MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE REVIEW OF THE CLOSING LOOPHOLES ACTS

MARCH 2026

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OVERVIEW

This is the Minerals Council of Australia's (MCA) submission to the 'Closing Loopholes Review', which includes the statutory reviews of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (**Closing Loopholes Act**)* and *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024 (**Closing Loopholes No. 2 Act**).* The MCA's submission focuses on the significant changes that have impacted the mining industry which are subject to the Review.

Australia should have a modern, efficient workplace relations system that delivers improved pay and conditions, while supporting productivity, innovation and job creation. It is only through creating attractive investment conditions and supporting modern work practices that Australians' real wages, opportunities and standard of living can improve.

Even before the Albanese government's range of amendments, Australia's workplace relations framework was notable for its complex system of awards and employee entitlements. In mining, complex award classifications are used to assess dozens of competencies, penalties and allowances which vary according to rosters, location and other factors. Onerous requirements to demonstrate 'genuine agreement' and meet the better off overall test remain longstanding problems that have made enterprise bargaining inefficient.

Yet instead of reducing this complexity, major changes to the *Fair Work Act* from 2022 have added further uncertainty, risk and regulatory burden for businesses.

Since the government was first elected, 663 pages have been added to workplace relations laws and regulations, an increase of approximately 45 per cent (**Appendix A**). None of these changes will enhance productivity or investment in either mining, or the broader economy. Instead, they are highly complex, extremely litigious, and give unions many more powers without proper safeguards.

Far from simply closing so-called 'loopholes', these changes were a major paradigm shift in Australia's workplace relations system with significant negative effects on the mining industry, including:

- **Broad 'Same job, same pay' orders** which to date have mainly targeted the coal industry. These are operating well beyond their intended scope. They are being applied to more than just labour hire, and more than just 'the same job'. In mining, they have been used to cover jobs not even performed by employees of the 'host' business and hypothetical scenarios for which a business 'could' employ workers in future.
- **Service contractors**, whom the government purported to 'exclude' from 'same job, same pay' orders, can still be captured due to the extremely broad discretion the Fair Work Commission has to decide which arrangements are captured and which are not.
- Uncertainty about how to calculate the **'Protected Rate of Pay'** under 'same job, same pay' orders is increasingly driving disputes after orders have been made. This will further burden the Commission and regulators while increasing the risk of 'back pay' claims and penalties for employers.
- **'Same job, same pay' variation obligations**, which require 'host' employers to litigate new contractors to rope them into 'same job same pay' orders as soon as they become 'aware' that a person is performing work covered by the order. These provisions were introduced without parliamentary scrutiny, have further expanded 'same job, same pay' adding ongoing costs to the engagement of skilled workers, with added costs for both hosts and contractors.
- **Union delegates' powers**: The Federal Court has recently ruled that this legislation does not allow for employers, or the Commission, to impose reasonable limits on such powers and has confirmed that union delegates have the power to hinder or disrupt the performance of work with legal impunity.
- **Union right of entry**: Expanded union entry powers are adding costs and disruption in Australia's most productive workplaces. Australian iron ore producers have publicly expressed

concern over the diversion of resources to address repeated ‘right of entry’ requests, which are aimed at disrupting the Pilbara’s highly successful operating model. This model is built on employee respect and cooperation, high wages, and workplace productivity.

- **‘Intractable bargaining’** has perversely altered the dynamics of collective bargaining, so that productivity-enhancing agreements that also deliver competitive wages have become harder to make. Under these changes, unions have little incentive to agree to trade-offs that improve productivity. At the same time, ‘same job, same pay’ orders undermine the certainty enterprise agreements previously provided. The foreseeable outcome is lower quality enterprise agreements that perpetuate restrictive work practices, inhibiting business growth, opportunities and wages.

