LET'S CLOSE THE LABOUR HIRE LOOPHOLES

SAME JOB SAME PAY

Mining and Energy Union
Submission re Fair Work Amendment (Closing Loopholes) Bill 2023

29 September 2023

Mining & Energy Union

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A. Introduction

1. The Mining and Energy Union[1] (hereafter **MEU**) is the principal trade union representing workers in the mining industry.

2. We also have significant membership working in power stations, coal ports and amongst locomotive drivers in the Pilbara. In total, we have over 21,000 members who work in the mining and energy industries across Australia.

3. Our members work in regional Australia – including in the coal mines in the Hunter Valley, Central Queensland, the Illawarra, Lithgow & Mudgee in Western New South Wales, Collie in the South West of Western Australia, and Tasmania; the metalliferous mines in the Pilbara and Broken Hill; and the power stations in the Latrobe Valley, Hunter Valley and around Lake Macquarie in New South Wales, and in Central Queensland.

4. For well over one hundred years, we have proudly advocated for fairly paid and secure jobs in those regional communities. Such jobs have been the backbone of those regional communities. Those towns are all heavily reliant on the jobs and services that flow from the mining and energy industries.

5. That is hardly a revelation – the role of the mining industry in generating decent jobs and viable communities in regional Australia is well understood.[2]

6. For well over the past decade, fairly paid and secure jobs in regional Australian mining communities have been increasingly converted into insecure and unfair jobs with less pay, fewer entitlements and rights. The mega mining companies have relentlessly pursued that objective by contracting out what were, not that long ago, permanent and fairly paid jobs.

[1] At the time of preparing this submission, the Mining and Energy Union (**MEU**) remains a Division of the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**). The MEU is in the process of withdrawing from the CFMMEU pursuant to Part 3 of Chapter 3 of the *Fair Work (Registered Organisations) Act 2009*. Consequently, the MEU has a strong interest in Part 13, and especially the transitional provisions of item 212, of the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023.*

[2] "*Wage-cutting Strategies in the Mining Industry: The cost to workers and communities*'', Report to the McKell Institute, March 2020, pages 8, 13 – 15.

Mining & Energy Union

7. The sheer scale of the contracting out of jobs in the mining industry is evident from the findings of the Queensland Coal Board of Inquiry (hereafter **Board of Inquiry**). The Board of Inquiry was tasked with reporting on a serious incident that occurred on 6 May 2020 at Grosvenor Underground Mine (hereafter **the Mine**) in Central Queensland.[3] An explosion underground – described by the Board of Inquiry as terrifying – resulted in 5 workers being seriously burned.[4] At the time of the event, 76% of the Mine's workforce (including all 5 of the injured workers) were labour hire workers undertaking mining production work.[5] The Board of Inquiry found:

- In 1996, 94.1% of the workforce in the Queensland coal industry were employed directly by the mine operator.[6] Only 5.9% of the workforce in the Queensland coal industry at that time were engaged as labour hire or contractors.[7]

- By 2017, there were more labour hire or contractors working in the Queensland coal industry than directly hired employees.[8] That is, by 2017, only 46% of the workforce in the Queensland coal industry were employed directly by the mine operator.[9] The remaining 54% were engaged as labour hire or contractors.[10]

- The use of labour hire and contractors has increasingly been for the performance of core mining work rather than specialist work.[11]

8. Most troubling, is the Board of Inquiry's finding of a clear link between the increase of labour hire in the inherently hazardous mining industry and inferior safety outcomes.[12] That link is driven by labour hire workers and contractors

[3] Foreword, Queensland Coal Board of Inquiry Report, Part II, May 2021.
[4] Foreword, Queensland Coal Board of Inquiry Report, Part II, May 2021.
[5] Paragraph 100: Executive Summary, Queensland Coal Board of Inquiry Report, Part II, May 2021, page 14.
[6] Paragraph 11.27 of the Queensland Coal Board of Inquiry Report, Part II, May 2021, page 373.
[7] Paragraph 11.27 of the Queensland Coal Board of Inquiry Report, Part II, May 2021, page 373.
[8] Paragraph 11.29 of the Queensland Coal Board of Inquiry Report, Part II, May 2021, page 374.
[9] Paragraph 11.29 of the Queensland Coal Board of Inquiry Report, Part II, May 2021, page 374.
[10] Paragraph 11.29 of the Queensland Coal Board of Inquiry Report, Part II, May 2021, page 374.
[11] Paragraph 11.25 of the Queensland Coal Board of Inquiry Report, Part II, May 2021, page 373.
[12] Paragraphs 101 - 102: Executive Summary, Queensland Coal Board of Inquiry Report, Part II, May 2021, page 14.

