MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

FAIR WORK LEGISLATION (PROTECTING WORKER ENTITLEMENTS) BILL 2023

APRIL 2023

TABLE OF CONTENTS

OVERVIEW

The *Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023* (**the Bill**) was introduced to the Parliament on 29 March 2023 and referred to the Senate Education and Employment Legislation Committee on 30 March, for report by Thursday 28 April.

The Bill is limited in scope and makes six targeted changes to existing legislation, as follows:

1. Clarify that the *Fair Work Act* applies equally to temporary migrant workers
2. Expand and clarify rights relating to unpaid parental leave
3. Include a right to superannuation in the National Employment Standards
4. Clarify that workplace determinations displace previous enterprise agreements
5. Amendments to rules relating to pay deductions
6. Enhanced entitlements for casual employees under the Coal Mining Industry (Long Service Leave Funding) Scheme

As each of these measures are limited in scope and effect, this submission provides only brief comments on each. The MCA does not oppose any of the measures in the Bill, which are mostly updates and clarifications of existing legislative provisions.

COMMENTS ON PROVISIONS OF THE BILL

Clarify that the *Fair Work Act* applies equally to temporary migrant workers

The MCA supports this amendment to clarify that the status of an employee under the *Migration Act 1958* has no bearing on their rights and entitlements under the *Fair Work Act* (**the Act**). This clarifies the legal position that workplace rights under the Act apply equally to all workers regardless of their migration status. Whilst the Act already applies in this manner, misconceptions that temporary visa holders are not equally protected have been used to facilitate unscrupulous conduct in certain industries.

The Australian mining industry is Australia's highest paying industry, providing secure, high paying jobs. The industry employs a small number of temporary skilled migrant workers, who accounted for 0.6 per cent the mining workforce in 2022. The profile of Temporary Skills Shortages TSS (subclass 482) visa (and its predecessor the 457 visa) holders in the minerals sector are overwhelmingly professionals, technicians and tradespeople, and managers (which collectively make up almost 97 per cent of TSS visa users). These workers receive an average total remuneration of $144,900 per annum (compared to the all-industries average of $103,700).[1]

The mining industry has therefore not experienced the problems relating to underpayment of less-skilled migrant workers that were the focus of the Report of the Migrant Workers Taskforce (**MWT**). The MCA nonetheless supports measures to strengthen workplace and migration laws to prevent exploitation of vulnerable workers.

The MCA also supports appropriate measures to ensure migrant workers are encouraged to report breaches of workplace laws to the Fair Work Ombudsman (**FWO**) and not discouraged due to concerns that this may put their working visa at risk. This issue was considered in Recommendation 21 of the MWT Report:

> "It is recommended that the Fair Work Ombudsman and the Department of Home Affairs undertake a review of the Assurance Protocol within 12 months to assess its effectiveness and whether further changes are needed to encourage migrant workers to come forward with workplace complaints."

[1] Department of Home Affairs, *Temporary resident (skilled) quarterly report, 31 December 2022*, BR0008, Australian Government tables 1.09, 1.14, 1.22.

The MCA also supports further reforms that would protect migrant workers who seek to exercise their workplace rights from being subject to adverse immigration outcomes where this is appropriate. Whilst the MCA makes no recommendations on the form of such arrangements, it encourages the government to further pursue this matter.

Expand and clarify rights relating to unpaid parental leave

The MCA understands the government's policy intent is to align the entitlement to more flexible unpaid parental leave in the Act with changes to paid parental leave contained in the *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Bill 2022* (**PPL Bill**). This includes the provision of at least 100 days of 'fully flexible' unpaid parental leave that can be accessed by either parent.

The MCA notes that the provisions for unpaid parental leave in the Act are minimum requirements that are exceeded by the parental leave entitlements provided by many large employers.

Australian mining is Australia's highest paying industry and is constantly renewing efforts to attract a broad and diverse talent pool.[2] As part of their value proposition, Australian mining businesses commonly offer employees paid and unpaid parental leave benefits that substantially exceed statutory minima and provide greater flexibility to employees than the minimum requirements in the Act. A number of MCA members already provide fully flexible parental leave arrangements under their company policies.

Superannuation in the National Employment Standards

The MCA does not oppose the expansion of the National Employment Standards (**NES**) to include a general right to superannuation. The Bill will give effect to this right by reference in the Act to employers' obligation under the *Superannuation Guarantee* (**SG**), rather than create additional entitlements.

