[redacted]

From: [redacted]
Sent: Friday, 25 October 2024 1:02 PM
To: FWC Consultation
Cc: [redacted]
Subject: Guidelines in relation to the operation of Part 2-7A -CEPU Response

Categories: [redacted]

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Dear Registry,

Re: Guidelines in relation to the operation of Part 2-7A - (LH2024/24)

The CEPU refers to the Statement of President Hatcher dated 14 October 2024, inviting interested parties to comment on the draft guidelines concerning the operation of Part 2-7A of the Fair Work Act 2009 (Cth).

The CEPU supports the publication of these draft guidelines, as they will serve as a valuable resource for all interested parties, facilitating better understanding and compliance with the new provisions.

Additionally, we suggest that the guidelines could benefit from incorporating illustrative case examples which would enhance the practical utility of the guidelines (similar to the bench books).

We thank the Commission for considering our input.

CEPU Legal Team

[redacted]
CEPU - Electrical Trades Union

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AUSTRALIAN RESOURCES & ENERGY EMPLOYER ASSOCIATION

25 October 2024

The Honourable Justice Adam Hatcher
President
Fair Work Commission
Terrace Towers
80 William Street
East Sydney NSW 2011

Email: consultation@fwc.gov.au

Dear Justice Hatcher,

RE: Guidelines in relation to the operation of Part 2-7A

I refer to your 14 October 2024 statement inviting comment on the publication of draft written guidelines concerning the operation of Part 2-7A of the Fair Work Act 2009.

The Part relates to new labour hire provisions or Regulated Labour Hire Arrangement Orders (RLHA Orders), which were added to the *Fair Work Act 2009* by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Closing Loopholes Act).

Australian Resources & Energy Employer Association (AREEA)

As the national employer association for Australia's mining, oil and gas and service contracting sectors, AREEA is the largest and most diversified representative of the resources and energy industry and is also the sector's industrial relations specialist group.

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

Background

While the new laws require labour hire employees covered by a RLHA Order to be paid in accordance with the Protected Rate of Pay (PROP) of their Regulated Host's enterprise agreement, prior to the passage of the Closing Loopholes Act AREEA negotiated amendments with the Federal Government that secured an explicit exemption for service contractors and providers (who form an essential part of a strong resources and energy industry).

Specialist maintenance, production, facilities management and related support services relied on by the mining and oil and gas sector have never been considered labour hire. Where the FWC finds, on balance, they are providing a service rather than simply supplied labour ("something more" than labour hire as referenced in *Batchfire*) they should have confidence they will be expressed excluded from any coverage in future RLHA Orders.

The publishing of appropriate guidelines could assist in delivering this confidence.

AREEA has a strong interest in ensuring the "contractor exemption" provision at section 306E(1A) of the Closing Loopholes Act (embodied by five criteria at subsection 7A), is applied with the intent in which it was negotiated between AREEA and the Government.

The Guidelines

AREEA supports the content of the draft guidelines and the view they should be published in final form.

The Revised Explanatory Memorandum (REM) (784) of the Closing Loopholes Act affirms that written guidelines in relation to the operation of Part 2-7A would assist with education and compliance, so that readers can more easily understand the new Part.

We agree with this assessment, and submit the guidelines faithfully reflect such intent and other important aspects of the REM. Some further detailed feedback follows below.

Performance of the work is not or will not be for the provision of a service

According to the guidelines, subsection 306E(1A) "provides that the Commission 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."

AREEA was instrumental in elevating this consideration of whether performance of work is for provision of a service rather than supply of labour to its rightful position of primacy.

In becoming a jurisdictional threshold issue for the Fair Work Commission (FWC), the contractor test stands alone as a matter to be determined before applications can proceed to broader considerations of whether it is "not fair and reasonable" to make an order.

The guidelines point to subsection 306E(7A) as setting out the matters the Commission must factor when deciding whether work is for the provision of a service.

As previously referenced, AREEA proposed the basis of these criteria during its consultations with government.

The guidelines state:

> *These include things like the employer's involvement in the performance of the work, whether the regulated employees use the employer's systems, plant or structures to perform the work and how specialist or expert the work is. The Commission needs to consider all the matters in section 306E(7A) to make an overall assessment of the work. For example, if the employer directs, supervises or controls the work, this will weigh in favour of a finding that a service is being provided rather than just labour. Work may be considered specialist or expert without requiring higher educational qualifications and may include things like catering services.*

This is a key clarification of a matters which will undoubtedly come to prominence as more host employers seek to contest applications for RLHA Orders from unions, individuals and other parties.

No order if not fair and reasonable to do so

The guidelines underline the FWC cannot make an order if it is satisfied it is not fair and reasonable in all the circumstances to do so, having regard to matters in subsection 306E(8) upon which submissions have been made.

Consequentially, the guidelines point out, "this means that if submissions are not made about a matter in section 306E(8), the Commission is not required to have regard to it."