underreporting safety concerns for fear of jeopardising their employment.[13] The underreporting of such safety concerns means that hazards are not reported and consequently cannot be rectified.

9. Labour hire workers don't feel that they can raise safety or other concerns related to their employment because of the precarious nature of their employment. This is exemplified by the permanent casual rort which is widespread across the mining industry. Many labour hire workers in the mining industry are described as a casual employee in the carefully drafted contract of employment presented to them on engagement. If the labour hire worker wants the job, they have no choice other than to accept the contract.

10. There is nothing casual, for example, about a labour hire worker working for years on end at the same mine and on a roster set 12 months in advance, and expected to notify their employer if they need some (unpaid) time off if they are unwell and unable to work. The fact that such a labour hire worker can be denied the benefits of permanent employment – for example, paid leave and redundancy pay – because a term in a carefully drafted employment contract describes them as a casual is a loophole that has long been exploited by the mega mining companies.

11. The culmination of contracting out jobs in the mining industry means that, today, in the very profitable mines of the Hunter Valley and Central Queensland (and elsewhere) it is incredibly common to find two workers working side-by-side - with the same level of skills and competence, operating the same machines, on the same roster, at the same mine – however on very different terms of employment. One such worker may be a permanent employee directly employed by the mine operator with job security, and good pay and conditions reflected in an enterprise agreement. The other worker is likely to be a permanent casual labour hire worker on a lower rate of pay (inclusive of the casual loading), with less rights and entitlements, reluctant or unwilling to raise

[13] Paragraph 101 - 102: Executive Summary, Queensland Coal Board of Inquiry Report, Part II, May 2021, page 14.

any safety concerns and who can be let go without explanation and without any effective recourse on a few hours notice, at best.

12. The situation is even more extreme in BHP's mining operations. BHP has gone one step further than its industry peers and established its own internal labour hire company – Operations Services (hereafter **BHP OS**) – which only performs work at BHP's mines. The labour hire employees of BHP OS are paid 30 - 40% less than their coworkers employed by the established BHP company for operating the same machines, on the same roster, at the same BHP mines.

13. The converting of secure and fairly paid jobs across the mining industry into lower paid and less secure jobs has significantly benefited the bottom line of the mega mining companies. Those companies continue to reap massive profits. The three biggest Australian coal producers in 2022 were Glencore, BHP and Yancoal. The most recent financial results of those companies is recorded below:

    a) Glencore: for the calendar year ending December 2022, recorded a net profit after tax of US$17.3 billion,[14] which was considerably more than the net profit after tax of US$5 billion in the previous financial year.[15]

    b) BHP: for the financial year ending June 2023, recorded a net profit after tax of US$12.9 billion.[16]

    c) Yancoal: for the calendar year ending December 2022, recorded a net profit after tax of AUD$3.8 billion,[17] which was considerably more than the net profit after tax of AUD$861 million in the previous financial year.[18]

14. The effect on workers in the mining industry and the regional communities has been corrosive. The two-tiered workforce discussed at paragraphs 11 & 12 above is deeply unfair and inequitable.

[14] Glencore Annual Report 2022.
[15] Glencore Annual Report 2021.
[16] BHP Annual Report 2023.
[17] Yancoal Full Year Financial Result 2022.
[18] Yancoal Full Year Financial Result 2021.

15. The absence of any job security creates very practical difficulities for permanent casual labour hire workers. Being permanently casual makes it difficult for such a worker to take time off work to care for a sick child, take a holiday with their family, obtain a mortgage to buy a home etc.

16. Consistent with the findings of the Board of Inquiry, such a model of engagement exposes workers in the mining industry to greater risk of serious injury or fatality in an inherently hazardous industry.

