



29 September 2023

Committee Secretary
Senate Education and Employment Committees
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Canberra ACT 2600

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Dear Committee Secretary

FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES) BILL 2023

The Chamber of Minerals and Energy of Western Australia (CME) is the peak representative body for the resources sector in WA. CME is funded by member companies responsible for more than 86 per cent of the WA's mineral workforce employment,¹ ranging from mining to manufacturing² and support services across over a hundred sites and a dozen commodities from exploration to production and closure.

The resources sector significantly contributes to local, state and Australian economies. In 2021-22, the WA resources industry generated \$186.8 billion in gross value added, accounting for almost half of WA's economic activity.³ The industry's exports totalled \$233.6 billion, accounting for 95 per cent of WA goods exports and 66.1 per cent of national resources exports.⁴

The resources industry is also directly and indirectly responsible for a large share of employment in WA and the nation. In 2022-23, the WA resources industry employed 166,000 people, equivalent to 10.8 per cent of total employment in WA and 53.4 per cent of national mining employment.⁵ Employment in the WA resources industry grew by 40 per cent between February 2020 (pre-COVID) and May 2023, accounting for around 70 per cent of growth in national resource sector employment.⁶ Modelling based on CME's 2021-22 Economic Contribution Survey indicates spending by the WA resources industry supports at least 493,235 additional full-time jobs across Australia, including 259,959 full-time jobs in the state.⁷

Since the commencement of the Department of Employment and Workplace Relations (DEWR) public consultation process on the Same Job, Same Pay and other workplace reform measures in April this year, there has not been sufficient consultation with different sectors of the economy on drafting the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) (the Bill) to ensure it operates effectively as intended. Now it has been introduced into Parliament, we are concerned that the Bill presents a **significant overhaul of the workplace relations system, increasing the complexity and red tape of doing business in Australia**. A Senate inquiry into the Bill is thus strongly welcomed.

Summary

The resources sector drives the WA economy and substantially contributes to our nation's prosperity. It provides jobs and livelihoods, supports local businesses, communities and regions, and contributes significantly to providing government services at both the state and national levels.

With current global demand projections, the opportunities for the resources sector are substantial. The industry is working hard to maintain globally competitive operations and progress the \$148.8 billion worth of WA resource projects in the pipeline.⁸ Building on the industry's existing strengths in supplying the minerals and energy the world needs, Australia has an enormous opportunity to have a world-leading, sustainable,

¹ Government of Western Australia, [2022 Economic indicators resources data](#), full-time equivalents onsite under State legislation, Department of Mines, Industry Regulation and Safety (DMIRS), 21 April 2023.

² Mining includes mineral and petroleum commodities, whilst manufacturing includes alumina production, basic inorganic chemicals (lithium), basic non-ferrous metals (silicon), concrete and fertiliser explosives.

³ 47.8 per cent. Australian Bureau of Statistics (ABS), [Cat 5220](#), Table 6.

⁴ DMIRS, [WA Mineral and Petroleum Statistics Digest 2021-22](#); ABS, [Cat 5302](#), Table 21; [Cat 5368](#), Table 32a; [Cat 5220](#), Table 6.

⁵ May 2023 reference period. ABS, [Cat 6291.0.55.001 Labour Force, Australia, Detailed](#), Table 5.

⁶ Ibid.

⁷ CME, [2021/22 Total direct economic contribution to Australia](#), published June 2023.

⁸ The pipeline includes \$60.3 billion committed or under construction and \$88.5 billion planned or possible in March 2023. Government of Western Australia, [Industry activity indicators](#), DMIRS, accessed 19 September 2023.

value-adding critical minerals and clean energy industries, supporting the crucial decarbonisation of our world and country.

But our sector faces considerable challenges in the form of intense global competition for investment capital, geopolitical tensions, rising costs, persistent skilled labour shortages and weak productivity growth. Further, lengthy and duplicative approval processes and recent changes and uncertainty regarding regulatory policy decisions at both a state and federal level threaten WA's relative attractiveness to highly mobile global capital. We need the State and Federal Governments to work with us to ensure the industry's continuing global competitiveness and contributions.

In this context, CME and our members are concerned the **Bill would significantly worsen the challenges faced by our industry**. It is a complex and onerous piece of legislation that will significantly and unnecessarily increase compliance costs for employers, introduce uncertainty and reduce labour market productivity. Off the back of significant reforms to the *Fair Work Act 2009* (Cth) (the Act) that came into place earlier this year, there is also a risk the extent and nature of this Bill's proposed reforms will increase the likelihood of industrial action and workplace disputes in Australia.

