DECISION

Fair Work Act 2009
s 306E – Application for a regulated labour hire arrangement order

Applications by the Mining and Energy Union re: Goonyella Riverside Mine, Peak Downs Mine and Saraji Mine
(C2024/3846, C2024/3847, C2024/3848, C2024/3849, C2024/3850, C2024/3851, C2024/3853, C2024/3856, C2024/3857, C2024/3858)
and
Applications by "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) re: Peak Downs Mine, Saraji Mine and Goonyella Riverside Mine
(C2024/3859, C2024/3860, C2024/3861)

VICE PRESIDENT ASBURY
VICE PRESIDENT GIBIAN
COMMISSIONER DURHAM

BRISBANE, 7 JULY 2025

INTRODUCTION

[1] The Mining and Energy Union (**MEU**) and the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (**AMWU**) (the **Unions**) have applied for regulated labour hire arrangement orders under s 306E of the *Fair Work Act 2009* (Cth) (the **Act**). The orders sought by the Unions would apply variously to employees of the following entities employed at the Goonyella Riverside mine, Peak Downs mine and/or Saraji mine located in Central Queensland:

(a) OS ACPM Pty Ltd (**OS Maintenance**) and OS MCAP Pty Ltd (**OS Production**) (the **OS Parties**);
(b) WorkPac Pty Ltd and WorkPac Mining Pty Ltd (**WorkPac**);
(c) Ready Workforce Pty Ltd (a Division of Chandler Macleod Pty Ltd and Chandler Macleod Group Limited (**Chandler Macleod**).

as set out in the following Table.

Matter Number	Applicant	Employer	Mine
C2024/3846	MEU	OS ACPM Pty Ltd	Goonyella Riverside Mine
C2024/3847	MEU	OS MCAP Pty Ltd	Goonyella Riverside Mine
C2024/3848	MEU	WorkPac Pty Ltd and WorkPac Mining Pty Ltd	Goonyella Riverside Mine
C2024/3849	MEU	OS ACPM Pty Ltd	Peak Downs Mine
C2024/3850	MEU	OS MCAP Pty Ltd	Peak Downs Mine
C2024/3851	MEU	WorkPac Pty Ltd and WorkPac Mining Pty Ltd	Peak Downs Mine
C2024/3853	MEU	Ready Workforce Pty Ltd (a Division of Chandler McLeod) and Chandler McLeod Group Limited	Peak Downs Mine
C2024/3856	MEU	OS ACPM Pty Ltd	Saraji Mine
C2024/3857	MEU	OS MCAP Pty Ltd	Saraji Mine
C2024/3858	MEU	WorkPac Pty Ltd and WorkPac Mining Pty Ltd	Saraji Mine
C2024/3859	AMWU	OS ACPM Pty Ltd	Peak Downs Mine
C2024/3860	AMWU	OS ACPM Pty Ltd	Saraji Mine
C2024/3861	AMWU	OS ACPM Pty Ltd	Goonyella Riverside Mine

[2] The mines are open cut mines producing black coal and are located in the Bowen Basin in Queensland. The Goonyella Riverside mine is located some 30 kilometres north of Moranbah. The Peak Downs mine is located some 31 kilometres south of Moranbah. The Saraji mine is located near Dysart in the Isaac region. The mines are operated by BM Alliance Coal Operations Pty Ltd (**BMACO**) on behalf of the Central Queensland Coal Associates Joint Venture (**CQCAJV**). Entities of which BHP Group Ltd is the ultimate holding company hold a 50 percent interest in CQCAJV: BHP Coal Pty Ltd (**BHP Coal)** 40.75 percent, Umal Consolidated Pty Ltd 0.75 percent and BHP Queensland Coal Investments Pty Ltd 8.50 percent. The other interests in CQCJAV are split between entities held by the Mitsui Corporation and Perpetual Limited.

[3] The CQCJAV has appointed an entity known as BM Alliance Coal Operations Pty Ltd (**BMA**) as a manager and agent in relation to particular matters. The share capital of BMA is held equally by a subsidiary of BHP Group Limited, BHP Metcoal Holdings Pty Ltd and a subsidiary of the Mitsubishi Corporation, Mitsubishi Development Pty Ltd. The regulated host for each of the orders sought by the Unions is BHP Coal, the employer covered by the *BMA Enterprise Agreement 2022* (**BMA Agreement**), which is the "host employment instrument" prescribing the "protected rate of pay" for the purposes of the proposed orders.

[4] The orders sought by the Unions are opposed by all respondents on various grounds. The OS Parties and BHP Coal assert that the Commission cannot be satisfied, for the purposes of s 306E(1A), that the work performed by employees of the OS Parties is not "for the provision of a service, rather than for the supply of labour". If that submission is accepted, no order can be made with respect to the OS Parties. If the submission is not accepted, the OS Parties and BHP Coal do not advance any submissions concerning the matters set out in ss 306E(2) and (8) and do not contend that the Commission should find that it is not fair and reasonable in all the circumstances to make orders with respect to the OS Parties.

[5] The OS Parties and BHP Coal note that the applications with respect to WorkPac and Chandler Macleod appear to be confined to employees of those entities supplied to BMACO to perform work in BMACO and BHP Coal supervised crews, as distinct from employees of the WorkPac and Chandler Macleod Parties supplied to third party contractors, and reserved their position to advance submissions and evidence in response to any attempt by the Unions to extend those applications beyond the scope understood by the OS Parties and BHP Coal. The

Unions made clear that it is not the intention of their applications that any regulated labour hire arrangement order would apply to employees of the Workpac or Chandler Macleod performing work for third party contractors.

[6] WorkPac and Chandler Macleod accept that the preconditions in s 306E(1) for making an order are met and that the Commission should be satisfied that the performance of work by their employees for BHP Coal is not or will not be for the provision of a service, rather than the supply of labour, for the purposes of s 306E(1A). WorkPac and Chandler Macleod, however, contend that it would not be fair and reasonable in all the circumstances for the Commission to make the orders sought in the applications concerning those parties.

HEARING AND CONFIDENTIALITY ORDER

[7] A hearing was conducted over 9 days. Oral evidence was given by 30 persons, as listed in **Annexure A** and Statements of evidence from those persons were tendered. A further 6 witness statements were tendered made by persons who were not required for cross-examination. BHP, the OS Parties, Chandler Macleod and WorkPac sought, and were granted, a confidentiality order relating to certain material tendered by witnesses for those parties and material provided to the MEU and the AMWU in response to Notices to produce, which was tendered in evidence and referred to in submissions. The confidentiality order, the scope of which was expanded through the course of the hearing, was issued pursuant to s. 594 of the Act on the basis that BHP, the OS Parties, WorkPac and Chandler Macleod contended that the material is commercially sensitive. The effect of the confidentiality order is to designate certain material as Confidential and to authorise access to that material by persons designated as 'Confidential Materials Authorised Persons' in respect of the confidential material for each of the parties to the applications. Parts of the oral evidence and cross-examination traversing the confidential material were also the subject of the confidentiality orders and was given in closed session. Parts of the Transcript of proceedings in relation to that evidence were also made subject of the confidentiality order.

[8] The confidentiality order was necessarily made prior to us receiving the confidential material. We have now had an opportunity to review and consider that material. We have decided to include extracts from, and summaries of, some of the material subject to the confidentiality order. We have incorporated that material at a level that in our view, does not involve the publication of material that should properly be confidential, or where a description of or extract from that material does not itself disclose information that is confidential. Prior to the publication of this decision, we granted a request made by BHP and the OS Parties to view an advance copy and provided those parties with an opportunity to raise any concerns about the inclusion of confidential material. At the same time, the decision was provided to the relevant Confidential Materials Authorised Persons for each party with redactions applied to any material that the persons in specific matters were not authorised to view. In an email sent with the advance copy of the decision, we expressed a *provisional view* to the parties that the way in which we had dealt with the confidential material in our decision, had appropriately addressed any concerns they may have in relation to its publication.

[9] Submissions were made by the parties in relation to our provisional view. BHP and the OS Parties contended that confidentiality should be maintained in accordance with the orders and that to publish the material would disclose information and documents that were put before

the Commission on that basis. It is also submitted that BHP and the OS Parties had not sought to redact all parts of the confidential information in the orders but instead, had identified information that is of substantial commercial sensitivity such that it would be prejudicial for it to be disclosed. WorkPac and Chandler Macleod also submitted that confidentiality should be maintained in accordance with the current order by redacting relevant parts of the decision. WorkPac submitted that the information is financial information that is commercially sensitive to WorkPac's business and that its publication could have adverse consequences for the Company.

[10] While not seeking to be substantively heard in relation to question of which, if any parts of the decision should be redacted, the MEU submitted that the proceedings were a matter of public interest, the reasons of the Full Bench would have wider implications for applications under s. 306E and the decision involves the first occasion the Commission has had to construe and apply ss. 3096E(1A) and (7) of the Act. The decision also deals with significant matters of construction and application concerning s. 306E(2). The MEU submitted that it is important that the public and other industrial parties are able to gain as complete an understanding as to the reasoning of the Full Bench as possible, and any redactions should be limited in nature and as confined as possible.

[11] We have had regard to these submissions. As a result, we have redacted some, but not all the material subject to the confidentiality order. We have redacted quantitative information but have retained summaries of material such as contractual arrangements between the various parties. It is axiomatic that these contracts exist, and we do not accept that simply because they were the subject of confidentiality orders, those arrangements should remain confidential. The overview and information we have provided is at high level we have redacted references to the quanta of payments made under the contracts and the formulae for calculating those payments. In doing so we are conscious that the applications subject of these decisions are the first contested applications under s 306E, and that it is in the interests of open justice that the evidence upon which we have relied and our approach to assessing that evidence is set out as comprehensively as possible, while maintaining the confidentiality of commercially sensitive information, the release of which could cause damage to the parties. An amended confidentiality order will be issued consistent our conclusions in relation to redaction of confidential material.

STATUTORY PROVISIONS

[12] Part 2-7A of the Act is entitled "Regulated labour hire arrangement orders" and provides, among other things, for the Commission to make such orders and sets out the obligations of employers and regulated hosts covered by those orders. The key provision in Part 2-7A is s 306E which sets out when the Commission must make a regulated labour hire arrangement order. The most relevant parts of s 306E for present purposes are as follows:

> **306E FWC may make a regulated labour hire arrangement order**
>
> *Regulated labour hire arrangement order*
>
> (1) The FWC must, on application by a person mentioned in subsection (7), make an order (a regulated labour hire arrangement order) if the FWC is satisfied that:

(a) an employer supplies or will supply, either directly or indirectly, one or more employees of the employer to perform work for a regulated host; and
(b) a covered employment instrument 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; and
(c) the regulated host is not a small business employer.

Note: The FWC may make other decisions under this Part which relate to regulated labour hire arrangement orders: see Subdivisions C (short - term arrangements) and D (alternative protected rate of pay orders) of this Division, and Division 3 (dealing with disputes).

(1A) Despite subsection (1), the FWC must not make the order unless it is satisfied that the performance of the work is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters in subsection (7A).

(2) Despite subsection (1), the FWC must not make the order if the FWC is satisfied that it is not fair and reasonable in all the circumstances to do so, having regard to any matters in subsection (8) in relation to which submissions have been made.

…

(4) For the purposes of paragraph (1)(b), in determining whether a covered employment instrument would apply to the employees, it does not matter on what basis the employees are or would be employed.

…

Matters that must be considered in relation to whether work is for the provision of a service

(7A) For the purposes of subsection (1A), the matters are as follows:

(a) the involvement of the employer in matters relating to the performance of the work;
(b) the extent to which, in practice, the employer or a person acting on behalf of the employer directs, supervises or controls (or will direct, supervise or control) the regulated 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 employer to perform the work;
(d) the extent to which either the 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.

Matters to be considered if submissions are made

(8) For the purposes of subsection (2), the matters are as follows:

(a) the pay arrangements that apply to employees of the regulated host (or related bodies corporate of the regulated host) and the regulated employees, including in relation to:
(i) whether the host employment instrument applies only to a particular class or group of employees; and

(ii) whether, in practice, the host employment instrument has ever applied to an employee at a classification, job level or grade that would be applicable to the regulated employees; and

(iii) the rate of pay that would be payable to the regulated employees if the order were made;

(c) the history of industrial arrangements applying to the regulated host and the employer;

(d) the relationship between the regulated host and the employer, including whether they are related bodies corporate or engaged in a joint venture or common enterprise;

(da) if the performance of the work is or will be wholly or principally for the benefit of a joint venture or common enterprise engaged in by the regulated host and one or more other persons:

(i) the nature of the regulated host's interests in the joint venture or common enterprise; and

(ii) the pay arrangements that apply to employees of any of the other persons engaged in the joint venture or common enterprise (or related bodies corporate of those other persons);

(e) the terms and nature of the arrangement under which the work will be performed, including:

(i) the period for which the arrangement operates or will operate; and

(ii) the location of the work being performed or to be performed under the arrangement; and

(iii) the industry in which the regulated host and the employer operate; and

(iv) the number of employees of the employer performing work, or who are to perform work, for the regulated host under the arrangement;

(f) any other matter the FWC considers relevant.

…

[13] Section 306E has been considered by the Full Bench in *Re Mining and Energy Union* [2024] FWCFB 299 (***Batchfire***), *Application by the Mining and Energy Union re Rix's Creek* [2025] FWCFB 12 (***Rix's Creek***) and, subsequent to the decision in this matter being reserved, in *Application by the Mining and Energy Union re Bengalla Mining Company* [2025] FWCFB 53 (***Bengalla***). In *Batchfire*, the Full Bench outlined a number of principles concerning the proper interpretation and application of s 306E. As observed by the Full Bench in *Batchfire*, s 306E(1) requires the Commission to make a regulated labour hire arrangement order if it is satisfied that the criteria specified in paragraphs (a), (b) and (c) of the subsection are met and neither of the prohibitions upon the making of such an order ("must not") in ss 306E(1A) and 306E(2) apply.[1]

[14] The issues raised by the parties in this matter fall into two categories. BHP and the OS Parties contend that the Commission cannot be satisfied that the performance of work by employees of the OS Parties is not or will not be for the provision of a service, rather than the supply of labour, for the purposes of s 306E(1A). WorkPac Parties and Chandler Macleod submit that the Commission should be satisfied that it is not fair and reasonable in all the circumstances to make orders that will apply to them and their employees for the purposes of s 306E(2). The questions of construction and factual controversies that are required to be addressed in relation to those matters are distinct and it is convenient to address the position of the OS Parties first and then turn to address the orders sought with respect to WorkPac Parties and Chandler Macleod.

SECTION 306E(1A) – FOR THE PROVISION OF A SERVICE, RATHER THAN THE SUPPLY OF LABOUR

[15] The basis upon which BHP and the OS Parties oppose the making of regulated labour hire arrangement orders with respect to employees of the OS Parties requires consideration of s 306E(1A) of the Act. The submission requires consideration of what is meant by the requirement that the Commission be satisfied that "the performance of work is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters in subsection (7A)" in s 306E(1A). The submission also requires consideration of the matters in s 306E(7A) to which the Commission is required to have regard in assessing whether "the performance of work is not or will not be for the provision of a service, rather than the supply of labour".

[16] It is appropriate to start with the structure of s 306E. Section 306E(1) imposes an obligation on the Commission ("must") to make a regulated labour hire order if it is satisfied that the matters in subsections (a), (b) and (c) are met. Leaving aside the circumstance that the regulated host is a small business employer, the obligation to make an order arises if the Commission is satisfied that an employer supplies or will supply employees to perform work for a regulated host to whom, if they were employed by the regulated host, a covered employment instrument would apply. That is, the premise upon which the section operates is that an employer supplies employees to perform work for a regulated host.

[17] Section 306E(1A) then qualifies the statutory imperative in subsection (1) ("[d]espite subsection (1)"). The qualification is by way of a prohibition on the Commission making an order ("must not make the order unless"). The prohibition exists unless the Commission is satisfied that the performance of work is not for the provision of a service, rather than the supply of labour. The Commission's state of satisfaction in relation to that matter is required to be formed "having regard to the matters in subsection (7A)". Section 306E(2) further qualifies the obligation to make an order in subsection (1) if the Commission is satisfied that it is not fair and reasonable in all the circumstances to do so having regard to any matters in subsection (8) in relation to which submissions have been made. As we have observed, s 306E(2) is not relied upon by the OS Parties, but we will return to that subsection in dealing with the submissions advanced by WorkPac and Chandler Macleod.

[18] Section 306E(1A) and (7A) were added to the amending legislation during the parliamentary process. Part 2-7A was introduced into the Act by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (the **Closing Loopholes Act**). The text of the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) (the **Closing Loopholes Bill**) at the time of its first reading included reference to "whether the performance of the work is or will be wholly or principally for the provision of a service, rather than the supply of labour to the regulated host" as one matter to which the Commission was required to have regard (if a submission was made in relation to it) in determining if it is not fair and reasonable in all the circumstances to make an order. Section 306E(8)(b) listed a series of matters to which the Commission was to have regard in determining that question which are similar, but not identical, to those now appearing in s 306E(7A) of the Act.

[19] The initial Explanatory Memorandum to the Closing Loopholes Bill explained the new s 306E(8)(b) in the following terms:

> New paragraph 306E(8)(b) would provide that the FWC may consider whether the work performed by the regulated employee is part of the provision of a specific service, rather than the supply of labour. This paragraph would recognise that employers often contract for the provision of specialised external services rather than for the provision of labour to undertake work that the employer engages in the ordinary course of its business. The Part does not intend to regulate contracting for specialised services. For example, a catering service contracted to provide catering for employees of a regulated host whose primary business is not the provision of catering services may be found to be the provision of a specialised service, even where the host employment instrument provided for the performance of work of the type provided by the service. New subparagraphs 306E(8)(b)(i)–(vi) would outline factors that would inform this consideration. Not all the factors listed would need to be satisfied for the FWC to find that the arrangement relates to the provision of a service rather than the provision of labour.

[20] As such, the stated intention of the new subsection was to give effect to an understanding that Part 2-7A did not intend to "regulate contracting for specialised services". The statement was not entirely accurate for at least two reasons. The initial version of the Bill did not exclude contractors providing specialised services from the operation of the Part entirely. Whether the performance of work was for the provision of a service, rather than the supply of labour, was only one matter to be considered by the Commission when determining if it is not fair and reasonable to make an order. Further, although the extent to which the work is of a specialist or expert nature was one matter the Commission was to have regard to in assessing whether the performance of work was wholly or principally for the provision of a service, that concept was not necessarily limited to "contracting for specialised services".

[21] During the second reading debate in relation to the Closing Loopholes Bill, the Government moved amendments to add s 306E(1A) and (7A) in the section in place of s 306E(8)(b). The Minister explained the amendments in the following terms:[2]

> On closing the labour hire loophole, one of the key arguments made by business groups was that there was concern about whether or not the legislation had unintentionally caught service contractors. The provisions were never intended to apply to service contracting, as is reflected in the explanatory memorandum to the closing loopholes bill. I want to acknowledge the engagement with the Australian Resources and Energy Employer Association, AREEA, and Professor Andrew Stewart, who had raised concerns and called for an amendment of this form. However, to make this even clearer than it was in the explanatory memorandum, the government amendment ensures the Fair Work Commission cannot make an order where work performed for a host is the provision of a service rather than the supply of labour. These amendments expressly provide that the Fair Work Commission must not make an order unless it is satisfied that the work is not for the provision of a service rather than supply of labour; delete the words 'wholly or principally' from the multifactor test, providing further certainty on how the multifactor test will operate; and clarify the termination entitlements for a labour hire employee covered by a regulated labour hire arrangement order. The amendment is a commonsense way of cutting red tape for business and simplifies leave entitlements while still preserving the government's policy intention.

[22] The Minister submits in these proceedings that the addition of s 306E(1A) and (7A) did not represent the addition of new qualifications which had not been in contemplation at the time of the Closing Loopholes Bill being introduced into Parliament or the Minister's second reading speech. Rather, the Minister suggests that the amendment gives effect to what had always been the intention behind the legislation. Regardless of intention, the effect of s 306E(1A) is to

prohibit the Commission from making a regulated labour hire arrangement order if it is satisfied that the performance of work is not or will not be for the provision of a services, rather than the supply of labour.

[23] It is necessary to then address relevant questions which arise in relation to the construction of s 306E(1A) and (7A), some of which are in contest between the parties. *First*, the words "[d]espite subsection (1)" mean that s 306E(1A) takes precedence in the sense that, even if the requirements for the making of an order in subsection (1) are met, the Commission is prohibited from making an order if it is not satisfied of the matter identified in subsection (1A). The word "despite" generally has a meaning equivalent to "notwithstanding".[3] Subsection (1) confers the power, and obligation, to make a regulated labour hire arrangement order. That section is rendered inoperative unless the Commission is positively satisfied that the performance of work is not or will not be for the provision of a service, rather than the supply of labour.[4] In that sense, the subsection erects an additional jurisdictional precondition to an order being made.

[24] BHP and the OS Parties suggest that this means the Unions bear the persuasive onus of proving that the performance of work is not, or will not be, for the provision of a service and that the MEU and the AMWU have not met their "persuasive onus". That is not, in our view, an apt description of the task facing the Commission under s 306E(1A). It has frequently been said that notions of onus have a limited role in Commission proceedings. It may be accepted that where the Act requires satisfaction as to a matter in order for a particular power to be exercised, the party invoking the jurisdiction will bear the risk of failure if the material before the Commission does not permit that state of satisfaction to be reached.[5] The MEU and the AMWU, in that sense, bear the risk of non-persuasion where they have applied for the Commission to make an order.

[25] However, whether the state of satisfaction required by s 306E(1A) can be reached will depend upon an assessment of all the material before the Commission, including whether any other party has advanced evidence in opposition. That may be particularly significant where such matters are peculiarly within the knowledge of one or other of the parties.[6] The regulated host and the employer that is either supplying labour or providing a service will frequently be best placed to put forward evidence relevant to that assessment. Whether those parties have advanced evidence in relation to the work performed by the regulated employees, and the nature of any evidence put forward, may be relevant to whether the Commission can be satisfied that the precondition in s 306E(1A) is met. The evidence which is put forward, and what evidence is not put forward by parties who are in a position to do so, may affect whether the Commission reaches the relevant state of satisfaction. At the end of the day, the Commission is either satisfied the power to make an order exists or it is not, and it matters little how the Commission arrives at that state of mind.[7]

[26] *Second*, there is no dispute that the phrase "the performance of work" in s 306E(1A) refers to the performance of work by the regulated employees referred to in subsection (1)(a). In the context of s 306E(1), that must be correct. Section 306E(1)(a) establishes that one matter about which the Commission must be satisfied before it can make a regulated labour hire arrangement order is that an employer supplies or will supply one or more employees to "perform work for the regulated host". An employee who is supplied to perform that work is a "regulated employee".[8] Where s 306E(1A) asks whether the performance of work is for the

provision of a service, rather than the supply of labour, it can only sensibly be understood as referring to the same work, that is, the work performed by the relevant employees for the regulated host and requires consideration of the work tasks and job responsibilities of the those employees.

[27] BHP and the OS Parties submit that this is only part of the story and what is significant is what the performance of work is "for". It is submitted that the word "for" in s 306E(1A) connotes the purpose or end for which the work is being performed and, ultimately, requires an assessment of whether the performance of work is for the provision of a service. BHP and the OS Parties suggest that the required characterisation concerns what the OS entities are employing the regulated employees to perform work for, that is, whether it is to permit the OS entities to provide a service to BMA/BHP Coal or to supply labour to BMA/BHP Coal. Submissions to a similar effect are made by the Minerals Council and the AREEA.

[28] The Minister, whose submissions are largely embraced by the MEU and the AMWU, appears to accept that the inquiry as to what the performance of work is "for" requires an examination of purpose. Such an approach is consistent with dictionary definitions of the word "for" as including the meaning "with the object or purpose of".[9] However, the Minister submits that the focus of the inquiry should be directed at the purpose of the performance of work and not the terms of any legal or commercial arrangement between the employer and the regulated host or any other entity. The Minister contends that BHP and the OS Parties erroneously concentrate on characterising the arrangements between the OS entities and BMA/BHP Coal rather than the performance of work by the regulated employees. The MEU similarly submits that s 306E(1A) focuses on the performance of the work rather than the underlying commercial or contractual arrangements between the employers, the regulated host or other legal entities.

[29] The true position is more nuanced than the parties suggest. We accept that the word "for" connotes an examination of the purpose or object of the work of the regulated employees, or the function served by the work performed. We also accept that the purpose or function of the work performed by the regulated employees is necessarily bound up with the arrangements between the employer and the regulated host under which the regulated employees are supplied to perform work for the regulated host. It will also be relevant to examine what the employer provides to the regulated host to ascertain whether the work performed by the regulated employees is for the provision of a service or the supply of labour. This is likely to include consideration of whatever commercial or contractual arrangements exist between the employer and the regulated host but will not be limited purely to the contractual provisions.

[30] However, the arrangements which exist between the employer and the regulated host are not relevant in a general sense or in themselves, but only to the extent that they cast light upon the purpose or function of the work performed by the regulated employee or employees. It is conceivable that the arrangements as between the employer and the regulated host will cover other matters going beyond the work performed by the regulated employees or the employer will undertake activities properly regarded as facilitating or supporting the supply of labour. Those activities will have limited, if any, relevance and will not preclude a finding that the performance of work is not for the provision of a service rather than the supply of labour. Further, although the contractual obligations of the employer and the regulated host may be relevant, the considerations in s 306E(7A) make clear that the Commission is not confined to examining the relevant legal obligations of the employer and the regulated host and is required

to consider the arrangements applying to the work of the regulated employees "in practice". Also relevant will be the nature of the business or enterprise of the regulated host and the work performed by employees of the regulated host vis-à-vis the work performed by the regulated employees.

[31] Section 306E(7A)(b) expressly requires consideration of the extent to which the employer directs, supervises or controls the work of the regulated employees "in practice". In our opinion, each of the considerations in s 306E(7A)(a), (c), (d) and (e), properly understood, direct attention at the extent to which the employer is actually involved in matters relating to the performance of work, the regulated employees use systems, plant or structures of the employer, the employer will be subject of industry or professional standards and the work is actually of a specialist or expert nature. The contractual arrangements under which the employees are supplied will be relevant but are not exhaustive of the required analysis. The Revised Explanatory Memorandum to the Closing Loopholes Bill supports this view. Among other things, it states that:[10]

> These provisions allow the FWC to assess the reality of the arrangement to determine whether it is, or is not, for the provision of a service and then decide, as a jurisdictional question, whether it is prevented from making an order.

[32] *Third*, the expression "for the provision of labour, rather than the supply of labour" presents a binary choice. In circumstances in which the employer supplies employees to perform work for the regulated host for the purposes of s 306E(1)(a), the performance of work will fall into one of two categories identified in subsection (1A). Either the performance of work by a regulated employee is or will be for the provision of a service or the performance of work is or will be for the supply of labour. The parties agree that the Commission's task, in that respect, involves a question of characterisation as to which side of the line the performance of work falls in a particular case. The question of characterisation involves an evaluative inquiry in which all relevant matters, at least including those in s 306E(7A), are taken into account.

[33] The parties disagree, however, in relation to the nature of the distinction. BHP and the OS Parties submit that the distinction between the "provision of a service" and the "supply of labour" is that the provision of a service involves something more than "just" or "simply" the supply of labour. On this submission, the "provision of a service" is defined in contradistinction to the "supply of labour". If OS Production nor OS Maintenance do more than merely supply labour, so the submission goes, it must follow that each provides a "service" and the performance of work by the regulated employees is "for" the provision of that service. The Minerals Council, the AREEA and the Ai Group make similar submissions or support the position advanced by BHP and the OS Parties. The Minister, the MEU and the AMWU and the ACTU each contend that the characterisation exercise required by s 306E(1A) is not to be conducted on the basis that, if the employer provides anything more than the mere supply of labour, it follows that the performance of work is to be characterised as being "for the provision of a service".

[34] The approach contended for by BHP and the OS Parties is, in our opinion, overly simplistic and cannot be reconciled with the text or purpose of s 306E(1A) and (7A). Of particular significance are the considerations in subsection (7A) to which the Commission is required to have regard in undertaking the characterisation exercise. BHP and the OS Parties may be correct to submit that the considerations listed in s 306E(7A) do not directly define the

concepts of the "provision of a service" and the "supply of labour". However, they are matters to which the Commission is required to have regard in making the assessment and are plainly relevant to understanding what is meant by those concepts. As BHP and the OS Parties acknowledge, a finding that one or more of the matters in s 306E(7A) exist is likely to favour a finding that the performance of work is for the provision of a service and its absence to favour a finding that it is for the supply of labour. The Revised Explanatory Memorandum notes, for example, that:[11]

> To the extent that each of the factors in paragraphs 307E(7A)(a) to (e) are demonstrated by submissions and evidence of the parties to the application for an order – for instance, that an employer directs, supervises or controls work being performed for the host – this would weigh in favour of the FWC finding that the arrangement is for the provision of a service rather than the supply of labour.

[35] The description of the matters in s 306E(7A) cannot be reconciled with the submission that if an employer provides anything more than the mere supply of labour then the performance of work must be for the provision of a service. The considerations in s 306E(7A)(b), (c), (d) and (e) each refer, respectively, to the "extent to which" the employer directs, supervises or controls the regulated employees when they perform the work, the regulated employees use systems, plant or structures of the employer, the employer will be subject to industry or professional standards and the work is of a specialist or expert nature.

[36] That language contemplates that one or more of those features may be present to some extent, yet the performance of work will nonetheless still be properly characterised as being for the supply of labour. For example, the employer might direct, supervise or control the regulated employees when they perform work to some extent for the purposes of s 306E(7A)(b) but the performance of work by the regulated employees will remain for the supply of labour and not the provision of a service having regard to all other relevant matters. Similarly, s 306E(7A)(c) contemplates that the regulated employees might use the systems plant or structures of the employer in the performance of the work, but the performance of work will nonetheless remain for the supply of labour.

[37] In support of their submission in this respect, the OS Parties rely on a passage from the decision in *Batchfire* in which the Full Bench said:[12]

> … It is clear that 'service' in s 306E(1A) is used in a different sense than 'service' as defined in s 22. The contradistinction between the provision of a service and the supply of labour in s 306E(1A) implies that the former must involve something more than simply the performance of work by the employees supplied to the regulated host. The matters prescribed in s 306E(7A) provide guidance as to the matters which might constitute this 'something more', so that a finding of fact that one or more of these matters apply would weigh in favour of a conclusion that a service, and not just labour, is being provided.

[38] BHP and the OS Parties read too much into this passage. The Full Bench suggested that the "provision of a service" must involve *something more* than simply the performance of work by the regulated employees. It does not say that the provision by the employer to the regulated host of *anything more* than the work of the regulated employees necessarily leads to the performance of work being properly characterised as being for the provision of a service. The recognition that a finding that one or more of the matters in s 306E(7A) apply would "weigh in

favour" of a conclusion that a service is being provided acknowledges that the assessment involves questions of degree. Just because one or more of those matters applies does not necessarily lead to the conclusion that the performance of work is for the provision of a service, or that it is for the supply of labour. That the assessment involves questions of degree is implicit in the analysis of the Full Bench in *Batchfire* which emphasised that the anchoring of the requirement to make a regulated labour hire order upon the Commission reaching a relevant opinion or state of mind, imports a degree of latitude and subjectivity in the evaluation of matters in s. 306E(1)(a) – (c).[13] The observations of the Full Bench in *Batchfire* about s. 306E(1A) must be viewed in the context of its earlier views about the approach to deciding whether the Commission has reached the necessary state of satisfaction for the purposes of s. 306E(1). It would be contrary to that approach to apply s. 306E(1A) in the manner contended for by BHP and the OS parties.

[39] Furthermore, the considerations in s 306E(7A) are not to be regarded simply as either present or absent. The nature, circumstances and degree of the involvement of the employer in matters relating to the performance of work for the purposes of s 306E(7A)(a), for example, is likely to bear upon the characterisation exercise and not merely whether the employer has some or no such involvement. Similarly, the type, value and circumstances in which the regulated employees use systems, plant or structures of the employer for the purposes of s 306E(7A)(c) may be significant. The provision of uniforms or relatively inexpensive personal protective equipment by the employer may say little about whether the work should be characterised as being for the provision of a service. The use by the regulated employees of valuable and specialist equipment in which the employer has made a significant investment, on the other hand, might present a substantial impediment to the Commission being satisfied that the performance of work is not for the provision of a service, rather than the supply of labour.

[40] We also note that, in *Batchfire*, there was no opposition to the Commission making a regulated labour hire arrangement order and there was no serious contention between the parties as to proper construction of s 306E(1A). No party contended that the performance of work by the regulated employees concerned was for the provision of a service, rather than the supply of labour. Whilst the Full Bench provided valuable guidance in relation to the provisions of Part 2-7A of the Act, it did so in the absence of contention as to the proper application of the provision. A case is not authority for a proposition that was not argued.[14] We do not accept that *Batchfire* is authority for the proposition advanced by BHP and the OS parties in relation to s. 306E(1A).

[41] BHP, the OS Parties and the Minerals Council refer to a number of authorities which have considered the concept of "labour hire" or analogous expressions in other contexts. The phenomenon of "labour hire" is not new to industrial relations and courts, tribunals and legislatures have endeavoured to address the challenges presented by hired or lent workers, both practical and to legal doctrine, for many years. The engagement and deployment of workers through labour hire arrangements has raised issues, for example, as to the nature of the legal relationship between the worker, the labour hire agency and the host,[15] attribution of liability for negligence on the part of the worker[16] and the obligations of the labour hire agency under work health and safety or workers compensation legislation.[17] A number of States and Territories have enacted legislation facilitating licensing regimes for labour hire agencies which contain definitions of "labour hire".[18]

[42] Part 2-7A is concerned with the regulation of labour hire workers and, as it is put in the extrinsic materials, closing the "labour hire loophole". Stated in sufficiently general terms, the concept of labour hire is not difficult to understand and encompasses a situation in which an employer supplies workers under contract to a client to perform work for the client ordinarily at the client's premises. The general concept of labour hire is contemplated by the requirement in s 306E(1)(a) and provides a useful frame of reference for the assessment required by s 306E(1A). In our view, having regard to the language of s 306E(1A) and the matters listed in s 306(7A), the core question asked is whether the performance of work by the regulated employees is properly characterised as being for the provision of an identifiable and discrete service to the regulated host which is distinct from the supply of the labour of the workers to work in or as part of the business of the regulated host.

[43] Different arrangements which fall within the broad concept of labour hire might vary significantly in the manner in which they operate in practice, including in relation to the degree of control retained by the labour hire employer, the extent to which equipment, uniforms or plant are provided or involvement in selection, discipline or training. Particularly when it comes to consideration of the operation of the precondition in s 306E(1A), we believe limited assistance can be derived from authorities, or statutory definitions, dealing with the general concept of "labour hire" in other contexts. The Commission is required to apply s 306E(1A) having regard to the particular considerations listed in s 306E(7A).

