

Review of the Closing Loopholes Acts

Submission to the independent
statutory review into the operation of
the *Fair Work Legislation Amendment
(Closing Loopholes) Act 2023* and
the *Fair Work Legislation Amendment
(Closing Loopholes No. 2) Act 2024*

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SUMMARY

1. The Australian Resources and Energy Employers Association (AREEA) welcomes the opportunity to make a submission to the statutory review of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (CL1 Act) and *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (CL2 Act – collectively the “Closing Loopholes” Acts).
2. AREEA represents employers across the resources and energy sector, including asset owners/operators, contractors and service providers delivering large-scale projects in capital-intensive, safety-critical and often remote environments.
3. These employers depend on workplace laws that support flexibility, certainty and timely access to skilled labour to sustain investment, productivity and regional employment.
4. AREEA opposed the Closing Loopholes legislation in principle and substance. That opposition has been reinforced by early implementation experience. The reforms were not a targeted response to clearly identified regulatory failures. Rather, they represented a deliberate re-orientation of Australia’s workplace relations system towards expanding union power and influence inside workplaces, including in non-union settings.
5. This shift has been achieved by embedding new rights, presumptions and discretions that favour collective representation and third party intervention in the employment relationship, while transferring risk, cost and complexity onto employers.
6. While this observation applies to the Closing Loopholes Acts as a package of reforms, below are the key issues for AREEA members detailed in this submission.

a) ***Delegates rights***

The expansion of workplace delegates’ rights elevates employer-paid employees into quasi-union representatives with broad communication, access and paid time training rights, backed by enhanced protections and reverse onuses. In practice, this blurs the long-standing distinction between union officials and employees, will embed union activity within day-to-day operations and increase the likelihood of disruption, disputes and compliance risk — particularly in continuous, remote and safety-critical operations common across the resources and energy sector. These consequences were foreseeable and were repeatedly raised by AREEA during the legislative process.

b) ***Labour hire laws (‘Same Job, Same Pay’)***

The labour hire reforms similarly undermine established and legitimate workforce models that are critical to the sector. Labour hire businesses play a vital role in providing flexibility, supporting rapid workforce mobilisation, and acting as a key entry pathway for new and transitioning workers into resources and energy, investing in training, qualifications and workforce readiness to enable safe and timely deployment to sites. The CL1 Act’s labour hire laws place these benefits at serious risk. Meanwhile, the regime’s practical application has extended well beyond labour hire, drawing genuine service providers into its scope despite the legislation’s express exemption for service arrangements and creating persistent uncertainty and litigation risk for long-standing contracting models essential to project delivery.

c) ***Intractable bargaining declarations***

The amendments to the intractable bargaining declaration (IBD) regime made by the CL 2 Act exemplify the broader policy failure of the reforms. By removing meaningful downside risk for unions and employees in arbitration, the legislation has fundamentally altered bargaining incentives and normalised arbitrated outcomes in place of

negotiated enterprise agreement terms. Early case law from 2025 shows the Fair Work Commission (interchangeably “FWC” and “Commission” throughout) becoming increasingly comfortable exercising these powers, while unions are adapting their strategies to use IBDs both as a threat and as a destination.

d) **Other issues of note**

Other elements of the Closing Loopholes reforms reflect the same underlying policy direction and raise additional concerns for AREEA members. Examples are provided below – while AREEA does not make detailed submissions on these parts, it supports those of other business representatives including the Australian Chamber of Commerce and Industry (ACCI) of which AREEA is an industry member.

- The *casual employment* reforms make it harder for businesses to engage and retain casual employees, disregarding the value that casual work provides to many individuals who actively choose flexibility. In the resources and energy sector, casual engagement supports short-term projects, seasonal work and operational surges. Increasing regulatory friction in this area risks reducing opportunities while adding further compliance complexity for employers.
- The expanded statutory *definition of employment* similarly introduces significant uncertainty and compliance risk. AREEA has consistently warned that attempting to codify the employee–contractor distinction through broad, subjective and often fluid tests increases ambiguity rather than clarity, particularly in sectors that rely on specialist independent contractors and service providers.
- The government *criminalising wage underpayments* at the same time as making the workplace relations system far more complex was deeply concerning. While AREEA supports strong action against deliberate wrongdoing, the Closing Loopholes Acts expanded employer obligations, complexity and uncertainty, and then attached the most severe sanctions available for non-compliance.

7. Taken together, the Closing Loopholes Acts prioritised the expansion of union influence and leverage — including through expanded FWC discretion, intervention and arbitration powers — over encouraging greater direct engagement between employers and their employees.
8. They weakened established distinctions between employment and contracting models, expanded the Commission’s influence in commercial and operational decision-making, and increased the scope for disputes in circumstances where employers are acting in good faith. The cumulative effect is greater uncertainty, higher compliance costs and a workplace relations system that is less aligned with the needs of industries that underpin Australia’s economic growth, energy security and regional employment.

This review must acknowledge timing constraints and avoid premature conclusions.

9. Against that background, AREEA also raises a threshold concern about the timing of this review. Many of the most consequential Closing Loopholes reforms involved staggered implementation, delayed commencements, gradual union adoption, and lengthy Commission processes that have, in some cases, taken several months to see precedents set.
10. As a result, the full commercial, operational and workforce impacts of the legislation have not yet been revealed. Early case law and application trends are emerging, but they represent only the initial phase of how these reforms will reset workplaces in practice.
11. In addition to AREEA’s fundamental concerns with key parts of the Closing Loopholes Acts, this submission further sets out why the review is occurring too early to capture the full consequences and makes the case for ongoing, longitudinal evaluation.

THRESHOLD ISSUE

This review is occurring too early to assess real-world impacts

12. A fundamental theme of AREEA's submission is that, despite more than two years having passed since the Closing Loopholes Acts were enacted, it is still too early for the full impacts of its most damaging reforms to have materialised. This is not because concerns raised by business have proven unfounded, but because of the way these reforms have been staged, operationalised and strategically utilised in practice.
13. In several critical areas, the legislative changes involve delayed commencement, complex secondary processes, and behavioural responses that only emerge over time. As a result, a snapshot review at this point risks drawing premature conclusions based on incomplete evidence.

Workplace delegates' rights

14. In relation to workplace delegates' rights, there is a widely held view across the business community that key unions which strongly advocated for these reforms — particularly the CFMEU and the MEU in the construction and mining industries — have deliberately moderated their use of the new rights while legal and regulatory uncertainty played out.
15. Despite s. 350C being enacted as part of CL1 Act in late 2023, there was significant uncertainty for both employers and unions during the period between the legislation taking effect and the FWC determining the relevant modern award terms in mid-2024. That uncertainty was compounded by the Commission's initial award determinations being strongly opposed by unions and challenged in the Federal Court of Australia.
16. Only now — following the Federal Court's judgment of 17 December 2025¹, which found in the unions' favour, and the revised FWC award terms issued in January 2026 — has the framework for workplace delegates' rights been settled with sufficient clarity and breadth to enable their full practical deployment.
17. Against that background, many employers reasonably expect that unions have been “holding their fire” while the legal position was contested, and that the period ahead will see a more assertive and systematic use of these expanded rights. From that perspective, the practical impacts on productivity, managerial authority, compliance burden and workplace stability are only just beginning to emerge. A review conducted at least two and preferably three years from now is likely to be far more illuminating than one undertaken at this early stage.

Labour hire “same job, same pay” reforms


18. Similar timing issues arise in relation to the labour hire “same job, same pay” (SJSP) laws, formally known as the Regulated Labour Hire Arrangement (RLHA) orders regime.
19. While the legislation commenced on 15 December 2023, any RLHA orders made from that point were not able to take effect until 10 November 2024. Rather than encourage early applications and allow for significant lead time, in practice this saw unions hold back their applications until close to (or after) any orders were able to take effect. Further delaying the system shock of these significant new laws, the FWC's processes for dealing with RLHA applications have generally been lengthy rather than expedited.

