Regulated Labour Hire Arrangements

Employer Guide

Australian Chamber of Commerce and Industry

SOUTH AUSTRALIAN Business Chamber EST. 1839

This publication has been funded by the Australian Government Department of Employment and Workplace Relations through the Productivity, Education and Training Fund grant program.

Disclaimer

The material in this guide is of a general nature and should not be regarded as legal advice or relied on for assistance in any particular circumstance or situation. In any important matter, you should seek appropriate independent professional advice in relation to your own circumstances. The Australian Chamber of Commerce and Industry accepts no responsibility or liability for any damage, loss or expense incurred as a result of the reliance on information contained in this guide.

Working for business.
Working for Australia

Telephone 02 6270 8000 | Email info@acci.com.au | Website www.acci.com.au

South Australia Business Chamber
1 / 136 Greenhill Road
Unley SA 5061

Telephone 08 8300 0000 | Email customerservice@sabusinesschamber.com.au | Website sabusinesschamber.com.au

Further Disclaimers & Acknowledgements

The Australian Chamber of Commerce and Industry (ACCI) has taken reasonable care in publishing the information contained in this publication but does not guarantee that the information is complete, accurate or current. In particular, ACCI is not responsible for the accuracy of information that has been provided by other parties. The information in this publication is not intended to be used as the basis for making any investment decision and must not be relied upon as investment advice. To the maximum extent permitted by law, ACCI disclaims all liability (including liability in negligence) to any person arising out of use or reliance on the information contained in this publication including for loss or damage which you or anyone else might suffer as a result of that use or reliance.

Contents

1. Introduction

Context

1.1 This guide is intended to help businesses understand the scope of the new 'same job same pay' laws to determine what impact the reforms might have on your business, as well as providing some practical suggestions for steps you might wish to consider when navigating these laws.[1]

1.2 The 'same job same pay' reforms (**reforms**) were introduced into the *Fair Work Act 2009* (Cth) (**FW Act**) in December 2023 following the passage of the Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (**Closing Loopholes Act**).[2]

1.3 The reforms impose new obligations on both labour hire agencies and businesses who use labour hire workers by inserting a framework into the FW Act to regulate certain labour hire arrangements, with the intention of ensuring that employees working for a host business as part of a labour hire arrangement are paid perform in line with the terms of the host business' covered employment instrument.

1.4 The Fair Work Commission (**FWC**) has new powers to make orders that labour hire workers engaged by a host business receive the same pay as the host business's employees if certain factors are met. Such orders are known as 'regulated labour hire arrangement orders'. See **New Part 2-7A of the Fair Work Act** below.

1.5 The primary policy intent of the reforms is to protect bargained wages in enterprise agreements from being undercut by the use of labour hire workers who are paid less than enterprise agreement rates.[3] Regulated labour hire arrangement orders could have financial, legal, and operational impacts for businesses who are subject to an order.

1.6 Labour hire agencies and host businesses who use labour hire workers should familiarise themselves with the reforms and consider the risk of a regulated labour hire arrangement order being made and its operational impact. Businesses at a high risk of being subject to a regulated labour hire arrangement order should consider potential contingencies including in relation to how it structures its operations (including the use of labour hire workers or the terms on which labour hire workers are engaged) and understand potential cost impacts to minimise risk.

1.7 Employers may wish to review additional resources. The Department of Employment and Workplace Relations (DEWR) has developed a factsheet on regulated labour hire arrangement orders. The Fair Work Ombudsman has also provided some general advice with respect to labour hire and supply chains.

1 The guidance in this document was finalised on 6 August 2024 and may be subject to future revision
2 A glossary of key terms is contained in Part 20 of this Guide
3 Explanatory Memorandum to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

New Part 2-7A of the Fair Work Act

1.8 Subject to certain exemptions, the new laws empower the FWC to make regulated labour hire arrangement orders' where the tribunal is satisfied that:

a. an employer (which, for the purposes of this Guide is referred to as the 'supplying employer') supplies or will supply, either directly or indirectly, one or more employees to perform work for a 'regulated host' (that is not a small business employer)[4]; and

b. a 'covered employment instrument' (i.e. an enterprise agreement or other prescribed determination) that applies to the regulated host would apply to the employees if the regulated host were to employ the employees to perform work of that kind.[5]

1.9 These regulated labour hire arrangement orders will be legally enforceable and will generally require labour hire providers to pay a specified group of employees no less than what they would be entitled to receive under the host business's enterprise agreement (or other employment instrument) if the employee was to be directly employed by the host.

1.10 Where a regulated labour hire arrangement order is made, the supplying employer will not simply be required to pay the hourly rates or base rates under the host business enterprise agreement; the supplying employer will generally be required to pay employees no less than the "full rate of pay" that would be payable to the employee if the host employment instrument covered them [6], including all loadings, overtime, penalty rates, monetary allowances, incentive-based payments and bonuses and any other separately identifiable amounts.[7]

1.11 The legislation also contains a range of other related provisions and obligations, including mechanisms for additional employers to be 'roped in' to an existing regulated labour hire arrangement order or an application for a regulated labour hire arrangement order.

Potential Impacts

1.12 Businesses should anticipate that labour hire agencies will become subject to regulated labour hire arrangement orders or multiple regulated labour hire arrangement orders if a labour hire agency supplies labour hire workers to multiple host businesses.

1.13 Regulated labour hire arrangement orders could have a number of financial, legal, and operational impacts for businesses, including:

a. labour hire becoming more expensive;

b. disputes about 'same job same pay' potentially resulting in litigation, particularly in relation to calculating the protected rate of pay;

c. additional measures being implemented or required for tender processes to ensure compliance;

d. contractual arrangements requiring terms dealing with 'same job, same pay' obligations and potential cost implications of orders during contract terms; and

e. adjusting internal procedures and systems to ensure compliance with 'same job, same pay' obligations.

1.14 General guidance for businesses about how to prepare and considering adapting business practices to accommodate the impacts of 'same job same pay' laws is set out in this Guide at:

a. for host businesses, at section 23; and

b. for supplying employers (labour hire agencies), at section 24.

4 See Part 4 of this Guide for a more detailed explanation of who is covered by the laws
5 FW Act s 306E(1)
6 FW Act s 306F(2)
7 FW Act s 18

2. Overview of the key changes

Question	Answer
What are the key changes?	- Subject to certain exemptions, the new laws empower the FWC to make regulated labour hire arrangement orders' where the tribunal is satisfied that: • a supplying employer supplies or will supply, either directly or indirectly, one or more employees to perform work for a 'regulated host' (that is not a small business employer)[8]; and • a 'covered employment instrument' (i.e. an enterprise agreement or other prescribed determination) that applies to the regulated host would apply to the employees if the regulated host were to employ the employees to perform work of that kind.[9] - These regulated labour hire arrangement orders will be legally enforceable and will generally require labour hire providers to pay a specified group of employees no less than what they would be entitled to receive under the host business's enterprise agreement (or other employment instrument) if the employee was to be directly employed by the host. - Where an Order is made, the supplying employer will not simply be required to pay the hourly rates or base rates under the host business enterprise agreement; the supplying employer will generally be required to pay employees no less than the "full rate of pay" that would be payable to the employee if the host employment instrument covered them[10], including all loadings, overtime, penalty rates, monetary allowances, incentive-based payments and bonuses and any other separately identifiable amounts.[11] See **section 1 Introduction** for more information.
What are the potential impacts?	- Businesses should anticipate that labour hire agencies will become subject to regulated labour hire arrangement orders or multiple regulated labour hire arrangement orders if a labour hire agency supplies labour hire workers to multiple host businesses. - Regulated labour hire arrangement orders could have a number of financial, legal, and operational impacts for businesses, including: • labour hire becoming more expensive; • disputes about 'same job same pay' potentially resulting in litigation, particularly in relation to calculating the protected rate of pay; • additional measures being implemented or required for tender processes to ensure compliance; • contractual arrangements requiring terms dealing with 'same job, same pay' obligations and potential cost implications of orders during contract terms; and • adjusting internal procedures and systems to ensure compliance with 'same job, same pay' obligations. - General guidance for businesses about how to prepare and considering adapting business practices to accommodate the impacts of 'same job same pay' laws is set out in this Guide at: • for host businesses, at section 23; and • for supplying employers (labour hire agencies), at **section 24**.

8 See Part 4 of this Guide for a more detailed explanation of who is covered by the laws
9 FW Act s 306E(1)
10 FW Act s 306F(2)
11 FW Act s 18

Question	Answer
When do the laws come into effect?	- The amendments formally commenced operation on 15 December 2023. However, regulated labour hire arrangement orders cannot come into effect until on or after 1 November 2024. - This means that applications can be made prior to 1 November, but that any regulated labour hire arrangement orders, if granted, must have a commencement date on or after 1 November 2024. See **section 3 When Do the New Laws Come into Effect** for more information.
Who do the laws apply to?	- The laws are intended to regulate arrangements where an 'employer' (the 'supplying employer') supplies labour to a 'regulated host' (a third-party business that is not a small business and who has a 'covered employment instrument' such as an enterprise agreement in place). - In the labour hire sector, these third-party businesses are often described as the 'host business'. - In practice these laws are likely able to apply to private businesses within Australia if they provide or utilise labour hire arrangements. Specifically, for a regulated labour hire arrangement order to be made by the FWC: • the supplying employer in these scenarios must be a 'national system employer' (see below); • the 'employee' must be a 'national system employee'; and • the 'regulated host' must be a constitutional corporation (this will pick up most businesses in Australia), the Commonwealth / a Commonwealth authority, or another specified category of business/entity. See **section 4 Who do the new laws apply to** for more information.
When can a Regulated Labour Hire Arrangement Order be made?	- For a regulated labour hire arrangement order to be made by the FWC, the following must be satisfied that each of the following requirements are satisfied: • An application has been made by an eligible person; • The supplying employer supplies or will supply, either directly or indirectly, one or more employees to perform work for a 'regulated host'; • The 'regulated host' is not a small business employer; • A 'covered employment instrument' (such as an enterprise agreement or other prescribed determination) applies to the host business; and • The 'covered employment instrument' would apply to the employees if the host business was to employ the employees to perform that same kind of work. See section **6 When Can a Regulated Labour hire Arrangement Order Be Made** for more information.
What are my businesses obligations once an order is made?	Once a regulated labour hire arrangement order is made, both supplying employers and host business have a number of obligations. For labour hire agencies, see **section 15 Payment Obligations Under Regulated Labour Hire Arrangement Regulated Orders** of this Guide. For host businesses, see **section 19 Host Business Obligations Related to Regulated Labour Hire Arrangement Regulated Orders** of this Guide.

Question	Answer
What exemptions will apply?	- There are five potential separate and distinct exemptions which could apply regulated labour hire arrangement orders. - This includes where: • The FWC is satisfied that it is not 'fair and reasonable in all the circumstances' to make an Order; • The FWC is satisfied that the work undertaken (or proposed to be undertaken) by the relevant employees is "for the provision of a service" rather than the "supply of labour"; • The host business is a small business employer; • The labour hire employees are performing work for a host business for 3 months or less; or • The labour hire employees are employed under a training arrangement. See **section 7 What Exemptions Apply** for more information.
Can other labour hire suppliers be 'roped in'?	- Yes. The FW Act contains provisions which facilitate the capturing of additional labour hire providers that may also be supplying employees to the host business and "roping them in" to existing or proposed regulated labour hire arrangement orders. - At the time an application is being dealt with by the FWC, the FWC or another interested party can apply for the proposed regulated labour hire arrangement order to also capture one or more other employers who are supplying employees to work for the relevant host business. Or alternatively, in circumstances where an order has already been made, and one or more other employers start (or will start to) perform the same kind of work, the regulated host is required to make an application to have the order varied to capture the other supplying employers. See **section 14 Roping-In Other Labour Suppliers** for more information.
What happens if a dispute arises?	- Where a regulated labour hire arrangement order has been made and a dispute arises about the operational of the Order or the same job same pay laws, an affected party is able to apply to the FWC to have the dispute dealt with. - The dispute resolution process is very similar to the types of dispute procedures contained in modern awards or enterprise agreements. The parties to a dispute must first attempt to resolve the dispute at the workplace level before the FWC is able to deal with the dispute. Where the dispute remains unresolved, the FWC will have the power to deal with disputes as they consider appropriate (this includes mediation, conciliation, making a recommendation, expressing an opinion and via arbitration). See **section 20 Dealing with Disputes** for more information.
Are there any anti-avoidance provisions?	- The FW Act contains a broad anti-avoidance framework to prevent both supplying employers and host businesses engaging in behaviour to avoid the making and operation of a regulated labour hire arrangement order. - Under the anti-avoidance framework, supplying employers and regulated hosts cannot avoid regulated labour hire arrangement orders by entering an arrangement to specifically avoid the operation of the provisions. - Supplying employers and regulated hosts are also prohibited from engaging other types of workers for the purpose of avoiding paying the employee rate of pay. - Civil penalties can be imposed for contraventions of the anti-avoidance framework. The anti-avoidance provisions apply retrospectively from 4 September 2023. This means that penalties may apply in relation to conduct engaged from 4 September 2023. See **section 21 Anti-Avoidance Framework** for more information.

3. When Do the New Laws Come Into Effect?

3.1 The amendments formally commenced operation on 15 December 2023. However, regulated labour hire arrangement orders cannot come into effect until on or after 1 November 2024.

3.2 This means that applications can be made prior to 1 November, but that any regulated labour hire arrangement orders, if granted, must have a commencement date on or after 1 November 2024.

3.3 The first application for a regulated labour hire arrangement order was lodged to the FWC on 13 March 2024. Another application for a regulated labour hire arrangement order was withdrawn after the host employer employed all relevant employees directly. It is likely applications for regulated labour hire arrangement orders will continue to be lodged with the FWC throughout 2024 (prior 1 November 2024) so that the applications can be determined by the FWC prior to the 1 November 2024 commencement date.

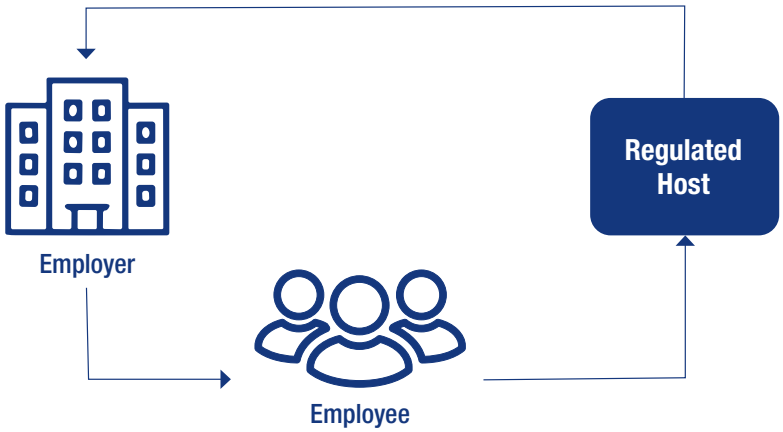
Timeline of the passage of the Bill

4 September 2023	The *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**Bill**) is introduced into Parliament — anti-avoidance provisions retrospectively commence from this date.
7 September 2023	The Bill is referred to the Education and Employment Legislation Committee for inquiry and report by 1 February 2024
3 Oct – 10 Nov 2023	Public hearings of the senate inquiry held.
7 December 2023	The Bill was split into two bills following an agreement between the government and crossbenchers.
7 December 2023	The Bill is passed by both Houses of Parliament.
14 December 2023	The Bill receives Royal Assent.
15 December 2023	The “same job same pay” reforms come into effect.
1 November 2024	The date on which regulated labour hire arrangement orders may come into effect, which is the earliest date a requirement to pay the ‘protected rate of pay’ can come into effect. The date on which regulated labour hire arrangement orders may come into effect, which is the earliest date a requirement to pay the ‘protected rate of pay’ can come into effect.

