[2025] FWCFB 12

The attached document replaces the document previously issued with the above code on 17 January 2025.

Changing references to ‘section 306’ to ‘section 306E’ in para [21] (3rd line) and para [34] (1st line).

Associate to Vice President Gibian

Dated 21 January 2025

DECISION

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

Application by the Mining and Energy Union re Rix's Creek
(C2024/3832)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT GRAYSON

SYDNEY, 17 JANUARY 2025

Application for a regulated labour hire arrangement order in respect of WorkPac Mining Pty Ltd in relation to work performed for Rix's Creek Pty Ltd at the Rix's Creek Mine – Making of some form of regulated labour hire arrangement order not opposed – Submission that order should be limited to employees of labour hire provider who work roster arrangements permissible under the enterprise agreement that applies to the regulated host – Whether Commission has jurisdiction to make an order which applies to employees who work a roster not permitted under the covered employment instrument which applies to a regulated host – "Work of that kind" – Whether it is not fair and reasonable to make a regulated labour hire arrangement order which applies to all WorkPac employees for the purposes of s 306E(2) – Whether the Commission able to consider a matter in s 306E(8) even if no submissions made about it – Commission required to make order that applies to all WorkPac employees – No basis to limit the regulated employees to whom the order applies – Order made.

Introduction

[1] On 11 June 2024, the Mining and Energy Union filed an application for a regulated labour hire arrangement order under s 306E of the *Fair Work Act 2009* (Cth) (the **Act**). The order sought by the MEU would apply to labour hire workers employed by Workpac Mining Pty Ltd (**WorkPac**) who perform work for Rix's Creek Pty Ltd (**Rix's Creek**) at the Rix's Creek Mine near Singleton in New South Wales (the **Rix's Creek Mine** or the **Mine**). The host employment instrument is the *Rix's Creek Mine Enterprise Agreement 2021*, as varied in 2023 (AE511876) (the **Rix's Creek Agreement**).

[2] The MEU filed written submissions and evidence in support of its application on 17 July 2024. On 27 September 2024, WorkPac filed its written submissions and evidence. In its written submissions, WorkPac indicated that it "accepts that a [regulated labour hire arrangement order] can be made". Impliedly at least, WorkPac accepts that the conditions which require the Commission to make such an order in s 306E are satisfied. However, WorkPac contended in its written submissions, and continues to contend, that the order can and should apply only to those of WorkPac's employees who work roster arrangements that are permitted under the Rix's Creek Agreement.

[3] In its submissions, WorkPac suggests that its employees who perform work at Rix's Creek Mine can be categorised in two groups. The first group work Monday to Friday on an 8 hour and 10-minute roster pattern which is contemplated by clause 7.1 of the Rix's Creek Agreement. It does not object to an order being made covering the first group who perform work in accordance with rosters contemplated by, and provided for, in the Rix's Creek Agreement. The second group of WorkPac employees "can conceivably work the weekend rosters that employees covered by the Rix's Creek Agreement are prohibited from working." WorkPac submits that the Commission cannot make a regulated labour hire arrangement order which covers the second group of employees.

[4] WorkPac indicated that it opposes the making of an order that extends to or operates to cover any of its employees who work roster arrangements that are prohibited for employees covered by the Rix's Creek Agreement on two grounds, namely:

(a) There is no jurisdiction for the Commission to make an order that extends to or operates to cover those employees; and

(b) Additionally or alternatively, it would not be fair and reasonable to make such an order within the meaning of s 306E(2) of the Act.

[5] Together with its written submissions, WorkPac filed a document setting out the terms of a proposed draft order which it submits should be made. Relevantly, WorkPac's draft order proposed to identify the employees covered by the order in the following terms:

> The regulated employees covered by the order are employees of the Employer who perform work at the Rix's Creek Open Cut Mine near Singleton in the State of New South Wales who would, if employed by the Regulated Host, be covered by the Host Employment Instrument identified in A.4 (the Regulated Employees), and who are performing work on roster arrangements which are permitted to be worked by employees of the Regulated Host in the same work stream under the terms of the Host Employment Instrument.

[6] The draft order proposed by the MEU would simply cover all WorkPac employees who perform work at the Rix's Creek Mine and who would, if employed by Rix's Creek, be covered by the Rix's Creek Agreement.

[7] Rix's Creek, for its part, communicated to the Commission on 2 October 2024 that it "supports an order being made in the terms proposed by WorkPac but at this stage does not propose to file any submissions or evidence in support of this position". Rix's Creek was represented at the hearing of the application and made brief submissions in support of the position adopted by WorkPac.

[8] The MEU submits that the absence of specific rostering arrangements provided for in the host employment instrument does not preclude the making of the order with respect to all of WorkPac's employees who perform work for Rix's Creek. It further submits that it is fair and reasonable for an order to be made which covers all WorkPac employees who perform work at the Rix's Creek Mine consistent with the purposes and policy considerations underlying the enactment of Part 2-7A of the Act.

Evidence before the Commission

[9] The evidence before the Commission in relation to the application comprised the following:

(a) A witness statement of Bradley Young dated 16 July 2024. Mr Young is employed by WorkPac as a Multi-Skilled Operator and performs work at the Rix's Creek Mine.

(b) A witness statement of Michael Hill dated 8 May 2024 and a witness statement in reply of Mr Hill dated 9 October 2024. Mr Hill is employed by Rix's Creek as a Production Employee to work at the Rix's Creek Mine.

