CLOSING LOOPHOLES REVIEW

Mining and Energy Union Submission

6 March 2026

Mining &
Energy
Union

Introduction

1. The Mining and Energy Union (**MEU**) welcomes the opportunity to contribute to the independent review of the operation of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (**Closing Loopholes 1**) and the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 (Cth)* (**Closing Loopholes 2**). These landmark pieces of legislation made extensive and long-overdue amendments to the *Fair Work Act 2009* (Cth) (**FW Act**).

2. This submission will principally address the review's Terms of Reference in relation to the insertion of Part 2-7A into the FW Act by Closing Loopholes 1, which established the regulated labour hire arrangement order (**RLHAO**) scheme. It also proposes a critical amendment to the delegates' rights framework inserted into the FW Act by Closing Loopholes 1 and outlines why the amendments made to the definition of casual employment by Closing Loopholes 1 are appropriate and effective.

3. Specifically, this submission will:

    a. Provide a brief introduction to the Mining and Energy Union.
    b. Outline the effect that the enactment of Part 2-7A has had on our members, their communities and regional Australia.
    c. Summarise the MEU's significant experience utilising Part 2-7A of the FW Act.
    d. Identify a series of amendments to Part 2-7A that are necessary to improve the operation of, or to address an unintended consequence of Part 2-7A.
    e. Identify an amendment to the delegates' rights regime that is necessary to improve its operation and to address an unintended consequence.
    f. Outline why the amendments made to the definition of casual employment are appropriate and effective.

Summary of recommendations

#	Recommendation	Para No
1	**Recast the s 306E(1A) exemption:** Replace the current formulation with a provision directing the Commission not to make an order where it is satisfied that the work is performed for the provision of a genuine service, giving unequivocal effect to Parliament's intention.	[28]-[37]
2	**Redefine "genuine service" in place of s 306E(7A):** Confine the genuine service exemption to arrangements where the regulated employees perform specialised tasks that are not, have not been, and could not be performed by employees of the host employer or any related joint venture or common enterprise.	[28]-[37]
3	**Reverse the legal onus in s 306E(1A):** place the evidentiary onus to establish that the supply of labour is for a genuine service on the employer.	[28]-[37]
4	**Amend s 306F:** Insert a new s 306F(4A) to clarify that a regulated employee's PROP must be determined by reference to a directly engaged employee performing equivalent work and who has equivalent service and skills, ensuring labour hire employees receive the same rate of pay as their directly engaged counterparts	[38]-[46]
5	**Amend s 306Q:** Confer on unions the capacity to bring representative proceedings under Part 2-7A, enabling large-scale disputes to be resolved efficiently and effectively.	[38]-[46]
6	**Repeal s 306G(1).**	[47]-[52]
7	**Amend s 306D:** such that work performed by an associated entity of the person, an enterprise carried on by an associated entity of the person or a joint venture or common enterprise engaged in by the associated entity of the person is taken to be work performed for the benefit of that person.	[53]-[58]
8	**Retrospective operation of orders:** Amend Part 2-7A to provide that any regulated labour hire arrangement order takes effect from the date on which the application was lodged, ensuring regulated employees are not disadvantaged by procedural delay.	[62]-[69]

9	**Interim orders:** Alternatively, amend Part 2-7A to require the Commission to issue an interim regulated labour hire arrangement order in any case where it is unable to finally determine an application within a specified period, for example, 30 days.	[62]-[69]
10	**Pay and conditions:** Amend Part 2-7A to provide that labour hire employees are entitled to pay and conditions no less favourable than those afforded to the host employer's directly engaged employees under their enterprise agreement.	[70]-[78]
11	**Equal access to workplace entitlements:** Require both the employer and the regulated host to afford regulated employees equal access to training, amenities, rostering rights and the right to apply for vacancies with the host employer.	[79]-[83]
12	**Extend the obligations in 350A to all employers:** extend the obligations in 350A to all employers whose employees are being represented by the workplace delegate, regardless of whether those employers engage the delegate directly.	[84]-[88]

Table of Contents

The Mining and Energy Union

4. The MEU is the principal trade union representing workers in the mining industry.

5. The MEU has significant membership working in coal and metalliferous mining, power stations and coal export terminals. In total, we have over 25,000 members who work in the mining and energy industries across Australia.

6. Our members live and work in regional Australia – including in the coal fields of the Hunter Valley, Central Queensland, the Illawarra, Lithgow, Mudgee, Collie, Latrobe Valley, and Tasmania as well as in the metalliferous mining areas in the Pilbara and Western New South Wales.

7. For well over one hundred years, we have proudly advocated for well-paid and secure jobs in regional communities.

The effect that the enactment of Part 2-7A has had on the MEU's members, their communities and regional Australia

8. In the decades preceding the enactment of Closing Loopholes 1, well-paid and secure jobs in regional Australian mining communities were increasingly converted into insecure jobs with less pay and fewer entitlements.

9. The principal mechanism of this degradation was the proliferation of labour hire employment (also known as agency or on-hire arrangements). In a relentless pursuit of profit, multinational mining companies ruthlessly outsourced permanent and fairly paid jobs to avoid affording workers the conditions in union enterprise agreements. These rates represented the industry standard and were the result of more than a century of industrial compromises between unionised labour and employers.

10. The human cost of this practice is illustrated when examining the significant disparity between rates of pay under enterprise agreements covering direct employees and those applicable to labour hire workers performing identical work at the same site.