In addition to the above concerns, the MCA notes that many of the core concepts of ‘same job, same pay’, intractable bargaining and union delegates’ powers have not been settled and are the subject of ongoing consideration through the courts. The resulting legal uncertainty will continue to increase costs and risks for businesses in the medium term.

However, it is already sufficiently clear, based on cases decided so far, that the legislation will cause ongoing problems, which should be addressed by the government through targeted amendments.

KEY RECOMMENDATIONS

'Same Job, Same Pay'

The following recommendations are designed to implement **appropriate limits** to the application of 'same job, same pay' laws, which are in keeping with the way the policy was presented to the public; and to limit **unintended adverse consequences** for industry:

1. Ensure the policy only captures workers who perform the same work, and who have commensurate qualifications, experience and levels of responsibility to their directly employed counterparts.

   Amendment: Add:

   - 306E(1AA) Despite subsection (1), the Fair Work Commission must not make a regulated labour hire arrangement order unless it is satisfied that the regulated employees to be covered by the order, when compared with employees directly employed by the regulated host and covered by the host employment instrument:
   - (a) have commensurate qualifications, experience and levels of responsibility; and
   - (b) perform work in positions that are equivalent in substance.

2. Recognise the legitimate role of labour hire and reflect the government's intent to address 'undercutting' by limiting orders to cases where the supply of labour has a material impact on the directly employed employees' wages.

   Amendment: Add:

   306E(1AB) Despite subsection (1), the FWC must not make the order unless it is satisfied that the supply of labour has the effect of materially reducing the pay that would otherwise apply to employees of the regulated host.

3. Confine 'same job, same pay' orders to work that is **genuinely the same** in both substance and classification. The Fair Work Commission should be required to ensure its orders only capture roles that clearly define the 'kind' of work covered by each order, so they do not capture all work performed, or hypothetical future roles.

   Amendment: Add:

   306E(9)(f) the kind of work covered by the order.

   Note: the kind of work covered by the order must be based on evidence of the work employees actually perform at the site.

4. Prevent unfair back pay claims and penalties. Identifying the 'protected rate of pay' is unworkable in many situations as enterprise agreements and their classifications are not designed to be transplanted to other businesses that had no role in establishing them. Where the Commission has not determined the 'protected rate of pay' and employers have taken reasonable steps in good faith to comply with an order, they should be protected from back pay and penalties.

   Amendment: Add:

   306F(3C) The employer does not contravene subsection (2) if:

   (a) the Fair Work Commission has not determined the protected rate of pay for the regulated employee; and

   (b) the employer took reasonable steps in good faith to comply with subsection (2).

   306F(3D) Nothing in this section allows the recovery of wages arising from genuine uncertainty in the determination of the 'protected rate of pay', where the employer took reasonable steps in good faith to comply with subsection (2).

Service contractors

5. Clearly exclude service contractors from 'same job, same pay' laws, to reflect the government's original policy intent that 'we did not want service contractors who were providing a service other than effective labour hire to be captured by the labour hire loophole sections of the Act.'[1] This should be done through a clear and workable definition of 'labour hire' in the Act, that does not rely on discretionary factors.

Varying 'same job, same pay' orders

6. Abolish the **unworkable employer variation obligation** in ss. 306ED and 306EE, which requires host businesses to continuously monitor their suppliers and then litigate them to rope them into 'same job, same pay' orders. These provisions are unnecessary and onerous. They did not receive parliamentary scrutiny, were never part of the government's policy and were not subject to consultation with industry.

Delegates' rights

7. Amend the *Fair Work Act* to **restore the balanced framework** endorsed by the Fair Work Commission when it created a delegates' rights term on 28 June 2024, which provided that a union delegate could only exercise their statutory rights subject to the condition that they:
    a. comply with their duties and obligations as an employee
    b. comply with the reasonable policies and procedures of the employer
    c. not hinder, obstruct or prevent the normal performance of work
    d. not hinder, obstruct or prevent eligible employees exercising their rights to freedom of association.
    e. may only represent employees of their own employer and not those of other employees in a broader 'enterprise'.[2]

    This amendment is necessary to provide certainty, prevent abuse, and ensure that industrial representation occurs without substantially disrupting normal business operations.