(c) A witness statement of Cameron Hockaday dated 27 September 2024. Mr Hockaday is the Chief Commercial & Risk Officer of WorkPac Group Pty Ltd (which is the parent company of the corporate group which includes WorkPac Mining Pty Ltd).

[10] Each of those witness statements was admitted into evidence in the proceedings and none of the witnesses were required for cross-examination. The evidence indicates, and the Full Bench finds, as follows:

(a) The Rix's Creek Mine is an open cut coal mine situated approximately five kilometres northwest of Singleton in New South Wales. The Mine is owned and operated by Bloomfield Collieries Pty Ltd. Employees employed to perform work at the Rix's Creek Mine are employed by Rix's Creek. Bloomfield Collieries Pty Ltd and Rix's Creek are part of the same corporate group (the **Bloomfield Group**).

(b) The Rix's Creek Mine is constituted by two mining areas (north and south) and all coal extracted is conveyed to a Coal Handling and Preparation Plant (**CHPP**). Thermal and semi-soft coking coal is produced at the Mine, the bulk of which is exported. The Mine operates 24-hours a day, 7-days a week other than on Christmas Day and Boxing Day.

(c) Rix's Creek employs production and maintenance employees to perform work at the Rix's Creek Mine. The Rix's Creek Agreement covers and applies to these employees. Clause 10 is entitled "Wages" and sets out the classifications for employees under the Agreement. The classifications hinge on the experience and skills of employees operating particular plant and equipment, performing maintenance functions, or performing CHPP duties. For operators, the classification for them aligns with the number of production equipment they operate.

(d) In addition to the directly employed workforce, WorkPac supplies employees to Rix's Creek to perform production work at the Rix's Creek Mine. WorkPac is party to a contract with a company known as Four Mile Pty Ltd which is also part of the Bloomfield Group. Under the contract, WorkPac provides labour for deployment across the operations of the Bloomfield Group including at the Rix's Creek Mine. The *Workpac Coal Mining Agreement 2019* covers and applies to WorkPac and its employees who perform work at the Rix's Creek Mine.

(e) The contracts of employment provided to WorkPac employees, among other things, require that the employees act in accordance with Rix's Creek's directions including with respect to working arrangements, safety regulations and the manner and proficiency with which they are to carry out their work, are subjected to the days of work, hours and length of 'the assignment' as determined by Rix's Creek, must obey lawful written and verbal directions issued by WorkPac or Rix's Creek and adhere to standard operating procedures and safe systems of work laid down by Rix's Creek.

(f) Production work at the Rix's Creek Mine involves engagement in processes relating to the extraction of coal and its transportation to a CHPP. The various steps involved in the extraction of coal involve the use of plant and equipment by production workers employed by Rix's Creek and WorkPac. These items of plant and equipment include rear dump trucks, dozers, graders, water trucks, rubber tyred dozers, excavators, ancillary excavators/loaders, production front end loaders and overburden/blast-hole drill. Rix's Creek owns this plant and equipment. WorkPac provides no plant and equipment that is used at the Mine.

(g) Both Rix's Creek and WorkPac employees perform production work at the Mine, operating these various types of plant and equipment. Rix's Creek and WorkPac employees work alongside one another, use the same machines and use the same crib facilities. Rix's Creek determines which plant and equipment that workers, including employees of WorkPac, operate by reference to the worker having undertaken relevant training and assessment. The same training is required to be undertaken by both Rix's Creek and WorkPac employees and is conducted by Rix's Creek.

(h) The supervisors, who oversee and superintend work at the Rix's Creek Mine, are employed by Rix's Creek. The supervisors arrange, oversee and monitor the work of WorkPac employees as well as Rix's Creek employees. No managers or supervisors employed by WorkPac perform work at the Rix's Creek Mine or oversee and superintend the work of WorkPac employees at the Mine. The Rix's Creek supervisors report to Rix's Creek's project superintendent who, in turn, reports to its mine manager who, in turn, reports to its operations manager.

(i) Rix's Creek supervisors are present for all hours of work and one of the supervisors employed by Rix's Creek is an open cut examiner required to be appointed under the *Work Health and Safety (Mines and Petroleum Sites) Regulation 2022* (NSW).

(j) Policies and procedures in place at the Rix's Creek Mine, to which all workers including those employed by WorkPac are required to adhere, are those promulgated by Rix's Creek. The relevant policies comprise health and safety policies and procedures, including the blue book, job safety analyses and hazard reports. Training packages required to be undertaken by workers at the Rix's Creek Mine are Rix's Creek's, and Rix's Creek ensures that all workers at the Mine are trained in accordance with these packages. Rix's Creek also monitors and keeps track of training undertaken by each worker.

(k) Personal protective equipment for work at the Rix's Creek Mine is provided to workers by Rix's Creek, and all consumable products used and accessed by workers at the Mine are provided by Rix's Creek.

(l) Rix's Creek controls the sign in and sign out of workers to the Rix's Creek Mine and all workers are issued swipe cards recording their name and an identification number. WorkPac employees are provided with such a swipe card and the sign in/sign off procedure for WorkPac and all other workers is determined and enforced by Rix's Creek. Rix's Creek also monitors and enforces an alcohol and drug testing regime at the Mine that covers all workers including WorkPac employees.

