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Dear Committee Secretary

UnionsWA submission: Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

UnionsWA is the governing peak body of the trade union movement in Western Australia. As a peak body we strengthen WA unions through co-operation and co-ordination on campaigning and common industrial matters. UnionsWA represents around thirty affiliate unions, who in turn represent approximately 140,000 Western Australian workers.

UnionsWA welcomes the opportunity to make a submission on *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*. We support the submissions of the ACTU, who point out that

... Australia is facing a cost of living crisis where wages have continued to decline in real terms despite continued profit growth. For over a decade nearly all productivity growth has been taken in profits and now during a cost-of-living crisis, big companies are posting record profits while real wages are seeing record decline in real terms. This is not fair, it is not equitable nor is it sustainable.

...

The Closing Loopholes Bill will plug several gaps that need to be addressed if we are to embrace the concept that all workers should be treated fairly ...

Accordingly, we support the ACTU's Overarching Recommendation that

... the Closing Loopholes Bill is passed in full, subject to the further recommendations made in this submission.

UnionsWA is disappointed at the misleading propaganda attack on the modest goals of this Bill, the content of which is largely concerned with restoring balance and fairness to the industrial relations system.

The head of Lynas Rare Earths, Amanda Lacaze, recently argued that¹

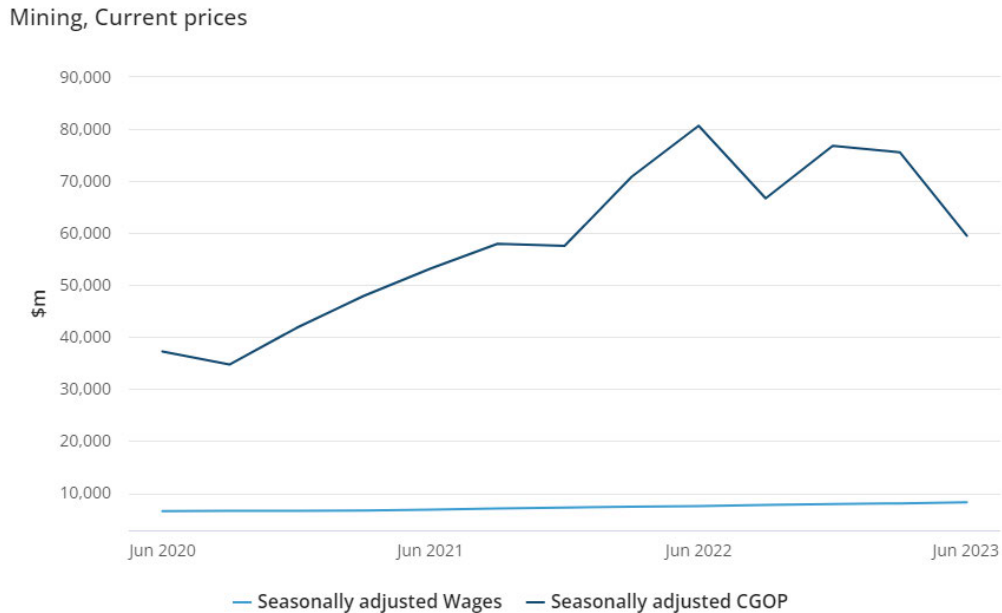
"Frankly, mining workers earn very good money and the current system works very well."

¹ 'Lynas Rare Earths chief Amanda Lacaze takes aim at Albanese Government's industrial relations changes' <https://thewest.com.au/business/mining/lynas-rare-earth-chie-executive-amanda-lacaze-reiterates-previously-stated-opposition-to-labors-ir-changes-c-11870925>

In fact, real wages growth in the mining industry has been unimpressive in the last decade and have fallen substantially over the last two years. The wage arrangements in mining have not been working very well for workers.²



Nevertheless, the profit performance of mining is successful indeed, can be seen from the most recent ABS data on the industry’s Seasonally adjusted Wages, and Company gross operating profits.



² ABS, Wage Price Index, June 2023, Table 5b <https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/wage-price-index-australia/latest-release#data-downloads> ; Consumer Price Index, June 2023, Tables 3 and 4 <https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/consumer-price-index-australia/latest-release#data-downloads>

WA big business lobbyists such as the Chamber of Commerce and Industry (CCIWA) argue that *‘the success of WA’s mining industry underpins the success of our entire national economy’* and that it is³

crucial ... to many small and medium businesses in WA who supply equipment and services to mining operations in sectors like manufacturing, transport, professional services – even caterers and cleaners.

However, for private sector workers in WA who are employed by these businesses, their real wages have also gone backwards in a similar pattern to mining wages and performed worse in 2022.



