



# MINERALS COUNCIL OF AUSTRALIA

## 'SAME JOB, SAME PAY' POLICY: ADDITIONAL INDUSTRY INFORMATION AND RECOMMENDATIONS

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## EXECUTIVE SUMMARY

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This submission sets out recommendations and additional information following the initial consultation workshop on 28 July 2022 with the MCA, member companies and the Department of Employment and Workplace Relations.

The MCA notes that since the consultation workshop, parliament has passed the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, which significantly alters the workplace relations framework by implementing multi-employer bargaining and other changes. The MCA considers that these changes, which can be seen as an alternative policy to achieve 'levelling' of wages and conditions, should prompt the government to reconsider the 'same job, same pay' policy having regard to a reasonable period of operation of the recently legislated revised bargaining regime.

During the workshop, the department clarified the objective of the government's policy as preventing employers from using labour hire or other outsourcing arrangements to systemically avoid paying a segment of workers the same pay and entitlements as direct workers doing the same work on more favourable terms under an enterprise agreement.

Presentations by MCA member companies demonstrated that:

- Labour hire makes up a small proportion of mining workforces, ranging from 1 per cent to 31 per cent on individual sites and averaging 10.7 per cent across the industry<sup>1</sup>
- In mining, labour hire workers on sites are invariably employed under enterprise agreements negotiated with trade unions
- Under these agreements, labour hire workers receive between 21 and 73 per cent above the applicable award
- Labour hire allows minerals producers to leverage the large national databases maintained by providers to deploy trained workers quickly, gain access to specialised skill sets, cover unplanned absences, meet production challenges associated with weather and commodity cycles and draw on a national talent pipeline to achieve workforce diversity outcomes
- Service contractors perform essential non-core mining, operational and maintenance tasks, often under long-term arrangements that may last for decades
- Service contractors employ highly skilled and permanent workers under enterprise agreements with above-award remuneration
- Workplace relations regulations are significant in determining the attractiveness of Australian mining and minerals processing projects to international investors.

The policy opportunity for high-paying industries like mining is to make enterprise bargaining more attractive by improving its capacity to support real wages growth through productivity gains. Imposing terms and conditions on businesses based on arrangements of other businesses will complicate and compromise the enterprise bargaining system, especially under the new enterprise bargaining regime.

The MCA has emphasised that a 'same job, same pay' policy must be carefully designed to preserve choice and flexibility in employment arrangements, and the mutual benefits they provide.

The policy must also avoid unintended adverse consequences, including:

- Discouraging enterprise bargaining and productivity gains by removing the link between pay and experience/performance
- Closing off avenues to new talent in a tight labour market
- Reducing and delaying pay increases

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<sup>1</sup> Deloitte Access Economics, [Economic effects of changes to labour hire laws](#), report prepared for the MCA, 4 June 2019, p. 38.

- Reducing recruitment and training opportunities, including for women and Indigenous workers
- Restricting access to specialist skills and original equipment manufacturer contracts
- Encouraging suboptimal employment arrangements, such as 100 per cent outsourcing, or uniform and ‘vanilla’ company contracts
- Encouraging litigation arising from ill-defined concepts
- Reintroducing problems of job demarcation and disputes
- Creating complexity and the prospect of false comparisons
- Creating unfairness based on superficial assessments
- Discouraging international investment in mining, minerals processing and mining-related manufacturing by adding significant uncertainty to Australia’s high-cost and complex regulatory environment.

The MCA notes clarifications from both the department and the Prime Minister that the government’s ‘same job, same pay’ policy is not intended to block employers’ use of temporary labour to manage demand or their access to specialist skills. We also note recent comments by Minister Burke that the policy is not intended to prevent the use of labour hire for legitimate temporary purposes and ‘surge’ capacity.

The MCA makes the following recommendations regarding the policy.