(m) Prior to 2 September 2024, a number of WorkPac employees performing work at the Rix's Creek Mine worked a rotating seven-day 12-hour day/night roster. Some time prior to 2 September 2024, an operational decision was made by Rix's Creek to change its operating rosters such that the seven-day roster would cease to be worked and, thereafter, all permanent WorkPac employees undertaking work at the Rix's Creek Mine work on the Monday to Friday, 8 hour and 10 minute Roster consistent with the Rix's Creek Agreement. Some casual WorkPac employees also work on the Monday to Friday, 8 hour and 10 minute roster, but other WorkPac casuals work fluctuating shifts and are predominantly "weekend warriors".

(n) Prior to 2 September 2024, WorkPac employees performing the same work as Rix's Creek employees at the Rix's Creek Mine were paid less than Rix's Creek employees. For example, WorkPac employees performing the same work as a Classification Level 2 under the Rix's Creek Agreement would earn approximately $43,817.76 less per annum than a Rix's Creek employee. Since 2 September 2024, WorkPac and Rix's Creek agreed that WorkPac employees who perform work on the same work patterns as employees under the Rix's Creek Agreement would be paid the same rate as Rix's Creek employees.

[11] WorkPac's submissions rely on aspects of the Rix's Creek Agreement, particularly the limitations that are imposed on the hours of work and rostering arrangements for employees covered by the Agreement. The parties to the Rix's Creek Agreement are recorded as being Rix's Creek, the Construction, Foresty, Maritime, Mining and Energy Union (CFMMEU –

Mining & Energy Division) and "All Production & Engineering Employees directly employed by the Company who are engaged at Rix's Creek Mine".[1]

[12] A number of aspects of the Rix's Creek Agreement are relevant to the arguments advanced by the parties. Clause 6 is headed "Contract of Employment" and sets out the types of employment provided for under the Agreement. Clauses 6.14 to 6.17 provide for casual employees as follows:

> **Casuals**
>
> 6.14 Casual Employees will be appointed to a shift of a Roster under Clause 7 or any other hours of work as determined by the Company.
>
> 6.15 If Casual Employees are not appointed to a shift of a Roster under clause 7 and work such hours of work as determined by the Company, Casual Employees will be paid on an hourly basis the Casual Rate for all Ordinary Hours of Shift worked.
>
> 6.16 If Casual Employees are appointed to a shift of a Roster under clause 7 (that is, to work Rostered Hours under one of the roster arrangements in clause 7), Casual Employees will be paid on an hourly basis the Casual Rate for all Rostered Hours worked and for any Rostered Overtime worked that forms part of their Rostered Hours worked, they will also be paid an amount which is double the applicable Wage Rate for those Rostered Overtime hours.
>
> 6.17 Subject to clause 6.16, hours worked in excess of Ordinary Hours of Shift or worked on a Weekend do not attract Shift Allowance (as outlined in Clause 12.5) or Casual Loading, and will be paid at double the applicable Wage Rate as defined in Clause 10.

[13] Clause 7 of the Rix's Creek Agreement sets out the provisions governing rostering arrangements. The relevant parts of clause 7 are set out as follows:

> **7. Rosters**
>
> 7.1 The Company may require Employees within the agreed streams to work any of the following roster arrangements, subject to clause 7.2 below: -
>
> **a) Monday to Friday 8 Hour & 10 Minute Roster**
>
> Day 06.30am - 02.40pm
>
> Afternoon 02.30pm - 10.40pm
>
> Night 10.30pm - 06.40am
>
> **b) Wednesday to Saturday 10 Hour Roster**
>
> Rostered Hours will be Wednesday to Saturday 06.30am to 04.30pm. This time may be varied if agreed in writing by the majority of affected Employees.
>
> **c) 7-Day, Rotating Day & Night, 12 Hour Roster**
>
> Rostered Hours will be 06.30am to 06.30pm and 06.30pm to 06.30am. These times may be varied if agreed in writing by the majority of affected Employees.

The following is the agreed roster pattern. The week that an Employee will commence on the roster is at the discretion of the Employer:

Week	S	M	T	W	T	F	S
1		D	D	N	N		
2				D	D	N	N
3	N					D	D
4	D	N	N				

7.2 Production Employees will only be engaged on Roster (a) and Casual Employees will not be engaged on Roster (c).

[14] Clause 9 also provides for overtime. The most relevant parts of clause 9 are as follows:

9. Overtime

9.1 The Employees acknowledge that all Employees may be required to work a reasonable amount of Non-Rostered Overtime.

9.2 Employees acknowledge that Non-Rostered Overtime labour must be made available for train loading.

9.3 Non-Rostered Overtime can be worked in any block length on an 'as needs' basis by agreement between the parties.

9.4 All Rostered Overtime and Non-Rostered Overtime worked is paid at Overtime Rates.

9.5 Roster Payments

9.5.1 Monday to Friday Fixed 8 Hour & 10 Minute Roster

Employees are rostered five days per week on 8 hour and 10 minute shifts giving a total of 40 hours and 50 minutes each week, which is made up of Ordinary Hours and Rostered Overtime.

This is paid as 7 Ordinary Hours of Shift at the applicable Wage Rate and 1 hour and 10 minutes Rostered Overtime at Overtime Rates per day. Any rostered hours that fall on the Weekend, will be paid at Weekend Penalty Rate (e.g. night shift being paid double time from 10.30pm to midnight on a Sunday).

