MASTER ELECTRICIANS AUSTRALIA

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# DEWR Workplace Reform.

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Jordan Carlisle & Chris Lehmann 18th April 2023

# Introduction

Master Electricians Australia (MEA) is the trade association representing electrical contractors recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. Our website is www.masterelectricians.com.au

**1. Stand up for casual workers**

- Would have thought that given the scrutiny this area of employment got throughout the Workpac cases that there should be ample considerations in this space from which legislators can develop relevant, clear and reliable tests about what is and isn't a casual engagement,

- Further, given that casual engagements are based on the reciprocal nature of the worker's availability to work and the employer's availably to provide the work. Post-contractual conduct of the parties is going to be hugely subjective. The employee has already accepted that their engagement is casual.

- That the worker is able to request conversion to full or part-time employment under the NES gives the worker the ability to rely on the pattern of their engagement to support that request to convert.

- A post-contractual conduct assessment doesn't give either party any certainty about their engagement.

- As the Workpac cases also identified, the worker under a casual engagement has accepted the casual loading in lieu of those full-time features. Any post-contractual assessment is going to throw up a whole range of questions (questions that Workpac was prepared to counter claim for) that the worker should have to pay back that casual loading so as to not double dip on the entitlements of 'permanency' AND the casual loading.

**2. Same Job, Same Pay**

- *How should a 'same job' be identified* – needs to be significantly and substantially the same work/duties as an existing work. Not 51% but higher =>70% the same work/duties. Directly translatable from the applicable industrial instrument.

- Same definition of 'full rate of pay' under the Act is acceptable. Apples with apples is paramount.

- Same 'conditions' would rope in terms that wouldn't apply to the labour hire employer's own industrial instrument. For example, Income Protection schemes under EBAs. The engagement is temporary (perhaps a day or a week); impractical to apply. Often schemes (such as Protect) may not recognise contributions from employers who are not bound/party to an EBA.

- FWC should assess based on the duties performed by labour hire employee against the host employer's industrial instrument to determine applicability. It should be considered in isolation to the 'in-house' worker's position.

- Labour hire agency should have the ability to renegotiate its rates based on additional costs under any existing or new enterprise agreement.

- Employers found to have been avoiding their obligations for Same Job, Same Pay are subject to underpayment of wages claims. However, the assessment should be an assessment of both the host and the labour hire agency. The host employer needs to be open and transparent about the costs under their industrial instrument. Where the labour hire agency relies on that information in good faith they should not be subject to any penalties for the resultant underpayment. Penalties may be applied to host and employer who both, knowingly, and with malice of forethought, seek to avoid their obligations.

- *What could be done to avoid discouraging parties from enterprise bargaining?* The Fair Work Act could include a model term that this included in EBAs regardless of the terms they might establish themselves. That way it is 'in play' irrespective of bargaining outcomes.

**3. Compliance and enforcement: criminalising wage theft**

- MEA agrees that criminal sanctions should be introduced for the most serious forms of exploitative conduct. MEA supports a consistent approach across each state and territory, to create one system and set of penalties anything less than this will create confusion amongst businesses and perhaps a loop whole defence.

- MEA submits criminal penalties should apply in the event of systematic instigation and demonstrated knowledge of wrong doing, in particular those repeat offenders, that are seen to be breaching awards and / or not meeting minimum standards.

- What is clear is that 'wage theft' is not defined by one single element. It is not singularly the underpayment of a wage rate, it is the combined efforts of, often, intimidation of vulnerable workers, a system of deceitful practices to hide the practice, the avoidance of regulatory steps and the finding of the overall intent to underpay workers.

- MEA submits that the definition of "wage theft" should be meaningful so as to not capture, excessively it would suggested, underpayment matters that arise and are able to be dealt with by the available regulators and the parties. Wage theft should be the most serious of cases of underpayment of wages, where there is a system of deceptive and/or threatening conduct designed to result in an avoidance of obligations under the relevant instrument.

