



Australian Government
Department of Employment
and Workplace Relations

Annexures to Certification Letter OBPR22-02409

Closing the labour hire loophole
August 2023



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Contents

- ANNEXURE A..... 5**
- Summary of the Reviews..... 5
 - The Reviews..... 5
 - Victorian Inquiry Report 5
 - Third Interim Report..... 6
 - EPEW Report 6
- Impact Analysis Question 1: What is the problem you are trying to solve and what data is available?..... 7
 - Victorian Inquiry Report 8
 - Third Interim Report..... 8
 - EPEW Report 8
 - Available data regarding the problem to be solved 8
- Impact Analysis Question 2: Why is government action needed?..... 11
 - Victorian Inquiry Report 11
 - Third Interim Report..... 11
 - EPEW Report 12
 - The need for Government action..... 12
- Impact Analysis Question 3: What policy options are you considering? 12
 - When the measure is activated..... 13
 - What happens when an order is made 13
 - How are disputes resolved 14
- ANNEXURE B..... 15**
- Impact Analysis Question 4: What is the likely net benefit of each option? 15
 - Option 1 – Legislate a ‘Closing the labour hire loophole’ measure 16
 - Option 2 – Maintain the status quo 28
 - Having weighed Options 1 and 2, what is the net benefit of the Government’s proposal?..... 29
- Impact Analysis Question 5: Who did you consult and how did you incorporate their feedback? . 29
 - Purpose and objectives of consultation 29
 - Consultation process undertaken by the department regarding this proposal..... 30
 - Summary of stakeholders’ main views..... 31
 - Areas of agreement and difference between stakeholders, and how stakeholder views informed the design of the preferred approach (Option 1) 32
- Impact Analysis Question 6: Which is the best option and how will it be implemented?..... 37

Which is the best option?.....	37
Which option is the most effective, appropriate, efficient, and least costly?	38
Decision-making process.....	39
How will the option be implemented?.....	39
Impact Analysis Question 7: How will you evaluate your chosen option against the success metrics?	40
ANNEXURE C.....	42
Summary and methodology	42
Estimating the number of labour hire employees eligible to be covered by a Fair Work Commission order.....	43
Exclusions	43
Accounting for internal labour hire.....	44
Estimating the negative wage difference.....	44
Exclusions	44
Adjustments	45
Estimating average hours worked.....	46
Limitations.....	46
Tables	48
ANNEXURE D.....	51
Time taken to read guidance materials and underlying cost assumptions.....	51
The cost to hosts	52
The cost to labour hire employers	52

Summary of the Reviews and how they address Impact Analysis Questions 1-3

Summary of the Reviews

The Reviews

After consulting with the Office of Impact Analysis (**OIA**) in accordance with the 2023 Australian Government Guide to Policy Impact Analysis, the independent reviews listed below (**Reviews**) have been considered and relied upon by the Department of Employment and Workplace Relations (**the department**) to satisfy impact analysis for Impact Analysis Questions 1-3,¹ for the Government's 'Closing the labour hire loophole' election commitment:

- Victorian Inquiry into the Labour Hire Industry and Insecure Work (Report, 31 August 2016) (**Victorian Inquiry Report**)²
- Senate Select Committee on Job Security, Third interim report: labour hire and contracting (Report, November 2021) (**Third Interim Report**)³
- Senate Education and Employment Legislation Committee, Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (Report, October 2022) (**EPEW Report**)⁴

Victorian Inquiry Report

On 13 October 2015, the Victorian Government established the Victorian Inquiry into the Labour Hire Industry and Insecure Work (**Victorian Inquiry**) to report on the extent, nature, and consequence of labour hire employment in Victoria.⁵

The Victorian Inquiry received 695 primary written submissions (comprising 91 from organisations and 604 from individuals) and heard from 221 witnesses during 113 hearing sessions, over 17 days of hearings held from November 2015 to March 2016.⁶ The Victorian Inquiry heard evidence from stakeholders that it is common for the applicable rate of pay for labour hire workers at a site with an enterprise agreement to be less than the rates provided by the host's enterprise agreement.⁷

In making its recommendations, the Victorian Inquiry had regard to the limitations of Victoria's state-based legislative powers over workplace relations and the Victorian Government's capacity to

¹ Impact Analysis Questions 1-7 can be found at: Office of Impact Analysis, *Australian Government Guide to Policy Impact Analysis* (March 2023) p 9.

² Victorian Inquiry into the Labour Hire Industry and Insecure Work (Final Report, 31 August 2016) <www.vgls.vic.gov.au/client/en_AU/search/asset/1293786/0> (**Victorian Inquiry Report**).

³ Senate Select Committee on Job Security, Third interim report: labour hire and contracting (Report, November 2021) <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Job_Security/JobSecurity/Third_Interim_Report> (**Third Interim Report**).

⁴ Senate Education and Employment Legislation Committee, Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (Report, October 2022) <aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/EqualPayBill2022/Report> (**EPEW Report**).

⁵ Victorian Inquiry Report, p 37.

⁶ Ibid, p 14.

⁷ Ibid, p 101. Further, the Productivity Commission has acknowledged that the capacity of an employer to contract with lower cost or more flexible forms of labour (such as labour hire) may undermine collective bargaining power in reaching enterprise agreements, but concluded this was unlikely to occur to a great extent: see Victorian Inquiry Report, p 105, citing Productivity Commission, *Workplace Relations Framework Report* (2015) p 815.

regulate these matters.⁸ The Victorian Inquiry Report recommended that labour hire workers should have the opportunity to be covered by enterprise agreements applying at a host's workplace, and that this *could* occur by a voluntary decision of the labour hire employer to apply the host's enterprise agreement, or by application of a pay parity clause in the host's enterprise agreement.⁹

Third Interim Report

On 10 December 2020, the Senate Select Committee on Job Security (**Job Security Committee**) was appointed by resolution of the Senate.¹⁰ The Job Security Committee was 'established to enquire into and report on [among other things] the impact of insecure or precarious employment on the economy, wages, social cohesion and workplace rights and conditions', with particular reference to the extent and nature of insecure or precarious employment in Australia.¹¹

The Job Security Committee published the following reports:

1. The First Interim Report on on-demand platform work in Australia (June 2021)
2. The Second Interim Report on insecurity in publicly-funded jobs (October 2021)
3. The Third Interim Report on labour hire and contracting (November 2021)
4. The Fourth Interim Report on job insecurity (February 2022)
5. The Final Report on the matter of possible privilege (March 2022)

The Third Interim Report is directly relevant to the Government's 'Closing the labour hire loophole' proposal.

When the Third Interim Report was published in November 2021, the Job Security Committee had held 20 public hearings, 6 private hearings, and received and published 219 submissions.¹² The Job Security Committee heard from workers, employers, unions, experts, sector organisations and industry bodies, and collected a significant amount of data and information from government agencies, private companies, and not-for-profit services providers.¹³

The Third Interim Report recommended that the Government amend the *Fair Work Act 2009* (**Fair Work Act**) to ensure the wages and conditions of labour hire workers are at least equivalent to those that would apply had those workers been directly employed by their host entities.¹⁴

EPEW Report

On 10 February 2022, the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (**EPEW Bill**) was introduced to the Parliament by Senator Malcolm Roberts. On 28 July 2022, the EPEW Bill was referred to the Senate Education and Employment Legislation Committee (**SEEL Committee**). On 24 October 2022, the SEEL Committee issued a report on the EPEW Bill, having held one public hearing, and having received and published 18 submissions.

⁸ Ibid p 38.

⁹ Ibid p 19, Recommendation 2. The common effect of a parity clause (or jump up clause) is to provide that where a labour hire worker is performing work which is the subject of an enterprise agreement, that employee is entitled to be paid at the same rate, and receive the same conditions, as a direct employee of the host performing that work.

¹⁰ Parliament of the Commonwealth of Australia, *Senate Journals No. 81—10 December 2020*, pp 2890–2.

¹¹ Job Security Committee, *Terms of Reference*.

¹² Third Interim Report, p 4 [1.21].

¹³ Ibid, p 4-5 [1.21], [1.24].

¹⁴ Ibid, p ix Recommendation 1.

While recommending that the EPEW Bill not be passed (including because of its limited scope), the SEEL Committee supported calls for the Government to work with stakeholders to give effect to the policy intent behind the EPEW Bill in a more comprehensive manner,¹⁵ given the Committee broadly supported the aim of the EPEW Bill to ensure that a labour hire worker doing the same job as a directly engaged employee receives the same rate of pay.¹⁶ The Government's 'Closing the labour hire loophole' proposal broadly aligns with this policy intent, with respect to limiting the circumstances in which the use of labour hire undercuts the wages in enterprise agreements.

Impact Analysis Question 1:

What is the problem you are trying to solve and what data is available?

The policy problem the Government is addressing with its 'Closing the labour hire loophole' proposal is that bargained wages in enterprise agreements can be undercut by the use of labour hire employees who are paid less than the wages set out in the host employer's enterprise agreement.

Addressing the disparate wage payments made to some labour hire employees, compared with the wages paid to host employees under a host's enterprise agreement, is consistent with the Government's Secure Australian Jobs election commitment to address circumstances in which workers doing comparable work on the same site, working the same shifts, are paid differently.

This issue does not impact all labour hire employees or have a direct impact on the majority of Australian workers. However, the undercutting of bargained wages – which have been agreed by employees and their employer as minimum rates of pay for a workplace – by the use of labour hire is a loophole in the workplace relations framework that the Government seeks to close.

Emphasising the confined scope and impact of the issue being addressed (and the solution proposed by the Government), it is important to note that labour hire workers represent only around 2.3 per cent of employed people in Australia (around 319,900 of 13,852,900).¹⁷ However, evidence accepted in the Reviews suggests that some employers engage in sharp business practices and use labour hire to undercut wages in enterprise agreements.¹⁸ For example, in the Third Interim Report, the Job Security Committee acknowledged submissions made about issues regarding workforce arrangements in the mining, agriculture and transport and distribution sectors.¹⁹ However, the issues identified – particularly in relation to labour hire employees being paid less than what they would be paid under a host's enterprise agreement – are not unique to those industries.

Many labour hire firms operate in a fair way to support business to deal with a genuine need to bring on additional workers. However, some labour hire firms provide workers to businesses at lower wages than what they would be paid if they were directly employed by the host. This arises in both 'external' labour hire arrangements (where a labour hire provider is a distinct business from the host employer) and in 'internal' labour hire arrangements (where labour is provided from one corporate entity to another). The result is that labour hire employees are sometimes paid less, and have less

¹⁵ EPEW Report, p 22 [2.55].

¹⁶ Ibid, p 21 [2.52].

¹⁷ ABS, *labour hire workers, June 2022* (released 6 December 2022) using ABS, *Labour Account, June 2022*, though the ABS notes limitations with this data within this cited resource.

¹⁸ See, e.g., Victorian Inquiry Report; Third Interim Report. See also: Senate Education and Employment References Committee, *Corporate avoidance of the Fair Work Act 2009* (September 2017); Senate Economics References Committee, *Systemic, sustained and shameful: Unlawful underpayment of workers' remuneration* (March 2022).

¹⁹ Third Interim Report, pp 39-62; 63-84; 85-118.

job security, than if they had been directly hired by a host. This loophole in the Fair Work Act allows businesses to bypass genuinely bargained wages intended to apply at a particular workplace.

The Reviews each speak to this as an issue in the federal workplace relations system. This shows that the Fair Work Act has not kept pace with the changing nature of work and working arrangements across Australian businesses, which has led to greater insecurity and inequitable treatment between workers. The Government's proposal, alongside others proposed for introduction to the Parliament in Spring 2023, seeks to address that insecurity and inequitable treatment, and the emergence of sharp business practices with respect to the use of labour hire and the undercutting of wages.

Victorian Inquiry Report

The Victorian Inquiry found some labour hire employers seek to use enterprise agreements as a mechanism to drive down employment conditions.²⁰ Further, the fact that host enterprise agreements do not generally apply to labour hire workers results in lower pay for some of those workers when compared with directly engaged employees.²¹ The problem becomes more pronounced, and has become common in some sectors, where labour hire workers work at the site of one host over a lengthy period.²²

Third Interim Report

In the context of labour hire, the Job Security Committee observed that host enterprise agreements do not commonly apply to labour hire workers working within the host, resulting in differential treatment between labour hire workers and directly engaged employees.²³ The Committee expressed that it was 'very concerned' that labour hire workers 'commonly receive lower pay' than those workers who are directly employed.²⁴

EPEW Report

A finding of the EPEW Report was that the use of labour hire had become an established mechanism for lowering business operating costs by undercutting wages.²⁵ It set out concerns from SEEL Committee members that labour hire workers in some industries may be earning 30 to 40 per cent less than directly-employed employees in the same role, despite performing the same duties.²⁶ Additional comments in the EPEW Report also acknowledged evidence of pay disparity in some sectors, for example, coal mining, where the average wage is estimated to be \$144,000 compared with the average pay for labour hire workers in that sector estimated to be \$120,000.²⁷

Available data regarding the problem to be solved

Data limitations and their influence on estimating regulatory burden and costs

Estimates in these Annexures regarding the extent of the problem, the regulatory burden of any proposed response, and cost of the Government's 'Closing the labour hire loophole' proposal, have

²⁰ Victorian Inquiry Report, p 84, Finding 3.6.

²¹ Ibid, p 84, Finding 3.7.

²² Ibid.

²³ Third Interim Report, p 2 [1.8].

²⁴ Ibid, p 60 [3.62].

²⁵ EPEW Report, p 20 [2.47].

²⁶ Ibid, p 21 [2.50].

²⁷ Ibid, pp 25-6, [1.16], [1.21].

been informed by available data on, for example, the use of labour hire in Australia. However, there are several limitations with current data, and they are described below.

Where reliable data is unavailable with respect to one or more elements of the Government's proposal, this is noted at relevant sections throughout the Annexures (including where a particular cost or impact cannot reasonably be quantified). This has been done to minimise the extent to which analysis about the impact of the proposal would be speculative without supporting data. However, limitations are expressly noted in the analysis to ensure estimated costs and impacts are considered by decision-makers with appropriate caveats front of mind.

Overall, data limitations mean estimating the regulatory impact of the proposal is complex, and calculating costs other than at a very high level is challenging.

The data

The Australian Bureau of Statistics (ABS) releases data on the volume and characteristics of labour hire workers, drawn from different sources.²⁸ However, the multi-party nature of labour hire work makes it challenging to assess statistically.

For example, there is no authoritative data on the prevalence of *internal* labour hire arrangements within corporate groups. This has required the department to base internal labour hire cost analyses on a rudimentary assumption about the number of workers who *may* be captured by the concept of internal labour hire, with a clear caveat that this number may be higher, and consequently, may result in higher costs.

Also, as ABS data is only available at the aggregate level, a direct comparison of the earnings of labour hire workers with the earnings of directly engaged employees performing work that would be covered by the same enterprise agreement classification is not possible.