While it is appropriate for the guidelines to point out the limitations of 306E(8), AREEA believes the guidelines should also note that under 306E(8)(f) submissions can be made on "any other matter the FWC considers relevant".

In AREEA's view such matters are likely to extend to considerations of commercial impacts, administrative burden and potential frustration of contract issues.

We recommend the guidelines clarify that respondents are not limited to the factors explicitly set out at 306E(8) and submission can be made on any matters a respondent may believe is relevant to the FWC in determining whether it would be "not fair and reasonable" to make an order.

Anti-avoidance provisions

In AREEA's view the guidelines should include far more guidance and general information in relation to the anti-avoidance provisions. AREEA has long-held concerns with the anti-avoidance provisions set out at sections 306S, 306SA, 306T, 306U and 306V.

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

These new labour hire laws are likely to drive businesses towards perfectly legitimate commercial responses – arguably, that seems to be what is intended by the overarching policy (a disincentive to the use of labour hire outside of short-term arrangements).

Some businesses may decide to modify their use of labour hire, perhaps to reduce their use or alternatively to have entire functions performed by full scope service providers. It is unclear as to whether it would be unlawful for a business to do so in the context of the anti-avoidance framework.

Similarly, labour hire businesses may well experience a decline in demand and may seek to pursue alternative opportunities, including transforming their service offering beyond being principally the provision of labour into "something more" as referenced in *Batchfire.*

On a broad reading of these ambiguous anti-avoidance provisions, labour hire businesses may be prevented from lawfully doing so, which would lead to loss of business opportunities and impacts on commercial viability and employment.

Without clarity, the proposed anti-avoidance provisions suggest that any attempts by businesses to change their current use or provision of labour hire services, where there is a mere possibility of FWC orders, may be unlawful.

While the FWC should not be expected to foreshadow or detail an exhaustive list of behaviours or "schemes" that could be considered anti-avoidance behaviour, it would be very useful to businesses of all types if the FWC contemplated the types of behaviours the provisions are intended to prohibit.

Ideally, this would also see the FWC via the guidelines clarify that legitimate business restructuring and/or the pursuit of different operating models is not captured as a "scheme", or as otherwise being unlawful under the Act.

The guidelines should also clarify at what stage strategies, actions or behaviours becomes a potential "scheme". Does this become a relevant matter only after an application has been made and/or an order is in-effect? Or, could any business decisions made prior to a future RHLA application/order be considered within the context of avoidance?

Conclusion

Due to the evolution and complexity of these news laws, and the high degree of business, stakeholder and community expectation in their being fairly and transparently applied, AREEA commends the publishing of guidelines.

We submit that the draft guidelines are appropriate, save for the additions recommended in this correspondence.

Yours sincerely,

TOM REID
Director, Industry & Advocacy
AREEA

Australian Industry Group

Draft Guidelines - Operation of Part 2-7A – Regulated Labour Hire Arrangement Orders

Submission

25 October 2024

DRAFT GUIDELINES – REGULATED LABOUR HIRE ARRANGEMENT ORDERS

1. This Australian Industry Group (**Ai Group**) submission is made in response to the statement[1] issued by the President on 14 October 2024 (**Statement**) and accompanying *Draft guidelines in relation to the operation of Part 2-7A – Regulated labour hire arrangement orders* (**Draft Guidelines**).

2. The Draft Guidelines have been prepared pursuant to s.306W of the *Fair Work Act 2009* (Cth) (**FW Act**) which confers a discretion on the Fair Work Commission (**Commission**) to make written guidelines in relation to the operation of Part 2-7A of the FW Act. Part 2-7A was inserted into the FW Act by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth), and contains a new regulated labour hire arrangement jurisdiction. If made, any Commission guidelines under s.306W must be in force by 1 November 2024.

3. The Statement invited interested parties to comment on the content of the Draft Guidelines and whether they should be made at all, by Friday, 25 October 2024.

4. Ai Group submits that the Draft Guidelines accurately describe the legislative framework of Part 2-7A. We did, however, identify one typographical error at the top of page 14 of the Draft Guidelines. We have assumed that the reference in the first bullet point on that page to s.306F(1) is intended to be a reference to s.306G(1) which deals with exceptions to pay the protected rate of pay in the context of applicable training arrangements.

5. The Draft Guidelines provide limited practical guidance on the application of Part 2-7A. This is likely a feature of the fact that no contested application for a regulated labour hire arrangement order has yet been heard by the Commission. If made, it will be important that the guidelines are updated to reflect the outcomes of significant decisions issued by the Commission. An intention to do so was foreshadowed by the President in the Statement, and we support this.[2]

[1] *Guidelines in relation to the operation of Part 2-7A* [2024] FWC 2854.

[2] Statement at [5].

Ensuring the guidelines remain updated and current will mean the document will be of optimum utility to parties accessing the jurisdiction.