17. Moreover, the two-tiered workforce has clearly resulted in the suppression of wages for all workers in the mining industry - not just the labour hire workers and contractors. The contracting out of core mining jobs reduces the number of directly employed permanent employees at the mine who traditionally in the coal industry will bargain together through the MEU for fair wages and conditions. Shrinking the number of permanent employees covered by the mine site enterprise agreement and engaging labour hire workers and contractors to do that exact work reduces the bargaining power of the permanent employees.

18. The effect is that wages – even in the extremely profitable mining industry - have not been keeping up with the cost of living. The fact that workers in such a profitable industry have experienced prolonged real wage cuts[19] demonstrates that legislative reform is absolutely critical. Real wage cuts in the mining industry cannot be justified. The mega mining companies clearly have the capacity to provide the workforce with fair wage increases to assist with the extremely high cost of living.

19. The wage suppression in the mining industry cannot be justified by reference to productivity. In mining, productivity gains have outstripped wage increases. The Productivity Commission recently named mining as one of two industries that have experienced significant 'decoupling' of wage growth from productivity growth.[20]

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[19] See further, ''*A decade of wages lost*'', report by the McKell Institute, January 2023.
[20] ''Productivity Insights, Productivity growth and wages – a forensic look'', report by the Productivity Commission, September 2023, page 1.

20. The decade or so of wage suppression in the extremely profitable mining industry also stunts economic activity in the regional Australian communities that have traditionally relied on secure and fairly paid mining jobs. The contracting out, excessive use of labour hire and casualisation in the mining industry has resulted in the mining communities in the Hunter Valley and Central Queensland experiencing an annual loss of economic activity of approximately $668 million.[21]

21. That means approximately $668 million less is spent each year in the local shops, cafes and otherwise stimulating the local economies in those parts of regional Australia. It is not an exaggeration to say that the contracting out of what were, not that long ago, permanent and fairly paid jobs, threatens the viability and liveability of regional communities that have traditionally relied upon secure and fairly paid mining jobs.

22. It is worth remembering that there has been support across the political spectrum for legislative reform to address these issues. That has included:

    a) The Liberal & National Party dominated House of Representatives Standing Committee on Industry, Innovation, Science and Resources which in 2018 produced the ''*Keep it in the regions: Mining and resources industry support for businesses in regional economies*'' report. That Committee made the following findings:[22]

Casual labour hire

6.128 The Committee was concerned by the increased use of casual labour hire by mining companies and the associated increases in FIFO and DIDO workforces associated with this practice. Workers who are employed under this model face financial difficulty and are often forced to move to capital cities for work, creating a 'second class' of mining employee.

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[21] '*Wage-cutting Strategies in the Mining Industry: The cost to workers and communities*'', Report to the McKell Institute, March 2020, page 25.
[22] Pages 155 – 156.

6.129 The Committee understands that during the downturn the mining industry was looking for ways to economise, but these kinds of work practices can be damaging to communities, impacting on companies' social licence to operate, and should be reviewed.

6.130 The Committee is watching this issue closely and <u>supports moves to legislate to prevent further casualization and outsourcing of mining workforces</u>. (emphasis added).

b) One Nation, who through Senator Roberts introduced the *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022* into Parliament. The Explanatory Memorandum to Senator Robert's Bill said:

The Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 amends the Fair Work Act 2009 to require that, for labour hire workers covered by certain modern awards, the rate of pay being offered for the labour hire workers is the same or greater as for directly employed workers…

The Black Coal Mining Industry Award 2010 contains recently-added protections for casuals. This award has a long history of labour hire contracts being used to destroy hard-won entitlements for workers. Mines will still have the right to use labour-hire contracts, however the cost of those contracts will no longer be borne by the employee through lower wages.

23. Part 6 of the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (hereafter **the Bill**), which is entitled ''Closing the labour hire loophole'' is a central pillar of the Bill. Part 6 is consistent with the support that has been expressed across the political spectrum to legislate for secure jobs and against the erosion of fair pay in the extremely profitable mining industry.

24. The MEU believes that Part 1 of the Bill, which concerns casual employment, and Part 6 of the Bill are likely to result in real wage growth and significantly enhance the job security of MEU members working in the extremely profitable mining industry.