### **Recommendations**

1. Review and reconsider the appropriateness of implementing a ‘same job, same pay’ above awards and agreements requirement considering the operation of multi-employer bargaining introduced by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*. The review should be conducted at least 12 months after the 2022 reforms have been fully implemented.
2. 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)’.
  - Include a ‘group of entities’ exception to this definition of labour hire, consistent with the labour hire licensing schemes of Victoria and Queensland
  - Explicitly exempt service contractors from the definition of labour hire provider
3. Ensure the legislation includes workable exemptions for surges based on temporary and ‘surge’ operational requirements, consistent with the need to ensure operational continuity in cyclical industries such as mining

## 1. RECONSIDERING THE NEED FOR A ‘SAME JOB, SAME PAY’ POLICY

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### Recommendations:

- Review and reconsider the appropriateness of implementing a ‘same job, same pay’ above awards and agreements requirement considering the operation of multi-employer bargaining introduced by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*. The review should be conducted at least 12 months after the 2022 reforms have been fully implemented.

### Comment

Since the MCA and member companies met with the department on 28 July 2022, the government introduced far-reaching changes to Australia’s workplace relations laws, which are now embodied in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the **SJBP Act**).

The SJBP Act makes fundamental changes to Australia’s system of workplace relations. It provides for compellable multi-employer bargaining, the involuntary imposition of agreements on, and the expansion of compulsory arbitration in a range of situations (among many other changes).

The introduction of multi-employer bargaining is a major change to the government’s workplace relations policy; however, there was no pre-election mandate for its introduction. It was introduced with no proper consultation process and rushed through a Senate inquiry, without the opportunity for proper review.

The form of multi-employer bargaining the SJBP Act introduces is designed to have a ‘levelling’ effect on wages and conditions as it can be used to tie together diverse employers and apply wages and conditions to them under a single industrial instrument. There is no carve-out for labour hire employees. As such the SJBP Act can be seen as an alternative approach to implementing the government’s commitment to ensure that labour hire workers receive no less pay than directly engaged workers performing the same work.

A further major intervention in the workplace relations system through introducing a novel ‘same job, same pay’ requirement above awards and enterprise agreements carries a heightened risk of unintended consequences, in circumstances where employers are adjusting to an unexpected major change to the workplace relations system.

The MCA submits that, having dramatically altered the workplace relations system through the SJBP Act, the government must not proceed with its plan to introduce a broad ‘same job, same pay’ above awards requirement without first analysing the practical impact of the SJBP reforms and then formally reviewing the need for such a policy, or significantly altering its scope. The timing for such a policy review should be at least one year after the SJBP reforms have been fully in operation.

Apart from the opportunity to evaluate the combined effect of the policy and the operation of the revised system, the policy review at an appropriate later time will be able to properly consider the numerous important issues that have been raised and not been subject to proper consideration or consultation, including limiting the scope of same job, same pay policies to employees earning below the average wage, addressing the significant definitional issues highlighted in discussions and ensuring that the reforms are properly targeted to address actual problems.

Many of the problems raised in previous discussions could be magnified by the combined effect of far-reaching reforms.

Accordingly, the MCA recommends the government pause policy development to review and reconsider the appropriateness of implementing a ‘same job, same pay’ above awards requirement considering the unexpected introduction of the SJBP Act.

## 2. DEFINING LABOUR HIRE CLEARLY AND CONSISTENTLY

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### Recommendations:

- 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).*
- Include a ‘group of entities’ exception to this definition of labour hire, consistent with the labour hire licensing schemes of Victoria and Queensland
- Explicitly exempt service contractors from the definition of labour hire provider
- Ensure that if a national labour hire licensing scheme is established, the definitions and provisions of the government’s ‘same job, same pay’ policy are incorporated into that scheme to prevent unnecessary and costly regulatory complexity.

### Comment

The Department of Employment and Workplace Relations asked the MCA to propose a definition of labour hire to help the government ensure that its ‘same job, same pay’ policy is appropriately targeted.

Mining companies tailor their employment arrangements to suit very different locations, ore bodies, production techniques, occupations and worker preferences

The MCA and its members have emphasised the importance of distinguishing 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, ranging from underground development work to planned maintenance shutdowns. Service contractors offer flexibility – and enhance productivity – by providing safety systems, labour, plant and equipment, and expertise.

Labour hire must also be differentiated from group arrangements. For example, some producers employ specialised teams of permanent employees who target specific safety and productivity projects.