ANONYMOUS COMMENTS ON THE DRAFT GUIDELINES

FOR REGULATED LABOUR HIRE ARANGEMENT ORDERS

These anonymous comments are made by a global staffing and recruitment services business, in accordance with the Statement of President Justice Hatcher dated 14 October 2024.

1 INCENTIVE PAYMENTS

1.1 Section 306F(4) of the Fair Work Act (the "Act") defines the protected rate of pay as the full rate of pay that would be payable to the labour hire employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee.

1.2 The full rate of pay is defined in section 18(1) of the Act. It includes all of:

(a) incentive-based payments and bonuses;

(b) loadings;

(c) monetary allowances;

(d) overtime or penalty rates; and

(e) any other separately identifiable amounts.

1.3 The provisions do not provide any method of incorporating incentive payments and bonuses in the protected rate of pay for casual and fixed-term employees. Incentive payments and bonuses are often discretionary in nature and based on an individual's past personal performance.

1.4 Please provide guidance on how incentive payments and bonuses should be incorporated into the protected rate of pay and what detail should be sought from regulated hosts in order for labour hire employers to calculate the correct protected rate of pay. For example, should the payments be calculated based on the average bonus paid in the previous year to employees performing the same work as the labour hire employee? Should these amounts be prorated based on hours worked by the labour hire employee, or should the labour hire employee receive the same bonus amount as a direct employee?

1.5 If the amount of incentive payment or bonus to be included in the protected rate of pay should be forward looking, and not based on past payments, how should those amounts be calculated and incorporated into the protected rate of pay, given that the amount of bonus or incentive payment payable to direct employees of a regulated host may not be known at the time the labour hire employee is engaged, or in some instances may not be known until after the labour hire employee's assignment at the regulated host has ended.

2 PROVISION OF SERVICES VS PROVISION OF LABOUR

2.1 Section 306E(1A) of the Act provides that the Fair Work Commission ("Commission") must not make a regulated labour hire arrangement order unless it is satisfied that

the performance of the work is not and will not be for the provision of a service, rather than the supply of labour.

2.2 Please provide in the guidelines more explicit examples or scenarios of where an engagement would be regarded as a provision of a service rather than the provision of labour. For example, a service provider in the delivery of services to a customer for an IT project, offers personnel as well as additional services including some or all of a delivery manager, on-boarding and off-boarding, resource performance management and administrative functions, but the customer retains control over the project's technical and strategic outcomes. Would this make it more likely that this arrangement would be regarded by the Commission as the supply of a service?

3 REGULATED HOST VS LABOUR HIRE PROVIDER VS INDEPENDENT CONTRACTOR ENTITIES

3.1 **Regulated Host (Customer)**: An organisation that requires workers and engages an LHP to supply workers, including independent contractors, for specific projects or services.

3.2 **Labour Hire Provider (LHP)**: An organisation that sources and places workers or contractors (including IC Entities) with the Customer. The LHP usually handles the contractual and administrative aspects of the worker's placement.

3.3 **Independent Contractor Entity (IC Entity)**: This is a separate legal entity (such as a company or trustee) through which an individual worker operates. The IC entity enters into a contract with the LHP to provide services to the Customer. The IC Entity is responsible for its own tax, GST, and contractual obligations. The individual worker may be the IC Entity's director and sole worker.

3.4 There may be multiple agreements between these parties:

(a) Labour Hire Agreement: Between the LHP and the Customer for the provision of services.

(b) Services Agreement: Between the LHP and the IC Entity, for the provision of services to the Customer through the LHP.

3.5 Where a labour hire arrangement involves multiple agreements between multiple parties including an IC Entity, please provide guidance as to the checks and enquiries the LHP should make with the IC Entity including as to the employment status of the individual worker.

3.6 LHP affected by an order must be named in the order. If an IC Entity indirectly supplies an employee to a Customer of an LHP and an order is already in place, but the IC Entity is not named in the order, please provide guidance on who should notify who of the existence of the order.

Australian Chamber of Commerce and Industry

Draft Guidelines – Regulated Labour Hire Arrangement Orders

Comments
28 October 2024

The Australian Chamber of Commerce and Industry (**ACCI**) welcomes the opportunity to provide feedback to the Fair Work Commission (**FWC**) on its draft guidelines in relation to the operation of Part 2-7A – regulated labour hire arrangement orders (**Draft Guidelines**).

ACCI notes the discretion conferred upon the FWC to make the Draft Guidelines, and the deadline imposed upon it. ACCI also notes the extract referred to in the President's Statement[1] stipulating that the guidelines are intended to assist with education and compliance by allowing readers to more easily understand the new part.

ACCI's view is that while the Draft Guidelines are presented in a format that is more accessible to the reader than legislation, they still contain a high level of legal terminology and often directs the user back to the legislation. While the concepts in the Draft Guidelines may still be difficult for some readers, it is ACCI's view that the FWC have taken a sensible approach Given the timeframe within which the FWC are required to finalise the guidelines, and noting that there have been no decisions from contested matters dealing with those provisions, the FWC is restricted in its ability to provide additional guidance at this time.