There is also limited information on the arrangements between labour hire providers and host employers. For example, there is no reliable data on how many Australian businesses use labour hire. This means the department is unable to estimate the number of businesses that may be affected by the proposal or consider a range of potential distributional impacts (such as whether smaller businesses may be impacted differently to larger businesses). That noted, hosts that are small businesses within the meaning of section 23 of the Fair Work Act – that is, a business that employs fewer than 15 employees – will be excluded from this proposal. Further details about the scope of the proposal are set out under Impact Analysis Question 3.

Further, published data from the ABS shows that, despite a high number of labour hire workers working full-time hours (81 per cent), those workers are comparatively low paid when assessed against all full-time employees. Median hourly earnings for full-time labour hire employees stood at \$34.80 in August 2022, compared with \$40.70 for all full-time employees (see Table 1 below).²⁹ While this 'all full-time employees' statistic includes labour hire workers, they are a small proportion of all employed persons (2.3 per cent), and it is standard practice by the ABS to compare statistics by form of employment with those statistics for all employees. The department has adopted this approach.

²⁸ ABS, *Labour hire workers, June 2022*.

²⁹ *Ibid*, using *Characteristics of Employment, August 2022*.

Table 1: Median hourly earnings for employees paid by a labour hire firm, August 2022

	Median hourly earnings		
	Employees paid by a labour hire firm	All Employees	Difference
Full-time	\$34.80	\$40.70	-\$5.9
Part-time	\$35.50	\$30.50	+\$5
Permanent	\$30.00	\$40.60	-\$10.6
Casual	\$35.20	\$29.20	+\$6
Total	\$34.90	\$37.30	-\$2.4

Source: ABS, *Labour hire workers, June 2022*, using *Characteristics of Employment, August 2022*.

Table 1 shows the difference in median hourly earnings for employees paid by a labour hire firm and all employees. These differences, however, are to some extent due to labour hire workers having different characteristics to the larger group of ‘all employees’. For instance, Managers (median hourly earnings of \$52.00) and Professionals (median hourly earnings of \$52.60) have median hourly earnings almost 50 per cent higher than any other of the 8 broad occupation groups.³⁰ However, just 21.4 per cent of labour hire employees work as ‘Managers’ or ‘Professionals’, compared with 38.4 per cent of all employees.

In addition, labour hire workers are not a homogeneous group. The difference in median hourly earnings is largely driven by full-time and permanent workers paid by a labour hire firm, who earn less than ‘all employees’.³¹ Conversely, part-time and casual labour hire workers often earn more.³² This is consistent with other research undertaken into labour hire. For example, Laß and Wooden (2019)³³ used data from the Household Income and Labour Dynamics (HILDA) Survey and conducted analysis incorporating fixed effects, removing the effect of unobserved person-specific traits.³⁴ They found that labour hire workers at the top end of the income distribution experience a wage premium, while those at the bottom end appear to receive a small penalty. Laß and Wooden also outlined that there may be a range of circumstances as to why an individual might be in a labour hire arrangement. For example, a labour hire arrangement may exist so that low paid temporary workers can be hired to accommodate fluctuations in demand. Another arrangement might be that labour hire is required so that high paid temporary workers (with far greater bargaining power) can be engaged to meet sudden or short-term demand for specific skills.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Wooden, M and Laß, I 2019, The Structure of the Wage Gap for Temporary Workers: Evidence from Australian Panel Data, *British Journal of Industrial Relations* 57:3, pp 453-478, 474.

³⁴ The department considers that the ABS estimate of labour hire workers is preferable to HILDA data. The HILDA survey uses self-identification to classify employees as temporary agency workers, which is different from the ABS Labour Account publication, which uses industry disaggregated data. The ABS conducted a review into Labour Hire data in 2022 which concluded that using industry disaggregated data is a better measure of the headline number of labour hire workers, as collecting labour hire information in a household survey can result in an undercount as individuals are not always able to identify that they are in a labour hire arrangement, due to employment and payment arrangements in the labour hire industry. In addition, given labour hire arrangements comprise a small proportion of overall employment in Australia (2.3 per cent in June 2022), sample size concerns make it challenging to provide data at highly disaggregated levels. This is particularly the case with the HILDA labour hire data, where in 2021, just 177 respondents identified as being in a labour hire arrangement. Further, any differences in the ABS labour hire data and results from Wooden and Laß’s paper may, in part, reflect that Wooden and Laß use 2015 HILDA data, which is less recent than ABS data from June 2022 (headline figure for number of labour hire workers) or August 2022 (earnings figures).

That noted, there is no data on the proportion of labour hire employees that are paid less, the same, or more than what they would be paid under a host's enterprise agreement. Some labour hire employees may be paid the same,³⁵ some may be paid less, and some may be paid more. This makes it challenging to estimate what proportion of labour hire employees may receive a pay increase once the Government's 'Closing the labour hire loophole' proposal is legislated, and how much the proposal may cost business (high-level estimates are set out in answer to Impact Analysis Question 4). However, further analysis of ABS data on the distribution of earnings shows that there may be a premium for labour hire employees at the top and bottom ends of the earnings distribution, but a penalty for the bulk of employees in the middle of the distribution.³⁶

Taking these issues together, accurately estimating the scope of the problem and anticipated impact of the Government's 'Closing the labour hire loophole' proposal is difficult, but reliance on latest data from sources such as the ABS has informed commentary to supplement the additional analysis in these Annexures.

Impact Analysis Question 2:

Why is government action needed?

The policy problem – that is, the use of labour hire undercutting bargained wages in a host's enterprise agreement – arises because the Fair Work Act currently allows this to occur. Addressing this can only be achieved by government action (that is, legislative amendment to the Fair Work Act), which broadly aligns with recommendations from each of the Reviews.

Victorian Inquiry Report

The Victorian Inquiry found there were two aspects of the Fair Work framework regarding enterprise agreements and bargaining in the labour hire context that gave rise to the issues that will be addressed by the 'Closing the labour hire loophole' proposal: first, some labour hire providers seek to use enterprise agreements as a mechanism to drive down employment conditions; second, host enterprise agreements do not generally apply to labour hire workers, which can result in differential treatment (that is, in some instances, lower pay).³⁷

Having regard to these issues, the Victorian Inquiry Report recommended that labour hire workers should have the opportunity to be covered by host enterprise agreements, and that this could occur through the voluntary decision of the labour hire provider to apply host rates of pay or by including pay parity clauses in enterprise agreements.³⁸

Third Interim Report

The Job Security Committee recommended the Fair Work Act be amended to 'ensure that the wages and conditions of labour hire workers are at least equivalent to those that would apply had these workers been directly employed by their host entities.'³⁹

³⁵ Evidence accepted by the Victorian Inquiry indicated that some labour hire providers voluntarily pay site rates already: see Victorian Inquiry Report, p 100.

³⁶ ABS, *Labour hire workers*, using *Characteristics of Employment*, August 2022.

³⁷ Victorian Inquiry Report, p 106.

³⁸ *Ibid*, p 107, Recommendation 2.

³⁹ Third Interim Report, p 33 [2.85].

EPEW Report

The EPEW Report broadly supported steps being taken to ensure that labour hire workers doing the same job as directly engaged workers receive the same rate of pay,⁴⁰ and stakeholder calls for all parties to work with the Government on legislation that gives effect to that policy intent more comprehensively than what was proposed in the EPEW Bill.⁴¹ However, in additional comments made in the EPEW Report, Coalition Senators stated that a one-size-fits-all approach risks overlooking the nuances of the labour hire industry and leading to unintended consequences, such as impacts on flexibility and other benefits.⁴²

The need for Government action

The Victorian Inquiry handed down its findings in 2016, recommending that the issue to be addressed by the Government's proposal could be resolved by labour hire providers voluntarily paying host enterprise agreement wages to their workers, or by exploring pay parity clauses in enterprise agreements.

However, following the Victorian Inquiry Report, the Third Interim Report and the EPEW Report (handed down in 2021 and 2022, respectively) found that labour hire workers often receive lower pay than what they would receive if a host's enterprise agreement applied. These findings, and the time passed since the conclusion of the Victorian Inquiry, suggest a continuing market failure that has not since been resolved through voluntary action by labour hire providers or host employers, and that Government action is required.

In the absence of Government action, there are also risks that only *some* workers would benefit from a voluntary approach by industry participants to address discrepancies in pay to labour hire employees. Power imbalances inherent in the bargaining system can lead to disparate outcomes, even within the same industry. This would extend to differences with respect to the inclusion of pay parity clauses in enterprise agreements – that is, if only some hosts include pay parity clauses but not others, that action will only benefit labour hire employees provided to those hosts and not labour hire workers of hosts without such clauses. Taking this into account, it is unlikely that voluntary behavioural change will comprehensively address the problem the Government's proposal seeks to address.

Impact Analysis Question 3:

What policy options are you considering?

This proposal addresses an issue considered by the Government in its Secure Australian Jobs election commitment. Therefore, the policy options considered are:

- Option 1: Legislate a 'Closing the labour hire loophole' measure
- Option 2: Take no action (that is, maintain the status quo)

The findings and recommendations of the Reviews support pursuing Option 1 – that is, pursuing legislative amendments to the Fair Work Act to give effect to the Government's proposal. Such amendments are intended to reflect the following parameters.

⁴⁰ EPEW Report, p 21 [2.52].

⁴¹ Ibid, p 22 [2.55].

⁴² Ibid, p 23 [1.6].

When the measure is activated

The Government's 'Closing the labour hire loophole' proposal is an application-based model. This means obligations on businesses, and entitlements for workers, are not activated until an application is made to the Fair Work Commission and an order is made that activates these obligations and entitlements.

Applications can be made before and after obligations under this reform are proposed to take effect – 1 November 2024. The Fair Work Commission must make an order if it is satisfied that:

- a labour hire employer supplies or will supply one or more *employees* to a host to perform work for the host (meaning the proposal does not apply to independent contractors);
- an enterprise agreement⁴³ applies to the host and would apply to the labour hire employees being provided to work for the host, if they were directly employed by the host; and
- the host is not a small business employer.

However, the Fair Work Commission must not make an order if it is satisfied that it is not fair and reasonable to do so, having regard to any of the following matters:

- the pay arrangements applying to the labour hire employees and the host's employees (which, for example, may demonstrate that the labour hire employees are being paid more than directly engaged employees such that an order does not need to be made);
- whether the work being performed by the labour hire employees is the provision of a service, rather than the supply of labour (for example, under a service contracting arrangement), having regard to factors including:
 - the labour hire employer's involvement in matters about the performance of work;
 - the extent to which the labour hire employer directs, supervises or controls the labour hire employees when they are working for the host; and
 - the extent to which the work for the host is of a specialist or expert nature.
- the history of industrial arrangements applying to the host and labour hire employer;
- the relationship between the host and labour hire employer – such as whether they are related bodies corporate;
- the terms and nature of the arrangement under which work is done for the host; and
- any other matter the Fair Work Commission considers relevant.

What happens when an order is made

When an order is made by the Fair Work Commission and applies to an arrangement between a labour hire employer and a host, the labour hire employer must pay affected employees no less than the 'protected rate of pay' for the employee in connection with the work they perform for the host, calculated with reference to the host's enterprise agreement. The 'protected rate of pay' is the

⁴³ Or, for public sector employers, a public sector collective employment instrument described in the Bill.

'full rate of pay'⁴⁴ that would be payable if the host's enterprise agreement applied. However, the protected rate of pay does not include benefits that cannot reasonably be provided by the labour hire employer to a labour hire employee, or benefits that cannot reasonably be converted to an amount of money.

Assuming other criteria are satisfied, if a labour hire employee is a casual employee and works for a host with an enterprise agreement that does not provide for work to be performed on a casual basis, the protected rate of pay is calculated by adding a 25 per cent loading to the 'base rate' component of the full rate of pay that would be payable to that employee.

There are exemptions to when an order of the Fair Work Commission applies. Orders do not apply to labour hire employees if a training arrangement also applies to them in relation to their work for the host, nor does an order apply to labour hire arrangements of less than 3 months (the 'default exemption period') – or a different period of time if, by application by one or more parties, the Fair Work Commission extends or shortens the exemption period.

The Fair Work Commission will also have the power to determine an 'alternative protected rate of pay', if satisfied that it would be unreasonable for the labour hire employer to pay its employees no less than the protected rate of pay (such as, for example, where the rate would be excessive).

Once an order is made, labour hire employers can request additional information from a host in order to calculate the protected rate of pay. The host must either provide the information requested or inform the labour hire employer what to pay affected employees. This second option provides hosts with a pathway to complying with information sharing obligations if there are concerns that sharing information (for example, internal company policies) may expose confidential or commercially sensitive information.

Parties will be bound by anti-avoidance provisions in the Bill, including those that prohibit actions to prevent a Fair Work Commission order being made or to avoid obligations after an order is made.

How are disputes resolved

When disputes arise, parties must take steps at the workplace level to seek to resolve the issue. If these discussions are unsuccessful, disputes can be brought to the Fair Work Commission for resolution by way of mediation, conciliation and arbitration.

Unless by consent of the parties, the Fair Work Commission will not be able to order backpay if a dispute reveals that a labour hire employer has paid employees less than the protected rate of pay – resolving backpay issues remains a matter for court proceedings, in line with the current operation of the Fair Work system.

Affected parties and the Fair Work Ombudsman will be able to commence court proceedings, including in relation to alleged avoidance behaviour and underpayments, and existing 'small claims' and 'serious contravention' provisions in the Fair Work Act will apply.

⁴⁴ Defined in section 18 of the *Fair Work Act 2009*, and includes incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, and other separately identifiable amounts.

Supplementary analysis to address Impact Analysis Questions 4-7

Annexure B sets out supplementary analysis to answer Impact Analysis Questions 4-7 regarding the Government's 'Closing the labour hire loophole' proposal and should be read with Annexure A.

Impact Analysis Question 4:

What is the likely net benefit of each option?

The policy options being considered (as described in answer to Impact Analysis Question 3) are:

- Option 1: Legislate a 'Closing the labour hire loophole' measure
- Option 2: Take no action (that is, maintain the status quo)

To inform an assessment of the benefits, costs and impacts of these two options, the department has undertaken extensive stakeholder consultation with employers and their representatives, unions and academics, which commenced in 2022. In April 2023, the department published a detailed consultation paper about the proposal (**Consultation Paper**).

Through the Consultation Paper, stakeholders were asked to consider and provide views on a broad range of policy considerations, including the scope, application, and potential cost impacts that may flow to affected parties and the broader economy.⁴⁵ The impacts identified by stakeholders are described in the analysis below about the costs and benefits for businesses (hosts and labour hire employers) and individuals (labour hire employees and host employees) (for further detail on consultation generally, see Impact Analysis Question 5).

With the benefit of views provided by stakeholders during consultation, the department has assessed the two options with reference to the following guiding principles (noting these are informed by, and have developed from, the guiding principles in the Consultation Paper):

- a) Business should be able to access labour hire for genuine work surges and short-term needs.
- b) Labour hire employees should be paid at least the amount provided in a host's enterprise agreement, where that agreement would apply if they were directly employed.
- c) Hosts should not be able to undercut bargained wages by using labour hire.
- d) The proposal should only impose a reasonable regulatory burden on businesses.