Mine	Mine operator	Labour hire company	Shortfall between EA rates per annum (approx.)
Appin	GM3	PIMS	$18,000[1]
Bengalla	New Hope	Programmed	$45,000[2]
Mangoola	Glencore	Workpac	$47,500[3]
Saraji	BHP	BHP Operations Services	$30,000[4]
Blackwater	Whitehaven	Workpac	$17,500[5]

11. The effects of this practice are not confined to individual workers; it had devastating consequences for entire regional communities. Across just three regional communities in NSW and Queensland — the Hunter Valley, Mackay-Isaac-Whitsunday, and Central

[1] Appin Colliery & West Cliff CPP Enterprise Agreement 2022 (AE517907; PIMS Mining (NSW) Pty Ltd Enterprise Agreement 2019 (AE507893).
[2] Bengalla Enterprise Agreement 2022 (AE517092).
[3] Mangoola Coal Enterprise Agreement 2021(AE513167);WorkPac Coal Mining Agreement 2019 (AE504188)
4 BMA Enterprise Agreement 2022(AE518866); Operations Services Production Agreement (AE530138)
[5] BMA Enterprise Agreement 2022(AE518866); WorkPac Coal Mining Agreement 2019 (AE504188)

Queensland — the collective economic loss attributable to the substitution of directly employed workers with lower-paid labour hire arrangements ranged from $485 million to $851 million every single year.[6]

12. The sums of money withheld from regional communities because of entrenched labour hire practices in the mining industry were rendered particularly egregious in the two years before the passage of Closing Loopholes 1, when record-high coal prices delivered billions in windfall profits for Australian coal producers. In the 2021-22 calendar year, Australian coal exporters benefitted from an estimated $39-45 billion in windfall profits.[7]

13. The practice had also become deeply entrenched across the broader economy, with the number of people whose primary job was for a labour hire company growing by 415 per cent between 1994 and 2024, rising from 0.8 per cent to 2.4 per cent of total employment over the same period.[8]

14. The introduction of Part 2-7A into the FW Act began to reverse this trend. For the first time, workers and their unions were able to pierce the corporate veil and ensure that companies could not use convoluted corporate structures and outsourcing to drive down wages.

15. Since the passage of Closing Loopholes 1, the MEU estimates that our applications have delivered over $140 million in annual pay rises for labour hire workers, including $82 million in the Bowen Basin, $53 million in the Hunter region, and $8 million in the Illawarra.

16. The effect of some of these applications on individual workers cannot be understated. For example, before the enactment of Part 2-7A, labour hire workers at the Poitrel Mine in Queensland were paid up to $90,000 less than their coworkers who were engaged by the mine operator to perform the same tasks and duties. As a result of an application made by the MEU under Part 2-7A, these workers are now paid the same.[9]

17. Equally encouraging is the way Part 2-7A is reshaping employer behaviour more broadly. Rather than waiting for orders to be made against them, a growing number of host employers are proactively insourcing labour hire roles — a striking illustration of the reform working exactly as intended. At BHP's Mount Arthur mine in the Hunter Valley, for instance, the number of labour hire workers at the site fell from over 400 before the amendments

[6] McKell Institute, *Wage Cutting Strategies in the Mining Industry*, 2020, p.25
[7] Saunders and Campbell, 2022, 'From Russia with love: Coal profits from war in Ukraine', *The Australia Institute*, p. 3.
[8] McKell Institute, *Closing Loopholes, Opening Opportunities*, 2025, p.8
[9] *Application by Mining and Energy Union re Poitrel Mine* [2024] FWCFB 412

passed, to 270 when the application to the Fair Work Commission was first made, and to 230 by the time the order was issued — with BHP subsequently announcing the insourcing of a further 200 labour hire roles, effectively reversing a decade of outsourcing at the mine.[10]

18. The full economic significance of Part 2-7A becomes even clearer when its broader community impacts are considered. The McKell Institute's 2025 report *Closing Loopholes, Opening Opportunities* estimates that in a moderate scenario regulated labour hire arrangement orders could generate an aggregate annual wage uplift of approximately $920.3 million.[11] When the multiplier effects of increased consumer spending are applied, the whole-of-economy benefit is calculated at up to $2.556 billion per year.[12]

19. For regional Australian communities that depend heavily on the mining industry, these figures are transformative. For every mining job created, 1.4 additional jobs are typically created in the surrounding regional community,[13] meaning that wage increases flowing from regulated labour hire arrangement orders ripple powerfully through local economies.

20. When set against this background, the enactment of Part 2-7A was not just fair industrial relations reform; it was reform that supported regional Australia and the national economy.

[10] McKell Institute, *Closing Loopholes, Opening Opportunities*, 2025, p.17-18
[11] McKell Institute, *Closing Loopholes, Opening Opportunities*, 2025, p.26
[12] McKell Institute, *Closing Loopholes, Opening Opportunities*, 2025, p.27
[13] Fleming, D.A. and Measham, T.G., 2014. Local job multipliers of mining. Resources Policy, 41.

The MEU's experience utilising Part 2-7A

21. The MEU has obtained approximately 50 regulated labour hire arrangement orders, covering approximately 5,000 regulated employees across the resources sector.

22. The MEU has been party to more applications for regulated labour hire arrangement orders under Part 2-7A — and more s 306Q dispute applications concerning the operation of that Part — than any other registered organisation or company, giving it unparalleled experience in the practical operation and application of the legislative scheme.

23. The MEU has been involved in every significant test case before the Fair Work Commission and every Federal Court proceeding arising under Part 2-7A to date, placing it in a unique position to identify the limitations of the current framework and to advance informed proposals for reform.

Proposed amendments to Part 2-7A

24. Our considerable experience with Part 2-7A has uncovered several issues requiring legislative attention. We address two categories of reform:

    a. amendments necessary to maintain the integrity of Part 2-7A; and,
    b. amendments to maximise the benefit of the regime

    For each issue, we identify the relevant problem and propose a specific legislative solution.