9.5.2 Wednesday to Saturday 10 Hour Roster

Wednesday to Friday
- Work 10 hours
- First 8.75 Ordinary Hours of Shift at the applicable Wage Rate
- Remaining 1.25 Rostered Overtime at Overtime Rates Subsequent hours worked as Non-Rostered Overtime at Overtime Rates

Saturday
- Work 10 hours
- First 10 hours at Weekend Penalty Rate
- Subsequent hours worked as Non-Rostered Overtime at Overtime Rates

Sunday to Tuesday	Any hours worked are Non-Rostered Overtime and paid at the applicable Weekend Penalty Rate or Overtime Rates

Employees on the Wednesday to Saturday roster shall be paid 13.44 hours at the applicable Wage Rate for each day worked. This is equivalent to the average across the four (4) day roster of Ordinary Hours at the applicable Wage Rate, Rostered Overtime Hours at Overtime Rates and Weekend hours at Weekend Penalty Rate.

…

9.5.3 7-Day, Rotating Day & Night, 12 Hour Roster

Monday to Friday	- Work 12 hours - First 10 Ordinary Hours of Shift at the applicable Wage Rate - Remaining 2 Rostered Overtime hours at Overtime Rates - Subsequent hours worked as Non-Rostered Overtime at Overtime Rates
Saturday or Sunday	- Work 12 hours - First 12 hours at Weekend Penalty Rate - Subsequent hours worked as Non-Rostered Overtime at Overtime Rates

Employees on the 7-Day, Rotating Day & Night, 12 Hour Roster shall be paid 16.86 hours at the applicable Wage Rate for each Rostered Shift worked. This is equivalent to the average across the roster cycle of Ordinary Hours at the applicable Wage Rate, Rostered Overtime Hours at Overtime Rates and Weekend hours at Weekend Penalty Rate.

Statutory Provisions

[15] 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, notwithstanding the use of the word "may" in the heading of the section, 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:

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.

…

[16] In *Re Mining and Energy Union* [2024] FWCFB 299; (2024) 333 IR 249 (***Batchfire***), a Full Bench of the Commission outlined a number of principles concerning the proper interpretation and application of s 306E.[2] 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. The objection advanced by WorkPac to an order being made in relation to all of its employees performing work for Rix's Creek draws attention specifically to the requirement in s 306E(1)(a) and (b) and the fair and reasonable assessment required by s 306E(2).

[17] It is convenient to deal first with whether a regulated labour hire arrangement order must be made in accordance with s 306E of the Act in relation to employees of WorkPac performing work at the Rix's Creek Mine at all and then address the submissions advanced by WorkPac as to the coverage of any regulated labour hire arrangement order.

Whether a regulated labour hire arrangement order must be made?

[18] As we have observed, no party disputed that the requirements in s 306E of the Act are met so as to require the Commission to make a regulated labour hire arrangement order with respect to those employees of WorkPac who undertake work in accordance with a roster arrangement that is permitted by the Rix's Creek Agreement. Leaving to one side the dispute as to the employees who must be covered by such an order, we are satisfied that each of the requirements in s 306E(1) are met and that neither of the prohibitions in s 306E(1A) and 306E(2) apply.

[19] We are satisfied, for the purposes of s 306E(7), that the MEU is an employee organisation that is entitled to represent the industrial interests of the employees of WorkPac who are supplied to perform work for Rix's Creek at the Rix's Creek Mine as well as employees of Rix's Creek employed to perform work at the Mine. Accordingly, the MEU is entitled to apply for a regulated labour hire arrangement order under s 306E of the Act by operation of s 306E(7)(c) and, as such, for the purposes of s 306E(1).

[20] We are further satisfied that the requirements of s 306E(1) of the Act are met. Specifically, on the basis of the material before the Full Bench, we are satisfied that:

(a) WorkPac supplies employees employed by WorkPac to perform production work for Rix's Creek at the Rix's Creek Mine involving engagement in processes relating to the extraction of coal and its transportation and the use of mining plant and equipment.

(b) The Rix's Creek Agreement applies to all employees undertaking production work at the Rix's Creek Mine. As a consequence, the Agreement would apply to employees of WorkPac supplied to perform work at the Rix's Creek Mine if those employees were directly employed by Rix's Creek to undertake the same kind of work.

(c) Rix's Creek is not a small business employer.

[21] For the purposes of s 306E(1A) of the Act, we are satisfied that the performance of work is not and will not be for the provision of a service, rather than the supply of labour having regard to the matters in s 306E(7A). In relation to the matters set out in s 306E(7A) to be considered in being satisfied of the requirement in s 306E(1A), we make the following findings:

(a) There is no evidence before the Full Bench that WorkPac has any involvement in matters relating to the performance of work by its employees working at the Rix's Creek Mine.

(b) The evidence indicates that Rix's Creek directs, supervises and controls the work of WorkPac employees who are supplied to perform work at the Mine. Rix's Creek administers training and assessment to ensure competence of WorkPac employees in relation to operating equipment and the performance of work.

(c) WorkPac employees assigned to perform work at the Rix's Creek Mine operate the same equipment and machinery as Rix's Creek employees and are subject to the same work safety policies, inductions, access to site and site policies and procedures as Rix's Creek employees.

(d) There is no evidence before the Full Bench that WorkPac is or will be subject to industry or professional standards or responsibilities in relation to the work of its employees supplied to Rix's Creek.

(e) The work undertaken by WorkPac employees at the Rix's Creek Mine involves the operation of plant and equipment but does not involve work of a specialist or professional nature.