¹ *Construction, Forestry and Maritime Employees Union v Australian Industry Group* [2025] FCAFC 187

20. In practice, there is often a substantial lag between:
 - a) a union filing a RLHA application;
 - b) conciliation processes (which the FWC typically seeks to facilitate as a first step);
 - c) the exchange of evidence and submissions in contested matters;
 - d) the hearing of the application; and
 - e) the eventual making of an order.
21. Unless a quick consent outcome is reached, it can be months before a matter is resolved – typically in the form of an order being made. These procedural realities mean that, even where the legislation has been in force for over two years, the number of RLHA orders actually operating for a sufficient period to observe commercial, workforce and market impacts remains very limited.
22. Critically, many of AREEA’s concerns with the RLHA regime relate to long-term and structural effects, rather than immediate or one-off cost increases. These impacts are only likely to emerge as enterprise agreements expire, bargaining cycles recommence, and commercial arrangements across labour supply chains are renegotiated.
23. These bargaining effects are explored further below. The key relevance to this point is they are not short-term phenomena. Such negative effects will unfold progressively over multiple bargaining cycles and across different layers of the contracting ecosystem. As a result, the most significant impacts of the RLHA regime on wages growth, labour costs, bargaining behaviour and industrial disputation are unlikely to be visible at this early stage.
24. For these reasons, AREEA cautions against treating this review as a definitive assessment of how the labour hire reforms are operating in practice. The interaction between RLHA orders and enterprise bargaining — particularly in complex, multi-employer and contractor-heavy sectors such as resources and energy — requires time and longitudinal evidence to be properly understood. This reinforces the need for ongoing, targeted reviews that track not only the number of orders made, but their broader impacts on bargaining behaviour, labour markets and economic activity over time.

Intractable bargaining declarations, and other parts

25. In relation to intractable bargaining declarations, the relevant amendments were only substantively operationalised following the CL 2 Act and have since required interpretation and application by the FWC. As outlined elsewhere in this submission, early case law from 2025 reflects an initial phase in which the Commission and bargaining parties are still adjusting to the altered framework.
26. The most significant impacts of the IBD regime — including changes in bargaining behaviour, increased reliance on arbitration, and the normalisation of Commission-imposed outcomes — will unfold progressively over multiple enterprise bargaining cycles. As agreements expire and renegotiations occur under the amended settings, the economic and productivity consequences of these changes are likely to become more pronounced.
27. Similar considerations apply to the reforms affecting casual employment and the expanded statutory definition of employment. These changes introduce new tests, presumptions and compliance obligations that operate over time, particularly as workforce arrangements are reviewed, contracts renewed, and disputes arise.

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28. The risks associated with misclassification, reduced flexibility and increased disputation are inherently cumulative and are unlikely to be fully captured in the short period since commencement.
 29. For industries such as resources and energy, which rely on diverse workforce and contracting models across long project lifecycles, these impacts will only become apparent as arrangements are tested in practice.
 30. The same is true of the criminalisation of wage underpayments. While criminal offences may exist on the statute book, their real-world effects — including on employer behaviour, compliance systems, risk tolerance and engagement with the workplace relations framework — will emerge gradually.
 31. These effects are likely to be shaped by future enforcement approaches, prosecutorial discretion and interaction with an increasingly complex regulatory environment. It would be premature to assess the effectiveness or proportionality of these measures before their practical operation, deterrent effects and unintended consequences are better understood.

The case for longitudinal review

32. Across almost all parts of the Closing Loopholes reforms, the most consequential impacts are unlikely to be fully observable at this early stage, due to delayed practical operation, evolving behavioural responses, and the cumulative nature of the risks involved.
33. For these reasons, AREEA cautions against treating the current review as a definitive assessment of whether the Closing Loopholes reforms are operating as intended. The absence of clear evidence of business and economic harm at this stage should not be mistaken for evidence that such harm will not reveal itself over coming years.
34. AREEA recommends that, in addition to the current review, the Government commit to regular, targeted longitudinal reviews of key elements of the reforms — particularly workplace delegates' rights, the labour hire SJSP regime and the impacts of the Intractable Bargaining Declaration laws on enterprise bargaining and commercial and employment outcomes.
35. At a minimum, this should include:
 - annual, time-limited data collection led by the Department of Employment;
 - public monitoring, tracking and reporting on impacts on business operations, workforce outcomes, investment decisions and broader economic activity; and
 - A second, substantial review of this type in three years' time.
36. Such an approach would provide government with a far more reliable evidence base to assess whether the reforms are delivering sustainable outcomes, or whether recalibration is required as their full effects become apparent.

KEY ISSUES FOR AREEA MEMBERS

37. This section of AREEA's submission provides greater detail on the three primary parts of concern for AREEA members – Workplace Delegates Rights, Labour hire SJSP (general issues and, separately, the impact on service providers), and the IBD provisions.

A. Workplace Delegates' Rights

A structural shift in workplace power

38. Workplace delegates' rights are not a technical or peripheral change to Australia's workplace relations system. They represent a material re-allocation of power inside workplaces, with direct consequences for operational control, safety, productivity and dispute escalation.
39. For resources and energy employers — operating in multi-employer, high-risk, remote and project-based environments — the effects are magnified. These reforms go directly to who directs work, how work is performed, and how quickly disputes can be activated and escalated.
40. As set out earlier in this submission, many of these impacts have not yet fully materialised in practice, not because the reforms are narrow or benign, but because their operation has been staged, contested and only recently settled.
41. When workplace delegates' rights were introduced, employers were given assurances that the framework would be modest, balanced and subject to practical limits through award terms. It was suggested during the passage of the legislation, including in the Explanatory Memorandum, that the FWC would operationalise the new rights through award terms and dispute resolution processes in a way that preserved work continuity, managerial authority and safety obligations.²
42. Those assurances have not been borne out. The Full Federal Court has confirmed that the Commission had no discretion to narrow or calibrate the statutory rights conferred on workplace delegates.
43. As a result, the system now operates in a materially broader and more intrusive manner than employers were led to expect. Only with the resolution of that litigation and the redetermination of award terms in early 2026 has the framework been settled with sufficient clarity and breadth to enable its full practical deployment.
44. In *Construction, Forestry and Maritime Employees Union v Australian Industry Group [2025] FCAFC 187*, the Full Court held that the Commission impermissibly limited workplace delegates' rights in three critical respects:
- Delegates cannot be confined to representing employees of their own employer. Rather, their representational rights extend to all workers who "work in" the enterprise, including those employed by other entities;
 - Communications cannot be limited to active representation - the statutory right extends to communications "in relation to" industrial interests more broadly; and
 - Nor can award terms impose absolute obligations requiring delegates to prioritise normal work where doing so would constrain the reasonable exercise of delegate rights.

² Explanatory Memorandum, *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*, at paragraphs [827-828]

45. The practical consequence is that workplace delegates' rights now extend across employers at a single site, attach to a broader category of workers, and tolerate interference with normal work where characterised as reasonable.
46. These are not marginal adjustments. They establish the conditions for more assertive and systematic use of delegates' rights and mark a clear departure from longstanding industrial norms that placed primacy on work performance, safety and employer direction.

Delegates' rights in complex, multi-employer operations

47. These outcomes are particularly acute in the resources and energy sector. Operations commonly involve principals, joint ventures, multiple contractors, labour hire providers and specialist service companies working side-by-side at a single enterprise. Under the framework as now interpreted, delegates may exercise rights in respect of workers employed by other entities and seek to engage employers with whom they have no employment relationship.
48. A remote mining operation provides a clear illustration:
 - A single site may include employees of the mine owner or operator performing core production roles, alongside one or more specialist mining services providers executing discrete production scopes — for example, separate open cut and underground operations in a mixed-mine environment. Labour hire employees are commonly used to supplement or backfill both workforces. In addition, the site may involve specialist drill and blast contractors, maintenance and monitoring providers, and engineering, procurement and construction contractors expanding or modifying the operation.
 - In such an environment, it may only take one union with coverage of the site — and one motivated workplace delegate — to exercise representational and access rights across multiple employers, contractors and labour hire providers. The practical effect is the creation of a de facto site organiser, operating across the entire project with extensive statutory protections and access rights, despite being employed by only one entity and without the accountability or constraints traditionally associated with union officials.
49. This creates structural accountability gaps. Employers may be required to facilitate delegate activities affecting workers they do not employ, supervise or discipline. Clear lines of authority — critical to safety, scheduling and risk management — are diluted. Contractual allocation of responsibility becomes harder to maintain in practice, particularly where delegate activity intersects with operational decision-making.
50. AREEA has consistently warned that the delegates' rights regime risks turning paid employees into de facto union officials, funded by employers. The Full Court's interpretation confirms this is not rhetorical. Delegates may exercise statutory powers during working time, act inconsistently with ordinary employment duties where reasonable, and lawfully disrupt normal work in the course of exercising those powers.
51. This blurs the longstanding distinction between union officials — remunerated and directed by unions — and employees — remunerated and directed by employers. It embeds employer-funded organising capacity within workplaces, including non-union workplaces, and shifts the balance of power in a way that was neither transparently acknowledged nor fully tested during the legislative process.
52. To date, practical use of these powers has been moderated, not by any inherent limitation in the framework but rather reflecting prolonged legal uncertainty that has now been rectified in favour of the very unions who campaigned heavily for these broad new site organising rights.