4. Who do the new laws apply to?

4.1 The laws are intended to regulate arrangements where an 'employer' (the 'supplying employer') supplies labour to a 'regulated host' (a third-party business that is not a small business and who has a 'covered employment instrument' such as an enterprise agreement in place).

4.2 In the labour hire sector, these third-party businesses are often described as the 'host business'.



4.3 In practice these laws are likely able to apply to private businesses within Australia if they provide or utilise labour hire arrangements. Specifically, for a regulated labour hire arrangement order to be made by the FWC:

a. the supplying employer in these scenarios must be a 'national system employer' (see below);
b. the 'employee' must be a 'national system employee'; and
c. the 'regulated host' must be a constitutional corporation (this will pick up most businesses in Australia), the Commonwealth / a Commonwealth authority, or another specified category of business/entity.[12]

4.4 The FW Act defines 'national system employers' and 'national system employees' as:

a. all private sector businesses and their employees throughout Australia[13] (except for businesses based in Western Australia that are not constitutional corporations — i.e. sole traders, partnerships, etc.);
b. all businesses and their employees in the Australian Capital Territory (including the public sector);
c. all businesses and their employees in Victoria (except for law enforcement officers and executives in the public sector)
d. all businesses and their employees in the Northern Territory (except for members of the NT Police Force); and
e. the local government sector in Tasmania.

4.5 The following **are not** national system employers:

a. the State public sector in New South Wales, Queensland, South Australia, Western Australia and Tasmania;
b. the local government sector in New South Wales, Queensland, South Australia and Western Australia; or
c. businesses in Western Australia that are not constitutional corporations (e.g. sole traders, partnerships).

12 The other categories of business/entity are: a body corporate incorporated in a Territory; a person, so far as work is performed for the person in connection with constitutional trade or commerce, and the work is of a kind that would ordinarily be performed by a flight crew officer, a maritime employee; or a waterside worker; a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as work is performed for the person in connection with the activity carried on in the Territory; a person, so far as work is performed for the person in a Territory in Australia; or any person in a State that is a referring State because of Division 2A or 2B of Part 1–3 of the FW Act.

13 Including external Territories such as Norfolk Island, Christmas Island and the Territory of Cocos (Keeling) Islands

5. Who Can Apply for Regulated Labour Hire Arrangement Orders?

5.1 Applications for regulated labour hire arrangement orders can be made by:

a. one or more 'regulated employees' (i.e. one or more employees who are supplied to a host business to perform work);

b. one or more employees of the host business (i.e. one or more employees of the business into which the labour hire employees have been placed);

c. an employee organisation (i.e. union) that is entitled to represent the industrial interests of either the labour hire employees or the employees of the host business; and/or

d. the host business itself.[14]

5.2 It is not necessary for a union to have a member affected to be entitled to make an application. It is sufficient that they are entitled to represent the employees by reason of the union's eligibility rules (or that one or more of the relevant employees are eligible for membership with the union).[15]

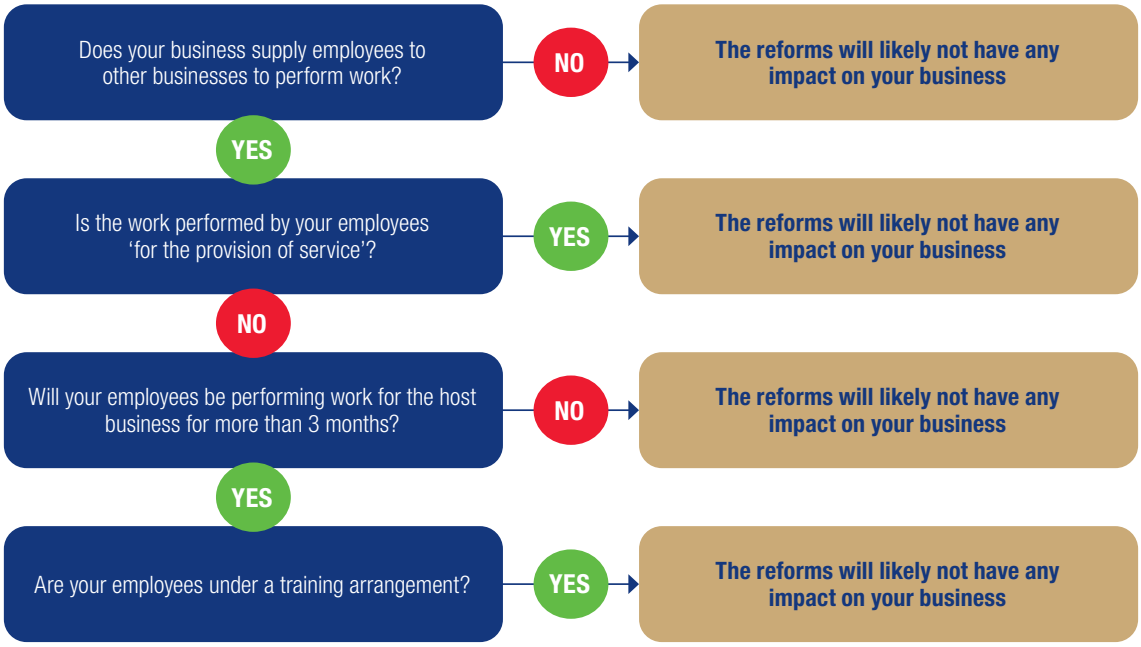
5.3 The first application for a regulated labour hire arrangement order has already been lodged. Another application for a regulated labour hire arrangement order was withdrawn after the host employer employed all relevant employees directly.

5.4 We would expect that unions will be the source of most applications given their resources and interest in pay parity for labour hire employees (as a means of promoting full time employment). Businesses in traditional blue collar and unionised industries are advised to follow these applications closely to understand the FWC's approach to the applications. However, given the scope of the laws, and that unions do not need a member to make an application, businesses without a union presence should not overlook the risks to their operations.

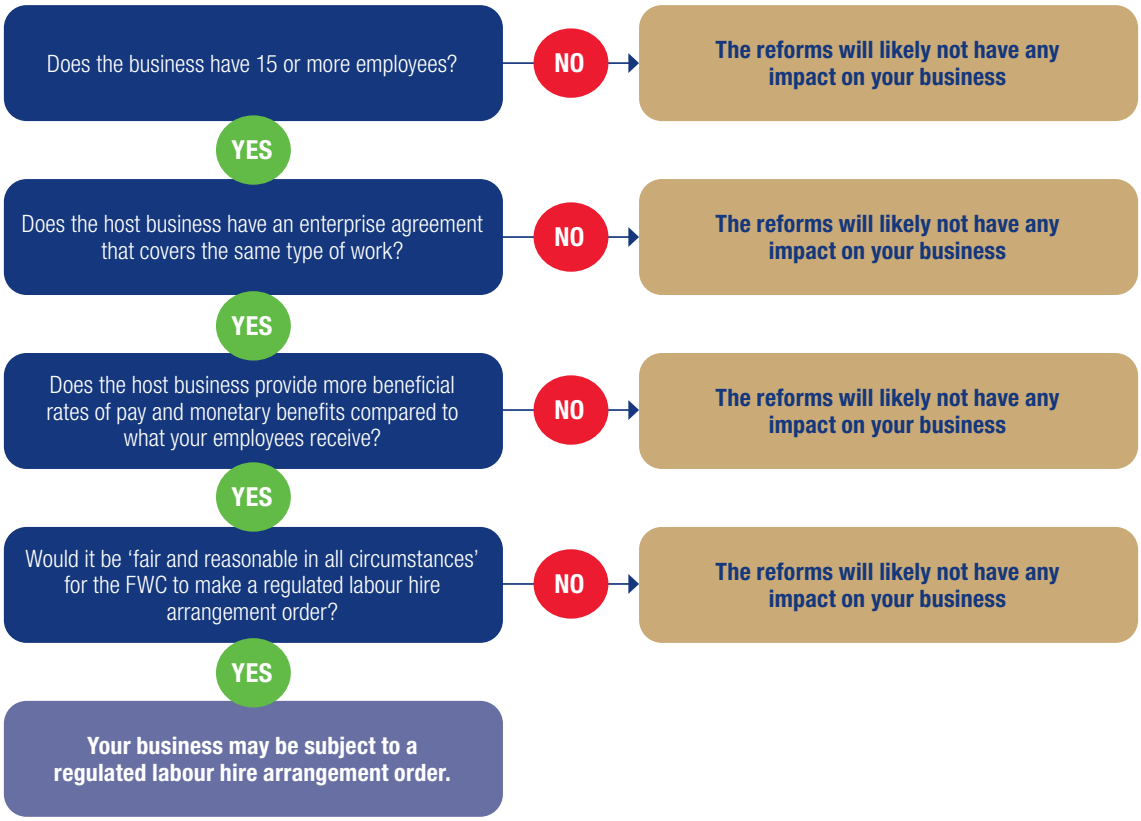
14 FW Act s 306E(7)

15 See *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55

Flowchart 1 — Will your business be impacted by the reforms?



If some of your employees are not trainees or apprentices:



6. When Can a Regulated Labour Hire Arrangement Order Be Made?

6.1 Subject to a number of specific exemptions (which are addressed in detail in Parts 7–12 of this Guide), the FWC has the power to make regulated labour hire arrangement orders where each of the statutory requirements are met.

Once a regulated labour hire arrangement order is made, both supplying employers and host business have a number of obligations.

For labour hire agencies, see section 15 Payment Obligations Under Regulated Labour Hire Arrangement Orders of this Guide.

For host businesses, see 19 Host Business Obligations Related to Regulated Labour Hire Arrangement Orders of this Guide.

6.2 In order for the FWC to make a regulated labour hire arrangement order, the FWC must first be satisfied that each of the following requirements are met:

a. an application has been made by an eligible person;[16]

b. the supplying employer supplies or will supply, either directly or indirectly, one or more employees to perform work for a 'regulated host' (i.e. host business);[17]

c. the 'regulated host' (i.e. the host business) is not a small business employer;[18]

d. a 'covered employment instrument' (such as an enterprise agreement or other prescribed determination) applies to the host business;[19] and

e. the 'covered employment instrument' (such as an enterprise agreement or other prescribed determination) would apply to the employees if the host business was to employ the employees to perform work of that kind.[20]

6.3 Each of these five elements are explained in more detail below. Other than (e) these factors are largely factual and in most cases are unlikely to be heavily litigated. However, two elements are likely to lead to more debate, namely:

a. whether employees are supplied "indirectly" to a regulated host; and

b. whether the covered employment instrument would apply to relevant employees.

6.4 These are issues that we expect will be areas of dispute before the FWC and may be elements that can form the basis of a strategic response to the risk of a regulated labour hire arrangement order or a defence to an actual application to the FWC.

16 See Part 5 of this Guide
17 See paragraph 4.5 for the definition of 'regulated host'
18 See Part 10 of this Guide
19 FW Act s 306E(1)(b)
20 FW Act s 306E(1)(b)

Element 1 — Has the application been made by an eligible person?

6.5 It will usually be straightforward to determine whether or not the person making the application is eligible to bring the application. If the applicant is not eligible to make the application, the FWC cannot make a regulated labour hire arrangement order. The FWC does not have the ability to make a regulated labour hire arrangement order on its own initiative.

Element 2 — Is the employer supplying employees to perform work for a regulated host either directly or indirectly?

6.6 A regulated labour hire arrangement order can only be made where a business (described in this Guide as the 'supplying employer') supplies, or will supply, either directly or indirectly one or more employees to perform work for the host business.

6.7 A formal agreement (such as a written contract) between the supplying employer and the host business is not required.[21] The relevant question is whether the supplying employer is supplying, or will supply, employees to perform work for the host business.[22]

6.8 The supply of labour is where a business provides one or more of their employees to a host business to perform work for a fee. The work is normally done under the supervision and instruction of managers/supervisors of the host business (rather than by the supplying employer).

6.9 The laws are not intended to apply to businesses engaged to provide services whose employees may perform work for, or on the premises of, another business merely in the context of providing a service to that business (for example, where a maintenance business sends one of their service technicians to service specialised equipment being used by the host business).[23]

6.10 Please refer to Part 8 of this Guide for a more detailed explanation of the 'service provider' exemption.

Examples of labour hire arrangements

Example 1

A business specialising in providing labour hire services to the construction sector places an employee with a client to perform work as a labourer. The employee does not have any specialised skills or qualifications and takes instructions from a supervisor who is employed by the construction company. The client pays the business for the supply of labour rather than for the performance of a service.

Example 2

A business specialising in providing labour hire services places an employee with a client in the coal mining sector to perform work as an underground multi-skilled mineworker. The employee works in a crew alongside people who are directly employed by the mining company who perform the same work. The employee is supervised by a Deputy employed by the mine company, and from whom they receive instructions. The employee does not provide any equipment but instead uses the mine company's equipment.

Example 3

A casual employee is placed at a client site to undertake reception / clerical duties on a 6-month assignment to help cover a staff shortage within the host business. The employee's work is overseen and supervised by the client.

21 FW Act s 306D(3)

22 A reference to performing work 'for a regulated host' includes performing work wholly or principally for the benefit of that person, or an enterprise carried on by that person, or a joint venture or common enterprise engaged in by that person and one or more other persons

23 Explanatory Memorandum to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (**Explanatory Memorandum**).

6.11 In determining whether the arrangement is one involving the supply of labour or the provision of a service, the FWC will take into account the following factors:

Indicator of labour hire arrangement	Indicator of service provision arrangement
The supplying employer is not involved in the work being done (i.e. directing the work, controlling the work, supervision, etc.)	The service provider is involved in matters relating to the performance of the work
The supplying employer supplies personnel only to the host business (i.e. only labour; not equipment)	The service provider supplies equipment, work systems and other services in addition to personnel
The host business exercises supervisory functions over the employees	The service provider supervises the performance of the work (e.g. by having supervisory personnel on site)
The host business controls the employees when they perform the work	The service provider controls the employees when they perform the work
The host business assigns tasks / duties	The service provider assigns tasks / duties
The host business manages / reviews the quality of the work	The service provider manages / reviews the quality of the work
The employees use the host business's systems, plant or structures to perform the work	The employees use the service provider's systems, plant or structures to perform the work
The supplying employer is not subject to industry / professional standards in relation to the employees	The service provider is subject to industry / professional standards in relation to its employees
The work performed by the employees is of a basic / non-specialised nature	The work performed by the employees is of a specialised nature or involves expertise
The employees are performing work which is the same or very similar to work being undertaken by employees of the host business (or the host business previously had employees performing the same kind of work)	The host business has not previously performed work of this kind and it does not presently have employees performing work of this kind

6.12 Bearing in mind that the amendments contain penalties for employers or regulated hosts who enter into schemes to avoid regulated labour hire arrangement orders, businesses should nevertheless carefully consider how they engage with service providers and in particular how those services are described in contracts and terms of engagement to ensure that where it is a contract for services (rather than for the provision of labour) this is clearly specified. When drafting contracts businesses should consider if any exemptions apply and refer to them specifically in the terms of engagement. Once established, businesses should act strictly in accordance with these arrangements.

6.13 Please refer to Part 9 of this Guide for examples of service provision arrangements that would not constitute labour hire arrangements.