[44] BHP and the OS Parties and the Minerals Council rely specifically on two authorities. In *Victorian Workcover Authority v Divadeus Pty Ltd (in liq)* [2016] VSCA 81, the Victorian Court of Appeal considered the meaning of "supply of labour" in a WorkCover premiums order made under the *Accident Compensation (WorkCover Insurance) Act 1993* (Vic). The expression "labour hire" was defined in the order to mean "the supply, whether directly or indirectly, of the labour of one or more workers employed by the employer, not being a supply of labour in connection with: (a) the performance by the employer of a specified task; (b) the discharge by the employer of a specified function; or (c) achievement by the employer of a specified outcome." The court concluded that an employer carrying on a business of providing security services to tertiary education institutions was providing labour in connection with the performance of its own tasks and to discharge its own obligations to the client.[19]

[45] In coming to that conclusion, BHP and the OS Parties and the Minerals Council emphasised that the court gave primacy to the contractual terms and limited weight to certain incidents of client control given the broader contractual relationship. The court said, for example:[20]

> It is evident that the obligations of Divadeus to its clients extended beyond the mere provision of suitable labour. Divadeus was obliged to provide security services as extensively provided for in the contracts. In requiring Divadeus to provide security services, and not merely to provide suitable labour to enable the client to have security-related work performed, the contracts specified tasks or functions within the meaning of paragraphs (a) and (b) of the definition of 'labour hire'. And, as the definition requires, the contracts stipulated that the tasks or functions were to be performed or discharged by Divadeus.
>
> …
>
> In our view, how the contract is performed is not critical. In this regard, and with respect, we do not attach the same importance as the judge did to whether or not the security guards and supervisors were required to perform specific tasks at the direction of the clients or at the

> direction of Divadeus. That distinction is not determinative of the applicability of subparagraphs (a) and (b) of the definition of 'labour hire'. We acknowledge that the Swinburne University contract stated that the 'high quality comprehensive security service' would be provided by '[Divadeus] and its Security Officers', 'together with University staff'. However, the joining of Divadeus and University staff in the provision of security services does not alter the fact that Divadeus' staff were being supplied in connection with the performance of tasks or the discharge of functions by Divadeus.
>
> The fact that its employees were subject to direction or control by the clients in undertaking the performance of the contracted services, and that such direction or control was regularly exercised by clients, does not detract from the existence of the obligation of Divadeus. It remained contractually bound to provide the services and could be sued for any failure to do so.

[46] Although the concepts under consideration are not entirely foreign to s 306E(1A), the reasoning of the court demonstrates the difficulty with seeking to directly apply approaches adopted in other statutory contexts to the section. For example, the court regarded how the contract was performed as of limited significance to the application of the workers compensation order. Although the terms of any contract between the regulated host and the employer are likely to be relevant, s 306E(7A) requires that the Commission have regard, expressly or impliedly, to how the arrangement operates "in practice". Similarly, the court suggested that the fact the employees were subject to direction or control by the client was not relevant in the particular statutory context under consideration. In contrast, s 306E(7A)(b) requires the degree to which the regulated employees are subject to the direction, supervision or control of the employer must be considered in characterising what the performance of work by those employees is for in the context of s 306E(1A). Necessarily, that will involve some consideration of the direction or control exercised by the regulated host.

[47] The second authority referred to is the decision of the NSW Court of Appeal in *Marketform Managing Agency Ltd v Ashcroft Supa IGA Orange Pty Ltd* [2020] NSWCA 36. That decision concerned an exclusion for work performed under a contract for "labour only services" in the terms of an insurance policy. The court concluded that the contract between the agency and supermarket was not for "labour only services" and said, among other things:[21]

> I am prepared to assume that, in context, the language of a contract "for the provision of labour only services to the Insured" should be understood as intended to capture many of what the appellant described in submissions as "labour hire" arrangements.
>
> That assumption, however, does not answer the critical question in this case. The phrase the parties have chosen to use is "labour only services". The language used captures a narrower class of contractual arrangements than all "labour hire" arrangements. Whatever the limits of the expression labour only services, the contract between Skillset and the first respondent was not a contract for the supply of "labour only" services because a number of other important services were supplied under the contract.

[48] The court noted that the agency was expressly contracted to provide other services such as recruitment, vocational training, payroll and administration services and support to the supermarket.[22] Again, the reasoning demonstrates the difficulty with applying authorities addressing differently worded instruments. The court made clear that it was not dealing with "labour hire" generally, but the specific provision of the policy which excluded liability for injury to a person under a contract for the provision of "labour only services". The contractual

focus was dictated by the term of the policy. As we have explained, whilst contractual arrangements relating to the performance of work by a regulated employee are likely to be relevant, s 306E(1A) is not directed only at contractual provision and it cannot be said that the performance of work is for the "provision of a service" only because something more than labour is provided by the employer to the regulated host.

[49] *Fourth*, the Minister, the MEU, the AMWU and the ACTU each submit, in somewhat different terms, that s 306E(1A) and (7A) should not be interpreted narrowly so as to preserve the statutory intent behind the beneficial or remedial scheme in Part 2-7A. The Minister, for example, submits that an overly broad interpretation of s 306E(1A) and (7A) may result in the "provision of a service" exception undermining the public interest and the beneficial and remedial purpose of Part 2-7A. The Minister says that it is well-settled that beneficial provision ought to be construed liberally and beneficially, "least courts become the undoers and destroyers of the benefits and remedies provided by such legislation".[23]

[50] We accept that Part 2-7A can be described as containing beneficial and protective provisions. The Part generally, and s 306E in particular, is intended to permit the Commission to make an order the effect of which is to ensure that the engagement of employees through a labour hire arrangement cannot be used to pay employees lower rates of pay than those applicable to directly engaged employees of the regulated host. In a general sense, the Part should be construed so as to give the fullest relief which the fair meaning of its language will allow. However, we recognise that it can involve error to commence the task by identifying a "liberal" or "narrow" approach. For example, in *Ryan v Commissioner of Police* [2022] FCAFC 36; (2022) 290 FCR 369, the Full Court explained:[24]

> It is true that the High Court has more recently held that, "to commence the process of construction by posing the type of construction to be afforded — liberal, broad or narrow — may obscure the essential question regarding the meaning of the words used": *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232 at [32]-[33]. Rather, as Gageler J pointed out at [92], "[t]he principle that beneficial legislation is to be construed beneficially is a manifestation of the more general principle that all legislation is to be construed purposively". That general principle is mandated by s 15AA of the Acts Interpretation Act: *Tjungarrayi v Western Australia* (2019) 269 CLR 150 at [44] (Gageler J). However, this does not justify a simplistic assumption that whatever construction furthers the statute's primary purpose must be determinative: *Tjungarrayi* at [46] (Gageler J); *Carr v Western Australia* (2007) 232 CLR 138 at [5]-[7] (Gleeson CJ). We do not read the passages in *IW v City of Perth* as requiring any different approach.

[51] We adopt that approach in the present matter. In addition, s 306E(1A) and (7A) represent an exception to the operation of Part 2-7A or, to put it another way, a precondition to the obligation which would otherwise arise to make a regulated labour hire arrangement order. A provision designed to exclude the operation of beneficial legislation conferring rights on employees should not itself be liberally construed.[25] However, exceptions will frequently be included in legislation to provide the practical balance between competing public interests. It is important that such an exception should be interpreted carefully in order not to destroy that balance.[26] Section 306E(1A) is to be regarded as intended to provide balance by excluding employees performing work for the provision of a service or what the Minister refers to as "genuine service contractors". In those circumstances, we are not much assisted by exhortations

to adopt a liberal or generous construction. However, we are conscious that s 306E(1A) and (7A) are to be construed in the context of the purpose of Part 2-7A as a whole.

[52] *Fifth*, the parties disagree as to whether the list of considerations set out in s 306E(7A) is exhaustive of the matters the Commission is able to consider in assessing whether the performance of work is for the purposes of subsection (1A). Section 306E(1A) requires the Commission to have regard to the matters in subsection (7A) in determining if it is satisfied that the performance of work is not or will not be for the provision of a service, rather than the supply of labour. It is uncontroversial that the requirement means that they are mandatory considerations in the sense discussed in *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24[27] and are matters that must be treated as a matter of significance in the decision-making process.[28]

[53] The disagreement between the parties is as to whether the list is exhaustive of the considerations that might bear upon the question posed by s 306E(1A). The Minister, the MEU and the ACTU each contend that the factors in s 306E(7A) are exhaustive of the considerations the Commission is able to take into account. Those parties submit that the language of s 306E(1A) and (7A) support that view, particularly the requirement in subsection (1A) that the Commission be satisfied "having regard to the matters in subsection (7A)" and that subsection (7A) provides that "the matters are as follows". They also contrast the language of s 306E(1A) and (7A) with the language of s 306E(2) and (8). The reference in s 306E(2) to the Commission assessing whether it is not fair and reasonable to make an order "in all the circumstances" and the express capacity in subsection (8)(f) for the Commission to have regard to "any other matter the FWC considers relevant" indicates that those factors are not exhaustive. The absence of similar language in s 306E(1A) and (7A) is said to suggest a different approach is intended.

[54] Although there is some textual support for the position advanced by the Minister, the MEU and the ACTU, we do not believe the language of s 306E(1A) and (7A) dictate the conclusion that the matters in subsection (7A) are exhaustive of the considerations the Commission is lawfully able to take into account in making the judgment required by subsection (1A). The subsections do not expressly state that those considerations are exhaustive or preclude consideration of other relevant matters. The breadth and significance of the finding required to be made for the purposes of s 306E(1A) suggests that, although the Commission is required to have regard to the matters set out in subsection (7A), other relevant matters arising from the evidence might be considered.[29]

[55] Some assistance can be derived from authorities in other contexts. In *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322, the court considered a provision that required the determination of a scale of fees for nursing homes having regard to the "costs necessarily incurred in providing nursing home care in the nursing home". In relation to that provision, Mason J observed:[30]

> However, the sub-section does not direct the Permanent Head to fix the scale of fees exclusively by reference to costs necessarily incurred and profit. The sub-section is so generally expressed that it is not possible to say that he is confined to these two considerations. The Permanent Head is entitled to have regard to other considerations which show or tend to show that a scale of fees arrived at by reference to costs necessarily incurred, with or without a profit factor, is excessive or unreasonable. It may be that the rent paid by the proprietor of a nursing home, though a cost necessarily incurred, exceeds the prevailing rental which is paid for comparable premises and

> that the determination of a scale of fees by reference to that rent would result in a scale of fees which is unreasonably high. The Permanent Head would be entitled to take this factor into account in making his determination.

[56] A requirement to have regard to particular considerations does not necessarily exclude the potential consideration of other relevant matters.

[57] The approach proposed by the Minister, the MEU and the ACTU has the potential to lead to somewhat artificial distinctions. For example, the Minister acknowledged that his submissions would mean that s 306E(7A)(c) requires the Commission to take into account the extent to which the regulated employees use or will use systems, plant or structures of the employer to perform the work but would not permit consideration of the manner or nature of the use. That approach would impose an unnatural constraint on the broad evaluative assessment the Commission is required to make and is unlikely to have been intended. In that respect, we note that the Revised Explanatory Memorandum to the Closing Loopholes Bill simply states:[31]

> In order to determine whether an arrangement is for the provision of a service rather than the supply of labour, the FWC would be required to have regard to the matters listed in new subsection 306E(7A).

[58] In our view, the matters set out in s 306E(7A) are not necessarily exhaustive of the considerations the Commission is able to take into account in assessing whether the performance of work by the regulated employees is able to be described as for the provision of a service rather than the supply of labour.

[59] *Finally*, it is appropriate to say something about the use of extrinsic material related to the Closing Loopholes Bill. BHP and the OS Parties submit that recourse to extrinsic materials is not warranted in this matter because the circumstances identified in either s 15AB(1)(a) or (b) of the *Acts Interpretation Act* 1901 (Cth) do not exist. The same submission is made by WorkPac with respect to s 306E(2) and (8). WorkPac submits that the extrinsic material is not relevant because no word or expression in Part 2-7A generally, or s 306E in particular, is ambiguous or obscure or has an ordinary meaning that is manifestly absurd or unreasonable so as to permit recourse to extrinsic material to "determine the meaning of the provision".[32]

[60] We do not accept the limitation on reference to extrinsic materials is as restricted as those parties suggest. It has been said that the notion that context and legitimate secondary material such as a second reading speech or an explanatory memorandum cannot be looked at until some ambiguity is drawn out of the text itself cannot withstand the weight and clarity of High Court authority since 1985.[33] Furthermore, s 15AB of the Acts Interpretation Act supplements but does not displace the common law.[34] In *Sydney Seaplanes Pty Ltd v Page* [2001] NSWCA 204; (2021) 106 NSWLR 1, for example, Bell P (as his Honour then was) explained:[35]

> Although s 34(1) of the *Interpretation Act 1987* (NSW), which is in virtually identical terms to s 15AB of the *Acts Interpretation Act 1901* (Cth), would appear to constrain the use of extrinsic materials such as explanatory memoranda and second reading speeches in the identification of statutory purpose and only permit recourse to them either to confirm the "ordinary meaning" of a statutory provision or in cases of ambiguity or obscurity or where giving effect to the ordinary

> meaning would lead "to a result that is manifestly absurd or is unreasonable", the modern common law of statutory interpretation permits recourse to such extrinsic materials in the absence of ambiguity and has, perhaps somewhat surprisingly, been held to authorise such use even in circumstances where that use would not be permitted under the *Acts Interpretation Act* and, by parity of reasoning, the *Interpretation Act*: see *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 99, 112; [1997] HCA 53; *Consolidated Media* at [39], quoted in [28] above; and see P Herzfeld and T Prince, *Interpretation* (2nd ed, 2020, Lawbook Co) at [8.160], [8.200].

[61] In any event, we have no difficulty in being satisfied that there is at least some ambiguity or obscurity in s 306E. The submission that no word or expression in s 306E(1A), (2), (7A) and (8) has any obscurity attached it is a bold one which is belied by the submissions advanced in this matter. Although the words of a Minster or of an explanatory memorandum cannot be treated as a substitute for the text of the legislation concerned,[36] the Revised Explanatory Memorandum and the Minister's second reading speech provide useful background which is informative of the general purpose of Part 2-7A and the mischief to which it is directed. Having said that, we have not found it necessary to rely on the relevant extrinsic materials to determine the meaning of any part of the section. It, rather, provides useful background to the purpose and intended function of the provisions.

[62] There is one particular aspect of the Minister's second reading speech which requires mention. The Minister specifically referred to OS Production. The Minister said:[37]

> This bill is for Brodie, who is with us in the gallery today. Brodie works for BHP Operations Services in Queensland as an operator in production. Brodie and his directly employed workmates all work full time, all within the same part of the business, performing the same operator role.
>
> Except that Brodie gets paid less.
>
> This bill will close the labour hire loophole for people like Brodie.

[63] BHP and the OS Parties submit that these observations take the analysis nowhere, particularly in circumstances in which the second reading speech was made prior to the Closing Loopholes Bill being amended to incorporate s 306E(1A) and (7A). There is a more fundamental problem with relying on the specific comments of the Minister in relation to OS Production. We do not know what information was available to the Minister in relation to the operations of the OS Parties or the work performed by an employee such as Brodie. The Commission must determine the present applications based on the evidence before it and apply the provisions of Part 2-7A as enacted to that evidence. The Full Bench has given no weight to the Minister's second reading speech to the extent that it identified OS Production.

[64] In our view, the proper approach to s 306E(1A) and (7A) may be summarised as follows:

(a) The Commission is required to be positively satisfied that the performance of work by the regulated employee or employees is not for the provision of a service, rather than the supply of labour.

(b) The formation of that state of satisfaction requires the characterisation of the purpose, object or function of the performance of work by the regulated

employees and involves an evaluative inquiry in which all relevant matters, at least including those in s 306E(7A), are taken into account.

(c) The inquiry as to whether the performance of work is for the "provision of a service" cannot be reduced to an examination of whether the employer provides anything more than "merely" or "just" the supply of labour. Questions of extent and degree are likely to be involved in the characterisation exercise.

(d) The focus is required to be on the performance of work by the regulated employees albeit that the commercial or contractual arrangements between the employer and the regulated host and the nature of the employer's operations may be relevant when characterising the purpose or function of the work of the regulated employees.

(e) The Commission is required to have regard to the matters in s 306E(7A) in the sense those matters are to be treated as a matter of significance in the decision-making process, but the considerations listed in s 306E(7A) are not necessarily exhaustive of the matters to be considered. The Commission may have regard to other relevant matters.

(f) The question posed by s 306E(1A) is likely to turn on whether the purpose of the work performed by the regulated employees can properly be characterised as contributing to the provision of an identifiable and discrete service to the regulated host which is distinct from the supply of the labour of the workers to work in or as part of the business of the regulated host.

[65] In light of those reflections on the statutory scheme generally, and s 306E(1A) and (7A) more specifically, it is necessary to turn to consider the applications for regulated labour hire arrangement orders with respect to the OS Parties.

APPLICATIONS WITH RESPECT TO THE OS PARTIES

Introduction

[66] Employees of both OS Production and OS Maintenance perform work at the Goonyella Riverside, Peak Downs and Saraji mines. A total of nine applications are before the Commission with respect to the OS Parties. In short, the MEU has made separate applications with respect to OS Production and OS Maintenance at each of the three mines and the AMWU has made separate applications with respect to OS Maintenance at each of the mines. The submissions of the parties do not suggest that different considerations arise in relation to the operation of the Goonyella Riverside, Peak Downs and Saraji mines or the nature of the work performed by employees of OS Production and OS Maintenance at the different mines. There are some differences, however, between the nature of the work undertaken by employees of OS Production and OS Maintenance and the practical arrangements which apply to that work which will need to be considered.

[67] OS Production and OS Maintenance are both part of the BHP group of companies and were established in 2018. Employees of those entities were first deployed to mine sites in 2019.

OS Production and OS Maintenance currently employ approximately 3,797 employees who perform work across various BHP Group operations in Australia. OS Production and OS Maintenance are both wholly owned subsidiaries of BHP Group Operations Pty Ltd, which is a wholly owned subsidiary of BHP Group Limited and identified in BHP Group Limited's consolidated financial statements for the 2023 financial year as having the principal activity of "administrative services". OS Production and OS Maintenance are parties to a deed of cross guarantee together with other BHP Group subsidiaries including BHP Coal. BHP Coal and the OS Parties were jointly represented in the proceeding and made the same submissions.

[68] The Goonyella Riverside, Peak Downs and Saraji mines are each open cut coal mines and are among the largest coal mines in Australia by reference to the quantity of coal that is mined. The mines utilise a load and haul mining method. The coal mining process at an open cut mine was described in the evidence as involving the following steps:[38]

(a) coal mine workers remove the surface level "overburden" with graders and dozers to prepare the flat pad (overburden is material that is not needed and which sits above the coal seam);
(b) coal mine workers drill holes to a certain depth and then load the holes with shots (explosives) and fire;
(c) the blasted material, known as "waste", is either removed by coal mine workers with excavators or shovels into trucks, or if possible, a dragline (a heavy duty excavator) as a dragline moves greater volume and more quickly;
(d) once the overburden waste is removed and the coal is exposed, coal mine workers load the coal with excavators or shovels into trucks and take the coal to a holding point or the processing plant; and
(e) after the coal is removed, depending on the coal seams, coal mine workers may come back to continue digging with an excavator or shovel or the coal mine workers responsible for drilling and blasting will blast again.

[69] The duties of coal miners are commonly grouped into four categories; dragline operations (involving coal mine workers removing overburden using dozers or large electric draglines that require high voltage cables), load and haul (involving the removal of overburden using either a shovel or excavator into a truck), drill and blast (involving specialist work involving a coal mine worker drilling large holes in the ground, loading them with explosives and then blasting the explosives) and coal mining (involving coal mine workers excavating the coal into a truck using an excavator).[39] Work falling within each of those four categories is broadly described as production work.

[70] The personnel who perform work at the Goonyella Riverside, Peak Downs and Saraji mines are a combination of employees directly employed by BHP Coal undertaking production and maintenance work as well as the operation of coal handling and preparation plants, BHP Coal employees engaged in administrative, supervisory or professional roles, a small number of employees of BM Alliance Coal Operations performing official statutory functions, employees of OS Production and OS Maintenance, employees of contractors such as BUMA Australia Pty Ltd and Thiess Pty Ltd, employees of WorkPac and Chandler Macleod who provide labour hire services, employees of specialist drilling and blasting work as well as employees of smaller contractors or equipment manufacturers undertaking primarily maintenance work.[40]

[71] Most BHP Coal employees who perform work at the mines, other than those in administrative, supervisory or professional roles, are covered by the BMA Agreement. That agreement covers employees of BHP Coal who perform work covered by Schedule A of the *Black Coal Mining Industry Award 2020* (the **Black Coal Award**) at the Goonyella Riverside, Peak Downs and Saraji mines (as well as another mine known as the Blackwater Mine) and who are members or eligible to be members of unions, including the MEU and the AMWU.[41] In summary terms, the Black Coal Award covers production and engineering workers who are employed in the black coal industry as defined in that award.

[72] The BHP Coal employees performing work at the Goonyella Riverside, Peak Downs and Saraji mines undertake work as part of the mining production division of BMA as well as the maintenance division and that the work involved is properly described as production and engineering work. There is no dispute that employees of BHP Coal who work at the three mines are performing work which is of the same kind as work performed by employees of the OS Parties at the mines or that, for the purposes of s 306E(1), the BMA Agreement would apply to employees of the OS Parties if they were employed directly by BHP Coal.

[73] OS Production employees are primarily engaged in work associated with load and haul overburden mining involving waste or overburden removal also referred to as pre-strip operations although OS Production employees perform some work involving coal removal.[42] OS Production employees are not involved in, and OS Production is not contracted to undertake work, relating to dragline operations or drill and blast operations. OS Production employees are, generally at least, allocated to work groups comprised of other OS Production employees and a supervisor employed by OS Production. It will be necessary to return to the evidence concerning the supervision of OS Production employees below.

[74] OS Maintenance employees are primarily engaged in providing maintenance and repair services in relation to high-usage mining machinery and equipment at various mines operated by BHP, including the Goonyella Riverside, Peak Downs and Saraji mines. The type of equipment in relation to which maintenance work is conducted includes equipment such as rear dump trucks, excavators, dozer, graders, services trucks and wheel dozers.[43] In addition to OS Maintenance employees undertaking maintenance work at mine sites, it operates two repair centres at which off-site maintenance work is undertaken as well as two "Future Fit Academy" training facilities.[44] It will also be necessary to return to that evidence below.

[75] Both OS Production and OS Maintenance have contractual arrangements with BMA which facilitate the operations undertaken by those entities and the work performed by their employees. OS Maintenance first entered into an agreement known as the Framework Maintenance Services Contract on 30 November 2018. OS Maintenance and BMA entered a replacement agreement also entitled the Framework Maintenance Services Contract on 28 July 2022 (the **Maintenance Framework Agreement**). The contract end date of the Maintenance Framework Agreement is 30 June 2025 unless the contract is brought to an end at an earlier date in accordance with its terms.[45] In broad terms, the Framework Agreement makes provision for BMA to request "services" by giving OS Maintenance what is referred to as a "Site Work Package".[46]

[76] OS Production first also entered into a Framework Production Services Contract with BMACO on 30 November 2018 on the same day that the initial Framework Agreement was entered into by OS Maintenance. OS Production entered into another Framework Production Services Agreement with BMA on 28 July 2022 again on the same day as OS Maintenance (the **Production Framework Agreement**). The contract end date of the Production Framework Agreement is 30 June 2025 unless the contract is brought to an end at an earlier date in accordance with its terms.[47] The Production Framework Agreement also provides for BMA to request "services" by giving OS Production a "Site Work Package".

[77] With that introduction, we turn to consider the matters raised by the parties as being relevant to the assessment of whether the performance of work by employees of OS Production and OS Maintenance is properly characterised as "for the provision of a service, rather than the supply of labour" for the purposes of s 306E(1A). We will first address general matters which are referred to by the parties and then each of the matters the Commission is required to take into account by s 306E(7A). As we have emphasised, the task required by s 306E(1A) involves an evaluative assessment of characterising the purpose, function or object of the work performed by the employees of OS Production and OS Maintenance for BMA having regard to the matters required to be considered by s 306E(7A) or which are otherwise relevant to that characterisation.

General contextual considerations

Corporate group and intra-group arrangements

[78] The MEU submits that an important matter of context in assessing whether the performance of work by OS Production and OS Maintenance employees at each of the mines is not for the provision of a service rather than labour, is the fact that both entities are wholly owned subsidiaries of BHP Group Operations Pty Ltd. The MEU points out that the company constitutions of both OS Production and OS Maintenance make clear that in managing their respective businesses or exercising powers, the directors of both companies may act in the best interests of BHP Group Operations Pty Ltd as holding company.

[79] In its evidence, the MEU points out that the OS Parties describe themselves as part of BHP, including in advertising the availability of employment opportunities with OS Production or OS Maintenance. For example, BHP's website describes the OS Parties as offering permanent roles within BHP. The website states:

> What is Operations Services all about? BHP Operations Services (OS) is a production and maintenance workforce. We offer permanent roles within BHP with full-time benefits including flexible working arrangements and more.

[80] The careers section of the website goes on to provides the answers to a series of frequently asked questions, including:

> **What is the difference between OS and BHP?**
>
> There is no difference. OS is a key component of BHP's strategy to maintain our competitive edge in the current operating environment.

> …
>
> **Is OS still BHP?**
>
> Yes. OS is a key part of BHP's ongoing strategy to maintain our competitive edge in the current operating environment.

[81] Counsel for the MEU ultimately explained that it does not submit that simply the fact that OS Production and OS Maintenance are part of the BHP precludes a finding that the work performed by employees of the OS Parties is for the provision of a service rather than the supply of labour for the purposes of s 306E(1A). Counsel explained the position of the MEU as follows:[48]

> MR BONCARDO: Just as a segue from that observation, Vice President, can I deal with what our learned friends say, at paragraphs 50 to 54, about OS being part of the BHP Group? We concur that the mere fact OS is a part of the BHP Group and has a corporate relationship with BHP Coal doesn't, of itself say anything about the statutory test the Commission has to apply. But that does overlook a number of things. …

[82] The MEU went on to articulate why, in its submission, the fact that the OS Parties are part of the BHP group has implications for the manner in which their operations are conducted, including the use of BHP systems, processes and field leadership, application of BHP policies such as the Code of Conduct for employees and the reliance on BHP for human resources, commercial and health, safety and security support and recruitment services.[49] The closeness of the relationship is said to underscore that the arrangement is not one for the provision of a service in any conventional sense and that the OS entities are not conventional services contractors but, when viewed objectively, vehicles for the provision of labour in the BHP Group's business. The MEU submits that this is material to the assessment required by s 306E(1A) insofar as it bears upon the reality of the performance of the work at each of the mines by OS employees.

[83] BHP and the OS Parties submit that no party contends the arrangements between BMA and the OS Parties, including the Framework Agreements and Site Work Packages are other than legitimate and bona fide. In that context, they submit that the mere fact that OS Production and OS Maintenance sit within the BHP corporate group says nothing per se about whether the performance of work by OS employees is for the provision of a service or the supply of labour. BHP and the OS Parties also observe that that BMA, as the contracting counterparty under the Framework Agreements and Site Work Packages, is agent and manager for the Central Queensland Coal Associates Joint Venture, in which the Mitsubishi participants hold a 50 per cent interest.[50] It is also said to overlook the fact that BMA is itself 50 per cent owned by Mitsubishi Development Pty Ltd.

[84] We accept that the mere fact that OS Production and OS Maintenance are subsidiaries of BHP Group Operations Pty Ltd does not itself preclude a conclusion that the work performed by their employees is for the provision of a service to BHP, rather than the supply of labour. It is possible for a company to establish a subsidiary and for that subsidiary to employ workers to provide a service to the parent company. Whether that is the correct characterisation of the work performed by the employees of the subsidiary will turn on the evaluative inquiry required by s 306E(1A) having regard to the matters listed in s 306E(7A).

[85] The fact that the employer that supplies employees to perform work for a regulated host is a subsidiary of the regulated host may affect the assessment required by s 306E(1A). It may be relevant if the practical consequence of the corporate structure is such that the employer has less control over or involvement in the work of the employees because, for example, policies, process or systems of the regulated host are applied to its subsidiary. The fact of the corporate relationship may also put a different complexion on aspects of the conduct of the corporate entities or affect the weight that can be attached to aspects of the operation of the employer or the regulated host. For example, the assessment of the extent to which the employer directs, supervises or controls the regulated employees when they perform work for the regulated host may be affected if the employer only exercises control subject to ultimate direction and control by the regulated host because it is a subsidiary.

[86] For those reasons, the fact that OS Production and OS Maintenance sit within the BHP corporate group is relevant to the assessment required by s 306E(1A). However, we agree that this is not, of itself, determinative or even influential. The extent to which the fact that the employer is part of the same corporate group as the regulated host affects the assessment to be made under s 306E(1A) will depend on an examination of all the circumstances of the particular case and the impact of that fact on the matters listed in s 306E(7A). In this matter, we believe that the fact that OS Production and OS Maintenance are part of the same corporate group, is a factor which favours a conclusion that the performance of work by their employees is not for the provision of a discrete service to BMA, and rather the supply of labour, not of itself, but as a result of the consequences it has for the manner in which the work is performed and the nature of the arrangements between BHP and the OS Parties.

[87] It is appropriate to address one further submission made by BHP and the OS Parties in relation to the fact that OS Production and OS Maintenance are part of the BHP group. In relation to the application of "BHP Group-level policies" (such as the Code of Conduct), they submit that those policies do not demonstrate the imposition by the regulated host of any particular policy, such as might point toward a mere labour supply arrangement. Rather, it is submitted that those policies apply as a consequence of the OS Parties forming part of the broader BHP Group, and each of OS Production and OS Maintenance implement several additional policies of their own.

[88] We do not accept that submission. The fact that OS Production and OS Maintenance, and their employees, are subject to BHP policies, systems and processes is relevant, or at least potentially relevant, to whether the performance of work is for the provision of a service, rather than the supply of labour. Depending on the content of the policy or process concerned, the fact that the OS Parties are subject to BHP policies may be relevant at least to the degree of involvement they have in the performance of work, the extent to which the OS Parties direct, supervise or control the work of their employees and the extent to which the regulated employees use the systems of the employer for the purposes of s 306E(7A)(a), (b) and (c). It is, in our opinion, immaterial whether the OS Parties are subject to BHP policies and processes because they are part of the BHP group, as a result of a contractual provision or otherwise. The fact that BHP policies are applied is relevant in assessing the extent or degree to which the OS Parties are involved in or have control over the work of the employees.

Operational arrangements and internal corporate structures

[89] BHP and the OS Parties emphasised in their submissions that OS Production and OS Maintenance are each substantial businesses in their own right. The evidence indicates that OS Production and OS Maintenance have their own directors, board meetings, and financial reporting and that the broader OS business is led by a Vice President who sits on the Minerals Australia executive leadership team alongside the other asset presidents.

[90] The submissions of BHP and the OS Parties refer to the evidence that the OS Parties have their own organisational structure and reporting lines at site level. That includes that frontline workers report to OS supervisors, OS supervisors report to the OS superintendent for their relevant deployment, OS superintendents report to the OS Production Manager or OS Maintenance Manager, the OS Production Manager or OS Maintenance Manager for the relevant mine reports to the General Manager of OS Production East or General Manager of OS Maintenance East and the OS General Managers report to the Vice President of Operations Service.[51] In addition, BHP and the OS Parties refer to evidence that there are dedicated "OS functional support teams" including with respect to Business Development and Commercial, Health, Safety and Security, Human Resources and Finance.[52]

[91] These submissions are by and large a distraction from the analysis required by s 306E(1A). The focus of the assessment required by the section is upon the work performed by the regulated employees. The internal structures or organisation of an employer that supplies employees to perform work for a regulated host which do not themselves touch upon the performance of work by the regulated employees do not assist the analysis. For example, the fact that OS Production and OS Maintenance have directors, board meetings or financial reporting structures in place do not, in themselves, suggest work of the employees working at the three mines is not properly characterised as the supply of labour. A labour hire provider is likely to have such corporate arrangements in place. The same can be said in relation to the existence of dedicated teams dealing with finance and business development. In this matter, the relevance of that evidence and the contention it was called to support is further undermined by the evidence that the Business Development and Commercial, Health, Safety and Security, Human Resources and Finance all sit within the BHP Group operations.

[92] The Human Resources team and Health, Safety and Security team potentially fall into a different category. However, the activities of those teams are only likely to be relevant to the extent that the evidence discloses that the work of those teams affects the performance of work at the mines. The activities of those teams might, for example, indicate that OS Production or OS Maintenance, as employers, are involved in the performance of work at the mines or direct, supervise or control the work of the OS employees. It is that involvement which would be relevant rather than the existence of the Human Resources team and Health, Safety and Security team in itself. The on-site supervision arrangements are relevant to the matters in s 306E(7A)(a) and (b) and will be considered separately below.

[93] Finally, in their initial written submissions BHP and the OS Parties refer to evidence that OS Maintenance, in addition to work performed by its employees at BHP mines, operates two repair centres that undertake off-site maintenance work. The repair centres employ approximately 115 employees and generate revenue in excess of $200 million total per annum.[53] That reference was not repeated in its closing submissions, and it is unclear if it is pressed. The evidence indicates that OS Maintenance has separate contracts for the maintenance work

undertaken at the repair centres.[54] The employees performing work at the repair centres would not be covered by the orders sought because they are not supplied to perform work at the Goonyella Riverside, Peak Downs and Saraji mines. The existence of the repair centres does not assist in characterising what the performance of work by employees of OS Maintenance at the mines is for other than, perhaps, by way of background context.

Framework agreements and site work packages

[94] The contractual arrangements between BMA and OS Production and OS Maintenance are contained in the Production Framework Agreement and the Maintenance Framework Agreement, the most recent iterations of which were made on 28 July 2022. Both the Production Framework Agreement and the Maintenance Framework Agreement provide for the making of site work packages as a mechanism through which BMA may request "services" from OS Production or OS Maintenance, respectively. BHP and the OS Parties, as well as the MEU and the AMWU, relied on aspects of the Framework Agreement and the site work agreements. As we have indicated, the contractual arrangements that facilitate the performance of work by the regulated employees are relevant to the assessment required by s 306E(1A) albeit that a number of the matters listed in s 306E(7A) make clear that regard must be given to the manner in which the work is performed in practice.

