

Submission

**Statutory review of the Fair Work
Legislation Amendment Closing
Loopholes Act 2023 and the Fair Work
Legislation Amendment Closing
Loopholes No. 2 Act 2024**

February 2026

Executive Summary

1. Introduction

The National Electrical and Communications Association (NECA) welcomes the opportunity to contribute to the statutory review of the *Fair Work Legislation Amendment Closing Loopholes Act 2023* and the *Fair Work Legislation Amendment Closing Loopholes No. 2 Act 2024*, conducted jointly in accordance with the *Fair Work Act 2009* (Cth) (**FW Act**).

NECA is the peak body representing electrical and communications contracting businesses across Australia. NECA represents more than 6,500 businesses operating across construction, infrastructure, energy, communications, housing, renewables, and essential services. The overwhelming majority of these businesses are small and medium enterprises operating as subcontractors in complex commercial and regulatory environments.

NECA made a detailed submission in September 2023 in relation to the Closing Loopholes Bill and represented the industry at the Senate Enquiry in October 2023 on the proposed changes. NECA's submission identified material risks relating to workability, compliance burden, and unintended consequences for contractors and SMEs. Many of those risks are now evident in the early operation of the amendments and are directly relevant to this statutory review.

This submission addresses how the amendments are operating in practice, identifies unintended consequences affecting NECA members, and recommends targeted refinements to improve certainty, proportionality, and effectiveness.

2. Alignment with the Review Scope

This submission responds directly to the Terms of Reference by assessing whether the amendments are operating appropriately and effectively, identifying unintended consequences, and considering whether further amendments to the FW Act or related legislation is necessary.

NECA's evidence is informed by continuous engagement with members across metropolitan, regional, and remote Australia, and through NECA's national legal, workplace relations, and business advisory services, which engage daily with small businesses navigating compliance under the Fair Work framework.

3. Workplace Delegate Rights

The workplace delegate provisions are not operating in a manner that is proportionate or well adapted to the structure of the electrical contracting industry.

Electrical contracting is characterised by project-based work, transient worksites, and multi-employer environments. Many sites are short term, highly mobile, and not suited to

permanent or default representational arrangements imposed through awards or standardised agreement terms.

The mandatory insertion of delegate rights into modern awards (and now the recently broadened application of the term) and enterprise agreements removes the ability for workplaces to determine suitable or proportionate representational arrangements through mutual agreement. This represents a departure from established enterprise bargaining principles and has introduced uncertainty regarding the scope of delegate powers, interaction with right of entry provisions, and the practical impact on small and medium sized projects.

These risks are magnified in multi-employer bargaining contexts, as addressed further in section 6. NECA submits that delegate rights would operate more effectively if determined through enterprise agreements negotiated at the workplace or project level. In the absence of this approach, clearer statutory limits are required to ensure delegate numbers, paid time, and scope of activities are proportionate to workforce size, workforce composition, and project duration.

Further consideration should also be given to circumstances where there is not only multi-employers on a site but multiple employee associations who would all be seeking their own delegates on site, potentially making the number of delegates on any given site untenable and a burdensome cost to employers who are required to pay for their training, access to utilities and time away from the site.

4. Compliance Burdens on Small and Medium Enterprises

The cumulative compliance burden arising from the Closing Loopholes amendments is significant for small and medium electrical contractors.

While individual changes may appear manageable in isolation, their combined effect has materially increased regulatory complexity, legal risk, and administrative cost. Most NECA members do not maintain in-house legal or human resources capacity and rely on external advice to navigate compliance. This requirement for external advice also further increases the direct compliance costs for these businesses which then adds to the overall project costs.

Key issues include the reintroduction of multi factor employment tests that undermine certainty, expanded dispute resolution pathways that increase procedural exposure, and heightened civil and criminal penalties that apply irrespective of intent or good faith compliance.

NECA members consistently report that uncertainty, rather than deliberate noncompliance, is the dominant risk and that they are suffering from regulatory fatigue and fear of criminal prosecution. This uncertainty is compounded where businesses operate within multi-employer bargaining frameworks, where compliance outcomes may be influenced by factors beyond the control of any individual employer.

NECA submits that the review should consider whether the legislation is achieving its objectives without imposing disproportionate burden on compliant SMEs. Clearer statutory

safe harbors for businesses acting on professional or industry advice would materially improve workability, within suitable constraints or controls.

5. Unintended Consequences for Contractors and SMEs

The electrical contracting industry relies on genuine subcontracting, trade specialisation, and project-based engagement. These arrangements have been operated lawfully for decades and are fundamental to delivering construction, infrastructure, and energy projects nationally.

Several elements of the Closing Loopholes framework have produced unintended consequences for contractors who are not the target of the reforms. Members report increased reluctance to engage subcontractors, expand their workforce, or take on new projects due to concerns about misclassification, retrospective liability, and regulatory exposure.

This risk aversion has direct consequences for productivity, workforce participation, and apprentice employment. These effects are most acute for SMEs and are further intensified where contractors are drawn into collective bargaining environments.

NECA submits that the review should clearly distinguish between exploitative labour practices and genuine contracting arrangements in skilled trades. Without clearer statutory distinctions, lawful business models are exposed to unnecessary risk without delivering additional worker protections.

6. Interaction Between Multi Employer Bargaining and the Closing Loopholes Amendments

Although the Closing Loopholes legislation did not introduce multi-employer enterprise bargaining, its operation cannot be assessed in isolation from the existing bargaining framework. In practice, the interaction between multi-employer bargaining and the Closing Loopholes amendments materially alters risk, compliance burden, and power dynamics, particularly for SMEs.