Safety, productivity and dispute escalation

53. In safety-critical industries, these changes are not abstract. Their significance will become increasingly apparent as the post-Federal Court framework is utilised more fully in day-to-day operations, particularly in complex, multi-employer worksites.
54. Resources and energy operations rely on disciplined work sequencing, well-established command structures and immediate compliance with safety directions. A framework that weakens work-priority norms and expands third-party influence into operational decision-making increases systemic risk. Legal tolerance for disruption where characterised as reasonable creates uncertainty for frontline supervisors and managers responsible for maintaining safe systems of work.
55. Productivity impacts flow directly from these dynamics. Expanded delegate rights increase the scope for interruption, amplify bargaining leverage and accelerate dispute escalation. Over time, this will undermine operational efficiency and investment certainty across the sector.
56. Delegates' rights also do not operate in isolation. They interact with, and amplify, other Closing Loopholes reforms — most notably intractable bargaining and the “same job, same pay” regime. Enhanced delegate access and protections will strengthen union coordination across sites, increase leverage during bargaining and facilitate strategic use of new statutory mechanisms to grow union power and influence at a worksite regardless of the size and depth of its membership.
57. The combined effects will see higher frequency of disputes, longer dispute duration and a heavier regulatory burden on employers.

Timing and uncertainty

58. These substantive issues are compounded by ongoing implementation uncertainty. Employers complied in good faith with award terms later found to be invalid and now face retrospective correction of those terms. This creates uncertainty about lawful conduct during the intervening period and exposes employers to compliance risk despite reasonable efforts to follow the law as it stood at the time. A broader problem is demonstrated here with the Closing Loopholes reforms: complexity, ambiguity and shifting goalposts that undermine confidence in the system.
59. A further example of unresolved complexity is the operation of the paid training entitlement for workplace delegates. While the award terms seek to limit access to paid training time to one workplace delegate per 50 eligible workers, it remains unclear how this limitation operates in practice in complex, multi-union workplaces.
 - As an example, consider an offshore vessel operating with approximately 50 employees on board. It is common in such environments for multiple unions to have coverage of the workforce. Marine crew may be represented by the MUA, AMOU and AIMPE across integrated ratings, officers and engineers, while specialist construction or decommissioning work may involve employees represented by the AWU, AMWU and ETU. In this scenario, six well-established unions may each have an active workplace delegate seeking access to up to five days of paid delegates' training.
 - The current framework provides no clear answer to whether the employer is required to provide paid delegates' training to each of those six delegates, or whether the entitlement is capped at a single delegate for the entire workforce of 50. If the latter, the framework does not explain who determines which delegate receives the benefit, or on what basis. Nor is it clear whether unions whose

delegates are refused access to paid training may argue that the employer has “hindered or prevented” the exercise of their delegates’ rights, thereby triggering disputes, litigation and/or penalties.

- It is likely that the FWC contemplated scenarios of this kind when developing the “one delegate per 50 eligible workers” limitation. However, these practical questions are not addressed in the legislation, in the award terms, or in any published Commission statement. They have not yet been tested before the Commission or the courts.

60. These questions are not theoretical. They have real cost, operational and workforce planning implications for employers, particularly in offshore, remote and highly unionised environments common across the resources and energy sector.
61. This lack of clarity places employers in an invidious position.
62. Decisions taken in good faith about which delegates are entitled to paid training may later be challenged, exposing employers to compliance risk and disputes. It also creates incentives for strategic behaviour, including the multiplication of delegate roles across unions, with cumulative cost and disruption consequences that were never transparently addressed during the legislative process.
63. Left unresolved, these ambiguities risk transforming a purportedly limited training entitlement into an open-ended and cumulative obligation, driven by union coverage and organising strategy rather than workforce size or operational need.

Implications for the statutory review

64. AREEA maintains its opposition to the workplace delegates’ rights framework in principle. Ideally, this review would recommend the delegates rights and protections inserted as s. 350C in the FW Act in late 2023 be repealed, to restore longstanding and well understood distinctions between union officials and workplace delegates.
65. At a minimum, the review must revisit the scope and operation of these provisions, particularly in multi-employer and high-risk workplaces. Reform is required to restore clarity around work priority and safety, re-draw the line between employees and union officials, and constrain cross-employer reach. These issues cannot be left to incremental litigation; they require deliberate, evidence-based policy correction.
66. Moreover, the fact that many of the most serious consequences are only now beginning to emerge also reinforces AREEA’s concern that this statutory review is being conducted too early to draw firm conclusions about real-world outcomes.

B. Labour hire ('Same Job, Same Pay') – General Issues

Overview and in-principal concerns


67. AREEA has long opposed the labour hire “same job, same pay” regime in principle.
68. The framework represents a significant and unjustified regulatory intervention into commercial labour supply arrangements across the resources and energy sector – one that materially undermines the purpose of enterprise bargaining. While framed as a fairness measure, the regime in practice operates as a powerful industrial lever that enables outcomes achieved in one enterprise to be imposed across others, irrespective of commercial context, bargaining history or operational differences.
69. RLHA proceedings, and enterprise bargaining broadly post the Closing Loopholes changes, have shown that the regime is already being used strategically to reshape bargaining behaviour, strengthen union leverage and undermine enterprise-specific wage setting.
70. The existence of a readily available “same job, same pay” pathway is distorting negotiations before any application is made, weakening the integrity of enterprise bargaining and reducing the capacity of employers and contractors to reach outcomes tailored to their own businesses. These effects are structural, cumulative and are likely to intensify over time as unions increasingly factor the RLHA regime into bargaining strategy and dispute escalation.
71. This section outlines AREEA’s key concerns with the general operation of the labour hire laws — separate from the impacts on service providers covered later — and explains why AREEA considers the regime, as designed and applied, to be legally unbalanced and damaging to workforce flexibility, competition and sustainable employment outcomes.

Regulatory uncertainty and deterrence of labour supply arrangements

72. Beyond its direct effects, the RLHA regime is creating a level of regulatory uncertainty that is itself influencing commercial behaviour across the sector. The prospect of retrospective wage alignment, retrospective increases in leave entitlements and exposure arising from future RLHA applications means that labour supply arrangements are now being assessed through a heightened risk lens, often well in advance of any formal claim or FWC involvement.
73. In AREEA’s experience, this uncertainty is altering contracting and workforce decisions in real time. Employers and labour hire providers are increasingly making commercial decisions based on potential RLHA exposure, such as limiting the scope or duration of labour hire engagements or avoiding such arrangements altogether where the risk profile is difficult to quantify. This is occurring even in circumstances where labour hire arrangements have historically operated lawfully, transparently and with workforce support.
74. The result is a deterrence effect that extends beyond the stated intent of the legislation.
75. Workforce flexibility is reduced not by the making of RLHA orders, but by uncertainty about when and how the regime may be applied, with longer-term consequences for labour deployment, operational responsiveness, supply-chain costs, project delivery and investment.

Distortion of enterprise bargaining dynamics

76. AREEA’s close monitoring of RLHA proceedings and enterprise bargaining across the resources and energy sector has shown that the “same job, same pay” regime is already reshaping bargaining behaviour in practice.

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77. For labour hire providers and service contractors, the existence of the RLHA framework is materially undermining enterprise-level bargaining.
 78. Unions are increasingly pursuing strategies designed to drive contractor and labour supplier wages toward host or asset-principal rates, on the basis that alignment now carries both strategic and legal leverage through potential RLHA applications. This weakens enterprise bargaining for contractors as a genuinely enterprise-specific process and encourages outcomes to be benchmarked — explicitly or implicitly — against host arrangements that often have very different job functions, scope, experience levels and other key differentiators.
 79. AREEA has also observed that enterprise bargaining at the host or principal level is being distorted by the RLHA regime operating in the background.
 80. Both employers and unions now bargain with the prospect of future “same job, same pay” claims firmly in mind. Employers are increasingly adopting a more defensive bargaining posture, moderating wage outcomes, tightening classification structures and allowances to manage downstream exposure through labour supply arrangements.
 81. At the same time, unions are approaching bargaining with heightened ambition — seeking to broaden classification coverage, drive base rates and introduce new or creative allowances — with the express or implicit objective of flowing these outcomes through the supply chain via future RLHA orders.

Erosion of labour hire as a workforce entry and surge mechanism

82. AREEA is concerned that the operation of the RLHA regime is undermining the role of labour hire as a critical workforce entry, training and surge mechanism in the resources and energy sector.
83. Labour hire providers play an important role in recruiting, training, qualifying and rapidly deploying workers to meet fluctuating operational and project-based demand, particularly in regional and remote locations. These arrangements support workforce participation by new entrants to the sector, workers seeking flexible engagement and individuals transitioning between projects or employers.
84. Increased regulatory risk and cost uncertainty associated with “same job, same pay” exposure is already reducing the willingness of host employers to utilise labour hire arrangements where flexibility, speed to site and short-duration deployment are required.
85. Over time, this is likely to narrow entry pathways into the sector, reduce redeployment opportunities between projects and constrain the industry’s ability to respond efficiently to demand spikes, shutdowns and unplanned operational requirements.
86. These impacts are likely to fall most heavily on regional labour markets and project-based operations, where labour hire arrangements are often essential to workforce continuity, and risk reducing — rather than enhancing — employment opportunities and workforce participation.