These principles reflect the Government's aim to close the loophole in the Fair Work Act that allows the use of labour hire to undercut bargained wages. Overall, Options 1 and 2 lead to different net benefits and impacts on hosts, labour hire employers, labour hire employees and host employees. These are outlined below.

⁴⁵ Australian Government, *Same Job, Same Pay consultation paper* (April 2023) (Consultation Paper), pp 12-3.

Option 1 – Legislate a ‘Closing the labour hire loophole’ measure

Summary of net benefit and impact

Option 1 gives rise to varied impacts across workplaces and industries. This is because, for example, the use of labour hire differs across industries, and the terms and conditions of employment that apply to hosts and labour hire employers is often disparate.

It is difficult to estimate how many labour hire arrangements may be the subject of a Fair Work Commission order that activates relevant obligations and entitlements. There may be a number of reasons why an eligible labour hire employee does not apply for an order (see below for further details). In summary, and with regard to available data, pursuing Option 1 is expected to have the following calculable impact on businesses and individuals (further details at Annexure C):⁴⁶

Regulatory burden estimate table			
Annual regulatory costs (from business as usual)			
Change in costs (\$ million)	Business	Individuals	Total change in costs
Total, by sector	-\$510.8m	(\$510.6m)	-\$0.2m

This cost estimate is at the upper limit of the estimated increase to costs and is informed by the assumption that all in-scope labour hire employees will be covered by a Fair Work Commission order and receive a wage increase, and by a consideration of:

- how many businesses and individuals are expected to be impacted by the proposal; and
- for those groups, the estimated cost of engaging and complying with relevant obligations.

How many businesses and individuals are expected to be impacted by the proposal?

The following section provides an overview of how many businesses and individuals may be captured by this proposal. However, because the proposal relies on parties applying to the Fair Work Commission and an order being made, only a limited number of those employers and employees *potentially* within scope will *actually* be caught by this proposal’s obligations and entitlements.

Hosts

It is unclear how many hosts may be impacted by the proposal, because there is no reliable data on how many businesses use internal or external labour hire.

In the absence of, for example, ABS data on the prevalence of labour hire use, the department has considered whether information published by companies that are required to report publicly on their operations (for example, information published by ASX100 companies in annual reports) may help discern the impact of Option 1. However, it has been observed that few companies disclose whether they use labour hire, and if they do disclose this information, they do not generally report on the size of their labour hire workforce.⁴⁷ The lack of reliable data on how many businesses use labour hire makes it difficult to estimate how many businesses will be affected by Option 1.

⁴⁶ Data limitations mentioned previously may mean these figures are higher than what can be estimated accurately.

⁴⁷ Hepworth, K, 2020, *Labour Hire and Contracting Across the ASX100*, Australasian Centre for Corporate Responsibility, <www.accr.org.au/research/labour-hire-contracting-across-the-asx100/>.

Labour hire employers

Hosts use a variety of third-party labour arrangements, including to supplement their workforce. This proposal will affect labour hire employers that provide employees to work for a host (directly or indirectly), including within the same corporate group. The proposal is not intended to capture arrangements where one company provides a service to another company that is distinct from the supply of labour only – the factors that may be considered by the Fair Work Commission before deciding whether to make an order reflect this proposal intent, while giving the Commission the opportunity to scrutinise circumstances to determine the nature of an arrangement between parties.

Assuming companies that provide services, rather than labour, to others (for example, under service contracting arrangements) can demonstrate to the Fair Work Commission the nature of their arrangements such that an order is not made, the number of providers expected to be covered by this proposal can be estimated with reference to the number of labour hire providers in Australia.

The only reliable data on labour hire providers available is ABS data showing that as of 30 June 2022, there were 13,195 actively trading labour hire providers in Australia.⁴⁸ However, there were only 6,245 *employing* businesses in Labour Supply Services,⁴⁹ and only these businesses would be able to provide labour hire to hosts for the purposes of the Government’s proposal – because the proposal is limited to labour hire *employers* who provide *employees* to hosts.

For completeness, this figure does not include *internal* labour hire arrangements (those where entities within the same corporate group provide labour from one to another), which will also be covered by the proposal subject to relevant criteria being met and exemptions not applying. There is no reliable data on the number of such arrangements (see further discussion below).

Labour hire employees

Labour hire employees represent only around 2.3 per cent of employed people in Australia (around 319,900 of 13,852,900).⁵⁰ However, this does not include *internal* labour hire employees. The ABS estimate of labour hire employees is unlikely to count employees in internal labour hire arrangements, as the ABS estimate is a count of the number of workers in the Labour Supply Services industry. An internal labour hire employee would likely be counted as employed in the main industry of their host (for example, an internal labour hire employee in a mining corporate group would be expected to be counted as employed in Mining, rather than Labour Supply Services).

For the purposes of estimating the impact of this proposal on internal labour hire arrangements, the department has built into estimates an assumption that 6,000 employees will be working in these arrangements and be caught by the proposal, in addition to the employees captured by ABS data. The figure is used as a broad estimate only. It should not be read as determinative with respect to the number of internal labour hire arrangements that *may* be impacted but is used here in the interests of quantifying a high-level estimated impact, rather than not accounting for costs to internal labour hire arrangements at all.

This estimate of 6,000 employees has been informed by publicly available information about some corporate arrangements that may be described as internal labour hire arrangements. For example,

⁴⁸ ABS, *Counts of Australian Businesses, including Entries and Exits, July 2018 – June 2022* (see ANZSIC code: 7212 Labour Supply Services). Note, if a business is captured by this proposal but is *not* counted by the ABS under ‘ANZSIC code: 7212 Labour Supply Services’, there may be discrepancies with this figure.

⁴⁹ ABS, *Counts of Australian Businesses, June 2022*.

⁵⁰ ABS, *Labour hire workers, June 2022*; using *Labour Account, June 2022*.

Operations Services within BHP’s corporate group are reported as employing around 4,500 people,⁵¹ but the estimate of 6,000 employees also accounts (to some degree) for additional corporate arrangements over which the department does not have visibility and for which there is no reliable data. While noting these figures, the Government’s proposal is only estimated to impact a *subset* of the 2.3 per cent of employed people in Australia that can be attributed to labour hire, given the confined scope of, and exemptions that apply to, the proposal.

In relation to the 319,900 labour hire employees referred to in ABS data, the department has made a number of adjustments to estimate how many of these employees may be eligible to apply for an order from the Fair Work Commission once the proposal is implemented. These adjustments allow for an accurate interpretation of aggregated ABS data and take into account differing characteristics with respect to type of employment (full-time, casual), the number of labour hire employees recorded as working in their job for greater than 3 months (to account for the default exemption period),⁵² and the estimated number of labour hire employees provided to a host with an enterprise agreement.

Applying these adjustments and noting data limitations, the department estimates approximately 66,446 labour hire employees (60,446 external and 6,000 internal) will be eligible to be covered by orders from the Fair Work Commission. However, given the application-based nature of this proposal, it is estimated fewer labour hire employees than this will actually be covered by an order at any given time (see Annexure C).

For hosts, labour hire employers and employees – what is the cost of the proposal?

Estimating the economic impacts of workplace relations reforms can be difficult. Specific outcomes may depend on the approach that independent parties – such as employers, unions and the Fair Work Commission – take in response to proposed measures. It can also be difficult to isolate the impact of individual measures from other external factors, such as changes in the economic climate. However, addressing the loophole that allows the use of labour hire to undercut the wages in enterprise agreements will lead to an increase in the wages of some labour hire employees. This added income security and increases to pay may allow labour hire employees to make ends meet with elevated living costs, and allow them to afford to make purchases they are currently unable to, providing a boost to their local economies.

With that frame of reference, the tables below set out estimated costs for hosts, labour hire employers and labour hire employees (and their representatives), respectively, noting that where costs are difficult to quantify based on a lack of reliable data, assumptions have been informed by, for example, stakeholder feedback obtained during consultation.

1. Estimating cost impacts for <u>hosts</u>	
Cost category	Analysis
Reviewing guidance materials on	The department anticipates that businesses that use or <i>may</i> use labour hire may take time to read guidance material made available by the Fair Work Commission and Fair Work Ombudsman on the operation of this measure once

⁵¹ Clun, Rachel, ‘BHP claims proposed labour-hire policy would cost company \$1.3b per year’, *The Sydney Morning Herald*, 22 May 2023.

⁵² Costings have been based on the default 3-month surge exemption period, noting the Fair Work Commission’s capacity to extend or reduce that exemption period in limited circumstances.

<p>the application process</p>	<p>legislated – for example, guidance on how applications may be handled by the Fair Work Commission and what is expected of businesses involved in that process.</p> <p>However, given the lack of data available about how many Australian businesses use labour hire, it is difficult to estimate accurately the breadth of this administrative cost. However, using the Office of Impact Analysis’ \$79.63 per hour ‘work related labour rate’, the department estimates that hosts who read this guidance material may take 30 minutes to do so, at a cost of \$39.82 per host (see Annexure D).</p>
<p>Reviewing contractual arrangements with labour hire employers</p>	<p>Some hosts may revisit contracts in place with labour hire employers to ensure they are not inconsistent with new obligations, assuming they are involved in a Fair Work Commission application and the subject of an order. The extent of contractual reviews will be informed by, for example, whether labour hire employees are already being paid more than the rates in the host’s enterprise agreement.</p> <p>For example, evidence provided to the Victorian Inquiry by Australia Wide Personnel (a large organisation providing labour hire across trades, warehousing, and food industries) was that where a host has an enterprise agreement on its site, Australia Wide Personnel will ‘always’ pay labour hire employees according to the site agreement, even if it is not required to do so. Chandler McLeod gave similar evidence to the Victorian Inquiry, submitting that in many instances, productivity is retained or enhanced on a site where pay parity is maintained between labour hire employees and host employees.⁵³</p> <p>The department is unable to quantify the cost to hosts that may arise from reviewing contracts with labour hire employers due to a lack of visibility over the volume, content and complexity of such contracts.</p> <p>However, <i>if</i> contracts are revisited and the cost of using labour hire is <i>increased</i> in light of a higher wage cost, this should not be treated as separate to the wage cost set out further below regarding the wage impact on labour hire employers under this proposal. Put another way, if the cost of higher wages is passed on from labour hire employers to hosts, it should not be counted twice when estimating the impact of this proposal.</p> <p>The increased wage cost will fall to labour hire employers in the first instance – whether it is passed on to hosts will be a matter for affected entities to negotiate.</p>
<p>Cost of making an application to the Fair Work Commission</p>	<p>It will be open to hosts to apply for an order from the Fair Work Commission under this measure. Hosts may wish to do so to seek confirmation about their obligations from the outset of a labour hire arrangement, or may wish to ensure their labour hire provider pays their workers the protected rate of pay under an enforceable decision of the Commission.</p> <p>Where hosts choose to apply to the Commission for an order, they will need to pay the application fee when lodging their application for an order with the Fair</p>

⁵³ Victorian Inquiry Report, p 100.

	<p>Work Commission, which is currently \$83.30. As the department is not able to estimate how many hosts may make an application, this cost is noted for completeness.</p>
<p>Engaging with a Fair Work Commission application</p>	<p>Some hosts may be named in applications to the Fair Work Commission for an order activating entitlements and obligations under this proposal. While the department is unable to quantify how many applications may be made to the Fair Work Commission (see Annexure C), for those hosts involved in applications, the time and financial cost of engaging with that process is expected to vary greatly depending on the circumstances, noting the Fair Work Commission is intended to be a lower cost and more efficient forum than the courts.</p> <p>The Fair Work Commission can consider various factors when deciding whether to make an order, and the complexity of applications will vary greatly depending on how many of these factors the Commission considers, or how many issues a host may wish to draw to the Commission’s attention. This potential variance between circumstances means it is not possible to quantify accurately the cost of engaging with Fair Work Commission applications.</p> <p>For example, a host using labour hire simply to supplement its existing workforce may have less complicated submissions or evidence for the Fair Work Commission that, for example, a host actually engaging in a service contracting arrangement, which may require additional evidence about how the service contract work differs from work undertaken from host employees.</p> <p>While the duration, complexity and practical requirements of responding to applications will be informed by the specific circumstances, it is anticipated that these applications may require preparing submissions and evidence (including in relation to business operations and the rates payable under the host’s enterprise agreement) and attending conferences and hearings of the Fair Work Commission while an application is considered.</p>
<p>Providing information to a labour hire employer</p>	<p>If a Fair Work Commission order is made, a labour hire employer may request additional information from a host in relation to calculating the correct rates of pay for employees covered by the order. Complying with these requests will attract some administrative cost, however the department is unable to estimate accurately:</p> <ul style="list-style-type: none"> • the number of labour hire employers that may be subject to a Fair Work Commission order, and of these, how many may request additional information to be able to calculate the correct rate of pay under the host’s enterprise agreement; and • if a request is made, the volume or complexity of that information. <p>If hosts receive a request for additional information, the cost of complying with this obligation is estimated to accrue at \$79.63 per hour (using the Office of Impact Analysis’ work related labour rate), but the actual length of time it may take to comply is not able to be estimated due to a lack of relevant data about the complexity and frequency of any requests that may be made.</p>

<p>Engaging with disputes</p>	<p>If a dispute arises about a Fair Work Commission order or a party’s obligations, the time and financial cost of engaging with the dispute will vary between circumstances and is therefore difficult to quantify, noting however (as above) that the Fair Work Commission is intended to be a lower cost and more expedient forum than the courts. As with engaging in a Fair Work Commission application, engaging with a dispute may require preparing submissions and evidence and attending conferences and hearings of the Fair Work Commission.</p> <p>In addition, the Office of Impact Analysis’s Guidance Note on the Regulatory Burden Measurement Framework⁵⁴ advises that certain costs are excluded from the Regulatory Burden Measurement Framework and are not required to be considered when quantifying an estimate of burden. Relevantly, this includes ‘Non-compliance and enforcement costs’, including costs incurred in court and tribunal processes.</p> <p>If a dispute in court concludes that a host has deliberately not complied with their obligations under this proposal, regulatory impacts relating to engaging with the dispute can be taken to have been avoidable had the host complied with their obligations in the first place. This regulatory impact should not be treated as an <i>additional</i> burden on business.</p>
<p>Cost from engaging more employees instead of using labour hire</p>	<p>The Government’s proposal may cause some hosts to consider engaging more employees instead of using labour hire. The number of hosts that may consider this, and any associated costs, cannot be quantified because they will vary between circumstances and will be informed by, among other things, the exact pay rates in a host’s enterprise agreement and the nature of the employee’s engagement. That noted, relevant costs are likely to relate to wages paid directly to new employees, and other overhead costs associated with onboarding, training, and developing those new employees (which are costs that may have otherwise been absorbed by a labour hire provider).</p> <p>Paying a worker directly may, in some circumstances, result in an immediate cost saving. This is because, if a host was paying a labour hire employer a fee in recognition of the labour hire employee’s wage plus an additional amount, that additional amount would not need to be paid if the labour hire employee were employed directly – noting that, if more people are employed directly, the onboarding and training costs referred to above may be incurred.</p>

2. Estimating cost impacts for labour hire employers

Cost category	Analysis
<p>Reviewing guidance materials on</p>	<p>As with hosts, labour hire employers may also incur administrative costs by reviewing guidance materials on this proposal (including on the Fair Work Commission application process and related obligations), once legislated.</p>

⁵⁴ OIA, *Regulatory Burden Measurement Framework* (25 May 2023) <<https://oia.pmc.gov.au/resources/guidance-assessing-impacts/regulatory-burden-measurement-framework>>.

