MINERALS COUNCIL OF AUSTRALIA

SUBMISSION, DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS

Comments and proposed approach to workplace relations measures being considered for the second part of 2023

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6 APRIL 2023

TABLE OF CONTENTS

Background

This submission is in response to the letter to the Minerals Council of Australia from the Department of Employment and Workplace Relations of 23 March 2023 regarding 11 proposed measures to be included in government workplace relations legislation in the second half of 2023. Each of these proposals are addressed in turn below.

The MCA attended an initial consultation meeting with the department on 28 March and has been requested to provide initial views on the proposed measures by 6 April. The department has indicated that the further detailed consultations will occur in the coming months. The MCA welcomes the opportunity to actively participate in this process. We believe that all the proposed measures, if designed appropriately, can be implemented in a manner that achieves the policy objectives of government and balances enhanced benefits for workers with certainty for business.

The minerals industry is Australia's largest industry and largest source of export income, with the resources sector accounting for $413 billion (69 per cent) of the nation's export revenue in 2021-22.

The industry's substantial economic contribution over the last decade is the result of $246 billion of investment in exploration, mining projects and sustaining capital that began in the early 2000s, which has taken the resources sector's net capital stock to $933 billion.

Over the past 20 years, this investment has supported an expansion in mining that has generated and sustained highly paid, highly skilled and secure mining jobs across Australia:

- Mining employment has more than tripled from an average of 88,700 in 2003 to 286,000 in 2022[1]
- The industry directly and indirectly supports over 1.1 million jobs at over 200 operating mine sites and in supply chains across the country
- Mining pays more on average than any other industry in Australia ($148,000 a year compared to $96,800 across all industries)[2]
- 99 per cent of mining workers earn above-award wages and conditions[3]
- 86 per cent of mining workers are permanent and 96 per cent are employed full time[4]
- Where casual workers are employed in mining, their weekly earnings ($2,171) are more than three times the average for casuals across all industries ($648)[5]

The minerals industry is one that provides secure jobs and better pay, as well as underpinning Australia's national prosperity. It is essential that the proposed changes do not jeopardise any of the successful workplace arrangements that have achieved these outcomes.

Regulatory risks arising from changes to the workplace relations system have the potential to damage industry investment, productivity, and competitiveness. This in turn will ultimately mean job losses and worse wage outcomes.

This submission provides high level recommendations (based on the information so far available about the proposed changes) on how the next tranche of workplace relations changes can be implemented in a way that enhances opportunities for mining industry workers and keeps the Australian minerals industry strong and competitive. The MCA looks forward to working cooperatively with the government as part of this process.

[1] Australian Bureau of Statistics, *Labour Force, Australia, Detailed,* November 2022, released 22 December 2022, table 6.
[2] Australian Bureau of Statistics, *Average Weekly Earnings, Australia,* May 2022, released 23 February 2023, table 10H.
[3] Australian Bureau of Statistics, *Employee Earnings and Hours, Australia,* May 2021, released 19 January 2022, data cube 5.
[4] Australian Bureau of Statistics, *Labour Force, Australia, Detailed,* November 2022, released 22 December 2022, table 6; *Characteristics of Employment, Australia,* June 2022, released 14 December 2022, table 3.1.
[5] Australian Bureau of Statistics, *Characteristics of Employment, Australia,* June 2022, released 14 December 2022, Employee Earnings, table 3.1.

1. Casual employment definition and conversion

Item 1: Stand up for casual workers: Legislate an objective test to determine when an employee can be classified as casual

Government's proposal:

'The Australian Government made an election commitment to legislate a fair, objective test to determine when an employee can be classified as casual, so people have a clearer pathway to permanent work'.