Multi-employer enterprise agreements change the scale at which regulatory risk operates. Under single enterprise arrangements, disputes and compliance issues are generally contained within one employer and they have flexibility to negotiate with their individual business operational requirements informing their agreements. Under multi-employer arrangements, issues can be amplified across multiple employers simultaneously or in some cases become issues that were not previously present. This magnification effect means that ambiguity or unintended consequences arising from the Closing Loopholes amendments can become systemic and rapidly escalate.

This interaction is most pronounced in electrical contracting, where multiple employers often operate side by side on the same project, perform similar work, rely on subcontracting and project-based engagement models, and are covered by a number of different unions. In these environments, issues arising under one employer may be leveraged across others regardless of differences in size, structure, or internal capability.

Workplace delegate rights illustrate this effect. Delegate activity that may be manageable within a single enterprise becomes significantly more disruptive in a multi-employer context. Representational power becomes collective, while employer obligations remain individual. This creates an imbalance that reduces practical control for SMEs over workplace relations on their own sites.

Labour hire and subcontracting uncertainty is also magnified. While Government materials indicate that genuine subcontracting is not intended to be captured, the absence of explicit statutory exclusion creates uncertainty. In a multi-employer environment, incentives increase to test coverage boundaries. Even where subcontractors are ultimately excluded, the process itself imposes cost, delay, and uncertainty.

Compliance burdens compound rather than accumulate linearly. Multi-employer bargaining already requires higher levels of coordination and procedural compliance. The Closing Loopholes amendments add further layers, including expanded dispute resolution pathways, strengthened access and enforcement mechanisms, and heightened penalties. SMEs respond predictably by avoiding risk, reducing bargaining participation, and limiting growth.

Anti avoidance and misclassification provisions take on a different character in multi-employer settings. Legitimate commercial decisions may be scrutinised collectively, creating exposure for individual employers simply by operating within an industry subject to collective bargaining dynamics. There is also a risk that SMEs may be discriminated against in preference to larger suppliers if the administrative burden and risk are perceived as higher.

NECA submits that the statutory review must consider this interaction when assessing whether the amendments are operating appropriately and effectively. The combined effect may alter workplace relations dynamics in ways not fully anticipated at the time of enactment.

7. Labour Hire Provisions and Subcontracting Certainty

NECA acknowledges the policy intent of the labour hire provisions and the stated position that skilled trades and subcontractors are not intended to be captured.

However, reliance on explanatory materials does not provide sufficient legal certainty. Members are concerned about how these provisions may be interpreted over time.

NECA submits that the review should recommend explicit legislative clarification confirming that genuine subcontracting arrangements in the electrotechnology industry are excluded from regulated labour hire frameworks. This clarification must be embedded in the Act itself.

8. Paid Family and Domestic Violence Leave

NECA notes the findings of the 2024 independent review and agrees that the entitlement is operating broadly as intended. NECA supports the conclusion that further reform should only proceed when employers and employees have had sufficient time to fully understand and utilise the existing framework.

9. Delegate's and unions right of entry exemption for underpayments

Similar to the weaponisation of workplace health and safety right of entry entitlements, the exemption for underpayments has been shown to be utilised in a similar manner by the employer associations.

NECA members are finding that the exemption gives the employee associations what appears to be uncontrolled or unvetted access to employer workplaces under the guise of underpayments or workplace health and safety concerns.

NECA have been privy to many stories of right of entry for workplace health and safety (**WHS**) and underpayments being used to obtain access to the site and then to put pressure on employers to sign union enterprise agreements. We were made aware that a site was closed down for minor issues such as the green in an exit sign was slightly faded.

NECA does not discount the importance of ensuring sites are safe and employees are paid correctly but the right of entry and its underpayment exemption circumvents proper notice requirements and is being misused to further the agenda of employer associations.

10. Review Findings and Further Recommendations

NECA recommends that the statutory review find that:

1. the interaction between multi employer bargaining and the Closing Loopholes amendments has materially amplified compliance risk and unintended consequences for SMEs
2. workplace delegate provisions require refinement to ensure proportionality and enterprise or project level determination
3. compliance burdens have increased in ways that discourage lawful participation in bargaining and growth
4. explicit statutory exclusion of genuine subcontracting from labour hire regulation is required

NECA further recommends that the Government consider:

1. introducing statutory safe harbour provisions for businesses acting on professional or industry advice
2. requiring the Fair Work Commission to consider SME capacity and project based work when exercising discretion under multi-employer and enforcement provisions
3. developing binding guidance on the interaction of multi-employer agreements with subcontracting and project based industries
4. conducting a post implementation review focused specifically on SMEs in construction and infrastructure
5. the clear weaponisation of right of entry exemption

11. Conclusion

NECA supports strong and enforceable workplace laws that protect employees while enabling sustainable business operation. The Closing Loopholes reforms were introduced with legitimate objectives. However, their practical operation, particularly when combined with multi-employer bargaining, has produced outcomes that risk undermining certainty, productivity, and SME participation.

This statutory review presents an important opportunity to refine the framework to ensure it targets genuine misconduct without capturing lawful business models or imposing disproportionate burden on small and medium enterprises.

NECA welcomes continued engagement with the Reviewer and the Government.

To arrange a meeting or discuss this submission further, please contact:
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