29/09/2023

Committee Secretary
Senate Education and Employment Committees
PO Box 1600
Parliament House
Canberra ACT 2600
Australia

Eec.sen@aph.gov.au

Dear Sir/Madam

RE: CLOSING LOOPHOLES CONSULTATION PAPER

Thank you for the opportunity to comment on the Government's *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*.

Lynas Rare Earths Limited (**Lynas**) is the only major producer of separated rare earths outside of China. Rare earths are critical inputs to global megatrends that will shape economies and consumer behaviour over the next decade. This includes digital age and green technologies such as electric vehicles and wind turbines.

As the global economy and markets accelerate towards greener technologies, the demand for rare earths will only continue to grow, with an estimated $6 trillion worth of metals required for global energy transition.[1] The Australian Government has recognised the significance of these minerals to clean energy transition in the *2023 Critical Minerals Strategy and Critical Minerals Development Program*.

Lynas occupies a unique position in the global Rare Earths industry. We are the only major Rare Earths producer that operates independently of China's supply chain, supplying separated rare earth materials to global supply chains. Consequently, we face the compounding pressures of staying competitive on an overall costs basis with China, whilst also remaining an employer of choice in the Australian resources industry.

Lynas directly employs 247 people at its sites in the Goldfields region of Western Australia (Mt Weld, near Laverton, and Kalgoorlie) and Perth headquarters. Lynas is investing over $1.2 billion in capital projects at our operating sites, creating over 500 jobs in the construction phases, and approximately 155 ongoing jobs anticipated during operations.

Lynas is committed to employing local people and sourcing from local businesses in each of our operations. We stated our commitment to having a residential operational workforce for our new Kalgoorlie Rare Earths Processing Facility and have achieved a 100% residential workforce for operations. Our policy is to preference local employment and suppliers in our procurement process, and in FY2023, 99% of procurement was from Australian suppliers and 93% was from WA suppliers. As part of this commitment, we aim to improve training, employment and supplier opportunities for Aboriginal and Torres Strait Islander people.

Our contractors and suppliers are generally small to medium sized businesses and do not have dedicated human resource or legal departments. Lynas is dependent on these partners to supply vital goods and services to our operations. Lynas therefore not only makes these submissions with respect to our own unique position, but also on behalf of other operators in the Rare Earths industry with whom we interact on a regular basis, and which may not have the corporate capacity to file a submission on their own behalf.

[1] Source: Bloomberg New Energy Finance.

Yours faithfully

Amanda Lacaze
CEO and Managing Director

Lynas Rare Earths Ltd Level 4, 1 Howard St., Perth, WA 6000
p +61 8 6241 3800 | f +61 8 9225 6842 | w LynasRareEarths.com | ACN 009 066 648

SUBMISSIONS

Lynas Rare Earths Limited (**Lynas**) welcomes the opportunity to make submissions on the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**Bill**).

As noted in the covering letter above, Lynas occupies a unique position in the Australian critical minerals industry. We are the only major Rare Earths producer in Australia, and we are a smaller business than many other major players in the Australian (and regional) resources industry who operate in bulk commodities. Our competitors in the rare earths industry are located in mainland China, which puts us in a position where cost competitiveness and productivity are essential to the sustainability of our business and the broader Australian rare earths industry.

Australia is an expensive place to do business, and workers in the Australian resources sector in particular are paid some of the highest wages in the world. Lynas seeks to attract and retain our employees by offering attractive salaries and conditions. At the same time, it is imperative we remain competitive with our Chinese counterparts for the longevity and sustainability of our business.

Managing talent acquisition and retention against our cost base is a fine line in Australia's complex industrial relations environment. Further administrative costs associated with non-value creating activities will have a negative effect on the sustainability of critical minerals companies like Lynas.

