.*
>
> and
>
> *That's why Labor committed earlier this year to implementing a "same job, same pay" policy as part of our Secure Australian Jobs Plan. Under a Labor Government workers employed through labour hire companies will receive no less than workers employed directly.*[12]

74. It is also worth noting the Department of Employment and Workplace Relations (DEWR) *Same Job Same Pay consultation paper,* released on 13 April 2023, sought feedback on how to

[10] Senate Select Committee on Job Security, Third interim report: labour hire and contracting, November 2021
[11] The Hon Anthony Albanese, *Fair Work Amendment (Same Job, Same Pay) Bill 2021*, Second Reading Speech, 22 November 2021
[12] Same Job, Same Pay is no 'made up issue', the Hon Tony Burke MP, press release 23 November 2021

identify when people were performing the 'same job' and could therefore be subject to proposed regulation (emphasis added):

> *In order to legislate Same Job, Same Pay measures with clarity about the circumstances in which they apply, it will be necessary to identify when a labour hire worker is performing the 'same job' as a directly engaged employee.*[13]

75. Despite relying upon real evidence of a perceived 'unfairness' as the entire basis for the 'same job same pay' policy, at some point between the release of the DEWR consultation paper and the introduction of the Closing Loopholes Bill on 4 September 2023, the Government seemingly decided it was too difficult to directly address concerns about people being paid less for doing the 'same job', and easier to instead rely upon enterprise agreement coverage to trigger a potential obligation – irrespective of whether there are actual people performing the same or similar work under each of the relevant instruments.

76. Relying upon mere enterprise agreement classifications, without any consideration for whether the 'same job' or 'same work' is being undertaken by actual employees of both client and contractor parties, greatly broadens the application of this policy and fundamentally changes the substance of what it is trying to achieve:

    a) Instead of implementing "same job, same pay" principles for actual employees working "side by side" doing the "same work", orders and pay obligations will exist in circumstances where there is no real "unfairness" occurring but rather a prospective or entirely hypothetical "unfairness" that *could* come to fruition under certain circumstances.

    b) Instead of addressing a very defined real-life scenario, Part 6 of the Closing Loopholes Bill is instead all about enforcing union-agreed "site rates" throughout a project owner or principal business's supply chain, with little regard to the negative impacts on productivity and the integrity of the enterprise bargaining system.

77. In the short term, project owners or principal businesses could never seek to outsource or insource certain functions or scopes of work without exposing the business to a RLHA Order and all the administrative complexities and red tape that would come with defending an application or complying with an order. The longer-term impacts will drive businesses to substantially narrow coverage of their enterprise agreements and encourage greater outsourcing to contractors and/or labour hire firms.

78. The approach also fails to properly account for very broad variances in how different businesses set out their schedules of classifications in enterprise agreements. The lazy way in which the Bill seeks to resolve this is to require employers and host businesses subject to a RLHA Order to work together and 'place' a labour hire or contractor employee in the nearest classification or salary band that they would be covered by if employed directly by the host.

79. Not only does this bring about unnecessary and unproductive complexity and administrative burden, in many circumstances this exercise would account to little more than guesswork.

80. In practice, Part 6 of the Closing Loopholes Bill will result in labour hire or service contracting businesses working around the clock trying to shoehorn employees into client enterprise agreements that are structured entirely differently from their own and may have more or less variances in classifications or salary bands.

81. This will significantly undermine both the appeal and integrity of Australia's enterprise bargaining system and may lead to employer strategies to exit bargaining altogether.

[13] DEWR Consultation Paper: Same Job Same Pay, 13 April 2023

2.4 (b) Alternative agreements can be cherry picked as the standard

82. AREEA is concerned by the concept of 'Alternate Protected Rates of Pay', meaning the ability for the FWC, on application by a party such as a union, to nominate a different enterprise agreement to which labour hire/contractor employees would be entitled other than the enterprise agreement covering employees of their direct client/host.

83. Considering large companies often have multiple agreements covering different sites or related entities within a corporate group, the inclusion of this mechanism may encourage unions to 'cherry pick' those enterprise agreements that would provide their members (or prospective members) the greatest pay outcomes, irrespective of whether that enterprise agreement is the most obvious comparator for the employment arrangement subject to the application.

84. It would also, undoubtedly, lead to more unnecessary disputes and litigation about which enterprise agreement should set the protected rate of pay.

85. AREEA is also concerned by the possibility of competing unions making separate applications covering the same employees or workplaces, seeking to secure orders for different Protected Rates of Pay to "one up" each other on outcomes achieved for those employees.