<p>the application process</p>	<p>While quantifying this cost is difficult in relation to hosts, data is available on the number of labour hire employers in Australia, with reference to the number of <i>employing</i> businesses in Labour Supply Services according to ABS data⁵⁵— that is, 6,245.</p> <p>Using this figure, and adopting the same assumption used above in relation to the review of guidance material taking 30 minutes per business the department estimates labour hire employers will, collectively, incur \$248,676 in the first year of the proposal (see Annexure D for supporting rationale).</p>
<p>Reviewing contractual arrangements with labour hire employers</p>	<p>As above, some labour hire employers may revisit contracts in place with hosts to ensure they are not inconsistent with new obligations, assuming they are involved in a Fair Work Commission application and the subject of an order.</p> <p>The department is unable to quantify the cost to labour hire employers that may arise from reviewing contracts with hosts due to a lack of visibility over the volume, content and complexity of such contracts, but that fact that some cost will be incurred by this exercise is noted here for completeness.</p>
<p>Engaging with a Fair Work Commission application</p>	<p>The content in the table above on the costs that may be incurred by hosts from engaging with a Fair Work Commission application is equally applicable to the costs that may be incurred by labour hire employers in this circumstance.</p> <p>As above, the department is unable to quantify the number of applications that may be made to the Fair Work Commission (see Annexure C), however the time and financial cost of engaging with applications will vary depending on the circumstances. This variance means it is not possible to quantify accurately the cost of engaging with Fair Work Commission applications, once one is made.</p> <p>For completeness, and as above, it is anticipated that these applications may require preparing submissions and evidence (including in relation to business operations and the rates payable under the host’s enterprise agreement) and attending conferences and hearings of the Fair Work Commission while an application is considered.</p>
<p>Calculating the correct rate of pay for labour hire employees covered by a Fair Work Commission order</p>	<p>If a labour hire employer is covered by a Fair Work Commission order and is required to calculate a new ‘protected rate of pay’ for labour hire employees also covered by that order, in accordance with a host’s enterprise agreement, the time take to do so will also incur administrative costs.</p> <p>The department is unable to quantify the actual cost of this exercise to labour hire employers, because doing so is dependent on understanding how long a labour hire employer may take to do these calculations, the relative complexity of the host’s enterprise agreement, and how often a labour hire employer may be required to interpret the same host’s, or different host’s, enterprise agreements in any given (depending on, for example, roster changes under the same arrangement, or entering into multiple arrangements with different hosts with different enterprise agreements, in any given period).</p> <p>Stakeholder consultation on this (and other) administrative costs did not yield</p>

⁵⁵ ABS, *Counts of Australian Businesses, June 2022*.

	specific information about what this cost may be, however the length of time taken to make these calculations will be informed by factors including the complexity of a host's enterprise agreement, the roster a labour hire employee works (which is relevant for determining whether penalties or allowances may apply), and whether the labour hire employer needs additional information from the host.
Estimated increase to wage costs	<p>Given the number of labour hire employees eligible to apply to the Fair Work Commission for an order, the department estimates the direct increase in wage costs as a result of the proposal will be \$510.6 million per year, representing an increase of just 0.05 per cent of the total wages and salaries paid in Australia per year, calculated as \$1,006,234,000,000.00.⁵⁶</p> <p>This figure is the top of the department's estimate and assumes every labour hire employee eligible to benefit from a Fair Work Commission order is, in fact, covered by an order within the first year of the proposal being legislated. This outcome is unlikely for several reasons, and the number of employees covered by an order is expected to be much smaller (see Annexure C).</p>
Cost of dealing with disputes	The previous table describes the department's consideration of potential costs incurred by hosts if a dispute arises in relation to this proposal, once legislated, and concludes that quantifying those costs for hosts is not possible due to the variance between circumstances that may trigger a dispute. The same rationale is applied here in relation to labour hire employers such that the cost of engaging with disputes cannot be quantified defensibly.

3. Estimating costs for labour hire employees (and their representatives)

Cost category	Analysis
Reviewing guidance materials on the application process	<p>Given this proposal adopts an application-based model, it is reasonable to expect that some labour hire employees and their representatives may also read Fair Work Commission guidance material about who is eligible to seek an order, how applications will be handled, and the outcome if the Fair Work Commission makes an order.</p> <p>The department anticipates that not all labour hire employees will, in fact, read guidance made available by the Fair Work Commission, and in the absence of reliable data regarding the proportion of these employees that will, or will not, read the guidance material, the department is unable to quantify this cost defensibly here. However, assuming a labour hire employee reads the Fair Work Commission's guidance on work time, and takes around 30 minutes to do so, costs will accrue at \$39.82 per employee.</p>
Cost of making an application to the Fair	Labour hire employees (and their representatives) will need to pay the application fee when lodging their application for an order with the Fair Work Commission, which is currently \$83.30. As the department is not able to

⁵⁶ ABS, *Australian National Accounts: National Income, Expenditure and Product, March 2023*.

Work Commission	estimate how many labour hire employees will make an application to the Fair Work Commission, this cost is noted for completeness.
Engaging with a Fair Work Commission application	<p>Labour hire employees (and their representatives) will incur administrative costs when applying to the Fair Work Commission for an order, in addition to the actual application fee that is expected to attach to the proposal.</p> <p>However, as above in relation to hosts and labour hire employers, the time and financial cost of engaging with applications will vary depending on the circumstances, and this variance means it is not possible to quantify accurately the cost of engaging with Fair Work Commission applications.</p> <p>That noted, it is anticipated that these applications may require preparing submissions and evidence and attending conferences and hearings of the Fair Work Commission while an application is considered.</p>
Engaging with disputes	The previous table describes the department’s consideration of potential costs incurred if a dispute arises and concludes that quantifying those costs is difficult due to the variance between circumstances that may trigger a dispute. The same rationale is applied here in relation to labour hire employees such that the cost of engaging with disputes cannot be quantified defensibly.

What benefits are expected to flow from the proposal?

For hosts and labour hire employers

While there are a number of costs for business associated with the proposal, it also has the potential to generate benefits for hosts and labour hire employers (noting that, as a result of the above-mentioned data limitations, these benefits are framed here conceptually). For example, as mentioned above, the Victorian Inquiry heard evidence from some labour hire employers that voluntarily paying host enterprise agreement rates to labour hire employees has an observable impact on productivity, insofar as it was retained or enhanced on sites where pay parity exists between host employees and labour hire employees.⁵⁷

The Third Interim Report also contains observations from the Job Security Committee regarding adverse health and safety outcomes associated with labour hire and contract work when compared to ongoing full-time employment. Specifically, the Committee heard that the insecurity of work, such as labour hire work, led to higher incidences or frequency of injuries, poorer physical and mental health, and less willingness to raise health and safety concerns.⁵⁸ Arguably, if implementing this proposal leads to hosts engaging more direct employees, there may be an observable increase in work health and safety outcomes in those workplaces, to the benefit of employers and employees.

The proposal will not have a direct impact on small business host employers (that is, with fewer than 15 employees), as they are excluded from scope. Small businesses who are labour hire employers can be covered by a Fair Work Commission order and will face the same obligations as larger labour hire employers in the same circumstances.

⁵⁷ Victorian Inquiry Report, p 100.

⁵⁸ Third Interim Report, pp 27-8.

Further, some stakeholders have suggested to the department that this proposal may also give labour hire employers the opportunity to generate more revenue as a result of higher wage costs being passed on to hosts. For example, if a labour hire employer’s business model relies on a percentage on top of a payment to cover the wage of a labour hire employee placed in the host’s workplace, a higher wage cost will lead to a higher ‘on top’ percentage. Whether this materialises for labour hire employers is not able to be determined as part of this analysis.

For labour hire employees

Benefits for labour hire employees from implementing this proposal are set out in the table below:

Benefits	Analysis
<p>Improvement in wages</p>	<p>This proposal will ensure labour hire employees covered by a Fair Work Commission order are paid at least what they would be paid under a host’s enterprise agreement if they were directly employed by the host. For some labour hire employees, this will result in a wage rise.</p> <p>As outlined above, the increased wages bill under this proposal is estimated to be up to \$510.6 million per year (with respect to the cohort of 66,446 labour hire employees estimated as eligible to apply for a Fair Work Commission order). If this wage increase were averaged across each of the 66,446 labour hire employees, each employee would receive on average an additional \$7,684 per year (or \$295.53 per fortnight).⁵⁹ Further details are at Annexure C.</p>
<p>Benefits to job security</p>	<p>Implementing the Government’s proposal will strengthen job security for host employees where a Fair Work Commission order applies. If this proposal is not legislated, the economic incentive for hosts to use labour hire, who are not covered by the host’s enterprise agreement and who are paid lower rates, will remain. It follows that by legislating the Government’s proposal, this economic incentive will be reduced (if not eliminated entirely, having regard to the exemptions that apply to, and confined scope of, the proposal).</p> <p>This proposal will also positively impact labour hire employees with respect to job security in a new role, if they are engaged directly by hosts as a result. This increased job security (in a labour hire employee’s new role, if obtained) arises because this proposal aims to remove an economic incentive for hosts to prioritise externally sourced labour over direct employment. This is relevant to addressing issues including that labour hire employees often lack leave entitlements (and other entitlements generally attributable to permanent employment). The majority of labour hire employees (84 per cent) do not have paid leave entitlements,⁶⁰ which means they are more likely to be casual employees. If hosts choose to engage more employees directly as a result of this proposal (some of whom may currently be labour hire employees), it follows that if those employees obtain permanent employment with a host, they are likely to experience increased job security.</p>

⁵⁹ Noting the distribution of these increased wages will not be equal for affected workers, and noting the data limitations with respect to the number of workers who may be captured by this proposal (which affects the calculation of the overall wages increase and the value of that increase when divided equally across affected workers).

⁶⁰ ABS, *Labour Hire Workers, June 2022, using Characteristics of Employment, August 2022.*

	Further, the contractual terms under which labour hire employees are engaged means these employees are often subject to arrangements where their term of engagement with the host can be terminated at very short notice. ⁶¹ Secure, well-paid jobs are a key Government objective, and this proposal contributes to ongoing efforts to generate secure employment opportunities for Australian workers (including via direct engagement with hosts).
Distributional effects	<p>As ABS data shows that 61 per cent of labour hire employees are male, it is more likely that male employees will benefit from this proposal, while female labour hire employees will also benefit.⁶² However, the Office for Women has indicated to the department this proposal is likely to have generally positive impacts for women arising from reduced wage inequality (such as, for example, between female labour hire employees and host employees). However, due to data gaps that limit the department’s ability to assess and measure gender impacts, it is difficult to say whether this measure will have substantial benefits to women relative to men and contribute to reducing the gender pay gap.</p> <p>The National Indigenous Australians Agency have also advised they anticipate the policy will have positive impacts for Indigenous Australians. This is because Indigenous Australians engaged as labour hire employees, who currently receive less pay than what they would if they were paid under a host’s enterprise agreement, will benefit from the proposal.⁶³</p>

Alignment with similar proposals implemented in international jurisdictions

Other countries have implemented measures conceptually similar to the Government’s ‘Closing the labour hire loophole’ proposal (see below). Implementing the Government’s proposal would bring Australia’s workplace relations framework into alignment with these international efforts to address pay disparities impacting labour hire employees.

Jurisdiction	Description
European Union	<p>In 2008, the European Union (EU) issued Directive 2008/104/EC to member states, establishing the equal treatment principle (ETP) for labour hire workers to receive the same ‘basic working and employment conditions’ as directly engaged employees.⁶⁴</p> <p>Exemptions are provided for collective opt-outs (for example, for certain industries in Germany), for receiving pay between assignments, and there is a qualifying period. Member states are obliged to enact anti-avoidance measures which prevent labour hire agencies providing successive short-term assignments to circumvent the qualifying period. Equal treatment rules in the</p>

⁶¹ See, e.g., Third Interim Report, p 72 [4.43].

⁶² ABS, *Labour Hire Workers, June 2022*, using *Jobs in Australia, 2019-20*.

⁶³ Noting data is limited with respect to identifying the number of Indigenous Australians who may be engaged as labour hire workers and who may be impacted by the proposal.

⁶⁴ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

	<p>EU vary from state to state, reflecting differences in industrial relations frameworks.⁶⁵</p> <p>A European Commission report indicated all but two Member states said the Directive itself did not create a significant administrative burden, and that of 768 small to medium enterprise surveyed, only 59 (7.68%) identified the Directive as being particularly administratively burdensome.⁶⁶</p>
<p>United Kingdom</p>	<p>In the United Kingdom (UK), a labour hire agency is responsible for ensuring that the treatment of their workers is consistent with workplace laws. Similar to the Government’s ‘Closing the labour hire loophole’ proposal, the UK model includes a qualifying period of 12 weeks before workers are entitled to receive equal treatment with respect to pay and conditions, after which time the worker becomes eligible for the same basic terms and conditions of employment as if they were employed directly by the host organisation.⁶⁷</p> <p>In the UK, the concept of ‘basic terms and conditions of employment’ includes pay, duration of working time, penalty rates and entitlements, rest periods, breaks, and annual leave. Equal treatment can be established by referencing terms and conditions ordinarily set out in the contracts of directly recruited employees, which may include an employment contract, pay scales, collective agreements, or internal policy. The administration of this rule relies on an ‘as if’ principle – that is, the labour hire worker is entitled to the same basic terms and conditions of employment <i>as if</i> they were a directly engaged employee.</p> <p>The Government’s proposal differs slightly to the UK model, insofar as the Government’s proposal relates only to employment arrangements where hosts have an enterprise agreement, avoiding the complexity and potential issues arising from requiring businesses to make comparisons and calculations with reference to the arrangements of a host employee.</p>
<p>Japan</p>	<p>Japan prohibits unreasonable and discriminatory disparity in treatment between regular and non-regular employees, where reasonableness of disparity in treatment must be considered against the nature and purpose of such disparity.⁶⁸ Employers must consider individual working conditions and be satisfied that this obligation is not contravened, including with respect to base salary, bonus and other treatments.</p>

⁶⁵ See, e.g., OECD, *Detailed description of employment protection legislation, 2012-2013* (2013); European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2008/104/EC on temporary agency work* (2014) 4.2.