Element 3 — Is the regulated host a small business employer?

6.14 This element will usually also be straightforward. The FWC will need to determine, as a question of fact, whether or not the regulated host (and its associated entities) employs 15 or more employees. Where the regulated host (and its associated entities, if any) employs fewer than 15 employees, no regulated labour hire arrangement order can be made and the FWC will dismiss the application.

6.15 See Part 10 of this Guide for more detail on the definition of 'small business employer'.

Element 4 — Does a 'covered employment instrument' apply to the host business?

6.16 The FWC cannot make a regulated labour hire arrangement order unless a 'covered employment instrument' applies to the host business.[24]

6.17 A 'covered employment instrument' includes:

a. enterprise agreements;

b. workplace determinations;

c. some Commonwealth public sector determinations;

d. some public sector instruments; and

e. other instruments that may be prescribed by Regulations (there are currently no instruments prescribed by the Regulations).[25]

6.18 Enterprise agreements or enterprise awards applicable to a particular business can be found by searching the Fair Work Commission's online database.[26]

Element 5 — Would the host business's EA apply to the employees?

6.19 The FWC cannot make a regulated labour hire arrangement order unless there is a 'covered employment instrument' (such as an enterprise agreement or other prescribed determination) which applies to the host business and that instrument would apply to the employees if the host business was to employ the employees to perform work of that kind'.[27]

6.20 In other words, the employees who are sought to be covered by a regulated labour hire arrangement order must be doing work that falls within the scope of the host business instrument (e.g. enterprise agreement).

6.21 For example, if the instrument applies to clerical workers and the labour hire employees are doing clerical work, the labour hire workers will clearly fall within the scope of the instrument and this element of the test would be satisfied. However, if the instrument applies to truck drivers but the labour hire workers are performing clerical work, then no regulated labour hire arrangement order will be able to be made (i.e. because the work being performed is different and therefore the labour hire workers are not entitled to be paid the same rates as the employees of the host business who are employed as truck drivers).

6.22 To the extent it is possible, businesses that are negotiating enterprise agreements should consider the risks posed by these provisions when determining the scope of enterprise agreements. In the past, it may have benefited business to ensure their enterprise agreement has a broader scope to "future proof" the business and reduce the need for additional enterprise bargaining. However, now if you engage with a labour hire provider for workers that would be within scope of an enterprise agreement it opens the door for a regulated labour hire arrangement order.

6.23 To address this risk, businesses may wish to consider narrowing the scope of enterprise agreements to particularise the types of employees who are covered by the agreement, which may reduce the prospect of a regulated labour hire arrangement order being made. Businesses may wish to consider whether labour hire is an appropriate way to structure their workforce on the basis that potential efficiencies may be undermined by a regulated labour hire arrangement order.

What if we pay our employees more than the rates contained in the host business' EA?

6.24 Finally, the purpose of the reforms is to address situations where labour hire workers are performing the same work as other employees of a host business but paid **less** than those host business employees, and to give the FWC powers to order the labour hire business to pay the relevant workers no less than those employees of the host business.

6.25 That being the case, the reforms will not have any impact where labour hire workers are already paid the same rates of pay (and other monetary benefits) as set out in the host business' EA or other instrument (or greater). In those scenarios, the reforms will have no work to do because the labour hire workers are not being paid less than the employees working for the host business.

---

24 FW Act s 306E(1)(b)
25 FW Act s 12
26 See https://www.fwc.gov.au/document-search?options=SearchType_3%2CSortOrder_agreement-date-desc&q=*
27 FW Act s 306E(1)(b)

7. What Exemptions Apply?

7.1 The FW Act prescribes five separate and distinct circumstances where the FWC cannot make a regulated labour hire arrangement order:

a. where the FWC is satisfied that it is not 'fair and reasonable in all the circumstances' to make a regulated labour hire arrangement order (**Fairness Exemption**);

b. where the FWC is satisfied that the work undertaken (or proposed to be undertaken) by the relevant employees is "for the provision of a service" rather than the "supply of labour" (**Service Provision Exemption**);

c. where the host business is a small business employer (**Small Business Exemption**);

d. where the labour hire employees are performing work for a host business for 3 months or less (**Temporary Placement Exemption**);

e. where the labour hire employees are employed under a training arrangement (**Trainee/Apprentice Exemption**).

7.2 Each of these exemptions are addressed in detail below.

The FW Act contains a broad anti-avoidance framework aimed to prevent both supplying employers and host businesses engaging in behaviour to avoid the making and operation of regulated labour hire arrangement orders.

The anti-avoidance provisions capture re-structuring a business for the purpose of relying on exemptions, such as the Service Provision Exemption and Temporary Placement Exemption.

When adapting business practices to accommodate regulated labour hire arrangement order laws, businesses should ensure they do not adopt, or be perceived to adopt, business practices or corporate structures to avoid the operation of the laws.

See 21 Anti-Avoidance Framework in this Employer Guide.

8. The Fairness Exemption

8.1 Businesses will be exempt from having a regulated labour hire arrangement order made against them where the FWC forms the view that it would not be 'fair and reasonable in all the circumstances' to make the regulated labour hire arrangement order.[28]

8.2 This exemption provides the relevant FWC member with broad discretion to determine whether or not they are satisfied that a proposed regulated labour hire arrangement order would be fair and reasonable in all the circumstances.

Factors the FWC must take into account

8.3 The FWC will have regard to the following factors when determining whether it would be unfair to make a regulated labour hire arrangement order:

a. how many employees are being supplied to perform the work?

b. what is the relationship between the host business and the suppling employer?

Note: Where the two entities are related bodies corporate, or part of the same overall corporate group, this will increase the risk of a regulated labour hire arrangement order being made (e.g. where a large corporate group such as Qantas uses subsidiary entities to supply labour to another entity within the Qantas group).

c. what is the difference between the rates (and other monetary conditions) paid by the supplying employer and those contained in the host business instrument (or an instrument applying to the host business's related bodies corporate)?

d. do (or did) any of the host business's EAs apply to the same class of employees who are sought to be captured by a regulated labour hire arrangement order?

e. is there a history of industrial instruments applying in the supplying employer's business?

f. does the host business have a history of industrial instruments in its operations?

g. how long with the labour hire arrangement apply for?

h. where is the labour hire work being performed?

i. in which industry is the host business and supplying employer operating?

8.4 Importantly, the FWC is only required to take the above factors into account where either an employer or employer association makes a submission to the FWC that it would be not fair to make the regulated labour hire arrangement order and those submissions address the factors above. In other words, the FWC is not required to have regard to any of the above factors unless a party makes a submission addressing those factors. Therefore, it will be important for businesses to consider the relevant factors for submission to FWC that it is not fair and reasonable in all the circumstances for a regulated labour hire arrangement order to be made.

28 FW Act s 306E(2)

Factors to consider

8.5 In objecting to a regulated labour hire arrangement order on the basis of the 'fairness' exemption, businesses may wish to consider if any of the following apply:

a. the supplying employer provides its employees with rates that, while less than the rates provided under the host business instrument, are generally consistent with market rates;

b. the impact of the regulated labour hire arrangement order would disproportionately impact the host business or a third party and/or may result in a breach of contract;

c. the labour hire workers are covered by an enterprise agreement (or other employment instrument) that was legally negotiated with their employer and provides fair and reasonable conditions of employment;

d. the rates of pay in the host business' instrument are excessive or considerably higher than market rates for the particular type of work being performed;

e. in practice, the host business' EA has not historically applied to any person doing this kind of work;

f. the host business previously employed workers performing this kind of work on a different instrument that provided lesser conditions of employment (i.e. the instrument in question never actually applied to anyone);

g. there is no corporate relationship between the supplying employer and the client (i.e. the two businesses are not related bodies corporate or engaged in a joint venture or common enterprise);

h. the labour hire arrangement is intended to operate for a short period of time;

i. only a very small number of labour hire workers are engaged to perform work for the host business;

j. there is a difference in the location at which the work is being performed, such that it would not be fair or reasonable to make a regulated labour hire arrangement order (e.g. the labour hire workers are working at a different site to the employees of the host business – such as FIFO work versus work not requiring remote living).

8.6 Of course, there may be a range of other factors that could be relied upon to assert that it would not be fair or reasonable for a regulated labour hire arrangement order to be made in a particular circumstance. Businesses should pay attention to how the FWC considers such arguments as applications are heard and determined in order to develop strategies providing for their own business.

Tip: Supplying employers should be prepared and consider making submissions to the FWC if a proposed regulated labour hire arrangement order is not 'fair and reasonable' in all the circumstances.

Prior to engaging with a business supplying employers should consider how it can obtain information in relation to the instruments and pay and conditions that apply to a client's employees.

Supplying employers should have policies to consider these arrangements ahead of time to assess potential risk of a regulated labour hire arrangement order. This information will be critical for opposing an application and asserting that the order would not be fair and reasonable in all the circumstances.

If concerned, businesses should consider seeking legal advice any arguments they may seek to raise to the FWC about whether a regulated labour hire arrangement order is 'fair and reasonable' in all the circumstances.

9. The Service Provision Exemption

9.1 The FWC is not able to make a regulated labour hire arrangement order if the work undertaken (or proposed to be undertaken) by the relevant employees is "for the provision of a service" rather than the "supply of labour".[29]

9.2 The FW Act does not define "labour hire" or "service provider". However, in determining whether an arrangement is for the provision of services rather than the supply of labour, the FWC must have regard to the following factors:[30]

a. the involvement of the supplying employer in matters relating to the performance of the work;

b. the extent to which, in practice, the supplying employer or a person acting on behalf of the supplying employer directs, supervises or controls (or will direct, supervise or control) the employees when they perform the work, including by managing rosters, assigning tasks, or reviewing the quality of the work;

c. the extent to which the regulated employees use or will use systems, plant, or structures of the supplying employer to perform the work;

d. the extent to which either the supplying employer or another person is or will be subject to industry or professional standards or responsibilities in relation to the regulated employees;

e. the extent to which the work is of a specialist or expert nature.

9.3 FWC is required to consider, as a preliminary/threshold matter, the "reality of the arrangement" between the host and the supplying employer to determine if the exemption applies.[31]

9.4 With respect to (e), higher education qualifications are not required for work to be considered specialist or expert. For example, employees of a catering business contracted to provide catering for a host business whose primary business is not the provision of catering services may be found to be undertaking work of a specialist or expert nature.

How will the exemption work in practice?

9.5 The starting point for businesses wishing to reduce the risk of being subject to a regulated labour hire arrangement order is in the terms of engagement. As noted previously in this guide, businesses should carefully consider how they engage for labour hire services. In particular, parties should review how those services are described in contracts and terms of engagement to ensure that where it is a contract for services (rather than for the provision of labour) this is clearly specified. When drafting contracts businesses should consider if any of the above factors apply to the provision of services (such as the services being specialist or expert in nature) and refer to them specifically in the terms of engagement. Once established, businesses should act strictly in accordance with these arrangements.

9.6 Where an application for a regulated labour hire arrangement order is made, the applicant will need to assert that the arrangement involves the supply of labour. In response, the supplying employer might elect to make submissions or provide evidence in an effort to demonstrate that the arrangement is one of service provision rather than the supply of labour. This might involve the supplying employer filing a witness statement explaining the nature of their business, the nature of the contractual arrangement, what work is to be performed, etc. It could also involve filing a copy of the relevant commercial contract between the supplying employer and the host business to show the scope of services to be provided in order to demonstrate that it is not simply a labour hire service.

9.7 Where the arrangement is already in place (i.e. the employees are already performing work for the host business), the FWC will examine the reality of the arrangement. This might involve receiving evidence from employees, the host business or others about what work is being performed and the related circumstances. However, where the arrangement has not yet commenced (i.e. the supplying employer is due to supply the employees), the documentary evidence such as the terms of any supply contract between the supplying employer and the host business will presumably be relevant.

29 FW Act s 306E(1A)
30 FW Act s 306E(7A)
31 Supplementary Explanatory Memorandum at [72]

9.8 Where the FWC determines that the arrangement is one of service provision rather than the supply of labour, they must **not** make any regulated labour hire arrangement order.[32] As noted above, to the extent possible, parties should ensure that their arrangements (including how they are performed in practice) are consistent with their intent (noting again the provisions against avoidance schemes). Parties should consider how they can evidence the above factors throughout the life of the contract, and not just in the event an application for a regulated labour hire arrangement order is made in the FWC.

Example 1

A catering business is engaged to provide catering services to a manufacturing business. Employees of the catering business are based permanently on the client's site and are engaged to prepare the food for the manufacturing workers. The work is supervised by an on-site manager who is also employed by the catering business. The catering business provides all the catering equipment.

Example 2

A business provides specialist technical services (engineering/licenced maintenance) to a client that has not traditionally performed this work itself. The employer has expertise in this area, as opposed to the client. The employees use their own tools and equipment in performing the work. Licences are required to perform the work and external professional standards apply to the work.

Example 3

A security business supplies a number of security guards to a client for the purpose of performing security work on the client's site. Some security licences may be required and held by the employer/employees. The client does not supervise or instruct the security guard's work once the expectations of the area to be monitored has been communicated. The client has not traditionally performed this work. The employees also use some of their own equipment in performing the work (e.g. phones, radios, etc).

9.9 Where these types of arrangements are in place, they will likely fall within the service provision exemption, meaning that the FWC would not be able to make a regulated labour hire arrangement order in respect of the employees providing these services (assuming the FWC forms the view that the arrangement is not the supply of labour.

To the extent possible, parties should ensure that their arrangements (including how they are performed in practice) are consistent with the contract for services other than the supply of labour (noting again the provisions against avoidance schemes).

The FW Act contains a broad anti-avoidance framework aimed to prevent both supplying employers and host businesses engaging in behaviour to avoid the making and operation of regulated labour hire arrangement orders.

For example, it may be unlawful to dismiss employees and engage a new labour hire provider who already engages its staff as independent contractors to rely on the Service Provision Exemption.

When adapting business practices to accommodate regulated labour hire arrangement order laws, businesses should ensure they do not adopt, or be perceived to adopt, business practices or corporate structures to avoid the operation of the laws.

See 21 Anti-Avoidance Framework in this Employer Guide.

32 FW Act s 306E(1A)

10. The Small Business Exemption

10.1 Regulated labour hire arrangement orders cannot be made where the host business is a small business employer.[33] A 'small business employer' is defined as an employer who employs fewer than 15 employees at the relevant time.[34]

10.2 For the purpose of determining whether or not a host business employs fewer than 15 employees:

a. casual employees are not to be counted unless, at that time, they have been employed on a regular and systematic basis; and

b. employees of associated entities must also be included (except for casual employees who are not regular and systematic).

10.3 Supplying employers that are small businesses are not exempt from being subject to a regulated labour hire arrangement order. **The small business exemption only applies when the host business is a small business.**

10.4 The exemption is intended to alleviate some of the administrative burden on small business employers. However, the exemption only applies where the host business is a small business. Therefore, where the host business is a large business, a regulated labour hire arrangement order can be made irrespective of the size of the supplying employer. Therefore, supplying employers that are small businesses are still exposed to the threat of a regulated labour hire arrangement order being made where they supply labour to a bigger business.