86. Simply, there is no justification for the 'Alternative Protected Rate of Pay' mechanism especially when considering the counterproductive behaviours and complexities that would arise.

2.4 (c) There is no firm exemption for short-term work

87. Part 6 contains what is purported to be an exemption from RLHA Order pay obligations when an employee performs, or is to perform, work for a regulated host for a period of no longer than three months[14].

88. At face value such an exemption for short-term work is appropriate – it would make no sense to impose such a significant burden on businesses where labour hire arrangements are objectively temporary, such as the utilisation of labour hire casuals to backfill positions until FTE employees are recruited by the principal to the role.

89. There are, however, two fatal flaws in how this is executed. Firstly, three months is too short a minimum timeframe for resources and energy sector operations, where 'short-term' uplifts in production or shutdown maintenance projects may extend up to 12 months.

90. Given the policy is purportedly intended to apply to circumstances where labour hire is used to supplement or replace a direct-hired workforce for a considerable period of time (to "undercut an enterprise agreement"), it is AREEA's view employers should be exempt from RHLA Orders until supplementary labour is engaged beyond 12 months.

91. A second, even more fundamental issue, is the draft provisions provide the FWC with broad discretion to abolish, shorten or lengthen the time period of which short-term arrangements are exempt.[15]

92. This demonstrates a poor understanding of how legislative provisions are interpreted and treated in practical business situations. Simply, if an employer cannot be certain that short-term arrangements are expressly exempt, namely because the FWC can whimsically choose to abolish or shorten the 'default' three-month timeframe at the request of applicants, there is very little utility in having this in the legislation at all.

93. Having a firm exemption for short-term work would send a clear signal to employers and clients that they can engage in short-term labour hire and contracting arrangements free from exposure to being pulled into costly and litigious proceedings before the FWC. The absence of this adds further weight to the unworkability of this proposed new area of regulation.

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[14] At Section 306G, subsection 2(b)(i)
[15] At Section 306J

2.5 (d) The anti-avoidance provisions may capture legitimate business responses

94. AREEA has concerns with the anti-avoidance provisions in Part 6 of the Closing Loopholes Bill. Division 4 sets out the anti-avoidance provisions, which include provisions seeking to make it unlawful for a person to enter into a 'scheme' in order to prevent the FWC from making an order.

95. It is very unclear what behaviours these anti-avoidance provisions are intended to prohibit. The explanation for what constitutes a 'scheme' is extraordinarily broad and could, in theory, capture almost anything. Further, given the range of matters that are relevant to whether the FWC makes an order, it is entirely unclear what conduct might be considered to 'prevent' the FWC from making an order.

96. If enacted, these new labour hire regulations, including the potential for FWC orders, are going to be part of the context for perfectly legitimate commercial decisions – in fact, that seems to be what is intended. For instance, some businesses may decide to modify their use of labour hire businesses, perhaps to reduce their use or alternatively to have entire functions performed by full scope service providers. It is unclear as to whether it would be unlawful for a business to do so.

97. Similarly, labour hire businesses (given the potential administrative burden of these proposed laws alone creates a real disincentive to use their services) may well experience a decline in demand and may seek to pursue alternative opportunities, including transforming their service offering beyond being principally the provision of labour. On a broad reading of these ambiguous anti-avoidance provisions, labour hire businesses may be prevented from lawfully doing so, which would lead to loss of business opportunities and impacts on commercial viability and employment.

98. Without clarity, the proposed anti-avoidance provisions suggest that any attempts by businesses to change their current use or provision of labour hire services, where there is a mere possibility of FWC orders, may be unlawful. Like many parts of the Bill, these provisions seem to have strayed well beyond the stated (limited) policy intentions. If the new laws are intended to prevent avoidance of enterprise agreement obligations through the use of labour hire – these anti-avoidance provisions seem to be misconceived. The provisions appear to elevate the making of orders as being an end in itself.

99. That the anti-avoidance provisions do not specify what behaviour should be prohibited, and could in theory apply to various types of legitimate business activities, is further justification for Part 6 (and the entire Closing Loopholes Bill) to be withdrawn from Parliament.

100. If the Government does proceed, AREEA recommends significant re-drafting of the anti-avoidance provisions to specify exactly what behaviours would be considered unlawful anti-avoidance and to ensure legitimate business restructuring and/or pursuing new operating models is not captured as a 'scheme', or as otherwise being unlawful under the Act.