⁶⁶ *Ibid*, 15-6.

⁶⁷ *Ibid*, 18.

⁶⁸ Act on Improvement, etc. of Employment Management for Part-Time and Fixed-term Workers 1993, Article 8.

Option 2 – Maintain the status quo

The Fair Work Act currently allows labour hire employees to be paid less than what they would be paid under a host’s enterprise agreement if they were directly employed. This is the loophole that the Government seeks to address with this proposal.

Maintaining the status quo would allow hosts to continue using labour hire to supplement their workforce when and as needed (as does Option 1), but Option 2 does not protect the bargained wages that a host has agreed is the value of the work performed at its workplace.

For hosts, labour hire employers and labour hire employees – what will the costs and benefits of the proposal be?

Parties	Analysis of costs and benefits
Hosts	<p>Maintaining the status quo would not give rise to additional costs for hosts. Hosts would be able to continue entering into arrangements with labour hire employers to receive workers being paid less than what they would receive under the host’s enterprise agreement. There would be no express obligation on hosts to engage with labour hire employers when, for example, responding to requests for information about interpreting the host’s enterprise agreement to make correct payments to labour hire employees.</p>
Labour hire employers	<p>Maintaining the status quo would not give rise to additional costs for labour hire employers. There would be no obligation to pay labour hire employees at least what they would be paid under a host’s enterprise agreement. Existing industrial arrangements could continue operating uninterrupted, without the potential impacts on revenue that may arise under Option 1.</p>
Labour hire employees	<p>By maintaining the status quo, some labour hire employees would continue to receive wages lower than what they would be paid under a host employer’s enterprise agreement.</p> <p>Maintaining the status quo would be unlikely to give rise to any benefits to labour hire employees. That said, some stakeholders relayed to the department during consultations that the status quo currently allows labour hire employers greater flexibility with respect to setting their own industrial arrangements, and consistency with respect to relying on those industrial arrangements to be able to calculate lawful wage payments to employees. Some stakeholders suggested that by requiring labour hire employers and hosts to comply with proposed new obligations if a Fair Work Commission order is made, revenue and profitability would be put at risk – and, by extension, risking the job security of affected labour hire employees.</p> <p>In this regard, the benefit that could be taken from the status quo is that job security for labour hire employees <i>in their current labour hire jobs</i> may be maintained (as a result of maintaining existing profitability for affected business). However, and importantly, the department is unable to verify these stakeholder assertions and does not have access to data that would suggest the increased wage cost flowing from this proposal would displace profitability and job security to a measurable degree.</p>

Put another way, the department does not have data to suggest that the Government's proposal would adversely impact profitability and job security to a degree that might suggest maintaining the status quo should be preferred. Nevertheless, stakeholder views about this issue have been considered by the department in the course of consultations and preparing this analysis.

Having weighed Options 1 and 2, what is the net benefit of the Government's proposal?

The Government considers there is a loophole in the Fair Work Act which allows bargained wages in enterprise agreements to be undercut by the use of labour hire. This is because the Fair Work Act currently allows labour hire employees to be paid less than what they would be paid if they were directly employed by a host and paid under the host's enterprise agreement. This has informed the Government's election commitment to address the pay differential currently adversely impacting some labour hire employees.

Progressing the Government's proposal will lead to an increase in labour costs for labour hire employers and hosts covered by a Fair Work Commission order, where affected labour hire employees are being paid less than what they would be paid under a host's enterprise agreement. Labour hire employers and hosts will also face costs when engaging with applications made to the Fair Work Commission. However, these costs will be tempered by the reduced number of labour hire employees that are expected to apply for and be covered by a Fair Work Commission order.

The number of labour hire employees in Australia is low (2.3% of all workers, or 319,900), and the fact that of those 319,900, only around 60,446 are estimated to be eligible to apply for a Fair Work Commission further reduces the impact of this proposal directly impacted by the proposal – noting, again, the data limitations with identifying the number of workers potentially affected, and noting that, when adding broad estimates for internal labour hire workers, this figure rises to 66,446.

With this front of mind, and with regard to the various benefits to labour hire employees and the protection of bargained wages, the department has weighed the costs and benefits of the options described above and recommends pursuing Option 1: Legislate the Government's 'Closing the labour hire loophole' proposal.

Impact Analysis Question 5:

Who did you consult and how did you incorporate their feedback?

Purpose and objectives of consultation

Consultation is a core element of policy making and workplace relations reform. An effective consultation process can lead to better policy outcomes and greater acceptance of a policy in the community, particularly among those who will be affected by its implementation. Various stakeholders are involved by the department in consultation processes in relation to workplace relations reform, including employer groups, community organisations, employee representatives, academics, and civil society.

In workplace relations, consultation can take place through several avenues. For example, the *National Workplace Relations Consultative Council Act 2002* establishes the National Workplace Relations Consultative Council (NWRCC). The purpose of the NWRCC is to provide, in the public interest, a regular and organised means by which Government representatives, and representatives

of employers and of employees (and, when the Minister considers it appropriate, representatives of other persons, bodies and organisations) may consult together on workplace relations matters of national concern.⁶⁹ The Committee on Industrial Legislation (COIL) also meets when required to provide technical input on draft or existing workplace relations legislation.

The department also engages in ongoing consultation with a broad range of stakeholders on workplace relations legislation implementation and operation.

Consultation process undertaken by the department regarding this proposal

The department has engaged in open public consultation on the Government's 'Closing the labour hire loophole' proposal. During initial consultations undertaken in 2022, the department met with over 40 stakeholders including employers, peak industry and employer groups, labour hire providers, unions and State and Territory governments across 15 consultation meetings. The purpose of those initial consultation sessions was to seek to understand how and why different businesses use labour hire, how labour hire providers operate, and to invite stakeholder views on how a 'Closing labour hire loopholes' measure might work in practice.

More detailed consultations occurred from February to August 2023, with more than 45 consultation sessions on this proposal, held with over 75 stakeholders. The purpose of these more detailed consultations was to understand concerns and suggestions that stakeholders had in relation to implementing this proposal, test key policy parameters with stakeholders, and inform analysis ahead of final policy decisions being made by Government.

In order to support consultation and discussions with stakeholders about the impact of the Government's proposal, the department also called for written submissions via its public website and direct emails to identified stakeholders. Responses were sought to an initial one page summary of the proposal, which informed a subsequent detailed Consultation Paper released in April 2023.

The detailed Consultation Paper invited stakeholder views on each aspect of the proposal and anticipated costs and impacts. The department received over 80 written submissions from stakeholders about this proposal. All consultation sessions and written submissions are treated by the department as confidential, to encourage stakeholders to provide frank feedback about proposals and potential impacts on corporate arrangements, individual businesses, and the broader economy (noting some of these details may be commercially sensitive).

This was followed by meetings of the NWRCC and of Workplace Relations Ministers to discuss the Government's proposals at a high level on 8 June 2023. Both meetings were Chaired by the Minister for Employment and Workplace Relations.

The department held a further full day of consultations with key employer and union stakeholders on 16 June 2023. Participants provided the department with feedback, examples and suggested options in response to the details discussed.

In addition to views provided in response to consultation conducted directly by the department, the department also considered various stakeholder views that informed the Third Interim Report, EPEW Report, and Victorian Inquiry Report. Each of those reports was informed by extensive stakeholder consultation, and collectively, received more than 900 written submissions accompanied by 140 hearings.

⁶⁹ *National Workplace Relations Consultative Council Act 2002*, s 5.

Following further stakeholder consultations in mid-2023 on a preferred model for this proposal, and in light of additional stakeholder feedback (including from employer representatives), the department gave further consideration to the mechanics of this measure, such as how entitlements might be triggered and the administrative burden on business. This consideration informed the Government's proposal to have this measure apply by application-only, to provide certainty to business about when obligations apply while still providing labour hire employees and their representatives a pathway to being paid at least the rates calculated under a host's enterprise agreement.

Summary of stakeholders' main views

Stakeholders were asked to provide the department with any assumptions, data sources or workings in relation to any assessment of costs that may arise from the

Government's proposal. Stakeholders were also invited to comment on any other positive or negative consequences of this proposal that may arise for affected parties (including, where relevant, small business).

During early consultation, few stakeholders addressed directly the questions set out in the Consultation Paper regarding costs and impacts. For example, the following two employers provided a monetary estimate about what this specific proposal would cost them (noting the information described has been made publicly available by relevant stakeholders, or has been anonymised to avoid disclosing identifying information):

1. BHP estimated the proposal would cost them \$1.3 billion per year.⁷⁰ At the department's request, BHP provided further information with respect to this modelling, on a confidential basis. The department has considered this information and does not consider that it aligns with the scope and anticipated application of this proposal.
2. A meat wholesaler with over 1,500 employees estimated the proposal would cost them \$2 million annually, if legislated. The stakeholder did not indicate how many labour hire employees they receive in any given time period, so the department is unable to determine any potential pay difference between labour hire employees and their own employees.

Many stakeholders noted during consultation the difficulty in quantifying costs, as pay rates and project costs often vary from business to business or project to project. Others noted that costs will vary depending on business size, composition, and reliance on labour hire. The department acknowledges stakeholders' views about the complexity associated with quantifying the impacts of the proposal, which have informed the caveats in this analysis about the underpinning assumptions and limitations of the costs that have been estimated.

Overall, employer stakeholders identified a number of other perceived negative impacts from the proposal, including on bargaining, productivity, the ability to deal with surge requirements and seasonal fluctuations, inflation, jobs and investment. For example, employer representatives submitted that the proposal could be a disincentive for labour hire employers to bargain, as bargained agreements that apply to labour hire employers and their employees will be 'overridden' by host enterprise agreement wage rates where they are higher. The department notes that the risk of labour hire employers seeking to avoid enterprise bargaining in the wake of this proposal is mitigated (at least, to a degree) by the recent enterprise bargaining reforms in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay Act) 2022*. These include reforms to make it easier

⁷⁰ Coorey, Phillip, 'BHP "right to fear" \$1.3b wages hit', *Australian Financial Review*, 23 May 2023.

for employees to commence bargaining for a replacement agreement and to strengthen the Fair Work Commission’s power to resolve intractable bargaining disputes.

Employer representatives also submitted that the Government’s proposal would drive up labour costs, making hosts less likely to use labour hire and leading to labour hire employers becoming unprofitable and ceasing operations. Employer stakeholders submitted that this, in turn, would lead to losses in productivity as hosts would not be able to access labour hire when they need to.

While the ‘Closing the labour hire loophole’ proposal will lead to increased labour costs in some circumstances, the proposal is intended to protect bargained wages and address pay disparities for labour hire employees. It is also intended to remove an economic incentive for hosts to prioritise externally sourced labour over direct employment, especially where work is ongoing as part of the host’s business. If the proposal does result in a reduction in the use of labour hire, an increase in direct employment is reasonable to expect if hosts still need work to be performed.

Employer representatives also raised concerns that the Government’s proposal would reduce their ability to deal with fluctuations in demand or cover absences. The proposal does not prohibit hosts from using labour hire to respond to a short-term increase in demand for goods or services, seasonal fluctuations, or to cover temporary absences. Instead, it will ensure that where a host requires labour hire for longer than 3 months (by default), the labour hire employees must be paid at least the same as the rates in the host’s enterprise agreement. Additionally, during the application process for a Fair Work Commission order, hosts can apply to the Fair Work Commission have the default period extended, or recur annually, in exceptional circumstances.

Some employers submitted during consultation that the proposal would lead to increases in inflation, due to an increase in wages. This is unlikely, given the relative number of labour hire employees who could be impacted and entitled to higher pay. The current inflationary environment has been principally driven by global price shocks, including pandemic-related supply chain disruptions and the Russian invasion of Ukraine. Analysis from the Reserve Bank of Australia (RBA) notes that supply shocks account for around three quarters of the pick-up in inflation.⁷¹ While wages growth has increased over the last few years, it has not kept pace with the rapid rise in inflation, and the RBA estimates that due to structural differences in the labour market since the 1970s, the effect of wage rises on inflation is low.⁷²

Areas of agreement and difference between stakeholders, and how stakeholder views informed the design of the preferred approach (Option 1)

The following section summarises areas of agreement and difference between employers and their representatives, and employees and their representatives, expressed during consultation on this proposal. The views of individuals and specific organisations have not been included, given consultations with the department were undertaken on a confidential basis.

1. When the measure is activated	
Areas of agreement	This proposal having an application-based model was not expressly referred to in the department’s Consultation paper, but the scope of this proposal, questions about when and how obligations under this measure would be activated and

⁷¹ Reserve Bank of Australia, *Statement on Monetary Policy – February 2023*.

⁷² Suthaharan, N and Bleakley, J, ‘Wage-price dynamics in a high inflation environment: the international evidence’, *Reserve Bank of Australia, Bulletin – September 2022*, p 59.

	<p>imposed on businesses, was a central point of discussion.</p> <p>Employers and employee groups generally did not agree on the scope of the proposal, including who should be captured. There was some level of agreement between stakeholders that labour hire should not be used to deliberately undercut enterprise agreements and that businesses that engage in sharp business practices to undercut bargained wages should be the focus of the proposal. Stakeholders disagree about the extent to which this occurs, if at all.</p> <p>Similarly, there is some level of agreement that an exemption for the use of 'specialist' skills should be considered, though stakeholders generally disagree about the extent of any specialist exemption.</p>
<p>Areas of difference</p>	<p>Employers generally wanted a narrow scope and suggested this proposal should be limited to 'traditional' labour hire arrangements (that is, where third party labour hire employers provide employees to work in a host business). Where employers made submissions about defining 'labour hire' for the purpose of this proposal, they generally favoured the definition found in the <i>Labour Hire Licensing Act 2018</i> (Vic),⁷³ or the definition of 'on-hire' set out in modern awards.⁷⁴</p> <p>Many employers and their representatives suggested various exclusions from the scope of the proposal. These included service contracting and outsourcing arrangements, independent contractors, entities within the same corporate group, high-income earners, surge periods, small businesses and labour hire employers covered by an enterprise agreement of their own.</p> <p>Labour hire employers who participated in consultation opposed the proposal generally, but acknowledging the Government's election commitment, generally advocated for the proposal to have broad application to all arrangements regarding the provision of labour. These submissions appeared to be informed by a view that it would be unfair (with respect to commercial competitiveness) to limit the proposal to labour hire and not capture other arrangements.</p> <p>Employee organisations advocated for the proposal to have broad coverage with few exemptions (for example, arrangements captured by the transfer of business provisions in the Fair Work Act, and the provision of temporary specialist work). Other stakeholders, such as academics, supported the scope of the proposal covering traditional labour hire arrangements, and State and Territory governments emphasised the importance of aligning any definitions of labour hire with existing labour hire licensing schemes.</p> <p>In later stages of consultation, some employer representatives suggested that obligations should only apply where an application is made to the Fair Work Commission, rather than the obligation automatically applying across all hosts and labour hire employers.</p>
<p>How views informed the</p>	<p>The preferred option for the proposal has been developed to capture only those arrangements where a labour hire employer supplies an employee to work for a</p>

⁷³ *Labour Hire Licensing Act 2018* (Vic), s 7.

