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Stronger Together

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Senate Education and Employment Legislation Committee Inquiry into the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

Submissions of

THE AUSTRALIAN WORKERS' UNION

29 SEPTEMBER 2023

About the Australian Workers' Union

The Australian Workers' Union (**AWU**) is the nation's oldest union, and also one of its largest. The AWU has broad constitutional coverage in a wide variety of industries including construction, steel, manufacturing, mining, agriculture, pastoral, horticulture, hair and beauty, aviation, and oil and gas.

Standing to make submissions

The AWU covers employees in a broad range of industries and occupations, and given the breadth of the proposed amendments in the *Fair Work Amendment (Closing Loopholes) Bill 2023* (**Bill**), many of these industries will be impacted by the Bill.

Given the presence of labour hire and outsourcing in a number of AWU industries, the AWU has a particular interest in Part 6 of the Bill – *Closing the labour hire loophole*.

Submissions of the Australian Council of Trade Unions

The AWU has had the opportunity to read the Australian Council of Trade Unions' (**ACTU**) submission to this inquiry. The AWU supports those submissions, and the submissions made by the AWU below are made in addition to those of the ACTU.

Submissions of the Offshore Alliance

The Offshore Alliance is an alliance between the AWU and the Maritime Union of Australia (**MUA**), which for the past four years has engaged in an organising campaign targeting the offshore hydrocarbons sector in Western Australia.

Currently, the Offshore Alliance has approximately 3000 members, which is more than half of the employees in the sector. The Offshore Alliance has successfully negotiated over 60 enterprise agreements in the sector since 2019.

These submissions filed on behalf of the AWU incorporates the union's experience in the offshore hydrocarbons sector as part of the Alliance.

Summary of AWU position

The Bill should be passed, but with additional amendments that are designed to support and strengthen the policies that underpin the proposed amendments.

Focus of AWU submissions

In recognition of how thorough the ACTU submission to this inquiry is, these submissions will focus on what Part 6 of the Bill can do, and also what it should do to ensure that working Australians who have successfully improved the terms and conditions of their employment in a collective manner don't have their job security threatened by the introduction or proliferation of lower cost contractors or the exploitative use of labour hire providers.

The use and proliferation of labour hire providers and contractors always applies downward pressure on wages received by workers in a sector. Labour hire providers and employers trying to secure contracts with companies are generally seeking to tender the lowest possible price, and one of the first things that is impacted by cost cutting is wages.

Given that contracting parts of an operation out to a third party or utilising labour hire workers at a lower rate than that paid to direct employees always saves the primary employer money, the primary employer is incentivised to engage in this type of work arrangement.

This is a work arrangement where the worker is always the loser – both the worker engaged by the contractor or labour hire provider and the worker engaged directy by the primary employer working alongside them.

This submission will briefly address the labour hire arrangements in the offshore drilling industry and the third party contracting prevalent in the hydrocarbons industry

at large. Both require legislative attention to return integrity to the enterprise agreement making process, to ensure that all employees are remunerated fairly and that labour hire and contracting only continue to be used for genuine purposes, such as for short-term peak periods and for specialist services.

The Offshore Alliance

The Offshore Alliance is the principal union in the offshore hydrocarbons sector with approximately 3000 members in production, construction, maintenance, drilling, catering, ROV, aircraft maintenance, transmission and decommissioning.

When the Offshore Alliance commenced its campaign in 2019, there were very few enterprise agreements in the offshore hydrocarbons sector, and of those, many were baseline agreements – enterprise agreements that only set a minimum floor of entitlements for workers, usually only marginally above the relevant Modern Award entitlement (intentionally).

These baseline agreements are used by employers to secure contracts for work with larger employers – generally the operators of facilities. Due to their far inferior conditions, a consequence of these baseline agreements is to drive down the terms and conditions of employment in the industries in which they operate.

The Offshore Alliance has now negotiated over 60 enterprise agreements on behalf of members in the hydrocarbons sector – including many that replaced baseline agreements – but baseline agreements still persist and will continue to be an issue for the hydrocarbons industry without legislative amendment.

Many baseline agreements are made by employers with a very small cohort of what may or may not be actual employees covered by the scope of the agreement – this type of behaviour is engaged in for two purposes. Firstly, to avoid negotiating a greenfield agreeement with the relevant union. Secondly, to ensure that the terms and conditions of the agreement are as employer friendly as possible because it is a widely held belief in the sector that the more inferior the enterprise agreement, the

more likely it is that the employer will secure work because they can secure the work for the lowest rate.