25. For those reasons, the MEU supports the Bill. The Bill should be enacted in full, subject to the amendments suggested below and any amendments suggested by the Australian Council of Trade Unions (**ACTU**).

26. The submissions below are focused upon those parts of the Bill of the most relevance to the MEU – namely, Parts 1, 6 & 7 (which concerns workplace delegates' rights). In making this submission, the MEU adopts and supports the submissions made by the ACTU.

B. Part 1: Casual employment

27. There is nothing casual about a dump truck operator working for a large labour hire company first at an AngloAmerican, and then later a Rio Tinto, coal mine in Central Queensland for a period of almost three years in circumstances where:

    a) The dump truck operator was assigned on a permanent basis to one of the mine's production crews (namely, the ''C'' crew).

    b) The other workers on that crew were a mix of permanent employees engaged directly by the mine operator and labour hire workers.

    c) On being inducted to both mines, the dump truck operator was informed by the mine operator that his hours of work would be 12.5 hours per shift worked on a 7 days on, 7 days off continuous roster.

    d) For the duration of his employment, the dump truck operator worked to that roster.

    e) The dump truck operator did not have the opportunity to choose not to work the shifts and hours assigned to him on the roster.

    f) That roster was provided to the dump truck operator 12 months in advance.

    g) The dump truck operator worked on a FIFO basis and his flights and accommodation were provided at no cost.

h) When staying in such camp accommodation near the mine site during his rostered shifts, the dump truck operator was assigned to the same room.

i) The personal belongings of the dump truck operator were stored in that same room on his days off.

j) The dump truck operator was paid a flat rate of pay for each hour worked. It was unclear whether a casual loading was incorporated into that rate.

28. Those were the facts before the Full Court of the Federal Court of Australia in *WorkPac Pty Ltd* v *Skene*[23] (hereafter **WorkPac v Skene**). The dump truck operator, Mr Skene, was a proud MEU member. The MEU funded and supported the litigation, which illuminated the permanent casual rort.

29. The Full Court of the Federal Court of Australia in *WorkPac* v *Skene* considered Mr Skene's argument that he was not a casual employee. The Full Court unanimously concluded that Mr Skene was not a casual employee.[24] Consequently, Mr Skene was entitled to the benefits of permanent employment such as annual leave.

30. The unanimous conclusion of the Full Court was entirely consistent with how courts and tribunals across Australia had resolved this same question for the past few decades.[25] That question had been resolved by examining whether there is a firm advance commitment to continuing and indefinite work. Significantly, that examination has not been confined to looking only at the terms of the employment contract. Rather, in the decades prior to *WorkPac* v *Skene*, courts and tribunals across Australia also considered the practicial reality of the employment relationship.

31. The settled common law position applied by the Full Court in *WorkPac* v *Skene* was totally upended:

[23] [2018] FCAFC 131 at [18] – [36], [147].
[24] At [155] – [156], [192], [227].
[25] At [43] – [54]. Inserted

Mining & Energy Union

a) First by the former Morrison Government, which in 2021[26] inserted a definition of casual employee at s.15A of the *Fair Work Act 2009* (hereafter **FW Act**). That definition facilitates the permanent casual rort. That is because the definition is exclusively focused upon the terms of the employment contract on commencement of employment.[27] That definition prohibits regard being had to the practical reality to the employment relationship or any change to the employment relationship over time.

b) Then by the High Court of Australia in *WorkPac Pty Ltd* v *Rossato.*[28] The Court determined that the question of whether an employee was a casual employee or not was to be resolved only by reference to the terms of the employment contract.[29]

s.15A: Meaning of casual employee

32. The most significant element of Part 1 of the Bill is to repeal the Morrison Government's definition of casual employee (s.15A of the FW Act).

33. The Bill proposes a definition of casual employee that is entirely consistent with the position that was settled for decades at common law right up until the radical departure first by the Morrison Government and then by the Court in *Rossato*.

34. Importantly, the proposed definition allows the practical reality of the employment relationship to be considered. The proposed definition is not just confined to consideration of the terms of the carefully drafted employment contract.