Closing Labour Hire Loopholes

Gerhard Veldsman, chief executive of Roy Hill has claimed that recent IR changes are from Victoria from people who have *‘never set foot on a mine site’*. He went onto claim that

“We work together to make the industry better and then we make sure that when mining does well our employees share in it,” he said.

“Same job, same pay threatens to take this away and force us back to minimum award standards.”

Train drivers working at Roy Hill’s Pilbara mine, who were found by the Fair Work Commission to have been victims of ‘corporate manipulation’ to avoid bargaining with rail drivers and their union representatives and impose below Award pay and conditions, might have a different view.

The non-union deal was originally submitted to the FWC for approval in 2018 after being voted up by just two drivers before being applied to a much larger workforce. Big operators like Roy

³ ‘Mining supply-chain to be hit hard by workplace reforms’ <https://cciwa.com/media-statements/mining-supply-chain-to-be-hit-hard-by-workplace-reforms/>

Hill have used loopholes and labour hire companies to compete on supplying workers at the lowest possible rates, with worse results for employees across the industry.⁴

WA unions can assure the committee that there are plenty of people supporting these laws who have not only set foot on mine sites, but they have also worked there for years. Our affiliate the Mining and Energy Union pointed out at the time of the decision that⁵

Every train load of iron ore these drivers transport is worth millions of dollars.

We are ready to start bargaining for a better, fairer deal for these train drivers. They are highly skilled workers in short supply who play an essential role moving iron ore from pit to port.

The proposed amendments in the *Closing Loopholes Bill* would empower the FWC to issue a 'regulated labour hire arrangement order' which would guarantee that labour hire employees are paid the same as employees doing the same role for the host employer. The Bill incorporates specific exceptions including for small business host employers, training agreements; and 'genuine' service contractors.

UnionsWA supports the ACTU's recommendations to strengthen the Bill, such as

where there are consecutive labour supply arrangements with different operators, there should be a relatively streamlined procedure for extending an existing regulated labour hire arrangement order to the replacement supplier and its employees that will perform the same or similar work. Such a procedure could, for example, operate on the basis of a presumption that an order should be preserved and varied to specify the new employer and its regulated employees unless it is proved that a different kind of work is to be performed.

We also join with the ACTU in noting that

State and Local Governments use external labour, including traditional labour hire, extensively. The provisions of [the Bill's] Part 6 rely on regulated hosts being national system employers with employment instruments that apply to national system employees, which creates a gap in the scheme for some State and Local Government entities. We would encourage cooperation to facilitate State laws, referrals, or other arrangements that would ensure a more universal operation of the scheme.

Criminalisation of Wage Theft

Another example of misdirection on the contents of the Bill comes from BHP chief financial officer David Lamont, who recently claimed that 'Closing Loopholes' would cost \$1.3 billion a year, which will⁶

... come directly off our earnings for the year that will then flow directly to dividends.

⁴ 'Hire firm's 'corporate manipulation' slammed in Roy Hill driver deal' <https://www.afr.com/work-and-careers/workplace/hire-firm-s-corporate-manipulation-slammed-in-roy-hill-driver-deal-20210802-p58f09>

⁵ 'Roy Hill labour hire deal quashed' <https://meu.org.au/roy-hill-labour-hire-deal-quashed/>

⁶ 'Labor's work laws will cut dividends, BHP warns' <https://www.afr.com/companies/mining/labor-s-work-laws-will-cut-dividends-bhp-warns-20230918-p5e5kx>

We estimate that to be about 30¢ on a dividend payout.

And that will . . . impact the 70 million Australians that hold BHP shares either directly or through their retirement savings. So that's a direct impact flowing through. Another way to look at it (is) that \$1.3 billion is equivalent to around about 5000 jobs at BHP. So (it will have a) direct impact to all of our shareholders, not only in the dividends that will flow but also off the earnings of the overall organisation.

BHP's concern for its shareholders is not matched by a concern for its workers, or for Australian taxpayers by the so-called 'Big Australian'. Earlier this year BHP admitted to underpaying almost 30,000 workers since 2010. Fixing the issue will cost roughly \$430 million.⁷ In 2018 BHP had to settle a billion-dollar-plus tax dispute with the Australian Taxation Office over its Singapore marketing hub.⁸

Along with the ACTU, UnionsWA

supports the criminalisation of wage theft as part of a co-ordinated strategy to address the totality of the problem. What is required is a suite of measures that put in place a system of regulation and associated compliance which will help workers and their unions in addressing wage theft, rather than stifling their ability to do so. These measures should provide a fast, informal and inexpensive means by which disputed claims can be resolved. Criminalisation is a critical element of this solution to this systemic and complex issue.