[22] Having regard to the considerations referred to in s 306E(7A), it is clear that the performance of work by WorkPac employees is not for the provision of a service but is for the supply of labour.

[23] With respect to s 306E(2) of the Act, we are not satisfied that it is not fair and reasonable in all the circumstances to make a regulated labour hire arrangement order at least with respect to those employees of WorkPac who undertake work in accordance with a roster arrangement that is permitted by the Rix's Creek Agreement. With respect to that group of employees, no submissions were made by any party in relation to the matters specified in s 306E(8) and, accordingly, we are not required to have regard to those matters. There is otherwise no material before the Full Bench which would permit the state of satisfaction referred to in s 306E(2) to be reached.

[24] In those circumstances, the Commission is required by s 306E of the Act to make a regulated labour hire arrangement order at least to cover employees of WorkPac who undertake work in accordance with a roster arrangement that is permitted by the Rix's Creek Agreement. We now turn to consider the submissions advanced by WorkPac as to the employees who can, or should, be covered by the order we are required to make.

Coverage of the regulated labour hire arrangement order

[25] The submission advanced by WorkPac is that the Commission is only able to make a regulated labour hire arrangement order with respect to employees of WorkPac who are supplied to undertake work at the Rix's Creek Mine in accordance with a roster arrangement that is permitted by the Rix's Creek Agreement or, in any event, should only make an order which covers those employees. It submits that the Commission has no jurisdiction to make an order which covers employees who work roster arrangements not permitted by the Rix's Creek Agreement and, in the alternative, that it would not be fair and reasonable to do so.

Jurisdiction to make the order sought

[26] The starting point of WorkPac's jurisdictional submission is that the Rix's Creek Agreement imposes restrictions on the rostering arrangements available for permanent production employees. The relevant provisions are set out above. Clause 7.1 provides that Rix's Creek may require employees to work any of three rostering arrangements. Roster (a) is a Monday to Friday 8 Hours & 10 Minute Roster; Roster (b) is a Wednesday to Saturday 10 Hour Roster; and Roster (c) is a 7-Day, rotating Day & Night, 12 Hour Roster. Clause 7.2 imposes further restrictions in relation to production employees as follows:

> 7.2 Production Employees will only be engaged on Roster (a) and Casual Employees will not be engaged on Roster (c).

[27] So far as casual employees are concerned, clause 6.14 provides that casual employees will be appointed to a shift of a roster under clause 7 or "any other hours of work as determined by the Company". WorkPac accepts that casual employees can be appointed to work any pattern of hours. It says, however, that permanent production employees can only be engaged to work in accordance with Roster (a) being a Monday to Friday 8 Hours & 10 Minute Roster. WorkPac submits that this means that the "hypothetical exercise" contemplated by s 306E(1)(b) of the Act cannot be undertaken and the statutory scheme has no application to permanent WorkPac employees performing work at the Rix's Creek Mine other than those employees working in accordance with a Monday to Friday 8 Hours & 10 Minute Roster.

[28] It is correct to say that s 306E(1)(b) requires a hypothetical exercise to be undertaken. The Commission is required to be satisfied that 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". It requires consideration of what instrument would apply to employees in fact employed by, in this case, WorkPac if those employees were instead employed by Rix's Creek to perform the same kind of work. The reference to work of "that kind" is to be understood as work of the kind the employee is supplied to the regulated host to perform as referred to in s 306E(1)(a).

[29] WorkPac accepts that the phrase "work of that kind" in s 306E(1)(b) refers to the work tasks performed by an employee for the regulated host. It did not suggest that WorkPac employees performing production work would not, if employed by Rix's Creek, be employed to perform work of a kind covered by the Rix's Creek Agreement merely because the employee performs work under a different arrangement of hours or a different roster to that permitted under the Agreement. That concession was appropriate. It is clear, with respect, that the reference to work of "that kind" in s 306E(1)(b) refers to the nature of the work performed by employees, in the sense of the tasks, duties and responsibilities assumed by the employees, rather than the conditions of employment associated with the work.

[30] Section 306E(1)(a) directs attention to the "work" employees are supplied to perform for a regulated host. That can only be sensibly understood as referring to the functions performed, and the duties undertaken, by the employees for the regulated host. That conclusion

accords with the ordinary meaning of the words used in s 306E(1)(a) and (b) and with s 306D(1) which provides that:

> (1) A reference in this Part to work of a kind includes a reference to work that is substantially of that kind.

[31] The inclusion of work which is "substantially of that kind" in s 306D(1) is consistent with construing the phrase "work of a kind" as referring to the substance of the duties performed by an employee.

[32] WorkPac nonetheless submits that the hypothetical exercise required by s 306E(1)(b) cannot be undertaken with respect to its employees performing work on a roster pattern which is not permissible under the Rix's Creek Agreement. As we understood the submission, it submits that a production employee working, for example, a 7-day roster could not be employed by Rix's Creek because clause 7.2 of the Rix's Creek Agreement requires that production employees only be engaged on a Monday to Friday 8 Hours & 10 Minute Roster. It says that, for this reason, the Commission cannot make a regulated labour hire arrangement order with respect to employees who work a pattern of hours not contemplated by the Rix's Creek Agreement.