35. Most significantly, the proposed definition in Part 1 of the Bill calls time on the permanent casual rort. It will enhance the job security of especially labour hire workers in the extremely profitable mining industry.

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[26] In the form of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Reovery) Act 2021*.
[27] See, in particular section 15A(4) of the FW Act.
[28] [2021] HCA 23.
[29] At [62] – [63], [105] – [106].

36. The MEU wholeheartly supports the definition of casual employee set out in Part 1 of the Bill.

Division 4A: Employee choice about casual employment

37. The next critical element of Part 1 of the Bill is the proposed conversion process. That is found at Division 4A of Part 1 of the Bill. In essence, the conversion process is premised upon employee choice. That is, an employee cannot be forced or suddenly deemed to be a permanent employee. Rather, the Bill provides a pathway for those employees that are not a casual employee within the meaning of proposed s.15A to choose to convert to permanent employment.

s.66M: Disputes about the operation of the Division

38. Part 1 of the Bill also properly equips the Fair Work Commission (hereafter **FWC**) to resolve any disputes about the conversion process. Moreover, the transitional provisions in Part 18 of the Bill enable the FWC to resolve any uncertainties or difficulties about the proposed definition and a fair work instrument (modern award, enterprise agreement etc).

Summary of MEU position as to Part 1 and recommendation

39. These are all logical, balanced and appropriate provisions.

40. Part 1 of the Bill is well-drafted and will enhance the job security of MEU members working in the extremely profitable mining industry.

41. We recommend that Part 1 of the Bill be enacted without amendment.

C. Part 6: Closing the labour hire loophole

42. Part 6 of the Bill would introduce Part 2-7A into the FW Act. It is intended to close the labour hire loophole. The labour hire loophole involves the extremely profitable mining companies contracting out mining jobs – dump truck

operators, underground operators and the like – to labour hire on lower rates of pay than the mine site enterprise agreement.

43. The labour hire loophole is not about short term surges or short term absences. The labour hire loophole is not about specialist or expert work. It is not about genuine service contractors.

44. It is all about a labour hire workforce that is embedded in the day to day operations of the mine. Commonly, these labour hire workers will:

    - work in the same crews;
    - do the same work – such as operate the same dump trucks in an open cut mine or operate the same continuous miners in an underground mine;
    - work to the same roster;
    - work to the same policies, procedures and rules; and
    - be exposed to the same risk in an inherently dangerous industry

    as employees engaged on a permanent basis by the mine site operator. The only real difference being that the labour hire workers will commonly be paid between 30% - 40% less than the employees engaged on a permanent basis by the mine site operator.

45. The unfairness and devasting effect of the excessive contracting out of mining jobs upon both the permanent employees engaged by the mine site operator and the labour hire workers – in terms of their capacity to achieve real wage increases to assist with the extremely high cost of living, job security and safety at work – have been discussed above. The broader adverse consequences for regional Australian mining communities have also been discussed above.

46. Part 6 is well-overdue and a welcome legislative response to the labour hire loophole.

47. The provisions of Part 6 will not stop outsourcing.

48. The provisions of Part 6 will **not** threaten mining jobs, investment or mining development. After all, mining is a capital intensive industry. Labour costs account for a relatively small share of a mine's total costs (around 12%).[30] By way of comparision, labour costs account for around 25% of total costs in other industries.[31] Moreover, as will be discussed in the case study below, these provisions will not devastate the Pilbara – as has been hysterically asserted by lobbyists for the mega mining companies.[32]

49. However, the provisions of Part 6 will ensure the mega mining companies cannot undercut the rate of pay in the mine site enterprise agreement that they have freely agreed to by embedding lower paid labour hire workers into their workforce to do the same job, on the same roster, at the same mine.

50. The provisions will better assist all mine-workers – those directly employed by the mine operator and the labour hire workers – to achieve real wage increases to assist with the extremely high cost of living, and enhance the job security of all mine-workers.

51. The key provisions of Part 6 of the Bill are discussed below.

s.306E: FWC may make a regulated labour hire arrangement order

52. The obligations created by Part 6 of the Bill don't simply operate by force of the statute. Rather, the obligations are triggered by the FWC making a regulated labour hire arrangement order under s.306E of the Bill.

