

Making a Regulated Labour Hire Arrangement Order AFTER AREEA Amendments

PROCESS

CONSIDERATIONS

Initial 'Threshold Tests'

Application for RLHA Order by employee, union or host.

Is the FWC satisfied that the threshold considerations are met?

NO

FWC Not Satisfied

YES

FWC Satisfied

The FWC must make an order if satisfied:

- The employer supplies or will supply its employees to perform work for a host;
- An enterprise agreement that applies to the host would apply to the employees if employed by the host to perform work of that kind; and
- The host is not a small business.

CANNOT
make an order

'Contractor Test' (another threshold)

Is the FWC satisfied the work is not or will not be for the provision of a service, rather than the supply of labour?

NO

FWC Not Satisfied

YES

FWC Satisfied

The FWC must have regard to:

- Involvement of employer in performance of work;
- Extent of employer direction, supervision or control of the employees;
- Extent of use of employer's systems, plant or structure;
- Extent to which employer is subject to industry or professional standards or responsibilities; and
- Extent to which work is specialist or expert.

MUST NOT
make an order

'Fairness Test' (discretionary matters)

Is the FWC satisfied that it is not fair and reasonable to make the RLHA Order?

YES

FWC Satisfied Not Fair

NO

FWC Not Satisfied Not Fair

The FWC may have regard to (if submissions made):

- Pay arrangements of employees;
- History of industrial arrangements;
- Relationship between employer and host (related entities);
- Terms and nature of arrangement under which work performed (duration, location, industry, number of employees); and
- Any other relevant matter.

MUST NOT
make an order

The FWC must make RLHA Order specifying:

- Covered host, employer and employees;
- Host EA (for protected rate of pay); and
- Commencement and (optional) end.

How AREEA's input improved this process for services contractors and their clients:

- The 'Contractor Test' is now another threshold test, not just part of the discretionary 'Fairness Test'.
- FWC prevented from making an order unless it is satisfied the work is not for provision of a service.
- Onus no longer on contractor to prove that the work is "wholly or principally" for provision of a service.
- The 'Contractor Test' no longer requires or allows for scrutiny of the business arrangements of the client.

Making a Regulated Labour Hire Arrangement Order BEFORE AREEA Amendments

PROCESS

'Threshold Tests'

Application for RLHA Order by employee, union or host.
Is the FWC satisfied that the threshold considerations are met?

NO
FWC Not Satisfied

YES
FWC Satisfied

'Fairness Test'

Is the FWC satisfied that it is not fair and reasonable to make the RLHA Order?

YES
FWC Satisfied Not Fair

NO
FWC Not Satisfied Not Fair

The FWC must make RLHA Order specifying:

- Covered host, employer and employees;
- Host EA (for protected rate of pay); and
- Commencement and (optional) end.

CONSIDERATIONS

The FWC must make an order if satisfied:

- The employer supplies or will supply its employees to a host to perform work for the host;
- An enterprise agreement that applies to the host would apply to the employees if employed by the host to perform work of that kind; and
- The host is not a small business.

The FWC may have regard to (if submissions made):

- Pay arrangements of employees;
- [Previous 'Contractor Test']**
- History of industrial arrangements;
- Relationship between employer and host (related entities);
- Terms and nature of arrangement under which work performed (duration, location, industry, number of employees); and
- Any other relevant matter.

Previous 'Contractor Test'

Is the work **wholly or principally** for the provision of a service, rather than the supply of labour, having regard to:

- Involvement of employer in performance of work;
- Extent of employer direction, supervision or control of the employees;
- Extent of use of employer's systems, plant or structure;
- Extent to which employer is subject to industry or professional standards or responsibilities;
- Extent to which work is specialist or expert; and
- Host employs, has employed or could employ employees to whom the EA applies or would apply.**

CANNOT
make an order

MUST NOT
make an order

Significant problems with the (former) process for services contractors and their clients:

1. The 'Contractor Test' was not a stand-alone threshold test, it was just one part of the discretionary 'Fairness Test'.
2. So, the FWC could still make an Order even if it was satisfied the work is for provision of a service.
3. Onus was on contractor to prove that the work is "wholly or principally" for provision of a service.
4. The 'Contractor Test' included a 6th factor in paragraph (f), so required scrutiny of the business arrangements of the client. This could have operated as a type of 'catch all' clause if left in.