101. As a minimum, any 'anti-avoidance' provisions should not apply unless an order has actually been made by the FWC. Any other structure would be based on a 'presumption' that the FWC would make an order in any given set of circumstances, and having regard to the other components of the proposed regime, that would be an entirely false assumption.

3. OTHER PARTS OPPOSED

3.1 Casual Employment (Part 1)

102. AREEA has significant concerns with the Government's proposal to amend the definition of casual employment.

103. While the resources and energy sector is a below-average user of casual employment (circa 17% compared to 25% for the economy as a whole), where it is utilised, casual employment provides a very important role. Examples include:

    a) In the contracting supply chain, highly skilled employees often take well-paid fixed-term or casual contracts where their capabilities are in greatest demand and command the highest hourly rates. This includes short-term shutdown and maintenance contracts, fixed-term engineering contracts and experienced specialist consultants who prefer to be on a 'casual employment' basis with several leading high-paying employers, who engage their specialist skills when and as required.

    b) In some of the lower skilled areas of the resources sector supply chain (such as camp management), casual employment is used in similar ways to other sectors – to cater for fluctuating client demand. A good example is a hospitality provider to remote mine sites whereby the demand for chefs, cleaners and waitstaff is entirely dependent on how many people the client has on-site, which itself is dependent on commodity demand and a range of other commercial factors.

104. In these examples and all other casual employment arrangements, it is critical both the employer and employee have clarity about the nature of their contractual engagement.

105. For this reason, AREEA was a strong supporter of the Australian Parliament legislating a clear definition of casual employment into the Fair Work Act in 2021, giving primacy to the contract terms and minimising scope for post-contractual conduct to change the engagement terms, unless that conduct persisted for longer than 12 months, at which point it could be dealt with by the new casual conversion rights provided to employees.

106. The High Court's determination in *Rossato* was also welcomed as further clarity that contractual terms are the key determinants of an individua's employment status[16]. The Closing Loopholes Bill would undo all that certainty and again open up casual employment as a significant point of risk and litigation.

3.1 (a) Casual definition

107. The proposed new casual definition comprises highly subjective indicia, exemplified below, including:

    a) 'real substance, practical reality and true nature' of the relationship,

    b) 'mutual understanding or expectation from the conduct',

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

        - In relation to the above point, other employment relationships within the organisation should not determine whether a particular employment relationship is one of casual employment or not. AREEA considers it imperative that this be amended or removed to provide certainty to all parties.

[16] WorkPac Pty Ltd V Rossato & Ors [2021] HCA 23

108. Due to the subjectivity of these elements, there would be no clear or certain guidelines as to the nature of the employment, which will result in additional unnecessary time, costs and litigation to ascertain what the parties intended at the start of their working relationship. Businesses, as well as individuals, cannot afford the cost of ventilating these disputes.

109. The indicia do not adequately take into account the employer's operational needs (indeed, they are heavily skewed against this consideration, due to the placement of these factors below others at item 15A(2)(c) of the Closing Loopholes Bill). Equity demands that employers balance the competing factors of a business' operational needs for a flexible and responsive workforce, as well as the desires of individuals who make up that workforce.

110. AREEA would support a clearly worded exemption for employees who request certain regular, systemic patterns of work and who require specific rosters/shifts/patterns of work for study/family/training commitments, so that where those patterns of work have been requested by an employee, the employer will not contravene the FW Act for obliging them. It would be expected that such an exemption would also protect employers against the misrepresentation offence found in s359A of the Bill, as such an exemption would be pointless without such a protection from a civil remedy provision.

    a) The retention of the *Fair Work Amendment (Casual Loading Offset) Regulations 2018* is critical on this last point. This regulation would ensure an employer can recuperate the 25% loading paid to a casual employee against any leave or redundancy entitlements that may be awarded to them, if they are found to have been misclassified at a later date.

111. The Bill provides no indication as to *how much variation* in work will preclude a 'regular pattern of work' and this is likely to result in unnecessary litigation. Until a body of case law exists to direct decision makers to the meaning of this phrase, which could be years away, there needs to be some definitive guidelines around what this means. Employees, as well as employers, should be able to understand from the legislation whether or not they are exposed to litigation for the hours of work they have agreed to do between themselves, without risk of contravening s359A-C of the Closing Loopholes Bill.

3.1 (b) Casual conversion

112. The Fair Work Act now includes a right to casual conversion which creates a statutory obligation on employers to offer casual employees the ability to convert to permanent employment, provided certain conditions are met.