53. The criteria set out in s.306E must be satisified before the order can be made. The targeted and measured nature of Part 6 of the Bill is evident from one of the mandatory items of that criteria. That being, s.306E(1)(b) which requires the FWC to be satisfied that:

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[30] ''*Productivity in the Mining Industry: Measurement and Interpretation*'', Productivity Commission Staff Working Paper, December 2008, page 66.

[31] ''*Productivity in the Mining Industry: Measurement and Interpretation*'', Productivity Commission Staff Working Paper, December 2008, page 66.

[32] ''Same *Job, Same Pay: Minerals Council warn mining projects could grind to a halt under IR changes*'', The Western Australian, Monday 14 August 2023.

a covered employment instrument that applies to the regulated host would apply to the employees if the regulated host were to employ the employees to perform work of that kind.

54. In summary terms, s.306E(1)(b) of the Bill ensures that the order triggering the obligation must only be made where the regulated host is bound by an enterprise agreement[33] which has a coverage clause that extends to the work performed by the labour hire workers.

55. That mandatory item of the criteria will almost always be satisfied in the coal mining industry. That is because almost all coal mine operators across Australia are bound by an enterprise agreement. The coverage of such enterprise agreements is typically confined to production and engineering work. The effect being that labour hire workers performing production and engineering work on a coal mine will likely satisfy this item of the criteria.

56. That outcome illustrates the targeted and measured nature of Part 6. It is not intended to apply right across the economy. Part 6 is only intended to apply where the labour hire loophole is used.

57. It is a notorious fact that the labour hire loophole has been used with respect to production and engineering work in the coal mining industry by the likes of BHP and other mega mining companies. Part 6 is drafted to ensure that the labour hire loophole cannot be used by such mega mining companies.

58. A further point should be made about the typical coverage of enterprise agreements that are binding on coal mine operators. That is, the coverage of such enterprise agreements simply does not extend to:

- The bus driver that drives the mine-workers to / from camp and the mine;
- The cook or food attendant in the mine camp; or

[33] Or another covered employment instrument as defined (see item 72 of the Bill).

- The security guards at the mine.

59. That should dispel the myth peddled by some that Part 6 will apply to such ancillary or support functions if outsourced by the mega mining companies to labour hire. Moreover, it further reinforces the targeted and measured nature of Part 6.

60. Another fictitious claim asserted by opponents to the Bill is the supposedly devasting effect of Part 6 on the mining industry in the Pilbara. Ths claim is discussed in the case study below.

Case Study: Part 6 of the Bill & the Pilbara

The West Australian — Monday 14 August 2023

Same Job, Same Pay: Minerals Council warn mining projects could grind to a halt under IR changes

Ms Constable (Tania Constable) is warning there could be major consequences for the mining sector...

"The consequences will be devastating for the Pilbara and the wider economy."

The West Australian — Thursday 7 September 2023

Editorial: WA must fight against 'Victorian' IR laws

Gerhard Veldsman, chief executive of Gina Rinehart's Roy Hill said Same Job Same Pay would overhaul would force miners to shift staff to "minimum award standards".

The facts are that there are very few enterprise agreements that apply to mine operators in the Pilbara. Unlike the coal mines on the East Coast, enterprise bargaining is virtually non-existent – and certainly not the norm - with the mine operators in the Pilbara.

That is the direct result of the aggressive de-unionisation campaigns pioneered by the mega mining companies in the Pilbara combined with regressive industrial laws enacted by Federal and Western Australian

Governments in the 1980s and 1990s. Those laws placed a clear preference for individual contracts over collective bargaining.[34]

Moreover, even in those few instances where a mine operator in the Pilbara is bound by an enterprise agreement, those agreements have long passed their nominal expiry date. Consequently, the rates of pay in those agreements are now well below the market rate. For example:

- The Whaleback Fly-In Fly-Out Agreement 2013, which applies to certain employees at BHP's Whaleback Mine, provides an annual base rate of $88K for a tradesperson such as an electrician.[35] That agreement reached its nominal expiry date in October 2017.[36] It has not been replaced by another enterprise agreement.