These baseline agreements are used in both 'traditional' labour hire models and also to secure a part or parts of an operation that an operator has decided to outsource (generally for the purposes of saving money on labour costs).

Labour Hire – Offshore Drilling

The use of labour hire providers – or manning agents – is common in the offshore drilling sector. Every drilling facility operator currently in waters off the coast of Western Australia currently engages direct employees and also hosts labour hire employees beside them, performing the same or similar tasks for lesser conditions.

Prior to the Offshore Alliance securing significant improvements for employees of these manning agents, baseline agreements were in place across the sector. This permitted manning agents to tender for work at the lowest possible rates in an effort to secure contracts for the provision of labour.

Since 2019, members of the Offshore Alliance have made significant improvements in the terms and conditions in enterprise agreements for the manning agents they work for.

For example, the annual salary equivalent for an employee engaged by a manning agent as an entry level casual in drilling has gone from $120,450 in 2019 to $165,500 in 2023 – an increase of $45,000 or 37%.

Despite this significant improvement in rates of pay for employees of manning agents, they still fall short of the minimum rates payable to direct employees of the rig operators – the rate payable to an entry level casual employee in an enterprise agreement negotiated by the Offshore Alliance covering rig operators sit at approximately $200,000 for the same role – or $35,000 more per year.

Compounding this is the fact that the rates that appear in enterprise agreements in the drilling sector are almost always lower than those actually paid, particularly in periods of low unemployment, meaning the gap is generally larger than what it appears to be on paper.

One major issue even with union-negotiated enterprise agreements in the sector is the availability for another company to simply make a baseline agreement with employer-friendly 'employees' – which are usually management employees 'engaged' in roles covered by the agreement or employees who perform work in an entirely different industry, such as a workshop – to apply to offshore work or any other work for that matter.

Not only is this a possibility under the current legislative scheme, but it is also common. The AWU, in its capacity as part of the Offshore Alliance, recently successfully appealed the approval of an enterprise agreement in *Appeal by The Australian Workers' Union*[1] and in the process uncovered an ingenuine and fake process engaged in by the employer to secure an inferior baseline agreement for the purposes of tendering for work. Prior to the appeal, the enterprise agreement – the *Workforce Logistics Pty Ltd Enterprise Agreement 2022* – was used to engage workers for a contract at Chevron assets in Western Australia.

In response to this threat of an employer – established, brand new, or a related entity such as in *Oipo Pty Ltd*[2] – simply making a baseline agreement and using it to undercut established terms and conditions of employment in a sector – the Alliance has negotiated for the inclusion of specific contractor or labour hire rates in enterprise agreements to ensure that the current industry standard agency rates must be paid, no matter which manning agent the operator engages.

The Alliance is forced to go to all this effort simply to ensure that standards established through genuine collective bargaining are not destroyed by self-interested employers who act in bad faith by creating enterprise agreements that

[1] [2023] FWCFB 157 – discussed in more detail below.
[2] [2023] FWC 2278

significantly undercut them. The Alliance is forced to go to all this effort because the *Fair Work Act* doesn't prevent – or even discourage – such schemes. This must be remedied.

It is the job of the legislature to ensure the integrity of the enterprise agreement making system – not the union and its members. The only reason that the Alliance negotiates for the inclusion of such clauses is because the current enterprise agreement provisions are insufficient to protect their terms and conditions of employment.

The AWU acknowledges the amendments made to the enterprise agreement approval process by the *Secure Jobs, Better Pay Act*. These amendments are yet to be fully tested, and in any event, they are not a panacea to the issue of baseline agreements.

Outsourcing of Functions to Third Parties – Hydrocarbons Sector

Another common practice in the hydrocarbons sector is operators of certain facilities, including rigs, platforms, FPSOs and onshore facilities, outsourcing functions of the operation at the facility to contractors.

This is not a 'traditional' labour hire model as it is with offshore drilling, as the operator has outsourced a function such as maintenance or catering to a third party.

However, as with the more 'traditional' labour hire model, the two most significant impacts of these arrangements are the downward pressure on wages and the erosion of job security for workers directly employed by the operator.

The similarities between the outsourcing of a particular function and the hosting of labour hire are such that any amendment to the *Fair Work Act* to regulate the rates of pay paid to labour hire workers must also be effective against outsourcing arrangements that seek to undermine or destroy industry terms and conditions.