[95] The Framework Agreements are in substantially similar form. The Production Framework Agreement provides, in clause 3.1, that "BMA may, but is not obliged to, request Services of the same character and nature as those set out in Schedule 1 … by giving OS a Site Work Package". Schedule 1 describes the type of "services" which may be requested of OS Production as follows:

> This Contract is intended to apply to Site Work Packages for the following services to deliver the Target Volume:
> a) excavate, load, haul and dump;
> b) coal mining and haulage;
> c) reject haulage;
> d) bulk dozer push;
> e) rehabilitation services; and
> f) any other service as described in a Site Work Package.

[96] Clause 7.1 of the Production Framework Agreement requires that BMA provide OS Production with a "Mine Plan" which set outs the following:

> 7.1 No later than 30 days prior to the commencement of each year during a SWP Period and for each Site Work Package, BMA will provide OS with a plan which sets out:
> (a) the mining removal methodology having regard to the BMA Equipment;
> (b) the sequence of mining;
> (c) the dimensions of each pit and strip;
> (d) the limits of excavation of each pit and strip;
> (e) the required angle of the batters for the pit and ramps;
> (f) the condition in which the pit is to be left;
> (g) waste dump locations;
> (h) top soil stockpile locations;
> (i) other stockpile locations; and
> (j) any other matters applicable to the excavation of the pit and strip,

(**Mine Plan)**

[97] Provision is also made, in clause 8.1, for a "Monthly Mine Plan" to be provided to OS Production specifying more detailed prescription as to the available time and production time of each piece of BMA equipment as well as the planned material types, dig locations, haul routes, dump locations and haulage parameters. It will be necessary to address the evidence in relation to the mine planning process further below.

[98] The obligations of OS Production including that it must ensure that the services are "performed by appropriately qualified and trained OS' Personnel" and that the services are "performed with the professional skill, care and diligence expected of a Professional Contractor".[55] OS Production is required to "engage and provide the services of all Personnel who are required to ensure the Services are carried out efficiently and promptly" and that "all OS' Personnel who are engaged in performing OS' obligations under this Contract "have appropriate skill, experience and relevant qualifications and hold all necessary licences, permits, registrations and other statutory requirements necessary to perform their roles" and "have completed, and maintain the appropriate training and competency assessments in order to work on the Site and have met and complied with BMA's Site access requirements".[56]

[99] OS Production does not, however, have complete control of the employees it deploys to work at the mines. Clause 14.3 provides:

> BMA (acting reasonably) may require removal from the Site of any of OS' Personnel who, in BMA's reasonable opinion have breached the Minimum Requirements for Suppliers as set out in clause 34. If OS' Personnel have breached Site Standards and Procedures, or do not have the competence, qualifications or experience reasonably necessary for the Services assigned to that person, BMA may give OS written notice. Promptly following such notice, the Parties will discuss BMA's concerns, to the extent reasonable, OS will take all action requested by BMA in good faith or such action as is agreed between the Parties (which may include the removal of these Personnel from Site).

[100] The performance of work by employees of OS Production occurs as a result of BMA issuing a site work package to OS Production. As a matter of practice, there is a single site work package for each of the Goonyella Riverside, Peak Downs and Saraji mines which bear a start date of 1 July and an end date of 30 June the following year. The Production Framework Agreement requires a process of negotiation to occur prior to BMA issuing a site work package. In short, clauses 3.3 and 3.4 provide that, prior to issuing a site work package, BMA must invite OS to submit a proposal setting out "Variable Information" (defined as a proposal as to the site, the services, the estimated price, the Target Volume or Target Availability), the parties must attempt to agree on the Variable Information within 60 days, if BMA accepts the Variable Information then BMA may issue a site work package and if the parties are unable to reach agreement within 60 days, the site work package will not proceed.

[101] The site work package price is determined in accordance with clause 2.2 of Schedule 2 to the Production Framework Agreement. The MEU submits that the price is fundamentally dependent upon and driven by the provision of labour by OS Production to BMA. OS Production and BMA determine how many employees will be needed to achieve the removal of overburden or coal mining required by BMA at the mine over a particular period, and the level of labour required then drives the price paid by BMA to OS Production. The site work

package price is a lump sum payable monthly.[57] The formula used to determine the site work package price is substantially comprised of labour costs, as follows:[58]

[**REDACTED**]

[102] The OS Personnel Price is calculated in accordance with the formula: *(OS Personnel x Annual Rate Card) x Margin*. OS Personnel is defined to mean "the FTE of persons assigned by OS to the performance of the Services". The Annual Rate Card is defined to mean the salary, allowances, penalties and loadings and other employee benefits (such as leave entitlements, superannuation and the like) for OS Personnel. The reference to a mobilisation fee or de-mobilisation fee is not suggested to be relevant in this matter. Both payments relate directly to the cost of the deployment of employees or ending a deployment of employees. The "Margin" is defined as a specified percentage plus the "At-Risk Margin (if applicable)".

[103] The Maintenance Framework Agreement has a similar structure to the Production Framework Agreement. Clause 3.1 provides that "BMA may, but is not obliged to, request Services of the same character or nature as those set out in Schedule 1 … by giving OS a Site Work Package". The services set out in Schedule 1 include the following:

> This Contract is intended to apply to Site Work Packages for the following Services:
> a) day to day maintenance of the Maintained Equipment;
> b) undertaking breakdown, call out, recovery, accident damage and unplanned corrective maintenance work;
> c) undertaking troubleshooting and diagnostic work;
> d) booking and utilising spare parts for the Maintained Equipment from the Site or offsite warehouse; and
> e) any other Service as described in a Site Work Package.

[104] Clause 7.1 provides that BMA must provide a "Monthly Maintenance Plan":

> 7.1 No later than 14 days prior to the commencement of each month during a SWP Period and for each Site Work Package, BMA will provide OS with a Monthly Maintenance Plan which will specify matters including:
> (a) the Maintained Equipment scheduled for maintenance;
> (b) planned maintenance schedule;
> (c) BMA Supplied Items with availability dates and collection points;
> (d) utilisation of Maintained Equipment; and
> (e) unplanned maintenance.

[105] The obligations of OS Maintenance include to "engage and provide the services of all Personnel who are required to ensure that the Services are carried out efficiently and promptly in accordance with this Contract", ensure that OS personnel "have appropriate skill, experience and relevant qualifications and hold all necessary licences, permits, registrations and other statutory requirements necessary to perform their role" and "have completed, and maintain the appropriate training and competency assessments in order to work on the Site and have met and complied with BMA's Site access requirements".[59] BMA also has the power to require the removal from the mine of any OS personnel who, in BMA's reasonable opinion have breached the Minimum Requirements for Suppliers or have breached Site Standards and Procedures, or do not have the competence, qualifications or experience reasonably necessary for the services to BMA.[60]

[106] The performance of work by employees of OS Maintenance occurs as a result of BMA issuing a site work package to OS Maintenance. There is also a separate site work package for each of the Goonyella Riverside, Peak Downs and Saraji mines which bear a start date of 1 July and an end date of 30 June the following year. The Maintenance Framework Agreement, like the Production Framework Agreement, requires a process of negotiation to occur prior to BMA issuing a site work package.[61] The process also contemplates an invitation being made to OS to submit a proposal, the parties attempting to agree on terms and, if agreement is reached, BMA issuing a site work package.

[107] The formula used to determine the site work package price under the Maintenance Framework Agreement is the same as under the Production Framework Agreement. It is again determined by clause 2.2 of Schedule 2 to the Maintenance Framework Agreement. The site work package price is essentially driven by the number of OS personnel directly assigned to the performance of work under the Framework Agreement (the "OS Personnel"), the wages and other employment costs incurred with respect to those employees (the "Annual Rate Card" rate) as well as associated incidental costs, mobilisation or de-mobilisation costs and corporate overheads plus the defined margin.

[108] The parties submit that starkly different conclusions should be drawn from the provisions of the Framework Agreements, particularly in relation to the determination of the site work package price. BHP and the OS Parties submit that the metrics contained in the Framework Agreements are focused on production and maintenance outcomes rather than the supply of individual workers or labour hours and that this "stands in contrast to a typical labour hire 'schedule of rates' (ie. a specified rate for particular workers or classifications, multiplied by the number of hours worked on an individual employee basis)".

[109] Comparing the contractual arrangements involving OS Production and OS Maintenance with a "typical labour hire" schedule of rates does not greatly assist. No particular contractual arrangements are necessarily required for the Commission to be satisfied that the performance of work of regulated employees is not for the provision of a service, rather than the supply of labour. In any event, we do not accept that the pricing model contained in the Framework Agreements are properly characterised as being directed at the achievement of specified production and maintenance outcomes rather than the supply of labour.

[110] The annual and monthly fees payable to OS Production and OS Maintenance in accordance with the site work packages are not contingent upon, nor do they relate to the delivery of a particular outcome, save in one respect. The same percentage margin [**REDACTED**] is payable irrespective of any performance outcomes. The only payment which is conditional upon achieving targets is the additional "At-Risk Margin". Under clause 2.4 of Schedule 2 of the Production Framework Agreement, the "Performance Fee" is calculated with reference to the At-Risk Margin, personnel costs and Target Volume as follows:

[**REDACTED**]

[111] It is clear from these provisions that the overwhelming majority of the price paid to OS Production is a set amount calculated by reference to the cost of employing the employees to perform work at the mines, plus a margin. Only a small additional margin is potentially at risk based on production outcomes being the "At-Risk Margin" which is itself calculated by

reference to the "OS Personnel Cost". Essentially the same provision is made with respect to the performance fee payable to OS Maintenance under the OS Maintenance Framework Agreement.[62]

[112] Relatedly, BHP and the OS Parties submit that, although the site work packages entered into by OS Production and OS Maintenance provide for an indicative number of FTE required to deliver the relevant services, neither is bound under the Framework Agreements to supply that particular number of employees at any particular time. BHP and the OS Parties refer to the evidence of Mr Millican in relation to OS Maintenance which included the following:[63]

> Appendix D to the FY24 SWP provides the Saraji OS Maintenance labour requirements and pricing. While the SWP includes resourcing (i.e. an expected number of workers required to deliver the services), the number of workers that we have on site at any time to deliver the services are a matter for OS Maintenance. The labour figures have changed since they were originally produced, as OS Maintenance has done some work in determining labour rationalisation versus machines required, and determined the head count in Appendix D was no longer required to maintain the fleet. For example, OS Maintenance can employ as many people to maintain trucks as it wants as long it can meet the required availability targets and the SWP price does not change.

[113] BHP and the OS Parties submit that this aspect of the operations of OS Production and OS Maintenance indicate that the relevant deliverable, contrary to a labour hire scenario, is the contractually agreed production or maintenance outcome measures by the relevant performance metric, rather than the number of personnel who might deliver that performance.

[114] We do not find that submission persuasive. The site work packages identify the number of FTE employees expected to be provided by OS Production or OS Maintenance to perform work at the relevant mine. We assume that the FTE numbers in the site work packages reflect the number of employees that will, at least in a practical sense, be required to be provided by OS Production and OS Maintenance. Furthermore, leaving aside the performance fee, the other components used to determine the site work package price are based on the number of employees actually provided by the OS entity. The number of "OS Personnel" used to determine the labour costs is defined as:[64]

> **OS Personnel** means the FTE of persons directly assigned by OS to the performance of the Services (including, without limitation, execution personnel, supervisors, managers, superintendents, line engineers, reliability engineers, technical specialists, planners, trainer assessors and shutdown coordinators), but excluding any OS Personnel who are deployed over and above the base number of Personnel to meet performance of a Recovery Plan.

[115] That is, the number of employees of OS Production or OS Maintenance used to calculate the costs to be recovered in the site work package price is the "FTE of persons directly assigned by OS to the performance of the Services". Whether or not OS Production or OS Maintenance is required to provide the stipulated number of employees on any particular day, the cost it is entitled to recover is based on the employees "directly assigned" to the performance of work at one of the mines for BMA.

[116] That practical outcome is reinforced by the evidence given in relation to the payments made to OS Maintenance. For example, the site work package for OS Maintenance at the Peak Downs mine for 2023-2024 recorded an amount for "Productivity Savings" which was then

immediately deducted from the site work package price,[65] as confirmed by Mr Connors under cross-examination where he gave the following evidence:[66]

> If you go to 2839, please. We're back at the old Peak Downs site work package. Have a look at 2844 for me. You see there at the bottom of the table setting out the contract price the second last line in white talks about productivity savings?---Correct.
> And that's expressed as a negative. I'm reading that correctly?---You are.
> So what that reflects is in this financial year OS achieved some labour productivity one way or the other?---Correct.
> And that led to a reduction in their contract price?---Correct.
> The benefit from the productivity savings flowed back to BMA?---Contract to the package price, correct.
> I just couldn't hear your answer. Would you mind repeating that?---Yes. Yes.

[117] That is, if OS Maintenance achieves productivity savings and reduces labour costs, it does not retain the savings. Rather the savings flow back to BMA by reducing the price paid to OS Maintenance. This was also confirmed by Mr Connors' who accepted under cross-examination that OS Maintenance is a cost centre for maintenance costs, including labour, as follows: [67]

> If a normal services contractor achieves internal productivity improvements they get to reap the rewards of that. That's fair enough?---Correct.
> Yes. And that's not what happens when OS maintenance achieves productivity. That's fed back into the group?---Correct.
> This is just a product of you being part of the corporate group, isn't it?---Yes.
> It's just a decision about cost allocation and savings allocation; that's right?---Correct.
> As is the allocation of labour cost to OS maintenance?---Sorry?
> As is the allocation of maintenance cost to OS maintenance; do you agree?---Could you clarify the question for me, please.
> The reason that you've achieved productivity gains for that benefits flow back to BMA. That's just a group decision as to where that should sit in the balance line; that's right, isn't it?---Well, that's where we do it with the value to as a result of the contracted services we provide.
> And similarly there's a decision - BHP Group has necessarily labour costs it's going to incur one way or the other?---Sorry, could you - - -
> It needs maintenance workers engaged in one way or the other?---Yep.
> Yes. And so that labour cost is going to sit somewhere?---Yes.
> Within the group you're the cost centre, you're the one which OS maintenance is where the charge out comes from?---For the services that we're contracted to do, yes.
> Which also is the cost base, is the labour cost base?---Yes.

[118] Evidence was also given by Mr Hanson that variations occurred to the site work package price paid to OS Production at the Goonyella Riverside mine, in particular, to reflect any reduction in labour needs due to productivity savings.[68]

[119] BHP and the OS Parties submit that the AMWU mischaracterises the evidence by suggesting that, if it is able to develop any efficiencies in its operations, OS Maintenance "does not enjoy the fruits of its organisational success but is required to prospectively pass that value-add back on to BMA itself". They point to clause 15 of the Maintenance Framework Agreement which contemplates the establishment of a Performance and Continuous Improvement Committee to "evaluate and assess value generating initiatives for BMA that may be implemented as part of the Service". It is also said that any adjustment is only prospective. We

do not believe this reduces the force of the submissions made by the AMWU in this respect. Clause 15 of the Maintenance Framework Agreement requires that any value maximisation opportunities which reduce OS' cost of performing the services will result in an adjustment of the contract price.[69] The provision reinforces the AMWU's submission.

[120] The evidence to which we have referred supports a finding that the price paid to OS Maintenance and OS Production by BMA overwhelmingly reflects the cost of providing the labour of the workers performing maintenance or production work both direct employment costs and associated corporate overheads and on-costs. The price is also, at least prospectively, adjusted in the event that there is a reduction in the costs of the provision of services, including labour costs, such that the benefit accrues to BMA. In those circumstances, the contractual arrangements with respect to price, and the evidence concerning the payments in fact made to OS Production and OS Maintenance, support the conclusion that the performance of work by employees of OS Production and OS Maintenance should be characterised as involving the supply of labour and not for the provision of a service.

[121] Finally, in this respect, there is considerable dispute between the parties concerning the evidence relating to the issuing and negotiation of site work packages. BHP and the OS Parties, for their part, submit that the evidence reveals that detailed and arms-length commercial negotiations occur with respect to the Framework Agreements and site work packages. As we have described above, the Production Framework Agreement and the Maintenance Framework Agreement set out a process for negotiating site work packages. A number of witnesses called by BHP and the OS Parties described the process which is typically adopted as involving BMA approaching an OS representative, usually the OS Maintenance Manager, to advise that a particular package of work is available and inviting them to submit a proposal for that work, the request being passed onto the OS commercial team which will then price and determine what arrangements and resources are required to take on the requested work, a degree of back and forth between OS and BMA to confirm the exact nature of the services required, OS will then provide BMA with its proposal, BMA may challenge OS on the proposal and there may be, and usually is, negotiation, if BMA ultimately accepts OS Maintenance's proposal, then BMA will issue the site work package.[70]

[122] Although we have some scepticism as to the degree to which the negotiations between OS Production or OS Maintenance and BMA are properly to be regarded as arms-length interactions, the evidence relied upon by BHP and the OS Parties was not directly challenged. We accept, in broad terms, the evidence we have just described. However, we do not believe the evidence can be treated as having a significant impact on the assessment we are required to make under s 306E(1A). Whatever process of negotiation precedes BMA issuing a site work package to OS Production or OS Maintenance, the question posed by s 306E(1A) is directed as the characterisation of the work performed by regulated employees once the site work package is issued. The process which leads up to issuing a site work package is of limited relevance. The evidence that the discussions in relation to OS Maintenance commonly include the "precise type and number of pieces of equipment that need to be serviced" might be said to contemplate the provision of a service. In our opinion, it is equally consistent with determination of the number and skills of the employees required and it is equally probable that the same discussions would be undertaken with a regulated employer supplying labour rather than providing a service.

[123] The MEU and the AMWU, on the other hand, rely upon evidence of the informality of the process of issuing site work packages. Site work packages, under each of the Framework Agreements, operate for a specified period of time. Absent a formal variation being agreed between the parties, the site work packages cease at the time they expire and, absent formal variation, the Framework Agreements do not contemplate OS Production or OS Maintenance employees performing any further work. At the end of the period of a site work package, clause 12.5 of the Maintenance Framework Agreement provides that, unless otherwise agreed, OS Maintenance is to ensure the demobilisation of equipment and personnel. In the absence of an operative site work package, there are no provisions for calculating payments required to be made to OS Production or OS Maintenance, the supply of employees or the setting of targets.

[124] Each of the applicable site work packages initially put into evidence by the OS entities expired on 30 June 2024. A new site work package for OS ACPM at Saraji has still not been issued. In relation to each of the mines and each of OS Production and OS Maintenance (save for OS Maintenance at Saraji), replacement site work packages were not executed until September or October 2024.[71] The position with respect to OS Maintenance at the Saraji mine is unclear on the evidence. Mr Neilsen and Mr Millican suggested that OS Maintenance had submitted a draft site work package to BMA "before the start of this financial year" but were still being negotiated.[72] The documents appear to suggest that draft site work packages were submitted to BMA in September 2024 without apparent response.[73]

[125] No demobilisation occurred and there is no evidence of any agreement otherwise having occurred under clause 12.5. Notwithstanding the absence of site work packages, employees of OS Production and OS Maintenance continued to perform work for some months without any applicable site work package or a formal variation. This state of affairs seemed to pass unnoticed. The Maintenance Framework Agreement required OS Maintenance to demobilise at the conclusion of a site work package. This did not occur at any of the mines, despite there being no evidence of an agreement that demobilisation would not occur. The MEU submits that the nonadherence with and disregard of the provisions of the Framework Agreements concerning site work packages are explicable when it is appreciated that the OS entities are part of the BHP Group and are performing work at the mines for the benefit of and at the direction of BMA.

[126] BHP and the OS Parties suggest that reveals no more than that the negotiation of commercial terms between long-standing contracting parties may in some instances be a drawn-out process and that the contracting parties might see fit to roll over their contractual terms during that interim period is unremarkable. BHP and the OS Parties submit that this is immaterial for the purposes of these proceedings. BHP and the OS Parties submit that, if anything, the fact of drawn-out negotiations over the terms of the site work packages underscores both their arms-length nature, and the importance the parties place on ensuring the relevant performance targets and FTE estimates are properly calibrated.

[127] We do not accept the submission of BHP and the OS Parties that the evidence suggests the parties agreed to roll over the existing site work packages until a new agreement was put in place. The evidence of a number of witnesses suggests, to the contrary, that managers of BMA, OS Production and OS Maintenance did not turn their minds to the contractual arrangements which were in place or simply assumed the previous agreement would continue to be applied.

For example, the General Manager of the Goonyella Riverside mine, Mr Abrams, gave the following evidence:[74]

> Were there any other variations to the site work package Goonyella Riverside, for OS ACPM?---No.
> Both of the site work packages had end dates of 30 June 2024?---Yes.
> On 1 July 2024 there was no variation in place which extended the term of those site work packages, was there?---No, not to my knowledge.
> So is it the case that the end date for both these site work packages came and went, and things just continued as usual?---Yes. Effectively the SWP was rolled over until the new one came in place.
> But that didn't occur by way of any formal contractual variation?---Not that I can recall.
> You continued allocating work to OS MCAP and OS ACPM; correct?---Yes.
> In accordance with the needs of the mine?---Yes.

[128] Mr Neilsen, the General Manager of the Saraji mine, gave the following evidence:[75]

> And had there been any variations, starting firstly with OS MCAP to the site work and contractual variations to the site work package that applies for OS MCAP – or that applied, I should say, to OS MCAP from the 30 June 2024 until the execution of the new site work package?---No.
> And in respect to OS Maintenance have there, from the 30 June last year to today's date been any variations executed to that site work package?---No.
> And as what has occurred, sir, is that work in respect to OS Maintenance work has continued to be allocated to OS Maintenance after the end date of the site work package?---Yes.
> On an as needs basis in accordance with the mine plan?---I wouldn't say on as needs basis. There were discussions that were held between myself and OS Production General Manager and OS Maintenance Manager about continuing with the status quo until the new site work packages were signed - - -
> I see?---- - -and had been finished being negotiated.
> I see. And there was no, as I think we discussed, no instrument that was executed to give effect to that. They were informal discussions and work continued as normal?---What was the last bit there sorry?
> Work continued to be allocated to OS, both entities and performed by both entities after the 30 June 2024 as it had beforehand?---Yes. That's right. As it had been beforehand, yes.

[129] This evidence supports a finding that there was not a practice of having any form of agreement to roll over the existing site work packages beyond an assumption on the part of, or at most informal discussions between, the managers involved.[76] This is not indicative of arms-length commercial arrangements. It suggests a lack of concern about, and disregard of, the formal contractual arrangements between the parties. The evidence also does not suggest there was feverish activity between the parties seeking to finalise new site work packages as soon as possible. Such evidence indicated that the OS entities had submitted a proposal and were awaiting a response.[77]

[130] It is unsurprising that entities which are part of the same corporate group are not much concerned about whether there are formal contractual agreements in place to facilitate the performance of work and payment to OS Production and OS Maintenance. The evidence suggests that we should hesitate before accepting that the contractual provisions necessarily reflect the arrangements under which the employees of OS Production and OS Maintenance actually performed work. However, ultimately, we do not think that the evidence as to the informality of the contractual arrangements is directly relevant to the assessment required by s 306E(1A). The informality of the contractual arrangements, and the somewhat lackadaisical attitude towards the contractual provisions, is equally consistent with the employees of OS Production and OS Maintenance performing work for the provision of a service or as part of the supply of labour.

Training, development and deployment of staff

[131] The evidence put forward by BHP and the OS Parties set out various initiatives and programs in relation to the training, development and retention of staff by OS Production and OS Maintenance which were described as part of the "OS offering" which go beyond any concept of a "labour hire arrangement". The OS parties submit that the evidence supports the conclusion that each of OS Production and OS Maintenance provide something beyond the supply of labour. Three aspects of the evidence are relied upon in this respect.

[132] *First*, the evidence indicates that OS Maintenance operates two training facilities, known as the Future Fit Academies, as well as all the infrastructure and assets associated with those facilities. The Future Fit Academies offer paid trade apprenticeships or traineeships in machine operation, diesel and mechanical fitting, and metal and polymer fabrication, to approximately 700 people each year. Future Fit Academies apprentices and trainees are permanently employed by OS Maintenance or OS Production and, once qualified, FFA graduates have the opportunity to work at one of the OS Maintenance or OS Production deployments.[78] The OS Parties are described as "focused on developing a pipeline of qualified workers through BHP's Future Fit Academy".[79] The cross-examination suggested that the training provided by the Future Fit Academies is somewhat limited and, generally at least, graduates of the academies leave with a certificate II qualification, rather than a trade qualification and differs from traditional traineeships.[80]

[133] *Second*, there is evidence in relation to what is referred to as the "Mastery Program" which is described as being intended "to upskill, verify and assess the critical skills and activities of frontline team members". Mr Connors described the Mastery Program as follows:[81]

> Mastery is a program run by OS to upskill, verify and assess the critical skills and activities of our frontline OS team members and is a cultural enabler for the business in that it drives a high performance culture. No other organisation, including BMA, has a similar program. Under the Mastery program, each OS employee is given a mastery profile that sets out the suite of skills and activities in which the employee has been verified or is working to become verified. The activities in which an employee can become verified are generally based on areas that OS identifies as creating reliability issues on equipment. Some examples include hose fitting or bolting. The skills and activities that are verified through the Mastery program are also based on the type of trade the OS employees are engaged in. The trades include diesel fitters, hydraulic fitters, electricians or boilermakers. OS uses its own frontline technical experts and tradespeople to review the standards required under the Mastery program and perform employee assessments. This ensures that OS is setting and meeting the bar in terms of the execution of the activities.

[134] The evidence indicates that OS Maintenance uses its own frontline technical experts and tradespeople to review the standards required under the Mastery Program and perform employee assessments and that, for an employee to become verified, they must undergo OS Maintenance developed training and undertake an assessment to confirm they can perform the skill to the required standard.[82] Mr Connors asserts that "labour hire providers have not offered development opportunities to their employees, including such development opportunities as the Mastery Program".[83]

[135] *Third*, BHP and the OS Parties refer to evidence in relation to what is referred to as the "HUBS Model". The Hubs Model is described as being intended to provide a level of flexibility

to OS Production and OS Maintenance and their employees, in that those employees are able to perform work across their regional hub rather than being tied to a specific site, to assist in ensuring that employees have greater options for permanent ongoing employment should a deployment at a particular site come to an end and to assist employees to develop their skills by working at different sites.[84] BHP and the OS Parties again use this aspect of the operations of OS Production and OS Maintenance to endeavour to contrast their operations with those of what are described as "traditional labour hire providers".

[136] The MEU and the AMWU essentially submit that the evidence in relation to the Future Fit Academies, the Mastery Program and the Hubs Model is irrelevant to the proper characterisation of the work performed by employees of the OS Parties and the statutory question posed by 306E(1A). They submit that whether or not apprentices are trained offsite by the OS Parties has no bearing upon the performance of "the work" the subject of the application and note that the employees undertaking this training at the academy are not caught by the applications.

[137] In relation to the Future Fit Academies, it is difficult to understand how the fact that OS Production and OS Maintenance are involved in providing training to new starters prior to deployment to work at BHP mines assists in characterising what the work of the employees is "for" once assigned to work at a mine. There is no reason why an external employer cannot train its employees for the purpose of ensuring it is able to supply qualified and competent employees to a regulated host. The fact that such training is provided does not necessarily, or perhaps at all, suggest the external employer is not supplying labour, rather than providing a service, once the employees are deployed. We also note that the employees of the OS Parties when undertaking training at the Future Fit Academies would not be covered by any regulated labour hire arrangement order made because they are not, at that point, supplied to perform work for the regulated host.

[138] The Mastery Program falls into a potentially different category. As we understand the evidence, the Mastery Program involves both assessment of employees upon recruitment and also ongoing verification and assessment of an employee's skills and competency during their employment. We infer that includes whilst the employee is supplied to perform work for BHP, including at the Goonyella Riverside, Peak Downs and Saraji mines. The fact that an external employer has some continued involvement in the training or assessment of employees once supplied to a regulated host does not necessarily mean the performance of work is not properly characterised as for the supply of labour. However, in our opinion, the involvement of the external employer in the training or assessment of the employees might be relevant to the assessment required by s 306E(1A), including because it might be said to be relevant to the matters referred to in s 306E(7A)(a) and (b). In that sense, the evidence in relation to the Mastery Program is relevant and we have taken it into account. That evidence must, however, be seen in the context of other evidence in relation to the induction, training and assessment of employees at the mines to which we refer below.

[139] The evidence in relation to the Hubs Model, in our opinion, does not assist the assessment required to be made by s 306E(1A). The Hubs Model is concerned with the method by which the OS Parties arranges the deployment of individual employees to perform work at different sites and, among other things, provides the opportunity for employees to move between sites and gain experience at different sites. We do not understand why the internal

mechanisms developed by the OS Parties to deploy their employees say anything about whether the performance of work by those employees, once supplied to a particular mine, is for the provisions of a service, rather than the supply of labour. Section 306E(1A), and the matters referred to in s 306E(7A), are directed at the performance of work by the regulated employees for the regulated host.

[140] An aspect of the submissions of BHP and the OS Parties in this respect sought to contrast the operations of OS Production and OS Maintenance with a stereotypical view of the way a labour hire operator conducts itself. For example, in relation to the Hubs Model, they submit that "that model stands in contrast to traditional labour hire providers, who typically engage employees on a casual basis (that is, without the obligation to provide ongoing work between client engagements)". We do not think that comparisons with what some witnesses regarded as "traditional labour hire" are of assistance in applying s 306E(1A). BHP and the OS Parties did not attempt to comprehensively articulate the features of what it regards as being "traditional labour hire". There is no apparent reason that why arrangements similar to the Hubs Model could not be implemented as a means of deployment of employees by employers providing labour to a regulated host or hosts within a particular region or industry, regardless of whether the regulated hosts are related entities. In any event, s 306E(1A) must be applied in accordance with its terms and having regard to the matters listed in s 306E(7A).

Competitors of OS Production and OS Maintenance

[141] BHP and the OS Parties rely on evidence which asserted that relevant commercial competitors of OS Production are companies such as Thiess and BUMA and the competitors of OS Maintenance's primary competitors are companies like BUMA, Linkforce and Monadelphous. Those companies are described by the witnesses called by BHP and the OS Parties as "specialist contractors".

[142] For example, Mr Costello asserts that OS Production's competitors "are primarily Thiess Group Holdings Pty Ltd (Thiess), BUMA Australia Pty Ltd (previously Downer EDI) (BUMA) and other specialist contractors" and that it is not uncommon for OS Production to lose out on scopes of work to contractors such as Thiess and BUMA.[85] Mr Connors gave evidence that maintenance work in relation to mining equipment has historically been undertaken primarily by large specialist contractors such as BUMA, Hastings Deering, Linkforce and Monadelphous or original equipment manufacturers themselves such as Hitachi, Liebherr, Komatsu and Caterpillar.[86] Mr Connors indicates that the work now performed by OS Maintenance employees was predominantly taken over from external contractors and gave the following examples:[87]

(a) the mobile maintenance workshops at Saraji Mine and Peak Downs Mine that were previously maintained by Downer (now BUMA);
(b) the tyre bays at Saraji Mine that were previously maintained by Kal Tire (Australia) Pty Ltd;
(c) the wash plant at Saraji Mine that was previously maintained by G&S Engineering;
(d) mobile maintenance at Blackwater Mine that was previously done by Wisely Group Pty Ltd;

(e) fixed plant maintenance in Western Australia that was previously done by Rema Tip Top Australia Pty Limited or other fixed plant orientated businesses; and

(f) the maintenance services previously performed by WesTrac for over 30 years in Western Australia at WAIO's Newman Operations.

[143] It is also said that OS Maintenance competes with external contractors in competitive tender processes and has been unsuccessful in obtaining work as part of tender processes conducted by BMA.[88]

[144] BHP and the OS Parties contend that this evidence was unchallenged and must be accepted. As we understood the submission, the fact that OS Production and OS Maintenance regard themselves as competitors of certain external contractors, and in some instances took over work formerly being undertaken by employees of external contracting companies, is said to support the conclusion that the work performed by employees of the OS Parties is for the provision of a service, rather than the supply of labour. If, so the argument goes, the work could alternatively be undertaken by employees of a specialist contractor, it should be regarded as having the purpose or object of providing a service.

[145] There are at least two difficulties with the submission. *First*, simply because BMA could contract an external contractor to undertake an aspect of the production work at the mines or provide maintenance services in relation to vehicles and equipment at the mines such that there might be said to be "competition" with OS Production and OS Maintenance does not necessarily say anything about whether, if BMA decides to utilise employees of the OS Parties to perform work in relation to those functions, the work is for the provision of a service, rather than the supply of labour. That question must be answered by reference to the work performed by the employees of the OS Parties and the nature of the arrangements under which the work is performed once they are engaged to undertake that work, and having regard to the matters in s 306E(7A).

[146] BMA could, and does, deploy direct hire employees of BHP Coal to undertake production or maintenance work which could be outsourced and undertaken by employees of external contractors. To that extent, it could be said that employees of BHP Coal are in competition with external contractors because BMA could decide to contract out functions being undertaken by those employees. BMA could also enter contractual arrangements to facilitate employees of the OS Parties undertaking the same work. The fact that each of those arrangements is potentially available to BMA and "in competition" does not at all suggest that, if BMA chooses to facilitate employees of the OS entities performing the work, that work either is or is not for the provision of a service rather than the supply of labour. OS may be in competition with suppliers of labour.

[147] *Second*, there is no detailed evidence before the Full Bench in relation to the nature of the operations of contractors such as BUMA or Thiess or the manner in which work is undertaken by employees of those contractors at the three mines. There is also limited evidence as to the contractual arrangements which BMA has with those entities. As a result, there is not a sufficient basis in the evidence to permit the Full Bench to make a comparison with the way in which the external contractors operate which could support a submission that, because those contractors can perform a similar general function to that performed by employees of OS

Production or OS Maintenance, that in both cases the work of the employees involved should be characterised as being for the provision of a service, rather than the supply of labour.

[148] Such evidence as is before the Full Bench in relation to the operations of external contractors such as BUMA or Thiess suggests that they operate in a manner that is different to OS Production or OS Maintenance. For example, Mr Abrams gave evidence that BUMA is engaged on a "paid per material moved contract" under which it is paid purely on the basis of the volume of material moved, it provides its own equipment (which it either owns or itself hires), maintains its own equipment, its employees interact to a limited extent with BMA's autonomous haul trucks and its employees are not connected to, or directed by, the IROC or Minestar systems.[89] In relation to Thiess, Mr Thomas gave the following evidence:[90]

> Can I ask you about Thiess? They operate their own equipment?---That's correct, yes.
> That is, equipment that they own or hire?---Yes, that's correct.
> Whereas BMA and OS operate BMA-owned equipment?---Yes, and hired equipment.
> That equipment being hired by BMA?---Correct.
> Thiess maintain their own equipment?---That's correct.
> Thiess's equipment, whether it be haul trucks, graders, dozers, et cetera, is not attached to the MineStar system?---That's correct.
> And is not attached to the IROC system?---That's right.
> Thank you. Whereas the equipment used by OS employees and BHP Coal employees, is?---Yes, that's correct

[149] We accept that the operations of BUMA and Thiess are different to those of the OS Parties at least with respect to the provision of plant and equipment used in the work, the maintenance of that plant and equipment, integration with BHP systems such as IROC and Minestar and, it appears, the contractual provisions in relation to payment.