    The decision of the Federal Court in December 2025 to quash the Commission decision shows that the legislation is clearly not operating as intended.

Right of entry

8. Immediately **repeal the loophole that allows worksite access to anyone** on the basis that they are there to 'assist' a Health and Safety Representative. This loophole can be used to give criminals and thugs legal protection so they can intimidate employers and employees in their workplaces.
9. Strengthen the 'fit and proper person' test in light of further revelations of CFMEU corruption and misuse of powers by Health and Safety Representatives and union officials.

Intractable bargaining

10. Amend the intractable bargaining framework to restore the Fair Work Commission's powers to determine arbitrations as it sees fit, and to **i**ncentivise bargaining that supports both productivity and wages. This should be done by repealing the government-Greens party amendments that prohibit any term of a workplace determination from being 'less favourable' to a union or employee in any respect. These amendments have created new loopholes that allow the bargaining system to be manipulated to trigger arbitration, in which a particular side is guaranteed to always win.

[1] The Australian, *Tony Burke agrees to IR law changes, with casual employment, labor hire concessions*, 31 October 2023: https://www.theaustralian.com.au/nation/politics/back-off-tony-burke-employers-launch-bid-for-a-truce/news-story/20f688e05680924dfeb473d2eb0ec816

[2] *Statement* [2024] FWC 1699, pp. 5-6.

NOTE ON THE TERMS OF REFERENCE

The terms of reference state the review must:

- Consider whether the operation of the amendments is appropriate and effective
- Identify any unintended consequences of the amendments
- Consider whether further amendments to the *Fair Work Act 2009*, or any other legislation, are necessary to improve the operation of the amendments or rectify any unintended consequences that are identified.

The scope of the Review does not extend to assessing the broader policy merits of the amendments themselves. Rather, it is focused on whether the measures are operationally appropriate and effective, and on identifying unintended consequences that may require adjustment.

The terms of reference do not specify whose 'intent' is relevant when assessing unintended consequences. If the reference is to parliamentary intent, then the legislation itself is the only authoritative expression of that intent, and its interpretation is properly a matter for the judiciary.

If instead, the relevant intent is that of the government, this submission demonstrates that multiple and sometimes inconsistent rationales were advanced in support of the various measures. In some cases, these rationales were inaccurate, incomplete or contradictory. In multiple cases, most notably 'same job, same pay', the legislation is clearly operating in a manner contrary to what the MCA understands was the government's original policy intent.

While the amendments have produced adverse consequences for the mining industry, it is also apparent that many of those consequences were intended.

Accordingly, this submission focuses on identifying the government's stated intent and the practical outcomes of the legislation, including adverse impacts on the mining industry that may or may not be characterised as 'unintended'.

The MCA maintains its policy objections to the implementation of 'same job, same pay' orders, union delegates' powers, and expanded union right of entry powers, among other measures. Changes to the definition of employment and the new regime for casual employment and conversion have also added further unnecessary complexity and uncertainty. These objections have been set out in detail in previous submissions to government and parliamentary inquiries and are not repeated here.[3]

This submission addresses the following measures only, which are of particular importance to mining:

- 'Same Job, Same Pay' (the 'closing the labour hire loophole' measures)
- Union delegates' powers
- Union right of entry to assist Health and Safety Representatives
- Workplace determinations and 'intractable bargaining'

What was the government's intent?

In two of the four matters outlined above, it has not been possible to determine what the government's intent was:

1. In relation to 'same job, same pay' and service contractors, the government has expressed contrary and irreconcilable views. In October 2022, the then Minister, Tony Burke, announced that '*The government made a clear policy decision that we did not want service contractors who were providing a service other than effective labour hire to be captured by the labour hire loophole sections of the Act*.'