## 4. Extend the Powers of the Fair Work Commission to Include 'Employee-Like' Forms of Work

MEA supports the recognition that platforms are negotiating with non-employee on-demand workers. It is established that the method of engagement of workers to platform services is the individual offering their skills and services via a webpage or an app.

As such, the type of engagement should be clear and transparent from the time of that initial contact. Neither party should be misled by the actions of the other about the nature of the arrangement. MEA submits that this principle shouldn't be controversial in establishing fair conduct in the on-demand workforce.

However, the conduct of consultation about that status is impractical. The procurer of the services is not seeking employ an individual. These are engagements are to achieve a task. A customer wanting to replace an air conditioner or have a burrito delivered isn't seeking to employ someone; they want a task performed. To invite the various parties to provide advice to the management of the arrangement taking into account each party's needs, wants and expectations is not going to materialise practically in the setting – whether forced by legislation or not.

It is submitted that the evidence in growth in sole traders in various areas such as transport shouldn't be seen as the erasure of traditional transportation and delivery services. There is an opportunity to fill a gap in the needs of consumers of these services for whom traditional access to these services has been out of reach. An individual seeking a burrito isn't going to engage a courier service to go and pickup that burrito to deliver it to them it's too costly – that service doesn't exist outside of the restaurant offering or a platform seeking on-demand services.

Furthermore, when we consider the engagement of drivers providing their labour in the taxi industry who are, by and large workers engaged as contractors contracted to drive a vehicle for a period, it would be trite to suggest that this use of contractors on the 'border' of employment engagements is something new. The goal of the review should not be to force these engagements into employment ones; but rather strengthen the conditions of micro business operators.

To force parties to consider whether the status of the relationship should be something other than a transactional one is artificial and forcing the parties to submit to a system that has already been considered unviable. The offer is for a contract **for** service, not a contract **of** service. To bind the person providing the service to an employment arrangement, for example, would limit their capacity to engage on other platforms, offerings or quickly shift to better arrangements as the employer can dictate terms of fidelity in the employment relationship.

The review will also need to consider the impact of its ability to have effect on the manner in which worker status is established given the recent High Court matters of *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1 (9 February 2022)* and *ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2* (9 February 2022).

The High Court affirmed the primacy of contractual terms in determining employment relationships, finding a construction worker was an employee of a labour hire company and that two truck drivers were independent contractors despite decades of exclusive service to a solitary business.

It is submitted that efforts seeking to legislatively 'plug the gap' of provisions that enable an

‘escape’ from the bulk of the provisions in the Fair Work Act whereby simply by getting a worker to agree that they are an independent contractor not an employee and it will not matter that the practical reality of the relationship is one of employment is not the most effective measure to improve conditions. This is a battle that has been waged for decades with little to no net benefit – particularly if the outcome sought is improving practices between the parties. Rather than fight on the issue of employee versus employer; perhaps shape the argument towards appropriate business practices.

Employment Models aren’t the pinnacle of engagements of labour for reasons that are highlighted by the cultural and inflexible methods of a still far from ideal system. It is submitted that the desire for the on-demand to remain independent is not exclusively being driven by big and powerful tech-oligarchs pivoting towards new forms of race-to-the-bottom competitive labour engaging tactics.

Sydney University Business School's Lisa Gulesserian presented findings from research on *Uber dads, flexible work and gender roles*, at AIRAANZ 2022, February 2022[1].

Gulesserian highlighted that access to flexible work aids men's participation in unpaid work.

She said that men face barriers in accessing flexible work including the "ideal worker norm, co-worker and managerial perceptions, a flexibility stigma, and finding that although enablers are technically available to all genders, they're largely reserved for women".

Her study "sees the potential for the platform economy to enable a shift in gender roles if men and fathers make use of the flexibility to participate in care, as over half the men and fathers in my study are doing".

University of Sydney Business School Associate Professor Myra Hamilton praised the paper but gave voice to a dilemma it posed.