113. In AREEA's view, the requirement to offer casual conversion is appropriate after a period of 12 months. However, consideration must be given as to whether there is a reasonable prospect of ongoing work of a similar nature to that worked in the relevant period. This is particularly relevant in the resources and energy industry, where many technical and specialised projects requiring highly skilled specialists engaged for their expertise take up to 12 months or more to complete.

114. These casual conversion rights are strong and are serving their intended purpose – since being legislated in March 2021, many of AREEA's members have offered conversion to casuals employed for 12 months with mixed take-up of those offers (note: many casual employees are satisfied with their arrangements and prefer the extra pay over leave entitlements – particularly where they work rosters that involve considerable non-working periods).

115. AREEA urges great caution in unnecessarily amending the casual conversion rights, which appear to be operating as intended whilst carefully balancing employer/employee interests.

3.2 Delegates' rights (Part 7)

116. AREEA opposes these provisions in substance and principle. AREEA is particularly concerned about these provisions because they do not appear to serve any policy agenda outside of creating new powers and influence for unions in all workplaces.

117. AREEA views this Part as the Government attempting to enshrine in law unprecedented union privileges and preferences. The changes would make certain employees who are, and should always be, first and foremost, productive members of the workforce, de-facto union organisers paid for by the business.

118. This would apply to all businesses, including those with no union presence and no enterprise agreements. No debate has taken place on why such changes are necessary. The case for these changes has simply not been made.

119. There is an important historic distinction between union officials, who are funded by union members to conduct union business, and delegates who are paid by employers to work in the interests of their businesses. This distinction must be maintained both for the good of productivity and to uphold important freedom of association principles.

3.2 (a) Protection for workplace delegates

120. There is no policy basis for the employer bearing the onus of proving that they acted reasonably towards delegates. The legal burden should at the very least be fairly placed across both delegates and employers, so that the party making the claim of unreasonableness bears the onus of showing the other party behaved that way.

121. AREEA outright opposes these proposed new 'protections'. There has been no debate as to why the existing general protections provisions of the *Fair Work Act* should be amended. The case for these changes has simply not been made.

122. The burden of these new provisions on employers greatly outweighs any actual or potential benefits to employees. Employers would be extremely cautious about engaging employee representatives for fear of contravening (however inadvertently) these provisions.

123. These provisions would also greatly increase compliance costs as organisations attempt to mitigate the exposure to legal risk by providing additional training to staff, attempting to reduce or limit high risk interactions with employee representatives, and by ensuring that there are constantly staff available to respond to an employee representative.

124. These provisions also adversely impact on workplace productivity by removing a (presumably) valuable and contributing member of the workplace so they can undertake the activities of a de-facto union organiser.

3.2 (b) Training for workplace delegates

125. AREEA opposes these proposed new provisions and is concerned by the lack of detail in the Bill around these new rights.

126. In particular, 'reasonable time' is undefined, and might mean attending training or to exercise industrial functions. There is no detail on what these 'industrial training courses' would focus on or who would deliver them.

127. AREEA is concerned that providing unlimited paid training days will create a high financial and compliance burden on employers and destroy productivity, due to the lack of any limit on the number of delegates that may be appointed per business/organisation.

128. The resources sector involves 24/7 operations, often in remote hard-to-access locations, with varying shift and roster patterns, swings and so forth. It is unclear if there will be a legal requirement that every crew, on every shift has a nominated union delegate.

129. Many energy and resources employers (and indeed employers in other areas) require a certain number of employees to be available to perform their duties in each shift, or risk breaches of health and safety standards. Where employees are unavailable to perform their work due to undergoing union training, the employer must plan and prepare for this.

130. AREEA cannot and does not support any of these over-reaching and unjustified policy proposals.

3.3 Right of entry / Exemption certificates (Part 10)

131. AREEA opposes these provisions in substance and principle.

132. The prospect of employee representatives conducting snap inspections of pay records based merely on a suspicion is concerning to all employers.

133. Employers already face challenges in accommodating union representatives on short notice on remote/rural/ offshore sites, including due to the limited facilities and accommodation available and tight rostering schedules. By expanding the circumstances in which employers may be given less notice, these issues will only be exacerbated.

134. Workplaces in the resources sector are not usually in a position to respond to unnotified union site entry demands. These are major industrial sites where induction and safety protocols need to be followed.

135. This proposal does not appear to serve any proper policy agenda. Nor is it clear how it will help to deter employers from underpaying staff.