Failure of the “fair and reasonable” safeguard

87. A key safeguard in the labour hire “same job, same pay” regime is the requirement that the Fair Work Commission be satisfied it is fair and reasonable to make an order in the circumstances. In practice, however, case law decisions indicate that this safeguard is operating as a very low threshold.
88. To AREEA’s knowledge, of all RLHA applications determined to date, none have succeeded on the basis that it would not be fair and reasonable to make an order. This includes cases

where labour hire providers have led detailed evidence of significant financial and commercial impact flowing from the making of an order.

89. Recent RLHA hearings illustrate this point. In matters involving providers such as WorkPac, Skilled and others, evidence was put before the FWC about the commercial consequences of proposed orders, including material increases in labour costs, the shock impacts of previously unaccounted for increases in leave and entitlement liabilities, and risks to the ongoing viability of particular contracts.
90. Despite this evidence, the FWC proceeded to make RLHA orders, indicating an emerging approach in which financial impact on the labour hire provider and consequent future impacts on the workforce is given limited weight in the application of the “fair and reasonable” test.³
91. This points to a broader concern about how fairness is being assessed. The FWC appears to prioritise perceived unfairness in pay outcomes for on-hired workers, while giving less consideration to the practical consequences if a labour hire business becomes financially unviable as a result of an order.
92. If RLHA orders materially undermine the viability of labour hire providers — particularly when this effect scales across multiple contracts and businesses — the downstream consequences may be significant, including:
 - job losses and reduced redeployment opportunities;
 - unpaid or compromised employee entitlements in the event of insolvency;
 - losses to creditors and small businesses in the supply chain;
 - disruption to host operations and project delivery; and
 - longer-term impacts on competition, flexibility and resilience in labour supply markets, particularly in regional and project-based industries.
93. These second-order impacts are not hypothetical. They are a foreseeable consequence of sustained margin compression and retrospective liability increases in labour-intensive contracting models, yet there is currently no systematic mechanism to assess whether the “fair and reasonable” test, as applied, is producing sustainable outcomes over time.
94. To address this very significant issue, AREEA makes two recommendations:
 - a) The Department of Employment should establish and maintain a register to track the longitudinal commercial and employment impacts of RLHA orders.
 - Employers subject to an RLHA order could be asked to voluntarily provide periodic (for example, six-monthly) data to enable an evidence-based assessment of how the regime is operating in practice, including:
 - workforce numbers servicing the relevant client(s);
 - whether affected contracts have been retained, renegotiated or lost;
 - the impact of the order on profit or loss for affected contracts; and
 - the impact of unexpected increases in leave and entitlement liabilities.

³ Examples include [2025] FWCFB 53 *Application by the Mining and Energy Union re Bengalla Mining Company Pty Ltd* (13 March 2025); [2025] FWC 1273 *Applications by the Mining and Energy Union re Bulga Open Cut Mine* (12 May 2025); [2025] FWC 1499 *Applications by the Mining and Energy Union re Maules Creek Coal Pty Ltd* (6 June 2025); and [2025] FWCFB 134 *Applications by the Mining and Energy Union re: Goonyella Riverside Mine, Peak Downs Mine and Saraji Mine* (7 July 2025).

- Such a register would provide government with visibility of the real-world impacts of RLHA orders beyond the hearing room and support informed policy calibration over time.
- b) AREEA further recommends that the legislation be amended to expressly require the FWC, when applying the “fair and reasonable” test, to consider the commercial viability and financial impact of a proposed RLHA order on the labour hire employer.
- This would ensure the Commission actively turns its mind to evidence of material financial impact, risks to ongoing viability and the foreseeable consequences of provider distress or insolvency for employees, clients and supply chains, promoting greater transparency, confidence and balance in decision-making.

Practical complexity in determining the Protected Rate of Pay

95. A further and increasingly significant concern for AREEA members relates to the practical operation of RLHA Orders once made, in particular the determination and ongoing administration of the “protected rate of pay”.
96. While the statutory framework sets out the concept of a protected rate, it provides limited practical guidance on how host employers and regulated employers are to operationalise that requirement in complex, real-world settings where workforce structures differ in material respects.
97. In the resources and energy sector, enterprise agreements commonly contain different classification structures, duty descriptions, roster designs and pay architectures. Even where work is broadly similar in nature, host and contractor agreements often reflect different operational models developed over time. Determining the relevant protected rate therefore frequently requires detailed and resource-intensive mapping exercises that are not addressed in legislation or FWC guidance.
98. Particular complexity arises where there are differences in:
- a) classification descriptors and grading structures;
 - b) roster patterns, swing lengths and ordinary hours arrangements;
 - c) overtime triggers, penalty rate formulations and composite or annualised rates; and
 - d) site-specific allowances, incentives and historical loadings.
99. For example, a host enterprise agreement may embed overtime or penalties within a composite rate associated with a particular roster pattern, while a contractor agreement may apply discrete overtime triggers across a different swing structure. Translating the host instrument into an equivalent protected rate for a differently structured workforce requires judgment about equivalence that carries compliance risk.
100. Allowances present similar challenges. Host agreements in capital-intensive and remote operations frequently include site-specific payments linked to productivity, travel, accommodation or legacy bargaining outcomes. Determining which of these components form part of the protected rate, and how they should be valued and applied to differently structured contractor workforces, is not always straightforward.
101. In practice, these issues are often resolved without detailed guidance from the FWC beyond the terms of the RLHA order itself. Hosts and regulated employers are therefore required to make complex interpretive decisions under time pressure and with exposure to significant civil penalty risk in the event of miscalculation.

102. This layer of operational complexity and compliance risk generates ongoing administrative burden, increases the likelihood of disputation about calculation methodology, and adds cost uncertainty for both host and regulated employers.
103. The review should recognise that the protected rate framework, as currently designed and applied, leaves material practical questions unresolved. At a minimum, clearer statutory guidance or FWC-issued guidance material addressing classification alignment, roster equivalence and the treatment of allowances would materially improve certainty and reduce inadvertent non-compliance.

C. Labour hire ('Same Job, Same Pay') – Impact on service providers

Overview and core submission

104. This review must closely examine the operation of the “same job, same pay” (SJSP) regime as it applies to contracting businesses across the resources and energy sector. Focus must be on whether the service contractor exemption negotiated into the Closing Loopholes Acts is operating as intended and delivering outcomes consistent with the Government’s stated policy objectives and the assurances provided to industry during the passage of the legislation.
105. While the SJSP regime was presented as a targeted response to the misuse of labour hire arrangements to undercut enterprise agreement wages, its practical operation has extended well beyond that purpose.
106. Despite amendments negotiated by AREEA to protect genuine service contracting models, early case law and the emerging dispute landscape indicate that contractors are operating under persistent uncertainty and exposure to speculative claims. This undermines confidence in a sector that relies fundamentally on stability and certainty within many complex, specialist contracting arrangements.

Original policy intent and early warnings

107. The Albanese Government’s SJSP reforms were conceived as a targeted response to concerns that some employers were using labour hire arrangements to avoid paying enterprise agreement rates to workers performing the same work as directly employed staff.
108. Early policy material focused squarely on traditional labour hire arrangements involving the supply of labour to a host business, under the host’s direction, to perform work that would otherwise be undertaken by the host’s employees. For example, the Department of Employment and Workplace Relations’ April 2023 consultation paper said (emphasis added):

The Australian Government committed to legislate the proposal that if you do the same job as someone else, you should get the same pay. This is the Government’s Same Job, Same Pay measure. The Government’s Same Job, Same Pay measure seeks to address the limited circumstances in which host employers use labour hire to deliberately undercut the bargained wages and conditions set out in enterprise agreements made with their employees.⁴
109. Notably, this paper failed to recognise the difference between labour supply and service delivery - more than once wrongly conflating the two as the “labour supply services industry”.
110. From that point, AREEA cautioned that the resources sector has clear distinctions between the two types of arrangements.

⁴ Same Job, Same Pay Consultation Paper, Department of Employment and Workplace Relations (April 2023)

111. The sector relies on specialist contracting models involving discrete scopes of work, proprietary systems, specialist expertise and the assumption of commercial and operational risk. These arrangements are integral to modern mining and energy operations and are not designed to undercut wages or displace direct employment.
112. AREEA consistently warned that, without a clear and effective distinction between labour hire and service contracting, the proposed reforms risked capturing legitimate contracting arrangements that were never intended to fall within the SJSP regime.