[150] However, that is not to suggest that the work performed by employees of the OS Parties is, or is not, for the provision of a service for the purposes of s 306E(1A), simply because there are differences between the arrangements under which those employees perform work compared to those of BUMA and Thiess. The proper characterisation of the work performed by employees of the OS Parties depends on an examination of the nature of the work and the arrangements under which it is performed and not a comparison with any other supplier of labour or provider of a service. The evidence before the Commission does not suggest that OS Production and OS Maintenance operate in the same manner as external contractors with which BHP and the OS Parties suggested they should be compared. In this regard we note the evidence that while OS Production and Maintenance are said to be capable of tendering to under take work for companies other than BHP, this has not occurred, and in any event, if the OS entities did tender for such work, it may well be as a supplier of labour, given that OS does not own and operate the plant and equipment used by its employees.

[151] BHP and the OS Parties also seek to deploy this evidence to support a defensive submission, namely, that it puts paid to the contentions advanced by the MEU and the AMWU that the work performed by employees of OS Production and OS Maintenance was previously performed by employees of BHP Coal. The evidence does not necessarily establish that employees of OS Production and OS Maintenance do not, in some instances at least, undertake work formerly undertaken by BHP Coal employees. The picture appears to be mixed. However, we accept the submission of BHP and the OS Parties that, even if that is the case, it does not

assist the assessment required by s 306E(1A). Even if employees of OS Production or OS Maintenance did take over work previously undertaken by direct hire employees of BHP Coal, it remains necessary to examine the arrangements put in place for the employees of the OS Parties to perform the work. BMA could contract out a function such that the employees performing the work are doing so for the provision of service, or it could engage an external employer to supply labour to undertake the function. The fact that the work was previously undertaken by direct hire employees itself is likely to say little about how the performance of the work is then to be characterised.

[152] While we do not have detailed evidence to enable us to fully compare the operations of the OS Parties with those of Thiess and BUMA, the same cannot be said in relation to the operations of WorkPac and Chandler Macleod. Many of the matters said by BHP and the OS Parties to be indicative of the work performed by OS employees being for the provision of a service, could also be said in relation to the operations of WorkPac and Chandler Macleod, about which we did have evidence. In this regard we note that those companies:

(a) are subject to BHP policies, systems and processes including its Code of Conduct in addition to any WorkPac policies and procedures including in relation to expectations of behaviour;[91]
(b) may be required by BMA to remove personnel from its sites for reasons including breach of site standards and procedures.
(c) may have services procured through a purchase order or work package instruction,[92] with the latter being defined as services comprised in a separable parcel,[93] in turn defined as a portion of the services, after proposals are sought.
(d) have contracts with essentially the same requirements in relation to conditions as to the quality and services of personnel as are contained in the OS contracts;[94]
(e) are required to engage and provide personnel at their cost.
(f) are responsible for induction safety related training before their employees are mobilised to a mine site.
(g) are subject to requirements that their employees comply with SOPs and SWIs and other safety related policies and procedures of BMA.
(h) have charge rates for each operational role in which employees provided to BHP and OS parties set out in a Schedule of Charge Rates on an hourly basis; and
(i) are required to refer to and assess how Site Standards and Procedures listed in a Schedule to the contract apply to them and their employees.

[153] In evidence before the Full Bench were service contracts entered into by WorkPac and Chandler Macleod with BMA and the OS Parties. When these are compared to the contracts between BMA and OS, the distinctions are more matters of form rather than substance. BMA controls access to and removal from its mine sites; its codes of conduct and procedures such as those relating to workplace health and safety apply to employees of OS and WorkPac/Chandler Macleod; and the contracts with WorkPac and Chandler Macleod contain KPIs by which those companies can receive additional payments over the contract price. While the WorkPac and Chandler Macleod contracts have schedules of hourly rates for labour, the contracts between BMA and the OS Parties set out an annual rate charge card. Regardless of whether labour rates are hourly or annual, WorkPac, Chandler Macleod and the OS Parties have contracts stipulating

labour rates for labour supplied to undertake contracted work. The contracts for the OS Parties, WorkPac and Chandler Macleod provide for tracking and costing the wages and other conditions of employment applicable to their employees. When the respective contracts are examined, the OS Parties, WorkPac and Chandler Macleod are under contractual terms that, while differently worded, have much the same effect.

Matters in s 306E(7A) to which the Commission must have regard

[154] Having considered those general matters raised by the evidence and the submissions of the parties, it is appropriate to turn to consider each of the matters listed in s 306E(7A) to which the Commission is required to have regard.

Involvement of the employer in matters relating to the performance of work (s 306E(7A)(a))

[155] Section 306E(7A)(a) requires the Commission to have regard to the involvement of the employer in matters relating to the performance of work.

[156] The expressions "involvement of the employer" and "matters relating to the performance of work" are not defined. The Macquarie Dictionary defines "involvement" to mean "the state of being involved" and "involved" to mean, relevantly, "actively participating in". That definition appears to us to provide a reasonable basis for applying s 306E(7A)(a). That approach accords with the purpose of the inquiry being to differentiate between the provision of a service and the supply of labour. A supplier of labour might be expected to have limited involvement in matters relating to the performance of work by regulated employees.

[157] We accept the submission of BHP and the OS Parties, and of the Minerals Council, that the phrase "matters relating to the performance of work" is not limited to the involvement of the employer in the performance of work by regulated employees itself and is broader than matters of immediate control of the performance of particular tasks. Section 306E(7A)(a) extends to matters "relating to" the performance of work. The phrase "relating to" is one of wide import and can refer to a direct or indirect connection between two subject matters.[95] The degree of connection required between two subject matters joined by the words "relating to" is ordinarily to be determined by reference to the text, context, legislative purpose and history of the provision, and the facts of the case.[96]

[158] The "matters" to which s 306E(7A)(a) is directed must, however, be related to the "performance of work" and not merely related to the "work" or, more generally, the employment of the regulated employees. That may constitute a relevant distinction in some cases. For example, involvement in the development of work processes or health and safety measures required to be applied in the course of the duties of the regulated employees might be said to be related to the performance of work. On the other hand, involvement in human resources, payroll or finance arrangements might be related to the employment of the regulated employees but are less likely to be related to the "performance of work". That will, ultimately, depend on the facts of the case.

[159] All parties accepted that there is considerable scope for overlap between s 306E(7A)(a) and the matters referred to in s 306E(7A)(b) and (c). If the employer directs, supervises or controls the regulated employees when they perform work for the purposes of s 306E(7A)(b),

that is likely to constitute involvement in matters relating to the performance of work. Similarly, the provision of systems, plant and structures to be used by the regulated employees to perform work is likely to be a form of involvement in matters relating to the performance of work. We accept the submission of BHP and the OS Parties that the presence of s 306E(7A)(a) suggests that the subsection has potentially broader operation than s 306E(7A)(b) and (c).

[160] Where the Commission is required to have regard to a particular matter under more than one subsection in s 306E(7A), that does not suggest the matter must be considered more than once. It remains a matter to be considered as part of the overall assessment required by s 306E(1A). To the extent that the evidence and submissions in this matter have raised factual matters which must be considered under more than one of s 306E(7A)(a), (b) and (c), we have considered those matters under one or other heading. It is appropriate to make clear that we have considered those matters as part of the overall assessment that we are required to make irrespective of the heading under which that consideration appears.

Mine planning and maintenance planning

[161] A key feature of the evidence relied upon by BHP and the OS Parties to establish that OS Production and OS Maintenance are providing a service is the involvement of OS Production and OS Maintenance in the mine and maintenance planning processes in place at the Goonyella Riverside, Peak Downs and Saraji mines. The MEU and the AMWU, on the other hand, rely upon the mine planning and maintenance planning process as demonstrating that it is BMA that controls and superintends the work performed by employees of OS Production and OS Maintenance and those entities have, and can have, limited involvement in the performance of work.

[162] In relation to OS Production and as is set out above, the Production Framework Agreement provides that BMA will provide OS Production with an annual mine plan prior to the commencement of each year. The annual mine plan specifies matters such as the mining removal methodology, the sequence of mining, the dimensions of each pit and strip, the limits of excavation of each pit and strip, the required angle of the batters for the pit and ramps, the condition in which the pit is to be left, waste dump locations, top soil stockpile and other stockpile locations and any other matters applicable to the excavation of the pit and strip.[97] Provision is also made for a monthly mine plan providing more detailed prescription as to the available time and production time of each piece of BMA equipment as well as the planned material types, dig locations, haul rouse, dump locations and haulage parameters.[98] BMA can amend the monthly mine plan for any reason by providing three days' notice.[99]

[163] The MEU emphasised that BMA prepares and provides to OS Production weekly and daily mine plans which provide even more detailed prescription with respect to the work to be performed by OS Production. It is sufficient to refer to an example of a daily mine plan in evidence for prestrip day shift on 30 November 2023, setting out information including the priority for each area and dig unit, whether the dig unit is in a BHP or OS area, the locations at which dig and primary and secondary dump locations for each dig unit, the cycle rates, volumes and cycle times, truck types and minimum/maximum numbers of trucks assigned to each unit, and first and last load times, as follows.[100]

Insufficient Trucks Trucks Not Included

Prestrip DayShift Commencing 30/11/23 06:30

	Priority	Area	Dig Unit	Dig Location	Primary Dump Location	Cycle Dig Rate	Prod Hours	Volume	Units	True Cycle Time	Truck Type	Min	Max	Secondary Dump	First Load Time	Last Load Time	Material File	Next Dump	Comments
⚙	1	OS	EXD59	WI04N_40H13_P01 Not Planned	D05N35-132-4042	1,000	0min	0	bcm	10	**Preferred** LB T282 - OS **Additional** CAT 793 - Coal	1 0	2 0	RW-06N	30/11/23 06:30	30/11/23 18:00	CAT 3	D05N34-270-3442	Return to work. 3NP08 BLAST DELAY. Very High priority dig, Please keep trucked up and stockpile as much as we can to maintain feed during blast If not enough trucks look to low priority waste units for trucking.
⚙	2	OS	EXD73	WI05N_39H16_P01 Not Planned	D06N20-220-2335	1,800	9hr 55min	17,850	bcm	23	**Preferred** LB T282 - OS **Additional** CAT 797 - OS	4 0	5 0	D05N34-270-3442	30/11/23 06:30	30/11/23 18:00	CAT 3	D05N34-250-4549	Return to work. Bridge open but still work required on dumps. 220RL or 270RL expected to be first dump options available.
⚙	3	BMA PRESTRIP	SHE36	RI01S_41H16_P01 Not Planned	D02S30-271-1819	2,500	0min	0	bcm	25	**Preferred** CAT 797 **Additional** CAT 793 - PRESTRIP	6 0	7 0	D01S37-160-1416	30/11/23 07:00	30/11/23 18:30	CAT 2/3		Cable works and Maintenance all shift.
⚙	4	BMA	EXD61	YN02S_37H15_P01 Not Planned	D02S35-240-2739	1,300	9hr 15min	12,025	bcm	29	**Preferred** CAT 797 **Additional** CAT 793 - PRESTRIP	4 0	5 0	D02S35-190-3740	30/11/23 06:50	30/11/23 17:40	CAT 3		6/6 and 7/7 return to work. BMA will run this digger while wet weather recovery continues across site
⚙	5	BMA PRESTRIP	EXD62	RI01S_41H16_P01 Not Planned	D01S38-180-0205	1,350	9hr 55min	13,387	bcm	21	**Preferred** CAT 797 **Additional** CAT 793 - PRESTRIP	3 0	4 0	D01S37-160-1416	30/11/23 07:00	30/11/23 18:30	CAT 3		6/6 and 7/7 return to work. 180RL is JSA Dump.
⚙	6	OS	EXD60	WI05N_41Q01_P01 Not Planned	D06N20-220-2335	1,200	10hr 10min	12,200	bcm	23	CAT 793 - PRESTRIP	4	5	D05N34-270-3442	30/11/23 06:30	30/11/23 18:00	ALL CAT	D05N34-250-3847	Return to work. Bridge open but still work required on dumps. 220RL or 270RL expected to be first dump options available.
⚙	7	BMA PRESTRIP	EXD57	BO09S_32PSS_P01 Not Planned	D011S25-190-3246	1,100	5hr 50min	6,416	bcm	17	**Preferred** CAT 793 - PRESTRIP **Additional** CAT 797	3 0	4 0	D011S25-200-3135	30/11/23 07:20	30/11/23 18:20	SUB CAT 1		6/6 and 7/7 return to work. Wet weather recovery on circuit.

[164] The MEU emphasises that the daily mine plan will instruct OS Production as to where digging is to occur (with particular locations allocated to OS Production or BHP Coal, the priority of the dig unit assigned, dump locations for the dig unit, production hours for the dig unit, the cycle dig rate, being the time a dig unit is actually moving material and how much time the dig unit is to operate on that day.[101] We accept, and find, that the daily mine plans prepared by BMA dictate where OS Production employees will work, what work they will do and the details of how that work will be performed. The evidence conveys that BMA is intimately involved in the performance of work by OS Production employees and determines and directs what production work they are to perform, where and when.

[165] We did not understand BHP or the OS Parties to deny that this is the case. BHP and the OS Parties, rather, submit that OS Production nonetheless is involved in the performance of work because OS Production employees are involved in the development of mine plans and that this constitutes "involvement in matters relating to the performance of work". For example, Mr Costello gave the following evidence in relation to the mine planning process:[102]

> It became very evidence early in the position that if we don't have input into the mine plan SRF, meaning why – where we're digging, what material it's digging, what location it's digging, how it's going to dig, what sequence is going to happen, what sequence and interaction it has with other equipment and other areas of the mind than it became evident that we were unable to (indistinct) off a (indistinct) service contract due to other implications and interactions. So we now get heavily involved in the SRF and provide clean process. There's a draft that's produced by BMA. We then take that draft. We examine it, understand it. We understand if it's executable and then we provide feedback.

[166] Mr Abrams gave evidence in relation to the process for the development of the mine plans (also referred to as an "SRF" being a "short range forecast"). His evidence included:[103]

> And just in relation to the SRF, on a monthly basis, that is something that is issued by BMA to OS?---Yes, after detailed engagement through both parties it's then developed, agreed and issued and there's an escalation process if the parties can't agree.
> Certainly. But, ultimately, it is something that is issued to OS, which OS has to comply with?---Once they've agreed to it, yes.
> OS doesn't have a veto right over it, does it?---They have an escalation process.
> And that escalation process sets out a procedure for dealing in any issues between the parties, if there are those issues?---Yes.
> And otherwise, apart from that, OS does not have the ability to veto an SRF plan, does it?---No. The normal process would be both parties engage in detailed analysis for the month ahead, through the SRF. If there's any issues there where the parties can't agree normally that will, relatively informally, escalate, say, to myself and Mr Costello to resolve. And it's normally dealt with relatively informally, through a one-on-one meeting and we agree on the outcome for the SRF.

[167] The MEU emphasises that it is ultimately BMA that determines the content of the mine plans at an annual, monthly, weekly or daily level and submits that the involvement of OS Production is limited because it is ultimately involved only by way of consultation. For example, Mr Thomas gave evidence that:[104]

> Again, whilst OS may have some input into – or input to the formulation of that plan, ultimately it is a plan that BMA requires OS to execute each day?---Correct.

[168] Mr Nielsen gave similar evidence which included:[105]

> So there's a monthly mine plan issued to OS MCAP by BMA, and OS MCAP has to comply with the overall framework set out by that mine plan. Is that right?---Yes, that's right. There's an iterative process in there where that mine plan is reviewed by OS if there are parts of it that aren't achievable for whatever reason. That is fed back to the mine planning manager to review and for feedback. Sometimes that will be updated. Sometimes it won't be.
> And, ultimately, that's a decision of BMA influenced by whatever OS is telling it?---Yes. The feedback might be that there are certain parameters in here that can't be achieved for a variety of different reasons based on operational constraints.
> And BMA will take them into account and perhaps amend or not amend the mine plan as it considers appropriate?---Correct.

[169] BHP and the OS Parties accept that BMA has ultimate say over the formulation of mine plans but says that this does not mean the involvement of OS Production in the performance of work is to be disregarded. BHP and the OS Parties submit that the evidence supports a finding that OS Production is involved to a high degree in the performance of work by its employees as a result of its involvement in the mine planning process.

[170] The evidence with respect to the maintenance planning process is broadly similar. The Maintenance Framework Agreement requires BMA to provide OS Maintenance with a monthly maintenance plan which specifies matters including the equipment scheduled for maintenance, the planned maintenance schedule, the items BMA will supply, utilisation of maintained equipment and unplanned maintenance.[106] Again, BMA is able to amend the monthly maintenance plan for any reason by giving three days' notice.[107] Mr Cavanough explained that

maintenance work is first organised on a 12 week cycle, a monthly maintenance plan (again also referred to as an "SRF") is then issued by BMA each month and weekly plans which set out on a weekly basis, the maintenance to be performed in the coming weeks.[108] Mr Cavanough described the involvement of OS Maintenance in the process as follows:[109]

> … OS Maintenance is heavily involved in preparing these weekly work plans with BMA. OS Superintendents and Supervisors review draft weekly plans and provide their input based on what will allow OS Maintenance employees to succeed. It is common for OS Maintenance to cause BMA to make amendments to these weekly work plans. For example, where OS Maintenance is of the opinion that the weekly plan is not realistic for our team, we request that this is amended accordingly.

[171] BHP and the OS Parties again emphasised that OS Maintenance is involved in the process of developing the maintenance plans and that the plans are developed as part of an iterative process. The MEU and the AMWU underlined that, even if a process of consultation may occur, it is ultimately a matter for BMA to determine the content of the maintenance plan and OS Maintenance must comply with the plan provided by BMA. BHP and the OS Parties pointed to evidence of what they say is the detailed nature of the involvement OS Maintenance has in maintenance planning. For example, although he said he was not intimately involved in the monthly planning process, Mr Connors gave the following evidence in re-examination:[110]

> And could you just explain to the Commission what you mean by that expression in terms of 'OS's maintenance's involvement in the formation of the maintenance plans'?---Yes, I can. And perhaps even extend a bit further, it starts at a 12 month plan. So there was a 12 month time usage model, which was referenced in the documents around where the OS general manager maintenance agrees, or not agrees, to the availability targets set out for the fleet for the year. A lot of work goes into that analysis to understand, 'Are those targets achievable?', but then breaks down into - - -
> Sorry, just stopping you there. When you say, 'A lot of work goes into it to work out whether it's achievable', work by whom?---OS asset management reliability roles that are support structures, they're designed to bring technical capability to ensure that the work can be delivered to deliver the performance outcomes associated with the contracted KPIs.
> Who are those people employed by?---OS. That then moves down into a quarterly major event calendar, which dictates, at a higher level, the scheduled downtime by a fleet, which then breaks down even further when it gets down to a monthly view of more prescriptive about the work that needs to be done on the maintenance – on the equipment. The handover points is to the OS superintendent, at a two week meeting, to accept the schedule, or reject the schedule, and then it's over to the OS team to have full control on how it executes the work, triages the work, delivers the plan, and unplanned work, to deliver the performance requirements required out of the fleet.

[172] The MEU and the AMWU emphasised that BMA determines the content of the maintenance plans. For example, Mr Cavanough was asked about the maintenance work required to be performed by employees of OS Maintenance and gave the following evidence:[111]

> It's done in accordance with a maintenance plan that's ultimately set by BMA?---The maintenance plan is provided by BMA; that is correct.
> And OS Maintenance again has some input into that?---Yes, we have input into that both long and short-term range.
> Sure, but it's ultimately set by BMA?---Yes.

[173] The evidence supports a finding that a process of consultation takes place in relation to the preparation of mine plans and maintenance plans which will involve employees of OS Production or OS Maintenance. There was some confusion in the evidence as to the extent to which agreement is sought or obtained from OS Production or OS Maintenance prior to the finalisation of mine plans.[112] Sensibly enough, we infer that persons involved in developing work plans at a workplace as complex and large as a coal mine will endeavour to reach a consensus in relation to matters relating to the performance of work. As we have said, BHP and the OS Parties did not dispute that it is ultimately for BMA to determine the content of mine plans, and the participation of OS Production is properly characterised as involving consultation. BHP and the OS Parties did refer to the existence of escalation processes which were employed in the event that there was disagreement in relation to the content of a mine plan or maintenance plan[113] and that, as a practical matter, the plans were commonly able to be agreed. Furthermore, given that BMA can alter the mine plans at its discretion, we are satisfied and find that BMA has final control of the mine and maintenance planning process and, in effect, can require OS Production and OS Maintenance, as applicable, to comply with the content of the mine plans and maintenance plans it determines are appropriate.

[174] For the purposes of s 306E(7A)(a), the involvement of OS Production and OS Maintenance in the performance of work is, to some extent at least, qualified by the fact that their employees must work in accordance with mine plans and maintenance plans promulgated and ultimately determined by BMA. The evidence demonstrates that management or supervisory employees of OS Production and OS Maintenance are involved in the process of the development of the mine and maintenance plans. That involvement is more than incidental and is intended to permit OS Production and OS Maintenance to provide substantive feedback in relation to the contents of the plans. We do not doubt that bona fide attempts are made to reach agreement with respect to the content of the plans. We accept that this involvement in the mine planning process constitutes involvement in matters relating to the performance of work by regulated employees for the purposes of s 306E(7A)(a) and we have taken that involvement into account for the purposes of the assessment required by s 306E(1A).

[175] Nonetheless, the process described in the evidence involves BMA preparing the plan that it has determined should be followed, seeking feedback from OS Production or OS Maintenance as applicable which may, or may not, result in changes to the plan and then BMA determining the final content of the plan. In those circumstances, we do not believe the involvement of managerial and supervisory employees of OS Production and OS Maintenance in the mine planning process, or the development of maintenance plans, goes very far to support the contention that the Commission should not be satisfied the performance of work by the employees is not for the provision of a service, rather than the supply of labour. It is to be expected that a mine operator will consult with its own employees, and employees of other employers who perform work at the mine at appropriate levels of authority, in relation to the program for work at the mine. That is unlikely, in itself, to say very much in relation to whether the performance of work by the employees of the employer involves provision of a discrete service rather than the supply of labour.

Performance and disciplinary issues

[176] BHP and the OS Parties submit that OS Production and OS Maintenance is responsible for managing performance and disciplinary issues within its workforce. They submit that the

evidence indicates that, if an OS Production or OS Maintenance employee is alleged to have engaged in misconduct, either the OS Production or OS Maintenance line leadership, or BHP Group's central ethics and investigations team, may conduct an investigation into the allegations. Once the conduct has been investigated, the disciplinary outcome will always be determined by OS line leadership.[114]

[177] BHP and the OS Parties acknowledge that BMA will likely be involved if there is concern that an employee of OS Production or OS Maintenance has breached safety requirements at one of the mines. For example, the evidence of the Production Manager at the Saraji mine, Mr Thomasson, included the following:[115]

> Where an OS Production employee is executing work covered by a SWI, they would be supervised by an OS Production Superintendent and the OS Production Supervisor in their normal chain of command. However, given that BMA has ultimate accountability for the SHMS for the site under the CMSH Act, it can and does take steps to communicate with OS about performance or conduct issues in relation to OS Production employees (including recommending that OS Production take disciplinary action against that employee). BMA has the ability to remove access to the site.

[178] The Production Framework Agreement and the Maintenance Framework Agreement both permit BMA to require the removal of employees of OS Production or OS Maintenance from any of the mines.[116]

[179] The fact that OS Production and OS Maintenance have some role in the discipline and performance management with respect to their employees undertaking work at the mines is capable of falling within s 306E(7A)(a) or (b). It is necessary we have regard to that evidence, and we have done so. We do not regard that matter as having significant weight in the circumstances of this matter where BMA has a role with respect to discipline, and a capacity to remove an employee from the mines, and it would be expected that a supplier of labour would also retain some role with respect to the matters of discipline and performance management for their employees.

[180] BHP and the OS Parties also refer to the involvement of OS Production and OS Maintenance in relation to a range of other incidents of employment for their employees. That includes managing leave requests, the use of different crib rooms, typically using discrete camp accommodation and providing their own logistics team who make bookings for OS Production and OS Maintenance employees on flight or bus services. These matters appear to us not to fall within the concept of involvement in matters relating to the performance of work or the direction, supervision or control of employees when they perform work. We do not accept that such functions associated with the employment of the employees, but with little direct relationship to the performance of work, can assist in the assessment required by s 306E(1A).

<u>Recruitment, induction and training</u>

[181] BHP and the OS Parties rely on evidence that OS Production and OS Maintenance manage their own recruitment, induction and training processes. In relation to recruitment, we accept the submission of the MEU that it is difficult to see what relationship recruitment has to the performance of work so as to make it relevant to s 306E(7A)(a) or (b) or otherwise to the assessment required by s 306E(1A). It would be expected that both suppliers of labour and

providers of services would manage these matters with respect to their own workforce. In any event, the evidence is that recruitment is handled by the talent acquisition team within the BHP Group and the recruitment processes are the same as for all BHP Group entities. Although it is said that approval is given by the relevant manager of OS Production or OS Maintenance, recruitment is conducted by BHP.[117] In our view, this tends to indicate that the OS parties are supplying labour rather than providing a service.

[182] In relation to induction, training and assessment, the evidence indicates that, before a worker can perform any work at the mine, they have to be inducted into the safety health management system, engage in site specific induction, a workplace skills validation, a work area familiarisation and an induction in relation to any standard operating procedures and the Principal Hazard Management Plan. Each of those are processes which are provided or at least dictated by BMA.[118] The vast bulk of the training and induction provided to employees of OS Production and OS Maintenance is dictated or provided by BMA. That matter supports the conclusion that the performance of their work is not for the provision of a service, rather than the supply of labour. In this regard, while a purported host employer may be expected to induct employees of service providers accessing its workplace, and to provide some level of training in relation to safety or site specific practices and procedures, it would not be expected that employees of service providers would be trained by the company to whom the service is provided, to undertake their substantive roles. In short, it would generally be expected that employees of service providers would hold the skills they use to provide service, prior to being deployed to the site where the service is to be provided.

[183] OS Production and OS Maintenance do employ some of their own trainers and assessors. That is a matter which, in our opinion, is relevant for the purposes of s 306E(7A)(a) and we have taken it into account. The force of that matter is limited, however, in circumstances in which the content of the training is substantially dictated by BMA. The examples given in the evidence of other OS-specific training concerning subjects which, whilst important, are somewhat distant from the performance of work, such as leadership training, cultural induction and programs to encourage diverse leaders.[119] We have addressed the evidence concerning the FutureFit Academies and the Mastery Program above and it is unnecessary to repeat that consideration.

Extent to which the employer directs, supervises or controls regulated employees when they perform the work (s 306E(7A)(b)

[184] Section 306E(7A)(b) requires consideration of the extent to which, in practice, the employer or a person acting on behalf of the employer, "directs, supervises or controls regulated employees when they perform work". The subsection provides examples of acts which are considered to involve direction, supervision and control of the regulated employees when they perform work by referring to "managing rosters, assigning tasks or reviewing the quality of the work".

[185] It is appropriate to make a number of general observations in relation to s 306E(7A)(b). *First,* the words "direct", "supervise" and "control" should be given their ordinary meanings. To "direct" means "to give authoritative instructions to", or "to command; order or ordain", supervise is "to oversee (a process, work, workers, etc.) during execution or performance", and to "control" is to "to exercise restraint or direction over; dominate; command".[120] The

subsection directs attention at the direction, supervision and control of the regulated employees "when they perform work". As BHP and the OS Parties submit, the subsection invites attention to the degree of practical direction, supervision and control by their employer of their work such as the when, where and how of the performance of the employees' tasks.[121] The inclusion of reference to whether the employer directs, supervises or controls the employees "in practice" makes clear that the Commission is required to consider not only the lawful authority of the employer to control its employees, but the extent to which the authority of the employer is exercised in fact. That is consistent with the Revised Explanatory Memorandum which indicates that the Commission is to assess the reality of the arrangement to determine whether it is, or is not, for the provision of a service.[122]

[186] *Second*, the Minerals Council submits that if the employer supervises the employees performing the work in any capacity that should weigh heavily in favour of a conclusion that a service is being provided and that any form of supervision of employees in respect of the performance of work is antithetical to a finding that it is just the employee's labour that is being provided. We do not accept that submission. As we have already said, the requirement that the Commission have regard to the "extent to which" the employer directs, supervises or controls the regulated employees acknowledges that an employer might do so to some degree, yet the performance of work might still be properly characterised as being not for the provision of a service, but rather for the supply of labour. It cannot be said that any form of supervision of employees, or supervision to any degree, is necessarily inconsistent with the performance of work by the regulated employees being characterised as the supply of labour.

[187] *Third*, one question which arises from the facts in the present applications concerns what consequence follows if an employer provides supervisors to perform work for the regulated host. The Minister submits that, as a matter of practical reality, where the employer supplies employees to perform supervisory or managerial duties at the workplace of a regulated host, this does not necessarily mean that it is the employer or "a person on behalf of the employer" who exercises the direction, supervision, and control over the relevant employees. It may be that the relevant supervisory or managerial employees are themselves subject to the direction or control of the regulated host or are properly considered to be performing supervisory or managerial duties for or on behalf of the regulated host.

[188] We accept that it is possible for an employer to supply the labour of supervisory or managerial employees for those employees to perform work for a regulated host. The supply of the labour of supervisory employees, in itself, might not support a conclusion that the performance of work of the regulated employees is for the provision of a service rather than the supply of labour if the supervisory employees are performing work in the business of the employer rather than as part of the provision of a distinct service. That will be because, properly understood, the supervision is not being undertaken by, or on behalf of, the employer but rather by supervisors employed by the employer but as part of the labour supplied to the regulated host. Whether that is the case will depend on an assessment of the evidence before the Commission.

[189] *Fourth*, the submissions of BHP and the OS Parties endeavour to downplay the significance of some aspects of oversight of the work of employees of OS Production and OS Maintenance by BMA as being the consequence of its statutory obligations, particularly in relation to safety. The Minerals Council, similarly, submits that the fact that a regulated host

may also have policies and procedures which it requires the employees of the employer to follow while performing the work on site, including standard operating procedures and other systems of work, or utilises technology to monitor compliance, or requires employees to follow the instructions or directions of other personnel when on site, is to be expected in light of the regulated host's obligations to provide a safe workplace to all persons on site. The Minerals Council submits that these activities of the regulated host are irrelevant to the Commission's consideration of s 306E(7A)(b) and that the sole focus is on the employer or a person acting on their behalf, not on the regulated host.

[190] Section 306E(7A)(b) focuses on the extent to which the employer directs, supervises or controls the regulated employees when they perform work. This does not mean direction, supervision or control by others, including the regulated host, is irrelevant. If the regulated host exercises detailed control over the work of the regulated employees, the scope for, or the extent to which, the employer can direct, supervise or control that work is limited. The greater the extent to which the regulated host directs, supervises or controls regulated workers when they perform work, the more likely it is that the performance of work might be properly characterised as not being for the provision of a service, rather than the supply of labour. In that way, direction, supervision or control by the regulated host is, in our opinion, relevant for the purposes of s 306E(7A)(b) and the overall assessment required by s 306E(1A).

[191] Furthermore, the fact that an aspect of the direction, supervision or control by the regulated host may be the consequence of its statutory obligations does not render it irrelevant for the purposes of s 306E(7A)(b). Section 306E(7A)(b) requires the Commission to have regard to the extent to which the employer, in practice, directs, supervises or controls the regulated employees when they perform work. If the extent of the direction, supervision or control exercised by the employer is limited because that function is performed, or substantially performed, by the regulated host, that must still be considered, whatever the reasons for the regulated host doing so. The Commission may take into account the full circumstances of the case, including the role the statutory obligations of the regulated host play in the way the work is supervised and controlled. The fact that statutory obligations of the regulated host might influence the distribution of responsibilities in relation to the performance of work by regulated employees does not render limitations on the extent of the direction, supervision or control by the employer irrelevant. The extent of, and limitations upon, the direction, supervision or control exercised by the employer must be taken into account.

Management structure and day-to-day supervision

[192] BHP and the OS Parties submit that the practical day-to-day direction, supervision and control of maintenance and production work undertaken by employees of OS Production and OS Maintenance at the three mines rest with the OS entities. They submit that this is an important indicator that the performance of work by the employees is for the provision of a service, rather than the supply of labour.

[193] OS Production employees are allocated to a crew of around 15 employees which is supervised by an OS supervisor noting that crew sizes are different at the Goonyella Riverside mine. BHP and the OS Parties submit that, although there are some variations between the mines, the supervision of OS Production employees is as follows.[123] The OS supervisor selects the crew and allocates them to particular equipment at pre-start meetings. The OS supervisor

drives around in a light vehicle and uses a two-way radio to continually check that work activities are being carried out safely and efficiently. The OS supervisor will make judgments and direct changes where necessary throughout a shift and where this involves a change to the configuration of the circuit or pit conditions, those changes will be fed into BHP's Integrated Remote Operations Centre (**IROC**). The OS Production supervisors report to an OS Production superintended, who then reports to an OS Production manager, each of which are OS Production employees based at the mine site.

[194] In relation to OS Maintenance, BHP and the OS Parties submit that OS Maintenance supervisors are responsible for providing directions to OS Maintenance employees in the performance of their duties and are responsible for providing all practical day-to-day direction, supervision and control over the quality of OS Maintenance employees' work product, whether in the workshop or performing breakdown maintenance work in the field.[124] It is submitted that OS Maintenance supervisors manage the execution of work and intervene on work quality where required. The OS supervisors report to an OS Superintendent with direct responsibility for the OS supervisors' performance. The OS superintendent reports to the OS Maintenance Manager.

[195] The evidence is, in a broad sense at least, consistent with the submissions advanced by BHP and the OS Parties as to the role of OS supervisors and the employees who gave evidence for the MEU and the AMWU generally gave evidence consistent with the proposition that OS Production and OS Maintenance employees are supervised on a day-to-day basis by OS supervisors. The MEU and the AMWU, however, submit that the significance of the supervision provided by OS supervisors for the assessment required by s 306E(1A) must be assessed in the context of the evidence as a whole. The significance of the roles of OS supervisors is, in the submission of the MEU and the AMWU, reduced by a number of matters, most notably that the OS supervisors operate within a management structure which is led by BMA employees, the work of OS Production and OS Maintenance employees must be undertaken in accordance with Standard Operating Procedures (**SOPs**), Safe Work Instructions (**SWIs**), and other policies and procedures dictated by BMA, and day-to-day instruction and control is exercise by BMA though the Minestar and Modular systems and the operations of the IROC.