"Do we want to achieve more gender equal sharing of child care, through men taking on less secure work with poorer conditions in the way that women have in the past and continue to do?"

She continued, asking "does that ultimately reinforce a situation in which people who provide unpaid care are pushed into insecure work and economic insecurity or required to kind of check out of careers in order to manage their family life?"

Similarly, Edith Cowan University's Tom Barratt and UWA's Caleb Good presented a paper to the conference the following day that contended that "traditionally marginalised groups. . . are over-represented in platform work" because of the low entry barriers and flexibility.

Some 24.5% of people with disabilities reported facing discrimination at work and 36.5% in gaining employment.

In a similar vein to Gulesserian's findings about "uber dads" in flexible gig work, Goods said marginalised groups "often juggle various commitments, complex physical and mental health

[1] *The gig economy and the labour market participation of traditionally marginalised workers*, paper presented at AIRAANZ 2022, February 2022, paper by Alex Veen (Sydney University), Caleb Goods (UWA), Tom Barratt (Edith Cowan University), Myra Hamilton (Sydney University) and Marian Baird (Sydney University)

issues, and therefore, again, there was an ability to, with the flexible nature of rideshare work, to balance those commitments and priorities".

A push by this recommendation to seek to class these arrangements as some basis for forming an employment relationship should be resisted. It would undermine the nature of these engagements and seek to make them something they are naturally not. Protections for contractors, small and 'micro', would be a better approach and would likely have the additional effect of improving the conditions for more businesses and contractors than just the on-demand workforces.

## 5. Give Workers the Right to Challenge Unfair Contractual Terms

Exploitative and unreasonable practices in any industry or engagement have harmful consequences. There is a shift in the contracting arena to examine the practice of, and seek to address, unfair contract terms under Australian Consumer Law and other laws.

Parameters exist in many areas of contract engagements and on-demand engagements can be strengthened to afford reasonable protection in the same kinds of ways. This would also have the benefit of supporting other small businesses.

In November 2016, the Australian Consumer Law was extended to protect small businesses from unfair contract terms. In 2021, further changes were made to expand in reforms to unfair contract terms (UCT) laws found in the Australian Consumer Law (ACL) and *Australian Securities and Investments Commission Act 2001* (ASIC Act)

MEA submits that these provisions can be extended beyond their current scope to include on-demand contracts. Adopting the same concepts that mean a term in a standard form small business contract is 'unfair' if it:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract
- is not reasonably necessary to protect the legitimate interests of the party that would benefit from the term, or
- would cause detriment (financial or otherwise) to a small business if it were to be applied or relied on.

Consideration of these contract terms should include:

**Transparency -** A term may not be transparent if, for example, it is hidden in the fine print or written in legal or complex language. Is it in plain English, legible and clearly presented? Is it readily available given or just on webpage?

**Context -** an assessment of the fairness of a term in the context of the contract as a whole. Including:

- Would cause significant imbalance under contract
- Not reasonably necessary to protect
- Would cause detriment if applied

The 2021 changes included:

- significant financial penalties for contraventions;
- significantly expanding the number of business-to-business contracts subject to UCT laws;
- greater flexibility of remedies for breaches;
- introduction of a rebuttable presumption that certain terms which are "the same or substantially similar in effect" to UCT will also be unfair;
- clarity on the definition of a "standard form contract"; and
- exclusion of clauses that refer to "minimum standards" provisions contained in legislation.

These changes materially increase the risk profile for larger businesses that engage Business to Business (B2B) and Business to Consumer (B2C) via standard form contracts.

While many businesses reviewed relevant contracts in 2016 in the lead-up to the extension of ICT to B2B contracts, the significant increase in scope of the UCT laws, the introduction of penalties.

These changes ought to be leveraged/applied to the on-demand business to business arrangements to support the parties in the industry establishing appropriate practices.