[3] Minerals Council of Australia, submission, *Senate Education and Employment Legislation Committee inquiry on the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*, September 2023.

However, in the first 'test case' to consider the relevant provisions of the legislation in 2024, the subsequent Minister, Murray Watt, argued that the legislation did not *'"excise" any particular employer'* and that the laws were intended to capture *'more than the mere supply of labour'*.[4]

2. In relation to union delegates' powers, the Fair Work Commission and the Federal Court have adopted two very different approaches to how the legislation should be applied and the extent to which it can impose checks and balances on such powers. The government has never expressed a view on which of these two approaches it intended.

These issues are considered in greater detail in the body of this submission.

[4] Minister for Employment and Workplace Relations, Outline of submissions, 9 December 2024, paras 17 and 35.

JOB SECURITY, HIGH PAY AND PRODUCTIVITY IN MINING

- The MCA is proud that mining is Australia's highest paying and most productive industry, supporting 1.25 million jobs across the economy.
- Mining jobs continue to be highly secure across any measure. The industry continues to predominantly provide permanent, full time employment.
- The ability to deploy skilled workers quickly relies on service contractors and a small but essential labour hire workforce, arrangements which are exposed to new risks and costs under the legislation.

Mining employment and wages

Mining has made a consistently strong economic contribution to Australia that includes the highest wages of any industry. It is also the most productive industry in Australia. In 2024-25 average annual resources industry wages were $168,100, which was 57 per cent more than the all-industries average of $107,400.[5] From 2015-16 to 2024-25 (inclusive) the resources industry paid $279.9 billion in wages.[6] These high wages are underpinned by a mix of collective agreements and high-value individual agreements, with 97.5 per cent of the mining industry workforce paid above-award wages.

Mining's employment benefits are also delivered broadly. Mining industry employment was 290,100 in 2024-25, approximately three times the level it was two decades earlier.[7] In addition, Deloitte analysis shows that mining supports many more jobs in other industries, with combined direct and indirect employment estimated at 1.25 million full-time equivalent jobs in 2023-24 (approximately 8.6 per cent of Australia's employment).[8]

Secure jobs in mining

Job security, and wages, depend mainly on the profitability and competitiveness of the enterprise. Regulation alone – for example, restricting access to certain forms of employment – cannot guarantee job security or sustained pay rises. Businesses that are productive, globally competitive, and able to attract investment are the ones that provide secure, well-paid jobs. When productivity and competitiveness decline, job security and wages come under pressure, and this cannot be undone by imposing more regulatory restrictions.

On any practical measure, mining has consistently delivered strong outcomes on job security. While there is no single definition of a 'secure job', the industry stands out across key indicators:

- 97 per cent of mining employees are full-time (not part-time)[9]
- 91 per cent of mining workers are permanent (not casual)[10]
- 97.7 per cent of mining workers were employed directly (not as labour hire)[11]

[5] Australian Bureau of Statistics, Average Weekly Earnings, Australia, Table 10H, released 14 August 2025.
[6] Australian Bureau of Statistics, Business Indicators, Australia, Table 17. Wages and salaries, current prices, cat. No. 5676, Released 1 Dec 2025.
[7] Australian Bureau of Statistics, Labour Force, Australia, Detailed, Table 6. Employed persons by Industry sub-division of main job (ANZSIC) and Sex, released 18 December 2025. (Excludes oil and gas extraction).
[8] Deloitte Access Economics, Economic contribution of the Mining and METS sector 2024, table 1.1, released May 2025.
[9] Australian Bureau of Statistics, Labour Force, Australia, Detailed, Table 6. Employed persons by Industry sub-division of main job (ANZSIC) and Sex, released 18 December 2025.
[10] ABS Table Builder, Labour Statistics, Characteristics of Employment, 2025, Whether had paid leave entitlements in main job by Industry of main job, released 12 December 2025 (excludes oil and gas).
[11] ABS Table Builder, Labour Statistics, Characteristics of Employment, 2025, industry of main job by reference year and whether employed as a labour hire workers in main job, released 19 December 2024. (The MCA's calculation uses the same method as that used by the Department of Employment and Workplace Relations in its impact analysis statement, published in August 2023: Australian Government, Department of Employment and Workplace Relations, Annexures to Certification Letter OBPR22-02409: Closing the labour hire loophole, August 2023, p. 48).