UnionsWA also notes that the *Closing Loopholes Bill* could be strengthened in a number of ways, such as including the underpayment of superannuation as a wage theft offence. This is an issue of particular concern in WA as our state continues to have the largest gender pay gap in Australia.⁹

⁷ 'Mining giant BHP admits underpaying almost 30,000 Australian workers'

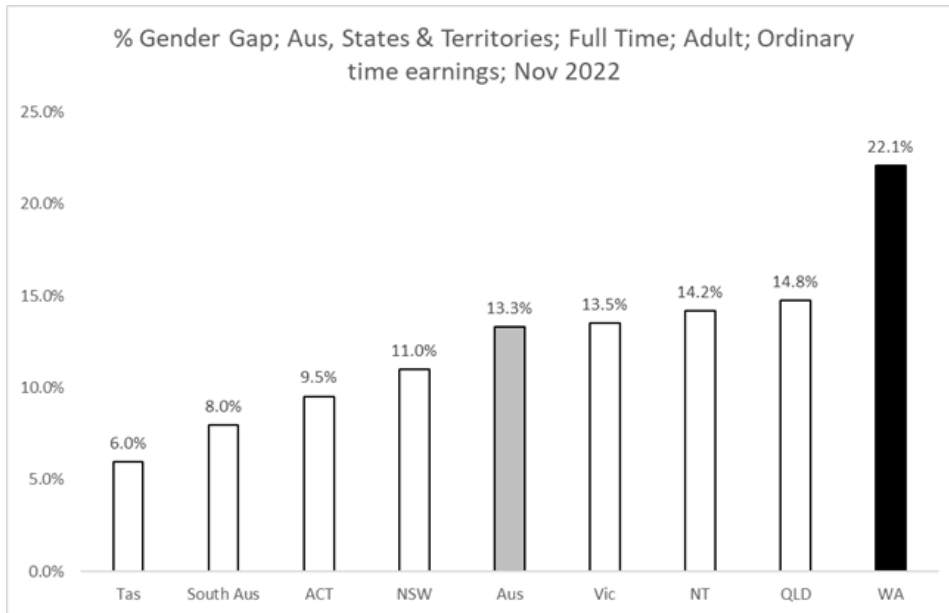
<https://www.abc.net.au/news/2023-06-01/bhp-wages-underpaid-28500-workers/102419890>

⁸ 'Tax deal between BHP and ATO ends one fight, but another awaits'

<https://www.abc.net.au/news/2018-11-20/tax-deal-between-bhp-and-ato-not-the-end-of-the-fight/10512732>

⁹ ABS Average Weekly Earnings, Australia, November 2022

<https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/average-weekly-earnings-australia/latest-release>



UnionsWA also supports the ACTU's contention that

The Commonwealth wage theft regime proposed in the Bill should not override or operate to the exclusion of superior state wage theft criminalisation laws or otherwise operate to override the activities of state based wage theft regulators. States should be free to legislate the criminalisation of wage theft for fault elements other than intention (such as recklessness or negligence). The new provisions do not make clear that they do not completely override state wage theft criminalisation legislation. This should be clarified in the Bill for the avoidance of doubt.

Industrial Manslaughter

UnionsWA joins with the ACTU in supporting the *Closing Loopholes Bill's* introduction of protections for workers in three key areas:

- harmonised industrial manslaughter laws,
- expansion of the Asbestos Safety and Eradication Agency to coordinate and evaluate measures to decrease the incidence of silica-related diseases, and
- the streamlining of the workers' compensation claims process for first responders suffering with Post-Traumatic Stress Disorder (PTSD)

In this submission we are focussing on Industrial Manslaughter, which was introduced into WA in the *Work Health and Safety Act 2020 (WHS Act)*.

There is currently no provision for industrial manslaughter in Commonwealth work health and safety laws. So, the *Closing Loopholes Bill* will insert an offence of industrial manslaughter into Commonwealth legislation, based on conduct which causes the death of a worker and is reckless or negligent about causing that death.

UnionsWA believes that healthy and safe work is a fundamental human right and is essential for a decent life. Every worker has an equal right to healthy and safe work irrespective of their employment arrangements or personal attributes. Health is a state of complete physical, mental, and social wellbeing and not merely the absence of disease or infirmity.

Nearly five years ago all Australian governments received Marie Boland's review of the Model WHS Laws which called for an industrial manslaughter offence to be included in the Model WHS Laws. In Ms Boland's words:¹⁰

I consider that this new offence is required to address increasing community concerns that there should be a separate industrial manslaughter offence where there is a gross deviation from a reasonable standard of care that leads to a workplace death. It is also required to address the limitations of the criminal law when dealing with breaches of WHS duties.