**6. Allow the Fair Work Commission to Set Minimum Standards to Ensure the Road Transport Industry is Safe, Sustainable and Viable**

- Pretty sure there's a whole road transport tribunal that does this. And its been attempted nationally a few times.
- Further, making FWC responsible for safety goes beyond their legislative purview

**7. Provide stronger protections against discrimination, adverse action and harassment**

- The breadth and scope of adverse action criteria and the bullying and sexual harassment jurisdictions in the FWC make it pretty all encompassing.

- We've had a number of cases of workers seeking to use GP claims and the bullying jurisdictions for the purpose of preventing reasonable management action being taken in a reasonable way;

- The FWC (anecdotally at least) estimates that about 40% of its GP claims come from dismissals where a worker isn't eligible to make an UFD and simply wants to make a claim because they are aggrieved.

- Not an issue about the ability for claims to be brought on; issues then subsequently experienced by all parties (including the FWC) when a claim is without the sufficient elements to allow it to be prosecuted.

**8. A single national framework for labour hire regulation, which could be implemented in place of existing state and territory schemes**

- MEA believe it will be very difficult making a single system from all the state versions.

- Needs to maintain concepts such as:

  MEA believes that a definition of a **secondment** should be created. It is our view that secondments have the following common features:

  The employment relationship, responsibilities and obligations remain with the originating employer.

  The employee has a permanent and substantive position that is and will be maintained for the employee to return to, except for cases of genuine redundancy.

  A secondment within a group of related entities with common directors is not Labour Hire.

  MEA agrees that secondments are not considered arrangements that should be covered by the LHL Act.

  MEA would suggest the State Governments own practice of secondments should be evidence enough that this arrangement is not and never shall be labour hire. The same can be said for private employers across groups of companies.

  Where "secondments" occur between unrelated entities it may well be considered to be either on a consultancy / professional consultancy or Labour Hire basis. The latter being covered by the LHL Act.

- Consultants are not labour hire and should not be covered by the LHL Act.

  The traditional self-employed consultant can be dealt with as a director and as such is not an employee and is certainly not covered by the LHL Act.

  Consultants however may well be employed by most employer associations and professional services firms providing professional advice, in MEA's case to members.

  This consultancy occurs generally over the phone however does occur in person at the members site on occasion. The services are "fee for service" or "included" in the members annual subscription fees or paid for on a fee for service basis. At all times our consultants are permanent employees of MEA. MEA controls their work allocation, how work is undertaken and the professional standard and internal processes that we engage are enforced on our staff. Our members/customers do not have any "control" over the MEA employees in the execution of the consultancy task / assignment.

This raises an important difference between consultants and labour hire relationships. The "control test" and certain aspects will be crucial in determining if consultants or other persons are labour hire or as we suggest NOT labour hire.

The significant aspects of the "control test" in our view are these

- Does the employing entity have control over the way they perform a task?
- Does the employing entity accept responsibility for any defective or remedial work which was their staffs doing?
- Is the employing entity free to work for other organisations at the same time?
- Does the employing entity incur any loss or receive any profit from the job?
- Does the employee receive instruction on how to do the task from the client/customer? or does the employing entity set the standard, methods, schedule and timing of the work of the employee to achieve an outcome on behalf of the client.

If the "control" or responsibility lies with the employing entity, then it is our view this is not a labour hire situation covered by the LHL Act. However, if the reverse is true then yes it will be a labour hire and the employing entity will need to be licenced under the LHL Act.

- A director or owner of a business who hires themselves out are not providing labour Hire. In the electrical contracting industry there are a significant percentage, approaching 45% of electrical contractors who are sole traders/directors/owners of a business, who operate an electrical contracting business. They operate under a "contract for service" with homeowners and other small businesses.

  We agree that these groups should be excluded by regulation and that electrical contractors who have an appropriate electrical contractors licence and hold electrical workers qualification be excluded from being considered labour hire.

- Corporate grouping will cause confusion and is an area in some industries that will cause a challenge for the department. However, MEA believes that a combination of tests will be able to resolve the complexity.

  MEA suggests that two tests involve the "control test" and "related entities / common directors".