Maintaining the integrity of Part 2-7A

25. The following section addresses amendments necessary to maintain the integrity of Part 2-7A. Notwithstanding the significant achievements of the "same job, same pay" reforms, the MEU's experience in prosecuting applications under the Part has revealed several structural weaknesses in the current framework that, if left unaddressed, risk being exploited in ways that would progressively erode the protections the legislation was designed to confer.

26. In particular, the MEU has identified the following four issues as warranting urgent legislative attention:

    a. the unintended breadth of the service contractor exemption;
    b. uncertainty in the calculation of the protected rate of pay;
    c. the inclusion of an exemption for traineeships; and
    d. The unintended limit of *'work performed for a person.'*

27. The amendments proposed below are directed at closing these identified gaps and ensuring that the legislative scheme operates in a manner consistent with its evident policy intent.

Section 306E(1A) - the service contractor exemption

The issue

28. When enacting Part 2-7A of the FW Act, Parliament intended that regulated labour hire arrangement orders would not be available with respect to arrangements for the provision

of a service, as opposed to the supply of labour. Section 306E(1A) was enacted to give effect to that intention, and provides as follows:

> *…the FWC must not make the order unless it is satisfied that the performance of the work is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters in subsection (7A).*

29. A Full Court of the Federal Court has considered the operation of s 306E(1A) on one occasion since its enactment. In *BHP Coal Pty Ltd v Mining and Energy Union* [2025] FCAFC 194 at paragraph 48, the Full Court observed that (our emphasis):

> *Rather, the Commission's reasons indicate that it was seeking to address itself to whether the service(s) provided by the applicants was (or were) identifiable* ***and involved something different or in addition to the mere supply of the labour*** *of the regulated employees.*

30. In the paragraphs that followed, the Full Court found no error in the Commission's reasoning. However, the Full Court's reasoning raises a real concern about the future integrity of the scheme and the availability of a new 'loophole' within the framework. In effect, the Court's reasons state that an arrangement may constitute the provision of a service merely because 'something more' than bare labour is supplied. That suggests there is substantial scope for host employers to restructure arrangements that are, in substance, labour hire to fall outside the framework, with the potential to frustrate the remedial purpose of Part 2-7A.

31. Although the legislation contains anti-avoidance provisions, these are insufficient to address the behavioural change that can be expected when the financial incentives to avoid an order are so significant. The anti-avoidance provisions are two-fold:

    a. Section 306S is directed at preventing conduct whose sole or dominant purpose is to frustrate the Commission from making a regulated labour hire arrangement order. This threshold, likely, presents an insurmountable obstacle in circumstances where employers can frame their actions in a manner responsive to it and where there is an inherent information asymmetry between the parties.

b. Section 306SA is targeted at preventing actions that avoid the application of a regulated labour hire arrangement order that has already been made and has no work to do in these circumstances.

32. The Court's findings about how the service contractor test should be applied in practice do not align with the policy intent of the Government and the Parliament in enacting this legislation. While the Minister clearly intended to exempt genuine service contracting arrangements from the scope of regulated labour hire arrangement orders, that was a limited exception that was always aimed at genuine specialist services rather than restructured labour supply arrangements. The very real risk following the Federal Court's judgment is that the careful balance proposed by the Government between the rights of labour-hire workers and the need to protect genuine specialised contractors is not maintained in the future operation of the scheme.

The solution

33. The most straightforward means of addressing the expansive operation of the service contractor exemption is to repeal ss 306E(1A) and (7A). Genuine service contractors would not be left without recourse, as they would retain the ability to resist the making of a regulated labour hire arrangement order by establishing, under s 306E(2), that it would not be *'fair and reasonable'* in all the circumstances for such an order to be issued. For a genuine service contractor, this would not be a high bar to overcome.

34. However, a less contentious reform would be to recast the exemption in s 306E(1A) to unequivocally give effect to Parliament's intention in enacting Part 2-7A. In place of the current formulation, the provision could direct the Commission not *to make the order if it is satisfied that the performance of the work is or will be for the provision of a genuine service.*

35. In place of the current s 306E(7A), a clear definition of *genuine service* could provide that an arrangement constitutes the provision of a genuine service only if:

a. the tasks performed by the regulated employees are of a specialised nature when compared to the tasks performed by the host employees; and

b. tasks of that kind are not, have not been, or could not be performed by employees of the regulated host, or by employees of a person engaged in a joint venture or common enterprise with the regulated host.

36. The proposed formulation would achieve two critical outcomes:

    a. It would define the service contractor exemption by reference to arrangements where the work performed by the supplied labour is qualitatively distinct from work that is, has been, or could be performed by the regulated host's own workforce — and which therefore genuinely constitutes the provision of a service rather than the supply of labour; and

    b. It would place the legal onus to establish that the supply of labour is for a genuine service on the employer. This better reflects the objects of the scheme and the practical realities of who holds the relevant information about the nature of the work performed.

37. These reforms would ensure that the genuine service contractor arrangements that exist in the mining industry remain outside the scope of the RLHAO scheme.

Proposed recommendation:

- **Recasting the s 306E(1A) exemption:** Replace the current formulation with a provision directing the Commission not to make an order where it is satisfied that the work is performed for the provision of a genuine service, giving unequivocal effect to Parliament's intention.

- **Redefining "genuine service" in place of s 306E(7A):** Confine the genuine service exemption to arrangements where the regulated employees perform specialised tasks that are not, have not been, and could not be performed by employees of the host employer or any related joint venture or common enterprise.