33 FW Act s 306E(1)(c)
34 FW Act s 23(1)

11. The Temporary Placement Exemption

A 'qualified' exemption

11.1 Where a regulated labour hire arrangement order is made, the default position is that the obligation to pay employees the protected rate of pay will not apply to employees who perform work for the regulated host for a period of 3 months or less.[35]

11.2 This exemption acknowledges the range of scenarios where businesses might need to use labour hire arrangements. For example:

a. businesses may occasionally need to respond quickly to short-term increases in demand for services, or to rapid deadlines;

b. businesses may need to engage employees for short-term periods to back fill positions for employees on leave or who are unwell (such as parental leave cover);

c. businesses might also have a discrete role or task that needs completion in the short term and may choose to engage employees through a labour hire agreement to meet that requirement;

d. businesses may need to engage labour hire employees while they conduct a formal hiring process.

11.3 The exemption for short-term arrangements is designed to allow these scenarios to be managed through the use of labour hire firms without the risk of additional regulation through a regulated labour hire arrangement order and will facilitate the business's need to respond rapidly to a range of staffing requirements that can arise.

11.4 However, this is not an absolute exemption.

FWC will have ability to increase, shorten or remove entirely the default 3-month exemption period

11.5 The FWC will have the power (upon application by an interested party such as a union or affected employee) to shorten or lengthen the 3-month exemption period, or to remove the 3-month exemption period entirely.[36]

11.6 However, the FWC must seek the views of the parties prior to making any such determination,[37] and the FWC may only issue a determination altering or removing the 3-month exemption period where it is satisfied there are 'exceptional circumstances' that justify making it, having regard to the following factors:[38]

a. whether the purpose of the proposed exemption period relates to satisfying a seasonal or short-term need for workers;

b. the industry in which the work is performed or is to be performed;

c. the circumstances of the regulated host and any relevant supplying employers covered by the regulated labour hire arrangement order;

d. the views of the regulated host, the supplying employer, the regulated employee/s and/or any representative organisations (such as a union);

e. where the exemption period is proposed to be increased beyond 3 months, the FWC must have regard to the principle that the longer the exemption period sought, the greater the justification that will be required; and

f. any other matter the FWC considers relevant.

35 FW Act s 306G(2)
36 FW Act s 306J. See also Explanatory Memorandum at [624]
37 FW Act s 306L(3)
38 FW Act s 306L(4)

11.7 It is anticipated that applications to vary the default 3-month exemption period will be made 'to reflect the specific circumstances of a surge demand period experienced by a regulated host'.[39] This suggests that where a business wishes to extend the default exemption period beyond 3 months, it would need to advance a sound merit-based argument as to why the period should be extended. We recommend that this be factored into a wholistic industrial or workplace management plan in order to establish protocols around identifying when short term labour hire is required and the factors that may be relevant to an FWC application.

11.8 Equally, where an employee or union applies to have the default 3-month exemption period reduced or removed altogether, they will need to satisfy the FWC that there are exceptional circumstances justifying the alteration.

11.9 Some examples where variations to the default 3-month exemption period might be given include the following scenarios:

a. where a labour hire placement is implemented to back fill a role to cover a person who is going on leave for 4 months, the FWC might extend the exemption period to 4 months;

b. where a seasonal surge in work takes place of 3.5 months each year, the FWC might be persuaded to extend the exemption period to allow labour hire workers to be used without the threat of a regulated labour hire arrangement order being made;

c. conversely, where a labour hire placement has nothing to do with covering any surges in demand, the FWC might be persuaded to remove the 3-month exemption period altogether, particularly in cases where it identifies a specific disadvantage to those workers.

11.10 Where the FWC determines that there will be no exemption period, the supplying employer will be required under the regulated labour hire arrangement order to pay the regulated employees no less than the protected rate of pay, even during the first 3 months of their placement with the host business.

FWC will have ability to declare a 'recurring extended exemption period'

11.11 To accommodate recurring seasonal surges in workforce needs, the FWC will also be able to decide that a specified period (greater than 3 months) will be a 'recurring extended exemption period' for the purposes of a regulated labour hire arrangement order. Where these determinations are made, they will have the effect of providing an annual exemption period for labour hire employees who might work during a particular part of the year, for example, during harvest season.[40]

11.12 An example of this could be for surges in staffing requirements in alpine resorts during the snow season each year (which occurs every year for a period of more than three months).

11.13 Another example might be for surges in staff demands over the Christmas holiday period or during peak tourism periods in tourist locations.

11.14 It is important that business who utilise or provider labour hire workers in such scenarios consider how they might evidence seasonal surges in workforce needs. As these declarations provide a recurring exemption, it may be a priority for those businesses who fall into these categories.

11.15 Where the FWC issues a declaration for a recurring extended exempt period, employees commencing during that period would not need to be paid the protected rate of pay for the remaining period of the extended exemption or three months (whichever is longer).

11.16 For harvest periods or surge periods with changeable dates, employers can apply for the recurring surge period to start at the earliest possible date for that predicted surge period. Host businesses would not be required to commence engaging labour hire on the start date of a recurring surge exemption period and could engage employees under the exemption at any time during the period. A host business could seek a longer recurring exemption period to buffer any uncertainty around the dates of a seasonal surge period if necessary.

11.17 The default 3 month exemption period will only apply until such time as the agreement or agreements under which the regulated employee is engaged to work are varied, or a new agreement or agreements are made that result in the employee continuing to perform work of the kind for the regulated host for longer than the 3-month period (or another exempt period as determined by the FWC).[41]

11.18 This means that if, after the employee is placed with the host business, you vary the arrangement or enter into a new agreement with the host business, you lose the benefit of the 3-month exemption period and another application will be required.

---

39 Revised Explanatory Memorandum at [707]
40 FW Act s 306J(2) and s 306K
41 FW Act s 306G(3)

12. The Trainee / Apprentice Exemption

12.1 Regulated labour hire arrangement orders cannot apply to employees for whom a 'training arrangement' is in place 'in respect of the work performed for' the host business.[42]

12.2 The term 'training arrangement' is defined to mean 'a combination of work and training that is subject to a training agreement, or a training contract, that takes effect under a law of a State or Territory relating to the training of employees'.[43]

12.3 This exemption means that, even if a regulated labour hire arrangement order is made, there would be no requirement to pay the protected rate of pay in relation to employees who are under a training arrangement (i.e. apprentices or trainees).

12.4 The only other qualification is that the training arrangement must be in place and must be 'in respect of' the work being performed by that individual for the host business. This means that there will most likely have to be a close connection between the training arrangement and the work being performed. For example:

a. an employee undertaking an apprenticeship to become a chef but who is working as a labour hire worker on a construction site undertaking general labouring duties would most likely not be excluded from any labour hire arrangement order purely by reason of them undertaking an apprenticeship. This is because the training arrangement does not have any connection to the work being performed by the employee for the host business (construction/labouring work); but

b. an employee undertaking an apprenticeship to become a chef and who is working as a labour hire worker on a mine site undertaking cooking and catering duties would most likely not be excluded from any labour hire arrangement order in place because the work being performed is directly connected to the apprenticeship being undertaken.

12.5 This exemption will be relevant to group training organisations that place trainees and apprentices with host employers for the term of their training arrangement.

42 FW Act s 306G(1)
43 FW Act s 12

13. If a Regulated Labour Hire Arrangement Order Is Made, What Will It Contain?

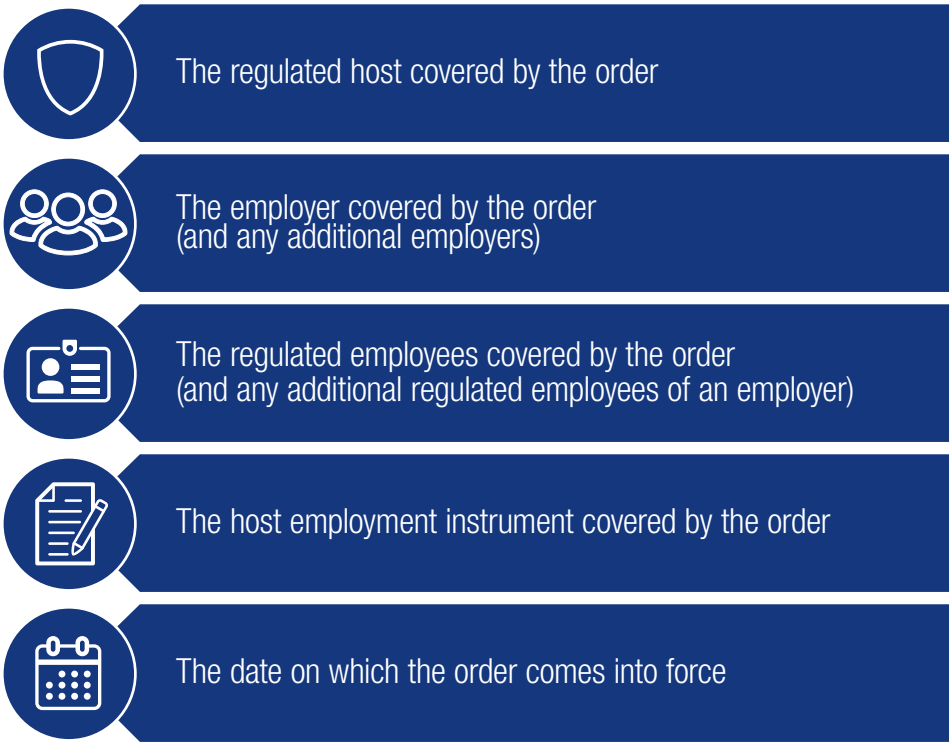
Overview

13.1 Where a regulated labour hire arrangement order is made by the FWC, it will be a legally enforceable order requiring the supplying employer to pay a specified group of employees no less than what they would be entitled to receive under the host business's enterprise agreement (or other employment instrument) if the employee was to be directly employed by the host.

13.2 Generally, the regulated labour hire arrangement order will require the supplying employer to pay the relevant cohort of workers no less than the 'protected rate of pay'. For details on how this is calculated, please refer to Part 15 of this Guide.

What will a regulated labour hire arrangement order actually specify?

13.3 A regulated labour hire arrangement order must specify a range of matters,[44] including:



A regulated labour hire arrangement order may also specify when the order will cease to be in force, however this is not required.

44 FW Act s 306E(9)(a)–(e). See also FW Act s 306E(10)

13.4 The regulated labour hire arrangement order does not need to list each individual employee who will have the benefit of the regulated labour hire arrangement order. Rather, the regulated labour hire arrangement orders are intended to be broad and simply need to specify the particular class or category of employees to whom the regulated labour hire arrangement order applies.[45]

13.5 Regulated labour hire arrangement orders will come into effect on the day they are made or at such a later date as specified in the regulated labour hire arrangement order (noting that if a regulated labour hire arrangement order is made before 1 November 2024 it cannot come into effect until 1 November 2024).

What happens when the FWC approves a new enterprise agreement for the host business?

13.6 Where a regulated labour hire arrangement order is in place and the host business has a new enterprise agreement approved which replaces the previous enterprise agreement, the Order will automatically have effect (from the commencement date of the host business' new enterprise agreement) as if the new enterprise agreement is the instrument covered by the Order.[46]

13.7 This means that regulated labour hire arrangement orders will be dynamic instruments that will automatically apply by reference to any future enterprise agreement that the host business might put in place after the making of the regulated labour hire arrangement order.

45 Revised Explanatory Memorandum at [656]
46 FW Act s 306EB

14. Roping-In Other Labour Suppliers

Introduction

14.1 The FW Act contains provisions which facilitate the capturing of additional labour hire providers that may also be supplying employees to the host business and 'roping them in' to existing or proposed regulated labour hire arrangement orders.

14.2 This can occur in two ways.

a. firstly, at the time an application in respect of a particular supplying employer is being dealt with by the FWC, either the FWC or another interested party can apply for the proposed regulated labour hire arrangement order to also capture one or more other employers who are supplying (or will be supplying) employees to work for the relevant host business;[47]

b. secondly, where a regulated labour hire arrangement order has already been made and applies to a particular supplying employer, but one or more other employers start (or will start) supplying employees to perform the same kind of work, the regulated host is required to make an application to have the regulated labour hire arrangement order varied to capture the other supplying employers.[48]

14.3 This will likely provide an efficient mechanism by which multiple labour hire providers on a particular site, or providing labour to a particular host business, can be captured by the single regulated labour hire arrangement order.

14.4 Each of these scenarios is explained in more detail below.

Scope for an application to be expanded to involve other supplying employers

14.5 Where an application for a regulated labour hire arrangement order has been made in respect of a particular employer (i.e. the application is before the FWC but no decision has yet been made whether to make a regulated labour hire arrangement order), the FWC or another interested party (such as a union, affected employee, or affected employer) may seek to have the application expanded to also relate to one or more other employers who are supplying (or will be supplying) employees to perform work for the relevant host business.

14.6 The FWC is empowered to make a determination effectively expanding the scope of the application (i.e. adding 'respondents' to the application) where it is satisfied that:

a. those additional employer/s supply (or will be supplying) one or more employees to perform work for the host business; and

b. the other statutory requirements are met (see the five elements set out in Part 6); and

c. the 'service provision' exemption and the 'fair and reasonable' exemptions do not apply.[49]

14.7 Where the above is satisfied the FWC may specify in a regulated labour hire arrangement order that the regulated labour hire arrangement order will cover any or all of the additional supplying employers, and additional regulated employees of those supplying employers.[50]

47 FW Act s 306EA
48 FW Act s 306ED
49 FW Act s 306EA(5)
50 FW Act s 306EA(4)

Requirement for the regulated host to apply to have a regulated labour hire arrangement order varied to capture other supplying employers

14.8 Where a regulated labour hire arrangement order is in place and applies to a particular kind of work, the host business will have a positive obligation to ensure that future labour hire providers will also be regulated by the regulated labour hire arrangement order where they provide employees to perform the same kind of work.

14.9 Under section 306ED, where:

a. a regulated labour hire arrangement order is in place capturing a host business and a supplying employer whose workers perform a particular kind of work; and

b. one or more other employers who are not covered by a regulated labour hire arrangement order (that covers or will cover the employees in relation to that work) start (or will start) to supply employees to perform work for the regulated host; and

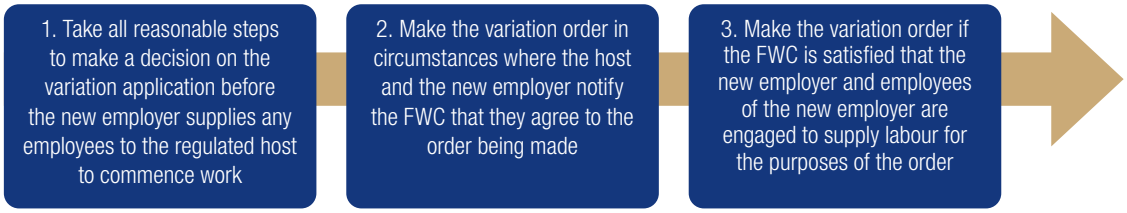
c. the work to be performed is of the same kind captured by the other regulated labour hire arrangement order, the regulated host must make an application to the FWC to seek to vary the regulated labour hire arrangement order to have it cover the new supplying employer/s.

14.10 The application must be made by the regulated host as soon as practicable after they become aware that the new employer is to supply employees. In practice, this might be when the contract for the supply of labour is signed and would likely be expected to be before the employees start doing the work.

14.11 The regulated host must also, as soon as possible after the application is made, give written notice to each of the new supplying employer/s advising them that the application has been made and that the regulated labour hire arrangement order would apply to them and their employees on an interim basis until the FWC makes a decision on the variation application.[51]

14.12 Section 306ED will have the effect of preventing a host business from simply engaging a new or different labour hire provider in order to circumvent the operation of a regulated labour hire arrangement order.