ACCI agrees with Justice Hatcher's intention to review and amend the guidelines over time to include details of significant decisions. Once the FWC have dealt with relevant matters, it will be in a better position to provide guidance to readers illustrating how the legislation has been interpreted.

That being said, ACCI has identified that the FWC may be in a position to provide clarity with respect to the definition of 'protected rate of pay'. The 'protected rate of pay' is defined as the full rate of pay that would be payable to the employee if the host employment instrument covered by the regulated hire arrangement order were to apply to the employee. The *Fair Work Act 2009* (Cth) (**FW Act**) provides a definition of 'full rate of pay', and the Draft Guidelines helpfully include a list of payments that are included in that definition. It would be helpful for

[1] [2024] FWC 2854.

the Draft Guidelines to clarify that discretionary payments that are not contained within the host employment instrument do not meet the definition of 'protected rate of pay' and are not in turn payable to the employee.

An additional area of concern is the rate of pay for leave that was accrued prior to the date a regulated labour hire arrangement order comes into force. While legislation is clear that a regulated labour hire arrangement order cannot apply retrospectively, it is silent on the issue of whether leave accrued prior to the order being in force is required to be paid at the protected rate of pay. ACCI acknowledged that is not an issue that can be rectified by the creating of the guidelines, however, notes that it is a significant issue that has the potential to arise and will likely form a part of the FWC's guidelines at a future time. The treatment of leave entitlements has the very real potential to impose a multi-billion dollar retrospective cost on businesses, at a scale and impact which could force some businesses to close, simply because of a change in law that occurred many years after the period in question. This is an issue that must be rectified by legislation, and in doing so should not impose retrospective financial liabilities upon a businesses.

Finally, ACCI suggests that to further assist the reader, it may be helpful to include an infographic demonstrating the interaction between the parties that may be involved in a regulated labour high arrangement order.

Telephone 02 6270 8000 | Email info@acci.com.au | Website www.acci.com.au
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Flight Attendants' Association of Australia

Regulated Labour Hire Arrangement Orders

Feedback on Guidelines in Relation to the Operation of Part 2-7A

18 October 2024

Contents

Introduction

1. This feedback outlines the **F**light **A**ttendants' **A**ssociation of **A**ustralia's response to the Statement of Justice Hatcher dated 14 October 2024,[1] regarding the content and publication of Guidelines in relation to the operation of Part 2-7A of the ***F****air* ***W****ork* ***Act*** *2009* (Cth).

2. The feedback sets out general background information about Cabin Crew characteristics and the role of the FAAA in utilising Part 2-7A of the FW Act, before turning to the benefits conferred in the content of the draft Guidelines,[2] proposed by the **F**air **W**ork **C**ommission.

3. The FAAA submits that the Guidelines are a necessary tool in supporting union applications for **R**egulated **L**abour **H**ire **A**rrangement **O**rders under Part 2-7A of the FW Act.

The Flight Attendants' Association of Australia and Cabin Crew

4. The FAAA represents the industrial and employment interests of more than 6,500 members, being the overwhelming majority of aircraft cabin crew employed in Australia, whether working under the ***A****ircraft* ***C****abin* ***C****rew* ***A****ward 2020* MA000047 or an enterprise agreement.

5. The FAAA is the only union in Australia exclusively covering cabin crew pursuant to the ACCA.

6. Understanding the characteristics of cabin crew, the work they perform and the environment in which work is performed is essential in understanding how RLHAOs fit into the aircraft cabin crew industry.

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[1] *Statement – Guidelines in relation to the operation of Part 2-7A* [2024] FWC 2854 (**Statement**).

[2] Draft guidelines in relation to operation of Part 2-7A Regulated labour hire arrangement orders, 14 October 2024 (**Guidelines**).

7. The predominant company utilising labour hire cabin crew in Australia is the Qantas Group, with subsidiaries and external companies providing thousands of labour hire employees to perform work for **Q**antas **A**irlines **L**imited, **N**ational **J**et **S**ystems Pty Ltd and **Jetstar** Airways Pty Ltd.

8. The success in these labour hire companies, which pay tens of thousands of dollars less per year in salary and allowances than the host employers, is reflected by the fact that QAL, NJS and Jetstar have not employed cabin crew directly and under the conditions of their enterprise agreements, for many years.

Regulated Labour Hire Arrangement Orders

9. The FAAA has been at the forefront in advocating for Part 2-7A of the FW Act, enacted under the *Fair Work Legislation Amendment (Closing the Loopholes) Act 2023* (Cth).

10. Since 12 July 2024, the FAAA has filed five applications for RLHAOs to bring rates of pay into line with host employers under the Qantas Group. Three of these applications have, at the time of writing, been consented to by all Respondents, being external companies and subsidiaries of the Qantas Group. All matters are still before the FWC.