The amendments also build on the existing framework for employees covered by industrial instruments, where the FWO already has powers to enforce superannuation provisions as workplace rights under the Act. The Bill also provides that parallel enforcement actions cannot be pursued under both the Act and through the taxation system via the Australian Taxation Office.

Retention of the 4-yearly review of superannuation default fund process in the Act

The MCA notes that the Bill does not include amendments to remove the 4-yearly review of superannuation default fund provisions, which was previously foreshadowed by the government during the consultation process on the development of the Bill. The 4-yearly review process is clearly redundant and unnecessary, as the selection of default funds by the Fair Work Commission (**FWC**) reflects legacy arrangements that predate the introduction of the modern '*MySuper'* system.

The MCA recommends that the Act be amended to require that modern awards include a term to the effect that any qualifying *MySuper* product may serve as a default fund. This would make the Australian Prudential Regulation Authority (**APRA**) the sole body that determines default fund status. As a result, modern awards would no longer need to include a list of default funds set by the FWC.

The *MySuper* system was introduced in 2012, at the same time the Act was amended to provide for the 4-yearly review of default funds. It was arguable at the time whether any FWC review process would be necessary in future, given that the *MySuper* system was intended to be a comprehensive 'quality control' process for any superannuation fund that could potentially be selected as a default award fund.

[2] In December 2021, the MCA launched mining's first *Industry of Choice* Framework – built on five pillars of inclusion, diversity, sustainability, skills and the environment. It is a virtual guide to best practice and supports efforts to promote and achieve a more inclusive and diverse culture, workforce and industry.

Now that the *MySuper* system is sufficiently mature, and the FWC has never made a decision under the 4-yearly review process, there is no logical reason to retain that process. The MCA is not aware of any credible arguments to retain a second, clearly inferior, and now completely superfluous 'quality control' process through the FWC.

APRA is better placed than the FWC to assess underperforming superannuation funds and products. It is a specialist regulator with specialist expertise that can review funds on an ongoing basis, as opposed to the FWC, which has none of these attributes.

Clarify that workplace determinations displace previous enterprise agreements

A workplace determination is, in effect, a substitute for an enterprise agreement where no agreement could be reached. They are not common in the mining industry. However, they are likely to become more common as a result of the 2022 amendments to the Act regarding arbitration of 'intractable' bargaining disputes.

The Act currently contains rules governing the replacement of one enterprise agreement with another. For example, section 58(1)(e) of the Act provides that:

> "if the earlier agreement has passed its nominal expiry date—the earlier agreement ceases to apply to the employee when the later agreement comes into operation, and can never so apply again."

The MCA supports the amendments in the Bill, which will clarify that equivalent rules apply to workplace determinations. This is already accepted as the current legal position; the amendments will put this beyond doubt.

Amendments to rules relating to pay deductions

The MCA is not aware of any concerns of members or their employees regarding undue burdens that inhibit employees from utilizing pay deductions. The MCA does not, however, oppose the amendments in the Bill.

The MCA does not support the weakening of any existing safeguards that require the employee to determine the purpose, timing and amount of any deductions. The interests of the employee must always take precedence over those of their employer or the recipient of the deductions.

Enhanced entitlements for casual employees under the Coal Mining Industry (Long Service Leave Funding) Scheme

The *Coal Mining Industry (Long Service Leave) Administration Act 1992* (**Coal LSL Act**) and associated legislation provides for long service leave entitlements to 'eligible employees' as defined in the Coal LSL Act.

We Bill is intended to implement Recommendation 4 of the 2022 "*Independent Review of the Coal Mining Industry (Long Service Leave Funding) Scheme*":

> "It is recommended that the Commonwealth enact legislative amendments to ensure that casual employees are treated no less favourably than permanent employees in the Scheme." [3]

The MCA supports the principle that industrial legislation should not include any preference in favour of either casual or permanent employment. As such, they ought to be 'cost-neutral' in terms of their relative cost to the employer.

The amendments in the Bill will require casual loading to be included in employer contributions to the Coal LSL fund and require that working hours for casual employees be averaged over each quarter. Whilst this formula is somewhat complex, we note that it is no less complex that the existing formula that applies to permanent employees. The MCA supports the intent of the amendment to equalise the treatment of Coal LSL for casual and permanent employees.

[3] Enhancing certainty and fairness: Report of the Coal LSL review - Department of Employment and Workplace Relations, Australian Government (dewr.gov.au)