There is a real concern that these wide-ranging and significant changes will have adverse and unintended impacts which **would increase costs, put jobs at risk and worsen productivity**, working against both the Federal Government's desire to foster a more productive economy⁹ and the OECD's recommendation that 'efforts to reduce constraints in labour and product markets ... would improve productivity prospects and sustainable living standards'.¹⁰ Modelling commissioned by the Minerals Council of Australia (MCA) found that a 5 per cent reduction in mining sector labour productivity would reduce gross domestic product by nearly 0.4 per cent and real wages by more than 0.2 per cent.¹¹

As a result, and in line with the MCA and many other peak bodies, **CME strongly opposes the Bill in its current form**. CME and its members note that such significant changes to Australia's industrial relations framework, with wide-ranging ramifications for Australian businesses, warrant appropriate and detailed consideration. We express our disappointment in the two-week window to provide submissions on such a detailed, lengthy, complex and far-reaching piece of legislation. It does not demonstrate a commitment to genuine consultation.

This submission provides in-principle support to the recommendations made by the MCA and the Australian Resources and Energy Employer Association (AREEA) in their detailed submissions. Wherever relevant, this submission seeks to reinforce views specific to the commercial dynamics of the WA resources sector, including those made in our earlier submission.¹²

Part 1 – Casual employment

CME **opposes the new definition of casual employment and its conversion pathway**. It is unnecessary and creates confusion when there is an existing definition under the Act. Currently, people employed on a casual basis have an existing right to convert to permanent status after 12 months.

At a time when employment in WA is at a record high and underemployment at its lowest,¹³ amending the Act to introduce an additional pathway for casual conversion will give rise to uncertainty and potentially higher operational costs via backdated pay entitlements and 'double dipping'.

The use of casual employment across CME's reporting ordinary member companies is minimal, at 2.9 per cent, with 65.3 per cent of these employees in skilled occupations such as technicians and trade workers, machinery operators and drivers and professionals.¹⁴ However, we acknowledge that casuals can be higher at 17.8 per cent within the supply chain,¹⁵ with over a third of these workers across occupations, such as labourers and hospitality, where more flexibility in staffing is needed.

⁹ Australian Government, [Intergenerational Report 2023: Australia's future to 2063](#), August 2023.

¹⁰ Organisation for Economic Co-operation and Development, [OECD Economic Outlook: Confronting Inflation and Low Growth](#), interim report, 19 September 2023.

¹¹ MCA, [Future Critical: Meeting the minerals investment challenge](#), September 2023, Figure 26, p 42.

¹² CME, [2023 Workplace reform consultations](#), submission to DEWR, 26 May 2023.

¹³ Government of Western Australia, [WA's employment hits new record](#), media statement by the Hon Rita Saffioti MLA, Deputy Premier; Treasurer, 14 September 2023.

¹⁴ Workplace Gender Equality Agency, [2022 WGEA Data: Public data file](#), workforce breakdown statistics, 11 December 2022.

¹⁵ Ibid. Associate member companies include service contractors across the following ANZSIC divisions: 'Accommodation and Food Services', 'Financial and Insurance Services', 'Manufacturing', 'Professional, Scientific and Technical Services' and 'Transport, Postal and Warehousing'.

Part 6 – Closing the labour hire loophole

CME members are **strongly opposed to the Part 6 provisions** (formerly titled Same Job, Same Pay measure) in the Bill and consider they are inconsistent with the stated objectives of these reforms. Without a clear definition for labour hire (or service contractor), there is concern the changes will serve as a catch-all for specialist service contractors, which are integral to the vast supply chain¹⁶ that underpins the WA resources sector. As a result, these changes could have far-reaching and unintended consequences for the strength of the Western Australian economy.

Labour hire has an important role in the resources industry. It is a genuine and legitimate source of workers across all stages of project development, from construction, ramp-up, and steady-state operations to decommissioning. Labour hire enables the industry to overcome skills shortages, respond to unforeseen events requiring additional labour, supplement the existing workforce in case of short-term absences, and facilitate the availability of specialist skills required for tight turnarounds and maintenance activities.

The resources industry also relies heavily on specialist service contractors for a wide range of goods and services required to safely and productively operate complex mines and production facilities. Without them, the industry would not be able to produce the minerals and energy products Australia and the world need. These services range from construction, contract mining, transport and maintenance services to professional, scientific and technical services (e.g. engineering, legal, environmental), catering and medical services.¹⁷ The construction, professional, scientific and technical, transport and financial services industries combined comprised 40 to 51 per cent of intermediate inputs into the resources industry in 2020-21.¹⁸ Focusing on WA, the split of contractors to company employees on WA mining sites is around 60/40, with half of these contractors working on iron ore projects in remote areas of the Pilbara region.¹⁹ Service contractors have played a critical role in providing specialised skills, enabling growth and maintaining operations through challenging economic phases.