11. The laws have also been integral in bringing Qantas to the table to negotiate fair and equitable outcomes, most recently in the FAAA's varying of the *Flight Attendants' Association of Australia, Qantas Airways Limited and QF Cabin Crew Australia Pty Limited Enterprise Agreement 2022 (EBA11)* to provide labour hire cabin crew with significant pay increases (subject to the approval of the FWC upon application).

12. The FAAA is well positioned to attest to the positive outcomes of this legislation, and to the value in the FWC providing any and all guidance to applicants utilising these new laws.

13. An ongoing need for published guidelines is likely as more RLHAO applications are inevitably made pursuant to Part 2-7A of the FW Act.

Proposed Guidelines – Content and Publication

14. The FAAA recognises the discretion afforded to the FWC in deciding whether guidelines on Part 2-7A of the FW Act should be made.[3]

[3] Statement [4]; s 306W(1) FW Act.

15. The FAAA welcomes and supports the publication and maintenance of the proposed guidelines by the FWC.

16. Much akin to the FWC caselaw benchbooks available online, the FAAA sees the potential in published guidelines for RLHAOs to address outstanding questions in implementing the legislation, with regular updates resulting from significant decisions made by the FWC. The FAAA anticipates this will be particularly important in relation to decisions on the implementation of the "fair and reasonable" test,[4] and protected rate of pay,[5] in the legislation.

17. Despite current applications before the FWC yet to be determined and the discussions in *Application by the **M**ining and **E**nergy **U**nion* [2024] FWCFB 299, ss 306E and 306F require close attention in how the Commission interprets and applies the tests.

18. The provisions are open to interpretation and their application will be informed by future decisions where applications are contested. Indeed in *MEU* the Full Bench highlighted at [10] that *"…paragraphs (a), (b) and (c) of s 306E(1) imports a degree of latitude and subjectivity in the evaluation of the three prescribed matters*."

19. The operation of ss 306F(4) and 18(1) of the FW Act will remain critical to an order made under Part 2-7A. As the current provisions are largely untested, there is great potential and utility in the publishing of the guidelines.

20. The content of the draft Guidelines is well structured and greatly informative for applicants. The Guidelines may allow potential applicants to triage whether such an application should be made, and the matters that must be comprehensively addressed, though the FAAA recognises this is not a substitute for independent legal advice. This is highly beneficial to all parties involved, and the FWC in case load management.

21. It must be noted that the draft Guidelines is a preliminary document that would benefit from the inclusion of links to major cases, as they are determined, and other forms on the FWC website.

22. The publication of guidelines on Part 2-7A makes further sense considering the FWC's designation of the FAAA's and Mining and Energy Union's applications as "major cases" with their own sub-website on the FWC website.

[4] Section 306E(2) *Fair Work Act 2009* (Cth) (**FW Act**).
[5] Sections 306F(4) and 18(1) FW Act.

Conclusion

23. The FAAA is highly invested in Part 2-7A of FW Act and the maintenance of educational material being made public by the FWC to provide guidance to applicants.

24. As the application of the legislation becomes more complex, and disputed, providing guidelines that evolve with the law is essential in explaining to potential applicants, in plain language, how their applications may be considered.

25. Whilst the content of the draft Guidelines is succinct and logical, there is significant future potential in updating the document as matters are decided, benefiting all parties and the public.

26. The FAAA implores the FWC to exercise their discretion under s306W(1) of the FW Act to make the proposed Guidelines and publish them.

Michael Cope
Industrial Lawyer
On behalf of **Teri O'Toole**, Federal Secretary
Flight Attendants' Association of Australia

MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE FAIR WORK COMMISSION

Draft guidelines in relation to operation of Part 2-7A—Regulated labour hire arrangement orders

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25 OCTOBER 2024

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Summary and recommendations

1. The MCA **recommends** that:

    a. The Commission publish the Draft Guidelines, with minor amendments to clarify that their purpose is solely explanatory.

2. The MCA **notes** that:

    a. The Draft Guidelines cannot resolve the key uncertainties in the legislation, including the extent to which service providers may be excluded from Regulated Labour Hire Arrangement Orders; what counts as work of the same 'kind' and how the 'protected rate of pay' can be calculated.

    b. As a result, Part 2-7A will contribute to elevated risk in mining industry employment and business conditions.

    c. The uncertainty emanates from the legislation itself, which the Commission is not in a position to address through the Guidelines.

Background to submission

3. Section 306W of the *Fair Work Act 2009* provides for the creation of guidelines by the Fair Work Commission (**Commission**), in relation to the operation of its new powers to make regulated labour hire arrangement orders. If made the Guidelines must be in force by 1 November 2024.

4. The Commission published Draft Guidelines on 14 October and requested submissions from interested parties by 12pm on 25 October.

