Fair Work Commission

Guidelines in relation to operation of Part 2-7A—Regulated labour hire arrangement orders

These guidelines are made under section 306W of *Fair Work Act 2009 (Cth)* (the Fair Work Act). They are intended to explain how Part 2-7A of the Fair Work Act operates in order to assist with education and compliance. They will be updated from time to time.

Visit our website to learn about regulated labour hire arrangement orders.

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Background

Part 2-7A—Regulated Labour Hire Arrangement Orders was added to the Fair Work Act by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) and commenced operation on 15 December 2023. Part 2-7A empowers the Fair Work Commission (Commission) to make orders that regulate employees' rates of pay for certain labour hire arrangements.

On application, the Commission can make a regulated labour hire arrangement order in relation to employees who are supplied, or will be supplied, by their employer to perform work for a host employer. An order can be made if the host employer has a covered employment instrument, such as an enterprise agreement, that would apply to the employees if the host employer employed them directly to perform the work. Other conditions must also be met, including that the arrangement must be for the supply of labour, not provision of a service to the host employer.

A regulated labour hire arrangement order generally requires the employer to pay the employees it supplies to the host employer at least the full rate of pay they would receive under the host employer's covered employment instrument, if it applied to them. This is called the protected rate of pay.

Common terms

The host employer is known as a **regulated host**, which is defined in section 306C of the Fair Work Act. A regulated host includes among other things, a constitutional corporation, the Commonwealth, a person for whom work is performed in a Territory (so far as work is performed in a Territory) and any person in a State that is a referring State for the purposes of Part 1-3 of the Fair Work Act. A regulated labour hire arrangement order can't be made if the regulated host is a **small business employer** as defined in section 23 of the Fair Work Act.

A **constitutional corporation** is a financial or trading corporation formed in Australia or a corporation incorporated outside Australia that does business in Australia (see section 12 of the Fair Work Act). Most companies operating businesses in Australia are constitutional corporations.

For the purposes of Part 2-7A, **employee** means a national system employee and **employer** means a national system employer, as defined in sections 13 and 14 of the Fair Work Act.

Employees who are, or will be supplied by their employer to a regulated host are known as **regulated employees** (see section 306E(5) of the Fair Work Act).

Covered employment instrument is defined in section 12 of the Fair Work Act. It includes an enterprise agreement, a workplace determination and certain other instruments that relate to the employment of national system employees.

A covered employment instrument that:

- applies to the regulated host, and
- would apply to the regulated employees if they were directly employed to perform the work,

is called a **host employment instrument** (see sections 206E(1)(b) and 306E(6) of the Fair Work Act).

The **protected rate of pay** is defined in section 306F(4) of the Fair Work Act as 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 regulated employee.

The Commission can make a regulated labour hire arrangement order

Who can apply for an order

Under section 306E(7) of the Fair Work Act, the following persons may apply to the Commission for a regulated labour hire arrangement order:

- a regulated employee
- an employee of the regulated host
- an employee organisation that is entitled to represent the industrial interests of a regulated employee or an employee of the regulated host, or
- the regulated host.

An employer that supplies, or will supply, employees to the regulated host *cannot* apply for a regulated labour hire arrangement order, but employers can seek to be covered by a proposed order (see The Commission can determine that an application for a regulated labour hire arrangement order relates to additional employers and employees).

Under the Fair Work Act, an organisation is entitled to represent the industrial interests of a person if the person falls within the coverage of the organisation's eligibility rule.[1]

Form F86 – Application for a regulated labour hire arrangement order

When the Commission must make an order

If an application is made for a regulated labour hire arrangement order, section 306E(1) of the Fair Work Act requires the Commission to make the order if it is satisfied that certain criteria are met:

- an employer supplies or will supply, either directly or indirectly, regulated employees to perform work for a regulated host

[1] *Regional Express Holdings Ltd v Australian Federation of Air Pilots* [2016] FCAFC 147, 244 FCR 344, 264 IR 192 [60] (Jessup J, North and White JJ agreeing).

- a covered employment instrument that applies to the regulated host would apply to the regulated employees if the regulated host were to employ the employees to perform work of that kind, and
- the regulated host is not a small business employer.