14.13 In determining whether to make the variation order, the FWC must:[52]



14.14 However, the FWC must not make the variation order in the following circumstances:

a. where the FWC is satisfied that the performance of the work is or will be for the provision of a service;[53] or

b. where the FWC is satisfied that it is not fair and reasonable in all the circumstances to make the variation order, having regard to submissions made in respect of the variation.[54]

14.15 Where the FWC determines to make the variation order, the order would come into force on the day specified in the order.[55]

51 FW Act s 306ED(4), 306ED(5) and 306ED(11); See Revised Explanatory Memorandum at [671]
52 FW Act s 306ED(5)
53 FW Act s 306ED(8)
54 FW Act s 306ED(9)
55 FW Act s 306ED(10)

15. Payment Obligations Under Regulated Labour Hire Arrangement Orders

15.1 Where a regulated labour hire arrangement order is in place, the usual position will be that the supplying employer will be required to pay regulated employees no less than the 'protected rate of pay'.

15.2 However, there is scope for the FWC to deviate from this position, by either:

a. making an 'alternative protected rate of pay order' (please refer to Part 17 of this Guide); or

b. making an 'arbitrated protected rate of pay order' (please refer to Part 18 of this Guide).

15.3 Each of these concepts is explained in more detail in the following sections of this Guide.

16. The 'Protected Rate of Pay'

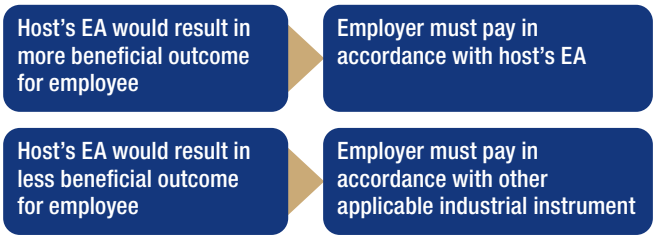
16.1 Where a regulated labour hire arrangement order is in place, the supplying employer will be required to pay the 'regulated employee/s' at least the 'protected rate of pay' while performing work for the host business.[56] Failure to comply with this requirement in a regulated labour hire arrangement order is an offence, for which civil penalties apply.

16.2 The 'protected rate of pay' is the full rate of pay that would be payable to the employee if the host's enterprise agreement applied to the employee.[57] It is not simply the hourly rate that would be applicable to the regulated employee if the host's enterprise agreement applied; it includes a range of other monetary amounts.

16.3 The 'full rate of pay' is defined at section 18 of the FW Act. In addition to the applicable base hourly rate, the 'full rate of pay' includes:[58]

- Incentive payments and bonuses
- Loadings (including annual leave loading)
- Allowances
- Overtime rates
- Penalty rates
- Any other separately identifable amounts

16.4 In effect, this means the supplying employer will need to use the host's enterprise agreement to determine the total overall amount which would be payable to the employee for the hours worked in a given pay cycle. If the total is more under the host's enterprise agreement than what they would receive if they were paid as usual, then the employee needs to be paid at least that higher amount.



16.5 Importantly, however, the supplying employer is not required to match any 'above-EA' rates of pay that might be paid by the host business. The employer is simply required to pay in accordance with the host's instrument. By way of explanation, if the host business elects to pay some or all of its employees amounts that are more generous than required under the relevant enterprise agreement, this will not mean that the supplying employer is required to match those rates or other benefits. Rather, the supplying employer will simply need to ensure they provide the relevant workers with the pay and benefits pursuant to the relevant enterprise agreement / industrial instrument.

---

56 FW Act s 306F(1) and (2)

57 FW Act s 306F(4)

58 For employers who are covered by the FW Act due to the referral of powers by their state to the federal jurisdiction, the protected rate of pay does not include some specified amounts. See FW Act s 306F(6), 30D, 30N, 30A(1) and 30K(1) for a list of these excluded amounts. This may include things such as long service leave, leave for victims of crime and jury or emergency service leave.

Tip: Businesses must be prepared and resourced to determine the labour hire worker's classification and pay if they were an employee of the host business.

A recent dispute in the FWC provides insight into the potential complexities that are likely to arise in calculating 'same job, same pay.'

The dispute was between the Australian Manufacturing Workers' Union and paper company Opal Australian Paper which arose from a requirement under Opal's enterprise agreement that Opal pay its contractors "wages and conditions" that are no less favourable than those provided to its employees. This requirement is akin to the 'same job, same pay' framework.

The case shows the complex and time-consuming legal and mathematical analysis businesses should expect to undertake when calculating the rate of pay payable to an employee and a labour hire worker.'

Special rules for leave and termination payments

Leave

16.6 The protected rate of pay only includes paid leave entitlements if the employee is otherwise entitled to them.[59] For example, a casual employee does not become entitled to paid annual leave simply because they are entitled to be paid a protected rate of pay based on an instrument that provides for paid annual leave for permanent employees. However, that same casual employee would still be entitled to paid family and domestic violence leave, because this entitlement comes from the NES.[60]

16.7 If the regulated employee is entitled to leave, the obligation to pay the protected rate of pay extends to periods of leave they take during their placement with the regulated host.[61]

Termination payments

16.8 The FW Act contains provisions dealing with how termination payments are calculated and when they are payable to employees covered by regulated labour hire arrangement orders.[62]

16.9 Only those employees who are entitled to be paid amounts on termination are actually entitled to payments under this section, i.e. permanent employees. In other words, this does not create an additional or new entitlement for casual employees.

16.10 Where a regulated labour hire arrangement order covers an employee in relation to work performed for a regulated host and termination occurs during a period the employee is performing work for that host (including periods of leave or authorised absence), the termination payment payable to the employee must be calculated based on the protected rate of pay (or the alternative protected rate of pay or arbitrated protected rate of pay, if applicable) rather than on their usual rate of pay.[63] This is the case unless this rate is less than another rate which would otherwise be payable to the employee (in which case, the higher rate is used).

16.11 The exception to this general principle is where the employee has performed work for more than one regulated host during their employment with their employer. In these cases, some components of termination pay (i.e. leave entitlements) will be calculated based on the supplying employer's enterprise agreement or other applicable instrument. The rationale for this is that leave accrues throughout the course of employment, and so it would be unfair to have all leave paid out at a higher rate where the employee might have only been entitled to the higher rate for a very small part of their overall period of service. However, payments in lieu of notice will always be calculated using the protected rate of pay applicable to the host to which they are deployed at the time of termination.[64]

16.12 Where the employee is not working for a regulated host at the time of termination, the payment will be calculated using the employee's usual rate.[65]

59 FW Act s 306F(9)
60 Revised Explanatory Memorandum at [693]
61 Revised Explanatory Memorandum at [685]
62 FW Act s 306NA
63 FW Act s 306NA2(a)
64 FW Act s 306NA(3)(d)
65 FW Act s 306NA(2)(b)

Special rules for certain categories of employees

Pieceworkers

16.13 If the regulated employee is a pieceworker, the applicable full rate of pay will be the rate specified as such in the host's enterprise agreement.[66]

Casual employees

16.14 If the host's enterprise agreement does not provide for a referable casual rate of pay and the regulated employee is engaged as a casual, then the protected rate of pay will be the base rate of pay that would be payable under the host's enterprise agreement, plus 25%.[67]

16.15 If the regulated employee is a pieceworker, then the applicable base rate of pay to be used to work out the casual rate is that specified in the host's enterprise agreement.[68]

Defences and exceptions to the requirement to pay the 'protected rate of pay'

16.16 There are a small number of circumstances in which a regulated employer is not required to pay the protected rate of pay (or will not be penalised for failing to do so).

The "mistake" defence

16.17 An employer who fails to pay the protected rate of pay will not be penalised if they 'reasonably rely' on information provided by the host to calculate the rate, and that information is incorrect in some material way.[69] This is intended to protect the employer from incurring a penalty when they have made an honest mistake as to the calculation of the protected rate of pay, due to incomplete or wrong information sourced from the host business.

16.18 In practice, this may mean that if the host business provides incorrect information to the supplying employer about how the rates of pay in the industrial instrument should be calculated or how other terms of the instrument should be applied, and such information cannot be easily verified by the supplying employer by means of their own analysis, and the supplying employer then relies on that information, they should be able to rely on the 'mistake' defence if it turns out they did not comply with the regulated labour hire arrangement order as a result of relying on that information.

16.19 A supplying employer should make clear records of the information received from a host employer and how it is applied to its workers in order to reduce risk of potential claims. If the supplying employer can evidence reasonable reliance on the information provided, it will be more likely to establish the mistake defence.

Training arrangements

16.20 As set out in Part 12 of this Guide, a regulated employer does not need to pay the protected rate of pay to an employee if they are engaged pursuant to a training arrangement;[70] i.e. employees engaged on apprentice or trainee contracts.[71]

66 See FW Act s 306F(8), which refers to s 18(2)(b)
67 FW Act s 306F(5)
68 See FW Act s 306F(7), which refers to s 16(2)(b)
69 FW Act s 306F(3).
70 FW Act s 306G(1)
71 Revised Explanatory Memorandum at [696]

Certain short-term arrangements

16.21 Where businesses need to use labour hire providers to respond to a range of short-term circumstances, they may be able to circumvent the requirement to pay the protected rate of pay during those periods of time. However, there are limitations on these circumstances. For more detail, please refer to Part 11 of this Guide.

Other circumstances

16.22 There are two other scenarios where a supplying employer will be relieved from the requirement to pay the protected rate of pay. That is, where a supplying employer is covered by a regulated labour hire arrangement order but either of the following apply:[72]

a. the supplying employer has not been notified that a variation application has been made by the regulated host;[73] or

b. where the supplying employer was the successful party in a tender process, and they were not notified about the existence of a regulated labour hire arrangement order.[74]

72 FW Act s 306F(3A)
73 Such an application is made under FW Act s 306ED(2)
74 See FW Act s 306EE(2) and (3)

17. 'Alternative Protected Rate of Pay' Orders

17.1 Where a regulated labour hire arrangement order is made, the Order will require the supplying employer to pay the regulated employees no less than the 'protected rate of pay'.

17.2 However, the FWC has the power, in limited circumstances, to make an 'alternative protected rate of pay order' which would require the supplying employer to pay by reference to a different industrial instrument.

17.3 This can only occur where:

a. it would be more appropriate for an alternative instrument to apply to the regulated employees (as opposed to the default instrument); and

b. the alternative instrument applies to one of the parties participating in or arranging for the labour hire arrangement (i.e. the FWC cannot simply pick a completely unrelated instrument and select that as the alternative instrument that should be applied).

17.4 An alternative protected rate of pay order can only derive from an enterprise agreement that falls into one of the following two categories:[75]

It must be an enterprise agreement which applies to a **related body corporate** of the regulated host and would apply to an employee of the related body corporate if they were performing work of the kind undertaken by the regulated employee

OR

It must be an enterprise agreement which applies to the regulated host and would apply to an employee of the regulated host if they were performing the same work as the regulated employee in **different circumstances**

17.5 In relation to the first category, if there is a different instrument which applies to a 'related body corporate'[76] of the host business and which is expressed to cover the type of work being performed by the labour hire workers, the FWC might decide that it should be the relevant instrument for the purposes of calculating the 'protected rate of pay' that must be payable by the supplying employer (rather than the other instrument). This is intended to cover scenarios where a host business might have a corporate group involving multiple entities each of which have different enterprise agreements that could conceivably cover the type of work being performed by the labour hire workers.

17.6 In such cases, there is scope for the FWC to consider the multiple industrial instruments and determine which instrument should be the reference point for the purposes of an Order (including selecting an enterprise agreement applying to a related body corporate instead of the instrument applying to the host business).

17.7 This second category is intended to cover situations where the regulated host has multiple enterprise agreements covering the same kinds of work, but which apply to different employees depending on their circumstances — for example, in different locations, or by reference to when the employee commenced employment.[77]

17.8 Where an Order has been made, or where an application is on foot, parties will be able to make an application for an alternative enterprise agreement to be used to determine the protected rate of pay in certain circumstances. For example:

a. where the alternative enterprise agreement better reflects the type of work or classification to be performed by the regulated employee; or

b. where the rate of pay specified by the alternative enterprise agreement more fairly compensates for the type of work to be performed by the employee.[78]

---

75 FW Act s 306M(3)

76 The term 'related body corporate' is defined as a holding company of the relevant body corporate, or a subsidiary of the relevant body corporate, or a subsidiary of a holding company of the relevant body corporate. See FW Act s 12; See also Corporations Act 2001 s 50

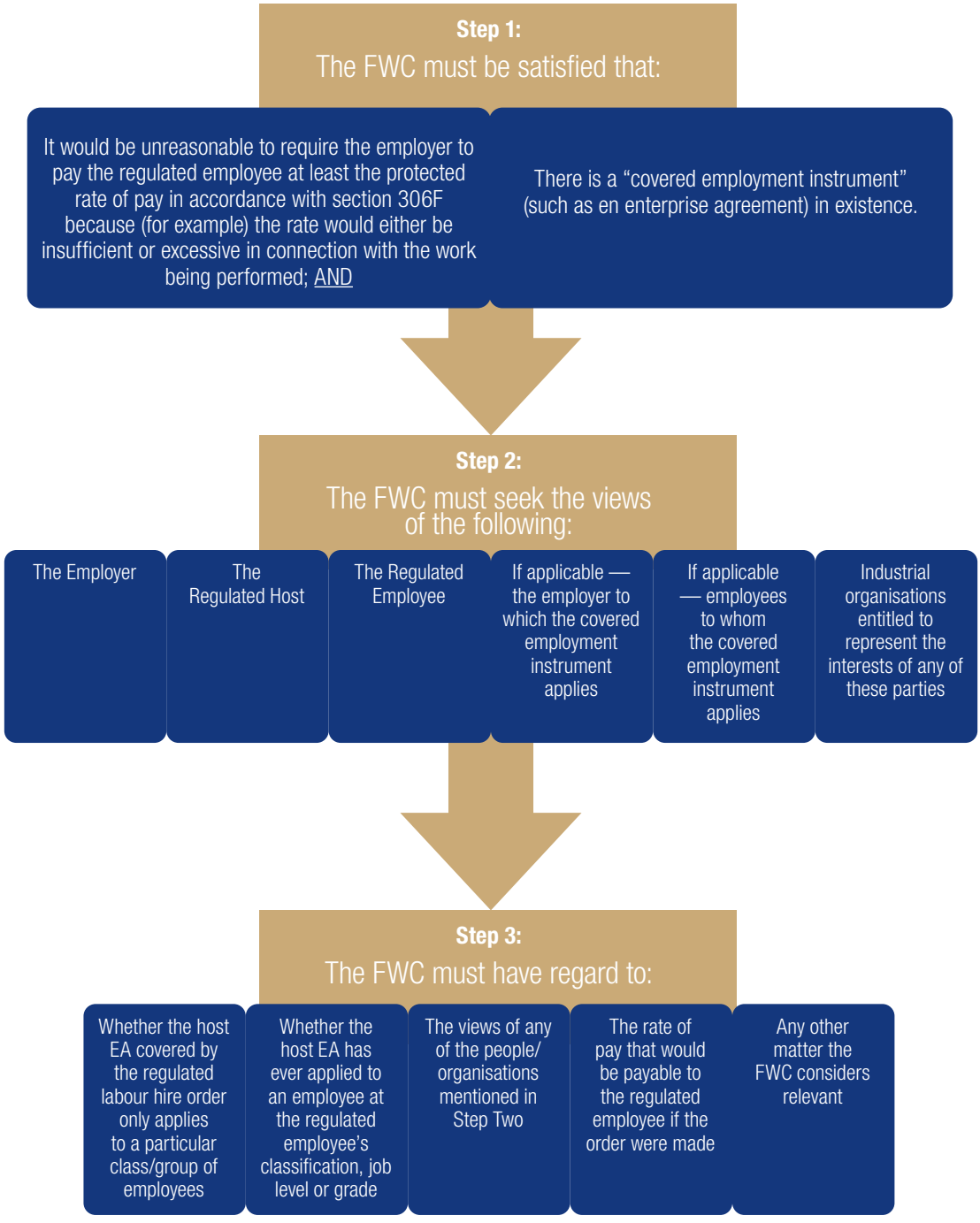
77 Revised Explanatory Memorandum at [722]

78 Revised Explanatory Memorandum at [718]

17.9 As an example, this might arise where there are multiple enterprise agreements applying to a particular type of work at a site but which provide for different rates of pay (for example, where there are clerical workers employed by two or more different entities (who are related bodies corporate), but who are performing similar work at a single work site, and who have different entitlements under the different enterprise agreements). In that scenario, the FWC would be able to select the enterprise agreement that has the most appropriate terms for the labour hire workers.