Lynas has concerns that the Bill will further complicate the requirements on employers alongside an increased risk of exposure to serious penalties. These proposals introduce complexity and confusion at an already challenging time for business and the global economy. In the rare earths industry, China's economic downturn has resulted in lower market prices for rare earth products, which affects not only Lynas but other rare earth companies in Australia who are seeking to bring their projects to fruition. For employers with small to no human resources or industrial relations capacity, these proposed changes will make the operating environment more difficult to navigate.

Lynas considers that these amendments, when considered as a single package, are unlikely to lead to increased productivity for the economy, or positive outcomes for businesses or employees. However, for the purpose of these submissions Lynas confines it comments to the four areas which it considers are likely to have the most significant impact on its business/operations, and that of its contractors and suppliers.

SAME JOB, SAME PAY

Firstly, Lynas is concerned that the changes proposed by the Bill go far beyond the Government's previously stated intent[2] to address the ***limited circumstances*** in which host employers use ***labour hire companies*** to deliberately undercut the bargained wages and conditions set out in enterprise agreements made with their direct employees. The provisions are much broader than these limited circumstances in a number of critical respects:

1. They are not limited to labour hire companies or their employees, as they could be extended to any circumstance where work is directly or ***indirectly*** performed for another person, including by

[2] 'Same Job, Same Pay Consultation Paper', DEWR, April 2023: https://www.dewr.gov.au/workplace-reform-consultation/resources/same-job-same-pay-consultation-paper; Tony Burke, Sky News Interview, 5 June 2023: https://ministers.dewr.gov.au/burke/interview-sky-news-andrew-clennell-0; *Fair Work Amendment (Same Job, Same Pay) Bill 2021*; Anthony A banese, Fair Work Amendment (Same Job, Same Pay) Bill 2021, Second Reading Speech, 22 November 2021 https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F25170%2F0151%22.

sophisticated and specialised services contractors or employees of related entities within a corporate group. There are no 'exemptions' for genuine services contractors.

2. They are not limited to arrangements where workers are used to supplement a direct hire workforce. In particular, there is no requirement in the Bill that the '*regulated employees'* perform the same work as the '*regulated host's*' direct employees or that these groups of workers perform any work 'side by side'. The Bill does not even require that the *regulated host* engage any employees doing the work performed by the *regulated employees*.

3. The '*protected rate of pay*' (**PROP**) concept in the Bill covers much more than the base rates paid to the *regulated host's* direct employees, and includes components such as incentives, bonuses and loadings. It is confusing and unclear how this would apply in practice, and could lead to unfairness and illogical results – for example, if a bonus is linked to the corporate performance of the *regulated host* (or a division or part of that host), would it be payable to the *regulated employees* if those performance metrics are met, even though they are not actually employed by that host? What if the regulated employees are also entitled to incentives under their normal enterprise agreement (or contract of employment) related to the corporate performance of their direct employer, would these employees then be entitled to both incentive payments?

4. Due to the ability to seek an '*alternative protected rate of pay*' order, the provisions do not require the *regulated host's* enterprise agreement to cover or even contemplate the types of work performed by, or classifications of, the 'regulated employees'. This could lead to circumstances where, for example, an agreement that is only expressed to cover employees performing construction work is applied to employees solely engaged in ongoing operations and maintenance work. As another example, an enterprise agreement that was drafted and intended to only apply to one particular site or operation could be used to ground an *alternative protected rate of pay* order for *regulated employees* performing work at a different site or operation, potentially one on the other side of the country. The result of this is that it will likely discourage employers, particularly those at risk of being designated as *regulated hosts*, from engaging in collective bargaining, as the employer must assume that the agreement may ultimately be applied to a much broader pool of workers, including those not within the intended scope or coverage of the agreement.

Further, the same job, same pay measures will create a minefield of complexity and uncertainty for employers to navigate. While Lynas supports a framework that promotes fair and equitable pay and working conditions, we have concerns that the proposed reforms will impede the operational flexibility required for Lynas to remain competitive with our international competitors.