Before the Commission can make a regulated labour hire arrangement order it must also be satisfied that the prohibitions in sections 306E(1A) and 306E(2) do not apply.

Section 306E(1A) provides that the Commission 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.

Section 306E(2) provides that the Commission must not make the order if it is satisfied that it is not fair and reasonable in all the circumstances to do so.

An employer supplies or will supply, either directly or indirectly, one or more employees of the employer to perform work for a regulated host (section 306E(1)(a))

There does not need to be an agreement for the supply of labour between the employer that supplies employees and the regulated host.[2] Section 306E(3) of the Fair Work Act provides that the supply of employees might be the result of multiple agreements, which might be between persons other than the employer and regulated host. The regulated host and employer may or may not be related bodies corporate.

Section 306D(2) defines **work performed for a person** broadly for the purposes of Part 2-7A. This includes work performed wholly or principally for the benefit of the person, or an enterprise they carry on, or a joint venture or common enterprise the person and others engage in.

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 (section 306E(1)(b))

A regulated labour hire arrangement order may only be made where:

- a covered employment instrument applies to the regulated host, and

[2] See *Application by the Mining and Energy Union*, [2024] FWCFB 299 [11].

- that covered employment instrument would apply to the regulated employees if the regulated host were to employ them to perform work of the kind the regulated employees are performing, or will perform.

A covered employment instrument that meets these requirements is called a **host employment instrument** (see section 306E(6)).

In *Application by the Mining and Energy Union*, a Full Bench of the Commission discussed the application of section 306E(1)(b) where the covered employment instrument is an enterprise agreement. Sections 52(1) and 53(1) of the Fair Work Act set out the circumstances in which an enterprise agreement applies to an employer, employee or employee organisation. The Full Bench noted that section 306E(1)(b) requires the Commission to make factual findings as to the nature of the work performed for the regulated host (including tasks undertaken, qualifications required, and skills exercised) and to determine, by reference to the coverage and classification provisions of the enterprise agreement, whether the agreement would apply to the relevant employees performing the work if they were directly employed by the regulated host. [3]

The regulated host is not a small business employer (section 306E(1)(c))

The Commission cannot make a regulated labour hire arrangement order if the regulated host is a **small business employer**, as defined in section 23 of the Fair Work Act.

Part 2-7A does not prevent the Commission making a regulated labour hire arrangement order where the employer that supplies or will supply employees to the regulated host is a small business employer.

The performance of the work is not or will not be for the provision of a service, rather than the supply of labour (section 306E(1A))

Even if the Commission is satisfied of each of the matters in section 306E(1), it must *not* make a regulated labour hire arrangement order unless it is satisfied the performance of the work *is not or will not be* for the provision of a service, rather than for the supply of labour.

[3] *Application by the Mining and Energy Union*, [2024] FWCFB 299 [12]-[13].

Section 306E(7A) of the Fair Work Act sets out matters the Commission must have regard to in deciding whether work is for the provision of a service. These include things like the employer's involvement in the performance of the work, whether the regulated employees use the employer's systems, plant or structures to perform the work and how specialist or expert the work is.

The Commission needs to consider all the matters in section 306E(7A) to make an overall assessment of the work. For example, if the employer directs, supervises or controls the work, this may weigh in favour of a finding that a service is being provided rather than just labour.

Work may be considered specialist or expert without requiring higher educational qualifications and may include things like catering services.[4]

The Commission must not make a regulated labour hire arrangement order if it is not fair and reasonable in all the circumstances to do so (section 306E(2))

Finally, the Commission must not make a regulated labour hire arrangement order if it is satisfied that it is not fair and reasonable in all the circumstances to do so.

Section 306E(8) of the Fair Work Act sets out matters the Commission must have regard to in deciding whether it is not fair and reasonable to make the order, including 'any other matter' the Commission considers relevant, if submissions are made about them. This means that if submissions are not made about a matter in section 306E(8), the Commission is not required to have regard to it. [5]

The Commission can determine that an application for a regulated labour hire arrangement order relates to additional employers and employees

If an application for a regulated labour hire arrangement order is made, the Commission can determine under section 306EA(1) of the Fair Work Act that the application is taken to also relate to one or more other employers (**additional employers**) and employees they supply or will supply to the regulated host to perform work of the kind in relation to which the application was made (**additional regulated employees**).