What will the FWC consider before making an order?

17.10 There are a range of things the FWC must consider and do before it makes an alternative protected rate of pay order.[79]



79 FW Act s 306M(6)-(8)

17.11 The considerations at Step Three may impact the FWC's decision whether to issue an order in varying ways. For example:

a. where the host's enterprise agreement has previously applied to employees at the same classification as the regulated employee, it may weigh against the making of an alternative protected rate of pay order; and/or

b. where the host's enterprise agreement applies to a class of employees that would generally not include the regulated employee, it may weigh in favour of the making of an order, given that a different covered employment instrument might be more appropriately applied to the regulated employee.[80]

17.12 If there is an exception under section 306G (short-term arrangements) that would apply to the requirement to the protected rate of pay, the FWC is also required to ensure that the exception applies to the alternative protected rate of pay order.[81]

17.13 Where a regulated labour hire arrangement order is already in force at the time the alternative protected rate of pay order is made, then the alternative protected rate is applicable only in respect of work performed once that order comes into force. No backpay will be required where an alternative rate of pay order comes into force after a regulated labour hire arrangement order is already in place,[82] even if it prescribes a higher rate of pay than the original protected rate of pay.

17.14 Likewise, no repayment will be required where employees have been paid in respect of a regulated labour hire arrangement order that is already in force, when an alternative protected rate of pay order is made that decreases the protected rate of pay.[83]

80 Revised Explanatory Memorandum at [728]
81 FW Act s 306M(9)
82 FW Act 306N(2); Revised Explanatory Memorandum at [733
83 FW Act 306N(2); Revised Explanatory Memorandum at [733]

18. Arbitrated Protected Rates of Pay' Orders

18.1 In addition to 'protected rates of pay' and 'alternative protected rates of pay', there is one final mechanism by which a regulated employee's rate of pay can be determined: 'arbitrated protected rate of pay' orders.

18.2 These orders can be imposed by the FWC in the course of a dispute settlement process. These disputes will most likely involve a dispute between the supplying employer and the employees/union about how the protected rate of pay should be calculated, which would then be escalated to the FWC. Further information relating to disputes can be found in Part 20 of this Guide.

What is an arbitrated protected rate of pay order?

18.3 An arbitrated protected rate of pay order is effectively an order of the FWC that specifies that the supplying employer must pay a particular amount/s or must calculate the rate of pay in a particular manner. These orders will likely only arise where a regulated labour hire arrangement order has been made and where the parties have then subsequently ended up in a dispute about how the 'protected rate of pay' should be calculated. This is then a mechanism by which the FWC can determine the dispute and impose a decision on the supplying employer as to how the rate of pay must be calculated.

18.4 The FWC can only make an arbitrated rate of pay order if it considers that it would be 'fair and reasonable' to do so.[84] Where an order is made, the employer must pay regulated employees in accordance with the arbitrated protected rate of pay order.[85]

18.5 In specifying how the rate needs to be calculated, the order may also deal with how the provisions of the host enterprise agreement are to be applied and how a regulated employee or class of employees should be classified under that instrument.[86]

18.6 If there is an exception under section 306G (short-term arrangements) that would apply to the requirement to the protected rate of pay, the FWC is also required to ensure that the exception applies to the arbitrated protected rate of pay order.[87]

When does an order commence?

18.7 Where the parties have agreed to the arbitration of the dispute by the FWC, the order can apply to any work performed on or after the day the regulated labour hire arrangement order commences.[88]

18.8 This may mean that a regulated employer is liable for backpay if the regulated employee has been paid at a rate which is less than the arbitrated protected rate of pay order.[89]

18.9 However, if the parties have not agreed to the arbitration of the dispute, the order can only apply from:

a. the date the order is made; or

b. if the relevant regulated labour hire arrangement order has not come into force, then the date the arrangement order comes into force.[90]

18.10 In these circumstances, an employer will not be required to pay backpay for work performed under a regulated labour hire arrangement which has occurred prior to the arbitrated rate of pay order being made, even if the employer has been paying the employee less than the rate in the arbitrated order.[91]

18.11 Please refer to Part 20 of this Guide for more detail / context.

---

84 FW Act s 306Q(3)
85 FW Act s 306Q(1). The order must also specify any amounts excluded pursuant to subsection 30A(1) or 30K(1) (if applicable) — see FW Act s 306Q(2)
86 Revised Explanatory Memorandum at [750]
87 FW Act s 306Q(8)
88 FW Act s 306Q(4)
89 Revised Explanatory Memorandum at [755].
90 FW Act s 306Q(5)
91 Revised Explanatory Memorandum at [756]

19. Host Business Obligations Related

Overview

19.1 Where a regulated labour hire arrangement order is made host businesses have a number of obligations, including:

a. host businesses must give labour hire providers sufficient information to enable the provider to pay its workers the protected rate of pay. Labour hire providers may request certain information from the host about how pay is calculated under the relevant enterprise agreement, including any policies of the host;[92]

b. if a new enterprise agreement is made, the host must notify the labour hire provider of the effect of the new instrument;[93]

c. if the host conducts a tender, or a tender process is conducted on its behalf, and a tenderer may be covered by the labour hire order, the host must provide the tenderer with written notice that the labour hire order may apply and require the tenderer to pay the protected rate of pay;[94] and

d. if the host engages a new labour hire provider, the host organisation must apply to the FWC to vary/expand the labour hire order to apply to the new labour hire provider.[95]

19.2 It is important that host businesses familiarise themselves with these obligations, given that civil penalties can arise in the event of non-compliance for some obligations.

See section 22 Penalties for Non-compliance of this Guide for obligations that attract civil penalties if not complied with.

19.3 Host businesses should also consider the practical and commercial impacts of these orders — such as, do the terms of engagement address potential cost increases as a result of such an order, what will be the contract cost implications of an order, are their rights to terminate the labour hire contract in the event that an order is made, or will the host business consider employing labour hire workers (or others to perform those services) directly. These broader factors should be considered when dealing with regulated labour hire arrangement order issues.

Obligations

92 section 306H(2), FW Act
93 section 306EC, FW Act
94 section 306EE, FW Act
95 section 306ED, FW Act

Notification requirements regarding new employment instruments

19.4 Where a regulated labour hire arrangement order is in force and the regulated host creates a new enterprise agreement with its workforce which will replace the 'covered employment instrument', the host businesses will have an obligation to notify (in writing) the supplying employer that it has created a new enterprise agreement and advise the employer of the effect of this event. The notification must be made as soon as practicable after the making of the new instrument.[96]

19.5 As stated in paragraphs 13.6–13.7 of this Guide, the relevance of this is that the new enterprise agreement will become the reference instrument for the purposes of the Order, and the new enterprise agreement will most likely lead to changes in the quantum of the 'protected rate of pay' that the employer must pay.

19.6 In addition to this obligation, the FWC will also be required to notify the employer, at the time of approving a new enterprise agreement, that the new agreement will become the applicable 'host employment instrument'.[97]

Obligations to vary regulated labour hire arrangement order to cover new employees

19.7 As stated in paragraphs 14.8–14.15 of this Guide, where there is a regulated labour hire arrangement order either in force or made but not yet in force between a host business and one or more employers, and the host enters into an arrangement with one or more other employers not already covered by the order to supply employees to perform work of the kind being provided by the employer already covered by the order, host businesses are required to apply to the FWC for an order to vary the regulated labour hire arrangement order to cover the new employers.

19.8 This may occur in the ordinary course of business, for example, where the host business puts the supply of labour services out to tender.

19.9 See paragraphs 14.8–14.15 of this Guide for further information.

Notifying tenderers etc. of regulated labour hire arrangement order

19.10 Where an Order is in place (whether in force or made but not yet in force) and a tender process is conducted either by or on behalf of a host business or for the purpose of a joint venture or common enterprise engaged in by the regulated host, the regulated host is required to advise all prospective tenderers that a labour hire arrangement order may apply if successful through the tender process.[98]

19.11 A host business who conducts the tender process must undertake the following steps:[99]

a. from the start of the tender process, advise tenderers in writing that the regulated labour hire arrangement order may apply to the successful tender and, as a result, they would be required to pay the protected rate of pay to their employees; and

b. after the end of the tender process, and as soon as practicable, advise the successful tenderer or tenders in writing of the following:

   i. that they will be required to make any application with the FWC to vary the regulated labour hire arrangement order to cover the new employer; and

   ii. the effect of this application to vary the labour hire arrangement order; and

   iii. where the FWC determines to vary the regulated labour hire arrangement order to cover those employers (and the order comes into force), advise that the employers would be required to pay their employees who perform work for the regulated host, the appropriate protected rate of pay.[100]

96 FW Act s 306EC(1) and (2)
97 FW Act s 306EC(3)
98 FW Act s 306EE(1)(a) and (b)
99 FW Act s 306EE(2)
100 FW Act 3 306EE(3)

Obligations regarding the provision of information

19.12 The FW Act contains provisions for the sharing of information between a host business and an employer who is subject to a regulated labour hire arrangement order in order to facilitate each party's compliance with their obligations under the Order.

19.13 Where an employer is covered by a regulated labour hire arrangement order, the employer is entitled to request information from the host business if they reasonably consider that they do not have all of the information required in order to work out the protected rate of pay.[101]

19.14 This may include information contained in company policies or documents which relate to how rates of pay are calculated or how a host employment instrument applies.[102] It may also include a copy of the host employment instrument.

19.15 Upon receipt of the employer's written request, the host business must:

a. comply with the request as soon as practicable;[103] and

b. comply within such a period that allows the employer to comply with its obligations to pay the protected rate of pay to its employees in a timely manner.[104]

19.16 The regulated host may elect to deal with the request in one of two ways:

Option 1	**Provide the employer with the relevant information that would allow the employer to undertake their own calculations to determine the protected rate of pay; OR**
Option 2	**Undertake its own calculations to determine the correct protected rate of pay for each employee and provide information, for each relevant pay period of the regulated employees, to the employer**

101 FW Act s 306H(2)
102 Explanatory Memorandum at [617]
103 FW Act s 306H(3)(a)
104 FW Act s 306H(3)(b)

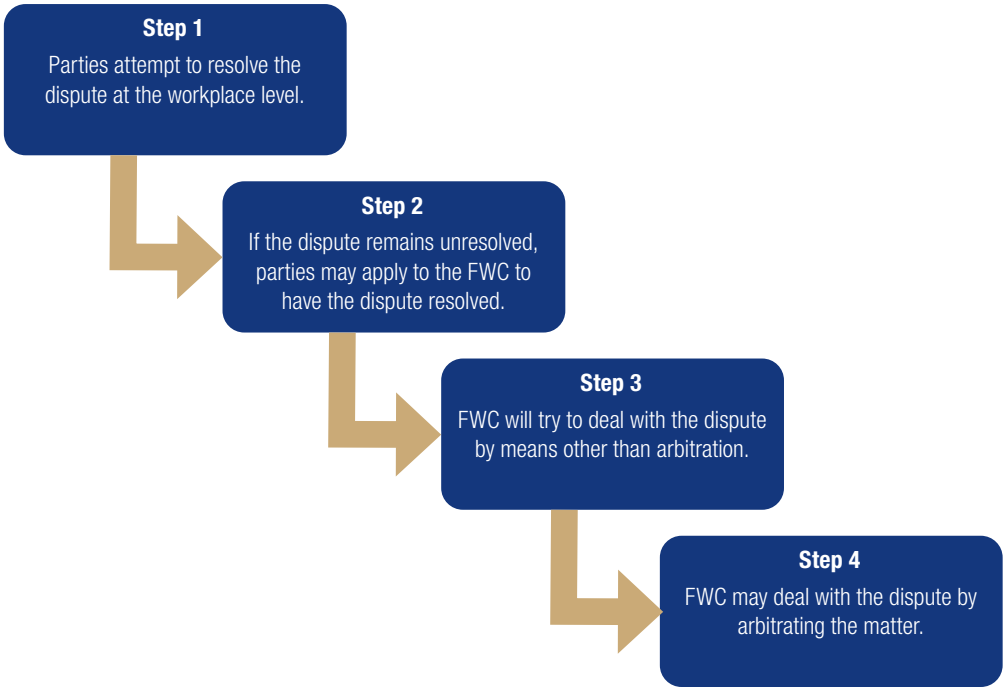
20. Dealing with Disputes

Overview

20.1 Dispute resolution processes will apply where a regulated labour hire arrangement order has been made and where a dispute arises about the operation of the regulated labour hire arrangement order or the same job same pay laws.[105] Under these provisions, an affected party (which might be the employer, one or more regulated employees and/or the regulated host) is able to apply to the FWC to have a dispute dealt with.

20.2 The dispute settlement procedure is very similar to the types of disputes procedures contained in modern awards or enterprise agreements. The FWC will have the power to deal with disputes as they consider appropriate, including by way of mediation, conciliation, making a recommendation, expressing an opinion and via arbitration.[106] However, the parties to the dispute must have first attempted to resolve the dispute at the workplace level before the FWC is able to deal with the dispute.[107]

20.3 Disputes may arise between parties in relation to what the protected rate of pay is for a particular regulated employee, or whether or not a regulated employee is being, paid less than the protected rate of pay. However, the FW Act does not limit the disputes provisions to any particular type of dispute. The dispute must simply be about the operation of Part 2–7A (e.g. how the regulated labour hire arrangement order is to be applied).[108]



105 FW Act s 306P
106 FW Act s 306P(5)
107 FW Act s 306P(3) and 306P(4)
108 FW Act s 306P(2)

What happens if a dispute arises?

Step 1 — Parties must attempt to resolve the dispute at the workplace level

20.4 At first instance, the parties involved in a dispute relating to a regulated labour hire arrangement order must first attempt to resolve a dispute at the workplace level by way of discussions between the parties.[109] A party cannot escalate the dispute to the FWC unless they have first attempted to resolve the dispute at the workplace level.

20.5 The FW Act does not prescribe any specific informal process; it simply requires the parties to 'attempt to resolve the dispute at the workplace level by discussions between the parties'.

20.6 Businesses should consider their dispute resolution and complaints processes to consider whether they need to be adjusted to accommodate potential disputes arising as a result of a regulated labour hire arrangement order.