- **Reversing the legal onus in s 306E(1A):** place the evidentiary onus to establish that the supply of labour is for a genuine service on the employer.

Section 306F(4) - calculation of the Rate of Pay

The issue

38. Section 306F(4) of the *Fair Work Act 2009* (Cth) defines the protected rate of pay for a regulated employee as the full rate of pay that would be payable to the employee if the host employment instrument were to apply to them.

39. This formulation operates satisfactorily in straightforward cases. For example, where a host enterprise agreement contains a classification structure under which employees are classified according to their skills or the tasks they perform, ascertaining the applicable rate of pay would be relatively straightforward.

40. However, the current formulation gives rise to significant ambiguity and uncertainty in other circumstances. For example, where a host enterprise agreement provides for classification progression based on time served at the previous level, it is unclear whether a regulated employee's service before the commencement of the regulated labour hire arrangement order is to be taken into account for the purposes of determining their classification — and therefore their rate of pay.

Case Study: The classification structure in the BMA Enterprise Agreement 2022

The ambiguity identified above arises directly under the BMA Enterprise Agreement 2022.
The BMA Enterprise Agreement 2022 covers and applies to employees of BHP at the Goonyella Riverside, Saraji and Peak Downs mines, as well as employees of Whitehaven Coal at the Blackwater Mine.

To date, 11 regulated labour hire arrangement orders have been issued naming the BMA Enterprise Agreement 2022 as the host instrument, collectively covering approximately 1,900 regulated employees.

Schedule 9 to the BMA Enterprise Agreement 2022 provides the agreement's career structure for a haul truck driver to be considered a level two employee; they must satisfy the condition that they have spent 24 months at level 1.

In the main, the employers of these approximately 1,900 employees, many of whom are haul truck drivers with more than two years of experience, have declined to recognise service accrued before the commencement of the relevant regulated labour hire arrangement orders.

41. If the approach taken by the employers in the above case study is permissible under s 306F(4), it creates a significant loophole enabling host employers to prospectively design enterprise agreement classification structures to insulate themselves from the full operation of Part 2-7A. A tiered pay structure of this kind — deliberately engineered to ensure that labour hire employees remain on lower rates of pay than their directly engaged counterparts even after a regulated labour hire arrangement order is made — would fundamentally undermine the legislative scheme. Such a result is irreconcilable with the "same job, same pay" intent. The subject matter of this case study is presently before the Commission in C2025/10667 - *WorkPac Pty Ltd v Loretta Bennett.* The matter was heard by a Full Bench on 18 February 2026, and the decision is reserved.

42. Further, although Part 2-7A contains a dispute resolution mechanism, it fails to confer on a union the capacity to initiate representative proceedings on behalf of affected workers. The practical consequences of this omission are significant.

43. To pursue a dispute of the kind described in the case study, a union would be compelled either to bring 1,900 individual applications before the Commission or to join 1,900 applicants to a single dispute notification. Neither course is efficient nor practicable as a means of resolving a large-scale and complex dispute.

The solution

44. Section 306F should be amended to insert a new subsection 306F(4A) to clarify how the host employment instrument is to be taken to apply to regulated employees. Specifically, in conducting the counterfactual exercise required by section 306F(4), the applicable rate of pay should be determined by reference to an employee of the host employer with equivalent length of service, experience, skills and competencies, or who performs the same work, tasks or duties as the regulated employee. That rate of pay should then be prescribed as the regulated employee's protected rate of pay.

45. Such an amendment would give effect to the evident intent underlying the "same job, same pay" principle and address a potential gap in the current framework that undermines equitable outcomes for regulated employees.

46. Further, 306Q should be amended to provide unions with the capacity to bring representative proceedings to enable the efficient resolution of large-scale disputes. This is consistent with the objects of Part 2-7A and the FW Act at large. The dispute settlement

pathway as drafted appears to limit disputes to individual worker matters. That is not appropriate where the primary source of disputes will be collective terms set out in an enterprise agreement. It is undesirable that employers, unions and workers can seek alternative outcomes for different workers on the basis that a s 306Q arbitral award is strictly not binding on the rest of the workforce cohort. This uncertainty is particularly acute in circumstances where a s 306Q arbitral award cannot resolve the meaning of the pay obligations in s 306F(4) as it applies to workers outside of the dispute.

Proposed recommendation:

- **Amendment to s 306F:** Insert a new s 306F(4A) to clarify that a regulated employee's PROP must be determined by reference to a directly engaged employee performing equivalent work and who has equivalent service and skills, ensuring labour hire employees receive the same rate of pay as their directly engaged counterparts.

- **Amendment to s 306Q:** Confer on unions the capacity to bring representative proceedings under Part 2-7A, enabling large-scale disputes to be resolved efficiently and effectively.

Section 306G(1) – adjusting the exemption in s 306G(1)

The issue

47. Section 306G(1) of the Fair Work Act currently excludes from the protections of section 306F any regulated employee to whom a training arrangement applies in respect of the work they perform for the regulated host.[14]

48. Trainees engaged through labour hire arrangements are among the most vulnerable workers and are often engaged on lower rates of pay in circumstances where the training component of their arrangement may be minimal or incidental to the work they perform.

[14] Section 12 of the *Fair Work Act 2009 (Cth)* defines a training arrangement as a combination of work and training that is subject to a training agreement, or a training contract, that takes effect under a law of a State or Territory relating to the training of employees.

49. Allowing regulated hosts and labour hire employers to rely on the trainee exemption to avoid the operation of Part 2-7A risks creating an incentive to structure arrangements as traineeship agreements to defeat the protections of Part 2-7A.

50. Since the enactment of Part 2-7A, traineeships in the black coal mining industry have increased in both frequency and duration. This is best illustrated in the below case study.