136. There is no identifiable reason for <u>not</u> giving employers 24 hours' notice of an employee representatives' intention to enter the workplace where they suspect an underpayment. Any new rights of entry with no notice, purportedly based on mere suspicion of underpayments, would be of particular concern when coupled with the increased penalties proposed under the Bill.

137. There is no factual or evidentiary basis for assuming that wage theft/underpayments will be reduced through enabling union officials to provide no notice period.

138. These provisions give employee representatives additional unwarranted powers without addressing the major reasons for wage theft / underpayments, which are the over complexity of the industrial relations system, and the challenges involved with payroll systems (both of which will be exacerbated as a result of this bill).

139. Problematically, there is no stipulation or requirement as to how the security of personal information will be protected and in due course, securely destroyed after the shortest necessary period of time, or how the *Privacy Act* or Australian Privacy Principles will be complied with where these new rights are exercised. Employees deserve to have their personal information handled securely and responsibly by both individual union officials and the unions more generally.

3.4 Definition of Employment (Part 15)

140. The proposed new definition may mean that some workers who fall outside the scope of the FW Act because they are independent contractors will now be deemed "employees" for the purposes of the FW Act. This will apply retrospectively to all existing contractor arrangements.

141. Due to the new definition, some independent contractors (at common law) will be provided with all the entitlements provided to employees under the National Employment Standards and other rights, such as remedies for unfair dismissal.

142. In *Jamsek* and *Personnel Contracting,* several justices of the High Court were highly critical of the "multi-factor test" applied by the Federal Court, which this definition seeks a return to, labelling it:

- "distinctly amorphous";
- "necessarily impressionistic";
- "inevitably productive of inconsistency";
- "apt to generate considerable uncertainty, both for parties and for the courts";
- "subjective";
- containing "injustice of a mechanistic checklist"; and
- "not appropriate".

143. AREEA opposes this new definition of employment for the reasons listed above.

144. AREEA respects the principle of freedom of contract – where parties can freely and independently enter into contracts that are mutually beneficial. This freedom, on which commerce is based, should not be overridden by a court or tribunal based on an imprecise and unreliable set of indicia.

145. Again, this proposed legislation is indicative of significant legislative overreach. This is a concerning example of the Legislature seeking to override the Judiciary because of an outcome that does not align with the Government's agenda and the agenda of its trade union constituency. Arguably this form of legislative activism undermines the utility of the High Court.

3.5 Minimum standards for road traffic industry (Part 16, Divisions 1-2)

146. AREEA opposes the addition of these standards and is concerned about the direction this policy is taking the road transport sector.

147. AREEA supported the abolition of the former Road Safety Remuneration Tribunal (**RSRT**) as that body was more intent on making determinations on wage rates and other issues that benefitted large road transport companies – often those with strong union presence – to the competitive disadvantage of independent truck owner/drivers. In the interests of fairness and competition, AREEA opposes the reestablishment of the RSRT – which is effectively what these reforms are attempting to do.

148. Further, with the broad regulation making powers, the Minister is effectively giving himself unprecedented powers to regulate an entire industry. This would set a very concerning precedent and has serious implications around government intervention in competitive industry settings.

3.6 Employee-like (Gig economy) workers (Part 16, Division 3)

149. AREEA opposes these provisions and supports broader business calls for the scope of 'employee-like' to be more narrowly confined.

150. While AREEA understands that the resources and energy sector is not a primary target for these provisions, AREEA is concerned that the jurisdiction of the FWC is expanding beyond dealing with employees and employers.

151. AREEA supports individuals and organisations' rights to freedom of contract.

3.7 Wage theft (Part 14)

152. In principle, AREEA does not oppose strong penalties, including carefully defined criminal penalties for the most extreme and egregious cases, for clearly intentional fraud and similar deliberate misconduct leading to underpayments.

153. However, the Closing Loopholes Bill goes well beyond that principle and instead seeks to increase penalties for unintentional civil breaches by five times.

154. AREEA cannot support a five-fold increase in penalties, which could see employers fined $4.7 million and individuals fined nearly $1 million, whilst at the same time proposing to materially increase the complexity of workplace laws in Australia and without any attempts to address or even acknowledge the overcomplexity of the industrial relations system, which is the major cause of underpayments.

155. While the Labor movement repeatedly chastises employers for underpayments, even those self-reported and immediately rectified, they ignore the reality that reducing the number and complexity of the modern awards would be the greatest action any Government could take to reduce their occurrence.