[4] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) [637].
[5] See discussion in *Application by the Mining and Energy Union* [2024] FWCFC 299 [16].

Section 306EA(2) of the Fair Work Act provides that the Commission can make a determination to add additional employers and additional regulated employees on its own initiative or on application by:

- the applicant for the regulated labour hire arrangement order
- the regulated host
- an employee of the regulated host
- a regulated employee
- an employer that will be covered by the proposed regulated labour hire arrangement order
- another employer that supplies or will supply employees to the regulated host to perform work of the kind in relation to which the application for the regulated labour hire arrangement was made
- an employee who is or will be supplied by another employer to perform work for the regulated host of the kind in relation to which the application for the regulated labour hire arrangement was made, or
- an employee organisation that is entitled to represent the industrial interests of such an employee of another employer, a regulated employee or an employee of the regulated host.

If the Commission determines that the application is taken to relate to additional employers and additional regulated employees, it must seek the views of the additional regulated employees, any employee organisations entitled to represent the industrial interests of those employees, and the additional employers, before deciding whether to make the regulated labour hire arrangement order.

Section 306EA(5) of the Fair Work Act sets out the matters the Commission must be satisfied of before including an additional employer and additional regulated employees of the employer in a regulated labour hire arrangement order. Section 306EA(6) provides that the Commission must not include an additional employer and additional regulated employees in the order if it is satisfied that it is not fair and reasonable in all the circumstances to do so.

Form F86B - Application for a determination that an application for a regulated labour hire arrangement order relates to additional employers and employees

What a regulated labour hire arrangement order must specify

Under section 306E(9) of the Fair Work Act a regulated labour hire arrangement order must specify:

- the regulated host covered by the order
- the employer covered by the order
- the regulated employees covered by the order
- the host employment instrument covered by the order, and
- the day the order comes into force (which must be the day the order is made or a later day – this means an order cannot apply retrospectively).

Section 306E(10) provides that the Commission *may* specify when an order ceases to be in force. The legislation notes that a regulated labour hire arrangement order may be varied or revoked under section 603 of the Fair Work Act.

If the host employment instrument covered by a regulated labour hire arrangement order stops applying to the regulated host, this does not mean that the regulated labour hire arrangement order ceases to be in force. Also see if the host employment instrument is replaced by a new covered employment instrument.

What a regulated labour hire arrangement order does

Protected rate of pay

When a regulated labour hire arrangement order is in force, the key obligation is established by section 306F(2) of the Fair Work Act: that the employer supplying a regulated employee to the regulated host must pay the regulated employee at no less than the protected rate of pay for the employee in connection with the work performed by the employee for the regulated host.

Section 306F(2) is a civil remedy provision.

A **civil remedy provision** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

If you are not sure of your obligations, it is important to get independent advice.

Section 306F(4) defines **protected rate of pay** as 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.

Full rate of pay is defined in section 18(1) of the Fair Work Act. It includes:

- incentive-based payments and bonuses
- loadings
- monetary allowances
- overtime or penalty rates, and
- any other separately identifiable amounts.

Section 306F(10) makes it clear that the requirement to pay no less than the protected rate of pay applies despite any provision of a fair work instrument, covered employment instrument or contract of employment that applies to the regulated employee and provides for a lesser rate of pay. This is subject to an exception for instruments made by the Commission under Part 2-7A, including alternative protected rate of pay orders and

arbitrated protected rate of pay orders. See the Commission can make an alternative protected rate of pay order and disputes about the operation of Part 2-7A for more information about these types of orders.