[196] We will address the significance of SOPs, SWIs and other policies and the operations of Minestar, Modular and the IROC below. It is appropriate to address the submissions in relation to the management structure. The management structure for each of the mines sets out a hierarchical reporting structure as required by the *Coal Mining Safety and Health Act 1999* (Qld). Senior managers (or risk owners), employed by BMA are responsible for particular areas at the mine and they report to the SSE. In the case of Goonyella, Mr Ferricks is the senior manager employed by BMA and responsible for Load and Haul and therefore for OS Production. Mr Croce is presently the senior manager responsible for maintenance, including OS Maintenance. In the case of Peak Downs, Mr Schloss is the senior manager responsible for Load and Haul and in relation to OS Production employees and Mr Everson is the senior manager responsible for maintenance and OS Maintenance employees. In the case of Saraji, Mr Hussey is responsible for load and haul and OS Production and Mr Chatterjee is the senior maintenance manager responsible for OS Maintenance.

[197] By way of example, the management chart for the Goonyella Riverside mine is as follows:

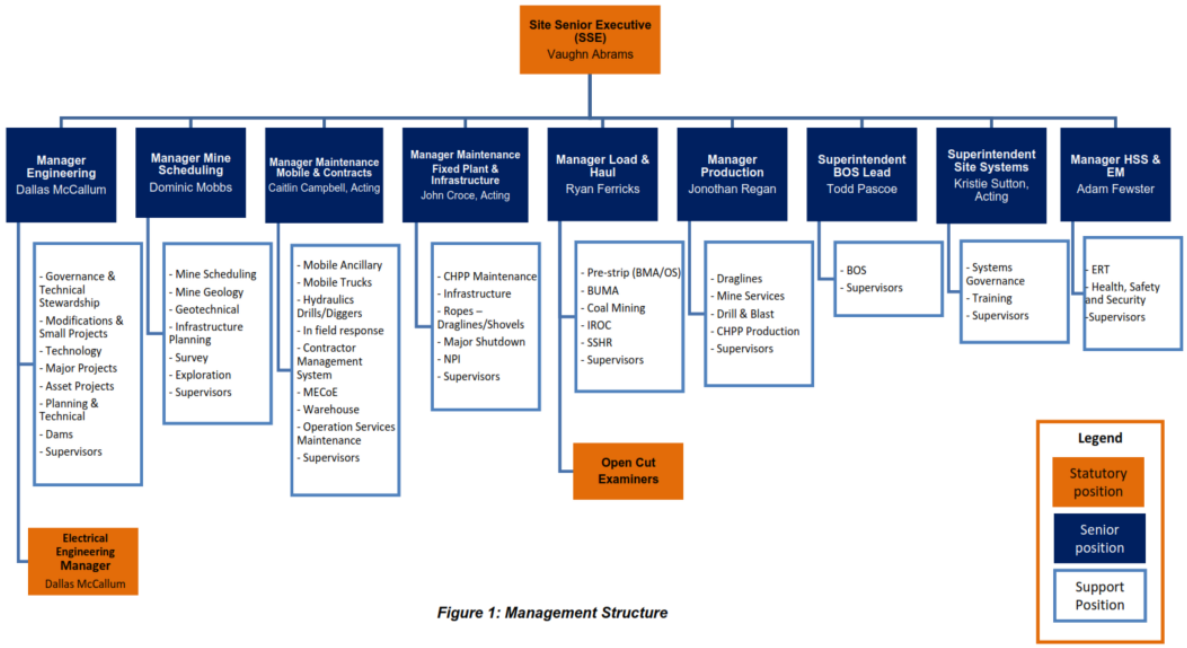


Figure 1: Management Structure

[198] The MEU submits that the site senior executive (the **SSE**) is the most senior officer at the mine and is responsible for the mine and all mine workers ultimately report to the SSE. The MEU submits that supervisors, including OS supervisors, are appointed by, and responsible to, the SSE for ensuring that the safety health management system dictated by BMA is followed. The MEU submits that the role and responsibility of the SSE points to the significant involvement of BMA in the performance of work and the extent to which BMA, rather than the OS entities, direct and control the work by OS employees at the mine.

[199] BHP and the OS Parties submit that, in relation to operational matters, OS Production and OS Maintenance employees report to OS supervisors and OS superintendents, who report through to OS general managers employed by either OS Production or OS Maintenance. BHP and the OS Parties submit that BMA's role is confined to safety matters, and it sits at the apex of the statutory safety regime because of its role as the coal mine operator. It is submitted that this says nothing about the extent of the day-to-day supervision or control exercised by OS Production supervisors.

[200] The evidence in relation to the management and reporting lines for supervisors engaged by OS Production and OS Maintenance was difficult to follow. The only organisational charts in evidence indicated that the SSE is the most senior executive, and all other managerial employees reported directly to the SSE in a hierarchical structure. The evidence of a number of the SSEs who gave evidence recognised that this role was the most senior position at the mine and responsible for the operation of the mine.[125] This appears to be consistent with the requirements s 55(1) of the *Coal Mining Safety and Health Act* which provides:

55 Management structure for safe operations at coal mines

(1) The site senior executive for a coal mine must—
(a) develop and maintain a management structure for the coal mine in a way that allows development and implementation of the safety and health management system; and
(b) document the management structure.
Maximum penalty—40 penalty units.

[201] The section requires that the SSE "develop and maintain a management structure for the coal mine". The section contemplates that a mine will have a single management structure which is maintained by the SSE. Some of the evidence suggested that OS supervisors reported to BMA managers for safety purposes and within an OS hierarchy for operational purposes. For example, Mr Nielsen gave evidence that OS supervisors and the OS maintenance manager reported to a BMA manager "for the requirements of section 55 of the Act, under the requirement for a management structure".[126]

[202] We have some difficulty in accepting that evidence. The evidence appears to suggest there can be one management structure for safety purposes and another management structure for other purposes. It is hard to see how that is consistent with the obligation imposed by s 55(1) of the *Coal Mining Safety and Health Act* to develop and maintain "a management structure". However, it is unnecessary to resolve that question. Safety is plainly a most important matter in the operation of a coal mine and integral to everything that happens at a mine. To submit, as BHP and the OS Parties did, that BMA's role is "confined to safety matters" cannot be accepted if it is intended to convey that the role is limited or does not touch upon the manner in which all work tasks are undertaken at the mines.

[203] The fact that OS supervisors report to BMA employees at least with respect to any matter touching upon safety, are required to ensure that BMA work processes, procedures and policies are applied and must themselves be appointed by the SSE is significant. It is, in our opinion, relevant to assessing the weight to be attached to the role of OS supervisors in determining whether the performance of work by OS employees is properly characterised as for the provision of a service, rather than the supply of labour. The role of OS supervisors is to enforce BMA's safety and health management system which applies at each of the mines, OS supervisors direct, supervise and control OS employees when they perform work in accordance with the requirements of BMA's safety and health management system.[127]

[204] Together with the requirements imposed by SOPs, SWIs and other BMA policies and procedures and the use of the Minestar and Modular systems and the IROC (to which we will turn), this aspect of the evidence supports a view that OS supervisors act within a supervisory structure which is answerable to BMA and part of BMA's management structure at the mine. The management structure underlines the significant extent to which BMA controls the performance of work by OS employees.

<u>Standard operating procedures (SOPs), safe work instructions (SWIs) and other policies and procedures</u>

[205] The MEU and the AMWU both rely on evidence that employees of OS production and OS Maintenance are required to comply with a very large number of BMA policies and

procedures, including SOPs and SWIs. As we understand the submission, the MEU and the AMWU submit that the degree of direction, supervision or control exercised by OS Production and OS Maintenance for the purposes of s 306E(7A)(b) is, necessarily, limited by the fact that the employees are required to comply with policies and procedures issued by BMA that govern, in minute detail, the manner in which their work is to be performed. They submit that, in practice, BMA directs and controls the performance of work by employees of OS Production and OS Maintenance. BHP and the OS Parties dispute both the nature and genesis of the policies and procedures and their significance for the analysis required by s 306E(1A) and (7A).

[206] It is plain from the evidence that, in the form of the SOPs, SWIs and other policies and procedures, BMA produces literally thousands of documents which OS employees are required to comply with whilst performing work and which detail how workers can and must perform work and regulate the performance of work. The parties agreed on the following facts:[128]

1. BM Alliance Coal Operations Pty Ltd and/ BHP Coal Pty Ltd publish and provide documents detailing or otherwise setting out how tasks or functions are to be performed by OS MCAP and OS ACPM employees who perform work at the Goonyella Riverside, Saraji and Peak Downs mines.

2. BMA and/ BHP have published and provided thousands of documents of the kind referred to in paragraph 1 above.

3. OS MCAP and OS ACPM employees are required to consult and adhere to documents of the kind referred to in paragraph 1 above whilst performing tasks and functions at the Goonyella Riverside, Saraji and Peak Downs mines

[207] Examples of SOPs and SWIs are in evidence. The examples of SOPs at Peak Downs include procedures to be followed with respect to lifting and cranage, watering and maintaining roads, personal protective equipment, safe operation of vehicles and mobile equipment.[129] Examples of SOPs at the Saraji mine include procedures with respect to safe loading and discharge of loads, safe operation of vehicles and mobile equipment and tyre and rim safety.[130] Examples at Goonyella Riverside include procedures dealing with lifting and cranage, loading and discharge of loads and safe operation of vehicles and mobile equipment.[131] Examples of SWIs in evidence include general operations such as rack Dozer Operations, Excavator Operations, moving heavy equipment in and out of a workshop and using hand held hoses and special tasks or activities such as HV Truck Hot Seat Park up Change, complete wheel rim removal and voltage isolation of Liebherr T282C Trucks.[132]

[208] BHP and the OS Parties response to these submissions is essentially twofold. The first response is a submission that SOPs and SWIs form part of the safety and health management system (the **SHMS**) prescribed by the *Coal Mining Safety and Health Act*. BHP and the OS Parties submit that SOPs prescribe the minimum risk controls to manage the hazards associated with a particular task and SWIs, although cast at a more detailed level, set out the minimum steps to take to perform particular tasks safely. It is submitted that each of the witnesses called by the MEU and AMWU accepted that SOPs and SWIs do not set out prescriptive procedures for how to perform particular tasks but rather provide "safety guardrails" in the performance of work. Each accepted that, within the bounds of those guardrails, there remained decisions for each employee to make about how to most efficiently and safely perform their allocated tasks.

[209] The SOPs and SWIs are, fundamentally, directed at ensuring that the various and numerous tasks required to be undertaken at the mines are performed as safely as possible. We do not accept that, because the ultimate object of the prescriptions is safety, that the SOPs and SWIs are not relevant to the extent of direction, supervision or control exercised by OS Production and OS Maintenance. The fact that BMA produces, implements and enforces detailed procedures as to the manner in which virtually every task associated with the operation of the mines is to be performed, and that the procedures apply to employees of OS Production and OS Maintenance, plainly impacts upon the degree to which those entities can be said to direct, supervise or control their employees when they perform work.

[210] It is correct to say that the prescriptions contained in the SOPs and SWIs do not entirely remove judgment or skills from the work of the employees at the mines or reduce them to automatons merely reading prescribed instructions. However, the evidence demonstrates that the SOPs and SWIs are both extremely numerous and are intended to cover at least key tasks undertaken at the mine[133] and are very detailed in their prescription of the manner in which the work is to be performed. SWIs, in particular, set out with more particularity how activities are to be conducted, including by detailing permissible ways in which tasks can be undertaken. Having reviewed the examples of SWIs that are in evidence, we think it is accurate to describe SWIs as providing granular detail as to how a particular task is to be performed. Indeed, Mr Thomas described SWIs as providing a "a step-by-step how to do a task".[134]

[211] We did not, with respect, find the cross-examination of the witnesses called by the MEU and the AMWU in relation to the SOPs and SWI's particularly useful. The ritualistic invocation of the catch phrase "safety guardrails" in the cross-examination was not illuminating as to the degree of prescription involved in the SOPs and SWIs. There is no dispute that there remain decisions for employees to make about how to most efficiently and safely perform allocated tasks or that supervisors continue to have some role in supervising the work performed. However, a review of the SOPs and SWIs themselves, and the other evidence, demonstrates that those documents represent extremely detailed instructions as to how key tasks are to be performed. The fact that BMA promulgates and enforces those documents diminishes the extent of the direction, supervision or control that remains to be exercised by OS Production or OS Maintenance with respect to their employees when they perform work at the mines and is more indicative of the work of the employees involving the supply of labour.

[212] The second response is that OS Production and OS Maintenance have a role to play in the development and modification of SOPs and SWIs. The evidence indicates that, to the extent that OS Production and OS Maintenance may be involved in the development of SOPs and SWIs, this is in accordance with BMA's consultation obligations under the *Coal Mining Safety and Health Act* and associated regulations.[135] That involvement is not rendered irrelevant simply because it is the consequence of a statutory consultation obligation. It is appropriate that this matter be considered as involvement by OS Production and OS Maintenance in matters relating to the performance of work by the regulated employees for the purposes of s 306E(7A)(a) and we have done so. We do not, however, believe it is a particularly significant matter in the overall assessment.

[213] In relation to other BHP policies and procedures that apply at the three mines, BHP and the OS Parties submit that those policies do not demonstrate the imposition by the regulated host of any particular policy, such as might point toward a mere labour supply arrangement.

Rather, it is submitted that those policies apply as a consequence of the OS entities forming part of the broader BHP Group. We do not accept that submission. Whether or not BHP Group policies apply to OS Production and OS Maintenance as a result of those entities being part of the BHP Group, the fact that the policies are applied reduces the degree of direction, supervision or control exercised by the OS entities and is more supportive of a conclusion that the performance of work by their employees involves the supply of labour.

Minestar, Modular and the IROC

[214] The MEU relies on evidence concerning the operations of BHP's Integrated Remote Operations Centre (the **IROC**) which is a control centre located in Brisbane which remotely monitors and coordinates operations at the mines. The IROC controllers are employed by a BHP Group company and use systems known as Minestar and Modular to monitor the operations of vehicles and machinery at the mines. Modular is an equivalent fleet management system operated by Komatsu, which is the manufacturer of equipment operated at Goonyella Riverside mine. The evidence did not specifically address the operation of the Modular system in as much detail, but we broadly understand it to work in a similar manner to the Minestar system.

[215] The parties sharply disagree about the significance of the Minestar system and the operations of the IROC controllers. BHP and the OS Parties submit that Minestar is a fleet monitoring system which collects GPS data and allows IROC supervisors to make decisions based on its data. They describe IROC as providing "logistical instructions" to employees working at a relevant mine and submit that the IROC controllers do not direct or control the performance of work by every machine at the mine, nor do they provide instructions or directions about work or how mining is to occur or take place.

[216] In our opinion, the submissions of BHP and the OS Parties understate the degree of control and direction assumed by BMA by reason of the operations of the IROC and the use of the Minestar system. The witnesses called by the MEU gave evidence of the detailed direction and instruction provided by the IROC through the Minestar system. For example, Tiahnni Gaukroger, a dump truck operator at the Peak Downs mine, described the operations of Minestar as follows:[136]

> Production workers at the Mine also receive direction and instruction from the IROC, which is known as either Control (in Coal Mining) or Dispatch (in Prestrip). IROC is run by BHP from an office in Brisbane and monitors and directs the operator of each machine during the performance of work. IROC directs and controls the performance of work by every machine at the Mine, no matter who the operator is employed by.
>
> By way of example, once a haul truck is loaded with coal or overburden (depending on the digger), Control will then send the operator an assignment, which tells them where to go next. The assignment appears on a screen in the truck which has a map on it and resembles a GPS. This is known as the MineStar system. This assignment directs us to take the material in the truck to a specific location. If we are hauling dirt and rock (i.e. overburden), the assignment specifies which dump we are required to go to. If we are hauling coal, it specifies if we are to take it to the stockpile or the specific ROM bin, which is a large feed chute which goes into a pile and then is sent into the wash plant. The screen then displays a white line to show the route to where the operator is required to dump the load. Next, the operator receives a new assignment from Control, for example they are sent back to same loading unit, or directed to go elsewhere.

> The operators repeat this process throughout their shift. If an issue arises, the operator can call Control on the two way radio.
>
> MineStar also tells Control what the status of the truck is, for example, if it is travelling empty, with a load, if it is over- or underloaded and the like. Operators are also required to record any delay to their work in MineStar, such as toilet and crib breaks, when the operator is waiting on the truck to be loaded, when maintenance is required and when the truck is being hot seated (i.e. operator changeover).

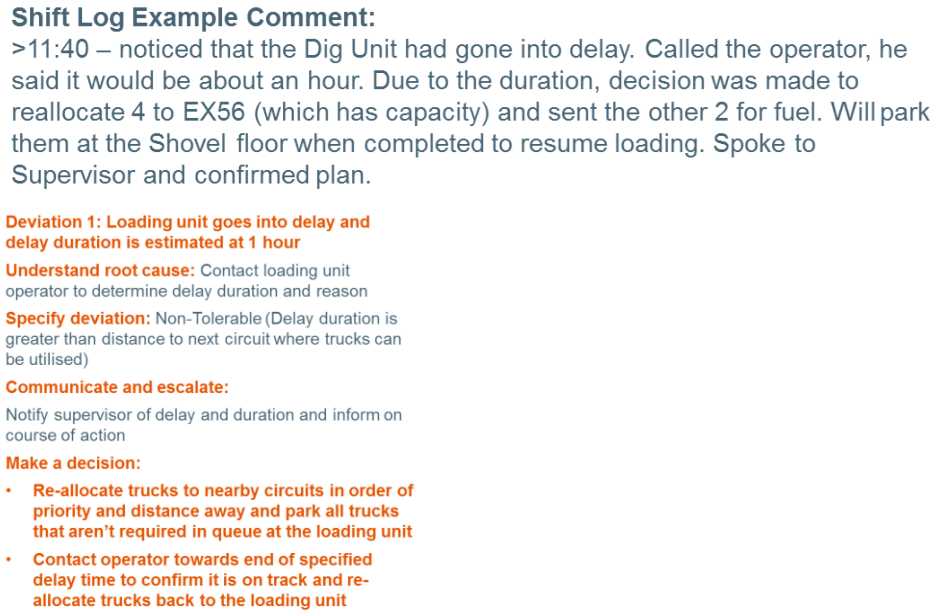
[217] The evidence of Mark Macfarlane, a production technician at the Saraji mine, included the following description of the Minestar system and interactions with the IROC controllers:[137]

> MineStar operates through a computer screen, which is in the cab of each machine. BHP's IROC facility in Brisbane monitors and manages the performance of each machine through MineStar, and directs and controls the operator of the machine through MineStar. By way of example, MineStar guides the operator of an excavator where to dig, the depth to be dug, the specific haul trucks to be loaded (by reference to their unique machine number) and the distance in minutes and / or seconds that each such haul truck is from the excavator. The speed at which the excavator is moving overburden, which is referred to as the 'dig rate' and is a key metric essentially measuring how much dirt is being moved per hour, is monitored through MineStar by IROC. If the dig rate is perceived to be too slow, IROC may call up the operator over the two-way radio or send a message to the operator asking why the dig rate is slow, or alternatively the Supervisor may call up the operater over the two-way radio and ask that question. By way of further example, MineStar instructs the haul truck operators which excavator they are to be loaded by, and also where they are to dump. That is, during the course of a shift, a haul truck operator may work under multiple excavators. On dumping each load, MineStar will assign the haul truck to a particular excavator, and then direct, via a white line, the exact route that the haul truck operator must take to receive the load from that excavator. On being loaded, MineStar records metrics about the load, including the weight, which enables IROC to monitor whether the haul truck has been properly loaded, and is not either underweight or overweigh.

[218] In short, the Minestar system facilitates the IROC sending precise instructions as to the work to be performed to a screen inside the vehicle or machine being operated by the OS employees. The route or design plan directs, with great precision, the work to be performed. IROC controllers monitor whether the work is being performed in accordance with the prescribed design plan or route and can intervene if there is any delay or divergence from the instruction.[138]

[219] The evidence of some of the witnesses called by BHP and the OS Parties presented somewhat of a different picture. Some witnesses suggested that the IROC controllers do not provide instructions or directions about work or how mining is to occur or take place.[139] BHP and the OS Parties point to evidence that described the Minestar as merely a fleet management system and asserted that the IROC controllers monitor and do not manage.[140] Even that evidence suggested that the IROC controller manages the work together with the OS supervisor responsible for the circuit.[141] It may be that the differences in the evidence is partly one of complexion or semantics. However, the evidence relied upon by BHP and the OS Parties overlooks the first stage of the process in which Minestar is used to provide direct instructions to the operator through the screen in the vehicle or machine to provide precise and detailed instructions as to the work to be performed. Contrary to the submissions of BHP and the OS Parties, the Minestar system is not merely a tool of communication. It is used to communicate very precise instructions in relation to the performance of work from BHP to OS operators.

[220] In relation to the monitoring task, the evidence demonstrates that IROC controllers identify departures from the route, timetable or design plan or delays in production activity in a manner that demonstrates a high degree of control and supervision of the work being performed by OS Production employees. The evidence establishes that the IROC controllers, if an issue is identified, investigate by communicating with the operator or the relevant supervisor and determine a course to be taken. A number of examples of those communications were in evidence. An example referred to by the MEU was as follows:[142]



[221] That is not to suggest that the relevant OS supervisor might not be involved in a discussion as to the course of action to be adopted and contribute to the decision that is made. That constitutes some involvement in the control of the work by the OS supervisors. However, we find that the evidence demonstrates that there is a high level of control and direction exercised by the IROC controllers through the use of the Minestar system. In the example provided above, the IROC controllers decided to reallocate the haul trucks in response to a delay in operations and then "spoke to Supervisor and confirmed plan". This accords with the evidence given by witnesses called by BHP and the OS Parties who recognised that the IROC controllers provide direction and manage the truck fleet. For example, Mr Abrams gave the following evidence:[143]

> And IROC controllers are people who observe the MineStar, sorry, the Modular system, operating on a day to day basis?---Yes, we run day and night managing the system.
> Certainly. And those controllers will be able to see where every particular autonomous haul truck is at the mine at any time?---Yes. Like I said, yes, they're GPS tracked.
> Where any dozer or water truck or grader is?---Yes.
> And they will be able to see how fast they are going?---Yes.
> And they will be able to communicate with the operators of dozers, water trucks, graders, and excavators?---Yes, either through radio or, I believe, they can effectively text message through the system as well.
> I see. And they'll communicate with operators of machines, including OS employees, in the event that, for example, they're digging too slowly, or they're - - -?---Yes, or too fast. Yes.

> And they can ask them questions about why they're digging too slowly or too quickly?---Yes, so they can manage the truck fleet. Yes.
> And they'll inquire into the reasons for digging too slowly or too quickly?---Yes.
> And if any remedial action needs to be taken they can direct it to occur?---Yes, they have control of the truck fleet.

[222] BHP and the OS Parties also suggest that Minestar is dependent on the information fed to it on the ground and, in that respect, OS supervisors are the "eyes and ears" on the ground for their respective crews, assessing changing conditions and feeding information to IROC which is in turn input into Minestar. It is not correct to say that Minestar is entirely dependent on information provided by persons on the ground in the mines. It uses GPS tracking and other remote monitoring to identify issues or departures from the mine plan. Information is also provided by operators or supervisors at the mines to IROC controllers. That information is used for the purpose of making decisions in relation to operational changes by IROC controllers or in consultation with the relevant supervisor.

[223] The evidence in relation to the operation of the IROC and the Minestar and Modular systems does not establish that OS supervisors do not exercise any form of direction, supervision or control of OS employees when they perform work. They do exercise a degree of direction, supervision or control and we have taken that into account in the assessment required by s 306E(1A). However, in addition to the other matters to which we have referred, the function performed by the IROC through the Minestar and Modular systems demonstrates a high degree of direction and control by BHP in relation to the performance of work by OS Production employees. That matter reduces the extent to which the role of OS supervisors suggests that the work performed by those employees is for the provision of a service, rather than the supply of labour.

Intermingling of OS and BHP Coal employees

[224] The MEU, in particular, relied on evidence which it says demonstrates that BHP Coal employees and OS Production employees regularly work with each other, in the same crews, or alongside each other in the same pits or on the same circuits. The MEU submits that this includes OS Production employees being assigned to a BHP Coal crew and BHP Coal crews and OS Production crews sharing the use of water carts or graders operated by OS MCAP employees.[144] The MEU also submits that it is common for OS Maintenance employees to work side-by-side in the workshops and in the field and share equipment and work together at least for certain tasks such as removing or reinstalling truck engines.[145]

[225] BHP and the OS Parties acknowledge that BHP Coal and OS employees interact and work together to some extent. However, they submit that the evidence makes clear that BMA and OS crews in the main carry out work separately, in separate crews, and with separate equipment and that interaction between BMA and OS Production crews is incidental, and cross-resourcing between those crews is occasional, unplanned, and reactive. BHP and the OS Parties further submit that OS Maintenance employees often perform different types of maintenance work to BHP Coal maintenance employees and in different workshops or different parts of workshops at the mines.

[226] It is unnecessary to survey the evidence in relation to the interactions between BHP Coal and OS employees in detail. We accept that ordinarily OS Production employees are deployed

in separate crews to BHP Coal production employees and that OS Maintenance employees work in either separate workshops or are allocated to separate parts of workshops. That does not mean BHP Coal and OS employees are not regularly in relatively close contact and the evidence also indicates that, on occasions at least, OS employees are reassigned to BMA production crews or directed to work with BHP Coal maintenance employees. However, that is not the normal arrangement of the work. We do not think the evidence of interactions on the radio or incidentally in the workplace are of significance for present purposes.

[227] The fact that OS Production employees are generally deployed in separate crews to BHP Coal production employees and that OS Maintenance employees work in either separate workshops or are allocated to separate parts of workshops is consistent with the performance of work being for the provision of a service. It does not, however, necessarily suggest that is the proper characterisation of the work of the OS employees. A regulated host might be supplied with labour by an external employer and determine to deploy that labour in distinct teams or crews. Furthermore, the fact that OS employees are cross-deployed to work in BMA crews, or work with BHP Coal employees, suggests that the proper characterisation of the work is that it involves the supply of labour even if the occasions this occurs are limited.

Rostering of employees of OS Production and OS Maintenance

[228] BHP and the OS Parties submit that OS Production and OS Maintenance set their own rostering patterns, shift allocations and shift lengths for their employees at the three mines. They also refer to evidence that the roster patterns of employees of OS Production and OS Maintenance vary, to some degree, from the rosters worked by BHP Coal employees. The standard roster for OS Production is 7 days on, 7 days off, 7 nights on, 7 nights off comprising 12.5 hour day shift and a 12.5 hour night shift whereas BHP Coal employees at Peak Downs and Saraji, for example, predominantly work 6 days on, 6 days off, 6 nights on and 6 nights off.[146] Similarly, OS Maintenance employees work a 7-on / 7-off roster, whereas BHP Coal maintenance employees work at 6-on / 6-off roster.[147]

[229] The MEU accepts that OS Production and OS Maintenance set their own rosters. The MEU submits, however, that it is significant that the rosters must be set within the framework, and the confines, dictated by BMA's Safety Health Management System and, more specifically, the relevant fatigue management plans that apply at each of the mines. By way of example, the MEU referred to the Fitness for Work: Fatigue Management Plan for the Peak Downs mine. The Fatigue Management Plan records that:[148]

> 12 All rosters must conform to the hours of work mandatory requirements listed in Table 2 - Hours of Work Mandatory Requirements and have controls identified from the QGN16 Guidance Note for Fatigue Risk Management (QGN16) aligned PDM Roster Risk Assessment documented in a PDM Fatigue Control Plan specific to the workgroup's roster.

[230] Table 2 sets out the "Hours of Work Mandatory Requirements" and sets out detailed prescriptions with respect to matters such as maximum shift length, maximum work time including commute, when overtime or extended shifts can be worked, minimum breaks between shifts, breaks required within shifts and night shift limitations.[149]

[231] The fact that an employer that supplies labour undertakes the task of managing rosters is an example of directing, supervising or controlling the performance of work by the regulated

employees given in s 306E(7A)(b). It must be contemplated that the Commission is required to take that into account under that subsection. Involvement in setting or managing rosters is also capable of falling within s 306E(7A)(a). Either way, it is a matter to which the Commission is required to have regard for the purposes of undertaking the assessment required by s 306E(1A). We have taken the evidence that OS Production and OS Maintenance set the rosters for their employees working at the three mines.

[232] We do not believe the fact there are constraints imposed by fatigue management plans of BMA greatly affects the significance of that matter for the assessment under s 306E(1A). When rostering employees an employer will commonly be required to comply with limitations on the hours of work of employees derived from industrial instruments or as a result of health and safety obligations either of a general nature or specific to a particular industry. The fact that there are limitations on the rostering arrangements that may be adopted by OS Production and OS Maintenance is not unusual. However, we do take into account that OS Production and OS Maintenance are not themselves able to make an assessment as to what constitutes safe rostering arrangements and, within reasonably prescriptive restrictions, those assessments are made by BMA.

Extent to which the regulated employees use or will use systems, plant or structures of the employer to perform the work (s 306E(7A)(c))

[233] Section 306E(7A)(c) requires the Commission to consider the extent to which the regulated employees use or will use systems, plant or structures of the employer to perform work. The reference to "systems, plant or structures" should be understood to broadly refer to any plant, equipment, buildings or facilities used by the regulated workers to perform work as well as to non-physical items such as health and safety management systems, modes of operating and performing work, and workplace policies and procedures.

[234] The subsection suggests that, if the regulated employees use systems, plant or structures of the employers, that will favour a conclusion that the work is for the provision of a service rather than the supply of labour. Conversely, if the regulated employees use systems, plant or structures of the regulated host, that is likely to favour a conclusion that the performance of work involves the supply of labour. The supply, by the employer, of its own systems, plant and structures to facilitate the work of the regulated workers will often be indicative of the provision of a discrete service to the regulated host and may support a conclusion that the proper characterisation of the work performed by the regulated employees is that it is for the provision of that service.

[235] There is no dispute that virtually all of the plant, equipment and facilities used by employees of OS Production and OS Maintenance is supplied by BMA rather than the OS Parties. In relation to OS Production, the heavy mining machinery used by OS Production employees to perform work at the three mines is supplied by BMA as the coal operator.[150] Each of the site work packages relating to work at the mines lists the specific machinery to be supplied. Although acknowledging that this is a matter to be taken into account in the assessment required by s 306E(1A), BHP and the OS Parties suggest that limited weight should be given to that consideration in the circumstances of this matter for a number of reasons.

[236] BHP and the OS Parties say that it is unsurprising that BMA supplies the mining equipment used by employees of OS Production given the large capital investment needed to acquire such equipment and that, as a result, the fact of the supply of mining equipment says little about the proper characterisation of the performance of work. In our opinion, the reasons why the regulated employees do not use systems, plant or structures of their employer is unlikely to affect the significance of that matter in the assessment required by s 306E(1A). The fact that the regulated employees do not favours a conclusion that the work of the regulated employees is not for the provision of a service. Whether the reason the employer does not provide the systems, plant or structures used in the performance of work is that it would not be economically viable, or for some other reason, is immaterial. Indeed, that it would not be economically viable for OS Production to supply its own equipment rather underscores the significance of that consideration.

[237] We should also mention that Mr Costello states that it is not uncommon for a mining services contractor not to own the heavy machinery operated by its employees, due to the large capital investment needed to acquire such equipment.[151] The basis of Mr Costello's assertion in that respect was not explained beyond a reference to his experience. The evidence otherwise indicated that, at the Goonyella Riverside, Peak Downs and Saraji mines, BUMA and Thiess do provide their own equipment in contrast to the operations of OS Production.[152] In any event, whatever the practices of other employers, the fact that OS Production employees overwhelmingly use machinery and equipment provided by BMA is relevant and the Commission is required to have regard to that consideration.

[238] Furthermore, it is not only the heavy equipment that is supplied by BMA. The site work packages make clear that BMA provides a range of other items, services and equipment to be used in, or to facilitate, the performance of work of employees of OS Production such as light vehicles for supervisors and staff in supporting roles such as trainers, assessors and technical specialists. By way of an example, the site work package for OS Production at the Peak Downs mine for the 2023-2024 year records at Appendix C:[153]

[**REDACTED**]

[239] Other BMA supplied equipment is listed in the site work package and includes crib, fatigue rooms and office facilities including necessary computer systems, diesel and other fuels, and consumables, first aid and emergency response services and emergency equipment including PPE management and supply.

[240] BHP and the OS Parties submit that of greater relevance is the nature of the use of plant and equipment by the employees of OS Production. They submit that there is no planned sharing of equipment between entities in the mine plan, within the week or month and equipment is only shared where there are emergency circumstances or operational needs within a shift, such as breakdowns. The Minister submits that this is not the question being asked by s 306E(7A)(c) and that the subsection simply asks whether the regulated employees use the employer's plant, systems or equipment. The MEU, similarly, submits that the subsection is not concerned with the extent of the use or the nature of the use of systems, plants or structures and, for example, it matters not whether OS Production employees use different crib rooms to BHP Coal employees. It says the critical matter is that the crib rooms are provided by BMA.

[241] We do not accept the submission of the Minister and the MEU that the nature of the use of systems, plant or structures of the employer, or of the regulated host, is irrelevant for the purposes of s 306E(7A)(c) or the overall evaluative exercise required by s 306E(1A). It is correct to say that s 306E(7A)(c) requires the Commission to consider the extent to which regulated employees use systems, plant or structures of the employer. That would include whether the regulated employees use systems, plant or structures of the employer at all as well as the "extent" of the use in the sense of frequency or regularity of that use.

[242] The nature of the use might also be relevant, potentially at least, to the significance of the use to the assessment required by s 306E(1A). For example, the type of plant or equipment at issue is likely to be important. The provision of crib rooms or accommodation by the regulated host is, in our opinion, relevant to the assessment required by s 306E(1A). However, the provision of facilities such as crib rooms, toilets or accommodation is likely to be less significant to the overall characterisation of the performance of work than provision of plant and equipment necessary for the performance of the work itself. More substantial plant and equipment involving a considerable investment might be more likely to suggest the employer of the regulated workers provides a discrete service.

[243] BHP and the OS Parties emphasise that, generally at least, plant and equipment is allocated to be used specifically by employees of OS Production rather than being shared with BHP Coal employees.[154] We accept that this evidence is relevant to the weight which can be attached to the use of BMA plant and equipment by employees of OS Production in the assessment required by s 306E(1A) and we have taken it into account. However, having regard to the whole of the evidence, the relevance of that evidence is marginal. Whether BMA has arranged its operations such that particular pieces of equipment are generally allocated to be used by OS Production employees rather than BHP Coal employees is, in our opinion, of limited significance. The important point is that OS Production employees use, virtually entirely, plant and equipment supplied by BMA to perform work. The equipment includes valuable and specialised mining machinery and vehicles and is the same type of machinery as is used by employees of BHP Coal performing the same type of work. That consideration supports a conclusion that the work performed by employees of OS Production is not for the provision of a service, rather than the supply of labour.