⁷⁴ See, e.g., Aircraft Cabin Crew Award 2020 [MA000047], cl 2.

design of the preferred option	<p>host, and the host has an enterprise agreement that would apply to the employee if they were directly employed by the host. Independent contractors will not be captured by the measure.</p> <p>The preferred option will also capture the supply of workers between entities within the same corporate group (referred to by the department in general terms as ‘internal labour hire’). This is because labour exchanged between these entities can still undermine bargained wages within enterprises.⁷⁵</p> <p>The proposal has also been designed in response to stakeholder feedback so that the provisions, by default, do not apply to arrangements of 3 months or less – unless that exemption period is altered by the Fair Work Commission in exceptional circumstances. This exemption accommodates situations where labour hire is required to meet surge work or fill temporary absences, and can be ordered by the Fair Work Commission as a recurring period if satisfied it is appropriate to do so (to avoid the need for hosts to apply to the Fair Work Commission an extension of the exemption period each year).</p> <p>The preferred option also responds to stakeholder feedback about the complexity of specialist work and service contracting arrangements.⁷⁶ Labour hire employers and hosts in these service contracting arrangements can draw this to the Fair Work Commission’s attention if an application is made, with the view to the Commission balancing that information and determining that an order should not be made (noting this remains a matter for the Commission to decide).</p> <p>In response to feedback from some employer representatives, employees under training arrangements that apply to their work for the host are also excluded from the proposal. Arrangements where the host is a small business employer are also excluded, noting the department heard from stakeholders that small businesses do not use labour hire to the same extent as larger businesses but that when they do, they are more heavily reliant on it to fill labour shortages.</p>
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2. What happens when an order is made	
Areas of agreement	<p>Many stakeholders agreed that an obligation to pay a labour hire employee a higher rate of pay should be determined with reference to a host’s enterprise agreement. Some employer and employee representatives made submissions advocating for a direct and hypothetical comparator employee, though employee representatives submitted that the proposal should be triggered even if a host did not employ a person doing the same job as a labour hire worker.</p>
Areas of difference	<p>When consideration was still being given to this proposal being one under which obligations were imposed on labour hire employers and hosts automatically (rather than only by application), some employer representatives raised concerns with the administrative burden on labour hire employers to figure out</p>

⁷⁵ See, e.g., Third Interim Report, p 61 [3.67].

⁷⁶ See, e.g., Australian Resources and Energy Employer Association, *Same Job, Same Pay: Resource employers urge Gov to exclude contractors*, 12 June 2023 <www.areea.com.au/news-media/media-center/media-release-job-pay-resource-employers-urge-gov-exclude-contractors/>.

whether they were covered by the measure, and then to work out the correct rate of pay. Concerns were also raised regarding a lack of certainty for business about whether an arrangement was covered by the measure. For example, concerns were raised by a number of employer representatives about service contracting being caught by the measure, and asserted that these arrangements should be differentiated from labour hire and excluded outright.

Before an application-based model was canvassed with stakeholders, some employer representatives supported obligations being enlivened where a worker would be covered by a classification in a host's enterprise agreement, submitting this was a practical and transparent method for determining when a worker should be entitled to a higher rate of pay, in a way that aligns with the overall intent of the proposal – that is, to protect *bargained* wages from being undercut. One peak employer body noted that classifying an employee under an industrial instrument is a practice that has been applied in Australia for decades and there is stable jurisprudence associated with such a task.

Most employer groups advocated for using 'base rate of pay' to calculate a labour hire employee's entitlements under this proposal, whereas employee organisations and academics supported using the concept of 'full rate of pay' (which has ultimately been adopted).

Employer stakeholders argued that going beyond the base rate of pay to calculate loadings, allowances, overtime, and penalty rates would be onerous and unworkable for business. Employer representatives argued the complexity of using 'full rate of pay' by referring to, for example, different pay periods and methods for calculating entitlements that can arise between industrial instruments, the need for labour hire providers to consider Single Touch Payroll compliance, and that requiring a labour hire employer to apply rules regarding these entitlements – as prescribed in a host enterprise agreement, where these differ from the labour hire employer's ordinary practices – would lead to heightened administrative burden and compliance risks.

Many employers also raised concerns with the inclusion of incentive and performance-based pay, arguing these would be difficult for labour hire employers to calculate. Labour hire employers generally supported what they referred to as 'identifiable' pay in an agreement and requested clear guidance on how to calculate entitlements.

Employers also raised concerns with labour hire employees being paid the same as host employees without taking into account differences in skills, experience and qualifications. They argued that requiring labour hire employees with little to no experience to be paid the same as more qualified or experienced host employees would be an adverse outcome of the proposal.

Few stakeholders addressed how enforcement of the proposal should work. Of the employer organisations that did address enforcement, some submitted that penalties should only apply to *deliberate* breaches of statutory obligations. Employee organisations wanted unions to have the power to enforce relevant provisions and supported civil penalties for breaches, and for breaches to be treated as underpayments.

	<p>Where employers addressed the topic of transition, they requested a long transition period (more than 12 months after Royal Assent). A number of employer representatives advocated for that period to be at least 1-2 years.</p>
<p>How views informed the design of the preferred option</p>	<p>The final design of the proposal is an application-based model where obligations on business will only be activated by application to the Fair Work Commission.</p> <p>During this application, it will be open to business to draw to the Fair Work Commission’s attention the nature of the arrangement in place, including whether it is a service contracting arrangement, which will inform whether the Commission will make an order. The capacity for parties to address this in the Commission is intended to address concerns raised by employer representatives who sought clarity on the types of arrangements to which this measure applies.</p> <p>During an application, information is expected to be provided by a host to the Fair Work Commission and other parties about how to interpret their enterprise agreement and the rates that would be payable to affected labour hire employees if they were directly engaged. The disclosure of this information during the application process, and the fact that the Fair Work Commission may set out the correct rate of pay in an order, should allay concerns from labour hire employers about not having sufficient information to be able to comply with a Fair Work Commission order.</p> <p>When an order is made, payments to labour hire employees will be calculated with reference to the ‘full rate of pay’ in the host’s enterprise agreement. While stakeholders raised administrative burden as a reason for limiting this proposal to the ‘base rate of pay’, for many workers a notable portion of their income comes from penalties, loadings and allowances – to exclude these from the proposal would be insufficient to protect bargained wages and would risk labour hire employees being paid less than host employees under such agreements.</p> <p>In order to address concerns about labour hire employees being paid the same as host employees with disparate skills and experience, the proposal will operate so that where there are multiple classifications and/or multiple pay points for a classification in a host’s enterprise agreement that are distinguished based on employee skills, qualifications and/or experience, the obligation on labour hire employers is to pay pursuant to the pay point referable to the employee’s skills, qualification, experience.</p>

<h3>3. How disputes are resolved</h3>	
<p>Areas of agreement</p>	<p>Most stakeholders supported the Fair Work Commission having a role in resolving disputes. Few stakeholders opposed the Fair Work Ombudsman regulating the proposal.</p>
<p>Areas of difference</p>	<p>Employer groups proposed that parties be required to attempt to resolve disputes at the workplace level before applying to the Fair Work Commission. Most employer representatives did not support the Commission having the power to arbitrate disputes, <i>unless</i> by consent of the parties. A small number of employer representatives did not want the Commission to have a role in</p>

	<p>resolving disputes at all.</p> <p>Employees and employee organisations supported the Commission having broad powers to deal with disputes in any way it sees fit, including arbitration and the ability to make orders determining correct pay rates. Some stakeholders supported a process for affected parties (such as labour hire employees) to be able to apply to the Commission for guidance prior to the commencement of a labour hire arrangement to obtain clarity about their entitlements and obligations.</p> <p>Regarding commencement timeframes, employer representatives sought a lengthy period before the measure commences (1-2 years). Employee representatives sought for all provisions to commence immediately.</p>
<p>How views informed the design of the preferred option</p>	<p>If disputes arise after a Fair Work Commission order has been made, the proposal requires that resolution is attempted at the workplace level <i>before</i> applying to the Commission for dispute resolution. If parties consent, the Commission will have the power to arbitrate, including to order backpay and prospectively determine the correct rate of pay. If parties do not consent, the Commission can only prospectively determine the correct rate of pay, with backpay only available through court action. Consistent with the Fair Work Ombudsman’s role as regulator of the Fair Work Act, the Ombudsman will be able to enforce entitlements and obligations under this proposal.</p> <p>The proposal includes anti-avoidance provisions that prohibit behaviour intended to prevent a Commission order being made. Few stakeholders gave feedback on anti-avoidance measures. Those employer organisations who did sought simple and confined measures, while employee organisations supported broad anti-avoidance provisions to prevent a multitude of corporate behaviours that may be designed or used to circumvent obligations.</p> <p>Taking into account stakeholder requests for a transition period after Royal Assent that would give businesses time to prepare for new obligations, orders made by the Commission will only be enforceable on and from 1 November 2024, however applications can be made from Royal Assent to clarify entitlements and obligations in advance. Anti-avoidance provisions will apply retrospectively from the introduction of the Bill to the House of Representatives, to deter hosts and labour hire employers from altering their arrangements to avoid the new obligations before the Bill is passed.</p>

Impact Analysis Question 6:

Which is the best option and how will it be implemented?

Which is the best option?

The Government is seeking to amend the Fair Work Act to limit circumstances in which the use of labour hire undercuts bargained wages. Option 1 (legislating the Government’s ‘Closing the labour hire loophole’ proposal) achieves this and aligns with the principles considered by the department during the design of this policy (see above under Impact Analysis Question 4, and the table below).

The issue addressed by this proposal has been considered extensively in (at least) three. The Job Security Committee and the Victorian Inquiry thoroughly reviewed the status quo and sought views on alternate options for addressing the operation of the Fair Work system that allows the use of labour hire to undercut bargained wages. Legislating the ‘Closing the labour hire loophole’ proposal is consistent with the findings and recommendations of these Reviews.

The department’s assessment of Options 1 and 2 against its four guiding principles is, in summary:

	Option 1: (Legislative measure)	Option 2: (Status quo)
Business should be able to access labour hire for genuine work surges and short-term needs	Very Good	Very Good
Labour hire employees should be paid at least the amount provided in a host’s enterprise agreement, where that agreement would apply to the employee if they were directly employed	Very Good	Poor
Employers should not be able to undercut enterprise agreements through the use of labour hire	Very Good	Poor
The proposal should only impose a reasonable regulatory burden on affected parties	Good	Very Good

Note: The department has assessed each Option against these four principles, having regard to the impacts on stakeholders. ‘Very good’ is considered to be an optimal outcome for stakeholders intended to benefit from the proposal. ‘Good’ is considered to be a positive outcome for stakeholders. ‘Fair’ is considered to be an adequate outcome with little impact on stakeholders. ‘Poor’ is considered a negative outcome for stakeholders.

Which option is the most effective, appropriate, efficient, and least costly?

Option 1 is the preferred measure because it is, on balance, the most effective, appropriate and efficient option for achieving the Government’s aims to prevent the use of labour hire undercutting bargained wages. It is the most effective option because it involves legislating to address the regulatory shortfall in the Fair Work Act which currently allows labour hire employees to be paid less than what they would be paid under a host’s agreement, and is appropriate and efficient because it is structured as an application-based model. This means that only those labour hire arrangements in which labour hire employees are paid less will be covered by a Fair Work Commission order, insulating hosts and labour hire employers from additional administrative burden in industries where the use of labour hire does not, or does not *often*, undercut bargained wages, without the need to expressly carve out entire industries of the Australian economy from the scope of the proposal.

Option 1 addresses the problem identified by Government and does not prevent business from accessing labour hire for genuine work surges and short term needs. Businesses can also still access labour hire longer term, but labour hire employees must be paid no less than what they would be paid under the host’s enterprise agreement if they were directly employed, in cases where a successful application has been made. This removes an economic incentive for employers to undercut bargained rates through the use of labour hire.

Conversely, Option 2 (maintaining the status quo) does not meet the Government’s election commitment or adequately align with the guiding principles considered above in relation to measuring an effective resolution to address identified issues. While maintaining the status quo essentially means a continuation of existing labour hire arrangements and does not impose

additional regulatory burden on business, it does not ensure that labour hire employees are paid at least the rates in a host's agreement, meaning the use of labour hire could continue to undercut those rates.

Option 1 is a targeted measure that will only apply to businesses as a result of a Fair Work Commission order, and the Fair Work Commission will be empowered to resolve disputes in an efficient and cost-effective manner. Anti-avoidance measures will ensure parties are aware of prohibited behaviours and will deter them from attempting to avoid their obligations.

It is acknowledged that Option 1 is likely to increase costs for some businesses, due to the increased labour and administrative costs for those responding to an application for a Fair Work Commission order (and bound by such an order if one is made). These costs are considered reasonable to ensure bargained wages are not undercut.

While Option 2 imposes no new costs on hosts and labour hire employers by retaining current arrangements, it does not address concerns identified by Government and articulated in its election commitment. It also does not address some of the secondary benefits outlined above, such as improvements in job security and work health and safety outcomes, including mental health outcomes. The World Health Organisation (WHO), for example, has outlined how decent work supports good mental health by providing a livelihood, and improved confidence and social functioning.⁷⁷ Higher paying and quality jobs can deliver better outcomes, including improved financial freedom, improved health outcomes, and a stronger link between the employer and employee leading to higher staff retention, increased investment in education and training, and improved productivity.⁷⁸

Decision-making process

As set out above, the Government made an election commitment to legislate this proposal. The department has consulted over a considerable period of time with a broad range of stakeholders on the design of the policy and its costs and impacts. Consultation involved extensive meetings and the review of written submissions in response to the Consultation Paper. The department has had regard to stakeholder submissions and arguments in the design of the policy, particularly where submissions spoke to the operation and practicality of its implementation.

How will the option be implemented?

Implementing Option 1 will require legislative amendments to the Fair Work Act. The Fair Work Commission, as the tribunal that will handle applications from employees, will play a central role in the implementation of the policy. The Government has allocated \$3.4 million over 4 years to the Fair Work Commission as part of the 2023-24 Budget to prepare for the commencement of this proposal. The Fair Work Commission will be required to publish guidance about the operation of this proposal, which will assist parties navigate their entitlements and obligations. The Fair Work Commission may establish a dedicated practice area and case management practices to support Members dealing with disputes.

The Fair Work Ombudsman will publish guidance about the operation and application of the proposal, including the roles and responsibilities of host employers, labour hire providers and workers. Parties will be able to access information and assistance from the Ombudsman about

⁷⁷ World Health Organization, 'Mental health at work', September 2022.

⁷⁸ OECD, *Measuring and Assessing Job Quality: The OECD Job Quality Framework*, 2015.

understanding and meeting the new obligations, and about dealing with disputes that may arise under the provisions.