MCA comments

The MCA agrees with the government's view that any changes to casual employment:

> *…should balance certainty and fairness for both employees and employers across different elements of the statutory framework including the statutory definition, the process to convert from casual to permanent employment and resolving disputes.*

Since 27 March 2021, a casual conversion entitlement for all employees has been enshrined in National Employment Standards. Employers across all industries are required to offer casuals the option of converting to permanent employment after 12 months if they have worked a regular pattern of hours for the previous 6 months.

The MCA notes the government's statement that *'post contractual conduct is not accounted for in the definition of casual employment'*, which points to a concern about potential misclassification which may disadvantage an employee.

However, the case has not been made as to why the arrangements in place since March 2021 do not address the problem of an employee working hours more akin to a 'permanent' role without this being able to be legally recognised. Under the current legislation, the employee and their employer can agree to convert to 'permanent' status at any time, or the employee can unilaterally convert by exercising a prescribed conversion right once they qualify to do so. This framework combines a requirement on employers to offer casual conversion, together with an ongoing right of employees to request conversion beyond 12 months. It effectively addresses 'misclassification', because it allows changes in the employment relationship to be 'checked' on a regular basis and, importantly, empowers employees to determine their own status.

Any arrangement that sees a casual employee automatically convert to a permanent employee once certain criteria are met would create inordinate uncertainty and remove the opportunity for employees to choose their form of employment. It is impossible for any legislative formula, no matter how 'objective' to cover every conceivable scenario in which a casual arrangement may evolve into a more fixed form. Any such arrangement would also ignore the reality that casuals may subsequently revert to less fixed arrangements, depending on the needs of the employer and/or the desire of the employee.

The worst approach would be to legislate a framework in which employers and employees would not be able to determine the status of the employment relationship at any given point in time, or which would arbitrarily re-classify an employee against their will.

Suggested approach

The government could deliver a well-balanced policy by:

1. Maintaining the basic framework in the definition of casual employee in section 15A and the casual conversion arrangements in Division 4A of Part 2-2 of the *Fair Work Act.* If it wishes to enhance employee conversion rights then it could adjust the existing criteria for conversion within this framework.
2. Not implementing any proposal for an 'objective' test that would result in an employee being reclassified without either:

a) a positive decision by either the employee, in accordance with a conversion right, or

b) by agreement with the employer.

3. Not implementing any regime that would expose employers to retrospective liability for ‘permanent’ entitlements in the event that an employee was retrospectively deemed to have been ‘misclassified’ and the employee has been paid a casual loading.

2. ‘Same Job, Same Pay’

Item 2: Same Job, Same Pay

The government *‘is considering how to implement the Same Job, Same Pay measure with the following principles in mind:*

1. *Business should be able to access labour hire for genuine work surges and short-term needs*
2. *Labour hire workers should be paid at least the same as directly engaged employees doing the same work*
3. *Disputes should be dealt with quickly, economically, and fairly in the Fair Work Commission*
4. *Targeted anti-avoidance measures are needed to protect Same Job, Same Pay entitlements and ensure long lasting behavioural change’*

MCA comments

The MCA’s position on ‘Same Job, Same Pay’ was set out in its submission to the Government in December 2022, following the previous consultation process with the department on this matter in July-August 2022.[6]

It is essential to distinguish between labour hire and other forms of employment that are common to mining, notably service contracting and internal service arrangements within a corporate group.

Labour hire involves an agency on-hiring the services of a worker to a ‘host’ business for a service fee, with the agency remaining the employer of the worker.

In contrast, service contractors perform specialist tasks or deliver a defined activity or scope of work (beyond just providing labour), ranging from underground development work to planned maintenance shutdowns. Service contractors offer enhanced productivity and benefits for employees – by providing safety systems, labour, supervision, plant and equipment, expertise, and accountability for delivery of the activity or scope of work.

Labour hire must also be differentiated from corporate group arrangements. For example, some producers permanently employ specialised teams who are engaged for specific safety and productivity projects. These arrangements have been entered into for commercial and operational reasons and cannot be likened to the ‘outsourcing’ of labour through labour hire.