AREEA's negotiated service contractor safeguard

113. In response to these risks, AREEA engaged intensively with the Government throughout 2023, including through detailed submissions, direct ministerial engagement and the provision of practical examples drawn from across the resources and energy supply chain.
114. On 12 May 2023, AREEA filed a 26-page response to the DEWR consultation paper, stating:
- The definition of labour hire must be strictly confined to “traditional labour hire” and avoid capturing a broader range of working arrangements, such as contractors and service providers. 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. Both competitive and flexible labour hire services and competitive and flexible “other” contracting arrangements are needed to maintain the commercial viability of mining and energy operations. Without those arrangements supplementing permanent site workforces, the strength and viability of the industry will be seriously undermined, resulting in significant negative impacts on Australia’s economic wellbeing.⁵*
115. Central to that advocacy was AREEA's proposal for a service contractor safeguard capable of excluding genuine service arrangements from the SJSP framework. The essential features of that proposal were that the distinction between labour hire and service provision should:
- be determined by reference to objective, factual matters;
 - focus on the relationship between the contractor and its employees and how work is performed in practice, noting traditional labour hire arrangements see high levels of integration and limited supervision provided by the labour hire employer;
 - not invite scrutiny, speculation or discretionary judgements of host workforce practices, outsourcing or other commercial decisions that sit firmly within the managerial prerogative of the business; and
 - operate as a jurisdictional threshold, preventing service contractors from being drawn into SJSP proceedings and disincentivizing speculative claims from unions seeking pay parity between asset principles and contractors delivery services on their facilities.
116. During this period, the Government publicly acknowledged the need to protect specialist service contractors and, having ruled out legislating a narrow or prescriptive definition of labour hire, indicated it could work with industry on a multifactor approach to identify what type of arrangements should and should not, be in scope.

A multifactor test is one of the things that we're considering as part of ongoing constructive consultation with industry.⁶

⁵ [AREEA submission to DEWR \(12 May 2023\), page 10](#)

⁶ Mining union open to carve-out on same job, same pay laws, AFR (12 June 2023)

Why negotiation was necessary: fixing a flawed Bill

117. Notwithstanding those assurances, the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, as introduced in September 2023, failed to give effect to those protections. While the Bill included a form of service contractor test, it was structurally deficient given:
- a) the service contractor question did not operate as a jurisdictional threshold;
 - b) the onus effectively rested on contractors to prove their arrangements were “wholly or principally” for the provision of a service;
 - c) the test was subsumed within the FWC’s broader “fair and reasonable” discretion; and
 - d) an additional factor permitted scrutiny of host workforce practices, reintroducing the very debates on the appropriateness or otherwise of outsourcing practices that the exemption was intended to avoid.
118. AREEA warned at the time that this drafting would fail to provide the certainty promised by the Government.
119. By October and November 2023, it had become clear that the Government would secure the support of the Senate crossbench to pass the SJSP reforms in some form. In that context, AREEA made a strategic decision to negotiate amendments to materially protect the resources and energy supply chain.
120. Those negotiations resulted in significant changes to the relevant provisions, including:
- a) making the service contractor question a jurisdictional threshold;
 - b) removing the “wholly or principally” requirement;
 - c) confining the analysis to a five-factor test focused on factual matters relevant to the nature of service provision;
 - d) removing contextual consideration of host workforce practices; and
 - e) placing the onus on the FWC to be satisfied an arrangement is not for the provision of a service before proceeding.
121. AREEA members overwhelmingly viewed these late amendments as delivering a clear carve-out for service contractors and preventing speculative or opportunistic claims.
122. Independent commentators at the time also observed that the changes aligned the legislation more closely with the Government’s stated intent.⁷

Application in practice: the BHP case

123. The BHP Operations Services proceedings⁸ were the first major test of the amended SJSP framework and the service contractor exemption. The case involved applications by unions seeking SJSP orders covering employees of BHP-owned Operations Services entities working at Queensland coal mines.

⁷ See Professor Andrew Stewart’s analysis in Ewin Hannan article *Labor’s IR deal with supports from WA, expert*, The Australian (23 November 2023)

⁸ [2025] FWCFB 134 *Applications by the Mining and Energy Union re: Goonyella Riverside Mine, Peak Downs Mine and Saraji Mine and Applications by “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) re: Peak Downs Mine, Saraji Mine and Goonyella Riverside Mine* (7 July 2025).

124. BHP argued that the Operations Services model involved the provision of comprehensive mining and maintenance services rather than the supply of labour, and that the service contractor exemption should operate as a threshold bar to the making of any orders.
125. The MEU and AMWU (“Unions”) contended that the arrangements were, in substance, labour supply arrangements, emphasising factors such as integration into BHP’s operations, labour-based pricing, and host control driven by safety and operational requirements.
126. In July 2025, a Full Bench of the FWC determined that the service contractor exemption in section 306E(1A) did not apply to the BHP Operations Services arrangements and proceeded to make regulated labour hire arrangement orders.
127. While AREEA acknowledges that the FWC decision turned on the specific facts of the BHP-OS model, the approach adopted by the Commission raised fundamental concerns about the way in which the service contractor exemption was construed and applied in practice.
128. The following four issues have driven employer concerns that go beyond the outcome in the BHP case and speak directly to whether the exemption is operating in the manner intended and negotiated:
- a) First, the Commission introduced and relied heavily on the concept of an “identifiable and discrete service” as a touchstone for distinguishing service provision from labour supply.
 - That formulation does not appear in the statutory text and was not part of the framework negotiated by AREEA with the Government. The negotiated amendments deliberately avoided requiring service contractors to demonstrate that their work constituted a stand-alone or separately identifiable service, recognising that many modern service arrangements are integrated into a host’s operations while nonetheless remaining genuine service contracts. By crafting this new concept, the FWC effectively imposed an additional hurdle that was neither contemplated by Parliament nor reflected in the agreed five-factor test.
 - b) Secondly, the FWC treated the five statutory factors in section 306E(7A) as non-exhaustive and placed significant weight on broader “contextual considerations” beyond those factors. In doing so, the Commission effectively diluted the function of the negotiated five-factor test by treating it as one input into a broader evaluative exercise, rather than as the disciplined statutory framework intended to govern the service contractor inquiry. This approach reopened the scope for expansive characterisation arguments about commercial context, outsourcing rationale and operational integration, contrary to the purpose of the amendments negotiated by AREEA.
 - AREEA’s negotiated position was that the service contractor exemption should operate as a confined and predictable threshold assessment. By construing the statutory factors as non-exhaustive, the Commission re-introduced uncertainty and discretion of the very kind the amendments were designed to remove.
 - c) Thirdly, the FWC placed substantial emphasis on the degree of cooperation between OS managerial staff (including supervisors and superintendents) and BHP’s own site management as indicative that BHP ultimately controlled the performance of work by OS employees. In doing so, the Commission effectively re-weighted the statutory five-factor test by elevating operational cooperation above the presence of OS-supplied supervision, despite supervision being an express consideration under the legislation. This approach permitted the Commission to characterise the arrangements as labour supply on the basis of integration and coordination, rather than by reference to who was responsible for directing, supervising and managing the workforce in substance.

- This reasoning risks conflating cooperation between client and contractor with labour hire. In the resources and energy sector, integration and cooperation between client and contractor supervisors and managers are often unavoidable features of safe and efficient operations, particularly in large, complex and continuous production environments.
 - Integrated service delivery, including day-to-day coordination between client and contractor personnel, is a common feature of legitimate service models and was well understood by the Government during consultation.
- d) Fourthly, the FWC treated host safety and health obligations, and the consequential direction and control exercised by the host, as probative of labour supply. In doing so, the Commission again re-weighted the statutory inquiry by treating compliance with mandatory safety obligations as evidence of host control over how work is scoped, directed and performed by contractor workforces.
- In safety-critical industries, host operators are legally required to exercise extensive oversight and control to meet statutory safety obligations, regardless of whether work is performed by employees or contractors. The negotiated service contractor exemption was expressly intended to accommodate this reality.
 - Treating safety-driven control as indicative of labour supply reflects a misunderstanding of how safety risk and operational accountability are managed in practice.

129. In summary, the FWC Full Bench's approach had the effect of significantly raising the evidentiary threshold for service contractors and reintroducing many of the features that AREEA had sought to remove through its negotiations with the Government, undermining the certainty and discipline the exemption was intended to provide.