[244] In relation to OS Maintenance, its employees also use plant and equipment and work in premises provided by BMA in the performance of work for BMA. Again, the site work packages set out the plant, equipment and facilities required to be provided for employees OS Maintenance to undertake work, in similar terms to the supply of these items in the packages relating to OS Production. For example, the sample site work package attached to the Maintenance Framework Agreement sets out the items to be supplied by BMA as follows:[155]

[**REDACTED**]

[245] As indicated in the Maintenance Framework Agreement, additional items required to be supplied by BMA to OS Maintenance are as follows: Crib, fatigue rooms(s) and office facilities including necessary computer systems, calibration, inspection and diagnostic tools required to properly maintain the equipment, diesel and other fuels, compressed air, lubricants, specified parts, materials and consumables, lube facility for storage and management, waste disposal facilities, workshops building with power, lighting, potable water and emergency shower,

suitable transportation services, necessary forklifts, jacks, stands, mobile cranes, elevated work platforms, access stairs and heavy vehicle transport as required, first aid and emergency response facilities, hand tools, tool trolleys and crew lockers, parts required to complete necessary maintenance activities, emergency equipment including PPE management and supply and all heavy vehicles including service trucks and flatbed trucks.

[246] There is some debate between the parties about the workshops provided by BMA in which employees of OS Maintenance perform work. The evidence indicates that the arrangements differ somewhat between the three mines. At the Peak Downs mine, most of the work performed by OS Maintenance takes place in a dedicated OS Maintenance Workshop, located approximately 80 metres away from the BMA Maintenance Workshop. The BMA Tyre Bay is a similar distance from the OS Maintenance Workshop.[156] At the Goonyella Riverside Mine, BMA provides OS Maintenance with access to, and control of, discrete areas and bays in Workshop 2. Workshop 2 is divided into distinct, physically separate areas in which employees of OS Maintenance, National Plant and Equipment, and BUMA perform work.[157] At the Saraji Mine, employees of OS Maintenance and BMA Maintenance work from the same workshop, but from discrete bays and OS Maintenance uses its own tool store.[158]

[247] The evidence in relation to the layout of the workshops in which OS Maintenance employees perform work is relevant to the assessment required by s 306E(1A) and we have taken that evidence into account. It is possible that the fact, to the extent it is the case, OS Maintenance employees perform work in separate workshops, might support a conclusion that their work is for the provision of an operationally distinct service. However, in the circumstances of this matter, the significance of that evidence is limited given that BMA provides and maintains the workshop, provides the tools and equipment to be used and controls the allocation of workshop space at the mines. In the circumstances of this matter, the provision of workshop facilities and associated tools, equipment and consumables needed for the performance of work by employees of OS Maintenance is, notwithstanding the physical arrangement of the workshops, a significant consideration which favours a conclusion that the work of the employees is not for the provision of a service, rather than the supply of labour.

[248] We have already addressed the extent to which employees of OS Production and OS Maintenance use systems of their employer to perform work, in dealing with other matters referred to in s 306E(7A). As will be apparent, the systems used by employees of OS Production and OS Maintenance to perform work are overwhelmingly those of BMA. OS employees are required to work in accordance with the safety and health management system imposed by BMA, comply with SOPs, SWIs and other policies and procedures produced and implemented by BMA (including the BHP Code of Conduct and Charter of Values) and are integrated into the Minestar or Modular systems and their work is coordinated through the activities of the IROC. This feature of the evidence supports the performance of work of OS employees being characterised as involving the supply of their labour.

Extent to which the employer or another person is or will be subject to industry or professional standards or responsibilities in relation to the regulated employees (s 306E(7A)(d))

[249] The matter to which the Commission is required to have regard by s 306E(7A)(d) is the extent to which either the employer or another person is or will be subject to industry or professional standards of responsibilities in relation to the regulated employees.

[250] The Revised Explanatory Memorandum does not explain the intended relevance of this consideration. We infer that s 306E(7A)(d) contemplates that, if the employer is subject to industry or professional standards or responsibilities in relation to the work of the regulated employees, this feature of the work might support a conclusion that the work is for the provision of a service, rather than the supply of labour. On the other hand, if the regulated host is subject to the relevant industry or professional standards, that fact may support the inference that the work of the regulated employees involves the supply of labour which remains the responsibility of the regulated host.

[251] The only "industry standard" relating to the work of the regulated employees referred to in the evidence concerns health and safety obligations. We observe that the Full Bench in *Batchfire* regarded the obligations under the *Coal Mining Safety and Health Act* as a relevant industry standard. The Full Bench concluded:[159]

> There is no evidence that WorkPac is or will be subject to industry or professional standards or responsibilities in relation to the production employees it supplies to Batchfire, apart from its usual statutory work health and safety obligations as an employer. Batchfire has obligations under the Coal Mining Safety and Health Act as to the safe operation of the Mine and, for that purpose, maintains a Safety and Health Management System which applies to the production employees supplied by WorkPac.

[252] BHP and the OS Parties acknowledge that BMA is the coal mine operator for each of the Peak Downs, Goonyella Riverside and Saraji mines under the *Coal Mining Safety and Health Act*.[160] Section 41 of the legislation imposes certain obligations on the coal mine operator in the following terms:

> **41 Obligations of coal mine operators**
>
> (1) A coal mine operator for a coal mine has the following obligations—
> (a) to ensure the risk to coal mine workers while at the operator's mine is at an acceptable level, including, for example, by providing and maintaining a place of work and plant in a safe state;
> (b) to ensure the operator's own safety and health and the safety and health of others is not affected by the way the operator conducts coal mining operations;
> (c) not to carry out an activity at the coal mine that creates a risk to a person on an adjacent or overlapping petroleum authority if the risk is higher than an acceptable level of risk;
> (d) to appoint a site senior executive for the mine;
> (e) to ensure the site senior executive, or acting site senior executive, for the coal mine is located at or near the coal mine when performing the duties of the site senior executive unless—
> (i) the duties require the site senior executive, or acting site senior executive, to be temporarily absent for not more than 14 days; or
> (ii) the site senior executive, or acting site senior executive, is temporarily absent on leave for not more than 14 days;
> (f) to ensure the site senior executive for the mine—
> (i) develops and implements a safety and health management system for the mine; and
> (ii) develops, implements and maintains a management structure for the mine that helps ensure the safety and health of persons at the mine;

(g) to audit and review the effectiveness and implementation of the safety and health management system to ensure the risk to persons from coal mining operations is at an acceptable level;
(h) to provide adequate resources to ensure the effectiveness and implementation of the safety and health management system.

[253] The obligations on the coal mine operator are, in our opinion, relevant to the assessment required by s 306E(1A). The nature of the obligations imposed on BMA extend, in a substantial way, to overseeing and controlling the performance of work by regulated employees employed by OS Production or OS Maintenance. The duties are both general (to ensure the risk to coal mine workers … is at an acceptable level) and specific (to appoint a site senior executive and ensure that the site senior executive develop and implement and safety and health management system and develops, implements and maintains a management structure). The *Coal Mining Safety and Health Act* also imposes obligations on a "contractor" which includes a person contracted to provide services or "contracted to provide coal mine workers to a coal mine".[161] The obligations imposed on a "contractor" are substantial, but more limited than those of the mine operator.[162]

[254] BHP and the OS Parties submit that, insofar as the primary responsibility for managing matters of health and safety rests with BMA as the coal mine operator, so much as is an industry standard as a consequence of the statutory scheme. They submit that the primary responsibility with respect to health and safety matters is no different in relation to any other contractor operating at, or visiting, any of the three mines and, for that reason, says little about the proper characterisation of the work performed by employees of OS Production or OS Maintenance for the purposes of s 306E(1A). A submission to a similar effect is made by AREEA. The Minerals Council submits that s 306E(7A)(d) is not directed towards legislation that applies universally to all participants at the workplace.

[255] Whilst the fact that the industry standards and responsibilities referred to in s 306E(7A) arise from statute might be a contextual feature that should be considered, we do not consider that the statutory origin of standards or responsibilities denies those standards or responsibilities significance. Section 306E(7A)(d) means the Commission must have regard to that matter along with the other matters listed in s 306E(7A). Statutory obligations may limit the degree to which an employer can be said to provide a discrete service to the regulated host or at least be relevant to that assessment. Furthermore, statutory obligations might limit the control of the employer over the work of the regulated employees or the extent to which the employer supervises, directs or controls their work for the purposes of s 306E(7A)(a) and (b). The statutory safety obligations of BMA are relevant to the assessment the Full Bench is required to make in this matter, and we have taken those obligations into account.

Extent to which work is of a specialist or expert nature (s 306E(7A)(e))

[256] The final matter to which the Commission is required to have regard in making the assessment required by s 306E(1A) is the extent to which the work performed by the regulated workers is of a specialist or expert nature.

[257] BHP and the OS Parties submit that the work of employees of OS Production or OS Maintenance is of a specialist or expert nature. Each of the employees who gave evidence in relation to production work accept that this work involved making decisions around which

particular techniques to implement in order to efficiently and safely operate their machines and that making those decisions and executing those tasks involved judgment, experience, and specialised skills developed through training and practical experience.[163] Similarly, each maintenance witness accepted that their role involved making decisions around diagnosing problems, identifying the appropriate fix, identifying the proper technique to implement that fix, and identifying whether the work could be safely performed and that making those decisions and executing those tasks takes judgment, experience, and specialised skills developed through training and practical experience.[164]

[258] The MEU and the AMWU submit that the position of BHP and the OS Parties misunderstands the matter referred to in s 306E(7A)(e). The MEU and the AMWU submit that whether work is capable of being described as being "of a specialist or expert nature" must be assessed in context, including by having regard to the operations of the regulated host. In short, the MEU and the AMWU submit that, even if the production or maintenance functions being performed by employees of OS Production and OS Maintenance could be described as specialist or expert in a general sense, that work should not be regarded as of a specialist or expert nature where employees of BHP Coal perform exactly the same type of work in the same enterprise.

[259] The Minister, similarly, submits that, if considered in isolation from the context of the regulated host's operations, the notion of "work of a specialist or expert nature" would be so broad as to apply to any type of trade or professional work. The Minister contends that such a broad interpretation undermines the key statutory intent of s 306E(1A), which was to prevent service contractors from being inadvertently caught by the operation of Part 2-7A. The Minister refers to the following passage from the Revised Explanatory Memorandum to the Closing Loopholes Bill:[165]

> For the purposes of these new subsections, higher education qualifications would not be required for work to be considered specialist or expert. For example, employees of a catering service employer contracted to provide catering for a regulated host whose primary business is not the provision of catering services may be found to be undertaking work of a specialist or expert nature, even where the host's covered employment instrument provides for the performance of work of the type provided by the catering service provider.

[260] The Minister submits that the example of the catering service employee that it is intended that whether work is to be regarded as specialist or expert involves consideration of whether the work is within the primary business of the regulated host.

[261] BHP and the OS Parties submit that the position of the MEU and the AMWU erroneously assumes that specialist or expert work requires some particular advanced training or study in a manner that is inconsistent with the passage from the Revised Explanatory Memorandum set out above. BHP and the OS Parties submit that the suggestion that the phrase "specialist or expert" should be construed in a comparative sense finds no support in the text of s 306E(7A)(e), the provision could easily have been drafted to require a comparative exercise be undertaken but was not and that there is no apparent purposive reason for favouring that construction. We note that, in this respect, the submissions of the Minerals Council depart from the position of BHP and OS Parties. The Minerals Council submits that the inquiry under s 306E(7A)(e) should be directed at whether the work being performed is not part of the primary business of the regulated host.

[262] The submissions of the parties do not adequately take into account, or give effect to, either the text of s 306E(7A)(e) or the context in which it appears. The text of s 306E(7A)(e) does not merely require the Commission to have regard to whether the work of the regulated workers is "specialist or expert" or not. Rather, the Commission must have regard to "the extent" to which the work is of a specialist or expert nature. In our opinion, the subsection invites consideration of the degree to which specialised knowledge, skills or expertise are required to be applied in the performance of work by the regulated employees. The supply of employees performing unskilled work is less likely to be indicative of the work of the employees being for the provision of a service, rather than the supply of labour. As a general proposition, if a higher degree of specialised knowledge, skills or expertise is involved in the work, that may support a conclusion that the work is for the provision of a distinct service.

[263] However, s 306E(7A)(e) is but one matter to be taken into account in the overall assessment required by s 306E(1A). It must be remembered that the purpose for which the Commission must take into account the extent to which the work is of a specialist or expert nature is for the purpose of determining whether it is satisfied that the work is not for the provision of a service, rather than the supply of labour. The relevance of that matter, and the weight that can be attached to it, will depend on the circumstances. The fact that the work is of specialist or expert nature might suggest the work is for the provision of a service rather than the supply of labour because, for example, the nature of the work limits the extent to which the regulated host can supervise or control the work or that the work is for the purpose of providing a service distinct from the operations of the regulated host. That is likely to be the case if the work involves specialised knowledge, skills or techniques or expertise which is not part of the usual operations of the regulated host.

[264] If, on the other hand, the work of the regulated employees is of the same nature, and involves the same specialised knowledge, skill or expertise as the work of employees of the regulated host, the specialised nature of the work may say little about whether the work is for the provision of a service, rather than the supply of labour. To put it another way, if the employer supplies expert or specialist employees to perform work of the same nature as employees of the regulated host, the specialist or expert nature of the work is unlikely to be inconsistent with the conclusion that the employer is supplying labour. That is because the specialist or expert nature of the work will, in those circumstances, not suggest that the work involves the provision of a distinct service or affect the capacity of the regulated host to control or supervise the work.

[265] We accept that the work of employees of both OS Production and OS Maintenance at the three mines is, in a general sense, of a specialist or expert nature for the reasons given by BHP and the OS Parties. The work of a maintenance employee is, as BHP and the OS Parties submit, probably of a more specialist or expert nature. We have taken that matter into account. We note that the Full Bench in *Batchfire* suggested that the production work in a mining operation was not work of a specialist or expert nature.[166] We accept the submission of BHP and the OS Parties that limited weight can be attached to that finding in another case in circumstances in which the point was conceded and not at issue between the parties.

a.

[266] However, in the overall assessment required by s 306E(1A), we do not believe significant weight can be attached to the specialist or expert nature of the work of employees of OS Production and OS Maintenance. The fact that BHP Coal employees perform the same

work, involving the same skills and expertise, and the performance of that work is part of the usual operations of the mines, means that the specialist or expert nature of the work does not, in this case, go very far to support a conclusion that the work is for the provision of a service. The specialist or expert nature of the work does not suggest BMA cannot control or supervise the work, or that the work is for the provision of a service distinct from the operations of BMA. The specialised or expert nature of the work is equally consistent with the conclusion that the work involves the supply of skilled labour.

Conclusions with respect to the OS Parties

[267] Having considered each of the matters listed in s 306E(7A) and the other relevant matters which have been relied upon by the parties, we are satisfied that the work performed by employees of OS Production and OS Maintenance at the Goonyella Riverside, Peak Downs and Saraji mines is not or will not be for the provision of a service, rather than the supply of labour for the purposes of s 306E(1A). Without limiting the consideration we have given to all of the matters referred to above, the most significant features which arise from the evidence which support that state of satisfaction are, in summary:

(a) The Framework Agreements, and associated site work packages, oblige OS Production and OS Maintenance to provide what are described as "services" by reference to an expected number of FTE employees required by BMA and the price paid to OS Production and OS Maintenance is overwhelmingly determined by reference to the cost of employing the employees to perform the work.

(b) OS Production and OS Maintenance have some involvement in matters relating to the performance of work because they are consulted and provide feedback in relation to mine planning and maintenance planning. However, the mine and maintenance plans are determined by BMA and determine matters including the timing, priority and nature of the work to be performed by the employees.

(c) Although OS supervisors play an important role in the day-to-day supervision and direction of employees of OS Production and OS Maintenance, OS employees are required to perform work in accordance with detailed and highly prescriptive requirements imposed by BMA in the form of SOPs, SWIs and an array of other policies and procedures and are subject to monitoring, intervention and direction by the IROC through the Minestar and Modular systems.

(d) Employees of OS Production and OS Maintenance performing work at the three mines use plant, equipment and systems provided by BMA in the performance of their duties and the plant, equipment and systems are the same as those otherwise used by production and maintenance employees of BMA in the operation of the mines.

(e) The work performed by employees of OS Maintenance and OS Production is capable of being described as of a specialist or expert nature in a general sense, but the work is of the same nature and involves the same specialised and expert skills as are exercised by employees of BHP Coal performing the same work in

the same mines suggesting that, in substance, what is being provided by OS Maintenance and OS Production is labour.

(f) On the material before us, many of the matters relied on by BHP and the OS Parties to establish that the OS Parties are providing a service, are also applicable to the supply of labour at the mines by WorkPac and Chandler Macleod. In the evaluation we are required to conduct, the extent of these similarities, combined with other matters we have identified as particular to the OS Parties, weigh in favour of a conclusion that the performance of the work by employees of the OS Parties is not for the provision of a service, rather than the supply of labour, within the meaning in s 306E(1A).

[268] Once all the relevant features of the arrangements are taken into account, we are satisfied that the evidence does not establish that the work of employees of OS Production and OS Maintenance involves the provision of an identifiable and discrete service to BMA as distinct from the supply of the labour of those workers to work in or as part of the business of the BMA. The consequence is that we are satisfied of the matters set out in s 306E(1A). As we have observed, there is no issue that the requirements of s 306E(1) are met. As we are satisfied that the performance of work by employees of OS Production and OS Maintenance is not or will not be for the provision of a service, rather than the supply of labour, for the purposes of s 306E(1A), we are required to make regulated labour hire arrangement orders.

[269] BHP and the OS Parties do not submit that it is not fair and reasonable to make such orders for the purposes of s 306E(2). Section 306E(2) requires that the Commission not make an order if satisfied it is not fair and reasonable to do so "having regard to any matters in subsection (8) in relation to which submissions are made". In the absence of any such submissions, regard need not be had to those matters.[167] In any event, we are not satisfied that is not fair and reasonable in all the circumstances to make the orders sought by the MEU and the AMWU. There is nothing in the material before us which would permit such a state of satisfaction to be reached.

APPLICATIONS WITH RESPECT TO THE WORKPAC AND CHANDLER MACLEOD

Overview

[270] It is necessary then to turn to the applications of the MEU with respect to employees of WorkPac and Chandler Macleod. Three separate applications have been made by the MEU with respect to employees of WorkPac Pty Ltd and WorkPac Mining Pty Ltd at the Goonyella Riverside, Peak Downs and Saraji mines. The MEU has also applied for a regulated labour hire arrangement order with respect to employees of Ready Workforce (a Division of Chandler Macleod) Pty Ltd and Chandler Macleod Group Limited at the Peak Downs mine. As we have observed, both WorkPac and Chander Macleod accept that they are employers who supply employees to perform work for BMA and that, if those employees were directly employed by BHP Coal, the BMA Agreement would apply to their employment. As we have previously noted, BHP Coal is not a small business employer. As a result, WorkPac and Chandler Macleod accept that the requirements of s 306E(1) are met.

[271] WorkPac and Chandler Macleod also accept that the Commission should be satisfied that the performance of work by their employees is not for the provision of a service, rather than the supply of labour for the purposes of s 306E(1A). On the evidence before the Full Bench, we are satisfied the concession is appropriate and correct. We make the following findings. For the purposes of the matters in s 306E(7A), there is no evidence that WorkPac or Chandler Macleod has substantial involvement in matters relating to the performance of work by its employees working at the three mines. The evidence indicates that BMA directs, supervises and controls the work of WorkPac and Chandler Macleod employees who are supplied to perform work at the three mines. WorkPac and Chandler Macleod employees operate the same equipment and machinery as BMA employees and are subject to the same work safety policies, inductions, access to site and site policies and procedures. There is no evidence that WorkPac or Chandler Macleod is or will be subject to industry or professional standards or responsibilities in relation to the work of their employees supplied to the three mines. In relation to whether the work of WorkPac and Chandler Macleod is of a specialist or expert nature, we have addressed that matter above in relation to OS Production employees. Even if the work of WorkPac and Chandler Macleod employees is of a specialist or expert nature, we are satisfied the performance of work is not for the provision of a service, rather than the supply of labour.

[272] Both WorkPac and Chandler Macleod contend, however, that the Commission should be satisfied it is not fair and reasonable to make an order for the purposes of s 306E(2) and the Commission is, accordingly, not able to make regulated labour hire arrangement orders with respect to their employees. In order to deal with this matter, we will first address the submissions of the parties in relation to the operation of s 305E(2) and (8) and then consider whether we are satisfied it is not fair and reasonable in all the circumstances to make an order with respect to WorkPac and Chandler Macleod.

Section 306E(2): Not fair and reasonable to make the order

[273] Section 306E(2) operates to impose a prohibition ("must not") on the Commission making a regulated labour hire arrangement order if the Commission is satisfied it is not fair and reasonable in all the circumstances to do so. Unless the Commission is positively satisfied that it is not fair and reasonable to make the order, the prohibition does not arise. For example, the Full Bench explained in *Batchfire* that:[168]

> … the prohibition on the making of a regulated labour hire arrangement order in s 306E(2) only operates if the Commission is positively satisfied that it is not fair and reasonable in all the circumstances to do so. The provision thus operates in an inverse way to s 306E(1A). The requirement to have regard to the matters in s 306E(8) is conditioned upon submissions having been made about them. That is, in the absence of any such submissions, regard need not be had to those matters. The statutory intention in this respect is confirmed in [646] of the REM: "The FWC is only required to consider matters listed in new subsection (8) where the parties have made submissions on these matters".

[274] As the Full Bench observed, the Commission is only required to have regard to a matter in s 306E(8) as a mandatory consideration if a submission is made in relation to it. Nonetheless, WorkPac submits, and we accept, that the reference to "all of the circumstances" in s 306E(2) and "any other matter the FWC considers relevant" in s 306E(8)(f) indicates the breadth of the matters to which regard must be had. The combined effect of s 306E(2) and (8)(f) is that regard must be had to any relevant circumstance about which a submission is made. A matter will be

relevant if it could rationally bear upon the assessment of whether it is fair and reasonable in all the circumstances to make the order.[169]

[275] In our opinion, the subsection requires the Commission to make a broad value judgment as to whether it is not fair and reasonable to make an order in all of the circumstances. That evaluative assessment is likely to involve a balancing of various interests that would be affected by an order having regard to the matters listed in s 306E(8), including any matter not specifically identified in the subsection that the Commission considers relevant.[170] It is also the case that the Commission is entitled, although not required, to have regard to a matter as part of "all of the circumstances" even if no submission is advanced about it.[171]

[276] The assessment of the fairness and reasonableness of making an order will inevitably involve consideration of the consequences of an order being made or not made. The principal consequence of an order is that the employer must pay the regulated employee at no less than the "protected rate of pay" in connection with the work performed for the regulated host in accordance with s 306F(2). The order is likely, for that reason, to have consequences for the employer, and perhaps the regulated host, that might be thought to be adverse in that the order will increase employment costs and positive for the regulated employees in that they will receive a higher rate of pay. However, the assessment to be made requires consideration to the whole of the circumstances, including (when relevant) the pay arrangements for employees of the regulated host, the industrial arrangements applying to the regulated host and the employer, the relationship between the regulated host and the employer and the arrangements between the regulated host and the employer. It is not a one-dimensional trade-off between the benefits to employees and asserted detriments to the employer or regulated host.

[277] The assessment of whether it is not fair and reasonable in all the circumstances to make the order is to be undertaken having regard to the statutory context in which Part 2-7A appears, including the object of the Act and the relationship orders under Part 2-7A have to collective bargaining and enterprise agreements made in accordance with Part 2-4.[172] WorkPac and Chandler Macleod rely particularly on s 3(f) of the Act which, read with the chapeau to the section, provides:

> **3 Object of this Act**
>
> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> …
>
> (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; …

[278] WorkPac submits that s 3(f) reflects the centrality of enterprise-level collective bargaining to the system of industrial relations established by the Act and that, in making the assessment required by s 306E(2), the Commission "must give priority to enterprise-level collective bargaining". WorkPac notes that the employees who would be covered by a regulated labour hire arrangement order are covered by the *WorkPac Coal Mining Agreement 2019* (the **WorkPac Agreement 2019**) and that an order would supplant the WorkPac Agreement 2019 at least in relation to rates of pay.[173]

[279] WorkPac submits that this is the opposite of emphasising enterprise-level collective bargaining within the meaning of s 3(f) because the order will operate only in respect of one part of WorkPac's enterprise and a labour hire arrangement order will displace the collective bargain made between the labour hire employer and its employees and replace it with an order imposed on them by decision of the Commission. It follows, according to WorkPac, that the Commission must be satisfied that it would not be fair and reasonable to make the orders unless "countervailing circumstances" overcome the priority it submits must be given to the WorkPac Agreement 2019. In oral submissions, WorkPac submitted that this approach is dictated "purely because of s (3)(f)".

[280] We do not accept the submission in the manner that it is advanced by WorkPac. The objects of the Act are relevant to the assessment of whether it is not fair and reasonable to make a labour hire arrangement order. However, the legislature seeks to achieve the object of legislation through the provisions that it in fact enacts. In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd* [2015] FCAFC 126; (2015) 233 FCR 301, for example, the Full Court explained:[174]

> First, both s 3 and s 171 of the FW Act set out the objects of the provisions to which they refer (the FW Act as a whole and Pt 2-4 respectively). While the Commission would undoubtedly be required to exercise any otherwise unconfined discretion in a way that was not antagonistic to these objects, it must be remembered that the primary means by which the legislature sought to achieve them was to enact the detailed provisions of the FW Act itself. It will be the section, or group of sections, that applies directly that will most usefully indicate what it was the legislature was seeking to achieve in a particular situation. What the Full Court said about s 208 of the FW Act in *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 at [86] was an instance of this approach.

[281] Enterprise agreements plainly play a central role in establishing terms and conditions of employment for national system employees.[175] Furthermore, s 3(f) indicates that one mechanism through which the object of the Act is sought to be achieved is "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining".

[282] An "emphasis" on enterprise level collective bargaining does not mean that bargains made within an enterprise are given unconstrained priority.[176] Among other things, an enterprise agreement can only be approved if the Commission is satisfied each employee will be better off overall than if the relevant modern award applied and an enterprise agreement cannot displace the National Employment Standards.[177] The Commission is required, in certain circumstances, to make a workplace determination determining matters in dispute between bargaining representatives which are not agreed.[178] The Act contains a number of avenues through which collective bargaining can occur across a number of enterprises, including requiring that the Commission make a determination compelling bargaining across a number of enterprises in specified circumstances.[179]

[283] A similar submission to that now made by WorkPac was made in *Bengalla* where the Full Bench also observed:[180]

> "… Bengalla's submissions adopt a limited understanding of how the Act seeks to achieve its object through an "emphasis on enterprise-level collective bargaining". An "enterprise" is

> defined as a "business, activity, project or undertaking".[181] Arguably, the enterprise in which CoreStaff and Skilled employees supplied to the Bengalla Mine are working is the enterprise of Bengalla. Where an enterprise agreement has been made that covers a particular type of work undertaken by employees of the regulated host, an order under Part 2-7A has the effect of protecting the outcome of that enterprise-level bargaining process by preventing the Bengalla obtaining workers to perform the same kind of work at lower rates of pay through a labour hire employer. Where that is the effect of a regulated labour hire arrangement order, the order protects rather than undermines enterprise-level collective bargaining."

[284] The nature and history of the industrial arrangements which apply to the labour hire employer will frequently be relevant to that assessment, including the effect the order will have on the operation of an enterprise agreement that applies to the employer. Section 306E(8)(c) expressly requires that the Commission have regard to the history of industrial arrangements applying to the regulated host and the employer at least if a submission is made in relation to that matter. However, we do not accept that s 3(f) means that the Commission must be satisfied it is not fair and reasonable to make a labour hire arrangement order which would apply to employees covered by an enterprise agreement made with the labour hire employer unless there are some countervailing circumstances are demonstrated. That approach would erect a false test. In our view, s 306E(2) simply requires the Commission to have regard to any matter in subsection (8) in relation to which submissions have been made (and any other matter the Commission considers relevant) and determine whether it is satisfied it is not fair and reasonable in all the circumstances to make the order.

[285] WorkPac also submits that the use of the word "despite" in s 306E(2) has the effect that, as between subsection (1) and (2), the latter is dominant, so that the objective existence of the state of affairs identified in subsection (1) (the supply by an employer of employees to perform work for the regulated host) does not affect and is not relevant to, the assessment required by subsection (2).[182] A submission to this effect was also made and addressed in *Bengalla*.[183] For the reasons given by the Full Bench in *Bengalla*, s 306E(2) is dominant over s 306E(1) in the sense that, even if the requirements in subsection (1) are met, the Commission must not make a regulated labour hire arrangement order if satisfied it is not fair and reasonable to do so in all the circumstances. However, we do not accept that the fact that employees are being supplied to perform work for the regulated host in circumstances in which, if they were directly employed by the host, the covered employment instrument would apply to the employees, is irrelevant to the fair and reasonable assessment.

[286] Section 306E(2) requires consideration of whether it is not fair and reasonable to make the order "in all the circumstances". The circumstances which must be considered do not exclude the fact of the supply of labour to the regulated host or the arrangements according to which the employees are supplied to perform work. The features of the labour supply arrangement are also capable of being relevant to whether it is not fair and reasonable to make the order. If a submission is made about the matter, s 306E(8) requires consideration of the pay arrangements that apply to the regulated host and the regulated employees (including the rate of pay that would be payable to the regulated employees if the order is made), the relationship between the regulated host and the employer, whether the work is performed for a joint venture and the terms and nature of the arrangement under which the work is performed.[184] For example, whether the regulated employees are paid substantially less than employees of the regulated host, or whether the rates are comparable and the employees receive some other

benefits from their employer, is capable of being relevant to whether it is not fair and reasonable to make an order.

[287] Finally, WorkPac contends that the MEU's submissions contain an implicit proposition that there is a presumptive right or an expectation that a regulated labour hire arrangement order will be made if the circumstances in s 306E(1) and (1A) are met. We do not necessarily understand the submissions of the MEU in that way. However, it is appropriate to make clear that the question of whether the Commission is satisfied it is not fair and reasonable to make an order for the purposes of s 306E(2) should not be approached by adopting a predisposition in favour of an order being made.[185] We have not adopted that approach.

Applications with respect to WorkPac

Background

[288] WorkPac is one of Australia's largest privately owned workforce services business, and describes itself delivering end-to-end recruitment solutions, skills development and career opportunities nationwide. WorkPac provides traditional recruitment services and directly employs over 15,500 on-hire employees each year. Approximately 70 percent of WorkPac's on-hire employees are employed in the mining sector. Some of those employees are classified as coal mine workers under the WorkPac Agreement 2019 and work across 25 coal mines in Queensland and 12 coal mines in New South Wales.

[289] WorkPac is party to an agreement known as the "Services Contract (Joint Procurement for Minerals Australia)" with BMA, OS Production and OS Maintenance (the **WorkPac Services Contract**). The WorkPac Services Contract was made on 18 January 2021 and has been amended on a number of occasions. The evidence filed by WorkPac suggested that the WorkPac Services Contract was most recently amended by amending deed dated 28 June 2024.[186] There was actually a further amending deed made on 16 December 2024.[187] In summary, the WorkPac Services Contract provides for any "Framework Company" to request services at any time by giving WorkPac a purchase order or work package instruction.[188] Under the WorkPac Services Contract, the services provided by WorkPac encompass the provision of labour personnel for deployment at various locations, including the Goonyella Riverside, Peak Downs and Saraji mines. The WorkPac Services Contract contemplates that the relevant services may be procured from WorkPac by BMA, OS Production or OS Maintenance.[189]

[290] WorkPac says that it has a long history of engaging in enterprise bargaining and successfully making workplace and enterprise agreements with its workforces, including in the black coal industry. Prior to the WorkPac Agreement 2019, WorkPac has been covered by the *WorkPac Pty Ltd Mining (Coal) Industry Workplace Agreement 2007*, the *WorkPac Pty Ltd National Enterprise Workplace Agreement 2009* and the *WorkPac Pty Ltd Mining (Coal) Industry Enterprise Agreement 2012*. The MEU and its predecessors were bargaining representatives for the WorkPac Agreement 2012 and the WorkPac Agreement 2019 and sought to be covered by those agreements upon their approval by the Commission. The WorkPac Agreement 2019 passed its nominal expiry date on 28 June 2023.

[291] For work performed at the Goonyella Riverside, Peak Downs and Saraji mines, purchase orders have at times been issued to WorkPac by BMA and OS Production. The number of

employees supplied by WorkPac at the three mines fluctuates over time. As at December 2024, WorkPac supplied over 600 employees at the three Mines comprising approximately [**REDACTED**] employees at the Goonyella Riverside mine, [**REDACTED**] employees at the Peak Downs mine and [**REDACTED**]employees at the Saraji mine.[190] Those employees are covered by the WorkPac Agreement 2019, are a mixture of casual employees and permanent employees and are classified at various levels under the WorkPac Agreement 2019.[191] WorkPac says it tenders for its WorkPac Services Contracts, and those tenders are costed on the basis that the WorkPac Agreement 2019 will continue to apply in accordance with its terms until it is terminated or replaced.[192]

[292] The submissions made by WorkPac as to why the Commission should be satisfied it is not fair and reasonable to make an order with respect to its employees varied somewhat between its initial written submissions and the manner in which the case was put in closing address. The closing submissions of WorkPac were framed by reference to the submission that there is nothing to displace the priority it says must be accorded to the WorkPac Agreement 2019 and, as a result, the Commission must be satisfied it is not fair and reasonable to make the order sought by the MEU. For the reasons we have explained, we do not believe that contention is the correct approach to be adopted to the question posed by s 306E(2). Nonetheless, the matters in relation to which submissions are made by WorkPac must be considered and we have considered each of the matters raised by WorkPac.

Section 306E(8)(a) and (c) – Pay arrangements and industrial arrangements

[293] WorkPac raises a number of matters said to be relevant to the pay arrangements that apply to employees of the regulated host and the regulated employees (s 306E(8)(a)) and the history of industrial arrangements applying to the regulated host and the employer (s 306E(8)(c)).