Any change must prioritise certainty and minimise administrative burden. If ‘Same Job, Same Pay’ drives the proliferation of costly and resource-intensive disputes, for example, on whether two jobs are ‘the same’ or paid the same, it will cement Australia’s reputation as a high cost, high regulation investment destination.

The problem to be addressed

The legislation should also be targeted at the labour market problem it is intended to address, i.e. ‘wage arbitrage’ in which a ‘host’ business uses labour hire staff because they are employed at lower wage rates than directly employed staff. This issue arises in sectors where workers perform lower skilled roles and receive lower wages than the general community average. The proposed legislation should be targeted at addressing this problem in the sectors in which it arises, and not impose unnecessary and onerous obligations in other situations where they are not necessary. Any legislation that goes beyond this objective risks a range of profound unintended consequences.

[6] Minerals Council of Australia, submission to Department of Employment and Workplace Relations, *Same Job, Same Pay’ Policy: Additional Industry Information and Recommendations*, 16 December 2022.

The risk of unintended consequences

If the 'Same Job, Same Pay' policy is not implemented in a measured manner, it will invariably give rise to a range of unintended adverse consequences, including but not limited to:

1. Discouraging enterprise bargaining by removing any benefits that may be gained by either 'hosts' or contractor businesses from having their own distinct workplace arrangements
2. Suppressing wage growth and productivity gains by removing the link between pay and experience/performance if 'same job' is defined widely and does not account for such factors
3. Disouraging 'host' employers from engaging a wider range of contractors due to administrative complexity and the risks of non-compliance. This problem will be greater in the minerals industry, where many large businesses pursue policies of encouraging local contractors in regional areas, including smaller businsesses and idegenous-owned businesses
4. Restricting access to specialist skills and original equipment manufacturer contracts
5. Encouraging suboptimal employment arrangements, such as purely award-based arrangements (which already provided for 'same job, same pay'), 100 per cent outsourcing, or uniform 'low-ball' company contracts
6. Discouraging international investment in mining, minerals processing and mining-related manufacturing by adding significant uncertainty to Australia's high-cost and complex regulatory environment.

Suggested approach

Any 'Same Job, Same Pay' legislation should be based on the following features, otherwise the legislation will have a range of adverse consequences for the minerals industry and the broader economy:

1. Ensure that the legislation includes a clear and workable definition of 'labour hire'. This should draw on the Victorian *Labour Hire Licensing Act 2018* to define 'labour hire provider' as *'a person who, in the course of conducting business, supplies one or more of its employees to perform work in and as part of the business or undertaking of another person (the host)'.*
2. Include a 'group of entities' exemption to this definition of labour hire, consistent with the labour hire licensing schemes of Victoria and Queensland.
3. Explicitly exempt service contractors from the definition of labour hire provider, recognising the vitally important role these specialised businesses play in the economy.
4. Ensure the legislation includes workable exemptions for surges based on temporary arrangements of less than 12 months and non-ongoing 'surge' operational requirements, consistent with the need to ensure operational continuity in cyclical industries such as mining.
5. Confine the policy to 'pay' rather than also attempting to equalise all 'conditions', including those that may be variable or non-quantifiable, such as incentives, and bonuses (which might include anything from performance bonuses to gym memberships to access to employee share schemes) – which would be unworkable in practice.

3. Criminalising ‘wage theft’

Item 3: Compliance and enforcement: criminalising ‘wage theft’

Government’s proposed measures:

1. *‘Introduce criminal offences into the Fair Work Act for wage underpayment and record-keeping misconduct’*
2. *‘Amend the existing civil compliance and enforcement framework, including the serious civil contraventions regime, to ensure that the framework contains a sensibly graduated scale of penalties to address the full spectrum of non-compliance with workplace obligations’*
3. *‘Increase maximum penalties for wage exploitation-related civil remedy provisions in the Fair Work Act and strengthen protections against sham contracting arrangement’.*

MCA comments

The MCA does not in principle oppose criminal sanctions for the most serious and deliberate underpayment of wages, provided well established principles of criminal responsibility are not undermined.