CME and our members consider **service contractors must be more clearly exempt from the Part 6 provisions**. While the measure will apply by application only, the onus of proof will be on the business to demonstrate the 'provision of a service, rather than the supply of labour' to avoid a Fair Work Commission (FWC) order. That is, they will be captured unless they can litigate their way out. The **proposed section 306E process the FWC may have 'regard to' in distinguishing labour hire from service contracting is unworkable and does not offer a genuine exemption for service contractors**. For projects with variable timeframes or multiple contracting arrangements within a single site this would create a substantial pre-emptive burden on businesses to comply. Further, we note that FWC processes can take significantly longer than the period for which a service may be needed. We consider the level of discretion and uncertainty created by this proposed FWC process could be reduced by introducing a workable, clearer exemption for service contractors.

CME notes subsection 306G(2) allows a three month period in which a FWC order under Part 6 cannot be made for labour hire. While we appreciate an exemption to 'satisfy surges in demand over a short-term period... or back fill positions', we consider it is too short in practice and could reduce labour demand. **CME recommends an alternative exemption period, in close consultation with industries exposed to international commodity cycles, is considered in the Bill to reflect the length of typical surges in labour demand**, e.g. unscheduled maintenance and shutdowns, weather events or responding to short-term price opportunities.

CME also recommends a **more detailed Regulation Impact Statement is undertaken** that correctly reflects how different industries contract for services and labour hire across the economy. We consider the Regulation Impact Analysis OBPR22-02409²⁰ (the RIA) has too many caveats in its analysis and lacks rigour and transparency in demonstrating evidence of genuine public consultation with a large range of stakeholders across different sectors of the economy, i.e. to minimise unintended consequences.

¹⁶ CME members directly contracted with over 14,000 individual businesses in WA in 2021-22. This will be an underestimate given it is based on a surveyed sample of ordinary member companies. See CME, [2021/22 Total direct economic contribution to Australia](#), published June 2023.

¹⁷ As an example of medical services contracting, Rio Tinto recently [awarded](#) St John WA a three-year contract to provide over 60 FTE nursing and paramedic staff for their Pilbara operations.

¹⁸ [ABS Cat. 5209](#), Table 5. Construction services includes Construction services and Heavy and civil engineering construction; transportation services includes Road, Rail, Air and space, Water, pipeline and other transport, Transport support services and storage and Postal and courier pick-up and delivery service; and financial services includes Finance and Auxiliary Finance and insurance services.

¹⁹ At June 2022. Government of Western Australia, [2022 Economic indicators resources data](#), full-time equivalents onsite under State legislation, DMIRS, 21 April 2023.

²⁰ Explanatory Memorandum (EM) to the Bill, *Annexures to Certification Letter OBPR22-02409: Closing the labour hire loophole*, August 2023, pp 357-408.

CME notes some limitations with the evidence relied on in the RIA, including:

- Victorian Inquiry – The labour market and economy are structurally different from other states. Although the terms of reference differ, we believe this could be more balanced by considering the labour hire considerations from the Inquiry into Wage Theft into WA.²¹
- Third Interim Report – Most evidence is East Coast or union-centric. However, trade union membership in WA or across national mining employees is low²² and not representative of the national economy. We note recommendation 1 follows on from the Committee's discussion of evidence on workers 'working side-by-side'.²³ However, the Bill would go much further than this.
- Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 – The evidence was also union-centric and confined to a handful of industry associations. The Committee also noted legitimate uses for labour hire and a lack of clarity concerning key definitions.²⁴ We do not consider the Bill sufficiently evolved to address these pre-existing issues.
- DEWR's consultation in April this year – Several stakeholders expressed the importance of defining 'labour hire', 'the same' and 'full rate of pay'. Despite this, the Bill was introduced into Parliament with broader coverage than initially anticipated. We note the two employer-provided examples in the RIA on estimated cost impacts were strictly limited to labour hire employees and did not envision including service contracting arrangements.

Furthermore, the RIA lacks a formal cost-benefit analysis of the anticipated administrative burden on businesses to comply. As noted above, there are concerns the lack of clear scope and definitions will result in the Bill capturing service contracting arrangements, internal labour hire arrangements and indirectly subcontracted workers. Unless the Bill's application is narrowed, CME members consider the regulatory costs will likely be **significantly higher and more onerous than the department's upper limit estimation of \$510.8 million in annual regulatory costs** under Option 1. We argue any assessment of financial impact should also capture the following potential effects:

- Lost productivity with ongoing internal resources consumed (time and cost) and external professional services procured (cost) to ensure compliance with the Bill. We note the RIA fails to acknowledge high costs will be incurred to reverse the burden of proof that an FWC regulated labour hire arrangement order should not apply. We also note 'non-compliance and enforcement costs' are expressly excluded, but given the significance of the Bill's application to the broader economy, we recommend compliance costs such as dispute escalations are included for assessment.
- Probable market distortions in increased balance sheet reporting of employee leave liabilities because of 'protected rate of pay', supply chain behaviour of road transport industry workers, and more broadly, medium to longer-term economic dynamism.²⁵ While the Explanatory Memorandum to the Bill²⁶ asserts a level playing field will promote competition in employee-like workers, there is no consideration in the RIA of the structural effects (i.e. fewer options for labour matching)²⁷ on the economy as commercial business models such as service contracting and labour hire become less competitive due to pre-emptive compliance with the Bill.