[294] The meaning of the phrase "pay arrangements" in s 306E(8)(a) is not difficult to discern. The examples provided in s 306E(8)(a)(i), (ii) and (iii) make clear the "pay arrangements" extend beyond simply the rate of pay payable to employees of the regulated host and the regulated employees and at least extends to the classifications covered by the host employment instrument and whether, in practice, the host employment instrument has applied to particular classes of work. It potentially extends to matters such as frequency of payment and arrangements for progression between classifications. The phrase "industrial arrangements" in s 306E(8)(c) is not defined. The revised explanatory memorandum to the Closing Loopholes Bill states:[193]

> New paragraph 306E(8)(c) would provide that the FWC may consider the history of industrial arrangements applying to the regulated host and the employer. This would include considering previous regulated labour hire arrangement orders and bargaining related to any covered employment instrument applying to each party. It may also include how workers have been previously engaged by a regulated host to perform certain work.

[295] The passage suggests that the subsection is directed at the history of the industrial instruments that have applied to the regulated host and the employer respectively, including the history of enterprise bargaining. It may extend to the history of other methods the regulated host and the employer used to engage workers.

[296] WorkPac asserts that it is an established, sophisticated and substantial employer and refers to its various activities providing recruitment services and labour hire services in the mining, construction, healthcare and other industries. WorkPac submits that it has direct, meaningful and established arrangements with its on-hire employees, including providing opportunities for apprentices, providing a designated contact person for employees for dealing with employment related issues, dealing with employee grievances and disputes and has a long history of engaging in enterprise bargaining. We will separately address the submissions with respect to enterprise bargaining. The other arrangements to which WorkPac refers appear of marginal relevance. The matters referred to by WorkPac do not appear to relate to either pay arrangements for the purposes of s 306E(8)(a) or industrial arrangements for the purposes of s 306E(8)(c). Even if they do, WorkPac does not explain how a regulated labour hire arrangement order would affect it offering work to trainees and apprentices. The obligation to pay employees the protected rate of pay does not apply if a training arrangement applies to the employee.[194] A regulated labour hire arrangement order would not affect the support WorkPac says it provides to its on-hire employees.

[297] WorkPac relies heavily on the existence of the WorkPac Agreement 2019 and its history of making enterprise agreements to apply to its workforce. It submits that the WorkPac Agreement 2019 has a pay and classification structure that closely aligns with the Black Coal Mining Industry Award classification structure, was approved by a majority of the employees who participated in a vote on the proposed enterprise agreement, such that its terms and conditions contained in the applicable document were taken to have been "agreed to" by WorkPac's employees, passed the better off overall test so as to allow the Commission to approve the agreement, and provides certainty to WorkPac in its tenders for opportunities with its clients across the industry. WorkPac points out that the MEU, and other unions, applied to be covered by the WorkPac Agreement 2019 and predecessor agreements. WorkPac says that the making of regulated labour hire arrangement orders will inevitably disturb and distort these arrangements. It particularly submits that those orders will operate only with respect to part of WorkPac's enterprise and would displace the collective bargain made between the labour hire employer and its employees and replace it with an order imposed by the Commission. It submits it is not fair and reasonable to make an order which would disturb the arrangements which exist under the WorkPac Agreement 2019.

[298] We accept that the existence of the WorkPac Agreement 2019, and WorkPac's history of enterprise bargaining, is relevant to whether the Commission can be satisfied it is not fair and reasonable to make regulated labour hire arrangement orders which will apply to its employees. We have taken that matter into account. It is also relevant to take into account the impact of making those orders on the arrangements under the WorkPac Agreement 2019 and we have also taken that matter into account. However, it is appropriate to make a number of observations about the submissions made by WorkPac.

[299] *First*, a regulated labour hire arrangement order would not entirely displace the WorkPac Agreement 2019. The WorkPac Agreement 2019 will continue to apply to employees of WorkPac falling within its coverage and its terms would continue to govern the employment of relevant employees. A regulated labour hire arrangement order would add an additional obligation by requiring WorkPac to ensure that employees covered by the order are paid no less than the protected rate of pay. That will be a significant change to the obligations of WorkPac as an employer. We recognise that the terms of an enterprise agreement are likely to represent

a compromise in which conditions and wages are part of an overall package. Nonetheless, a regulated labour hire arrangement order does not entirely displace, or "set at nought", the collective bargain made by WorkPac as it submits. We also note that the WorkPac Agreement 2019 already only applies to part of WorkPac's enterprise. That Agreement only covers WorkPac employees who are coal mine workers as defined.[195] To the extent that WorkPac submits that bargaining for an agreement to replace the WorkPac Agreement 2019 might be distorted, or frustrated, by an order being made, the submission was not explained by any evidence and is too speculative to be given consideration as part of the fair and reasonable assessment.

[300] *Second*, leaving aside the rate of pay itself, WorkPac pointed to only one aspect of the WorkPac Agreement 2019 that it says distinguishes it from the BMA Agreement. WorkPac states that the WorkPac Agreement 2019 contains a tiered classification structure and that progress through the classifications is linked to minimum competencies. The BMA Agreement, it submits, provides for a career structure that is flatter and less prescriptive than the WorkPac Agreement 2019 and progression is based on "BMA mine site experience". It is not clear that this is an accurate description of the respective classification structures in the BMA Agreement and the WorkPac Agreement 2019. The BMA Agreement does not provide for progression simply based on "BMA mine site experience" but, rather, in addition defines the classification levels by reference to an employee being "trained, competent, authorised and appointed" to undertake certain tasks.[196] The "Career Structure" indicates that:[197]

> The Company will determine an Employee's level based on the tasks/role that the Employee is appointed by the Company to perform, and the skills and qualifications the Employee is required by the Company to hold and use in that task/role in the Career Structure or the period of service with the business.

[301] The WorkPac Agreement also provides, in part, for progression through experience.[198] In any event, there is no evidence before the Commission that any differences between the classification structures in the BMA Agreement and the WorkPac Agreement 2019 will cause any particular difficulty or unfairness. There is no evidence, for example, that WorkPac will have any difficulty calculating the protected rate of pay or any unfairness or dislocation will be caused as between employees as a result of any differences in the criteria for progression in the respective agreements.

[302] It is possible that a labour hire employer could contend that its own enterprise agreement provides for benefits or conditions which mean it is not fair and reasonable for employees to also receive the protected rate of pay. WorkPac made no such submission. Aside from the impact of the requirement to pay the protected rate of pay to relevant employees, we are unable to discern any aspect of the WorkPac Agreement 2019 or the BMA Agreement that could contribute to the Commission being satisfied it is not fair and reasonable to make a regulated labour hire arrangement order.

[303] *Third*, with respect to rates of pay, it is likely that a regulated labour hire arrangement order will require a substantial increase in the rates of pay of WorkPac employees performing work at the three mines. Mr Hockaday estimates that the effect of a regulated labour hire arrangement order would be that the average salary for WorkPac's employees would increase by 36 percent.[199] The impact of that requirement on WorkPac is a matter we will consider below. In relation to the disturbance of the arrangements under the WorkPac Agreement 2019,

it is relevant that the majority of WorkPac employees performing work at the Goonyella Riverside, Peak Downs and Saraji mines are not directly paid the rates under that Agreement but receive additional payments referred to by WorkPac as "flex payments".[200] The submission that a regulated labour hire arrangement order will disrupt the bargained arrangement with respect to rates of pay must be considered having regard to the fact that WorkPac already pays rates at variance with the WorkPac Agreement 2019.

[304] *Fourth*, to the extent that WorkPac says that it has, in the past, tendered for services on the basis that the WorkPac Agreement 2019 will continue to apply in accordance with its terms until it is terminated or replaced, that is a consideration relevant to the impact of a regulated labour hire arrangement order on WorkPac. In the future, if regulated labour hire arrangement orders are made, it will be able to tender to BMA on the basis of those orders. In relation to its reliance on the existence of the WorkPac Agreement 2019 in the past, the weight to be given to that matter is influenced by the fact that the Agreement passed its nominal expiry date on 28 June 2023, that is, nearly two years ago. Although we accept that WorkPac is likely to have planned on the basis that that WorkPac Agreement 2019 would continue to apply to its operations and we have taken that matter into account, WorkPac cannot have expected the Agreement to continue to operate indefinitely.

[305] WorkPac also submits that, once consideration is given to the disruption of its enterprise bargaining arrangements, there are no other considerations that would not make the making of regulated labour hire arrangement orders not fair and reasonable. WorkPac submits that the mischief to which Part 2-7A is directed, described as being the undermining or undercutting of rates of pay fixed by enterprise agreements, is not engaged in this case. WorkPac submits that there is no evidence that WorkPac employees performing work at the three mines has actually undermined any of the benefits to which any BHP employee is entitled or the security of employment of any employee covered by the BMA Agreement. In oral submissions, counsel for WorkPac submitted that, for the "job security" of BHP employees to be undermined, it would require proof that at least one worker, directly employed by BHP Coal, had lost their job at one of these mines because that job had gone to a worker supplied by WorkPac and that the reason why that had happened was the rate of pay.

[306] The submissions of WorkPac take a too narrow view of the matters that may be relevant to whether the Commission can be satisfied it is not fair and reasonable to make an order for the purposes of s 306E(2). The MEU submits that the unchallenged evidence is that WorkPac employees who perform the same work in the same crews as BHP Coal employees are paid significantly less than their directly employed colleagues. That is a result purely of the fact that they are employed by WorkPac rather than BHP Coal. Although there may be other considerations which nonetheless satisfy the Commission it is not fair and reasonable to make an order in a particular case, in our opinion, that circumstance is relevant to the fair and reasonable assessment. The weight to be attached to such a matter will vary depending on the whole of the circumstances, including the degree of the difference in the rates of pay. We do not accept that, for the consideration to be relevant, it must be demonstrated that existing employees of the regulated host have been dismissed as a result of the engagement of a labour hire employee. The job security and conditions under the host instrument are undermined to some degree by reason of the availability of the device of engaging workers to perform the same work at a lower rate of pay through a labour hire employer.

[307] WorkPac relies on clause 7 of the BMA Agreement which provides:

> **7 Contractors**
>
> The Company shall have free and unfettered access to contractors, except only where clauses 31 and 32 apply to a Surplus.

[308] WorkPac submits that this provision means the parties to the BMA Agreement contemplated there would be no limitations on the use of contractors other than as provided for in clauses 31 and 32. Clause 7 of the Agreement, read with clauses 31 and 32, operate as between BMA and the employees covered by the BMA Agreement and requires that those employees not restrict BMA in relation to its use of contractors. The terms of the BMA Agreement cannot fetter the rights of the MEU to make an application for a regulated labour hire arrangement order and nor does the making of such an order constitute a fetter on BHP using contractors, imposed by its employees covered by the BMA Agreement. Accordingly, there is no basis upon which we could find that making a regulated labour hire order could fetter BMA's right to use contractors in a manner inconsistent with the terms of the BMA Agreement. If BMA wishes to enter into contractual arrangements with labour hire companies to provide labour, it is free to do so and to engage labour hire companies other than WorkPac or Chandler Macleod. However, it does not, in our opinion, mean that the difference in the rates of pay of BHP Coal employees and WorkPac employees is irrelevant to the fair and reasonable assessment required by s 306E(2).

[309] Finally, WorkPac submits that the legislative objective of protecting bargained rates from being undermined or undercut does not arise in the present matter since the WorkPac Agreement 2019 was made prior to the BMA Agreement. We do not accept that the objective of protecting bargained rates of being undercut arises only where no enterprise agreement or a new enterprise agreement applies to the labour hire employees. The possibility of having employees perform work within an enterprise at lower rates than those applicable to the regulated host's existing employees, through the use of labour hire, has the potential to undercut the rates applicable to direct employees of the regulated host. Having said that, the significance of that potential as part of the fair and reasonable assessment required by s 306E(2) will depend upon a consideration of the whole of the circumstances, including each of the matters in s 360E(8) in relation to which submissions are made.

Section 306E(8)(d), (e) and (f) – Relationship with regulated host, arrangements under which work is performed and other matters

[310] In relation to the matters referred to in s 306E(8)(d), (e) and (f), WorkPac makes essentially two submissions. The first submission is that the making of regulated labour hire arrangement orders with respect to the WorkPac employees at the three mines will increase the value of the accrued leave entitlements of WorkPac employees in a manner for which it has not made provision. The second submission is that the making of regulated labour hire arrangement orders will cause it to incur substantial additional costs it will not be able to recover from BMA to the extent of rendering the arrangements unviable, and may result in WorkPac's clients reducing their use of WorkPac employees. Both submissions address potential financial or other impacts on the business of WorkPac if an order is made.

[311] The financial impact of a regulated labour hire arrangement on a labour hire employer is relevant in assessing whether it is not fair and reasonable to make the order,[201] and we have taken into account such evidence as there is in relation to the potential impact on WorkPac of orders being made in this matter. The evidence supports a finding that the supply of WorkPac employees to perform work at the Goonyella Riverside, Peak Downs and Saraji Mines is a significant account for WorkPac and the relevant workforce makes up approximately 20 percent of the total number of black coal mine workers employed by WorkPac under the WorkPac Agreement 2019.[202] We accept that the supply of workers to the three mines is a significant aspect of WorkPac's operations in the black coal industry and that the financial implications of an order being made are significant.

[312] Two financial impacts must be considered. *First*, Regulated labour hire arrangement orders have the potential to increase WorkPac's liabilities with respect to the accrued leave entitlements of relevant employees. WorkPac provided a revised estimate which suggested that the total additional liability could be in excess of [**REDACTED**]. This is an impact we must consider. We accept that the consequence of regulated labour hire arrangement orders being made is to potentially increase the contingent future liability with respect to leave entitlements. If WorkPac continued to deploy its employees to perform work for BMA and, in the future, those employees access a paid leave entitlement when performing work for BMA, the employees would be entitled to be paid the protected rate of pay. The actual liability will depend on future events. The rate at which an employee's accrued entitlements are required to be paid upon termination, for example, depends on the circumstances. Section 306NA provides, in short, that where an employee has only performed work for one regulated host during their employment, termination payments will be calculated with reference to the protected rate of pay, but otherwise by reference to the terms of the employer's enterprise agreement or other applicable employment instrument.[203]

[313] *Second*, WorkPac says that the rates payable under the WorkPac Services Contract were determined without considering the potential impact of regulated labour hire arrangement orders and the WorkPac Services Contract only permits the rates to be adjusted at the discretion of BMA, OS Production or OS Maintenance and any adjustment can only be approved up to the applicable percentage uplift to wage rates in the relevant award.[204] Mr Hockaday suggested that unless WorkPac's commercial arrangements allow the increased cost arising from an order to be recovered from the client, the additional cost will have a significant impact on its operations and many arrangements could become wholly unviable. He said WorkPac would need to consider its options to respond to those challenges, which may include terminating those arrangements which are commercially unsustainable.[205] WorkPac submits that the deleterious consequences for its revenue will inevitably have consequential flow on impacts across the whole of its business and may diminish the security of, and opportunities for, all WorkPac employees.

[314] As we have said, the financial impact of regulated labour hire arrangement orders on WorkPac is relevant to whether we can be satisfied it is not fair and reasonable to make the orders, and we have considered those effects both as to the potential to increase leave liabilities and the potential additional costs to WorkPac. Whilst an estimate was provided with respect to the increase in the value of WorkPac's leave liabilities, no estimate was provided of the total increased employment costs it expects will result from orders being made as sought by the MEU. Mr Hockaday said that he estimates WorkPac's labour costs at the three mines will

increase by approximately [**REDACTED**] percent.[206] No estimate of the total amount is provided or a breakdown of how WorkPac expects the orders would affect its profitability with respect to the provision of employees at the three mines beyond a general statement that if, in general, WorkPac is unable to recover cost increases from clients "many arrangements could become wholly unviable for our business".[207]

[315] Counsel for WorkPac accepted that the size of WorkPac's operations is relevant when assessing the impact of orders upon it.[208] The MEU submits, and we accept, that it is relevant to consider the position of the WorkPac group as a whole. The financial statement for WorkPac Group and its controlled entities for financial year 2024 disclose revenue of $[**REDACTED**]for that financial year with a gross profit of $[**REDACTED**], total assets of $[**REDACTED**] and net assets of $[**REDACTED**], EBITDA of $[**REDACTED**] and payment of a fully franked dividend of $[**REDACTED**] for that financial year.[209] Although the fact that the WorkPac group have very substantial operations does not mean we should disregard the impact of the orders sought in this matter, it is relevant to our assessment as to whether we are satisfied it is not fair and reasonable in all the circumstances to make the orders.

[316] We are aware that WorkPac is covered by a number of other regulated labour hire arrangement orders.[210] It was open to WorkPac to rely on the cumulative effect of the orders which have been made on its operations. However, no such submission is made. WorkPac did not put forward any evidence as to the impact on its business of the other regulated labour hire arrangement orders. In cross-examination, Mr Hockaday informed the Commission that WorkPac continues to supply employees to perform work at each of the mines in relation to which a regulated labour hire arrangement order has been made.[211] There is no evidence as to whether any change has been agreed in relation to the terms on which WorkPac supplies labour. It appears, however, that WorkPac has not determined it is unviable to do so and the regulated host, in each case, has not decided to terminate its arrangements with WorkPac.

[317] To the extent that WorkPac submits the Commission should consider the possibility that BMA might decide in the future to cease requesting WorkPac to supply employees at the three mines, it is difficult to give that matter substantial weight in the absence of any evidence that this outcome is a likely prospect. As we have indicated, the evidence suggests WorkPac has not ceased supplying employees to other sites in relation to which orders have been made. There is no evidence that WorkPac has made any inquiries of BMA in relation to its intentions if an order is made. BHP Coal or BMA have not given any evidence in that respect. In those circumstances, there is no evidence which justifies a finding that it is likely BMA will cease to request that employees be provided by WorkPac in the future as a consequence of orders being made.

Conclusions in relation to WorkPac

[318] Having considered each of the matters in relation to which submissions have been made by WorkPac and other matters we consider relevant, the Full Bench is not satisfied that it is not fair and reasonable to make a regulated labour hire arrangement order with respect to WorkPac employees supplied to perform work for BMA. The context in which the applications must be considered is that WorkPac employees are performing the same work in the same crews and BMA employees and receiving substantially lower remuneration because of the identity of their employer. We have considered the impact of regulated labour hire arrangement orders being

made on the pay arrangements for WorkPac employees, WorkPac's industrial arrangements and the financial impact on WorkPac. Having considered each of those matters and the other matters to which we have referred, we are not satisfied that it is not fair and reasonable to make the orders sought by the MEU. The consequence is that the Commission is required by s 306E(1) to make regulated labour hire arrangement orders.

Application with respect to Chandler Macleod

Background

[319] The Chandler Macleod Group describes itself as providing contingent labour to its clients. Chandler Macleod is part of a global business now known as RGF Staffing which provides human resources services internationally across multiple industries and sectors. RGF Staffing ANZ Pty Ltd is the local RGF Staffing entity that supports related companies in Australia, New Zealand, Hong Kong and Singapore, including Chandler Macleod entities.[212] Chandler Macleod provides two broad services, namely, an outsourced talent acquisition and recruitment function and the provision of temporary labour in a traditional on-hire model to perform work for a host employer to perform work at the host's site or premises. Chandler Macleod supplies on-hire employees to perform work for the BHP Group of companies among other clients.[213]

[320] Chandler Macleod has a number of clients in the mining industry in Queensland, New South Wales, South Australia and Western Australia. Chandler Macleod provides approximately 273 employees to perform work at four BMA mine sites, namely, the Peak Downs, Goonyella Riverside, Saraji and Caval Ridge mines. As at October 2024, Chandler Macleod supplied 138 employees to perform work at the Peak Downs mine, 116 employees at the Caval Ridge mine, 9 at the Saraji mine and 4 at the Goonyella Riverside mine.[214] The only application presently before the Commission concerns the employees supplied to perform work at the Peak Downs mine.

[321] Chandler Macleod is party to an agreement known as the "Services Contract (Joint Procurement for Minerals Australia)" with BMA, OS Production and OS Maintenance (the **Chandler Macleod Services Contract**). The Chandler Macleod Services Contract was made on 18 January 2021 and was subject to an amending deed made on 2 July 2024 and a further amending deed made on 18 December 2024.[215] The Chandler Macleod Services Contract was initially to end on 31 January 2024 subject to two one-year extension options exercisable at the discretion of BMA. One effect of the amending deed made on 18 December 2024 was to change the end date of the contract to fix a date of 31 January 2026 unless the contract is terminated at an earlier date in accordance with its terms. The amending deed made on 2 July 2024 sets the charge rates for employees supplied by Chandler Macleod.

[322] In summary, the Chandler Macleod Services Contract provides for any "Framework Company" to request services at any time by giving WorkPac a purchase order or work package instruction.[216] The services provided by Chandler Macleod encompass "the provision of suitably qualified Labour Personnel predominantly being tradespeople, technicians and operators" for deployment at BMA's operations.[217] The rates contained in the Chandler Macleod Services Contract payable to Chandler Macleod identify a specific hourly rate of pay by reference to the classification and level of the particular employee.[218] The evidence suggests

that the charge rate is calculated on a basis that includes a calculated profit margin as a percentage of the other costs.[219] Adjustment of the charge rates is at the absolute discretion of BMA.[220] BMA can also bring the contract to an end at its discretion by giving notice.[221]

[323] Chandler Macleod claims to have a long history of entering into enterprise agreements in the black coal mining industry. There have been a number of industrial instruments bargained for by Chandler Macleod in relation to Queensland black coal mining employees being the *Ready Workforce Workplace Agreement 2007*, the *Chandler Macleod and CFMEU - Queensland Coal Mining Agreement 2011*, the *Chandler Macleod – Queensland Black Coal Mining Agreement 2015*, the *Chandler Macleod - Queensland Black Coal Mining Agreement 2019* (which was not approved by the Commission) and the *Chandler Macleod - Queensland Black Coal Mining Agreement 2020* (the **Chandler Macleod Agreement 2020**).[222]

[324] The Chandler Macleod Agreement 2020 applies to the employment of the employees supplied to perform work at the Peak Downs mine. Although the Chandler Macleod Agreement 2020 sets the minimum terms and conditions for Chandler Macleod employees covered by it, the evidence indicates that Chandler Macleod employees performing work at the Peak Downs mine are paid at rates above the minimum rates contained in the Agreement as a result of the need to attract employees to perform the work. Chandler Macleod pays employees at pay rates it has agreed with BMA.[223] Employees are allocated to roles which do not align with the classification descriptions in the Chandler Macleod Agreement 2020.[224] The evidence further indicates that Chandler Macleod pays different rates at different sites, including between employees at the Peak Downs mine and other mines operated by BMA.[225]

[325] Chandler Macleod makes submissions in relation to a number of the matters listed in s 306E(8) albeit much of its submissions concerned other matters it contends the Commission should consider relevant for the purposes of s 306E(8)(f). We turn to consider the matters in relation to which submissions have been made.

Section 306E(8)(a) – Pay arrangements

[326] In relation to the pay arrangements that apply to employees of the regulated host and the regulated employees for the purposes of s 306E(8)(a), Chandler Macleod accepts that its employees performing work at the Peak Downs mine would be covered by the BMA Agreement if they were directly employed by BHP Coal. Although it suggests that the classifications under the BMA Agreement do not directly align with the classifications under the Chandler Macleod Agreement, Chandler Macleod does not suggest that the BMA Agreement does not apply or apply in practice to work of the type performed by Chandler Macleod employees at the Peak Downs mine for the purposes of s 306E(8)(a)(i) and (ii).

[327] Chandler Macleod accepts that the rate of pay that would be payable if a regulated labour hire arrangement order is made will be much higher than the rates under the Chandler Macleod Agreement 2020 and the rates actually paid to the employees it supplies. That matter is relevant to the fair and reasonable assessment for the purposes of s 306E(2) to the extent that the requirement to pay a higher rate of pay will have an impact on the business of Chandler Macleod. We will consider that matter below. Otherwise, the fact that Chandler Macleod employees are being paid at significantly lower rates of pay to perform the same work at the

same site and in the same crews as BHP Coal employees militates against a finding it is not fair and reasonable in all the circumstances to make the order.

[328] One feature of the application made by the MEU with respect to Chandler Macleod is that the only application concerns employees supplied to perform work at the Peak Downs mine. Chandler Macleod submits that an order is likely to result in its employees at Peak Downs earning a significant higher rate of pay compared to its employees performing work at other BMA mines, including Goonyella Riverside and Saraji. Chandler Macleod submits that this could cause tension between its employees at different sites and may cause it difficulty in attracting or retaining employees at other sites.[226]

[329] We accept that this could be a relevant consideration for the purposes of s 306E(8)(a) (or, in any event, (8)(f)) and we have taken that matter into account. However, having regard to the evidence as a whole, we do not believe this consideration favours a conclusion that it is not fair and reasonable to make the order. Only a very small number of employees of Chandler Macleod are currently deployed to the Goonyella Riverside and Saraji mines. Furthermore, Chandler Macleod already pays employees different rates at different sites, apparently to attract employees to appropriate skills and experience. There is no evidence that this feature of its operations has produced difficulties in the past. Although a regulated labour hire arrangement order may accentuate the differences in the rates of pay at different sites, we do not accept that the evidence justifies a finding that substantial difficulties will be experienced by Chandler Macleod as a result.

Section 306E(8)(c) – Industrial arrangements

[330] Chandler Macleod submits that an important consideration in assessing whether it is fair and reasonable to make the regulated labour hire arrangement order is that Chandler Macleod has long engaged in enterprise bargaining in the federal industrial relations system and has made agreements with its black coal mining employees in Queensland since at least 2011. Chandler Macleod submits that, by and large, its engagement with the MEU has been productive and it is not a "recalcitrant" employer that refuses to participate in enterprise bargaining. Chandler Macleod has relied on rates in its enterprise agreement to structure its business and its commercial arrangements and provide it with some ongoing certainty as to minimum rates and making an order would undermine that certainty and the "value" of the rates legitimately bargained for in the Chandler Macleod Agreement 2020.

[331] The MEU submits that Chandler Macleod's history of enterprise bargaining is, at best, modest. In 2019, it says Chandler Macleod's participation in bargaining was desultory. It attended two meetings before putting an agreement to a vote in circumstances where the MEU's predecessor had told the Company that it was premature for a vote to occur, and later Chandler Macleod discontinued its application for approval of the agreement. After filing a notice of discontinuance on 29 August 2019, the MEU says that Chandler Macleod sat on their hands until October 2019 before re-commencing bargaining. Chandler Macleod attended a handful of bargaining meetings before determining on 9 December 2020 to put the agreement to a vote. In advance of the vote, Chandler Macleod incorrectly told employees it had reached in principle agreement with the MEU's predecessor when it had not.[227] The agreement was approved by a vote in which only 102 of the 214 employees voted with 78 voting to approve the agreement.[228]

[332] As we have said in dealing with WorkPac's submissions, the existence of the Chandler Macleod Agreement 2020, and Chandler Macleod's history of enterprise bargaining, is relevant to whether the Commission can be satisfied it is not fair and reasonable to make a regulated labour hire arrangement order. We have taken that matter into account. It is also relevant to take into account the impact of making those orders on the arrangements under the Chandler Macleod Agreement 2020 and we have also taken that matter into account. The evidence referred to by the MEU suggests that the bargaining leading to the making of the Chandler Macleod Agreement 2020 was far from ideal. However, at least in this case, we do not believe it is necessary to interrogate the conduct of the parties in previous enterprise bargaining for the purpose of assessing whether it is not fair and reasonable to make an order. The Chandler Macleod Agreement 2020 was made in accordance with the Act and approved by the Commission. It is relevant to the assessment to be made under s 306E(2) that there is an enterprise agreement in place which applies to relevant employees of Chandler Macleod.

[333] However, the weight that can be attached to those matters in determining whether we can be satisfied it is not fair and reasonable to make the order sought by the MEU is diminished by a number of considerations. Chandler Macleod's reliance on the enterprise agreement is limited. Its employees are paid at rates above the minimum rates contained in the Chandler Macleod Agreement 2020 and are allocated to roles which do not align with the classification descriptions in the Agreement. The Chandler Macleod Agreement 2020 was made in 2019 and passed its nominal expiry in March 2024. Chandler Macleod explained that it has been reluctant to commence bargaining for a new agreement having regard to the potential for a regulated labour hire arrangement order to be made.[229] Nonetheless, the consequence is the current enterprise agreement is well passed its nominal expiry, and the rates of pay in the Agreement were last increased in July 2023.[230] In those circumstances, we do not believe the impact of a regulated labour hire arrangement order on the Chandler Macleod Agreement 2020 supports a conclusion that it is not fair and reasonable to make such an order to any substantial degree.

[334] Like WorkPac, Chandler Macleod also refers to clause 7 of the BMA Agreement. We have addressed that matter in dealing with WorkPac's submissions.

Section 306E(8)(d) – Relationship between regulated host and employer

[335] Section 306E(8)(d) requires the Commission to have regard to the relationship between the regulated host and the employer. There is no evidence of any relationship between Chandler Macleod and BMA other than as a result of the arrangements under which it supplies employees to perform work for BMA under the Chandler Macleod Services Contract. There is no basis in the evidence to suggest that this is not a commercial arm's length contract. That is part of the circumstances to be considered for the purposes of s 306E(2) and we have considered that matter.

Section 306E(8)(e) – Terms under which the work is performed

[336] Section 306E(8)(e) requires the Commission to have regard to the terms and nature of the arrangement under which the work will be performed. The arrangements between Chandler Macleod and BMA are subject to a commercial contract whereby Chandler Macleod provides labour hire services to BMA. The Chandler Macleod Service Contract has been in place since 18 January 2021 and was extended in late 2024 to run to 31 January 2026. As we have recorded,

the Chandler Macleod Service Contract does not require BMA to request services from Chandler Macleod and permits BMA to bring the contract to an end by giving notice.

[337] Chandler Macleod submits that the arrangement, which is in the context of the Queensland mining industry, provides BMA with a number of advantages that go beyond the cost of labour. It submits these benefits include flexibility, the provision of surge labour to cope with peaks and troughs in labour needs, simplified recruitment and selection processes, the ability to meet interim or immediate staff needs, outsourcing of risk management and the administrative burdens associated with regulatory compliance, including unfair dismissals and workers' compensation, passing on the consequences of redundancies including redeployment, entitlement payments and dismissal claims and reduced stoppages and industrial action.[231] It submits that these benefits will be eroded if the regulated labour hire arrangement order is made both if Chandler Macleod is required to cease the arrangement with BMA or to continue with the arrangement without adequate compensation.

[338] The aspects of the arrangements between Chandler Macleod and BMA relied upon are capable of being matters falling within s 306E(8)(e) (or, in any event, (8)(f)) to which the Commission is required to have regard. The submissions attempt to identify some advantages of the supply of employees by Chandler Macleod. The MEU submitted that the fact that the number of Chandler Macleod employees at the Peak Downs mine has remained reasonably stable suggests its employees are not used purely to provide surge labour. Nonetheless, we are prepared to assume that the provision of labour hire employees could have the advantages alluded to by Chandler Macleod. Those advantages will only be threatened if Chandler Macleod decides to cease providing the services or if BMA ceases to request employees to be provided by Chandler Macleod. If, as Chandler Macleod submits, there are significant benefits to BMA of the use of labour hire employees, we infer that a commercial arrangement will be worked out to permit those arrangements to continue. A regulated labour hire arrangement order does not, in itself, prevent labour hire workers being provided by Chandler Macleod.

[339] The MEU also alleges that there are various disadvantages of the arrangements under which Chandler Macleod provides employees to perform work at the Peak Downs mine. The MEU contends that labour hire employees are less likely to report safety concerns as a result of the precariousness of their employment. It also submits that Chandler Macleod employees are subject of temporary and insecure employment arrangements. It is unnecessary for the Full Bench to make findings in relation to those submissions. A regulated labour hire arrangement order is not concerned with preventing regulated employees from being supplied to perform work for a regulated host. An order, if made, simply has the effect of requiring that regulated employees be paid the protected rate of pay. The function of a regulated labour hire arrangement order is not to attempt to address what the MEU regards as shortcomings of the labour hire model aside from providing an avenue, in an appropriate case, to address a pay differential between labour and directly engaged workers.

[340] We have taken into account the advantages that Chandler Macleod says arise from the arrangements it has to supply employees to perform work at the Peak Downs mine. However, we do not believe those matters contribute to the Full Bench being satisfied it is not fair and reasonable to make the order in the circumstances of this matter since the order, in itself, does not prevent the arrangement continuing.

Section 306E(8)(f) – Other matters the Commission considers relevant

[341] Section 306E(8)(f) requires the Commission to have regard to other matters the Commission considers relevant to whether it is not fair and reasonable in all the circumstances to make the order. Chandler Macleod submits that the Chandler Macleod Service Contract was made in a commercial context that did not include the prospect of a regulated labour hire arrangement order. It says the entirety of its profit margin will be eroded if the order is made and the arrangement will be loss-making for the business. It also says the profit margin is small and its labour costs are likely to increase by between 11 and 28 percent if the order is made and the average weekly estimate is 18.27 percent.[232] Further, it says that its budgeted contingent liabilities (such as leave) will be exceeded if the order is made. Chandler Macleod also submits that, if the labour hire arrangement between it and BMA ceases, there is a real prospect at least some "white collar" positions will be made redundant and cost pressures will be placed on the business generally.

[342] The financial impact of a regulated labour hire arrangement on a labour hire employer is relevant in assessing whether it is not fair and reasonable to make the order, and we have taken into account such evidence as there is in relation to the potential impact on Chandler Macleod of orders being made. Although no estimate of the total additional costs likely to be incurred by Chandler Macleod was provided, we accept that an order will increase labour costs substantially. We do not accept the submission of Chandler Macleod that it is not relevant to take into account the size and significance of its operations and the operations of the RGF Staff group as a whole when considering the impact of a regulated labour hire arrangement order. RGF Staffing ANZ Pty Limited and its controlled entities are in strong financial health. The financial report for the 9 months to 31 March 2024 reveal revenue of $[**REDACTED**], gross profit of $[**REDACTED**], net profit of $[**REDACTED**], net assets of $[**REDACTED**]and EBITDA of $[**REDACTED**].[233]

[343] We accept that the making of a regulated labour hire arrangement order applying to Chandler Macleod employees at the Peak Downs mine will have a financial impact on the company if it is unable to renegotiate its arrangements with BMA. However, that impact must be considered in light of the size and scope of the operations of the broader group. We are satisfied that the making of the order sought will not appreciably impact the financial health or viability of the entities the subject of the proposed order in the context of the wider group of companies of which it is a part.

[344] To the extent Chandler Macleod submits that it is not fair and reasonable to make an order because it entered its current commercial arrangements without knowing of the potential for such an order, we are not convinced significant weight can be given to that consideration. Whilst the contract was first made in 2021, Chandler Macleod negotiated the current rates it receives in July 2024 after Part 2-7A was enacted (albeit before the provisions commenced) and made a further amending deed to the Chandler Macleod Service Contract to fix its end date in December 2024 when these proceedings were on foot. Furthermore, the Chandler Macleod Services Contract only runs until 31 January 2026 and will need to be renegotiated at that time if that does not occur earlier.