Mining is Australia’s highest paying industry paying 53 per cent more per week than the national average across all industries. There are strong incentives (both legal and non-legal) for mining companies to ensure wages are paid correctly. Mining businesses make decades-long investments in projects, which rely on strong, long-term relationships with employees, investors, regional communities. Systematic and illegal underpayment and exploitation of workers is simply not a viable business model in the mining industry – nor should it be.

Suggested approach

A robust and balanced sanctions regime should be developed according to these principles:

1. Only deliberate, systemic and dishonest underpayment of wages should attract criminal penalties. Lesser breaches should continue to be dealt with under the exiosting civil penalty regime, including the regime for ‘serious breaches’ introduced in 2016.
2. Ordinary principles of criminal liability should apply in relation to the mental element of the offence.
3. Criminal offences should only be prosecuted by an independent prosecuting authority, eg. he Commonwealth DPP or the Fair Work Ombudsman, if it is provided with sufficient expertise. Employees and unions should not have standing to seek criminal sanctions, as they do for civil penalties.
4. Criminal sanctions regarding record keeping should be confined to circumstances where they also involve the mental element of criminal liability, such as where there are deliberate efforts to falsify records or mislead regulatory authorities. Mistakes or inadvertant breaches should not be captured.

4-6. 'Employee-Like' forms of work

Item 4: Extend the powers of the Fair Work Commission to include 'employee-like' forms of work

Item 5: Give workers the right to challenge unfair contractual terms

Item 6: Allow the commission to set minimum standards to ensure the road transport industry is safe, sustainable and viable

Government commitment:

'The government is utilising five guiding principles in developing the details of the three commitments:

1. *Australia's workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.*
2. *All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.*
3. *Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.*
4. *The Fair Work Commission should set minimum standards that:*
   - *are fair, relevant, proportionate, sustainable, and responsive*
   - *reflect workers' independence and flexible working arrangements. For example, choosing which tasks to accept and refuse; how to undertake their work; where and when they work; and which businesses to contract with, and*
   - *mitigate, to the greatest extent possible, unintended consequences for workers, businesses, consumers, and other aspects of the labour market.*
5. *The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties'.*

MCA comments

While it is important to ensure workplace relations laws remain up to date and reflect modern working arrangements, this must be balanced against the need for certainty.

The MCA supports new minimum standards for new forms of independent contractors, provided the Fair Work Commission's powers are limited to workers who have a high degree of dependence on a single employer or digital platform for ongoing work (such as gig-workers).

Such powers should be limited to new and evolving forms of work, such as 'gig work' and should not extend to well-established forms of work that are not 'employment', for example independent contracting, partnerships and owner-driver road transport.

The worst possible approach would be to re-introduce anything akin to the former 'Road Safety Remuneration Tribunal' which was abolished in 2016 and had sought to render unviable an entire industry of owner-driver contractors. No case has been made for any such legislation, nor should it be contemplated.

It is not yet clear what the government is proposing in relation to the proposed expansion of the Fair Work Commission's powers to deal with 'unfair contractual terms'. The FWC does not have a history of dealing with commercial and contractual matters, which have long been dealt with by courts. No case has yet been made for any transfer of such powers to the FWC, nor is it clear what, if any perceived shortcomings of the existing regime require such reform. As such, the MCA does not express a position on this proposal at this stage.

Suggested approach

A Fair Work Commission power to make minimum standards for 'employee-like' forms of work must:

1. Not change well established legal definitions of 'employee', 'employer' and independent contractor'.
2. Only apply to clearly defined classes of workers who are determined to have a high degree of dependence on a single business or technology for their ongoing employment
3. Not disrupt existing arrangements in established industries that pre-date newer forms of work, such as 'gig' work
4. Only set minimum standards – not provide an alternative form of 'wage levelling'

7. Anti-discrimination, adverse action and harassment

Item 7: Provide stronger protections against discrimination, adverse action and harassment

Government position:

'The following principles will guide the development of reforms to the Fair Work Act anti-discrimination framework.