Case Study: Traineeships at the Wilpinjong mine

At Annexure 1, we have included two advertisements published by the same labour hire employer, which illustrate this concern.

The first advertisement is for a dump/haul truck traineeship with a labour hire company at a mine near Mudgee in central New South Wales. During the 24-month traineeship, the trainee operates hall trucks and completes a Certificate III in Surface Extraction. For each hour worked, the worker is paid $38.

Peabody operates the Wilpinjong mine near Mudgee in central New South Wales. Under the *Wilpinjong Coal Mine Enterprise Agreement 2024 (*AE529050), Peabody trainees are paid an all-in minimum rate of $52 per hour, and the traineeship lasts only nine months. Upon completion of the traineeships, the all-in minimum rate rises to $66 per hour.

By way of the second advertisement, the same labour hire company seeks experienced dump/haul truck operators. A Certificate III in Surface Extraction is not listed as a requirement for the job.

51. Only one conclusion can be drawn: traineeships are being used as a vehicle to circumvent Part 2-7A and to pay labour hire workers less than their permanently engaged workmates.

The solution

52. Section 306G(1) should be repealed. Repealing 306G(1) would have a positive effect on training in the mining industry. It would encourage more people to seek jobs in mining because they would be paid a fair wage.

Proposed recommendation:

- Section 306G(1) should be repealed.

Section 306D(2) – expanding the reach of *'work performed for a person'*

The Issue

53. One jurisdictional precondition that the Commission must be satisfied of before making a regulated labour hire arrangement order is that (our emphasis):

> an employer supplies or will supply, either directly or indirectly, one or more employees of the employer to **perform work for a regulated host;**[15]

54. Large companies regularly operate through complex and opaque corporate structures. For example, within a single corporate group, one entity may employ workers engaged at a mine, a separate related entity may own the mine, and another related entity may operate it. These arrangements may be further complicated by joint ownership structures with unrelated entities, or by third parties contracted to perform operational functions.

55. In such circumstances, applicants for regulated labour hire arrangement orders must positively establish that the work is performed *for* the regulated host — that is, the entity party to the enterprise agreement covering the host's employees. This is a significant burden and one in which the MEU has regularly had to overcome when litigating these matters, particularly given the information asymmetry between an applicant and the employer.

56. As currently drafted, s 306D(2) assists applicants to satisfy this requirement by providing that a reference to work performed *for* a person includes work performed wholly or principally for the benefit of: the person; an enterprise carried on by the person; or a joint venture or common enterprise engaged in by the person and one or more others.

[15] FW Act, 306E(1)(a).

57. However, given the virtually unlimited capacity of a corporate group to organise and reorganise its structure, it is foreseeable that certain structures may fall outside the current scope of s 306D(2), effectively and arbitrarily removing those arrangements from the operation of Part 2-7A. The proposed amendment addresses this gap by extending the provision to capture work performed for, or for the benefit of, an associated entity of the regulated host — ensuring that the provision's protective purpose cannot be defeated through structural reorganisation alone.

The Solution

58. Currently, section 306D covers work performed for a person or their enterprise, or as part of a joint venture between that person and others. The section should be amended to extend this coverage so that work performed for — or benefiting — any entity associated with that person is also captured. This means, for example, that if work is done for a related company or subsidiary rather than the named person directly, it would still fall within the scope of this Part. An 'associated entity' would be a defined term and carry the same definition as s 50AAA of the *Corporations Act 2001* (Cth).

Proposed recommendation:

- **Amend s 306D:** such that work performed by an associated entity of the person, an enterprise carried on by an associated entity of the person or a joint venture or common enterprise engaged in by the associated entity of the person is taken to be work performed for the benefit of that person.

Maximising the Benefit of Part 2-7A

59. The introduction of Part 2-7A of the FW Act represents one of the most significant reforms to Australian workplace law in recent years, and one which the MEU strongly welcomes.

60. Notwithstanding the above, the MEU has identified several areas in which the operation of Part 2-7A could be improved to better achieve its remedial purposes. In particular, the MEU submits that the following reforms would maximise the effectiveness of the regime as described at paragraphs [8]–[20] above:

    a. addressing the practical disadvantage caused by the delay between the making of an application and the making of an order;

    b. expanding the regime to confer on labour hire workers an entitlement to the same terms and conditions as those applicable to employees of the host employer; and

    c. ensuring consistency of treatment among labour hire workers engaged at the same enterprise.

61. We will address each of these matters in turn.

Delay between application and order

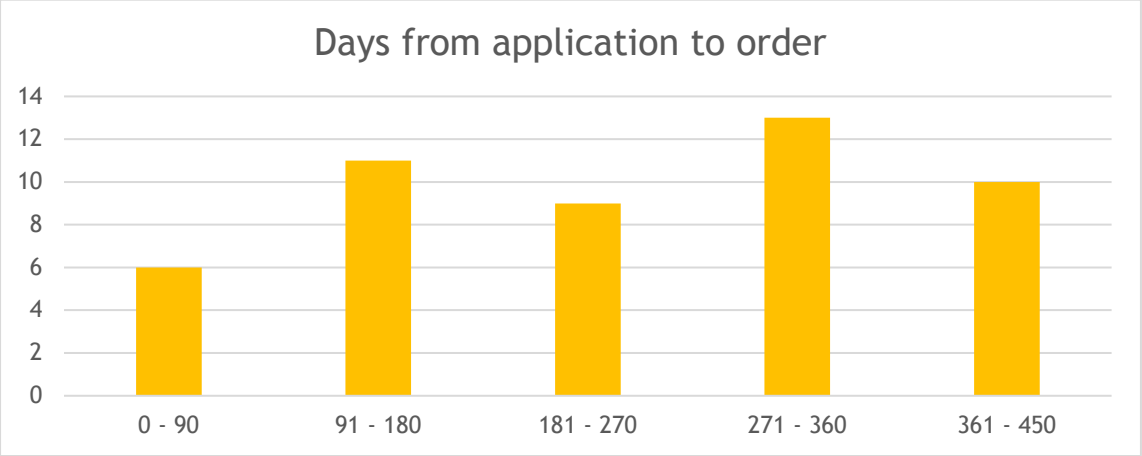
The issue

62. A significant practical obstacle to the effective operation of the regulated labour hire arrangement order regime is the time taken for the Commission to issue orders following an application.