156. In relation to the FWO's discretionary criteria for entering into cooperation agreements with employers (the 'safe harbour' concept), AREEA notes that these factors are broad, discretionary, and rely on what the regulations prescribe. There is a glaring lack of detail about how the FWO might apply its discretion and what timeframe employers would be required to self-report to get access to the so-called 'safe harbour'.

157. Given the majority of underpayments are caused by overcomplexity in the IR system, which would only be further compounded by the challenges created by this Bill (e.g. dealing with Protected Rate of Pay in a RLHA Order), providing a safe harbour that does not have an objective, easily ascertainable criteria that employers can lean on if they have misunderstood their pay obligations, does little to support employers to reduce instances of underpayments.

3.8 Transitioning from multi-enterprise agreements (Part 4)

158. AREEA supports providing an avenue for employees of a business covered by a multi-enterprise agreement to pursue an enterprise agreement negotiated with their direct employer, where majority support of those employees is demonstrated.

159. However, we take serious issue with two aspects of the process proposed in the Bill.

160. Firstly, it is not appropriate to require the union party to the multi-enterprise agreement to agree with the course of action chosen by the employees, before allowing the employees to lawfully pursue an enterprise agreement. The notion that a majority of employees could only lawfully leave a multi-employer agreement in preference of an enterprise agreement, with permission of their union, is surely at odds with freedom of association principles. It is absurd to propose Australia's IR laws could allow a union to veto a democratically chosen path by employees.

161. Secondly, it is very poor policy to suggest a multi-employer agreement would continue to be the basis for the 'Better Off Overall Test' (BOOT) even after that multi-employer agreement passes its nominal expiry date. While it may be reasonable to require a proposed replacement enterprise agreement pass a BOOT against a multi-employer agreement when that multi-employer agreement is in term, once that multi-enterprise agreement expires, the BOOT should revert to the longstanding process – namely a comparison of the proposed replacement instrument (an EA) against the relevant award.

162. The system proposed in the Closing Loopholes Bill, in essence, seeks to enshrine multi-employer agreements as the new permanent baseline for businesses and potentially entire industries, displacing awards as the safety net to which collective agreements must exceed.

4. PARTS THAT SHOULD BE SPLIT OFF

163. AREEA would support the following aspects to the Bill, in principle, subject to technical considerations of business stakeholders being addressed:

    a) Family and Domestic Violence Discrimination (Part 8)

    b) Asbestos / Silica (Schedule 2 – Amendment of the Asbestos Safety and Eradication Agency Act 2013)

    c) Small business redundancy exemption (Part 2)

    d) PTSD and first responders (Schedule 3 - Amendment of the Safety, Rehabilitation and Compensation Act 1988)

164. To that end, AREEA believes the Government should support proposals by Senate Crossbenchers that these Parts of the Closing Loopholes Bill be separated from the other highly contentious proposals within and be legislated separately.

5. OTHER COMMENTS

165. AREEA does not oppose the following amendments in principle.

    a) Industrial Manslaughter (Schedule 4 – Amendment of the Work Health and Safety Act 2011)

        - As a point of policy, AREEA does not oppose the new charge for industrial manslaughter or increased penalties. However, like the 'wage theft' changes, AREEA will closely monitor the jurisprudence regarding the interpretation of intent, recklessness and negligence.

    b) Withdrawal from Amalgamations (Part 13)

        - AREEA has long held the position that the structure of trade unions, including mergers and demergers, is a matter for members of those organisations, provided the appropriate rules and laws are followed. AREEA does not oppose the Government's policy in this space.

    c) Unfair Contracts (Part 3A5)

        - AREEA does not oppose this amendment but understands small business organisations, in particular, have some concerns that should be addressed by Government.

    d) Model Terms (Part 5)

        - Note AREEA's non-opposition to this Part is limited to the practical proposal to move model term powers and obligations from the Minister to the FWC.

        - AREEA does not support the FWC (or any other party) making new model terms for policy proposals opposed in this submission – such as model terms for union delegates rights.

ABOUT AREEA

AREEA is Australia's resources and energy industry group and has provided a unified voice for employers on workforce and other industry matters since 1918.

AREEA's membership spans the entire resources and energy industry supply chain, including exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to these sectors.

AREEA works to ensure Australia's resources and energy industry is an attractive and competitive place to invest and do business, employ people and contribute to our national well-being.

AREEA members across the resources and energy industry are responsible for a significant level of Australian employment, with an estimated 10% of our national workforce, or 1.1 million Australians, employed directly and indirectly as a result of the resources industry.

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