  The first and simplest test is that of "related entities / common directors". If the two or more entities involved in the arrangement under scrutiny have common directors, and are associated entities as per the Corporations Act, and the ONLY transaction of staff /labour is between these two or more related entities then it is our view this is NOT a Labour Hire arrangement. This may well be seen as a secondment.

  There are many reason particularly for small employers why they establish separate entities however if the only labour / secondment transaction is between the 2 or more related entities then other jurisdictions such as Fair Work, QIRC and their related investigative arms can evaluate if the wages and employment conditions are correct. It is well established in

the FWC that in the event of a redundancy that alternative employment must be examined in "related entities" this confirms that in related entities no labour hire relationship is considered.

If a second, third or subsequent entity is involved in the labour transaction, and the additional entity is not related as defined, this then becomes a labour hire situation. This is also simple test for the employers to establish if there are concerns raised by departmental officers.

- MEA agrees and draws similarities to electrical contractors and their employees who operate in the domestic electrical and small business areas. Electrical contracting is legitimate subcontracting and is not covered by the LHL Act.

**9. Address the impact of the small business redundancy exemption in winding up scenarios to support equitable outcomes for claimants under the Fair Entitlements Guarantee**

- *Is this an issue that should only be addressed for the purpose of administering the FEG program, or more widely for all insolvency scenarios*?

  Yes, the FEG can be adjusted to assess the size of the business in the preceding period, say 12 months, before the worker of the 'small business' was made redundant. If they were a larger business in that preceding 12 month period FEG should give them access to severance payment.

- *What safeguards could apply to ensure the solution does not impair the operation of the small business redundancy exemption for employers that are genuinely small businesses?*

  If you leave it in the FEG considerations of who is and isn't entitled to access the scheme. There is no overlap, no change to definitions in FW Act and no unintended consequences on other employment scenarios.

- *What other matters should be considered in settling the approach addressing the small business redundancy exemption in insolvency contexts?*

  Leave the Fair Work Act alone when making this change.

**10. Reforms to strengthen enterprise bargaining and close loopholes:**

*a. The Fair Work Commission issuing model terms for enterprise agreements*

FWC has the expertise, history of making terms, is established with practitioners, lawyers and members who make decisions on these terms everyday. Let them make it.

They will also have the ability to make their own panel to ensure consistency in developing and application of the terms.

FWC will be able to call for consultation and views on their 'preliminary views' as they commonly do. Can also determine if they wish for the matter to be determined on an evidentiary basis through a hearing.

*b. Preserve arrangements for employers already using single interest agreements*

Such a unique situation; we've never had anyone in this space. It's also so very rarely called on that we don't have any comment.

**11. Repeal demerger from registered organisations amalgamation provisions**

This really gets into the nitty gritty of the CFMMEU demerger with the mining division. There's a lot of overly technical elements to the matter that we just have not been following or are interested in to be frank.

There should be an overall principle of fairness about the governance and structure of registered organisations that the members of those organisations can have a say in how they operate.

Beyond that, it's a terribly existential question of a purely IR academic issue (unless you're those unions/divisions).

## Conclusion

MEA's membership is made up of mainly SME businesses that currently do not have a high proportion of union membership amongst their employees. MEA of course recognise the importance of unions in the industrial landscape and have a collaborative relationship with the ETU on the big issues affecting our industry around safety, licensing and skills. Indeed, we operate a number of NFP "For purpose" businesses around the country to further these aims in concert with the union. SME's generally work on smaller profit margins than large (union EBA) businesses and deliver the majority of domestic, public facing electrical installation to most Australian citizens, in fact over 90% of all electrical contracting businesses in this country are SME's. Bringing "EBA like" conditions into the broad IR structure will undoubtably have an inflationary impact on business inputs.

MEA believe that a number of the proposals in this tranche of reform have the potential to unduly disrupt the employment market in Australia without facilitating an increase in productivity to offset the increases in direct and indirect employment costs that will flow from this legislative agenda being fully implemented.