63. The MEU has obtained approximately 50 regulated labour hire arrangement orders covering approximately 5,000 regulated employees. On average, it has taken **236 days** (close to 8 months) from the date of the MEU filing an application to an order being issued. In at least 10 matters, the period between application and order exceeded one year.

64. During this period of delay, the status quo ante applies: employers get to continue paying the lower rates of pay until the matter is finalised. This creates a tremendous incentive for

both host and labour-hire operators to maximise delay through case management tactics aimed at getting the latest possible hearing date.



65. The MEU wishes to be clear that this is not a criticism of the Commission. As noted, the delay has largely been a product of the litigation strategy adopted by labour hire companies and host employers. On at least 10 occasions, those parties eventually consented to the making of an order in the days immediately preceding the hearing — but only after the expiration of a protracted timetable for the filing of submissions and evidence.

66. This delay substantially undermines the remedial purpose of the scheme. Regulated employees are exposed to extended periods of payment at unfair rates of pay that cannot be remedied retrospectively.

The solution

67. Part 2-7A should be amended in one of two ways. The preferred approach would be to provide that any order ultimately made takes effect from the date on which the application was lodged.

68. Alternatively, the Commission should be required to issue an interim order in any case in which it is unable to finally determine the application within a specified period — for example, 30 days.

69. Either mechanism would ensure that regulated employees are not disadvantaged by procedural delay and would create meaningful incentives for the timely resolution of applications.

Proposed recommendation:

- **Retrospective operation of orders:** Amend Part 2-7A to provide that any regulated labour hire arrangement order takes effect from the date on which the application was lodged, ensuring regulated employees are not disadvantaged by procedural delay.

- **Interim orders:** Alternatively, amend Part 2-7A to require the Commission to issue an interim regulated labour hire arrangement order in any case where it is unable to finally determine an application within a specified period, for example, 30 days.

Same Job Same Pay & Conditions

The issue

70. Part 2-7A, as currently enacted, requires a labour hire employer to ensure that regulated employees receive no less than the full rate of pay applicable under the host enterprise agreement.

71. It does not, however, require that those employees be afforded the broader conditions of employment provided by the host employer or under the enterprise agreement — including leave entitlements, rostering arrangements, access to consultation processes, or redundancy provisions. This is a significant gap in the protections offered to regulated employees.

72. It also departs from the legislation introduced by the now Prime Minister, Anthony Albanese when in opposition, the *Fair Work Amendment (Same Job, Same Pay) Bill 2021*.

73. An amendment extending regulated labour hire arrangement orders to cover broader conditions of employment would be consistent with the objects of Part 2-7A. Those objects reflect Parliament's concern that labour hire arrangements are not used to undercut the wages and conditions of a host employer's workforce. Limiting protection to pay alone leaves open the possibility that labour hire workers performing the same work as host employees are nonetheless subject to materially inferior conditions — an outcome that undermines the very purpose the Part was designed to address. An amendment of this

kind would give fuller effect to that legislative purpose without departing from the framework Parliament has already established.

74. Expanding the regulated labour hire arrangement order regime to cover broader conditions of employment — not merely pay — would maximise the benefits of the Part 2-7A identified at paragraphs [8]-[20] above.

An international perspective

Comparator jurisdictions provide for labour hire employees the right to be afforded the pay and conditions of their permanently engaged workmates. For example:

Temporary Agency Work Directive 2008/104/EC, European Union, Clause 5

> The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

Agency Workers Regulations 2010, United Kingdom, Clause 5

> Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer—
>
> (a) other than by using the services of a temporary work agency; and
> (b) at the time the qualifying period commenced.

75. Part 2-7A, which is confined to the protected rate of pay, falls materially short of the standard set by Australia's international contemporaries. The scheme, as currently enacted, ensures that labour hire workers receive equal pay for the same work but permits those same workers to be subject to inferior conditions.

The solution

76. When in opposition, the now Prime Minister, Anthony Albanese, introduced the *Fair Work Amendment (Same Job, Same Pay) Bill 2021*. This Bill contained provisions to ensure that labour hire workers received equal rights in relation to training, amenities and collective facilities, rostering and consultation, and the right to apply for vacancies with the host employer.

77. The Bill proposed to insert a new s 123C into the National Employment Standards. Section 123C would have obliged labour hire businesses to provide their workers' *pay and conditions* that are no less favourable than those that are paid to a host's employees.

78. Part 2-7A should be amended to bring it into line with the Prime Minister's private member's Bill. Specifically, it could provide that:

    a. Labour hire employees are entitled to *pay and conditions* that are no less favourable than those that are required to be paid to a host's employees by virtue of their enterprise agreements.

    b. The employer and the regulated host must afford regulated employees equal access to training, amenities, rostering rights and the right to apply for vacancies with the host employer.

Proposed recommendation:

- **Pay and conditions:** Amend Part 2-7A to provide that labour hire employees are entitled to pay and conditions no less favourable than those afforded to the host employer's directly engaged employees under their enterprise agreement.