5. This submission provides the MCA's high-level comments and recommendations regarding the Commission's approach within the short timeframe allowed for submissions.

Whether the Commission should make the Guidelines

6. Unfortunately, unclear legislative drafting has produced competing interpretations as to whether the Commission 'must' create the Guidelines.

7. The Commission has taken the view that it has discretion as to whether or not it can do so, consistent with the wording in s. 306W(1). The MCA agrees with this view, but notes that elsewhere it appears the intention is to require the Commission to create the Guidelines:

8. Section 306W(3) states:

> *(3) The FWC must ensure that guidelines under subsection (1) are in force:*
>
> *(a) by 1 November 2024; and*
>
> *(b) at all times on and after that day.*

9. The Revised Explanatory Memorandum states:

> *New section 306W would require the FWC to make written guidelines in relation to the operation of Part 2-7A to assist with education and compliance, so that readers can more easily understand the new Part.*

10. Notwithstanding the lack of clarity, the MCA recommends the Commission make the Guidelines and keep them updated to provide readers with a consolidated summary of the key principles in this evolving and inordinately complex area of law.

Purpose and status of the Guidelines

11. The Revised Explanatory Memorandum states that the purpose of the Guidelines is to *'assist with education and compliance, so that readers can more easily understand the new Part'*.

12. Section 306W(2) clarifies that the Guidelines are not a legislative instrument. Accordingly, they should not be regarded as having legal force.

13. The above suggests that the appropriate approach is for the Guidelines to be 'explanatory' only. That is, the Guidelines should attempt to summarise the principles that will be developed on a case-by-case basis under the legislation to assist with better understanding.

14. The Guidelines should not add principles, practices, conditions or interpretations that have not been tested by the Commission and/or appeal courts.

15. The MCA is pleased that this appears to be the approach the Commission has taken.

Clarifying the Guidelines are solely explanatory

16. The legal status and scope of the Guidelines should be explicit. It should be clear to anyone reading the Guidelines that, although authorised by legislation, they are not an independent source of law and are not intended to 'add' anything to the body of law the Commission and courts will develop over time.

17. The MCA suggests the introductory line of the Guidelines could be amended as follows to make this clearer:

> *These guidelines are made under section 306W of Fair Work Act 2009 (the Fair Work Act). They are solely intended to explain how Part 2-7A of the Fair Work Act operates to assist with education and compliance of this emerging area of the law. They will be updated from time to time as cases are decided (Underlined parts are MCA additions).*

18. Such an approach would support the educative purpose of the Guidelines by clarifying their status, purpose and scope.

The Guidelines cannot fix uncertainty created by the legislation

19. The MCA supports the 'explanatory' approach the Commission has taken to the production of the Guidelines as the most appropriate way forward. However, in taking this approach, many crucial questions will remain unanswered, resulting in ongoing uncertainty.

20. This includes uncertainty as to:

    a. What amounts to the 'provision of a service' versus the 'supply of labour'?

    The extent to which service contracting in the mining industry may be excluded from orders under Part 2-7A remains unknown. Service contractors are engaged to provide a specific technical service, unlike labour hire, which is engaged solely to provide labour. These services are often highly specialised and provided with a high degree of managerial autonomy. They are vital in ensuring the mining industry can meet the constant technological, productivity and workforce challeges at operations that are often in remote locations, and which require adaptibility to ensure production can continue. In this regard, they are not at all akin to labour hire.

    b. What counts as work of the same 'kind'?

    The Draft Guidelines provide guidance that the Commission will ascertain the 'nature' of the work performed for the regulated host by making factual findings on the tasks undertaken, qualifications required and skills exercised. However, it is currently impossible for employers to know how closely the nature of the work must correspond with the relevant enterprise agreement classification to support a RLHA order being made. Until this is resolved there will be ongoing uncertainty over the engagement of virtually any labour hire in the mining industry.

    c. How can host employers calculate the protected rate of pay?

    In orders made to date, the Commisson has declined to provide a method for calculating the 'protected rate of pay'. This likely reflects the unworkability of comparing vastly different enterprise agreement classisfications and remuneration structures. Given the Commission's approach, employers do not yet have any guidance on how to account for

performance bonuses and other allowances or ‘separately identifiable amounts’. For example, would labour hire employees need to receive performance-based pay that depended on the performance metrics of the host employer rather than those of their own employer? Despite employers’ exposure to civil remedies, no clarity has been provided or is expected from the Commission.

d. When will the Commission consider the making of an order ‘not fair and reasonable’?

No guidance is yet available on how the Commission will weigh up the relevant factors.

21. The ongoing legal uncertainty has real world impacts on businesses across the mining industry. This uncertainty is acting as a drag on economic activity and continues to contribute to uncertain investment conditions. The MCA recognises that this uncertainty emanates from the legislation itself, which the Commission is not able to address through the Guidelines.