- The Mining Area C Operations Agreement 2015, which applies to certain employees at BHP's Mining Area C Operations, provides an annual base rate of $69K for a Haul Truck Operator.[37] That agreement reached its nominal expiry date in August 2019.[38] It has not been replaced by another enterprise agreement.

Those two examples demonstrate the point – even if the FWC made a regulated labour hire arrangement order under s.306E of the Bill, the protected rate of pay (hereafter **PROP**) derived from either of those out of date enterprise agreements would now be significantly lower than the rate actually paid to labour hire workers engaged in such work.

It is evident that the claims that Part 6 of the Bill will devastate the Pilbara or the wider economy are simply untrue. Those claims ignore basic facts. Those claims should be disregarded.

[34] See, Ellem, Bradon ''*Hard Ground: Unions in the Pilbara*'', especially pages 8, 16 & 45.
[35] Clauses 7 & Schedule 1 of the Whaleback Fly-In Fly-out Agreement 2013.
[36] [2013] FWCA 7929 at [4].
[37] Clauses 5.1 & Schedule 1 of the Mining Area C Operations Agreement 2015.
[38] [2015] FWCA 5513 at [4].

61. BHP has also claimed that these laws would add billions to the cost of future critical minerals developments including burgeoning copper investments in South Australia.[39] It is unclear how any such figure could be calculated given there are no enterprise agreements that apply to any such hypothetical mining operations. In any event, the choice for the mega mining companies should be a simple one – bargain in good faith for fair wages and conditions with the entire workforce. Our future critical minerals industry should not be built on the same two-tier, divisive and exploitative employment model that the mega mining companies have engineered in the coal mining industry.

s.306F: Protected rate of pay payable to employees if a regulated labour hire arrangement order is in force

62. If the FWC makes the order under s.306E, the obligation is to pay the PROP. The PROP is clearly defined in s.306F. The PROP is defined by reference to the full rate of pay, which is already defined at s.18 of the FW Act. The PROP does not extend to conditions of employment. In effect, it is confined to wages. The MEU strongly supports the definition of the PROP in s.306F.

63. Under s.306F(2), the obligation is imposed on the employer. That is, the labour hire employer. That obligation is a civil remedy provision. That is critical to enhancing compliance by labour hire employers who are the subject of an order made by the FWC under s.306E.

s.306G: Exceptions from requirement to pay protected rate of pay

64. The effect of s.306G is that apprentices and trainees are exempt. That means, an order under s.306E cannot be made which would require a labour hire company to pay the PROP derived from the host enterprise agreement to either an apprentice or trainee.

65. Opponents of the Bill have repeatedly made the claim that an inexperienced worker, such as a first year apprentice, would be entitled to the same rate of

[39] ''*BHP warns of $3 billion hit from labour laws*'', Australian Financial Review, 27 July 2023.

pay as an experienced worker, such as a fully-qualified tradesperson. This exemption demonstrates that such a claim is patently false.

66. s.306G further provides an exemption for certain short-term arrangements. Subdivision C builds in further flexibility under the supervision of the FWC to deal on a case by case basis for such short-term arrangements.

ss.306M – 306Q: Alternative protected rate of pay orders & dispute resolution

67. ss.306P & 306Q equip the FWC with the capacity to resolve disputes about the operation of the part. Empowering the independent umpire to resolve such disputes is entirely logical. It cannot be sensibly argued that the FWC should not be able to resolve such disputes.

68. There is also capacity for the FWC to make an alternative protected rate of pay order under s.306M. The criteria for making such an order is clearly identified at s.306M. It would appear that such an order would only be made in extremely limited circumstances.

ss.306S – 306V: Anti-avoidance

69. Regrettably, some employers will simply not accept that the labour hire loophole is being closed.

70. Such employers will attempt to engineer circumstances to get around these provisions.

71. Such employers will attempt to manufacture scenarios to enable them to continue treating labour-hire workers as second-class citizens. That is, workers with no job security and on wages that are 30% - 40% lower than the wages of permanent employees engaged under the mine site enterprise agreement.

72. These employers will make false claims about the Bill in an attempt to stop its enactment. These employers will then fight tooth and nail in the courts to defend the schemes they have devised to avoid the clear intent of Part 6 of the Bill.