Step 2 — Application to the FWC

20.7 If the dispute cannot be resolved at the workplace level, a party to the dispute may refer the matter to the FWC (by way of an application) to have the dispute resolved.[110]

Step 3 — FWC deals with the dispute by means other than arbitration

20.8 Where a party to the dispute has applied to the FWC to have the dispute dealt with, the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances.[111]

20.9 The FWC is able to deal with a dispute as it considers appropriate, but typically this would involve conciliation or mediation. At this point, the FWC's function is to play a facilitative role in an attempt to assist the parties to reach an agreement to resolve the dispute.

20.10 The FWC is also able to make a recommendation or express an opinion.[112]

Step 4 — FWC deals with the dispute by way of arbitration

20.11 Where conciliation or mediation fails to resolve the dispute, the FWC is able to arbitrate the dispute.[113] This involves the FWC making a binding determination that the parties to the dispute must comply with. Unlike some other dispute resolution powers conferred on the FWC (such as its powers to resolve disputes relating to modern awards), the FWC does not require the consent of both parties in order arbitrate the dispute and make a determination. This means that the FWC is able to make binding orders on the parties in order to resolve the dispute even where the supplying employer does not consent to, or wish for, the FWC to do so.

20.12 The FWC's powers include the power to make an 'arbitrated protected rate of pay order' specifying:

a. how the rate of pay which must be paid to the employee is to be worked out; and

b. that the employer must pay the employee the rate of pay worked out in that manner.[114]

20.13 An arbitrated protected rate of pay order can only be made where the FWC considers it to be fair and reasonable to make the order.[115]

20.14 An arbitrated protected rate of pay order will specify how the protected rate of pay for one or more employees should be worked out. This may include a breakdown of how certain provisions of the host business EA must be applied. It could also, for example, specify how an employee should be classified under the EA.

109 FW Act s 306P(3)
110 FW Act s 306P(4)
111 FW Act s 306P(5)(a)
112 FW Act s 306P(5); Revised Explanatory Memorandum at [747]
113 FW Act s 306Q
114 FW Act s306Q(2)
115 FW Act s 306Q(3)

Can an arbitrated rate of pay order operate retrospectively?

20.15 An arbitrated protected rate of pay order is able to be made effective from the commencement date of a regulated labour hire arrangement order where the parties have notified the FWC in writing that they agree to the FWC arbitrating the dispute.[116]

20.16 This means that an arbitrated protected rate of pay order could operate retrospectively. Practically, this may mean that an employer would then be immediately liable to backpay one or more regulated employees if the employer had been paying the employee less than the rate prescribed in the arbitrated protected rate of pay order.

20.17 However, if the parties to the dispute have not notified the FWC that they agree to the FWC arbitrating the dispute, any arbitrated protected rate of pay order can only apply prospectively in relation to work performed from the date on or after the day the order is made (or on the date of commencement of the regulated labour hire arrangement order, if the order has not yet come into effect).[117]

20.18 Please note that this may not necessarily protect the employer from remedying any potential prior underpayment if what was paid to the employee was less than the 'protected rate of pay'.

The effect of arbitrated protected rate of pay order

20.19 Where the FWC makes an arbitrated protected rate of pay order in relation to a dispute, the order will have effect and will supplement the existing regulated labour hire arrangement order. The arbitrated protected rate of pay order will prevail over section 306F (which requires the employer to pay the 'protected rate of pay') and will apply to the employee/s to the exclusion of any other fair work instrument or contract of employment that applies to them and provides for a lower rate of pay in relation to the work performed during the period in which the arbitrated protected rate of pay order applies.[118]

20.20 The intention is that an arbitrated protected rate of pay order will establish a single authority for how the protected rate of pay should be calculated in respect of a regulated employee during the period in which it is in force.[119]

20.21 Where exemptions apply in respect of short-term arrangements or apprentice/trainee arrangements, the FWC is required to ensure that any arbitrated protected rate of pay order must also contain exemptions in respect of those matters (i.e. the requirement for an employer to pay employees no less than the arbitrated protected rate of pay must be expressed not to apply to trainees/apprentices or employees on short-term arrangements).[120]

Rights to be represented during any dispute process

20.22 Parties are able to be represented in any dispute resolution process, subject to the existing rules around requiring permission to be represented by a lawyer or paid agent in matters before the FWC.[121]

116 FW Act s 306Q(4)
117 FW Act s 306Q(5)
118 FW Act s 306Q(6)
119 Revised Explanatory Memorandum at [757]
120 FW Act s 306Q(8)
121 FW Act s 596

21. Anti-Avoidance Framework

21.1 The FW Act contains a broad anti-avoidance framework to prevent both supplying employers and host businesses engaging in behaviour to avoid the making and operation of a regulated labour hire arrangement order.

21.2 Under the anti-avoidance framework, supplying employers and regulated hosts cannot avoid regulated labour hire arrangement orders by entering an arrangement to specifically avoid the operation of the provisions.

21.3 Supplying employers and regulated hosts are also prohibited from engaging other types of workers for the purpose of avoiding paying the employee rate of pay.

Tip: When adapting business practices to accommodate regulated labour hire arrangement order laws, businesses should ensure they do not adopt, or be perceived to adopt, business practices or corporate structures to avoid the operation of the laws.

Businesses should familiarise themselves with the five anti-avoidance provisions set out below. It is important for businesses to understand the anti-avoidance provisions and consequences for non-compliance with the provisions, particularly if a business is considering restructuring.

For example, it is unlawful for businesses to adopt certain corporate structures to avoid the making or application for the purpose avoiding a regulated labour hire arrangement order being made, or to try to limit the number of people who might be caught by a regulated labour hire arrangement order.

If a business is considering restructuring or changing their employment arrangements because of the operation of regulated labour hire arrangement order laws, it should consider seeking legal advice to understand and manage any risks.

It should also carefully document any changes to evidence that the restructure was initiated for legitimate business reasons and not to avoid regulated labour hire arrangement orders. If necessary this should also be specified in contract documents or internal decision documents.

21.4 Civil penalties can be imposed for contraventions of the anti-avoidance framework. The anti-avoidance provisions apply retrospectively from 4 September 2023. This means that penalties may apply in relation to conduct engaged from 4 September 2023.

21.5 For more serious contraventions (often where the person or business was aware that they were contravening an obligation or where the contravention was part of a systematic pattern of conduct), parties may face penalties of up to $939,000 (equivalent to 600 penalty units). Otherwise, parties may face civil penalties in the amount of $93,000 (equivalent to 60 penalty units). All figures are calculated at the time of publication.

Anti-avoidance Provisions

21.6 The FW Act contains five anti-avoidance provisions, which are related to:

a. preventing the making of regulated labour hire arrangement orders;

b. avoiding the application of regulated labour hire arrangement orders;

c. engaging successive employees for less than three months (relevant for supplying employers);

d. entering into successive short-term labour hire agreements (relevant for host businesses); and

e. dismissing an employee and engaging another worker as an independent contractor, under a contract for services, to perform the same kind of work for the regulated host.

21.7 Examples of behaviour that may risk non-compliance with the anti-avoidance provisions are:

Example 1

Restructuring a business to engage labour hire providers under a separate corporate entity not covered by an enterprise agreement or other employment instrument.

Example 2

Engaging a new labour hire provider who already engages its staff as independent contractors.

Example 3

Issuing and entering new labour hire work orders under a standing/head agreement every three months.

21.8 A summary of the anti-avoidance provisions is set out below:

Provision	Information about the anti-avoidance provision
1. Preventing the making of a regulated labour hire arrangement orders[122]	- An employer or regulated host would contravene this provision where they enter into a scheme (or carry out or begin to carry out a scheme) either alone or with other person(s) for the sole or dominant purpose of **preventing** the FWC from making the labour hire arrangement order. - A scheme means *'any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings…'*  **Contravention of this section = civil penalties**

Provision	Information about the anti-avoidance provision
2. Avoidance of application of a regulated labour hire arrangement order[123]	- An employer or regulated host would contravene this provision where they enter into a scheme (or carry out or begin to carry out a scheme) either alone or with other person(s) for the sole or dominant purpose of **avoiding the application of** a regulated labour hire arrangement order that has been made, whether or not the order is yet in force. - A scheme means *'any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings…'*  **Contravention of this section = civil penalties**

122 FW Act s 306S

123 FW Act s 306SA

Provision	Information about the anti-avoidance provision
3. Short-term arrangements — engaging other employees[124]	- This anti-avoidance measure is designed to stop employers from engaging successive employees for less than 3 months in order to activate the short-term arrangement exemption, and to avoid paying employees in accordance with a regulated labour hire arrangement order. - An employer would contravene this provision if they were covered by a labour hire arrangement order and: • the employer is not required to pay a regulated employee the protected rate of pay, the arbitrated rate of pay or the alternative rate of pay, because the employee was engaged for less than 3 months (or as otherwise determined by the FWC when altering the exemption period); and • the employer engages another person to perform the same or substantially the same work as the first employee was performing; and • it could be reasonably concluded that the purpose (or one of the purposes) of engaging the other person was to avoid paying the rate that would be payable under a regulated labour hire arrangement order.  **Contravention of this section = civil penalties**

Provision	Information about the anti-avoidance provision
4. Short-term arrangements - entering into other labour hire agreements[125]	- This measure is designed to prevent a host business from entering into successive short-term labour hire agreements to avoid paying employees in accordance with a regulated labour hire arrangement order. This provision would be enlivened when an employer enters into an agreement for a period of 3 months, followed by a subsequent short-term arrangement. - Regulated hosts would contravene this anti-avoidance provision in circumstances where they are covered by a regulated labour hire arrangement order and the following occurs: • the employer is not required to pay a regulated employee the protected rate of pay, the arbitrated rate of pay or the alternative rate of pay, because employees are placed with the host business for less than 3 months (or as otherwise determined by the FWC when altering the exemption period); and • the regulated host enters into an agreement that has the result that another person is to perform the same (or substantially the same) work performed by the regulated employee for the regulated host; and • it could reasonably be concluded that the purpose (or one of the purposes) of engaging the other person was to avoid paying a regulated employee in accordance with a regulated labour hire arrangement order.  **Contravention of this section = civil penalties**

124 FW Act s 306T
125 FW Act s 306U

Provision	Information about the anti-avoidance provision
5. Engaging Independent Contractors[126]	- This anti-avoidance provision is intended to prevent an employer from dismissing an employee and engaging another worker as an independent contractor, under a contract for services, to perform the same kind of work for the regulated host to avoid the operation of a regulated labour hire arrangement order i.e. to avoid having to pay the protected rate of pay). - While dismissing an employee and re-engaging the same employee as an independent contractor to perform the same work is already prohibited under the FW Act, this section makes it clear that engaging independent contractors in this manner would contravene the FW Act under the new provisions.  **Contravention of this section = civil penalties**

Tip: We have recommended businesses carefully consider their operational requirements and workforce management arrangements to assess the risk of regulated labour hire arrangement orders and, if necessary, clarify contract terms to clearly state the intention of the parties and nature of the arrangements.

However, in taking these steps businesses should be careful to avoid breaching the anti-avoidance provisions. In managing risks of regulated labour hire arrangement orders, businesses **should not**:

- Adopt a specific corporate structure with the purpose of preventing the FWC from being able to make a regulated labour hire arrangement order, or for the purposes of avoiding the application of regulated labour hire arrangement order.
- Engage successive employees for less than 3 months in order to activate the short-term arrangement exemption, and to avoid paying employees in accordance with a regulated labour hire arrangement order.
- Enter into successive short-term labour hire agreements to avoid paying employees in accordance with a regulated labour hire arrangement order.
- Dismiss an employee and engage another worker as an independent contractor, under a contract for services, to perform the same kind of work for the regulated host to avoid the operation of a regulated labour hire arrangement order.

If a business is considering restructuring or changing their employment or operational arrangements to accommodate regulated labour hire arrangement order laws, it should consider seeking legal advice to understand and manage any risks.

126 FW Act s 306V

22. Penalties for Non-Compliance

22.1 Civil penalties can be imposed in a range of circumstances, including (but is not limited to) where:

a. a regulated labour hire arrangement order is in place and the supplying employer fails to pay an employee in accordance with the regulated labour hire arrangement order (or contravenes another term of the regulated labour hire arrangement order);[127]

b. an employer contravenes a term of an arbitrated protected rate of pay order made by the FWC;[128]

c. a host business does not provide certain information to an employer on request;[129]

d. a host business does not apply to the FWC for an order to vary the regulated labour hire arrangement order to cover the new employers, as soon as practicable after they become aware that a new employer is to supply regulated employees;[130]

e. a host business does not advise all of the tenderers for the supply of labour, from the start of the tender process, that the regulated labour hire arrangement order may apply to the successful tenderer, and that they could be required to pay the protected rate of pay to their employees;[131]

f. a host business does not notify supplying employers of a new covered employment instrument;[132]

g. a person or business contravenes any of the anti-avoidance provisions which are explained in Part 21 of this Guide;[133] or

h. a party contravenes any other order of the FWC.[134]

22.2 The maximum penalty that can be ordered for a breach of the same job same pay laws is $93,000 (60 penalty units) per breach for contraventions that are not 'serious contraventions', or $939,000 (600 penalty units) in the case of serious contraventions.[135] All figures are calculated at the time of publication.

22.3 More serious contraventions are often where the person or business was aware that they were contravening an obligation or where the contravention was part of a systematic pattern of conduct.

22.4 Contraventions of Part 2–7A of the FW Act (the part of the Act containing the same job same pay laws) do **not** attract criminal penalties.

127 FW Act s 306F(2). Please note figures are correct at the time of publication.
128 FW Act s 306Q(7)
129 FW Act s 306H(3)
130 FW Act s 306ED
131 FW Act s 306EE
132 FW Act s 306EC
133 FW Act s 306S(1)
134 Revised Explanatory Memorandum at [180]–[181]
135 FW Act s 539

23. General Advice for Host Businesses

23.1 Host businesses should anticipate that labour hire agencies will become subject to one or more regulated labour hire arrangement orders depending on the supplier's business.

23.2 Businesses who use labour hire services are encouraged to familiarise themselves with the 'same job, same pay' reforms so they can comply with their new obligations, understand the financial, legal and operational impacts and be prepared to deal with disputes as they arise.

23.3 There are a range of steps host businesses can take to prepare for how the reforms will impact their business, and if appropriate, adapt business practices to accommodate regulated labour hire arrangement order laws.

Preparing for cost implications

23.4 Host businesses should anticipate potential increases in cost arising from regulated labour hire arrangement orders.

23.5 There is a risk that supplying employers will attempt to pass on the costs of any orders to the host business to recoup increased wages bills from host businesses. Methods for dealing with potential cost increases should be provided in labour hire contracts.

23.6 The cost implications could result in labour hire becoming less commercially viable. Host businesses may wish to consider the viability of alternative forms of engaging workers, especially for longer term projects.

23.7 Even if a regulated labour hire arrangement order is not made in respect of a particular labour hire provider, the cost of using labour hire providers may nonetheless increase, noting the increased risks and administrative costs imposed by the 'same job, same pay' laws. There may also be a circumstance in which a labour hire provider is subject to a labour hire order in relation to another host business they provide workers to, and to achieve administrative efficiency, the provider seeks to pay workers engaged by host businesses at the protected rate of pay.

Considering impact on enterprise agreements

23.8 When negotiating new enterprise agreements, host businesses should carefully consider the impact of these reforms.

23.9 Host businesses should assess whether any new enterprise agreements might fall under a regulated labour hire arrangement order, the effect of this event for its contractual relationship with supplying employers.

23.10 Critically, host businesses should consider the scope of enterprise agreements and determine whether there are classifications in the enterprise agreements that are not necessary and/or will cover workers engaged through labour hire arrangements.