The intention of section 306F(10) is to ensure that regulated employees are remunerated at the higher of any applicable rate of pay under a fair work instrument or relevant covered employment instrument. If the protected rate of pay is less than the amount of total remuneration an employee receives, paying the employee as normal would comply with both the obligation to pay at least the protected rate of pay, and the remuneration obligations under the relevant industrial instrument.[6]

Sections 306F(3) and 306F(3A) provide that an employer will not contravene section 306F(2) in certain circumstances. See employers can request information from the regulated host and the host employer must apply for variation of a regulated labour hire arrangement order to cover new employers and relevant regulated employees for more information about these provisions.

Part 2-7A provides some exceptions to the requirement to pay no less than the protected rate of pay. See exceptions from the requirement to pay the protected rate of pay.

Casual employees

Section 306F(5) of the Fair Work Act provides for the protected rate of pay for a regulated employee who is a casual employee, where there is no covered employment instrument applying to the regulated host that provides for casual employees to perform work of the relevant kind.

In this situation, the protected rate of pay for the casual regulated employee is the full rate of pay that would be payable to the employee if:

- the employee was engaged other than as a casual employee under the host employment instrument, and
- the base rate of pay that would be payable to the employee were increased by 25 per cent.

Section 306F(9) makes it clear that the employee does not need to be treated other than as a casual employee for any other purpose (including determining leave entitlements).

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[6] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) [694].

If the employer is a national system employer under sections 30D or 30N

Sections 30D and 30N of the Fair Work Act extend the meaning of national system employer in reliance on state referrals of workplace relations matters. If an employer is a national system employer only because of those provisions, the protected rate of pay for the employer's regulated employees does not include any amount that relates to an excluded subject matter within the meaning of sections 30A(1) or 30K(1). **Excluded subject matter** includes things like superannuation, workers' compensation, long service leave, leave for victims of crime, and jury and emergency service leave.

Pieceworkers

Sections 306F(7) and 306F(8) of the Fair Work Act provide for the protected rate of pay for regulated employees who are pieceworkers to whom section 16(2)(b) or section 18(2)(b) would apply were the host employment instrument to apply to them.

Employers can request information from the regulated host

Section 306H of the Fair Work Act requires a regulated host covered by a regulated labour hire arrangement order that is in force to provide information to an employer covered by the order about the protected rate of pay for one or more of the employer's regulated employees, if requested in writing by the employer.

If the employer reasonably considers it doesn't have the information it needs to work out the protected rate of pay for one or more of its regulated employees, it can ask the regulated host in writing for this information. Section 306H(3) provides that the regulated host must comply with the request as soon as reasonably practicable, and within a period of time that would reasonably enable the employer to comply with its obligation to pay the regulated employees at no less than the protected rate of pay.

Section 306H(3) is a civil remedy provision.

A **civil remedy provision** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

If you are not sure of your obligations, it is important to get independent advice.

An employer does **not** contravene its obligation to pay no less than the protected rate of pay if the employer reasonably relies on incorrect information provided by the regulated host in response to a written request from the employer under section 306H (see section 306F(3)).

Exceptions from the requirement to pay no less than the protected rate of pay

Section 306G of the Fair Work Act provides 2 exceptions from the requirement to pay a regulated employee no less than the protected rate of pay. These are where:

- a training arrangement applies to the regulated employee in respect of the work performed for the regulated host (section 306G(1)), or
- an exemption period applies and the regulated employee performs work for the regulated host for a period of no longer than the exemption period (section 306G(2)).

Section 12 of the Fair Work Act defines **training arrangement** as 'a combination of work and training that is subject to a training agreement, or a training contract, that takes effect under law of a State or Territory relating to the training of employees'.

The exceptions in section 306G also apply to the requirement to pay a regulated employee:

- at the rate worked out under an alternative protected rate of pay order, and
- at the rate worked out under an arbitrated protected rate of pay order.

See the Commission can make an alternative protected rate of pay order and disputes about the operation of Part 2-7A for more information about these types of orders.

Exemption periods for short-term arrangements

The default exemption period is 3 months. This means that, unless the Commission has made a determination to change or remove the exemption period under section 306J or section 306K of the Fair Work Act (see below), the requirement to pay no less than the protected rate of pay does not apply to a regulated employee who performs work, or will perform work, for the regulated host during a period of no longer than 3 months.