The Fair Work Commission and the Fair Work Ombudsman will both play roles in dispute resolution and enforcement, with the Fair Work Commission able to deal with disputes that arise after an order is made.

Implementation risks regarding this proposal are considered to be low. There is a risk that some labour hire employees eligible to apply to the Fair Work Commission may choose not to do so, perhaps with reservations about adverse treatment from their employer if they are seen to be pursuing higher rates of pay in the Fair Work Commission. For example, casual labour hire employees may be concerned that applying to the Fair Work Commission may result in their rostered hours being reduced. As 84 per cent of labour hire employees are employed casually, this concern may affect a significant proportion of employees eligible to seek an order. It would be open to any employees who experience adverse action as a result of exercising workplace rights under this proposal to explore their rights and options for recourse under the Fair Work Act's General Protections provisions.⁷⁹

Further, some labour hire employers, hosts and affected employees may take some time to become aware of the proposal, even after it is legislated, unless given guidance. However, this risk will be mitigated through the advisory and stakeholder engagement work that forms part of the Fair Work Ombudsman and Fair Work Commission's roles, and an express obligation in this proposal for the Commission to make clear guidance material available to the public.

There is also a risk that employers may develop new practices or alter corporate structures to avoid new obligations or prevent Fair Work Commission orders from being made. This risk, however, will be mitigated by the anti-avoidance provisions to be included in the Fair Work Act, capable of enforcement by affected parties and the Fair Work Ombudsman.

In addition (though separately to this proposal), the Government has allocated \$25.1 million over 3 years to the Productivity, Education and Training (PET) fund. The PET fund is for key employer and employee representative organisations to engage with Government on workplace reforms, and to support the development and roll out of training and education activities for their members. Funding supports an understanding and implementation of the Government's workplace relations reforms at the workplace level, including the 'Closing the labour hire loophole' proposal.

Impact Analysis Question 7:

How will you evaluate your chosen option against the success metrics?

Consistent with its existing remit to monitor and advise on the implementation of recent Government reforms, and the operation of workplace relations laws and policies generally, the department will incorporate evaluation practices relating to this proposal into its current functions upon this proposal being legislated.

In order to provide timely and accurate advice to Government, in real time, about the impact of this proposal once legislated, the department will monitor Fair Work Commission decisions with respect to applications for orders to activate the proposal, including the Commission's consideration of the various discretionary factors to be included in the Fair Work Act (to identifying whether the Commission is affording weight to those factors in a manner consistent with pre-legislative

⁷⁹ See ss 365 and 372 of the *Fair Work Act 2009*

expectations). Policy and legal teams in the department will update tasking priorities to include tracking these Fair Work Commission decisions, having regard to, for example:

- the number of orders applied for and made
- the pay disparity between labour hire employees and host employees, and any subsequent pay increase for labour hire employees after orders are made
- the common industries in which businesses responding to applications belong
- the types of exemptions considered and determined by the Fair Work Commission in its decision making
- the rate of disputes that are lodged with the Fair Work Commission for resolution after an order is made

Advice to Government, particularly in the first 1-2 years of its operation, will inform policy considerations with respect to whether further amendments to the Fair Work Act may be needed, or other action is necessary to ensure the Government's policy intent is met.

Broadly, the Government's proposal will be considered effective if there is an observable increase in the wages paid to labour hire employees. Specifically, key metrics for successful implementation of this proposal, and indicators as to whether the proposal is effective in achieving its intended outcome, will include:

- a reduction in the wage gap between labour hire employees and host employees within industries and/or occupations where there had been a negative wage gap; and
- an increase in direct employment in industries with high rates of labour hire use.

ABS wage data will be matched with outcomes from Fair Work Commission orders over time, to evaluate whether the proposal is leading to an increase in wages for covered labour hire employees.

Data to assess these metrics will be derived from ABS publications on the use of labour hire and on median wages of labour hire employees compared to all employees. As noted throughout this analysis, there are limitations in the ABS data that will continue to impact the department's ability to measure the impact of the proposal in detail.

The proposal will also be considered effective if disputes are handled efficiently and effectively by the Fair Work Commission. Key metrics with regard to this are expected to include:

- Parties impacted by the provisions understanding their rights and obligations and, where relevant, complying with the provisions (this will be informed by data captured by the Fair Work Ombudsman and rates of court litigation to enforce these provisions).
- Low levels of disputes notified to the Fair Work Commission regarding this proposal.
- Key Performance Indicators within the Fair Work Commission regarding frequency and settlement timeframes for disputes reducing over time.

In addition to all of the above, the department will also continue to use its existing processes for consultation and engagement with employers and employees and their representatives in relation to workplace relations matters, in order to evaluate how the measure is working in practice – for example, through NWRCC, and other opportunities for stakeholder engagement that arise over time.

Detailed wage costings

Summary and methodology

The Government's 'Closing the labour hire loophole' proposal will lead to an increase in wages for labour hire employees who are currently seeing their wages undercut. This increase in wages is estimated to be up to \$510,552,085 per year, with a 10 year cost of up to \$5.1 billion.

This estimate of around \$510.6 million per year is the upper limit of the estimated wage bill. This figure is informed by the assumption that 66,446 labour hire employees may be eligible to be covered by a Fair Work Commission order (that is, those employees who meet requisite criteria and experience a negative wage differential compared to host employee – the department estimates that those labour hire employees currently earn on average \$4.79 per hour *less than* non-labour hire employees).

However, the department expects that a notable proportion of these 66,446 workers will *not* be covered by a Fair Work Commission order, and that as a result, the total wage bill will be less than the \$510.6 million per year that has been estimated. Reasons for this may include:

- that an individual labour hire employee, or group of labour hire employees, may not apply to the Fair Work Commission for an order without assistance from a representative, meaning they may not benefit from an order; and
- where the difference between labour hire employees' wages and host employees' wages is minimal, some labour hire employees and/or their representatives may consider the administrative cost of engaging with the Fair Work Commission outweighs any monetary benefit to be gained (in which case, labour hire employers and hosts will not incur costs engaging with applications).

It may also be the case that labour hire employees are, at first, unaware that they are eligible to make an application, or that some labour hire employees may be disincentivised from applying due to a risk of adverse treatment from their employer for seeking higher wages in the Fair Work Commission and causing a business expense (noting the General Protections in the Fair Work Act will mitigate this risk).

However, in the absence of reliable data to reduce the proportion of labour hire employees who may bring an application, or have an application brought on their behalf, it not possible to defensibly reduce this wage cost estimate.

That noted, estimating the upper bound of an increase in labour hire employee wages means considering:

- a. the number of labour hire employees estimated to be in-scope of the proposal (that is, the number of employees that may be covered by a Fair Work Commission order following a successful application);
- b. the negative wage difference between labour hire employees and non-labour hire employees; and
- c. the average number of hours worked by labour hire employees in a year.

This means the increase in labour hire employee wages can be calculated with the following formula:

$$\text{Number of labour hire employees eligible to be covered by a Fair Work Commission order} \times \text{negative wage difference} \times \text{average weekly hours worked} \times \text{average weeks worked in a year} = \text{Annual wage increase}$$

Therefore:

$$66,446 \times \$4.79 \text{ (approx.)} \times 38.1 \text{ hours per week (approx.)} \times 42.1 \text{ weeks per year (approx.)} = \text{around } \$510.6 \text{ million}^{80}$$

Estimating the number of labour hire employees eligible to be covered by a Fair Work Commission order

The department estimates **66,446** labour hire employees may be eligible to be covered by a Fair Work Commission order. This figure excludes certain workers from headline ABS data about the total number of labour hire employees in Australia and includes an estimate for internal labour hire (where an employer provides labour to another employer in the same corporate group).

Exclusions

ABS data shows there are 319,863 labour hire employees in Australia (rounded elsewhere to 319,900).⁸¹ However, the following employees within that headline figure can be excluded from these calculations:

Exclusion	Rationale
Part-time labour hire workers	Part-time labour hire employees who have been employed for between 3 months and 2 years earn on average \$9.67 per hour more than part-time non-labour hire workers. ⁸² This means the Government's proposal is unlikely to apply to part-time labour hire employees (because there is no negative wage differential to justify the making of a Fair Work Commission order, because it would have no work to do), and they can be excluded from calculations. ABS data show that 81.2 per cent of labour hire employees work full-time. ⁸³ Therefore: $319,863 \times (81.2\%) = \text{around } 259,676$ (that is, the total number of labour hire employees, excluding part-time labour hire employees).
Labour hire engagements of 3 months or less	The default 3 month surge exemption will generally exclude arrangements of 3 months or less. ABS data show that around 75.4 per cent of full-time labour hire employees work in their jobs for more than 3 months, ⁸⁴ meaning 24.6 per cent of the 259,676 labour hire employees can be excluded from calculations. Therefore: $259,676 \times (\text{approx. } 24.6\%) = \text{around } 63,884$ ⁸⁵

⁸⁰ Note: Figures in the component parts of this formula have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

⁸¹ ABS, *Labour hire workers, June 2022*; using *Labour Account, June 2022*.

⁸² ABS, *Labour hire workers, June 2022*, using *Characteristics of Employment, August 2022*.

⁸³ Ibid.

⁸⁴ Ibid, using unpublished Tablebuilder.

⁸⁵ Note: Figures here have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

<p>Host employers without an enterprise agreement or that are a small business employer</p>	<p>The Government’s proposal only applies where the host has an enterprise agreement that would apply to the labour hire employee if they were directly employed, and where the host is not a small business (employing fewer than 15 employees). This means any labour hire employees working in hosts without an enterprise agreement, or working in hosts that have fewer than 15 employees, can be excluded from calculations.</p> <p>Enterprise agreement coverage varies significantly across industries. However, using ABS data on how labour hire employees are distributed across industries and the proportion of host employees covered by enterprise agreements in those industries, the department can estimate the number of labour hire employees placed in hosts with an enterprise agreement.</p> <p>In summary, ABS data suggest around 31.4 per cent of labour hire employees will be working in workplaces where the host has an enterprise agreement.⁸⁶</p> <p>While data are not available on the size of host employers, ABS data show that just 1.8 per cent of employees on enterprise agreements are employed in small businesses. Put another way, 98.2 per cent of labour hire employees on enterprise agreements can be estimated as work in hosts where the Government’s proposal will apply.⁸⁹</p> <p>Therefore: 195,869*(approx. 31.4%)*(approx. 98.2%) = around 60,446.⁸⁷</p>
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Accounting for internal labour hire

The 60,446 figure above does not account for internal labour hire arrangements. As set out in answer to Impact Analysis Question 4, the department has incorporated an additional 6,000 workers into calculations to account for internal labour hire, bringing the total number of workers to **66,446**.

Estimating the negative wage difference

The department estimates a negative wage difference for labour hire employees of **-\$4.79 per hour**. This figure is calculated by applying the following exclusions and adjustments.

Exclusions

Exclusions	Rationale
Excluding part-time labour hire workers	As above, ABS data show that on average part-time labour hire employees earn \$9.67 more than part-time non-labour hire workers. ⁸⁸ This means the proposal will not apply to lift part-time labour hire employee wages, and they can be excluded from calculations.
Excluding arrangements with more than	It is important to exclude data that may skew calculations. Data about the wages of people in their jobs for more than 2 years falls into this category.

⁸⁶ See together: ABS, *Characteristics of Employment, August 2022*, unpublished Tablebuilder; ABS, *Labour hire workers, June 2022*; using *Labour Account, June 2022*; ABS, *Employee Earnings and Hours, May 2021*, unpublished Tablebuilder.

⁸⁷ Note: Figures here have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

⁸⁸ ABS, *Labour hire workers, June 2022*, using *Characteristics of Employment, August 2022*.

two years' duration	<p>ABS data⁸⁹ show that the median wage of people in their job for <u>more</u> than two years is 19.1 per cent higher than the median wage of those in their job for <u>less</u> than two years. Further, 56.5 per cent of non-labour hire workers have been in their job for more than two years, but this is only 19.4 per cent for labour hire employees (reflecting the transient nature of most labour hire work).</p> <p>This means that if labour hire employee wages are compared against non-labour hire worker wages, non-labour hire worker wages will be skewed higher because, on average, they are in their jobs for longer. To account for this, the department has only compared labour hire wages with non-labour hire wages, where people have worked in their jobs for between 3 months and 2 years (the 3 month minimum reflects the proposal's default 3 month surge exemption).</p> <p>Confining data to those workers who have worked in their jobs for less than 2 years means average labour hire employee wages are \$35.46 per hour, and average non-labour hire worker wages are \$37.30 per hour. This means labour hire employees are paid on average \$1.84 less than non-labour hire workers, before adjustments.⁹⁰</p>
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Adjustments

Excluding arrangements that are longer than 2 years and part-time labour hire arrangements suggests the wage difference between labour hire workers and non-labour hire worker is **-\$1.84 per hour**. However, this hourly rate does not account for:

- a. casual loadings (including data suggesting labour hire employees who work full-time hours are more likely to be casuals than non-labour hire workers working full-time hours); and
- b. wage differences by occupation.

The table below takes the -\$1.84 per hour figure and accounts for these, to come to **-\$4.79 per hour**.

Adjustments	Rationale
Accounting for casual loading	<p>Having calculated a negative wage difference of -\$1.84, it is important to account now for casual loadings, using ABS data.⁹¹</p> <p>Around 80.5 per cent of labour hire employees working full-time hours do not have paid leave entitlements, compared with only around 14.7 per cent of non-labour hire workers working full-time hours not having paid leave entitlements.⁹²</p> <p>This suggests that, despite working full-time hours, many labour hire employees are likely to be casuals. Further, this means that despite generally receiving a casual loading (usually 25 per cent), labour hire employees working full-time hours are still receiving \$1.84 per hour <u>less than</u> non-labour hire</p>

⁸⁹ Ibid.

⁹⁰ Note: Figures here have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

⁹¹ ABS, *Labour hire workers, June 2022*, using *Characteristics of Employment, August 2022*.

⁹² Note: Figures here have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

	<p>counterparts (who are more likely to be permanent, given only 14.7 per cent do not have paid leave entitlements).</p> <p>To ensure calculations are comparing ‘like for like’ cohorts, it is necessary to reduce casual loadings from existing calculations in a way that reflects the likelihood of those workers actually being casuals (80.5 per cent and 14.7 per cent, respectively).</p> <p>Using ABS data on median wages for permanent and casual employees, and accounting for the percentages above of labour hire and non-labour hire workers without paid leave entitlements and estimated to be casuals,⁹³ the department estimates average wages are around \$29.08 per hour for labour hire employees and around \$36.41 for non-labour hire workers. This means the negative wage difference estimate comes to -\$7.33, which is the figure used for the final adjustment in the next row (see Table 2).⁹⁴</p>
Accounting for occupational differences	<p>The -\$7.33 per hour figure does not account for wage differences between occupations. ABS data show labour hire employees tend to work in lower paid occupations than non-labour hire workers (see Table 3).⁹⁵ To account for this, the department has adjusted calculations to account for different wage gaps between occupations, which brings average wages to \$31.62 per hour for labour hire employees and \$36.41 per hour for non-labour hire workers.</p> <p>This means the actual negative wage differential for labour hire employees, taking all of the above exclusions and adjustments into account, is -\$4.79 per hour (see Table 4).⁹⁶</p>

Estimating average hours worked

ABS data show that on average full-time labour hire employees work 38.1 hours per week for 42.1 weeks per year, where they have worked in their main job for more than 13 weeks (which, as a period of greater than 3 months, exceeds the default exemption period that will be considered when an application is made to the Fair Work Commission).⁹⁷ These data are used in the formula above.