Parts 7 and 10 – Workplace delegates' rights and exemption certificates: Unions

CME **opposes the provisions related to increased union delegates' rights and right of entry powers for suspected underpayment**. Through DEWR's public consultation process there has been no discussion and no case made for expanding union powers.

In an industry where safety is the number one priority, it is impractical to allow waiving of the minimum 24 hours' notice requirement for right of entry. In the past, CME and other peak bodies did not support right of entry entitlements for unions or other parties when consultation on the Model Work Health and Safety (WHS)

²¹ Tony Beech, *Inquiry into Wage Theft in WA*, report for the WA Government, published 6 December 2019.

²² 11.8 and 10.2 per cent respectively. Australian Bureau of Statistics, *6335.0 Trade union membership*, August 2022 reference period, released 14 December 2022.

²³ Paragraph 2.80.

²⁴ Paragraphs 2.27 to 2.45.

²⁵ We recommend the Senate Education and Employment Legislation Committee liaise with the Standing Committee on Economics on interim progress of their inquiry into economic dynamism, competition and business formation from the perspective of better paying jobs.

²⁶ See *Minimum standards and increased access to dispute resolution for independent contractors OBPR22-02873: Annexure A – Supplementary Analysis to Impact Analysis Equivalent process*, available in the EM to the Bill, 23 August 2023, pp 409-521.

²⁷ Productivity Commission, *5-year Productivity Inquiry: A more productive labour market*, vol 7, inquiry report no 100, 7 February 2023.

Laws was underway.²⁸ Allowing third-party delegations can disrupt workplace safety and productivity, making processes unnecessarily adversarial. In itself, right of entry requests create logistical, administrative and supervisory burdens for remote worksites in WA.

Instead, direct, effective consultation between employers and employees is preferred. The industry has enjoyed a mutually beneficial and harmonious industrial relations environment for decades, resulting in a higher-paying and more productive industry. As currently drafted, the proposed changes could detract from this mutually beneficial environment.

Significant rights and protections for engaging in industrial activity already exist. Providing greater protection or immunity to union representatives for bad and disrespectful behaviour risks increasing disputation and undermining the focus across the industry on improving respectful behaviours.

Part 16 – Provisions relating to regulated workers: Road transport and employee-like minimum standards

CME **opposes the provisions relating to regulated workers**. CME is concerned that 'collective agreement' representation of regulated workers could result in a serious breach of competition laws, driving up prices for other businesses and harming the broader economy. It is likely to impact smaller road transport participants disproportionately.

We also caution against blurring the distinction between employees and independent contractors as it can create legal uncertainty. **We recommend the Bill's definitions be narrowed to ensure they are effective in operation as intended.**

Other parts of the Bill

We support the Schedule 1 amendments strengthening protections against discrimination, penalties for civil remedy provisions, wage theft and the Schedule 4 amendment of the *WHS Act 2011* (Cth). However, as highlighted in our last submission, a delicate balance between protecting vulnerable workers and overregulating business, particularly for small to medium-sized businesses where non-compliance is often unintentional and results from the complexity of the industrial relations system, needs to be achieved. These amendments could be detached from the Bill and considered as separate legislation.

Conclusion

CME strongly opposes the Bill in its current form. The Bill would significantly worsen the challenges faced by our industry by significantly and unnecessarily increasing compliance costs for employers, introducing uncertainty and reducing labour market productivity. These outcomes would risk jobs, worsen productivity and harm the WA resources sector's ability to provide the essential minerals and energy our world requires.

For the key issues raised in this submission CME provides its in-principle support to the recommendations made by the MCA and AREEA in their detailed submissions.

Should you have questions regarding this submission, please contact Ms Adrienne LaBombard, Director – Policy and Advocacy,

Yours sincerely

Rebecca Tomkinson

Chief Executive Officer

²⁸ CME, [Modernising Work Health and Safety Laws in WA](#), submission to DMIRS, August 2018. [Consultation Regulation Impact Statement: Recommendations of the 2018 Review of the Model Work Health and Safety Laws](#), submission to Safe Work Australia, August 2019.