Unfortunately, the response of business lobby groups to proposals for WHS laws is make spurious claims that their industries are so 'unique' or 'special' that standards of health and safety should be less rigorously enforced, or more flexibly applied for the convenience of employers. This is particularly the case in the Agricultural sector.

During an inquiry into the safety performance of the WA agricultural industry, commissioned by WorkSafe WA, UnionsWA presented figures from Safe Work Australia (SWA) showing that in the five years to 2020, there were fourteen worker fatalities in WA's agriculture, forestry & fishing industry, constituting 13.9% of WA's overall worker fatalities for that period despite the industry only representing 2.7% of WA's employment. This is higher than WA's share of national worker fatalities (11.2%), as well as WA's share of the national agricultural workforce (10.1% in August 2020).¹¹

Unfortunately, public commentary from Agriculture business groups has demonstrated profoundly retrograde attitudes towards work health and safety. As recently as 2019 an article the CEO at Western Australian Farmers Federation Trevor Whittington referred to the very basic safety practices of fluorescent clothing and safety signs as 'paranoia' by the mining industry and said that the inclusion of psychological health in the WHS Act was '*just to ensure the Industrial Relation lawyers can potential have a field day*'.

The same article referred to an increase of safety resources to WorkSafe as '*It is like the police going on a Christmas blitz, they will be looking for those who are not doing the right thing*'.¹²

Another example of the alarming attitudes by employers in the industry to worker safety comes from Tony Seabrook President, Pastoralists and Graziers Association of WA (PGAWA), who made the following statement before a WA Parliamentary Committee:¹³

¹⁰ Review of the model WHS laws: Final report

https://www.safeworkaustralia.gov.au/system/files/documents/1902/review_of_the_model_whs_laws_final_report_0.pdf

¹¹ Safe Work Australia, *Work-related traumatic injury fatalities Australia 2020* (p.31)

<https://www.safeworkaustralia.gov.au/doc/work-related-traumatic-injury-fatalities-australia-2020>; ABS, Labour Force, Australia, Detailed, Table 05. *Employed persons by State, Territory and Industry division of main job (ANZSIC)* <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia-detailed/latest-release#industry-occupation-and-sector>

¹² 'No Your Honour We Had No Safety Systems' <https://wafarmers.org.au/no-your-honour-we-had-no-safety-systems/>

¹³ Evidence by Pastoralists and Graziers WA, WAFarmers (9 Jul 2020)

[https://www.parliament.wa.gov.au/C8257837002F0BA9/\(InqByName\)/Work+Health+and+Safety+Bill+2019?opendocument#Hearings](https://www.parliament.wa.gov.au/C8257837002F0BA9/(InqByName)/Work+Health+and+Safety+Bill+2019?opendocument#Hearings)

There are five people in my workforce. It is a family farm and I am one of those five. I waste an inordinate amount of my time making absolutely certain that our workplace is as safe as it can possibly be.

When challenged about why he considers this activity a ‘waste of time’, Seabrook responded that

Because I want to be productive, doing what I am doing—I really do. I am not going to call it a total waste of time, but I spend an inordinate amount of my time making certain that our workplace is safe. That detracts from my ability to do my job, but that is by the by. I have endless scraps with people doing what we are doing, telling them, “For God’s sake, don’t do it that way. That’s not acceptable”, picking things up off the floor, putting things back on racks, constantly driving home the fact that I do not want a WorkSafe accident.

This view by employers in agriculture demonstrates why the industry is so dangerous for both workers and employers. It also points to a disturbing culture of victim-blaming. These attitudes are long standing and cannot be addressed by another ‘education campaign’. They justify the inclusion of Industrial Manslaughter in Work Health and Safety Acts across all jurisdictions.

UnionsWA therefore supports the introduction of a separate industrial manslaughter offence where (in Boland’s words) ‘*there is a gross deviation from a reasonable standard of care that leads to a workplace death*’. We also support the ACTU’s proposals to strengthen the Bill, in particular to

Amend the breach element of the industrial manslaughter offence to ensure that an officer engaging in conduct which falls short of either their specific duty, or the duty of the PCBU, is sufficient to make out the offence.

To conclude, UnionsWA supports the passage of *the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* through the parliament. Where any changes are made, it should be to strengthen the Bill according to the recommendations presented by the ACTU.

The Senate Education and Employment Legislation Committee should reject the alarmism and self-interested objections to the Bill’s provisions from big business and its lobbyists. These companies and organisations have consistently shown their own conduct that they cannot benevolently ‘look after’ workers. Instead, workers need to be empowered by stronger laws and rights.

Thank you for the opportunity to contribute to this Inquiry. Please contact me directly on
or if you wish to discuss this submission further.

Yours sincerely

Owen Whittle
Secretary