- **Equal access to workplace entitlements:** Require both the employer and the regulated host to afford regulated employees equal access to training, amenities, rostering rights and the right to apply for vacancies with the host employer.

Ensuring consistency of treatment among labour hire workers engaged at the same enterprise

The issue

79. Presently, Part 2-7A limits the Commission to issuing orders that cover employees performing the specific work performed or to be performed by regulated employees at a given site.

80. In *Skilled Workforce Solutions (NSW) Pty Ltd v Mining and Energy Union* [2025] FCAFC 195, the Federal Court confirmed that an order cannot extend to the whole of a host enterprise agreement if labour hire workers are not engaged in all categories of work falling within the agreement's scope.[16]

81. This approach introduces significant complexity into the drafting and administration of orders and creates scope for unnecessary fragmentation of the protections available to labour hire workers at a given site.

The solution

82. Section 306E should be amended so that the default scope of a regulated labour hire arrangement order corresponds with the scope of the host employment instrument.

83. The scope of an order should only be limited in circumstances where the contractor employer has affirmatively established that a distinct part of its workforce is engaged in genuine service contracting — that is, work of a specialised nature not performed by the host employer's employees (see [27]-[37]). Any such limitation should be confined to that identified group of workers, and the employer would bear the evidentiary onus of demonstrating that the limitation is warranted.

[16] *Skilled Workforce Solutions (NSW) Pty Ltd v MEU* [2025] FCAFC 195 [101], [113], [132].

Proposed recommendation:

- **Default scope of orders:** Amend s 306E so that the scope of a regulated labour hire arrangement order defaults to the full scope of the host employment instrument, with any limitation permitted only where the contractor employer affirmatively establishes that a distinct part of its workforce is engaged in genuine service contracting — with the evidentiary onus resting on the employer.

Closing loopholes 1: strengthening delegates' rights and supporting employment and casual employee definitions

Amending s 350A to apply to employers other than the employer of a workplace delegate

84. In *Mining and Energy Union v Australian Industry Group* [2025] FCAFC 187, the Full Court confirmed that s 350C of the FW Act entitles a workplace delegate to represent the industrial interests of all members of the organisation, and persons eligible to be members, who work in the enterprise or regulated business in which the delegate works, regardless of whether they are employees of the delegate's employer.

85. Despite this, the obligation under s 350A of the FW Act not to unreasonably hinder, obstruct or prevent the exercise of a workplace delegate's rights applies only to the delegate's own employer and does not extend to the employers of the individuals being represented.

86. Following that decision, the MEU and the Australian Council of Trade Unions sought to remedy this deficiency by applying to a Full Bench of the Commission to vary the modern awards. In addition to seeking a variation to reflect the Full Court's confirmation that a delegate may represent workers at their enterprise regardless of who employs them, the union parties sought the inclusion of an award term requiring all employers at the enterprise — not only the delegate's own employer — to refrain from hindering or obstructing the delegate in the exercise of their rights.

87. The Full Bench declined to include such a term, on the basis that s 350A confines those obligations to the delegate's own employer. In those circumstances, it is unlikely that this issue can be resolved without legislative amendment to s 350A.

Case study: MEU Lodge representation

In the mining industry, the workforce at any given mine is typically made up of workers engaged by numerous employers, including the mine operator and a range of labour hire and contracting companies. The MEU establishes a Lodge at each mine, which functions as the local union body, with members drawn from across all employers at the site.

Despite this multi-employer composition, Lodge Committee members — who serve as workplace delegates for the Lodge — are typically engaged by the mine operator rather than by the contracting or labour hire companies whose employees they also represent. This is because workers employed by labour hire companies are less likely to take on Lodge Committee roles, given the relative insecurity of their employment and the perceived risk of being seen to be at odds with their employer or the host site.

Section 350C entitles Lodge Committee members to exercise delegates' rights with respect to any worker at the mine, regardless of who employs them. However, s 350A currently obliges only the delegate's own employer — the mine operator — not to hinder or obstruct the exercise of those rights. The practical consequence is stark: a delegate can compel their employer to excuse them from duties to represent a labour hire employee in a disciplinary meeting, but the labour hire company can simply refuse them entry at the door.

That outcome is plainly inconsistent with the intention of Parliament in conferring on workplace delegates the right to represent employees beyond their own employer. An amendment to s 350A is necessary to give that right a meaningful effect.

88. Section 350A should accordingly be amended to extend those obligations to all employers whose employees are being represented by the delegate, regardless of whether those employers directly engage the delegate. Absent such an amendment, the practical utility of workplace delegate representation in labour hire and multi-employer settings will remain significantly constrained.

Proposed recommendation:

- **Extend the obligations in 350A to all employers:** extend the obligations in 350A to all employers whose employees are being represented by the workplace delegate, regardless of whether those employers engage the delegate directly.

The amendments to the definition of employment and casual employment

89. The repeal and reenactment of s 15A of the FW Act by Closing Loopholes 1 modified the definition of casual employment. The amendment was responsive to the High Court's decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23. With respect, that decision does not grapple with the power imbalance inherent in the employment relationship — an imbalance that is particularly acute at the commencement of employment and which distorts the employment contract, preventing it from accurately reflecting the substantive character of the relationship as it is actually performed.

90. Closing Loopholes 1 restored the approach to defining casual employment outlined by the Full Federal Court in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 and *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84. It confirmed that the substance of the relationship — not merely its contractual form — should determine whether an employee is casual. This is an approach that more appropriately reflects the industrial realities in which the definition operates.