Under subdivision C of Division 2 of Part 2-7A the Commission, on application, can make determinations altering or removing the exemption period for a short-term labour supply arrangement.

If a regulated employee in fact works for longer than the exemption period as a result of a variation to, or the making of, one or more agreements, the requirement to pay no less than the protected rate of pay applies to them on or after the day the agreements are varied or made (see section 306G(3)).

The Commission can, on application, make a determination to the effect that:

- there is no exemption period (section 306J)
- there is a specified exemption period of less than or more than 3 months (section 306J), or
- there is a **recurring extended exemption period** (section 306K).

An application for a determination changing or removing the default 3-month exemption period, or a determination specifying a recurring extended exemption period can be made under section 306L if:

- an application for a regulated labour hire arrangement order has been made to the Commission, but not yet fully determined, or
- the Commission has made a regulated labour hire arrangement order (which is in force or is not yet in force).

Such an application can be made by:

- the regulated host, an employer covered by the regulated labour hire arrangement order or a regulated employee covered by the order who is performing or is to perform work for the regulated host, or
- an organisation entitled to represent the industrial interests of any of those persons (section 306L(1)).

The Commission can only make a determination changing or removing the default 3 month exemption period or a determination specifying a recurring extended exemption period, if it is satisfied that there are exceptional circumstances that justify making it having regard to the matters in section 306L(4).

Before deciding whether to make the determination, the Commission must seek the views of any person or organisation that, apart from the applicant, could have made the application under section 306L(1).

Form F86C - Application to determine an exemption period

The Commission can make an alternative protected rate of pay order

Under subdivision D of Division 2 of Part 2-7A the Commission, on application, can make an **alternative protected rate of pay order** in relation to a regulated employee. An alternative protected rate of pay order requires an employer to pay a regulated employee a rate of pay based on an alternative covered employment instrument instead of the host employment instrument.

An application for an alternative protected rate of pay order can be made under section 306M if:

- an application for a regulated labour hire arrangement order has been made to the Commission, but not yet fully determined, or
- the Commission has made a regulated labour hire arrangement order (which is in force or is not yet in force).

Such an application can be made by:

- the employee, the employer or the regulated host, or
- an organisation entitled to represent the industrial interests of any of those persons (section 306M(4)).

The Commission can only make an alternative protected rate of pay order if it is satisfied that:

- it would be unreasonable for the requirement to pay the regulated employee at no less than the protected rate of pay to apply in connection with the work performed by the employee for the regulated host (for example, because the rate would be insufficient or excessive), and
- there is an alternative covered employment instrument that applies to:
    - a related body corporate of the regulated host and would apply to a person employed by the related body corporate to perform work of that kind, or
    - the regulated host and would apply to a person employed by the regulated host to perform work of that kind in circumstances that do not apply to the regulated employee (section 306M(6)).

In deciding whether to make the order the Commission must seek the views of the persons set out in section 306M(7) and must have regard to the matters set out in section 306M(8).

If an alternative protected rate of pay order is made, it must specify how to work out the rate of pay at which the employer must pay the regulated employee in connection with the work, and that the employer must pay that rate. The rate of pay must be the protected rate of pay that would apply if the alternative covered employment instrument was the host employment instrument.

Section 306N(3) provides that a person must not contravene a term of an alternative protected rate of pay order.

Section 306N(3) is a civil remedy provision.

A **civil remedy provision** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

If you are not sure of your obligations, it is important to get independent advice.

Form F86D – Application for an alternative protected rate of pay order

The host employer must apply for variation of a regulated labour hire arrangement order to cover new employers and relevant regulated employees

Under section 306ED of the Fair Work Act a regulated host covered by a regulated labour hire arrangement order must apply to the Commission to vary the order if:

- one or more **new employers** supplies, or will supply, **relevant regulated employees** to the regulated host to perform work of a kind to which the regulated labour hire arrangement order relates,
- the new employers are not covered by any regulated labour hire arrangement order that covers or will cover the relevant regulated employees in relation to the performance of that work, and
- the Commission did not make a determination under section 306EA(1) in relation to the new employers (see the Commission can determine that an application for a regulated labour hire arrangement order relates to additional employers and employees).