Federal Court decisions and continuing uncertainty

130. BHP's challenge to the FWC's decision was dismissed by the Full Federal Court on 19 December 2025⁹. In doing so, the Full Court provided the first appellate consideration of the service contractor exemption, confirming that section 306E(1A) operates as a jurisdictional threshold that must be resolved before any regulated labour hire arrangement order can be made.
131. However, the Full Court also emphasised that the application of that threshold involves evaluative judgments about facts, degree and characterisation, and that those judgments are matters primarily entrusted to the FWC. As a result, many of the most contentious aspects of the Commission's approach were left undisturbed, absent further judicial or legislative intervention.
132. Critically for AREEA members, the Full Court rejected BHP's arguments that the FWC had misconstrued the statute in the ways identified in the preceding section. In particular, the Court held that it was reasonably open to the FWC, as a matter of evaluative judgment, to:
- a) introduce and rely on the concept of an "identifiable and discrete service", notwithstanding that this formulation does not appear in the statutory text;
 - b) treat the five factors in section 306E(7A) as part of a broader evaluative task, rather than as an exhaustive and limiting code;

⁹ *BHP Coal Pty Ltd v Mining and Energy Union* [2025] FCAFC 194

- c) place substantial weight on factors such as integration into the host's operations, labour-based pricing models in the contracts between the parties and the history of BHP's corporate structure; and
 - d) treat host direction and control, including where driven by statutory safety obligations, as relevant to characterising the arrangements as labour supply rather than service provision.
133. In reaching that conclusion, the Full Court did not determine whether it would itself have characterised the BHP-OS arrangements as labour supply or service provision. Its task was confined to judicial review, and it was sufficient that the FWC had applied the correct legal framework and reached a conclusion that was reasonably open on the evidence.
134. Accordingly, while the Full Court confirmed the threshold nature of the exemption, it did not provide substantive guidance on where the boundary between labour hire and service contracting should be drawn in practice.
135. BHP has since sought special leave to appeal to the High Court. The employer community's interest in that application is not driven by a desire to vindicate the particular BHP-OS model, which is widely regarded as unique to those entities and operations and on which views differ. Rather, there is a strong interest in obtaining authoritative guidance on the most controversial aspects of the FWC's approach — including the introduction of extra-statutory concepts, the weight given to integration and safety-driven control, and the breadth of the FWC's evaluative discretion when applying the service contractor exemption.
136. Absent such guidance, the combined effect of the FWC's reasoning and the Full Court's endorsement of its approach is to entrench significant uncertainty for service contractors, particularly those operating in complex and safety-critical environments. That outcome departs materially from the certainty AREEA sought to secure through its negotiations with the Government and reinforces the need for further legislative clarification to realign the operation of the SJSP regime with its original policy intent.

Expansion beyond BHP: early evidence from oil and gas

137. From the outset of the SJSP reforms, the oil and gas sector anticipated that unions would seek to test the boundaries by pursuing applications against complex service contracting arrangements that were never contemplated as being "in scope" and which should always have been clearly excluded by the AREEA-negotiated provisions.
138. While these concerns have arisen largely independently of the BHP proceedings, the FWC's approach in BHP has since materially deepened those concerns by signalling that the service contractor exemption may be applied far more expansively than most stakeholders (on either employer or union sides) had envisioned.
139. To AREEA's knowledge, four SJSP applications have been pursued in offshore oil and gas and LNG operations involving a range of specialist service arrangements that bear little resemblance to the highly specific BHP-OS model. These matters include:
- a) Condex Services contracted to Esso Australia in the Bass Strait
 - an SJSP application which targeted offshore electrical and instrumentation maintenance services delivered under a services arrangement supporting Esso's offshore operations. Ultimately settled privately and withdrawn;
 - b) Kent contracted to INPEX on the Ichthys LNG Project

- a joint union application covering telecommunications services on offshore facilities, where the contractor was engaged to deliver specialist services integral to offshore operations. Resolved by confidential settlement;
- c) Ventia subsidiary BR&I contracted to Chevron Australia
- delivering maintenance services to Chevron’s facilities on Barrow Island. Withdrawn for unknown commercial reasons; and
- d) Monadelphous contracted to INPEX on the Ichthys LNG Project
- an early-stage application strongly contested on jurisdictional grounds by both the host and contractor, involving long-standing, scope-based maintenance services delivered as part of the complex offshore Ichthys LNG project.
140. Across these matters, host operators and contractors have advanced consistent positions, emphasising common characteristics including:
- a) such arrangements involve the provision of defined maintenance, telecommunications or industrial services under long-term services contracts;
 - b) contractors retain responsibility for workforce capability, training, supervision, quality assurance, safety systems and delivery of agreed scopes of work;
 - c) work is performed as part of an integrated service offering rather than as labour supplied to the host; and
 - d) any host direction or control reflects unavoidable statutory safety obligations in highly regulated environments, rather than indicia of close control over how contractor employees perform their work as would be indicative of a labour supply arrangement.
141. At a high level, these contracting models are precisely the type of arrangements that AREEA envisaged would fall outside the scope of the SJSP regime when negotiating the service contractor exemption with the Government.
142. They involve contractors delivering defined services, assuming responsibility for execution and workforce management, and operating within integrated, safety-critical environments where host oversight is inevitable and legally required. They bear little resemblance to the fact-specific BHP-OS model.
143. While some of these matters were resolved by private settlement or withdrawn, their significance lies not in their procedural outcomes but in the fact that the applications were able to be brought at all.
144. The FWC’s interpretive approach has materially lowered the practical threshold for initiating SJSP applications against genuine service arrangements, exposing businesses to significant cost, disruption and uncertainty and creating strong commercial incentives to settle rather than litigate jurisdictional questions to finality.

Systemic consequences for employers and the Commission

145. As outlined above, the FWC’s approach — and its subsequent endorsement by the Full Federal Court — has transformed what was intended to be a clear jurisdictional safeguard into a highly evaluative, fact-intensive inquiry in which extra-statutory concepts, contextual factors and integration-based reasoning play a central role.
146. This has widened the class of arrangements exposed to SJSP applications, including arrangements that bear little resemblance to traditional labour hire and which were expressly contemplated as falling outside the regime, with the result that employers are now required to

defend, at considerable cost, whether their arrangements can survive a discretionary characterisation exercise rather than rely on a clear statutory exclusion.

147. That outcome undermines commercial certainty and weakens confidence in the negotiated framework.
148. Even where employers consider claims to lack any merit, the practical reality is that the costs, delay and risk associated with litigation may drive commercial settlements to avoid adverse precedent. This dynamic mirrors experiences in other parts of Australia's industrial relations system, where low-threshold access to claims has fuelled a culture of "go-away money" rather than principled adjudication. That outcome is neither efficient nor consistent with the original purpose of the SJSP reforms.
149. These developments also have systemic implications for the FWC. SJSP disputes are inherently complex, highly fact-specific and resource-intensive. As unions pursue an expansionary strategy across multiple sectors — including offshore oil and gas and LNG — the Commission risks being drawn into an increasing number of protracted disputes concerning the boundaries of service contracting, rather than focusing on the mischief the regime was intended to address.
150. Given the public interest in the efficient operation of the FWC, and concerns raised by its President in multiple forums about the Commission's escalating and unsustainable workload relating to an explosion in General Protections and unfair dismissal claims, the last thing the FWC needs is to be dealing with a large number of contested, speculative SJSP matters.

The case for legislative recalibration

151. AREEA does not contend that all contracting models should be immune from scrutiny. In fact, many specialist contracting businesses would concede that a small minority of their work — such as backfilling employee absences within their client's primary workforce — may be more exposed to an application than their typical steady-state service delivery.
152. The experience to date demonstrates that the practical application of the service contractor exemption has departed materially from what AREEA negotiated with the Government and from the assurances provided to industry during the passage of the legislation. The exemption was intended to operate as a meaningful and robust safeguard, ensuring that only genuine labour hire arrangements — involving the supply of labour to perform work for a host — fall within the scope of the SJSP laws.
153. In practice, however, the way the test has been interpreted has allowed applications to be brought against integrated, scope-based service arrangements that were never intended to be captured, forcing businesses to defend themselves through costly and uncertain proceedings.
154. While BHP has sought special leave to appeal to the High Court, the employer community's concern is not directed to the ultimate characterisation of the BHP-OS model, which is widely acknowledged to be fact-specific.
155. Rather, the concern lies with the broader interpretive approach that has emerged and now governs the application of the service contractor exemption more generally, including the Commission's reliance on extra-statutory concepts, the weight given to integration and safety-driven control, and the breadth of discretion exercised when applying the statutory test.
156. It would be inappropriate for the resolution of these systemic issues to be left to the outcome of a single, fact-specific case. The statutory review of the Closing Loopholes legislation is the

proper forum to address them. In AREEA's submission, the review must recommend legislative amendments to restore certainty and confidence by making clear that:

- a) the service contractor exemption robustly excludes genuine service contracting arrangements from the SJSP regime;
- b) the scope of the SJSP laws is confined to traditional labour hire arrangements, consistent with the original policy intent;
- c) speculative or opportunistic applications are actively discouraged; and
- d) businesses can structure, tender and invest in contracting arrangements without the constant threat of SJSP litigation.