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President Michele O'Neil Secretary Sally McManus

25 October 2024

Associate to Justice Hatcher, President
Fair Work Commission

By email: consultations@fwc.gov.au

Dear Associate,

AUSTRALIAN COUNCIL OF TRADE UNIONS FEEDBACK
GUIDELINES IN RELATION TO THE OPERATION OF PART 2-7A
REGULATION OF CERTAIN LABOUR HIRE ARRANGMENTS
(LH2024/24)

On 14 October 2024, the President issued a Statement inviting comment interested persons to comment on the draft guidelines on the operation of Part 2-7A of the *Fair Work Act 2009* (both as to their content and whether they should be made at all).

The Australian Council of Trade Unions ("**the ACTU**") supports the making of the guidelines and their subsequent amendment to include the outcome of any subsequent decisions on the operation of Part 2-7A regarding orders regulating certain labour hire arrangements.

The ACTU has had the benefit of reading the feedback provided by the Flight Attendants' Association of Australia and the Mining and Energy Union and respectfully supports the matters raised in the submission of those affiliates regarding the content of the guidelines.

Yours faithfully,

[redacted]

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Australian Unions

RESPONSE TO DRAFT GUIDELINES IN RELATION TO THE OPERATION OF PART 2-7A: MINING AND ENERGY UNION

1. The Mining and Energy Union (**MEU**) welcomes the opportunity to comment on the draft guidelines in relation on the operation of Part 2-7A (**Draft Guidelines**).

2. The Draft Guidelines were issued on 14 October 2024 along with a Statement issued by President Hatcher issued on the 14 October 2024 (**Statement**).

3. The MEU makes five points with respect to the matters contained in the Statement and Draft Guidelines.

4. One, the MEU supports Guidelines being issued under s.306W of the FW Act. The Guidelines will assist parties in their knowledge of Part 2-7A of the FW Act, and compliance with their obligations under Part 2-7A of the FW Act.

5. Two, the MEU supports the Guidelines being updated over time to reflect significant decisions made under Part 2-7A of the FW Act.

6. Three, page 6 of the Draft Guidelines seeks to explain the jurisdictional pre-requisite under s.306E(1)(a). The first paragraph is set out below:

> *There does not need to be a direct contractual arrangement between the employer that supplies employees and the regulated host. Section 306E(3) of the Fair Work Act provides that the supply of employees might be the result of multiple agreements, which might be between persons other than the employer and regulated host. The regulated host and employer may or may not be related bodies corporate*. (emphasis added).

7. That is all true and accords with s.306E(3). However, the exclusive focus on a 'direct' contractual arrangement is apt to mislead. That is because the jurisdictional pre-requisite of s.306E(1)(a) can be satisfied in circumstances

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where there is no agreement at all. This is evident from the inclusion of the words 'whether the supply is the result of an agreement' in s.306E(3)(a). The inclusion of additional words in the first sentence of the above paragraph will address this issue. The additional words are highlighted in red. The MEU suggests the first sentence be revised as follows:

> *There does not need to be a direct ~~contractual~~ agreement between the employer that supplies employees and the regulated host, or an agreement at all.*

8. Four, as will be evident from the above suggested revised paragraph, the word 'contractual' should be deleted from the relevant paragraph on page 6 of the Draft Guidelines. Section 306E(3) does not mandate that the agreement must be contractual in nature. Moreover, s.306E(3) refers to an 'agreement'. it does not refer to 'arrangement'. The Guidelines should adopt the language used in s.306E(3).

9. Five, pages 7 & 8 of the Draft Guidelines concerns s.306E(1A). The three paragraphs at the top of page 8 concern s.306E(7A). The first sentence of the second paragraph correctly identifies that s.306E(7A) requires each of the matters at (a) – (e) to be taken into account. The weighing exercise clearly does not place greater significance or weight on any of the matters identified at (a) – (e). Each matter must be considered and evaluated in forming the requisite state of satisfaction under s.306E(1A). Accordingly, identifying only one matter from the matters identified at (a) – (e) to include in the Guidelines is only apt to mislead. The example set out in the second sentence of the second paragraph on page 8 should be deleted.

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Draft Guidelines on the operation of the Regulated Labour Hire Arrangement Provisions

Feedback from the Recruitment, Consulting and Staffing Association (RCSA).

RCSA appreciates the opportunity to provide feedback to the Commission on the draft guidelines relating to operation of the regulated labour hire arrangement provisions in the Closing Loopholes legislation.

RCSA is the peak body representing the recruitment and staffing industry, which includes the labour hire industry, across Australia and New Zealand.

RCSA represents over 1000 corporate and individual members who source, place and manage permanent and temporary workforces across almost every industry in the country, supporting private and public organisations with their professional, skills and labour demands.

Recommendations for additional clarification within guidelines:

RCSA appreciates that the predominant role of the guidelines is to provide clarity around the application of provisions in the Loopholes legislation relating to the application of Regulated Labour Hire Arrangement Orders (RLHAOs).