91. Similarly, Closing Loopholes 1 introduced a new definition of employment in the FW Act. The definition was responsive to the High Court's decision in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting* Pty Ltd [2022] HCA 1, in which the High Court held that the characterisation of a working relationship is determined by the terms of the written contract rather than the practical reality of how work is performed. The reforms make clear that whether a worker is an employee or contractor is a question going to the true character of the relationship as a whole.

92. The new definition of employment aligns with the approach endorsed by the International Labour Organisation in its Employment Relationship Recommendation, 2006 (**R198**). R198 provides that the determination of whether an employment relationship exists should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contractual or other arrangement between the parties.[17] By directing attention to the totality of the relationship rather than the terms of any written contract, the reforms give effect to this principle in the Australian context.

[17] International Labour Organization, *Employment Relationship Recommendation, 2006* (No 198), para 9.

93. The MEU strongly supports both reforms as restoring integrity to the law of work and curtailing the use of legal devices to circumvent workers' rights and entitlements.

Conclusion

94. The MEU is available to provide further information or details to the Reviewer should it assist in her deliberations.

CLOSING LOOPHOLES REVIEW

Mining and Energy Union Submission

Annexure 1

Trainee Production Operator

Our client is looking for driven individuals for Traineeship Dump Truck roles on a site based in the Mudgee region.

Regional NSW - Dubbo & Central NSW

Contract

$38.60 p/hour

Job details

Trainee Dump Truck Operator

- Entry Level Mining Position
- Complete a Nationally recognised Cert III In Surface Extraction
- Permanent positions

About Our Client

Our Client is located near Mudgee and produces a high-quality thermal coal for domestic and export markets.

About the role

Do you have enthusiasm, a commitment to safety and want to improve your career options?

We are seeking applications from those who would like to undertake a 24-month Dump Truck Traineeship program, at a local Mudgee mine.

Successful applicants will be employed by WorkPac and will join the production team at a local mine site as a Trainee Dump Truck Operator.

What you will be doing

Operating Haul Trucks while completing a Certificate III in Surface Extraction

What you Will need

- Current Drivers licence
- Complete a full Order 43 Medical & Drug Test
- Provide a residential address located within the Mudgee area

- Provide 2 recent workplace references

What's In It For You

- Entry level opportunity within Mining
- On Site Experience

Apply Now

Click on the apply button

Job Reference Number: 7220J20269368

Recruitment Coordinator: Katie Patrick | katie.patrick@workpac.com

Contact: 02 67418702

About WorkPac

WorkPac is one of the largest workforce solutions businesses in Australia, backed by over 25 years of proven success. We offer tailored, end-to-end solutions in recruitment, skills and career development across diverse sectors, including Mining, Construction, Industrial, Engineering, Healthcare, Social Care and more.

Equal Employment Opportunity

At WorkPac, we foster a work environment where everyone feels welcome and valued. As an Equal Employment Opportunity employer, we welcome applicants from all backgrounds and embrace diversity in race, gender, age, religion, culture, and ability.
Ready to apply?

Make a Good Move today.
Apply Now ↗
Apply Now ↗
Job Reference ID7220J20269368

Associated Industries

- Mining, Oil & Gas →

Share this job

Our proven process

This is how we move.

We understand that finding and securing a job or realising a career change can be challenging. When you apply for a job with WorkPac, we're here to help make it a little easier for you.

By joining WorkPac we can help you secure your next job.

Make your next Good Move today.

Recruitment

Our recruiters will review your application against our clients needs and may contact you to go through our recruitment process. This may include an interview, reference checks, pre-employment medicals, verification of documents including tickets/licences and right to work in Australia.

Mobilisation

Once the client has approved your application, you will commence our mobilisation process. The requirements of your mobilisation may differ depending on the job and industry. Your dedicated recruiter and/or mobilisation officer will step you through the process.

Dump Truck Operator

We are seeking experienced Dump Truck Operators to join the team at Glencore Hail Creek

Mackay & Central QLD - Greater Mackay & Bowen Basin

Casual

$59.27 p/hour

Job details

Key Selling Points

- $59.27 per hour
- 7/7 roster rotating day and night shifts
- Camp accommodation and meals provided with excellent facilities

About Our Client

With 25 years experience operating within Australia, our leading global client is Australia's largest producer of coal, cobalt, zinc, nickel and copper to supply resources and products that advance everyday life. Located 140km from the town of Mackay, this is an fantastic opportunity to join a leading, responsible client with a track record of excellence in supplying high quality coal.

What you will be Doing

Operate large mining trucks including:

- Komatsu 960
- CAT 793
- Terex 4400
- Maintain safety and productivity standards
- Conduct pre-start checks and basic maintenance

What you will need

- Proven experience operating large mining trucks
- Current Coal Board Medical and Standard 11
- Valid Drivers Licence

Whats in it for you?

- Pathways to permanent positions with our client
- Camp & meals provided onsite with access to 3 gyms and personal trainers
- BIBO from Mackay & Mackay Airport
- Fun and interactive team training days + yearly family day

Apply Now

Felicia John

07 4969 4705 or Felicia.John@WorkPac.com

Job Reference Number: 7396J202660063

About WorkPac

WorkPac is one of the largest workforce solutions businesses in Australia, backed by over 25 years of proven success. We offer tailored, end-to-end solutions in recruitment, skills and career development across diverse sectors, including Mining, Construction, Industrial, Engineering, Healthcare, Social Care and more.

Equal Employment Opportunity

At WorkPac, we foster a work environment where everyone feels welcome and valued. As an Equal Employment Opportunity employer, we welcome applicants from all backgrounds and embrace diversity in race, gender, age, religion, culture, and ability.
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Associated Industries

Mining, Oil & Gas →

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