Section 306ED(2) provides that the regulated host must apply to the Commission to vary the regulated labour hire arrangement order to cover a new employer and its relevant regulated employees, as soon as practicable after it becomes aware that the new employer will supply employees as described above.

Section 306ED(2) is a civil remedy provision.

A **civil remedy provision** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

If you are not sure of your obligations, it is important to get independent advice.

Section 306ED(4) provides that, as soon as possible after making the application to the Commission the regulated host must give written notice to each new employer:

- that the application has been made, and
- of the effect of the interim arrangements under section 306ED(11).

Under section 306ED(11) interim arrangements apply to the new employers if the Commission does not decide whether to vary the regulated labour hire arrangement to cover them before any of the relevant regulated employees start to perform the work for the host employer. If that occurs then the regulated labour hire arrangement order is taken to cover the new employers and relevant regulated employees from the time the application is made to the Commission until either:

- the Commission decides not to vary the order, or
- the order is varied.

Section 306ED(4) is a civil remedy provision.

A **civil remedy provision** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

If you are not sure of your obligations, it is important to get independent advice.

An employer does **not** contravene the requirement in section 306F(2) to pay no less than the protected rate of pay if:

- it is covered by a regulated labour hire arrangement order because of section 306ED(11), and
- it pays a regulated employee at less than the protected rate of pay because it has not been notified of the application to vary the order (see section 306F(3A)).

Form F86G – Application to vary a regulated labour hire arrangement order to cover new employers and relevant regulated employees

Notifying tenderers

Under section 306EE of the Fair Work Act a regulated host covered by a regulated labour hire arrangement order must notify employers that could become covered by the order under section 306ED as a result of a tender process.

This includes tender processes conducted:

- by or on behalf of the regulated host, or
- for the purposes of a joint venture or common enterprise engaged in by the regulated host and other persons.

At the start of the tender process – section 306EE(2)

If it could reasonably be expected that one or more employers will become covered by the regulated labour hire arrangement order as a result of the tender process, the regulated host must ensure that from the start of the tender process all prospective tenderers are advised in writing that, if one or more tenderers are successful:

- one or more employers could become covered by the regulated labour hire arrangement order, and
- the employers could be required to pay employees in accordance with Part 2-7A in connection with the work performed for the regulated host.

Section 306EE(2) is a civil remedy provision.

A **civil remedy provision** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

If you are not sure of your obligations, it is important to get independent advice.

After the end of the tender process – section 306EE(3)

If the regulated host is required by section 306ED to apply to the Commission to vary the regulated labour hire arrangement order to cover one or more employers as a result of the tender process, the regulated host must as soon as practicable after the end of the tender process advise the successful tenderers in writing:

- that the regulated host is required to make the application
- of the effect of the interim arrangements under section 306ED(11) (the effect of section 306ED(11) is explained above, see the host employer must apply for variation of a regulated labour hire arrangement order to cover new employers and relevant regulated employees), and
- that if the Commission varies the order under section 306ED to cover the employers, when the order is in force the employers will be required to pay employees who perform work for the regulated host, in accordance with Part 2-7A, in connection with the work.

The regulated host must give this advice in writing to the successful tenderers even if they are not the employers.

Section 306EE(3) is a civil remedy provision.

A **civil remedy provision** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

If you are not sure of your obligations, it is important to get independent advice.

An employer that was a successful tenderer does **not** contravene the requirement in section 306F(2) to pay no less than the protected rate of pay if:

- it is covered by a regulated labour hire arrangement order because of the interim arrangements under section 306ED(11), and
- it pays a regulated employee less than the protected rate of pay because it has not been advised as required under section 306EE(2) or section 306EE(3) (see section 306F(3A)).

If the host employment instrument is replaced then the replacement covered employment instrument becomes the host employment instrument covered by the order

Section 306EB of the Fair Work Act covers situations where a regulated labour hire arrangement order is in force and:

- the host employment instrument covered by the order ceases to apply to the regulated host covered by the order or to a class of employees of the regulated host, in connection with a new covered employment instrument starting to apply, and
- the new instrument would apply to the regulated employees covered by the order if the regulated host employed them to perform the work.