[33] We do not accept that submission. WorkPac's submission assumes that the hypothetical exercise required by s 306E(1)(b) incorporates the hours of work, or roster pattern, of the employees concerned. That conclusion is not required by, and cannot be reconciled with, the language of s 306E(1)(b). Section 306E(1)(b) asks only whether a covered employment instrument that applies to the regulated host would apply to the employees if the regulated host were to employ the employee to perform work of the kind they are supplied to perform for the regulated host. That requires consideration only of whether, if the employee was employed by the regulated host to perform the same type of work, the employee would be covered by the industrial instrument that applies to the regulated host.

[34] In this matter, the only question posed by s 306E(1)(b) is whether a production employee supplied by WorkPac at the Rix's Creek Mine would, if employed by Rix's Creek to do production work, be covered by the Rix's Creek Agreement. That question must be answered in the affirmative. The application of an enterprise agreement is dealt with in s 52(1) of the Act which, relevantly, provides that an enterprise agreement applies to an employee if the agreement is in operation and "covers" the employee. An employee is "covered" by an enterprise agreement, in accordance with s 53(1), if the agreement is "expressed to cover (however described) the employee".

[35] The Rix's Creek Agreement is in operation. The parties to the Agreement are described as including: "All Production & Engineering employees directly employed by [Rix's Creek] who are engaged at Rix's Creek Mine".[3] There is no doubt, and WorkPac does not dispute, that the Rix's Creek Agreement is expressed to cover all production employees of Rix's Creek. The Rix's Creek Agreement would apply to any production employee supplied by WorkPac at the Rix's Creek Mine if the employee was directly employed by Rix's Creek to do production work. In our opinion, that is plainly the case irrespective of the pattern of hours or roster arrangement worked by the WorkPac employee. The restrictions on rostering imposed by clause 7 of the

Rix's Creek Agreement do not alter the coverage of the Agreement but regulate the rostering arrangements that apply to employees who are covered by the Agreement.

[36] WorkPac endeavours to support its submission by suggesting that it would encounter difficulties in calculating the "protected rate of pay" for an employee working a roster patten not contemplated by the Rix's Creek Agreement. This, it suggests, supports the conclusion that the statutory scheme does not countenance a regulated labour hire arrangement order being made with respect to such an employee.

[37] The term "protected rate of pay" is defined in s 306F(4) as follows:

> (4) Unless subsection (5) applies, the ***protected rate of pay*** for the regulated employee is the full rate of pay that would be payable to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee.

[38] Section 18(1) defines the "full rate of pay" of an employee as the rate of pay payable to the employee including incentive-based payments and bonuses, loading, monetary allowances, overtime or penalty rates and other separately identifiable amounts.

[39] We do not accept that it is not possible for a protected rate of pay to be calculated for WorkPac employees performing production work other than on a Monday to Friday 8 Hours & 10 Minute Roster. If, for example, a production employee was rostered to perform work on the weekends, the employee would be entitled to be paid at overtime rates in accordance with clauses 9.4 and 9.5.1.[4] The full rate of pay that would be payable to a Rix's Creek employee for weekend work can be calculated by applying the overtime rate. Part 2-7A also provides a mechanism for disputes in relation to what the protected rate of pay for a regulated employee is.[5] If there were to be some uncertainty as to the manner in which the protected rate of pay is to be determined or what it is, the Act contains a mechanism to resolve such a dispute.

[40] Other provisions in Part 2-7A support the conclusion we have otherwise reached. Section 306F(5), for example, sets out how the protected rate of pay for a casual employee is calculated in the event that the covered employment instrument does not provide for work of that kind to be performed by casual employees. It is unnecessary, for present purposes, to reflect on the detail of those provisions. It is significant, however, that Part 2-7A contemplates that a regulated labour hire arrangement order can be made that applies to casual employees even though the instrument covering the host employer does not permit casual employment. That such provision is made is inconsistent with the proposition that an order cannot be made which applies to a labour hire employee performing work in accordance with a work arrangement not permitted by the host employment instrument.

[41] The construction of s 306E(1)(b) advanced by WorkPac is also inconsistent with the purpose of the statutory scheme and would substantially undermine achievement of the apparent object of Part 2-7A. Part 2-7A was enacted to close what the extrinsic materials describe as the "labour hire loophole".[6] The Part requires, if the relevant requirements are met, that the Commission make an order the effect of which is that labour hire employees must be paid no less that the rate which applies to directly hired employees performing the same, or substantially the same, work.[7] The object of the provisions is, reasonably obviously, to ensure that the

practice of sourcing employees through a labour hire employer cannot be used to undercut the rates of pay prescribed in industrial instruments which apply to a host employer.

[42] That object would be substantially undermined if the construction proposed by WorkPac were correct. On WorkPac's construction, a regulated labour hire arrangement order could not be made if any case in which the roster arrangements or pattern of work of labour hire employees differ from that permissible under the industrial instrument which applies to the host employer. The operation of the entire scheme could, on that view, be avoided by labour hire employees being engaged on a basis that departs in some marginal way from the hours of work or rostering arrangements permissible under the host employment instrument. As we have explained, the Rix's Creek Agreement requires permanent production employees only be engaged on a Monday to Friday 8 Hours & 10 Minute Roster. If WorkPac's submission is correct, it could supply production employees to work on a Monday to Friday roster of 8 hours and 15 minutes each day and thereby avoid the possibility of a regulated labour hire arrangement order being made in relation to those employees. That outcome would very substantially undermine the effectiveness of Part 2-7A and cannot have been intended by Parliament.