Conclusions in relation to Chandler Macleod

[345] Having considered each of the matters in relation to which submissions have been made by Chandler Macleod and other matters we consider relevant, the Full Bench is not satisfied that it is not fair and reasonable to make a regulated labour hire arrangement order with respect to Chandler Macleod employees supplied to perform work at the Peak Downs mine. The context in which the applications must be considered is that Chandler Macleod employees are performing the same work in the same crews and BMA employees and receiving substantially lower remuneration because of the identity of their employer. We have considered the impact of regulated labour hire arrangement orders being made on Chandler Macleod's pay and industrial arrangements, whether the order is likely to interfere with the claimed advantages of its labour hire arrangements and the financial impact on Chandler Macleod. Having considered each of those matters, we are not satisfied that it is not fair and reasonable to make the orders sought by the MEU. The consequence is that the Commission is required by s 306E(1) to make regulated labour hire arrangement orders.

Conclusion and disposition

[346] For these reasons, regulated labour hire arrangement orders will be made with respect to each of the applications. In the event that the Full Bench determined to make any orders, BHP and the OS Parties (as well as WorkPac and Chandler Macleod) asked the Commission to defer making orders to afford an opportunity for those parties to be heard on the question of timing of the orders. Those parties indicated that they proposed to give a commitment to pay the protected rate of pay from the date the Commission issues its decision. We direct that the parties confer and communicate to the chambers of Vice President Asbury within 7 days in relation to any proposed timetable for the resolution of any issue as to the timing of the operation of the orders the Full Bench has determined must be made.

VICE PRESIDENT

Appearances:

P Boncardo, of counsel, for the Mining and Energy Union, instructed by *A Walkaden* and *E Delpiano*
L Saunders, of counsel, for the Australian Manufacturing Workers' Union, instructed by *K Presdee* and *D Peatey*
R Dalton KC and *A* Pollock, of counsel, for the BHP Parties, instructed by *M Cameron*, *R Doyle* and *I Le Mare-Hutton*

I Neil SC and *J McLean*, of counsel, for WorkPac, instructed by *D Williams* and *T Walthall*
M Felman KC and *N Campbell*, of counsel, for Chandler Macleod , instructed by *S Billing* and *B Atton*
J Tracey KC, of counsel, for the Minister for Employment and Workplace Relations, instructed by *J Zhou* and *A Anthony*
Y Bakri, of counsel, for the Australian Council of Trade Unions, instructed by *K Tobin*
G Giorgi for the Minerals Council of Australia
S Kelleher for the Australian Industry Group

Hearing details:

2025.
Brisbane.
20-24 and 28-29 January; 17-18 February.

Printed by authority of the Commonwealth Government Printer

<PR788942>

Annexure A

Witness	Called by	Witness Statement/s	Exhibit Number
Wayne Thomas Goulevitch	MEU	Witness statement of 25 July 2024 Witness statement 7 November 2024	MEU 1 MEU 2
George Jeffrey Pearce	MEU	Witness statement of George Jeffrey Pearce dated 31 July 2024 Witness statement of George Jeffrey Pearce dated 24 October 2024	MEU-3 MEU-4
Helen Gabrielle Vine	MEU	Witness statement of Helen Gabrielle Vine dated 25 July 2024 Witness statement of Helen Gabrielle Vine dated 30 October 2024	MEU-5 MEU-6
Mark Lucas McFarlane	MEU	Witness statement of Mark Lucas McFarlane dated 28 July 2024 Witness statement of Mark Lucas McFarlane dated 30 October 2024	MEU-7 MEU-8
Scott Batchelor	MEU	Witness statement of Scott Batchelor dated 31 July 2024 Reply statement of Scott Batchelor dated 21 October 2024	MEU-9 MEU-10
Andrew James Large	MEU	Witness statement of Andrew James Large dated 29 July 2024	MEU-11

Jason John Noonan	MEU	Witness statement of Jason John Noonan dated 26 July 2024 Witness statement of Jason John Noonan dated 6 November 2024	MEU-12 MEU-13
Corey William Reading	MEU	Witness statement of Corey William Reading dated 31 July 2024 Witness statement of Corey William Reading dated 22 October 2024	MEU-14 MEU-15
Stephen Alexander Whitton	MEU	Witness statement of Stephen Alexander Whitton dated 30 July 2024 Witness statement of Stephen Alexander Whitton dated 25 October 2024	MEU-16 MEU-17
Bradley John Schofield	MEU	Witness statement of Bradley John Schofield dated 25 July 2024 Witness statement of Bradley John Schofield dated 23 October 2024	MEU-18 MEU-19
Jeffrey Michael Scales	MEU	Witness statement of Jeffrey Michael Scales dated 8 November 2024	MEU-20
Tiahnni Annette Gaukroger	MEU	Witness statement of Tiahnni Annette Gaukroger dated 30 July 20254 Witness statement of Tiahnni Annette Gaukroger dated 22 October 2024	MEU-21 MEU-22

Allen Thomas Uren	MEU	Witness statement of Allen Thomas Uren dated 30 July 2024 Witness statement of Allen Thomas Uren dated 31 October 2024	MEU-23 MEU-24
Angus Daniel Ryan	MEU	Witness statement of Angus Daniel Ryan dated 26 July 2024 Witness statement of Angus Daniel Ryan dated 21 October 2024	MEU-25 MEU-26
Ronald Green	MEU	Witness statement of Ronald Green dated 31 July 2024 Witness statement of Ronald Green dated 31 October 2024	MEU-27 MEU-28
Scott Leggett	MEU	Witness statement of Scott Leggett dated 29 July 2024	MEU-29
Marcus Welk	MEU	Witness statement of Marcus Welk dated 30 July 2024	MEU-30
Shane Stokes	AMWU	Witness statement of Shane Stokes dated 2 August 2024	AMWU-1
Daniel Lunan	AMWU	Witness statement of Daniel Lunan dated 2 August 2024	AMWU-2
Daryl Piper	AMWU	Witness statement of Daryl Piper dated 2 August 2024	AMWU-3
Grant John Costello	BHP	Statement of Grant John Costello dated 4 October 2024	OS-1
Scott Conners	BHP	Witness Statement of Scott Conners dated 27 September 2024	OS-2
Vaughn Stanley Bruce Abrams	BHP	Witness Statement of Vaughn Stanley	OS-3

		Bruce Abrams dated 4 October 2024	
Michael John Thomas	BHP	Statement of Michael John Thomas dated 4 October 2024	OS-5
Dane Andrew Nielsen	BHP	Witness Statement of Dane Andrew Nielsen dated 4 October 2024	OS-06
Mitch Hughes	MEU	Witness Statement of Mitch Hughes dated 29 July 2024 Witness Statement of Mitch Hughes dated 12 November 2024	MEU-52 MEU-53
Robert Geoffrey Hanson	BHP	Witness Statement of Robert Geoffrey Hanson dated 4 October 2024	OS-07
Cory James Cavanough	BHP	Witness Statement of Cory James Cavanough dated 27 September 2024	OS-08
Timothy Geoffrey Francis Witney	BHP	Witness Statement of Timothy Geoffrey Francis Witney dated 27 September 2024	OS-09
Cameron Scott Millican	BHP	Witness Statement of Cameron Scott Millican dated 4 October 2024	OS-10
Brennan John Long	BHP	Witness Statement of Brennan John Long dated 27 September 2024	OS-11
David Colin Thomasson	BHP	Witness Statement of David Colin Thomasson dated 4 October 2024	OS-12
Cameron Hockaday	WorkPac	Witness Statement of Cameron Hockaday dated 3 October 2024	WP-1 WP-2

		Witness Statement of Cameron Hockaday dated 2024 (including corrections page	
Nick Gabrielidis	Chandler Macleod	First Witness Statement of Nick Gabrielidis 4 October 2024 Second Witness Statement of Nick Gabrielidis 19 January 2025	CM-1 CM-2
Samuel Adam Willett	Chandler Macleod	Witness Statement of Samuel Adam Willett dated 27 September 2024	CM-3
Steven William Shepherd	Chandler Macleod	Witness Statement of Steven William Shepherd dated 4 October 2024	CM-4

[1] *Re Mining and Energy Union* [2024] FWCFB 299; (2024) 333 IR 249 at [10].

[2] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2023, p8704.

[3] *Attorney-General (Cth) v Oates* (1999) 198 CLR 162 at [33] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); *Environment Protection Authority v Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq)* [2014] NSWCA 149; (2014) 86 NSWLR 499 at [28] (Leeming JA).

[4] *Re Mining and Energy Union* [2024] FWCFB 299; (2024) 333 IR 249 at [15].

[5] *Retail & Fast Food Workers Union Inc v Coles Supermarkets Australia Pty Ltd* [2021] FWCFB 4414; (2021) 310 IR 130 at [16].

[6] See, for example, *Technical and Further Education Commission v Pykett* [2014] FWCFB 714; (2014) 240 IR 130 at [36]; *Teterin v Resource Pacific Pty Ltd* [2014] FWCFB 4125; (2014) 244 IR 252 at [23]-[30]; *Jain v Infosys Ltd (t/as Infosys Technologies Ltd)* [2014] FWCFB 5595 at [34]-[37].

[7] *Re Chamber of South Australian Employers Inc (No 2)* (1991) 43 IR 424 at 441-442; *Coal & Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (1997) 73 IR 311 at 317; *Re Family and Domestic Violence Leave Review 2021* [2022] FWCFB 2001; (2002) 315 IR 123 at [270]-[271].

[8] *Fair Work Act 2009* (Cth), s 306E(5).

[9] Macquarie Dictionary.

[10] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) at [638].

[11] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) at [635].

[12] *Re Mining and Energy Union* [2024] FWCFB 299; (2024) 333 IR 249 at [15].

[13] Op. cit. at [10].

[14] *CSR Ltd v Eddy* [2005] HCA 64; (2005) 226 CLR 1 at [13] (Gleeson CJ, Gummow and Heydon JJ); *Spence v Queensland* [2019] HCA 15; (2019) 268 CLR 355 at [294] (Edelman J); *Bird v DP* [2024] HCA 41; (2024) 98ALJR 1349 at [101] (Gleeson J).

[15] *Construction Industry Training Board v Labour Force Ltd* [1970] 3 All ER 220; *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104; *Drake Personnel Ltd v Commissioner of State Revenue* [2000] VSCA 122; [2000] 2 VR 635; *Forstaff Pty Ltd v Commissioner of State Revenue* [2004] NSWSC 573; (2004) 144 IR 1; *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1; (2022) 275 CLR 165.

[16] *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1947] AC 1; *Deutz Australia Pty Ltd v Skilled Engineering Ltd* [2001] VSC 194; (2001) 162 FLR 173.

[17] *Accident Compensation Commission v Odco Pty Ltd* (1990) 95 ALR 641; *Swift Placements Pty Ltd v WorkCover Authority (NSW)* [2000] NSWIRComm 9; (2000) 96 IR 69; *Labour Co-operative Ltd v WorkCover Authority of New South Wales (Insp Robins)* [2003] NSWIRComm 51; (2003) 121 IR 78.

[18] See, for example, *Labour Hire Licensing Act 2018* (Vic), s 7; *Labour Hire Licensing Act 2017* (Qld), s 7; *Labour Hire Licensing Act 2020* (ACT), s 7; *Labour Hire Licensing Act 2017* (SA), s 7.

[19] *Victorian Workcover Authority v Divadeus Pty Ltd (in liq)* [2016] VSCA 81 at [115].

[20] Ibid at [109] and [112]-[113].

[21] *Marketform Managing Agency Ltd v Ashcroft Supa IGA Orange Pty Ltd* [2020] NSWCA 36 at [68]-[69] (Payne JA, Ward CJ in Eq and Leeming JA agreeing).

[22] Ibid at [70]-[72].

[23] By reference to *IW v City of Perth* (1997) 191 CLR 1 at 58 (Kirby J) and *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50; (2016) 260 CLR 232 at [32] (French CJ, Kiefel, Bell and Keane JJ).

[24] *Ryan v Commissioner of Police* [2022] FCAFC 36; (2022) 290 FCR 369 at [110] (Griffiths, Rangiah and Perry JJ).

[25] *Rose v Department of Social Security* (1990) 21 FCR 241 at 244 (Lockhart, Gummow and Einfeld JJ); *Mann v Ross* (1999) 88 FCR 274 at [19] (Ryan, Moore and Marshall JJ).

[26] *Chief Executive Officer of Customs v Adelaide Brighton Cement Ltd* [2004] FCAFC 183; (2004) 139 FCR 147 at [17] (Black CJ) referring to Pearce and Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) at [9.5].

[27] *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason CJ).

[28] *Edwards v Giudice* (1999) 94 FCR 561 at [5] (Moore J); *National Retail Association v Fair Work Commission* [2014] FCAFC 118; (2014) 225 FCR 154 at [56] (Collier, Bromberg and Katzmann JJ); *Re 4 Yearly Review of Modern Awards* [2019] FWCFB 6067 at [13]; *Re Mining and Energy Union* [2024] FWCFB 299; (2024) 333 IR 249 at [15].

[29] See, for example, the approach adopted in *Andrews v Diprose* (1937) 58 CLR 399 at 310 (Dixon J).

[30] *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329 (Mason J).

[31] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) at [634].

[32] *Acts Interpretation Act* 1901 (Cth), s 15AB(1)(b)(i) and (ii).

[33] *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Bay Street Appeal)* [2020] FCAFC 192; (2020) 282 FCR 1 at [5] (Allsop CJ).

[34] P Herzfeld and T Prince, *Interpretation* (3rd ed, 2024, Lawbook Co) at [8.20].

[35] *Sydney Seaplanes Pty Ltd v Page* [2001] NSWCA 204; (2021) 106 NSWLR 1 at [41] (Bell P).

[36] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 517-518 (Mason CJ, Wilson and Dawson JJ); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Ltd* (No 2) [2010] FCA 652 at [22] (Logan J).

[37] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2023, p6240.

[38] Ex OS1 (Statement of Costello, 4 October 2024), [42]. See also description provided by Wayne Goulevitch in Ex MEU1 (Statement of Goulevitch, 25 July 2024), [16]-[21].

[39] Ex OS1 (Statement of Costello, 4 October 2024), [43].

[40] Ex OS3 (Statement of Abrams, 4 October 2024), [5]; Ex OS5 (Statement of Thomas, 4 October 2024), [12]; Ex OS6 (Statement of Nielsen, 4 October 2024), [10].

[41] *BMA Enterprise Agreement 2022*, clause 1.1(a) and (b).

[42] Ex OS1 (Statement of Costello, 4 October 2024), [41]-[46].

[43] Ex OS2 (Statement of Connors, 27 September 2024), [11].

[44] Ex OS2 (Statement of Connors, 27 September 2024), [12].

[45] Ex OS2 (Statement of Connors, 27 September 2024), [31]-[32].

[46] Maintenance Framework Agreement, clause 3.1.

[47] Ex OS1 (Statement of Costello, 4 October 2024), [57]-[58].

[48] Transcript, PN8837.

[49] See, for example, Transcript, PN2856-2962 (Costello) and Ex MEU36 (Operations Services, Operating Design) at p4-7.

[50] Being Mitsubishi Development Pty Ltd, QCT Investment Pty Ltd, WCT Mining Pty Ltd, and QCT Resources Pty Ltd.

[51] Ex OS1 (Statement of Costello, 4 October 2024), [24]-[26]; Ex OS2 (Statement of Connors, 27 September 2024), [16]-[17].

[52] Ex OS1 (Statement of Costello, 4 October 2024), [28]-[39].

[53] Ex OS2 (Statement of Connors, 27 September 2024), [12].

[54] Ex OS2 (Statement of Connors, 27 September 2024), [21].

[55] Production Framework Agreement, clause 13(c) and (d).

[56] Production Framework Agreement, clause 14.1(d).

[57] Transcript, PN3053-3054 (Costello).

[58] Production Framework Agreement, clause 2.2 of Schedule 2.

[59] Maintenance Framework Agreement, clause 1.3. 3.1(1) and (d).

[60] Maintenance Framework Agreement, clause 13.3.

[61] Maintenance Framework Agreement, clause 3.3-3.5.

[62] Maintenance Framework Agreement, clause 2.4 of Schedule 2.

[63] Ex OS10 (Statement of Millican, 4 October 2024), [44].

[64] Production Framework Agreement, clause 2.2 of Schedule 2; Maintenance Framework Agreement, clause 2.2 of Schedule 2.

[65] Ex OS2 (Statement of Connors, 27 September 2024), SC-4.

[66] Transcript, PN3891-3896 (Connors).

[67] Transcript, PN3898-3909 (Connors).

[68] Transcript, PN5964-5998 (Hanson).

[69] Maintenance Framework Agreement, clause 15.12(a).

[70] Ex OS2 (Statement of Connors, 27 September 2024), [37]-[39]. See also Ex OS1 (Statement of Costello, 4 October 2024), [62]-[64]; Ex OS3 (Statement of Abrams, 4 October 2024), [33]-[35]; Ex OS5 (Statement of Thomas, 4 October 2024), [64]; Ex OS6 (Statement of Neilsen, 4 October 2024), [24]; Ex OS12 (Statement of Thomasson, 4 October 2024), [18].

[71] Exhibits MEU37, MEU38, MEU39, AMWU4 and OS4.

[72] Transcript, PN5279 (Neilsen) and PN6815-6820 (Millican).

[73] Exhibits MEU56 and MEU57.

[74] Transcript, PN4213-4219 (Abrams).

[75] Transcript, PN5280-5286 (Neilsen).

[76] See also Transcript, PN4392-4397 (Abrams) and PN6942-6950 (Long).

[77] See, for example, Transcript 6816-6823 (Millican).

[78] Ex OS2 (Statement of Connors, 27 September 2024), [12]; Ex OS7 (Statement of Hanson, 4 October 2024), [63]; Ex OS8 (Statement of Cavanough, 27 September 2024), [38]-[39].

[79] Ex OS11 (Statement of Long, 27 September 2024), [61].

[80] Transcript PN6537-6545 (Cavanough).

[81] Ex OS2 (Statement of Connors, 27 September 2024), [78]. See also Ex OS7 (Statement of Hanson, 4 October 2024), [64]; Ex OS8 (Statement of Cavanough, 27 September 2024), [40].

[82] Ex OS2 (Statement of Connors, 27 September 2024), [78]-[82].

[83] Ex OS2 (Statement of Connors, 27 September 2024), [83].

[84] Ex OS1 (Statement of Costello, 4 October 2024), [125]-[128]; Ex OS2 (Statement of Connors, 27 September 2024), [114]-[120].

[85] Ex OS1 (Statement of Costello, 4 October 2024), [20]-[21].

[86] Ex OS2 (Statement of Connors, 27 September 2024), [17].

[87] Ex OS2 (Statement of Connors, 27 September 2024), [20].

[88] Ex OS3 (Statement of Abrams, 4 October 2024), [37].

[89] Transcript, PN4537-4548 and PN4712-4715 (Abrams).

[90] Transcript, PN4849-4856 (Thomas).

[91] Ex WP1 (Statement of Hockaday, 3 October 2024), [38]-[40].

[92] Ex WP1 (Statement of Hockaday, 3 October 2024), Annexure CH-1 (Services Contact, clause 3.1).

[93] Ex WP1 (Statement of Hockaday, 3 October 2024), Annexure CH-1 (Services Contact, clause 3.1).

[94] Ex WP1 (Statement of Hockaday, 3 October 2024), Annexure CH-1 (Services Contact, clause 7).

[95] *Minister for Home Affairs v DLZ18* [2020] HCA 43; (2020) 270 CLR 3672 at [43] and the authorities referred to therein.

[96] See, for example, *Travelex Ltd v Federal Commissioner of Taxation* [2010] HCA 33; (2010) 241 CLR 510 at [25] (French CJ and Hayne J).

[97] Production Framework Agreement, clause 7.1.

[98] Production Framework Agreement, clause 8.1.

[99] Production Framework Agreement, clause 8.3.

[100] Exhibit MEU41.

[101] See also Transcript PN4871-4903 (Thomas).

[102] Transcript, PN3363 (Costello).

[103] Transcript, PN4382-4386 (Abrams).

[104] Transcript, PN4904 (Thomas).

[105] Transcript, PN5302-5305 (Nielsen).

[106] Maintenance Framework Agreement, clause 7.1.

[107] Maintenance Framework Agreement, clause 7.2.

[108] Ex OS8 (Statement of Cavanough, 27 September 2024), [28]-[30].

[109] Ex OS8 (Statement of Cavanough, 27 September 2024), [29].

[110] Transcript, PN4009-4011 (Connors).

[111] Transcript, PN6345-6347 (Cavanough).

[112] See, for example, Transcript PN4383 (Abrams).

[113] See, for example, Transcript, N4381-4386 (Abrams), PN4764-4766 (Abrams) and PN4015-4018 (Connors).

[114] See, for example, Ex OS1 (Statement of Costello, 4 October 2024), [115] and Ex OS2 (Statement of Connors, 27 September 2024), [88].

[115] Ex OS12 (Statement of Thomasson, 4 October 2024), [59]. See also Ex OS1 (Statement of Costello, 4 October 2024), [116].

[116] Production Framework Agreement, clause 14.3; Maintenance Framework Agreement, clause 13.3.

[117] Ex OS1 (Statement of Costello, 4 October 2024), [95]; Transcript, PN2903-2905 (Costello).

[118] See, for example, Transcript, PN4452-4471 (Abrams).

[119] Ex OS1 (Statement of Costello, 4 October 2024), [101].

[120] Macquarie Dictionary definitions.

[121] Transcript, PN9490 (Dalton).

[122] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) at [638].

[123] See, generally, OS5 (Statement of Thomas, 4 October 2024), [36]-[40]; Ex OS6 (Statement of Hanson, 4 October 2024), [67]-[72]; OS9 (Statement of Witney, 27 September 2024), [83]-[88].

[124] Referring to Ex OS8 (Statement of Cavanough, 27 September 2024), [52]; Ex OS10 (Statement of Millican, 4 October 2024), [55]-[57]; Ex OS11 (Statement of Long, 27 September 2024), [67]-[71].

[125] See, for example, Transcript PN4449-4450 and PN4496-4497 (Abrams).

[126] Transcript, PN5353-5368 (Nielsen).

[127] See, for example, Transcript PN4446-4447 (Abrams) and PN5375-5376 (Nielsen).

[128] Exhibit MEU31.

[129] Exhibit MEU33, Volume 3 Tab 21, 22, 31 and 58.

[130] Exhibit MEU33, Volume 4 Tab 25, 26 and 33.

[131] Exhibit MEU33, Volume 2 Tab 39, 44 and 45.

[132] Exhibit MEU33, Volume Tab 3, 12, 15, 16 and 41; Volume 3 Tab 2, 6, 11, 12 and 29; Volume 4 Tab 18, 20, 31, 42, 52 and 58.

[133] Transcript, PN5007 (Thomas).

[134] Transcript, PN4982 (Thomas).

[135] Transcript, PN4533 (Abrams), PN5391 (Nielsen) and PN6731-6735 (Hanson).

[136] Ex MEU21 (Statement of Geukroger, 30 July 2024), [27]-[29].

[137] Ex MEU7 (Statement of Macfarlane, 28 July 2024), [42].

[138] See also Ex MEU5 (Statement of Vine, 25 Jul 2024), [33]-[34]; Ex MEU25 (Statement of Ryan, 26 Jul 2024), [30]; Ex MEU30 (Statement of Welk, 30 Jul 2024), [36].

[139] See, for example, Ex OS9 (Statement of Witney, 27 September 2024), [88]; Ex OS6 (Statement of Hanson, 4 October 2024), [57]-[59].

[140] Transcript, PN5411-5417 (Nielsen).

[141] Transcript, PN5415-5417 (Nielsen).

[142] Exhibit MEU54.

[143] Transcript, PN4663-4671 (Abrams). See also Transcript, PN6118-6120 (Hanson).

[144] Transcript, PN6225-6228 (Hanson) and PN7277- 7281 (Thomassen).

[145] See, for example, Ex MEU10 (Reply statement of Bachelor, 21 October 2024), [7]-[13]; Ex MEU14 (Statement of Reading, 31 July 2024), [21]-[22]; Ex MEU16 (Statement of Whitton, 30 July 2024), [47]-[50].

[146] Ex OS6 (Statement of Nielsen, 4 October 2024), [37]; Ex OS8 (Statement of Cavanough, 27 September 2024), [65]; Ex OS9 (Statement of Witney, 27 September 2024), [97].

[147] Ex OS2 (Statement of Connors, 27 September 2024), [92]; Ex OS8 (Statement of Cavanough, 27 September 2024), [63]; Ex OS10 (Statement of Millican, 4 October 2024), [50].

[148] Exhibit MEU30, Volume 3, Tab 30 at p6.

[149] Exhibit MEU30, Volume 3, Tab 30 at p7-8.

[150] See, for example, Ex OS1 (Statement of Costello, 4 October 2024), [50].

[151] Ex OS1 (Statement of Costello, 4 October 2024), [50].

[152] Transcript, PN4537-4548 (Abrams), PN4712-4715 (Abrams) and PN4849-4856 (Thomas).

[153] Ex OS1 (Statement of Costello, 4 October 2024), GJC-5.

[154] Ex OS6 (Statement of Nielsen, 4 October 2024), [33]-[39]; Ex OS6 (Statement of Hanson, 4 October 2024), [52]; Ex OS6 (Statement of Thomasson, 4 October 2024), [40].

[155] Ex OS2 (Statement of Connors, 27 September 2024), SC-3.

[156] Ex OS11 (Statement of Long, 27 September 2024), [26]-[30].

[157] Ex OS8 (Statement of Cavanough, 27 September 2024), [45].

[158] Ex OS10 (Statement of Millican, 4 October 2024), [51].

[159] *Re Mining and Energy Union* [2024] FWCFB 299; (2024) 333 IR 249 at [21](d).

[160] *Coal Mining Safety and Health Act 1999* (Qld), s 21.

[161] *Coal Mining Safety and Health Act 1999* (Qld), Schedule 3 (Dictionary).

[162] *Coal Mining Safety and Health Act 1999* (Qld), s 43.

[163] Transcript, PN275-279, PN409-421, PN747-748, PN976-978, PN2268-2270 and PN2386-2390.

[164] Transcript, PN59-79, PN409-422, PN541-551, PN558-566, PN566-585 and PN1077-1088.

[165] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) at [637].

[166] *Re Mining and Energy Union* [2024] FWCFB 299; (2024) 333 IR 249 at [21](e).

[167] *Re Mining and Energy Union* [2024] FWCFB 299; (2024) 333 IR 249 at [16].

[168] *Re Mining and Energy Union* [2024] FWCFB 299; (2024) 333 IR 249 at [16]. See also *Application by the Mining and Energy Union re Rix's Creek* [2025] FWCFB 12 at [49]-[50]; *Application by the Mining and Energy Union re Bengalla Mining Company Pty Ltd* [2025] FWCFB 53 at [78].

[169] *Redbubble Ltd v Hells Angels Motorcycle Corporation (Australia) Pty Ltd* [2024] FCAFC 15; (2024) 303 FCR 100 at [131] (Perram and Downes JJ). See also *B v Australian Postal Corporation* [2013] FWCFB 6191; (2013) 238 IR 1 at [21] (in the context of s 387(h) of the Act) and *Application by the Construction, Forestry and Maritime Employees Union for an entry permit for Joshua Thompson and Dylan Howard* [2025] FWC 1177 at [22] (in relation to s 513(g)).

[170] *Application by the Mining and Energy Union re Bengalla Mining Company Pty Ltd* [2025] FWCFB 53 at [81] referring to the approach adopted in other contexts in *Toms v Harbour City Ferries Pty Limited* [2015] FCAFC 35; (2015) 229 FCR 537 at [36] (Buchanan J) and *Secretary of the Ministry of Health v New South Wales Nurses and Midwives' Association* [2022] NSWSC 1178; (2022) 320 IR 249 at [12] (Walton J).

[171] *Application by the Mining and Energy Union re Rix's Creek* [2025] FWCFB 12 at [51]-[52]; *Application by the Mining and Energy Union re Bengalla Mining Company Pty Ltd* [2025] FWCFB 53 at [79].

[172] *Retail Employees Superannuation Pty Ltd v Crocker* [2001] FCA 1330 at [26] (Allsop J); *Alcoa of Australia Retirement Plan Pty Ltd v Thompson* [2002] FCA 256; (2002) 116 FCR 139 at [48] (RD Nicholson J).

[173] By operation of s 306F(10).

[174] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd* [2015] FCAFC 126; (2015) 233 FCR 301 at [23].

[175] *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53; (2012) 201 FCR 297 at [5] (Jessup J); *United Firefighters Union of Australia v County Fire Authority* [2015] FCAFC 1; (2015) 228 FCR 497 at [156] (Perram, Robertson and Griffiths JJ).

[176] *Application by the Mining and Energy Union re Bengalla Mining Company Pty Ltd* [2025] FWCFB 53 at [91].

[177] *Fair Work Act 2009* (Cth), ss 55(1) and 186(2)(d).

[178] *Fair Work Act 2009* (Cth), s 266(1) and 269(1).

[179] *Fair Work Act 2009* (Cth), s 249(1). See discussion in *Australian Municipal, Administrative, Clerical and Services Union v Central Goldfields Shire Council* [2024] FWCFB 444; (2024) 335 FCR 110 at [75]-[76].

[180] *Application by the Mining and Energy Union re Bengalla Mining Company Pty Ltd* [2025] FWCFB 53 at [92].

[181] *Fair Work Act 2009* (Cth), s 12.

[182] By reference to *RIG Consulting Pty Ltd v Queanbeyan-Palerang Regional Council* [2021] NSWCA 130 at [22] (Leeming JA).

[183] *Application by the Mining and Energy Union re Bengalla Mining Company Pty Ltd* [2025] FWCFB 53 at [84]-[88].

[184] *Fair Work Act 2009* (Cth), s 306E(8)(a), (c), (da) and (e).

[185] *Application by the Mining and Energy Union re Bengalla Mining Company Pty Ltd* [2025] FWCFB 53 at [82]-[83].

[186] Ex WP1 (Statement of Hockaday, 3 October 2024), [53](c).

[187] Exhibit MEU56.

[188] Ex WP1 (Statement of Hockaday, 3 October 2024), Annexure CH-1 (Services Contact, clause 4.2).

[189] Ex WP1 (Statement of Hockaday, 3 October 2024), [54]-[56].

[190] Ex WP2 (Supplementary statement of Hockaday, 19 December 2024), [17].

[191] Ex WP1 (Statement of Hockaday, 3 October 2024), [58].

[192] Ex WP1 (Statement of Hockaday, 3 October 2024), [51].

[193] Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) at [648].

[194] *Fair Work Act 2009* (Cth), s 306G(1).

[195] *WorkPac Coal Mining Agreement 2019*, clause 1.2.1.

[196] BMA Enterprise Agreement 2022, clause 2 of Schedule 9.

[197] BMA Enterprise Agreement 2022, clause 1.3 of Schedule 9.

[198] WorkPac Coal Mining Agreement 2019, Schedule 1 (particularly Levels 1, 2 and 3).

[199] Ex WP2 (Supplementary statement of Hockaday, 19 December 2024), [23].

[200] Ex WP2 (Supplementary statement of Hockaday, 19 December 2024), [18].

[201] *Application by the Mining and Energy Union re Bengalla Mining Company Pty Ltd* [2025] FWCFB 53 at [123].

[202] Ex WP1 (Statement of Hockaday, 3 October 2024), [63].

[203] *Fair Work Act 2009* (Cth), s 306NA(2) and (3).

[204] Ex WP1 (Statement of Hockaday, 3 October 2024), Annexure CH-4 clause 4(b).

[205] Ex WP1 (Statement of Hockaday, 3 October 2024), [62](g).

[206] Ex WP2 (Supplementary statement of Hockaday, 19 December 2024), [35].

[207] Ex WP1 (Statement of Hockaday, 3 October 2024), [62](g).

[208] Transcript, PN9843-9850 (Neil).

[209] Ex WP2 (Supplementary statement of Hockaday, 19 December 2024), Annexure CH-5.

[210] PR777029 (in relation to the Callide Mine), PR780878 (in relation to the Coppabella Mine), PR780861 (in relation to the Capcoal Surface Operations Mine), PR780868 (in relation to the Poitrel Mine) and PR 783395 (in relation to Rix's Creek Mine).

[211] Transcript, PN7627-7680 (Hockaday).

[212] Ex CM1 (Statement of Gabrielidis, 4 October 2024), [5]; Ex CM3 (Statement of Willett, 27 September 2024), [2]-[3].

[213] Ex CM1 (Statement of Gabrielidis, 4 October 2024), [9]-[13].

[214] Ex CM4 (Statement of Shepherd, 4 October 2024), [10].

[215] Ex CM4 (Statement of Shepherd, 4 October 2024), Annexure SWS-01 and SWS-02; Ex CM2 (Statement of Gabrielidis, 19 January 2025), Annexure NG-01.

[216] Ex CM4 (Statement of Shepherd, 4 October 2024), Annexure SWS-01 (Services Contact, clause 4.2).

[217] Ex CM4 (Statement of Shepherd, 4 October 2024), Annexure SWS-01 (Services Contact, Schedule 2).

[218] Ex CM4 (Statement of Shepherd, 4 October 2024), Annexure SWS-02 (Services Contact, clause 9 of Schedule 3).

[219] Ex CM2 (Statement of Gabrielidis, 19 January 2025), [12].

[220] Ex CM4 (Statement of Shepherd, 4 October 2024), Annexure SWS-02 (Services Contact, clause 4(a) of Schedule 3).

[221] Ex CM4 (Statement of Shepherd, 4 October 2024), Annexure SWS-01 (Services Contact, clause 22.2).

[222] Ex CM3 (Statement of Willett, 27 September 2024), [20].

[223] Ex CM1 (Statement of Gabrielidis, 4 October 2024), [24]; Transcript, PN8398 (Willett) and PN8467-8471 (Shepherd).

[224] Ex CM4 (Statement of Shepherd, 4 October 2024), [22]-[23]; Transcript, PN8220-8223 (Willett).

[225] Transcript, PN8399 and PN8427-8429 (Willett).

[226] Ex CM1 (Statement of Gabrielidis, 4 October 2024), [36]; Ex CM3 (Statement of Willett, 27 September 2024), [83].

[227] Transcript, PN8279-8369 (Willett).

[228] Ex CM3 (Statement of Willett, 27 September 2024), Annexure SAW-23 p15.

[229] Transcript, PN8462 (Willett).

[230] Transcript, PN8361 (Willett).

[231] Transcript, PN5758-5809 (Hughes).

[232] Ex CM2 (Statement of Gabrielidis, 19 January 2025), [14]-[15].

[233] Exhibit MEU66.