23.11 As regulated labour hire arrangement orders are only available if an enterprise agreement would otherwise apply to supplied workers, businesses may wish to consider narrowing the scope of their enterprise agreements to ensure that an order will not be available.

23.12 For example, a manufacturing business has classifications for cleaners in its enterprise agreement in circumstances where it does not engage cleaners directly and they are provided by a labour hire service. When re-negotiating the enterprise agreement, the manufacturing business may exclude cleaners from the scope of the agreement which will effectively mean that the labour hire workers will not be subject to a regulated labour hire arrangement order.

Assessing monetary benefits

23.13 Host businesses should evaluate whether any financial benefits provided to workers above the award could alternatively be paid through into company policies.

Not attempting to avoid 'same job, same pay' laws

23.14 Businesses should familiarise themselves with the five anti-avoidance provisions of the FW Act. It is important for businesses to understand the anti-avoidance provisions and consequences for non-compliance with the provisions, particularly if a business is considering restructuring.

23.15 If a business is considering restructuring or changing their employment or operational arrangements because of the operation of regulated labour hire arrangement order laws, it should consider seeking legal advice to understand and manage any risks.

Developing internal procedures and systems to meet new obligations

23.16 Host businesses should develop internal procedures and systems to meet their new obligations under 'same job, same pay' laws.

Requests for information

23.17 Host businesses should be prepared to respond as soon as reasonably practicable to any labour hire agency request for information about the rate of pay for labour hire workers covered by a regulated labour hire arrangement order.

23.18 Host businesses should have suite of information ready about their enterprise agreement, how pay is calculated and any relevant payroll or HR policies.

Notification protocols

23.19 Host businesses should also develop precedents and establish a notification mechanism for notifying successful tenderers that, where applicable, the host is required to make any application to the FWC to vary an applicable regulated labour hire arrangement order to cover the new supplying employer and the effect of the variation.

23.20 Host businesses should also establish a notification mechanism and protocol with its supplying employers for when a new enterprise agreement is made, and how the supplying employer will be notified of the effect of the new instrument for the protected rate of pay and contractual relationship.

Variation applications

23.21 Host businesses should have systems in place for when a new supplying employer is engaged to apply to the FWC to vary/expand a regulated labour hire arrangement order to apply to the new supplying employer.

23.22 Host businesses should:

a. consider which team will be responsible for different aspects of preparing and making the applications (e.g. procurement, industrial relations, legal); and

b. developing internal precedents for variation applications.

Reviewing tender processes and common contract conditions

23.23 Host businesses should undertake review of their tender processes and tender and contractual common conditions for labour hire arrangements to accommodate 'same job, same pay' laws and the anticipated operation of regulated labour hire arrangement orders.

23.24 In reviewing tender processes and tender and contractual common conditions, below are some matters host businesses should consider:

Circumstance	Contract Mitigation Measure
The host conducts a tender, or a tender process is conducted on its behalf, and a tenderer may be covered by a regulated labour hire arrangement order during the term of the contract.	Incorporating common tender and contractual conditions that a regulated labour hire arrangement order may apply and require the tenderer to pay the protected rate of pay if one is made to apply.
Negotiating a labour hire arrangement with a supplying employer.	Host business should anticipate labour hire suppliers will seek to negotiate warranties from host business as to their obligations under 'same job, same pay' laws. Host businesses may wish to incorporate standard common conditions into tender and contractual terms that refer to statutory obligations under Part 2–7A of the FW Act. Host businesses in turn should seek warranties from supplying employers guaranteeing their compliance with 'same job, same pay' laws, including paying employees in accordance with any regulated labour hire arrangement orders, and removing any liability of the host business outside of the statutory scheme.
The potential operation of a regulated labour hire arrangement orders will increase the supplying employers costs or a new enterprise agreement is made during a labour hire arrangement during the operation of a regulated labour hire arrangement order.	Host business should adopt a contractual position and incorporate terms about claims for costs for circumstances where the operation of a regulated labour hire arrangement order, including a new employment instrument being made during an existing contract, would increase the costs for the supplying employer.
Managing regulated labour hire arrangement orders during a labour hire arrangement	Host business may wish to consider providing a contractual process or requiring a regulated labour hire arrangement order management plan be made under contracts, where the parties agree to procedures for information sharing and notification protocols, with the view of mutually assistance compliance with 'same job, same pay' laws.

24. General Advice for Supplying Employers

24.1 Labour hire agencies should anticipate they will become subject to one of more regulated labour hire arrangement orders if they supply labour hire workers to host businesses.

24.2 Businesses who supply labour hire workers are encouraged to familiarise themselves with the 'same job, same pay' reforms so they can comply with their new obligations, understand the financial, legal and operational impacts and be prepared to deal with disputes as they arise (particularly about calculating the protected rate of pay).

24.3 There are a range of steps supplying employers can take to prepare for how the reforms will impact their business, and if appropriate, adapt business practices to accommodate regulated labour hire arrangement order laws.

Assessing impacts for workforce

24.4 Supplying employers should undertake a review their workforce and seek to identify which cohorts of their workforce might be exposed to regulated labour hire arrangement orders.

24.5 This will require a review of any labour supply arrangements to determine whether the employees are performing work for a host business and whether the arrangement might constitute the provision of a service.

24.6 Supplying employers should consider the attributes of the host business, including whether the host business employs 15 or more people and whether it has an enterprise agreement (or other 'covered employment instrument') in place which covers the work being performed by your employees.

24.7 This will also require consideration of whether any of the exemptions to regulated labour hire arrangement orders apply (such as the Temporary Placement Exemption or the Apprentice/Trainee Exemption).

24.8 A **Checklist** can be found at **Annexure A** which sets out the recommended steps for employers to take when evaluating their existing work arrangements.

Assessing monetary benefits

24.9 Supplying employers must be prepared and resourced to determine the labour hire worker's classification and pay if they were an employee of the host business. This may require complex and time-consuming legal and mathematical analysis to calculate the rate of pay payable to an employee and a labour hire worker.

24.10 Supplying employers should undertake an analysis of the monetary benefits currently provided to its labour hire employees and compare those arrangements to the terms of the enterprise agreement of the host business to determine whether the employees would be entitled to receive more beneficial entitlements under that instrument.

24.11 This will allow supplying employers to understand whether there is exposure to a regulated labour hire arrangement order and, if so, the potential financial implications to the business if a regulated labour hire arrangement order was to be made.

Anticipating multiple regulated labour hire arrangement orders

24.12 If supplying employers supply workers to multiple host businesses, they should anticipate becoming subject to multiple labour hire arrangement orders.

24.13 Supplying employers should review and implement payroll and HR processes to achieve administrative efficiency and minimise risk of non-compliance with regulated labour hire arrangement orders and exposure to unpaid entitlements claims.

Not attempting to avoid 'same job, same pay' laws

24.14 Supplying employers should not attempt to avoid their obligations under 'same job, same pay' laws.

24.15 Businesses should familiarise themselves with the five anti-avoidance provisions of the FW Act. It is important for businesses to understand the anti-avoidance provisions and consequences for non-compliance with the provisions, particularly if a business is considering restructuring.

24.16 If a business is considering restructuring or changing their employment or operational arrangements because of the operation of regulated labour hire arrangement order laws, it should consider seeking legal advice to understand and manage any risks.

Preparing to make submissions about whether regulated labour hire arrangement orders would be 'fair and reasonable'

24.17 Supplying employers should be prepared and consider making submissions to the FWC if a proposed regulated labour hire arrangement order is not 'fair and reasonable' in all the circumstances.

24.18 Supplying employers should develop internal assessment precedents to assess factors for whether a prospective regulated labour hire arrangement order would be fair and reasonable. This may include, for example, comparing the rates of pay provided to employees versus the rates of pay under the host business instrument, are whether they are generally consistent with market rates.

24.19 If concerned, businesses should consider seeking legal advice any arguments they may seek to raise to the FWC about whether a regulated labour hire arrangement order is 'fair and reasonable' in all the circumstances.

Reviewing and negotiating contractual arrangements for labour hire arrangements

24.20 Supplying employers should review and consider negotiating contractual arrangements with host employers to ensure it is best placed to comply with 'same job, same pay' laws.

24.21 For example, supplying employers may wish to review existing contractual terms and identify:

a. any mechanism whereby certain cost increases can be passed on to host businesses via price increases;

b. if the supplying employer can otherwise negotiate a price increase with the host business;

c. the termination rights or notice periods apply in respect of the potential cessation of the labour hire arrangement.

24.22 For future arrangements, supplying employers should anticipate the likelihood of a regulated labour hire arrangement being made and factor this risk into commercial activities via price and contracting terms.

24.23 Businesses should also undertake appropriate due diligence to ascertain and manage risks relating to these reforms through appropriate contract terms.

24.24 Set out below are a range of circumstances and possible contract mitigation measures that businesses should consider.

Circumstance	Contract Mitigation Measure
Managing regulated labour hire arrangement orders during a labour hire arrangement	Supplying employers may wish to consider negotiating a contractual process or agreeing to a regulated labour hire arrangement order management plan to be made under contracts, where the parties agree to procedures for information sharing and notification protocols, with the view of mutually assistance compliance with 'same job, same pay' laws.
The host business does not have an industrial instrument in place that applies to the kind of work your employees are engaged to perform.	Seek a warranty from the host business that there is no enterprise agreement, enterprise award or other kind of 'covered employment instrument' (within the meaning of s 12 of the FW Act) that applies to the work that is subject of the tender.
The host business has a covered employment instrument (within the meaning of s 12 of the FW Act) in place, but its rates of pay are lower than that paid by your business.	Seek a warranty from the host business that the only covered employment instrument that applies to the work are the instruments identified by your business (these could be listed in the contract). Seek a commitment from host business that, if a regulated labour hire arrangement order comes into effect increasing the rates payable by your business to its employees by reference to the terms of any client instrument, the client will pay a sum equivalent to the sum that your business has been required to increase its rates of pay to employees in order to comply with the regulated labour hire arrangement order.
The host business has a covered employment instrument (within the meaning of s12 of the FW Act) in place with rates of pay that might exceed rates paid by your business for the same work.	Seek a commitment from the host business that if a regulated labour hire arrangement order comes into effect increasing the rates payable by your business to its employees by reference to the terms of any host business instrument, the host business will pay a sum equivalent to the sum that your business has been required to increase its rates of pay to employees in order to comply with the regulated labour hire arrangement order.
The host business is a small business employer but has an enterprise agreement in its business.	Seek a commitment from the host business that, if a regulated labour hire arrangement order comes into effect increasing the rates payable by your business to its employees by reference to the terms of any host business instrument, the client will pay a sum equivalent to the sum that your business has been required to increase its rates of pay to employees in order to comply with regulated labour hire arrangement orders.

25. Annexure A — Risk Assessment Checklist for Supplying Employers

Question	Yes	No
Step 1		
Does a host business to which you are supplying labour hire workers have a 'covered employment instrument' that applies to this kind of work?	☐ Risk present, **proceed to Step 2**	☐ Low risk, **proceed to Step 4**
Step 2		
Is the full rate of pay paid by your business higher than the client?	☐ Low risk, **proceed to Step 6**	☐ Risk present, **proceed to Step 3**
Step 3		
Is the client a small business employer (ie. the client and all related bodies corporate/ associated entities employ less than 15 employees based on headcount)?	☐ Low risk, **proceed to Step 4**	☐ Risk present, **proceed to Step 4**
Step 4		
Are there factors that make it likely your business will be subject to a regulated labour hire arrangement order?	☐ Risk present, **proceed to Step 5**	☐ Low risk, **end risk assessment**
Step 5		
Consider obtaining independent legal advice to assist adapt internal business practices and negotiate contractual terms, to ensure compliance with 'same job, same pay' laws and the viability of supplying labour. Review and implement payroll and HR processes to achieve administrative efficiency and minimise risk of non-compliance with regulated labour hire arrangement orders and exposure to unpaid entitlements claims.		

26. Glossary of Key Terms

Key term	Legal meaning	FW Act reference
Regulated labour hire arrangement order	An order made by the FWC requiring an employer to pay 'regulated employees' at no less than the 'protected rate of pay' in connection with the work performed by the 'regulated host'.	S 306E(1)
Regulated employee	An employee who is (or will be) supplied to perform work for a 'regulated host' and who is covered by a regulated labour hire arrangement order made by the FWC.	S 306E(5)
Regulated host / host business	The business to whom the workers are supplied, and which is: - a constitutional corporation; - the Commonwealth (or a Commonwealth authority); - a person, so far as work is performed for the person in connection with constitutional trade or commerce, and the work is of a kind that would ordinarily be performed by a flight crew officer, a maritime employee; or a waterside worker; - a body corporate incorporated in a Territory; - a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as work is performed for the person in connection with the activity carried on in the Territory; or - a person, so far as work is performed for the person in a Territory in Australia; or - any person in a State that is a referring State because of Division 2A or 2B of Part 1–3.	S 306C
Supplying employer	An employer which is supplying labour to perform work for a host and is the broad target of this legislation. In most cases this will be labour hire providers, but companies which provide employees to a host business in provision of a service might also considered a supplying employer and could be subject to an regulated labour hire arrangement order if they are not sufficiently involved in the performance of their employees' work.	

Key term	Legal meaning	FW Act reference
Covered employment instrument	One of the following: - an enterprise agreement; - a workplace determination; - a determination under section 24 of the Public Service Act 1999 that applies to a class of APS employees in an Agency (within the meaning of that Act); - an instrument made under any other law of the Commonwealth (other than the FW Act), or of a State or a Territory, that provides for the terms and conditions of employment for a class of national system employees of: • the Commonwealth or a State or Territory; or • an authority of the Commonwealth or of a State or Territory; or - any other instrument relating to the employment of a class of national system employees that: • is made under a law of the Commonwealth (other than the FW Act) or a State or Territory; and • is prescribed by the regulations.	S 12
Host employment instrument	The 'covered employment instrument' that applies to the regulated host.	S 306E(6)
Protected rate of pay	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.	S 306F
Alternative protected rate of pay order	An order that an employer pay an alternative rate of pay determined by the FWC (i.e. a rate that is different to the 'protected rate of pay'). The FW Act empowers the FWC to make an order that the employer pay an 'alternative protected rate of pay' where the FWC is satisfied that it would be unreasonable for the employer to pay the 'protected rate of pay' (for example, where that rate of pay is insufficient or would be excessive).	S 306M(2)
Arbitrated protected rate of pay order	Where a dispute arises about how the 'protected rate of pay' should be calculated or whether a particular employee is being paid at less than the 'protected rate of pay', the FWC is empowered to determine that dispute and make an 'arbitrated protected rate of pay order' specifying how the rate of pay must be worked out and that the employer must not pay the employee less than the amount worked out in that way.	S 306Q(1)
Recurring extended exemption period	The default position is that there is an exemption from regulated labour hire arrangement Regulated labour hire arrangement orders in respect of short-term arrangements (which is generally 3 months). However, the FWC is empowered to remove or alter the 3 month exemption period. For the purposes of accommodating seasonal workers, the FWC is also able to make a determination that there will be a 'recurring extended exemption period' of a specified period (which must be more than 3 months) which will apply each year.	S 306K(2)
'Joint venture' and 'common enterprise'	Include arrangements between parties to participate in a common project, and where the parties act together to incorporate a company for the purposes of a joint project.	

acci.com.au

sabusinesschamber.com.au

Australian
Chamber of Commerce
and Industry

SOUTH AUSTRALIAN
Business
Chamber
EST. 1839