Lynas has concerns that the same job, same pay provisions will diminish the commercial viability of external labour. This will lead to operational impacts if contractors (noting that the proposed changes in the Bill extend far beyond the Government's previously stated target of 'labour hire' employees) are required to be replaced by direct forms of engagement. As a comparatively small player in the Australian resources sector, this constrains Lynas' operational decision making in a way that will stifle growth and innovation.

Lynas engages contractors for the supply of labour, through labour hire and services agreements. Indeed, these arrangements are fundamental to our ESG commitments to bolster local businesses. There are contractors within this supply and operational chain which do have enterprise agreements in place, and, given the broad manner in which the Bill is drafted, these enterprise agreements may be targeted by other workers further down the supply chain for RLHA orders.

These proposed provisions introduce terms that do not have existing legislative meaning or established case law. The Fair Work Commission is vested with considerable discretion, which it must exercise unless satisfied the order is not 'fair and reasonable'. What is 'fair and reasonable' is uncertain and will inevitably lead to dispute and litigation. Businesses like Lynas, and our suppliers and contractors, with no industrial

relations department, will be forced to funnel resources into legal fees and complex analysis, reducing our productivity and cost-competitiveness. As noted previously, productivity and cost-competitiveness are essential to Lynas' sustainability and to ensuring we can continue to pay our employees and contractors well.

This is compounded by the complex PROP test. Businesses will be required to undertake detailed calculations to determine the '*Full Rate of Pay*' based on a designated *covered employment instrument*, with a larger range of conditions to be consider than the BOOT. For businesses without large or sophisticated human resources departments or capabilities, this is an onerous task. This will be even more complex than the BOOT, which 'only' requires a comparison with terms set out in an award. The PROP will require a wider range of conditions to be considered and require a nominal value to be put on non-financial benefits. Lynas and our suppliers simply do not have the systems and processes to manage and respond to this.

Many of our suppliers are locally-owned small and medium-sized businesses. They generally do not have dedicated human or industrial relations resources capabilities. For example, at our Kalgoorlie site, we partnered with an Indigenous owned and operated business to provide jobs and training for young people. This particular partnership enabled some of its employees to move into permanent housing of their own for the first time. These are the kinds of innovations that the Government should be encouraging, but which may be stamped out by the Bill simply because of the complexity and cost of these unnecessary changes.

ENHANCED RIGHT OF ENTRY

Lynas supports balanced right of entry rules and union officials visit Lynas sites from time to time. Under the Bill, unions are proposed to be given increased rights to enter workplaces without notice, including where they have little or no membership. This raises clear concerns about over-reach and the ability of business to manage their affairs.

Currently, union officials must generally give 24 hours' notice of entry to investigate a suspected breach of a workplace law. Lynas works productively with union officials to manage access under the current arrangement as required. The Bill dramatically modifies the right of entry safeguards that are currently in the Act by introducing an exemption from providing the minimum notice period on the new ground of suspected underpayment. Concerningly, the threshold to access this exemption is extremely low and leaves it vulnerable to abuse and misuse, raising the prospect of workplace conflict and operational disruption.

While the permit holder will be permitted to enter the premises at which the union member works, there will only be marginal benefit gained by this entry and it is unlikely to address the stated objective of preventing underpayment. Accessing payroll data is generally a difficult and lengthy task and, because most data is held online, the physical presence of union officials is unnecessary.

A permit-holder may seek to maximise disruption by entering without notice under the guise of investigating an underpayment claim, or to investigate some unrelated claim. This will further entrench conflict and disrupt the operation of the site, with no benefit to workers.

DELEGATES' RIGHTS

The Bill will enshrine a new workplace right to be a 'workplace delegate' and impose compulsory and onerous 'delegates' rights terms' on every employer. These rights are framed in broad and unrestricted terms and there is no limit to the number of workplace delegates per employer. This could lead to reduced productivity and operational challenges.