Firstly, the employees of contractors generally perform work that was once performed by direct employees of the facility operator. Secondly, the terms and conditions of employment of the contracting workforce are generally vastly inferior to those of the operator. Thirdly, the outsourcing of functions promotes competition between contractors tendering for the work – and the pursuit of the lowest wages possible is inevitable in this. Fourthly, operators generally outsource functions to contractors to reduce the company's wage bill. Excluding specialist contractors who are only required during specific periods or for specific tasks, contractors are always subject to terms and conditions less favourable than direct hire employees.

Employees of contractors receive lesser pay and conditions than they would have if they were engaged directly by the operator, which is obviously detrimental to those employees. Direct employees of the operator are also impacted negatively as the security of their employment is undermined by the prospect of the operator outsourcing the work they currently perform, just as the operator has done with other functions.

One example is Shell outsourcing its once in-house logistics and stores employees on the Prelude FLNG facility to Qube as a contractor. The conditions applicable to the Qube workers performing the function once performed by Shell employees are significantly inferior – with a 40% reduction in remuneration for starters.

Although the outsourcing of particular functions is not a 'traditional' labour hire model, the impact is the same – downward pressure on wages and the erosion of job security for direct hire employees.

It is for this reason that the amendments that are intended to capture the 'traditional' labour hire arrangements must be applied to the outsourcing of work.

Baseline Agreements – Workforce Logistics

As addressed earlier in this submission, baseline agreements cause significant damage to conditions of employment in an industry that are the product of genuine negotiations and collective agreement.

The hydrocarbons sector was once rife with this type of agreement and dozens of these agreements still exist.

In *Appeal by The Australian Workers' Union* [2023] FWCFB 157, a Full Bench (President Hatcher, Vice President Asbury and Deputy President Grayson) quashed the decision to approve the *Workforce Logistics Pty Ltd Enterprise Agreement 2022*, describing the process for making the Agreement as "ingenuine and fake".

Just six alleged employees voted on the Agreement. These 'employees' did not do any work covered by the agreement and were only engaged by Workforce Logistics for a total period of four weeks prior to the vote.

Some two months after the agreement was approved, Workforce Logistics was sold to AusGroup Companies Pty Ltd and then to Altrad Australia Pty Ltd. The agreement was subsequently used to apply to maintenance employees working on Chevron oil and gas facilities – Offshore Alliance members who were not provided an opportunity to collectively negotiate the terms and conditions of their employment.

As part of the Decision, the Full Bench has referred numerous approvals of other enterprise agreements involving those who participated in the scheme for the *Workforce Logistics* agreement to the FWC's General Manager for further inquiry. The Commission intends to ascertain whether there has been a wider-scale abuse of the statutory framework for making agreements. The AWU is certain that such abuse exists.

However, the FWC does not have standing to quash agreement approvals on its own motion, which again places the burden on a union, other aggrieved party or the Minister to ensure the integrity of the legislative scheme for making enterprise agreements. This is not sustainable and immediate legislative intervention is necessary.

On 18 September, the AWU lodged an appeal against the enterprise agreement that some of the employees previously working under the *Workforce Logistics* agreement

were transferred to as a result of the successful AWU appeal – the APTS Agreement. The APTS agreement is another low voter cohort enterprise agreement that establishes below-industry conditions and was voted up in 2021 by just three employees, despite having broad national coverage.

Schemes by employers to actively undermine industry standard terms and conditions are permitted by the current legislative scheme, and as such, they flourish without targeted union intervention.

Unintended Consequences – Non-Compliance

Although the AWU is supportive of a mechanism to regulate the exploitation of the provision of labour hire and outsourcing certain types of work, the union does harbour some concerns about the current structure of the proposed amendments and encourages the Committee to strengthen them.

The primary concern for the AWU is that the provisions only appear to apply when the 'host' employer has an enterprise agreement in place – and, we assume, that enterprise agreement is superior in its terms and conditions to that applying to the labour hire provider.

An unintended consequence of this requirement is the clear disincentive for 'host' employers to make an enterprise agreement with employees at all. If forced to negotiate by employees or a union using the provisions in the *Fair Work Act*, there is a clear incentive for the 'host' employer to make nothing more than a baseline enterprise agreement and use individual contracts to provide actual terms and conditions of employment to avoid the proposed amendments applying to the enterprise.

Conclusion

The AWU supports the Bill and encourages the Committee to recommend reasonable amendments to ensure that the purpose of the labour hire loophole

provision is achieved, both with the provision of labour hire and the outsourcing of labour via contracting arrangements.

THE AUSTRALIAN WORKERS' UNION