[43] The task of statutory construction must begin with a consideration of the text itself. However, ascertaining the meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.[8] We are conscious that the determination of the purpose of a statute is to be derived from its text and structure (and, where appropriate, reference to extrinsic materials) and not from what those who promoted or passed the legislation may have had in mind when it was enacted or any a priori assumption about the desired or desirable reach or operation of the relevant provision.[9] Consideration of the purposes of a statute cannot displace the clear meaning of the text and a court or tribunal "is not at liberty to give it a construction that is unreasonable or unnatural".[10]

[44] However, s 15AA of the Acts *Interpretation Act 1901* (Cth) requires that the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation. As McHugh J said in *Newcastle City Council v GIO General Limited* (1997) 191 CLR 85 at 113:[11]

> … when the purpose of a legislative provision is clear, a court may be justified in giving the provision "a strained construction" to achieve that purpose provided that the construction is neither unreasonable nor unnatural. If the target of a legislative provision is clear, the court's duty is to ensure that it is hit rather than to record that it has been missed.

[45] Further, a construction that avoids an apparently irrational or unjust result is to be preferred.[12]

[46] We do not need to give s 306E a strained construction to reject WorkPac's submissions. Both the text and the unambiguous purpose of Part 2-7A cannot be reconciled with the construction of s 306E(1)(b) proposed by WorkPac. There is no jurisdictional impediment to the Commission making a regulated labour hire arrangement order with respect to all

production employees supplied by WorkPac at the Rix's Creek Mine. For the purposes of s 306E(1)(b), the Rix's Creek Agreement would apply to all production employees supplied by WorkPac to perform work at the Rix's Creek Mine if they were employed by Rix's Creek irrespective of the rostering arrangements that apply to the employee.

Whether it is not fair and reasonable to make an order?

[47] In the alternative, WorkPac submits that an order should not be made in the terms sought by the MEU applying to any and all WorkPac employees on the basis that it is not be fair and reasonable to do so in all the circumstances for the purposes of s 306E(2) of the Act.

[48] In relation to s 306E(2), WorkPac make three submissions which, it says, mean the Commission should be satisfied it is not fair and reasonable to make an order which applies to all WorkPac employees supplied to perform work at the Rix's Creek Mine. First, it submits that Rix's Creek and its workforce have chosen to regulate their relationship in a way which precludes production work, by permanent employees, on terms other than on the Monday to Friday Roster and they do not have a "bargain" as to what rate of remuneration should apply if production work is undertaken on a weekend roster. Second, in these circumstances, WorkPac submits that there is no reason relevant to the objects and purposes of Part 2-7A of the Act to disturb the "bargain" which WorkPac and its employees have reached via the terms of the *Workpac Coal Mining Agreement 2019* and it would not be fair and reasonable to do so. Third, it again relies on the submission that there is no basis in the Rix's Creek Agreement to calculate the protected rate of pay for production work on anything other than the Monday to Friday Roster.

[49] Section 306E(2) sets out one circumstance in which the Commission is prevented from making a regulated labour hire arrangement order. The Commission must not make an order if satisfied it is not fair and reasonable in all the circumstances to do so. In considering whether it is not fair and reasonable to make an order, the Commission is directed to have regard to the matters in subsection (8) but only those matters in relation to which submissions have been made. In *Batchfire*, the Full Bench made the following observations in relation to s 306E(2):[13]

> … 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".

[50] As the Full Bench said, s 306E(2) prevents an order being made only if the Commission has formed a state of satisfaction that it is not fair and reasonable to make an order. The Commission does not need to be positively satisfied it is fair and reasonable to make an order. As a practical matter, it is likely to be necessary for some consideration, or set of considerations, to be identified which are sufficient to persuade the Commission that it is not fair and reasonable in all the circumstance to make an order.

[51] The requirement that the Commission be satisfied it is not fair and reasonable to make an order "having regard to any matters in subsection (8) in relation to which submissions have been made" presents some difficulties in interpretation. It is apparent that the Commission is only required to have regard to a matter set out in subsection (8) if a submission is made about it. It is less clear whether the Commission can only have regard to a matter in subsection (8) if a submission is made in relation to the matter. The Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) indicated as follows:[14]

> **Matters to be considered if submissions are made:** New subsection 306E(8) would set out matters that the FWC may consider when deciding whether it is not fair and reasonable in all the circumstances to make a regulated labour hire arrangement order for the purposes of new subsection 306E(2). The FWC is only required to consider matters listed in new subsection (8) where the parties have made submissions on these matters (new subsection 306E(2)).

[52] The Revised Explanatory Memorandum suggests that s 306E(8) sets out matters that the Commission "may consider" when deciding whether it is not fair and reasonable to make an order. Those matters include, in subsection (8)(f), "any other matter the FWC considers relevant". Although the language of s 306E(2) is somewhat obscure, we believe the better view is that the Commission can have regard to a matter in s 306E(8) even if no submission is made in relation to it. However, the Commission is only required to have regard to a matter as a mandatory consideration[15] if a submission has been made about it.

[53] In this instance, we are not aware of any matters which might support a conclusion that it is not fair and reasonable to make an order in the form sought by the MEU other than the three contentions advanced by WorkPac. Having considered the three contentions advanced by WorkPac, we are not satisfied it is not fair and reasonable in all the circumstances to make an order in the form sought by the MEU for the purposes of s 306E(2).