73. This explains why the robust anti-avoidance measures contained in Part 6 of the Bill are absolutely critical.

Summary of MEU position as to Part 6 and recommendation

74. The MEU strongly supports the enactment of Part 6 of the Bill.

75. The proposed legislative scheme is targeted. It is not economy wide.

76. The proposed legislative scheme will make a real difference for mine-workers, especially on the East Coast in the coal mining operations of the extremely profitable mega mining companies.

77. It will enhance the job security of all such mine-workers.

78. It will assist all such mine-workers in achieving real wage increases, which is absolutely necessary given the extremely high cost of living.

79. It will improve safety outcomes in an inherently hazardous industry.

80. It will boost those regional Australian towns that have traditionally been reliant on fairly paid and secure mining jobs. It will boost the economic activity in those towns plus result in additional benefits to livability and viability that arise from the residents having greater job security and real wage increases.

81. The MEU supports and adopts the items identified by the ACTU as areas where Part 6 could be improved. In particular, the items that go to the streamlining of the process by which the FWC can make the order under s.306E, triggering the obligation on change of labour hire provider, or to expressly enable joinder of common applications.

D. Part 8: Workplace delegates' rights

82. The MEU is strongly supportive of Part 8 of the Bill, which provides some protections and rights for workplace delegates.

83. It is important to appreciate that a workplace delegate as defined by s.350C of the Bill is essentially a volunteer. A workplace delegate as so defined is not a full-time union official. Rather, a workplace delegate is actually employed by the relevant employer to work at the relevant enterprise. A workplace delegate volunteers their time to perform functions including:

- Negotiating wage increases and conditions with local management which are typically expressed in an enterprise agreement;
- Consulting with local management about workplace change or other issues of concern to their workmates;
- Offering support, assistance and representation to workmates that have experienced a range of problems at work – such as being dismissed, underpaid, injured, sexually harassed or bullied.
- Being the liason point between the union members at the relevant workplace and full-time union officials. That is an important role in the context of the various governance obligations that registered organisations are required to meet.

84. Workplace delegates perform all of those functions – and then more.

85. Such functions are done in addition to the actual job performed by the workplace delegate at the relevant workplace and any family, personal or other community commitments that the workplace delegate may have.

86. Typically, workplace delegates will be the same people that put their hand up to volunteer in the the local community – at the local sporting club, the P&C at their children's school, as volunteer firefighters in the local brigade or with a local environmental group cleaning up local bushland, beaches and rivers.

87. That is because workplace delegates are motivated to improve the position of their workmates and their community.

88. Workplace delegates play a critical role in giving their workmates a strong collective voice, ensuring fair wages and conditions, and proper representation and support at work.

89. Unfortunately, in some instances an effective workplace delegate that is strongly advocating for fair wage increases, enhanced job security and better safety at work will result in friction and a strained relationship between the workplace delegate and their employer. That conflict can manifest into some employers discriminating against workplace delegates.

90. In order to eliminate discrimination on that basis, it is entirely appropriate for Part 7 of the Bill to include proper protections for workplace delagates.

91. It is also appropriate that Part 7 of the Bill provides workplace delegates with the rights set out at s.350C of the Bill. The provision of such rights is absolutely necessary to ensure that a workplace delegate can properly support and represent the industrial interests of their workmates. For example, a workplace delegate who has received training will be better placed to support and represent their workmates than a workplace delegate who has received no training whatsoever. It is also likely that a workplace delegate who has received proper training – in negotiation, dispute resolution and the like - is likely to result in better outcomes for both the employees and the employer.

Summary of MEU position as to Part 7 and recommendation

92. The MEU strongly supports the enactment of Part 7 of the Bill.

Conclusion

93. The Bill is logical, fair and balanced. It delivers on the clear mandate of the Federal Government, supported at the last Federal election, to improve the job security and assist working Australians maintain their real wages.

94. The MEU supports and adopts the ACTU submissions made with respect to the Bill.

95. The MEU is strongly supportive of the enactment of the Bill, which will enhance the job security and real wages of our members that work hard in an inherently dangerous industry for extremely profitable mega mining companies. Our members and the mining communities where they reside deserve fairly paid and secure jobs. The enactment of this Bill is fundamental to those objectives.