The guidelines broadly affirm our industry's understanding of the provisions indicated above. There is, however, one area RCSA and its members believe could benefit from more direct clarification within the guidelines document itself.

Incentive payments within the context of a protected rate of pay.

RCSA would like the guidelines to provide clearer guidance in relation to the relevance of incentive-based payments and bonuses in relation to protected rate of pay.

Member organisations are already reporting examples to us where challenges and differences of opinion are arising between themselves and union representatives in relation to what should be included when calculating protected rate of pay.

RCSA believes the legislation makes it clear that only those identifiable monetary amounts within an industrial instrument are relevant to protected rate of pay.

Given disputes are already arising around discretionary payments not identified within an industrial instrument, we believe there would be benefit in specifically clarifying, within these guidelines, that monetary benefits not identified within an industrial instrument do not form part of a protected rate of pay. We ask the Commission to consider amending page 11 of the draft guidelines to incorporate the content in red below to better clarify this for employers and for order applicants:

> "Section 306F(4) defines **protected rate of pay** as the full rate of pay that would be payable to the employee if
>
> the host employment instrument covered by the regulated labour hire arrangement order were to apply to the
>
> employee.
>
> **Full rate of pay** is defined in section 18(1) of the Fair Work Act. It includes:
>
> • incentive-based payments and bonuses
> • loadings
> • monetary allowances
> • overtime or penalty rates, and
> • any other separately identifiable amounts that are applicable under the host employment instrument.
>
> Other payments, that are provided on a discretionary basis and that are separate from the host employment instrument, will not form part of the protected rate of pay.
>
> Section 306F(10) makes it clear that the requirement to pay no less than the protected rate of pay under the host employment instrument applies despite any provision of a fair work instrument, covered employment instrument or contract of employment that applies to the regulated employee and provides for a lesser rate of pay."

Anti-avoidance framework

While RCSA appreciates that a lack of granular detail around anti-avoidance frameworks is often necessary to maximise scope for enforcement, we also note there is little to no additional clarity provided beyond the content of the legislation within the guidelines. A number of RCSA members have asked whether the Commission might consider its capacity to provide some additional clarity around the types of matters that could amount to a breach of anti-avoidance measures within the guidelines.

Additional feedback relevant to the operation of RLHAOs more broadly.

Historic leave liabilities

Despite submissions and representation to government throughout the development and passage of Closing Loopholes, the legislation remains concerningly silent on addressing the potentially enormous commercial cost and challenge presented by annual leave accruals. Business liabilities in relation to accrued leave could be impacted dramatically by the application of regulated labour hire arrangement orders. While this is more a legislative consideration, the issuing of guidelines and the scheduling of contested activity in relation to RLHAO is a reminder of the pressing need for the legislation and orders to consider and provide clarity on the impact of RLHAO on annual leave accruals.

RCSA and its members believe treatment of leave entitlements has the very real potential to impose a multi-billion dollar retrospective cost on businesses, at a scale and impact which could force some businesses to close. This impost, if it occurs, will be the result of a change in law that occurred many years after the period in question. RCSA does not believe governments should be able to impose unreasonable retrospective financial liabilities upon a businesses through a change in legislation. We believe the legislation needs to clarify that RLHAOs will only apply to leave accruals post the date the Loopholes changes took effect. We believe this is issue presents a serious and important consideration for the application of orders and is something that must be addressed as a matter of urgency by the Government.

Labour Hire Workers engaged under an existing EA with their employer

RCSA reminds the Commission that there will be cases where RLHAOs will override or nullify existing industrial instruments that a labour hire worker has agreed with their employer. In some areas, the RLHAO will offer less favourable terms than existed under those workers' previous entitlements.

While again, we appreciate this is more a legislative than a guideline consideration, RCSA believes it is worth reminding the Commission that this is an issue that will arise in the process of the assessing and determining RLHAOs.

RCSA does not support the position adopted by legislation to dismiss and override instruments negotiated and agreed in good faith between employers and employees. We believe it renders labour hire workers the only workers in Australia unable to negotiate or bargain directly with their employer on terms and benefits related to their employment. We also anticipate that employers and employer organisations like RCSA will actively highlight examples within application of RLHAOs where new terms unilaterally applied to workers will be less favourable than those they had bargained for and agreed directly with their employer.

About RCSA

RCSA is the peak body for the recruitment and staffing industry in Australia and New Zealand.

RCSA promotes and facilitates professional practice within the recruitment and staffing industry. It sets the benchmark for industry standards through representation, education, research and business advisory support to our member organisations and accredited professionals who are bound by the Australian Competition and Consumer Commission (ACCC) authorised RCSA Code for Professional Conduct.

RCSA is also a proud member of the World Employment Confederation (WEC), the voice of the recruitment and staffing industry across 50 countries, and the Australian Chamber of Commerce and Industry (ACCI).