157. Absent such recalibration, uncertainty, disputes and compliance costs will continue to escalate, undermining productivity, investment and workforce stability across the resources and energy sector and beyond.

D. Intractable Bargaining Declarations

158. The amendments made to the IBD regime by the CL2 Act represent poor public policy. They have materially distorted enterprise bargaining incentives and, as the FWC becomes more comfortable exercising its arbitration powers, the practical impacts on employers, bargaining behaviour and the broader economy are already escalating.

159. In AREEA's view, this outcome flows directly from the CL2 amendments fundamentally altering the character of the IBD regime by removing meaningful downside risk for unions and employees when pursuing arbitration. The way the IBD regime developed through 2025 demonstrates that these concerns are no longer theoretical. They are now evident in:

- the Commission's approach to the IBD threshold;
- how bargaining parties behave in practice; and
- the expanding scope and financial reach of IBD workplace determinations.

The CL2 amendment: why it was bad policy

160. The critical change introduced by CL2 was the requirement that, in an intractable bargaining workplace determination, each term must not be less favourable to employees than the corresponding term in the expired agreement.

161. This amendment removed a core discipline underpinning effective bargaining: symmetry of risk.

162. Under the original IBD framework, enacted via the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* both employers and unions faced the possibility that arbitration could deliver outcomes worse than their preferred bargaining position. That mutual exposure incentivised compromise and preserved arbitration as a last resort.

163. The CL2 amendment eliminated that balance. It ensures that unions and employees cannot emerge worse off in arbitration on preserved terms, while employers carry the principal risk of imposed outcomes. This creates a rational incentive to delay agreement, maintain ambit claims and allow disputes to progress toward arbitration.

164. AREEA warned at the time that this change would incentivise unions to leverage the IBD framework as a bargaining strategy. The 2025 case law confirms that prediction.

2025 case law: from caution to normalisation

165. In early 2025, the Commission still displayed some caution in exercising its IBD powers.
166. In *Russell Wakefield* (Medlog), the FWC refused an IBD on the basis that bargaining had stalled but was capable of being renewed. The distinction between temporary impasse and true intractability was taken seriously.
167. Similarly, in *APESMA v Ulan West Operations* (June 2025), Deputy President Easton declined to issue an IBD for highly paid deputies, emphasising their strong individual bargaining power, the absence of disadvantage, and the real risk that arbitration could leave either party worse off.
168. These decisions reflected an understanding that arbitration should not be “lightly engaged” and that enterprise bargaining should remain the primary mechanism for setting terms and conditions.
169. From mid-2025, that caution receded. The Commission began making IBDs and associated workplace determinations as a routine mechanism to conclude protracted bargaining, including in:
 - Transdev Sydney & Parramatta Light Rail,
 - Network Aviation, and
 - Qube Offshore Services.
170. In these matters, arbitration was not framed as exceptional. It was treated as the expected endpoint once negotiations proved difficult. Backpay also became a regular feature of determinations, significantly increasing the financial consequences of drawn-out bargaining.
171. The most significant shift occurred late in 2025 through Full Bench decisions.
172. In *APESMA v Ulan West Operations* (FWCFB 264), the Full Bench expressly rejected the idea that IBD powers should be exercised reluctantly. It characterised the statutory “reasonableness” test as value-neutral, removing any presumption against intervention and materially lowering the practical threshold for arbitration.
173. In *Transgrid* (FWCFB 109), the Full Bench further expanded the reach of IBD determinations by confirming the Commission’s power to:
 - order backpay extending to former employees; and
 - treat the interests of former workers as relevant to the merits of a determination.
174. These decisions mark a decisive move away from the original conception of IBDs as exceptional and toward their normalisation as a common dispute-resolution mechanism.

Strategic behaviour: the system now rewards escalation

175. The evolution of the case law has been accompanied by clear evidence of strategic behavioural change in bargaining.
176. In *Endeavour Energy*, the Commission recorded evidence that union delegates deliberately maintained high wage claims because lowering them risked a worse arbitral outcome. This reflects the precise incentive created by the CL2 amendment: it is rational to hold firm and proceed to arbitration.
177. Other decisions, including *Quantem*, *Network Aviation* and *Transdev*, show bargaining increasingly dominated by disputes over what constitutes an “agreed term”, whether

concessions can be resiled from, and how informal language is interpreted. These types of disputes are a predictable consequence of a system in which arbitration no longer carries meaningful downside risk for one party.

178. The developments in 2025 represent the early phase of the amended IBD regime. Unions are becoming more strategic and confident in using IBDs as both a bargaining threat and an end destination. The Commission has shed initial caution and clarified the breadth of its powers. Bargaining behaviour is adjusting accordingly.

Heightened risks for the resources and energy sector

179. The consequences of the amended intractable bargaining regime are particularly acute in the resources and energy sector, where capital intensity, continuous operations and distinctive workforce structures amplify the effects of arbitration-driven outcomes.
180. Resources and energy projects involve large, irreversible capital commitments and long planning horizons, with labour costs embedded at the point of final investment decision. The post-CL2 IBD regime allows wages and conditions to be imposed through arbitration mid-cycle, including retrospectively and without scope to trade off legacy terms that no longer reflect operational reality.
181. Even where individual outcomes appear moderate, the availability of arbitration increases regulatory and investment risk, influencing decisions about whether projects proceed, are delayed or are scaled back.
182. These risks are compounded by the safety-critical and highly interdependent nature of resources operations, which rely on flexible rosters, fatigue management and evolving work practices. The CL2 “no less favourable” constraint freezes historical arrangements and limits the ability to modernise through bargaining, increasing the likelihood that inflexible or outdated terms are entrenched by arbitration, with consequences for productivity and safety.
183. The impact of IBDs is further magnified by workforce characteristics common in the sector, including small cohorts of highly skilled workers at remote sites or offshore facilities. Here, an IBD affecting a limited group can have disproportionate effects, resetting labour costs across an operation and quickly becoming a benchmark elsewhere, particularly across similar FIFO and DIDO environments where roster structures and allowances can flow across sectors.
184. In summary, the experience of 2025 confirms that the CL2 amendments to the IBD regime were misguided and are already producing adverse consequences.
185. As agreements negotiated or arbitrated under the post-CL2 framework begin to increase in number, the cumulative effects on costs, flexibility, productivity and investment confidence — particularly in capital-intensive sectors such as resources and energy — will intensify.
186. Without reform, the evidence from 2025 strongly suggests that IBD usage will continue to expand, bargaining behaviour will further harden, and the costs to employers, investment and economic efficiency will escalate accordingly.

RECOMMENDATIONS

187. AREEA recommends the statutory review of the Fair Work Legislation Amendment (Closing Loopholes) Acts make the following findings and recommendations.

A. Timing and review architecture

Recommendation 1: Acknowledge that this review is occurring too early to assess full real-world impacts

188. The review should expressly acknowledge that many of the most consequential Closing Loopholes reforms have not yet operated for a sufficient period to allow their commercial, workforce and economic impacts to be meaningfully assessed.

189. The review should recognise that:

- a) key reforms involved delayed commencement, staged implementation and lengthy Fair Work Commission (FWC) processes;
- b) union utilisation has been moderated pending litigation and regulatory clarification; and
- c) impacts will unfold over multiple bargaining cycles and contracting renegotiations.

190. The absence of extensive adverse outcomes at this stage should not be treated as evidence that such impacts will not emerge.

Recommendation 2: Commit to structured, longitudinal post-implementation review

191. In addition to the current review, the Government should commit to ongoing, targeted longitudinal review of the most significant Closing Loopholes reforms.

192. At a minimum, this should include:

- a) annual, time-limited data collection led by the Department of Employment;
- b) public reporting on impacts on productivity, investment, workforce structure, bargaining behaviour and dispute volumes; and
- c) a second substantial review within three years.

193. This approach would provide a more reliable evidence base than an early snapshot review.

B. Workplace delegates' rights

Recommendation 3A: Repeal s 350C of the FW Act

194. The review should recommend repeal of the workplace delegates' rights and protections inserted as s 350C of the FW Act.

Recommendation 3B: Alternatively, materially narrow and recalibrate delegates' rights

195. If repeal is not adopted, the review must recommend substantive amendment to recalibrate the scope and operation of workplace delegates' rights.