In August 2022, the Prime Minister described the government’s ‘same job, same pay’ election commitment as: ‘Closing the loopholes that allow firms to use labour hire as a tool for driving down pay, rather than as a source of specialist skills’.<sup>2</sup>

To achieve this policy objective without generating adverse unintended consequences, the MCA recommends drawing on the general definition of labour hire contained in section 7 of the *Labour Hire Licensing Act 2018 (Vic)*. This definition limits the provision of labour hire to circumstances where one or more individuals are supplied ‘to perform work in and as part of a business or undertaking of the host’.

Adopting this wording would provide a high level of confidence that the policy would exclude service contracting and internal arrangements. This is borne out in guidance provided by the Victorian Labour Hire Agency, which clarifies that a drilling company providing services at a mine site would not require registration with the authority.<sup>3</sup>

To ensure the definition of ‘labour hire business’ remains appropriately focused, the MCA recommends it be limited to situations where individuals on-hired to host businesses are employees

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<sup>2</sup> The Hon Anthony Albanese MP, Prime Minister, [Address to the National Press Club](#), 29 August 2022.

<sup>3</sup> Victorian Labour Hire Authority, [General definition of labour hire services: Scenario 3](#), viewed 24 August 2022.

of the labour hire agency, as opposed to independent contractors. This would avoid labour hire being conflated with other common arrangements, such as subcontracting.

Consistency across federal and state legislation is essential to preventing unnecessary and costly regulatory complexity. The definitions and provisions of the government's 'same job, same pay' policy should be incorporated into any future national labour hire licensing scheme.

### 3. ALLOWING FOR TEMPORARY AND ‘SURGE’ ARRANGEMENTS

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#### Recommendations:

- The legislation should include an exemption for temporary labour hire of 12 months or less.
- A further exemption should also apply for ‘surge’ demand for workers to enable businesses to utilise labour hire in situations where there demand for additional workers but no likelihood of ongoing employment.
- This exemption should apply to situations in which the demand for additional workers will transitory. This could include particular phases in a project, seasonal variations, or cyclical increases in demand.

#### Comment

The MCA is encouraged by clarifications from both the department and the Prime Minister that the government’s ‘same job, same pay’ policy is not intended to block employers’ use of temporary labour to manage demand or their access to specialist skills.

According to the Department:

The Government has acknowledged there are legitimate uses for labour hire, such as instances where employers need to use labour hire to provide surge capacity....<sup>4</sup>

The MCA also welcomes recent reported comments by Minister Burke that are consistent with this position:

Employment and Workplace Relations Minister Tony Burke said: “Workers doing the same job at the same site should get the same pay. There are legitimate uses for labour hire, particularly when companies need a seasonal or surge workforce.”<sup>5</sup>

Many resources projects will experience fluctuations in the size of their workforce during their project life. This will be due to operational and commercial reasons.

Given the volatility inherent in commodity prices, it is common for mining businesses to engage additional workers to meet surges in demand when prices are increasing. The loss of labour hire flexibility would mean there would be no scope for surge capacity. Without this capacity, businesses would be forced maintain a constant level of production with no ability to peak up and many opportunities would be foregone. It should also be noted that at times of peak demand in the industry the demand for workers is typically tight and those workers can command higher wages that those earned by ‘permanent’ workers. Other industries require surge capacity to deal with seasonal variations in demand or to deal with specific projects or undertakings that are of a fixed term duration only.

As the Government has acknowledged, the use of labour hire to fulfil short-term requirements is a ‘legitimate use’ and should not be curtailed by new restrictions. The legislation should include an exemption for short term engagement of labour hire of 12 months or less. This would be consistent with the approach in the *Fair Work Act* to casual employment, in which casual employees can opt to become ‘permanent’ after 12 months if their job is ongoing.

The exemption for surge capacity should not be prescriptive and should cover the range of scenarios in which a temporary increase in a workforce is required but there is no reasonable prospect of ongoing employment beyond the surge.

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<sup>4</sup> Department of Employment and Workplace Relations, [Inquiry into the Fair Work Amendment \(Equal Pay for Equal Work\) Bill 2022: Submission of the Department of Employment and Workplace Relations to the Senate Education and Employment Legislation Committee](#), September 2022.

<sup>5</sup> The Australian, ‘*Business alarm at Labor’s second IR wave*’, 12 December 2022