Limitations

Labour hire employees and labour hire employers represent a small proportion of the overall labour market.⁹⁸ Available data on the labour hire workforce has significant limitations as result of the small

⁹³ Ibid.

⁹⁴ Note: Figures here have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

⁹⁵ ABS, *Labour hire workers, June 2022*, using *Characteristics of Employment, August 2022*.

⁹⁶ Note: Figures here have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

⁹⁷ ABS, *Labour hire workers, June 2022*, using *Characteristics of Employment, August 2022*; ABS, *Jobs and Income of Employed Persons 2019-20*. Note: Figures here have been rounded for readability. Final statistics have been calculated with regard to precise data points in ABS source material.

⁹⁸ In August 2022, 2.3% of all employed persons in Australia had a job in labour supply services: ABS, *Labour hire workers, June 2022* (released 6 December 2022), using ABS, *Labour Account, June 2022*.

sample size.⁹⁹ The department acknowledges these calculations contain a high degree of uncertainty as a result. Data limitations include the following:

- Precise statistical data taken from ABS sources has been rounded for readability. Final calculations regarding monetary costs, adjustments, and the number of employees falling into different categories (including exemption categories) are based on precise figures in source data and may reflect minor discrepancies above once added together.
- Available data do not identify individual circumstances. For example, while on average part-time labour hire employees are paid more than their non-labour hire worker counterparts, there will be occasions where a part-time labour hire employee is paid less.
- ABS's estimate of the number of labour hire employees (319,900) cannot be disaggregated by characteristics such as hours worked, hourly wage, industry or occupation of employment.
- ABS data is limited to businesses and their employees classified to the ANZSIC 4-digit industry class of 'labour supply services'. This includes a small number of 'direct' employees of labour hire firms (e.g., administrative, managerial and support staff).¹⁰⁰ If arrangements that may be caught by the Government's proposal have been classified using a different industry class, they will not be reflected in the calculations above.
- ABS data on internal labour hire employees and their working arrangements is not available through the Labour Supply Services industry disaggregation. As set out in answer to Impact Analysis Question 4, it is assumed the characteristics of this group of approximately 6,000 labour hire employees are the same as the characteristics of the broader group of labour hire employees, for whom there is ABS data available on earnings and working arrangements.
- It is assumed there are no changes, aside from a wage increase for the eligible employees, to the working arrangements of labour hire employees.
 - Specific outcomes, such as changes in hours worked, are dependent on the approach that different parties take to the amended provisions.
 - In order to include a more detailed estimate about potential changes to working arrangements in labour hire employer businesses, further assumptions would need to be made about the behaviour and decisions of independent parties, as well as the interaction between various other measures in the bill and other government reforms, and any changes in broader economic conditions.
- It is assumed that the coverage of enterprise agreements in hosts reflects the coverage of enterprise agreements for all employers within relevant industries. This assumption has been made because there is no data available on how many businesses use labour hire and whether those businesses have enterprise agreements.
- It is assumed that the proportion of labour hire employees working for hosts that are small businesses with enterprise agreements reflects the proportion of all employees in small businesses on enterprise agreements.

⁹⁹ The ABS notes that data sources relevant to understanding labour hire work 'have relative strengths and limitations': ABS, *Labour hire workers, June 2022* (released 6 December 2022).

¹⁰⁰ *Ibid.*

- In addition, while ‘small business’ for the purposes of this proposal is a business employing less than 15 employees, ABS data typically define small businesses as those with less than 20 employees. Accordingly, the estimate of 1.8 per cent of employees on enterprise agreements that are employed by small businesses refers to those with less than 20 employees, which is likely to be a minor overestimate in comparison to the share of businesses with less than 15 employees.
- As a result, the final estimated cost to business is likely to be a very minor underestimate, as it will exclude labour hire employees working for hosts that employ between 15 and 19 people (to whom the policy would apply). Assumptions have been incorporated in relation to the default 3 month surge exemption period, noting parties can apply to the Fair Work Commission to extend or reduce this period in exceptional circumstances.

Tables

Table 1: Estimating host employers with an enterprise agreement by industry

Industry	Share of labour hire employees ¹	Estimated number of labour hire employees ²	Proportion of employees on enterprise agreements ³	Estimated number of labour hire employees on enterprise agreements ²
Agriculture, Forestry and Fishing	2.2%	7,168	0.0%	0
Mining	5.4%	17,248	37.2%	6,410
Manufacturing	13.0%	41,663	21.4%	8,916
Electricity, Gas, Water and Waste Services	3.2%	10,080	59.8%	6,028
Construction	4.1%	13,216	15.2%	2,007
Wholesale Trade	6.9%	22,175	10.3%	2,285
Retail Trade	3.2%	10,080	38.0%	3,835
Accommodation and Food Services	3.6%	11,424	16.3%	1,857
Transport, Postal and Warehousing	8.8%	27,999	42.2%	11,810
Information Media and Telecommunications	0.9%	2,912	31.0%	903
Financial and Insurance Services	5.9%	18,815	32.1%	6,045
Rental, Hiring and Real Estate Services	1.3%	4,032	7.5%	302
Professional, Scientific and Technical Services	5.6%	17,920	6.7%	1,203
Administrative and Support Services	16.2%	51,743	13.6%	7,040

Public Administration and Safety	7.5%	23,967	80.2%	19,232
Education and Training	4.6%	14,784	82.2%	12,150
Health Care and Social Assistance	6.7%	21,503	47.8%	10,281
Arts and Recreation Services	0.0%	0	30.9%	0
Other Services	1.0%	3,136	8.4%	263
Total		319,863		100,566

¹ Source: ABS, *Characteristics of Employment, August 2022*, unpublished Tablebuilder.

² Source: Derived estimate applying proportions in table to overall estimate of labour hire workers from ABS, *Labour hire workers, June 2022*; using *Labour Account, June 2022*.

³ Source: ABS, *Employee Earnings and Hours, May 2021*, unpublished Tablebuilder.

For the table above, it is noted that:

- The estimated number of labour hire workers working in workplaces with an enterprise agreement is $100,566/319,863 = 31.4\%$ (this is the figure applied above).
- As enterprise agreement coverage varies significantly by industry (from 82.2 per cent of employees in Education and training to 6.7 per cent of workers in Professional, scientific and technical services), estimating the number of labour hire workers working for a host that has an enterprise agreement is done at the industry level.
- The table above sets out a percentage breakdown, by industry, of enterprise agreement coverage insofar as that relates to directly engaged employees and the estimated number of labour hire workers working within that industry (from which the department can draw an estimate of the percentage and number of labour hire workers working in host employers with an enterprise agreement in each industry, providing at the end a global figure on which to base subsequent calculations).

Table 2: Accounting for casual loading

Full-time employees	Labour hire worker	Non-labour hire worker	Wage difference
Initial median hourly wage	\$35.46	\$37.30	-\$1.84
Post casual adjustment median hourly wage	\$29.08	\$36.41	-\$7.33

For the table above, and with reference to ABS Characteristics of Employment data:¹⁰¹

- Median wage for permanent employees (19.5% of full-time labour hire) = \$27.34
- Median wage for casual workers (80.5 per cent of full-time labour hire) = \$36.88
- Median wage for casual workers after 25 per cent casual loading is removed = \$29.50
- $(19.5\% \times \$27.34) + (80.5\% \times \$29.50) =$ median hourly wage after casual adjustment of \$29.08

Also,

- Median wage for permanent employees (85.3 per cent of full-time non labour hire) = \$38.55
- Median wage for casual workers (14.7 per cent of full-time non labour hire) = \$30.00
- Median wage for casual workers after 25 per cent casual loading is removed = \$24.00
- $(85.3\% \times \$38.55) + (14.7\% \times \$24.00) =$ median hourly wage after casual adjustment of \$36.41

¹⁰¹ ABS, *Characteristics of Employment, August 2022*, unpublished Tablebuilder.

Table 3: Median wages by occupation

Occupation	Full-time labour hire share of employment ¹	Full-time non-labour hire share of employment ¹	Median wage full-time ¹	Contribution to hypothetical median wage under full-time labour hire occupation share	Contribution to hypothetical median wage under full-time non-labour hire occupation share
Managers	3.8%	12.9%	\$48.13	\$1.85 (= \$48.13 * 3.8%)	\$6.23 (= \$48.13 * 12.9%)
Professionals	18.9%	29.6%	\$52.11	\$9.86	\$15.45
Technicians and Trades Workers	15.7%	16.2%	\$33.02	\$5.18	\$5.35
Community and Personal Service Workers	3.1%	7.6%	\$31.68	\$0.97	\$2.42
Clerical and Administrative Workers	20.8%	13.2%	\$36.23	\$7.53	\$4.80
Sales Workers	0.0%	5.8%	\$30.70	\$0.00	\$1.79
Machinery Operators and Drivers	24.0%	7.7%	\$31.61	\$7.59	\$2.44
Labourers	13.7%	6.8%	\$28.46	\$3.90	\$1.93
Total				\$36.88	\$40.40

¹ Source: ABS, *Characteristics of Employment, August 2022*, unpublished Tablebuilder.

Table 4: Adjusted wage figures accounting for casual loading and occupation

Full time employees	Labour hire worker	Non-labour hire worker	Wage differential
Post casual adjustment median hourly wage	\$29.08	\$36.41	-\$7.33
Post casual and occupation adjusted median hourly wage	\$31.62	\$36.41	-\$4.79

Costing administrative burden of reviewing guidance materials

In various sections in previous Annexures, reference is made to hosts and labour hire employers reading guidance materials made available by the Fair Work Commission about this proposal, and that doing so would attract a cost. This Annexure sets out how 'reading guidance materials' is costed, and where possible, the cost to different parties.

Time taken to read guidance materials and underlying cost assumptions

The Office of Impact Analysis provides an hourly rate of \$79.63 for 'work related labour rates', which can be used here for calculating time-based costs relating to reading guidance material.¹⁰² In relation to the amount of time affected parties may take to read guidance material made available by the Fair Work Commission, the department has assumed 30 minutes to quantify a minimum amount of time for these calculations. Examples of similar guidance produced by the Fair Work Ombudsman and Fair Work Commission can be found on their respective websites, and it is assumed similar guidance would be prepared for the 'Closing the labour hire loophole' proposal, once legislated.¹⁰³

Feedback received from stakeholders during consultation did not generally describe or quantify a compliance burden that may arise in relation to reading publicly available guidance material on the proposal. In light of this, an estimate of 30 minutes has been informed by taking into account similar time considerations used in previous impact analyses for workplace relations reforms, such as:

- 25 minutes, in relation to assessing the regularity of a casual employee's engagement and calculating cost liabilities if the casual employee has been misclassified;¹⁰⁴
- 15 minutes, in relation to reading, understanding and implementing new provisions regarding part-time flexibility provisions;¹⁰⁵ and
- 15 minutes, in relation to considering guidance materials from the Fair Work Ombudsman to determine obligations regarding the sunseting of 'zombie agreements' (noting this '15 minute' window is also cited with respect to considering guidance material and understanding obligations with respect to single and multi-enterprise bargaining, and changes to the Better Off Overall Test, respectively).¹⁰⁶

With these previous figures taken into account, the department acknowledges that obligations arising under this proposal may be less familiar than, for example, obligations relating to casual employment or bargaining (though the above-listed measures did introduce new obligations previously unfamiliar to affected parties). Nonetheless, the department considers it appropriate to allow for 30 minutes for parties to consider publicly available guidance to determine the scope of the proposal and how applications made to the Fair Work Commission may be handled.

¹⁰² OIA, *Regulatory Burden Measurement Framework*, p 11.

¹⁰³ See, e.g., Fair Work Ombudsman, *New rules for enterprise agreements and bargaining* (Web page) <www.fairwork.gov.au/tools-and-resources/fact-sheets/rights-and-obligations/enterprise-bargaining>; Fair Work Commission, *Secure Jobs Better Pay Act – what's changing* (Web page) <www.fwc.gov.au/about-us/secure-jobs-better-pay-act-whats-changing>.

¹⁰⁴ Attorney-General's Department, *Regulatory Impact Statement: Casual Employment Reforms* (December 2020), pp 10-1.

¹⁰⁵ Attorney-General's Department, *Regulatory Impact Statement: Part-time flexibility* (December 2020), p 9.

¹⁰⁶ Department of Employment and Workplace Relations, *Enterprise bargaining outcomes from the Australian Jobs and Skills Summit, Regulation Impact Statement* (October 2022), pp 48, 53, 58.

The cost to hosts

As mentioned in previous Annexures, it is not possible to calculate the cost to hosts of reading guidance materials made available by the Fair Work Commission, because there is no available data on how many businesses use labour hire. However, hosts should be aware that they will accrue a cost if they review guidance materials, which can be quantified on a case by case basis at \$79.63 per hour (using OIA's figures), or \$39.82 (if 30 minutes is taken to do so).

Additionally, it is noted that as well as spending 30 minutes reviewing guidance from the Fair Work Commission, it is also open to business to choose to use existing membership arrangements with employer representative organisations and industry groups – such as, for example, the Australian Chamber of Commerce and Industry, Australian Industry Group, and the Business Council of Australia – to seek advice about this proposal. Where business chooses to engage with industry groups to seek such advice, this would not represent an additional regulatory burden imposed on business arising from this proposal. Rather, this would be business volunteering to seek guidance separate to that which is made available by the Fair Work Commission, but is still expected to assist in understanding obligations and complement available guidance materials.

The cost to labour hire employers

As mentioned in previous Annexures, it is estimated that there are 6,245 employing labour hire businesses in Australia. Assuming each of these labour hire employers takes 30 minutes to consider guidance material made available by the Fair Work Commission about this proposal, the cost to labour hire employers of doing so can be calculated using the following formula:

$$\text{Number of labour hire employers} \times (\$79.63/2) = \text{Cost of reading guidance materials}$$

Therefore:

$$6,245 \times \$39.82 = \text{around } \$248,676 \text{ per year (in the first year of the proposal alone)}^{107}$$

Of note, this cost is only counted once in the headline cost figure for this proposal, on the assumption that labour hire employers will only likely read this guidance material once upon the enactment of relevant provisions. If labour hire employers read this guidance material on multiple occasions (either within the first year of this measure, or in subsequent years) costs will increase.

Observations above about businesses seeking advice from representative organisations also applied to labour hire employers, as well as hosts.

¹⁰⁷ Note: Figures in the component parts of this formula have been rounded for readability. Final statistics have been calculated with regard to precise data points.