From the time the new covered employment instrument starts to apply to the regulated host or class of employees, the order has effect as if the new instrument were the host employment instrument covered by the order. This means that, from the time the new covered employment instrument starts to apply, the protected rate of pay will be the full rate of pay that would be payable to the employee if the new covered employment instrument applied to the regulated employee.

Section 306EC sets out notification requirements in relation to the new covered employment instrument.

Notification by regulated host – section 306EC(1)

The regulated host must give written notice as below to any employers covered by the regulated labour hire arrangement order, as soon as practicable after the approval or making of the new covered employment instrument.

The regulated host must give the employers written notice of:

- the approval or making of the new covered employment instrument, and
- the effect this will have (or would have) in relation to the order.

Section 306EC(1) is a civil remedy provision.

A **civil remedy provision** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

If you are not sure of your obligations, it is important to get independent advice.

Notification by Commission – section 306EC(3)

When the Commission approves an enterprise agreement that will become the new host employment instrument covered by a regulated labour hire arrangement order (because of section 306EB), the Commission must as soon as practicable give written notice to any employers covered by the order of:

- the approval of the enterprise agreement, and
- the effect of the approval in relation to the order.

Termination pay is also based on the protected rate of pay

Section 306NA of the Fair Work Act deals with termination payments for a regulated employee who is or has been covered by a regulated labour hire arrangement order.

Section 306NA(2) provides that if the employer is required to make termination payments to the regulated employee, the rate of pay to be used in determining those payments will be the rate under Part 2-7A if the employee is covered by section 306NA(3). Amongst other conditions, section 306NA(3) will cover an employee if the termination occurs during a period in which the employee is performing work for the regulated host (including a period in which the employee is taking authorised leave in connection with that work).

Disputes about the operation of Part 2-7A

On application under section 306P of the Fair Work Act, the Commission can deal with a dispute about the operation of Part 2-7A where a regulated labour hire arrangement order is in force or has been made but is not yet in force.

A dispute could be:

- a dispute about what the protected rate of pay is for a regulated employee
- a dispute about whether a regulated employee has been paid, or is being paid, less than the protected rate of pay, or
- another dispute about the operation of Part 2-7A.

The parties to the dispute must first try to resolve the dispute by discussions at the workplace level. If these discussions do not resolve the dispute, a party to the dispute can apply to the Commission to resolve the dispute.

The Commission can arbitrate a dispute about the operation of Part 2-7A, but unless there are exceptional circumstances it must first try to resolve the dispute by other means. These might include mediation, conciliation, making a recommendation or expressing an opinion.

If the Commission arbitrates the dispute, this may include making an **arbitrated protected rate of pay order** that determines:

- how to work out the rate of pay for the regulated employee in connection with the work for the regulated host, and
- that the employer must pay the rate of pay worked out in that way to the regulated employee in connection with the work.

The Commission must not make an arbitrated protected rate of pay order unless it considers that it would be fair and reasonable to make the order.

If the parties have notified the Commission in writing that they agree to arbitration of the dispute, an arbitrated protected rate of pay order may apply in relation to work performed at any time on or after the day the regulated labour hire arrangement order comes into force.

If the parties have not notified the Commission that they agree to arbitration of the dispute, an arbitrated protected rate of pay order may apply only in relation to work performed on or after:

- if the arbitrated protected rate of pay order is made before the regulated labour hire arrangement order comes into force—the day the regulated labour hire arrangement order comes into force, or
- otherwise—the day the arbitrated protected rate of pay order is made.

Section 306Q(7) provides that a person must not contravene a term of an arbitrated protected rate of pay order.

Section 306Q(7) is a civil remedy provision.

A **civil remedy provision** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

If you are not sure of your obligations, it is important to get independent advice.

Form F86E – Application to deal with a dispute about the operation of Part 2-7A of the Fair Work Act 2009

Form F86F – Notification of agreement to arbitration of a dispute about the operation of Part 2-7A of the Fair Work Act 2009

Anti-avoidance framework

Sections 306S, 306SA, 306T, 306U and 306V of the Fair Work Act are intended to prevent employers and regulated hosts from taking certain actions to avoid the making of, or application of, a regulated labour hire arrangement order, or to avoid having to pay a regulated employee at a rate determined under or in accordance with Part 2-7A.