1. *Alignment and consistency with key features of anti-discrimination law, including terminology and definitions.*
2. *Protected attributes in the Fair Work Act 2009 are consistent with community expectations and best practice language.*
3. *Exemptions from anti-discrimination provisions are clear and relevant.*
4. *Protections for national and non-national system employees are consistent and fair.'*

MCA Comments

The minerals industry recognises the profound physical, emotional and psychological impacts can arise as a result of discrimination, disrespectful behaviour and harassment, and is committed to eliminating this unacceptable behaviour.

The MCA supports the government's principles outlined to guide the development of the reforms.

The MCA notes that a concurrent consultation process is currently being conducted by the Australian Human Rights Commission on the establishment of a national Human Rights Act.[7] This process is likely to consider similar amendments to Commonwealth discrimination laws to those proposed for the *Fair Work Act* anti-discrimination framework. The proposed Human Rights Act reform also intends to address the complex, differing and overlapping discrimination laws, both within existing federal laws and between federal, state and territory laws.

Suggested approach

1. Any amendments to the *Fair Work Act* anti-discrimination framework must be developed in a manner that complements other processes to modernise discrimination laws, rather than create new forms of complexity and inconsistency.
2. Any changes to the 'adverse action' regime should preserve the existing legal test, as settled by the High Court in *Bendigo TAFE v Barclay* [2012] HCA 32.
3. Any positive duties, where appropriate, should avoid duplication or overlap with positive duties in the model WHS laws.
4. Any representative actions be consistent with the *Federal Court of Australia Act*, which requires:
   - Seven or more persons to have a claim against the same respondent
   - A person to have a sufficient interest to commence a proceeding on their own behalf against another person
   - The prevention of competing representative proceedings commenced by different representative groups

[7] Australian Human Rights Commission, website, *A National Human Rights Act for Australia | Australian Human Rights Commission*, (viewed 6 April 2023).

8. National labour hire regulation

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

Government approach:

'The objectives of national labour hire regulation would be to:

1. *Provide a level playing field for business and promote accountability and transparency*
2. *Protect labour hire workers from exploitation by providers and in supply chains*
3. *Promote greater compliance with relevant laws and drive behavioural change, and*
4. *Reduce red tape and confusion for LHPs operating across multiple jurisdictions.'*

MCA comments

Labour hire should never be a vehicle for exploiting workers.

Whilst there is no evidence of widespread exploitation of labour hire workers in the mining industry, it is important that workers, businesses, and the public have confidence that the nation's laws are effective in preventing exploitation.

A national labour hire licencing regime can contribute to this objective, while also reducing duplication and inconsistencies between state labour hire licencing bodies. The MCA supports in-principle the development of a single national system of labour hire licensing to replace the four existing state and territory systems.

Suggested approach

A national labour hire licencing regime should:

1. Establish a single regulatory regime for labour hire providers
2. Apply a genuine definition of 'labour hire', such as that contained in the Victorian labour hire licensing legislation: *'a person who, in the course of conducting business, supplies one or more of its employees to perform work in and as part of the business or undertaking of another person (the host)'*
3. Apply the same definition of 'labour hire' to the proposed 'Same Job, Same Pay' legislation
4. Exclude employees who are not at risk of exploitation, eg. high income earners, sole traders, or secondees
5. Ensure that the licensing authority is responsive and properly resourced to provide timely advice to business on their obligations
6. Require licences to be renewed every 3 years, as is the case under the Victorian scheme
7. Allow for a single licence for a corporate group, rather than require each separate group entity to be licensed

The department has advised that a separate consultation process will be conducted on the question of achieving a single national licensing regime. The MCA welcomes the opportunity to engage in this process.