- 92.1 of resources employees expect to remain in their current job for the next 12 months[12]

These outcomes reflect industry workplace arrangements that combine a large, stable, core workforce with a level of flexibility to manage market volatility and operational demand.

Service contracting and labour hire are enablers of secure, well-paid jobs

To remain productive and internationally competitive, mining relies on a mix of directly employed workers, service contractors and labour hire. This reflects operational realities, including project-based activity, cyclical demand, shutdowns, fluctuating production requirements and the need for specialist skills for limited periods.

Each form of employment has a distinct and legitimate role. Together, they underpin productivity growth. Rather than weakening industry job security or wages, they support them.

Service contractors employ approximately 40 per cent of workers, typically on a permanent basis. They deliver services rather than simply supplying labour. These include full-service mining, civil construction, infrastructure development, manufacturing and maintenance of specialist equipment, drilling and exploration, logistics, site services and consultancy.

By providing specialist capability and scale, service contractors lift productivity. They allow mine operators to focus capital and labour on core activities. This productivity contribution directly supports profitability, investment, and the capacity to maintain a large permanent workforce on high wages.

Labour hire makes up only 2.3 per cent of mining industry employment.[13] This small but vital part of the workforce helps mining operations to be responsive to changing conditions, allowing skilled workers to be deployed when and where they are needed most.

Labour hire can be crucial in managing workforce demands caused by unpredictable events that risk production, cyclical demand, and planned or emergency shutdowns that require specific skills for a short time. Labour hire businesses are equipped to source and rapidly deploy qualified personnel, ensuring mining can continue under challenging conditions and within strict safety parameters.

Taken together, access to service contracting and labour hire underpins job security, high pay, and productivity in mining. Restricting these arrangements weakens competitiveness and investment and works against the aim of providing secure, well-paid jobs.

[12] ABS Table Builder, Labour Statistics, Characteristics of Employment, 2025, Reference year and Industry of main job by Expectations of future employment in main job (next 12 months), released 12 December 2025 (excludes oil and gas).
[13] Above, no. 7.

1. ‘SAME JOB, SAME PAY’ – INHIBITING BUSINESSES, ONE ORDER AT A TIME

- ‘Same job, same pay’ laws capture much more than just labour hire.
- ‘Same job, same pay’ orders have forced equal pay on very different roles with vastly different skills and experience.
- Service contractors are not excluded and continue to face uncertainty and risk.
- Variation obligations on ‘host’ businesses create an unnecessary and heavy compliance burden on both hosts and employers.

The legislation

The legislation established a new regime empowering the Fair Work Commission to make ‘regulated labour hire arrangement orders’ requiring employees supplied to a ‘host’ business to be paid at least the ‘full rate of pay’ they would receive if directly employed under the host’s enterprise agreement.

Before making an order, the Commission must be satisfied that the arrangement is not merely for the provision of a service (‘service contractor’ test). The Commission must also not make an order if it is satisfied that the arrangement is not fair and reasonable in all the circumstances (‘fair and reasonable’ test). These two tests are highly discretionary and are central to determining whether an order can be made.

To date, despite more than one hundred orders having been made, the service contractor ‘exclusion’ has never been successfully used. Nor has the Commission ever declined to make an order based on ‘fair and reasonable’ grounds.

Certain other exclusions apply under the framework, including arrangements of short duration (generally three months or less) and training arrangements.