[54] In relation to the first contention, we understand WorkPac to submit that, in circumstances in which the Rix's Creek Agreement does not permit production employees to be engaged other than on a Monday to Friday Roster, there is no "bargain" in relation to which production employees rostered on the weekend or on a 7-day roster should be paid. To the extent that the purpose of Part 2-7A is to protect the "bargain" contained in the industrial instrument which applies to the host employer, it suggests that there is no bargain to protect other than with respect to employees working a Monday to Friday Roster.

[55] We do not understand how that contention is made out or could support a conclusion that it is not fair and reasonable to make an order covering all WorkPac employees. We accept the submissions of the MEU that the supply of WorkPac employees to perform work at the Rix's Creek Mine undertaking the same kind of work as Rix's Creek employees undermines the job security of Rix's Creek employees and undercuts the Rix's Creek Agreement. Those effects arise whether or not WorkPac employees work in accordance with roster arrangements which are permitted by the Rix's Creek Agreement or not. Indeed, arguably those effects are more acute if WorkPac employees are supplied to perform work in a manner that avoids restrictions on hours of work or rostering imposed by the Rix's Creek Agreement.

[56] In relation to the second contention, WorkPac submits that it is not fair and reasonable to disturb the "bargain" WorkPac and its employees have made in the terms of the *Workpac Coal Mining Agreement 2019* at least for employees engaged on a roster that is not permitted under the Rix's Creek Agreement. We understand the submission to be that it represents a substantial step to make an order having the effect of imposing an obligation on WorkPac to comply with rates of pay which depart substantially from those WorkPac has agreed with its employees through an enterprise bargaining process under the Act.

[57] We acknowledge that the impact of a regulated labour hire arrangement order on a labour hire employer can be substantial. However, that is a consequence of the provisions Parliament has chosen to enact in Part 2-7A of the Act. In the circumstances of this matter, there is no material before the Full Bench to suggest that it is not fair and reasonable to make an order in the form sought by the MEU as a result of the impact on WorkPac or any WorkPac employee performing work other than on a Monday to Friday Roster. In that respect, it is relevant that, after the recent operational decision made by Rix's Creek with effect from 2 September 2024, all permanent WorkPac employees supplied to perform work at the Rix's Creek Mine work on the Monday to Friday, 8 hour and 10 minute Roster consistent with the Rix's Creek Agreement. There will, accordingly, be no immediate impact upon any WorkPac employees who are performing work other than in accordance with roster arrangements permitted by the Rix's Creek Agreement.

[58] In relation to the third contention, we have already addressed the submission that there is no basis to calculate the protected rate of pay for production employees engaged on anything other than a Monday to Friday Roster under the Rix's Creek Agreement. We do not accept that is the case. In any event, as the MEU submitted, Part 2-7A provides a mechanism for resolving disputes in relation to what the protected rate of pay for a regulated employee is in ss 306P and 306Q. In the circumstances of this matter, even if there is some uncertainty in relation to the method by which the protected rate of pay for any employee is to be calculated, that does not support a conclusion that it is not fair and reasonable to make an order in the form sought by the MEU. That conclusion is supported by the fact that there are currently no WorkPac employees performing work for Rix's Creek in relation to whom the difficulty alluded to by WorkPac would arise.

Conclusion and disposition

[59] For the reasons set out above, the Full Bench is required by s 306E of the Act to make a regulated labour hire arrangement order as sought by the MEU and which applies to all employees supplied by WorkPac to perform work at the Rix's Creek Mine. The Full Bench will publish the order together with this decision, setting out the matters specified in s 306E(9). The operative date of the order will be the day on which the order is made consistent with s 306E(9)(e)(ii). No party submitted that the order should come into force on a later day. No party submitted that the order should specify when it will cease to be in force for the purposes of s 306E(10). Accordingly, the order will also not contain such a specification.

VICE PRESIDENT

Appearances:

K Endacott with *M Taggart* for the MEU
D Williams, MinterEllison, for WorkPac Mining Pty Ltd
A Gray, King & Wood Mallesons, for Rix's Creek Pty Ltd

Hearing details:

19 November 2024.
Sydney.

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[1] *Rix's Creek Mine Enterprise Agreement 2021*, clause 2.3.

[2] *Re Mining and Energy Union* [2024] FWCFB 299; (2024) 333 IR 249 at [8]-[17].

[3] *Rix's Creek Mine Enterprise Agreement 2021*, clause 2.3.

[4] See also definitions of "Non-Rostered Overtime", "Overtime Rates", "Rostered Overtime" in clause 4 of the *Rix's Creek Mine Enterprise Agreement 2021*.

[5] Fair Work Act 2009 (Cth), ss 306P and 306Q.

[6] Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) at [602].

[7] See, for example, Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) at [604].

[8] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [23]-[24] (French CJ and Hayne J).

[9] *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3; (2012) 248 CLR 1 at [28] (French CJ, Hayne, Kiefel and Bell JJ); *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [25]-[26] (French CJ and Hayne J).

[10] *IW v City of Perth* (1997) 191 CLR I at 12 (Brennan CJ and McHugh J).

[11] See also *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421 (McHuch JA), *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531 at [60] (Gageler and Keane JJ) and *Federal Commissioner of Taxation v Douglas* [2020] FCAFC 220; (2020) 282 FCR 204 at [90]-[91].

[12] *Legal Services Board v Gillespie-Jones* [2013] HCA 35; (2013) 249 CLR 493 at [48] (French CJ, Hayne, Crennan and Kiefel JJ).

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

[14] Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) at [646].

[15] In the sense discussed in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).