The Bill provides that a workplace delegate is entitled to represent the industrial interests of current ***and potential*** union members. This would mean that, in a workplace with single union member (who was appointed as a delegate), the employer would be obligated to negotiate with them as if they represented all other workers who are *eligible to be* (even if not actually) members of their union, and to provide them with access to all other staff, even if those other staff had exercised the right not to join the union.

There is also no limit on the time that can be spent during working hours on delegate duties. Union delegates will be entitled to abruptly absent themselves from work to attend to their representative functions, or choose to prioritise their union duties over their work, including over urgent or safety-critical operational requirements.

Crucially, an employer is not able to direct a workplace delegate to attend to their work in preference to union duties, at the risk of offending the representational right in breach of general protections. In an irrational result, union officials may be immune from discipline for misconduct, including for engaging in bullying and harassment, in connection with conduct that is undertaken in the exercise of a right to reasonable communication with union members.

Additionally, the Bill provides workplace delegates with new paid leave entitlement for delegates to undertake training to assist with representing industrial interests. There is no express limit beyond what is 'reasonable'.

The Bill also introduces a right of workplace delegates to enjoy reasonable access to workplace facilities (including during working time). Previously, access to facilities such as meeting rooms (outside of the context of right or entry by union permit holders) and emails, has been rightly a matter for the employer's discretion. Now, workplace delegates are required to be provided with access to facilities and, again, aside from reasonableness, no limitation is imposed on this entitlement. Lynas is a small organisation, with limited facilities available on its operating sites. Providing and regulating access to company facilities will be onerous and detrimental to operational requirements.

In all circumstances, the cost lies with the employer, who will effectively be required (both directly and indirectly through interruptions to productivity) to fund the costs of union activities. Ultimately, this new framework impermissibly intrudes on business's ability to manage their own workplaces. It attempts to apply a one-size-fits-all approach across all of business in Australia, ignoring the spectrum of resourcing needs and capabilities across employers and industries.

DEFINITION OF 'CASUAL EMPLOYMENT'

The High Court only recently reaffirmed a simple and easy to apply approach to casual employment in the *Rossato* case. This followed amendments passed by Parliament in 2021 which provided for enhanced casual conversion rights in the NES and a clear objective definition of 'casual employee'. It is puzzling that the Government would seek to undo these matters, removing certainty and clarity, by returning to a multi-step process that is complex and costly to apply in practice, and leaves employers and employees unclear of their proper legal classification unless and until a legal challenge is brought.

The new definition signals a return to the multi-factor test, based on the 'real substance, practical reality and true nature of the employment relationship' (that is, the subsequent conduct of the parties). This removes any semblance of contractual certainty, leaving legal status to be determined by reference to various impressionistic factors. Employers can no longer understand the constitution of their workforce without conducting rigorous and regular assessments. Further, the definition is inherently fluid and could change according to the employee's patterns of work and the subjective expectations of the parties, which could change from week to week or day to day.

While Lynas rarely engages casual employees, many of our contracting partners use a casual engagement model. This is a model that works for them and for their employees. These companies do not have specialist resources to respond to changes of the complexity and scale of this Bill. Lynas itself is a lean business and has concerns from a resourcing perspective as to how to manage the risk that an employee will be found not to be engaged casually. In particular, the risk of being found to be secondarily involved in any misrepresentations poses a concern. Given the complexity of the Bill, employers are likely to inadvertently contravene these requirements and are left exposed to serious penalties.

Due to the complexity of factors, there is no doubt that this will lead to a raft of litigation to gain some understanding of what casual employment means. Such cases are unlikely to bring clarity over time, as it will inevitably be a fact-specific exercise.

These changes are likely to limit productivity and lead to casual employees only being offered insecure and irregular hours, which undermines stated purpose of the Government's agenda.

Lynas Rare Earths Ltd Level 4, 1 Howard St., Perth, WA 6000
p +61 8 6241 3800 | **f** +61 8 9225 6842 | **w** LynasRareEarths.com | ACN 009 066 648