Late amendments introduced during the 2023 parliamentary process added further onerous ‘variation obligations’ on employers.[14] These require hosts who are subject to an order to continuously monitor existing and future arrangements with their suppliers and contractors, and to then proactively litigate their contractors to ’rope’ them into orders.

The stated intent of the legislation

Numerous rationales have been put forward for ‘same job, same pay’ laws. In assessing the effectiveness and appropriateness of the legislation, it is necessary to consider the problem the amendments were said to address.

On 24 November 2021, then Opposition Leader Anthony Albanese outlined the problem the law was intended to address:

> You end up with two Australians working side by side, doing the same hours and the same job, with the same qualifications; yet one gets paid less and has less security than the other (emphasis added).[15]

During the 2022 consultation process prior to the development of the legislation, the government said that ‘same job, same pay’ would be designed to apply to the:

> limited circumstances in which host employers use labour hire to deliberately undercut the bargained wages and conditions set out in enterprise agreements made with their employees’ (emphasis added).[16]

In June 2023, then Minister Tony Burke said:

[14] Fair Work Act, s. 306ED.
[15] Opposition Leader Anthony Albanese, Opinion Piece, ‘Same Job, Same Pay, CQ Today, 24 November 2021: https://anthonyalbanese.com.au/media-centre/same-job-same-pay-opinion-cq
[16] ‘Same Job, Same Pay Consultation Paper’, DEWR, April 2023, p. 3: https://www.dewr.gov.au/workplace-reform-consultation/resources/same-job-same-pay-consultation-paper.

> The problem that we are trying to solve is where an enterprise agreement has been put in place where there are agreed rates of pay and then an employer uses a labour hire firm in order to undercut those rates of pay (emphasis added).[17]

In October 2023, Minister Burke stated that:

> 'The government made a clear policy decision that we did not want service contractors who were providing a service other than effective labour hire to be captured by the labour hire loophole sections of the Act.' [18]

The Minister's second reading speech on 4 September 2023 stated:

> There's a legitimate role for labour hire in Australia – for surge work, for specialist work, or to provide temporary replacement workers… But when a business agrees on rates of pay in an enterprise agreement, and then asks labour hire workers to work for less – this is a labour hire loophole and this bill will close it.

The revised explanatory memorandum described the purpose as:

> Protecting bargained wages in enterprise agreements from being undercut by the use of labour hire workers who are paid less than those minimum rates.[19]

The above rationales all pointed to a targeted concept – one which was:

- Limited to labour hire;
- Clearly excluded service contractors;
- Targeted situations where workers are 'side by side' and performing 'the same job';
- Aimed at practices that 'deliberately undercut' bargained wages.

[17]The Australian, *Labor poised to cut deal on 'same job, same pay' laws*, 12 June 2023: https://www.theaustralian.com.au/nation/politics/labor-poised-to-cut-deal-on-same-job-same-pay-laws/news-story/7f3320e68258707d6e77686e2edafba4.
[18] The Australian, 'Tony Burke agrees to IR law changes, with casual employment, labor hire concessions', 31 October 2023: https://www.theaustralian.com.au/nation/politics/back-off-tony-burke-employers-launch-bid-for-a-truce/news-story/20f688e05680924dfeb473d2eb0ec816
[19] Revised explanatory memorandum to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, p. 1.