9. Small business and Fair Entitlements Guarantee

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

Government approach:

'The Department is seeking views on a discrete measure confined to addressing the unintended and inequitable outcomes for employees whose employment is terminated after their employer becomes a small business employer in connection with the insolvency process, while preserving the effect of the small business redundancy exemption on viable small businesses'.

MCA comments

The *Fair Entitlements Guarantee Act 2012* (the FEG Act) enables the Commonwealth government to 'underwrite' unpaid employee entitlements in situations where employees are made redundant by virtue of the liquidation of their employer.

The FEG Act prescribes the circumstances in which the Commonwealth may make payments to employees who have not received their accrued entitlements, including redundancy pay, due to a liquidation. It does not provide any discretion for the government to make payments in any circumstances other than those set out in the Act.

The lack of discretion has created the unintended consequence of employees being deprived of their redundancy pay entitlements in circumstances in which they continue to work for a 'downsized' employer that has less than 15 employees remaining at the time of liquidation. This has created perverse outcomes in which employees who are retained to assist in the orderly winding up of a business are effectively penalised for do so.

Suggested approach

The MCA supports amendments to the FEG Act that would provide discretion to protect employee entitlements in circumstances where they would otherwise be payable if not for the 'downsizing' of their employer, as outlined in the government's proposal.

10. The Fair Work Commission issuing model terms for enterprise agreements

Item 10a: The Fair Work Commission issuing model terms for enterprise agreements

Government proposal

'To align model enterprise agreement terms with model modern award terms, the Government is inviting stakeholder views on a proposal to amend the Fair Work Act 2009 to provide for the Fair Work Commission to issue model terms for enterprise agreements'.

Item 10b: Preserve arrangements for employers already using single interest agreements

'In order to ensure the single-interest bargaining stream remains accessible to all who want to use it, the Australian Government is seeking stakeholder views on the merits of introducing further transitional arrangements to the single-interest bargaining stream'.

MCA comments

Based on the available information, the MCA makes no comment on these proposals at this stage.

11. Repeal demerger from registered organisations amalgamation provisions

Item 11: Repeal demerger from registered organisations amalgamations provisions

Governmenment proposal:

'The Australian Government is considering repealing the 2020 amendments to the Fair Work (Registered Organisations) Act 2009 (RO Act) made by the former Coalition government about the withdrawal of a constituent part from an amalgamated organisation'.

MCA comments

The MCA supports the right of employees in the minerals industry to freely determine how and by whom they wish to be represented in their workplaces. The current 'de-merger' provisions in the RO Act were passed with bipartisn support in 2020 and have given employees in larger amalgamated unions the opportunity to 'de-merge' into an independent union.

This opportunity has been utitlised by employees in the minerals industry who are members of the Mining and Energy Union (MEU) to 'de-merge' from the Construction, Foresetry, Maritime, Mining and Energy Union (CFMMEU). This decision is of direct relevance to MCA members, as it affects a large number of their employees. The MCA supports the right of these employees to freely determine the future of their union and opposes any legislation that would prevent their democratically-expressed wishes from being implemented.

The MCA was assured during consultations with the department that the government is not contemplating changes that would affect withdrawal applications that are currently on foot, or where an application for a ballot has been granted. The MCA would support that approach, assuming the government proceeds with this proposal.

In general the MCA supports the principle of freedom of association as an essential feature of our workplaces, including providing opportunity for groups to de-merge from an organisation that no longer represents their interests, where this is supported by a free democratic vote.

Suggested approach

1. Any amendments to the current demerger provisions of the legislation must not prevent demerger processes currently underway from continuing to their conclusion under the existing provisions.
2. Any amendments that would frustrate such processes commenced under the current regime would effectively be retrospective changes that would unfairly and adversely impact those workers who have freely chosen to 'de-merge' from amalgamated unions.