Preventing the making of regulated labour hire arrangement orders – section 306S

An employer or regulated host will contravene section 306S if:

- it enters into or carries out a scheme
- it does so *for the sole or dominant purpose* of preventing the Commission making a regulated labour hire arrangement order, and
- as a result of the scheme the Commission is prevented from making the order.

An example of such a scheme might be a regulated host adopting certain corporate structures for the purpose of preventing the Commission making a regulated labour hire arrangement order.[7]

Avoiding the application of regulated labour hire arrangement orders – section 306SA

An employer or regulated host will contravene section 306SA if:

- it enters into or carries out a scheme,
- it does so *for the sole or dominant purpose* of avoiding the application of a regulated labour hire arrangement order that has been made, and
- as a result of the scheme a person avoids the application of the order.

An example of such a scheme might be adopting certain corporate structures (such as a structure that limits the number of employees to whom the order would apply) for the purpose of avoiding the application of a regulated labour hire arrangement order.[8]

[7] Revised Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) [768].
[8] Ibid [772].

Short-term arrangements—engaging other employees – section 306T

An employer covered by a regulated labour hire arrangement order will contravene section 306T if:

- the employer is not required to pay a regulated employee at a rate determined under Part 2-7A because of an exemption period
- the employer engages another person to perform the same or substantially the same work as that performed by the regulated employee for the regulated host, and
- it could reasonably be concluded that *the purpose (or one of the purposes)* of engaging the other person is to achieve the result that the employer is not required to pay a regulated employee at a rate determined under Part 2-7A.

An example of such behaviour might be an employer covered by a regulated labour hire arrangement order, engaging successive employees for less than the 3-month default exemption period (or another applicable exemption period), in order to avoid paying employees at a rate determined under Part 2-7A.[9]

Short-term arrangements—entering into other labour hire agreements – section 306U

A regulated host covered by a regulated labour hire arrangement order will contravene section 306U if:

- an employer covered by the order it is not required to pay a regulated employee at a rate determined under Part 2-7A because of an exemption period
- the regulated host enters into an agreement that has the result that another person is to perform the same or substantially the same work as that performed by the regulated employee for the regulated host, and
- it could reasonably be concluded that *the purpose (or one of the purposes)* of engaging the other person is to achieve the result that the employer is not required to pay a regulated employee at a rate determined under Part 2-7A.

[9] Ibid [773].

An example of such behaviour might be a regulated host covered by a regulated labour hire arrangement order, entering into successive short-term labour hire agreements in order to avoid employers covered by the order being required to pay regulated employees at a rate determined under Part 2-7A.[10]

Engaging independent contractors – section 306V

An employer covered by a regulated labour hire arrangement order will contravene section 306V if

- it dismisses an employee who performs (or is to perform) work for a regulated host covered by the order and engages another person as an independent contractor to perform that work (or work of that kind) for the regulated host
- as a result of doing so, the employer is not required to pay a regulated employee at a rate determined under Part 2-7A, and
- it could reasonably be concluded that the employer did so *for the purpose (or purposes including the purpose)* of achieving that result.

An example of such behaviour might be an employer covered by a regulated labour hire arrangement order, dismissing employees and engaging other workers as independent contractors to perform the same work, to avoid the operation of Part 2-7A.[11]

Sections 306S, 306SA, 306T, 306U and 306V are civil remedy provisions.

A **civil remedy provision** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

If you are not sure of your obligations, it is important to get independent advice.

An affected employee, their employee organisation or a Fair Work Inspector can apply to a court for orders in relation to a contravention of these anti-avoidance provisions. Sections 306S and 306SA are only contravened if the employer or regulated host acted for the sole or dominant purpose specified, and sections 306T–306V are

[10] Ibid [776].
[11] Ibid [779].

only contravened if it could reasonably be concluded that the purpose or one of the purposes for which the employer or regulated host acted was to achieve the specified result.