196. Reform should:

- a) confine delegates' representational rights to employees of their own employer;
- b) restore primacy of work performance and safety obligations over delegate activity;
- c) limit cross-employer reach in multi-employer workplaces; and
- d) clarify and constrain paid training entitlements to prevent cumulative and open-ended obligations in multi-union environments.

197. These matters require legislative correction and should not be left to incremental litigation.

C. Labour hire “same job, same pay”

Recommendation 4: Establish a register to track the impacts of RLHA orders

198. The Department of Employment should establish and maintain a register to track and report on the longitudinal commercial and employment impacts of RLHA orders.

199. Employers subject to RLHA orders could be invited to provide periodic (for example, six-monthly) data on:

- a) workforce numbers;
- b) contract retention or loss;
- c) profitability of affected contracts; and

200. unanticipated entitlement liabilities.

201. This would provide government with visibility of real-world impacts beyond the hearing room.

Recommendation 5: Confine SJSP orders to circumstances involving wage-circumvention labour hire strategies

202. The FW Act should be amended to make clear that a “same job, same pay” order may only be made where there is evidence that labour hire arrangements are being used for the purpose of circumventing the agreed rates and conditions in the host employer’s enterprise agreement.

203. In particular:

- a) the evidentiary onus should rest on the applicant to demonstrate that the labour hire arrangement is being used to undercut enterprise-agreed wages, rather than as part of a legitimate workforce or service delivery model;
- b) applicants should be required to clearly identify the specific cohort or cohorts of employees sought to be covered by a proposed order and explain why inclusion of each cohort is justified; and
- c) applicants must positively establish that each jurisdictional precondition to the making of an RLHA order has been satisfied.

204. This reform is critical to preventing the SJSP regime evolving into a forum for speculative or unmeritorious claims — analogous to unfair dismissal and general protections litigation — characterised by low thresholds, reverse onuses and pressure to settle irrespective of merit.

Recommendation 6: Strengthen the “fair and reasonable” safeguard

205. The FW Act should be amended to require the FWC, when applying the “fair and reasonable” test¹⁰, to give explicit and genuine consideration to the commercial and financial impact of a proposed regulated labour hire arrangement (RLHA) order on the labour hire employer.
206. This should include mandatory consideration of:
- a) contract viability and margin compression;
 - b) impacts of previously unaccounted increases in leave and entitlement liabilities;
 - c) risks of insolvency or contract loss; and
 - d) foreseeable downstream impacts on employees, creditors, clients and supply chains.

Recommendation 7: Improve practical administration of Protected Rate of Pay obligations

207. The review should recommend that the FWC develop practical guidance material addressing classification mapping, roster equivalence and the treatment of allowances for the purposes of calculating protected rates of pay under RLHA orders.
208. The review should also consider introducing a statutory safe harbour or defence from civil penalty where a host or regulated employer has taken reasonable steps, acted in good faith, and made genuine efforts to comply with a protected rate obligation but has erred due to complexity or misalignment between enterprise agreements.
209. Such a measure would promote compliance, reduce unnecessary litigation and provide certainty in circumstances where the framework leaves technical questions unresolved.

Recommendation 8: Amend the FW Act to restore the service contractor exemption to its negotiated intent

210. The FW Act should be amended to restore certainty that genuine service contracting arrangements fall outside the scope of the SJSP regime.
211. Legislative amendments should make clear that the service contractor exemption robustly excludes genuine service provision, including by:
- a) making the statutory service contractor test exhaustive and determinative, and expressly preventing the FWC from relying on extra-statutory “contextual considerations” to circumvent or dilute the operation of that test;
 - b) enacting a new test factor — placed first in the statutory list — directing primary attention to:
 - the terms of the contract between the parties; and
 - the inherent and primary nature of the business conducted by the employer.so as to distinguish service provision from labour supply at the threshold, before any broader evaluative judgment is undertaken.
212. These amendments are necessary to restore certainty, prevent speculative claims, and realign the operation of the exemption with the assurances provided to industry during passage of the legislation.

¹⁰ Section 306E(8) *Fair Work Act 2009*

D. Intractable bargaining declarations

Recommendation 9: Repeal the CL2 “no less favourable” constraint

213. The review should recommend repeal of the CL2 requirement that each term of an intractable bargaining workplace determination must not be less favourable to employees than the corresponding term in the expired agreement.
214. This constraint has removed symmetry of risk, incentivised arbitration over agreement, and transformed arbitration from a last resort into a bargaining strategy. Reinstating downside risk for all parties is essential to restoring genuine enterprise bargaining.

Recommendation 10: Clarify and constrain the treatment of “agreed terms”

215. The FW Act should be amended to clarify the status and treatment of agreed and provisional terms in the intractable bargaining process.
216. This should:
- a) reduce tactical disputes over whether concessions have been “agreed”;
 - b) prevent informal discussions being weaponised in arbitration; and
 - c) restore confidence that good-faith bargaining will not be penalised.

Recommendation 11: Require systematic reporting on IBD usage and outcomes

217. The Government should require regular public reporting on intractable bargaining declaration usage and outcomes.
218. Reporting should cover:
- a) application volumes and timeframes;
 - particular regard should be had to the number of IBD processes entered where employers and unions have historically had a strong record of bargaining and reaching agreement.
 - b) wage and cost outcomes;
 - c) backpay exposure; and
 - d) sectoral and workforce impacts.
219. This data is necessary to assess the economic and productivity consequences of normalising arbitration.

CONCLUDING REMARKS

220. The Closing Loopholes Acts represented a significant re-orientation of Australia's workplace relations system. Collectively, the reforms shifted the balance away from enterprise-based negotiation, commercial certainty and clear workforce boundaries, and toward expanded arbitration, increased union leverage and greater regulatory discretion.
221. AREEA opposed the legislation in principle because this direction was evident from the outset. Early implementation experience has reinforced those concerns. While this review is necessarily constrained by timing, the evidence to date shows that the reforms are already reshaping behaviour, incentives and risk allocation in ways that extend beyond the stated policy objectives.
222. In several key areas, the problem is not simply technical drafting but practical effect.
223. The labour hire "same job, same pay" regime illustrates this clearly. Although framed as a targeted response to deliberate wage undercutting, the regime is already influencing enterprise bargaining dynamics, labour supply decisions and contracting strategies before any application is made. Regulatory uncertainty alone is deterring legitimate workforce models and encouraging defensive bargaining behaviour. These effects are structural and cumulative and cannot be assessed solely by reference to the number of orders made or their immediate cost impacts. The review must therefore be willing to assess whether the regime, as designed and applied, is operating consistently with its original policy intent.
224. The same is true of workplace delegates' rights and the amended intractable bargaining framework. Together, these reforms reduce incentives to compromise, normalise arbitration as an outcome rather than a last resort, and embed new sources of disputation into day-to-day operations. In multi-employer, remote and safety-critical environments, these impacts are particularly acute.
225. The cumulative effect is a growing reliance on the FWC to resolve matters that were previously addressed through bargaining or commercial negotiation. This raises systemic concerns. The Commission is increasingly being drawn into complex, fact-intensive disputes — including service contracting characterisation and protracted bargaining histories — at a time when its workload is already under significant strain. That trajectory is neither sustainable nor consistent with the Commission's intended role.
226. AREEA's recommendations are therefore directed at recalibration, not wholesale redesign. They seek to restore clear boundaries between labour hire and service provision, rebalance arbitration incentives, and ensure statutory safeguards operate as intended. They also recognise that many of the most significant impacts of the Closing Loopholes reforms will only become apparent over time, underscoring the need for ongoing, evidence-based review rather than premature conclusions.
227. Australia's resources and energy sector depends on regulatory certainty, workforce flexibility and enterprise-level engagement to sustain investment, productivity and regional employment.
228. This review provides an opportunity to acknowledge where the Closing Loopholes reforms have overshot their objectives and to recommend targeted corrections that restore balance, confidence and coherence to Australia's workplace relations framework.

ABOUT AREEA

The Australian Resources and Energy Employer Association (AREEA) is the national employer association representing Australia's mining, oil and gas industries, as well as the associated servicing and contracting sectors.

AREEA is the largest and most diverse representative body of the resources and energy industry and serves as the sector's specialist industrial relations organisation. AREEA is a member of the National Workplace Relations Consultative Committee (NWRCC) and the Council on Industrial Legislation (COIL) and has played a significant role in the development of Australia's industrial relations framework since Federation.

AREEA is Australia's resources and energy industry group and has provided a unified voice for employers on workforce and other industry matters for more than 103 years.

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 and living standards.

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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Australian Resources and Energy Employer Association (AREEA)

Email: policy@areea.com.au

Phone: (07) 3210 0313

Website: www.areea.com.au

ABN: 32 004 078 237

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