'Same job, same pay' – notable outcomes, so far

The 'same job, same pay' measures came into effect in December 2024 and there have now been over one hundred Fair Work Commission decisions, many of which have created various perverse outcomes. For example:

1. ***'Different job, same pay'* – no reward for qualifications:**
    - In one case in a coal mine, unqualified vehicle washers working off the mine site were awarded *'the same pay'* as skilled mining production technicians working on site.[20] (*Bengalla* decision)
2. **'*Several different jobs, same pay for each'* – no differences for skills and experience:**
    - In another case, the labour hire company had a pay structure with different pay rates for different skill levels, which the Commission admitted '*enables employees to progress through the classifications, generally if the employee achieves minimum competencies'.* In contrast, the 'host' employer had no such structure. Yet the FWC made an order overriding the tiered pay structure, forcing all workers to be paid the same, regardless of competency or experience.[21] (*Mount Thorley/Warkworth* decision)
3. ***'Same job, more pay'* – no extra pay for more hours worked:**
    - Orders are leading to 'overcompensation' of employees – in one case, the Commission admitted some labour hire workers would get all the benefits of extra pay for working additional 'unsociable hours', but without having to work those extra hours.[22] (*Bengalla* decision)
4. ***No 'same job' but still the 'same pay'* – hypothetical jobs must be considered:**
    - The Commission is making orders even when a 'host business' doesn't employ the same workers itself. The result is that employers must then calculate the 'same pay' for positions that do not exist. (*Rix's Creek* decision[23]; *Mt Arthur* decision[24])
    - The Commission's approach is that if a position could be covered by a host's enterprise agreement because it is the 'same type of work', then it can still issue an order.[25] (*Rix's Creek* decision)
5. ***'No job, no pay'* – job losses don't matter:**
    - Certain labour hire businesses facing 'same job, same pay' orders will be forced to either retrench staff or shut down if excessive costs are placed on them. The Commission concedes that there will be job losses, but this is outweighed by other 'fair and reasonable' considerations.[26] (*Bulga Mine* decision)
    - The Fair Work Commission has been unsympathetic to any argument so far made about the costs to businesses, simply stating '*that is a consequence of the provisions Parliament has chosen to enact…'*[27] (*Rix's Creek* decision)
    - In another case, the Commission accepted that the cumulative impact of a number of orders on one large labour hire business (WorkPac) would lead to job losses, but this was also not sufficient for it to not make an order: (*Blackwater and Daunia* decision)[28]

> *WorkPac has experienced a reduction in on-hire employee orders and its revenue and there have been job losses as a consequence of the five RLHA orders to which WorkPac is a Respondent.*
>
> *Further, the cumulative impacts of RLHA orders on WorkPac will result in a reduction in its services, it will lose a revenue stream, it will have difficulty finding alternative opportunities for displaced workers, for those it cannot place there will be redundancies and the flow on effect of that is that there will be a reduction of the size of WorkPac's internal staff.*

[20] *Application by the Mining and Energy Union re Bengalla Mining Company Pty Ltd* [2025] FWCFB 53 ('Bengalla decision'), 13 March 2023, para 130.

[21] *Application by the Mining and Energy Union re Mount Thorley/Warkworth Mine* [2025] FWC 973 ('Mount Thorley/Warkworth decision'), 7 April 2025, para 42.

[22] Bengalla decision, para 103.

[23] *Application by the Mining and Energy Union re Rix's Creek [*2025] FWCFB 12 ('Rix's Creek decision'), 17 January 2025.

[24] *Application by the Mining and Energy Union- Skilled Workforce Solutions* [2025] FWC 866 ('Mr Arthur decision'), 27 March 2025.

‘Same job, same pay’ legislation in practice: scope creep adding cost and uncertainty

In practice, the legislation is operating well beyond the intended limits described above, giving rise to significant cost, uncertainty and unintended consequences.

1. It applies to much more than labour hire

While labour hire is commonly understood as the supply of employees of one business to perform work in and as part of another business or undertaking (the host), the legislation does not define ‘labour hire’.[29]

Instead, it captures any *‘work performed for a person’* that *‘wholly or principally benefits*’ a host, or any of its associated entities. This formulation extends the operation of the regime beyond labour hire arrangements and exposes a broad range of workforce and contracting models to regulated labour hire arrangement orders.

2. It forces ‘the same pay’ on materially different roles

Commission decisions demonstrate that orders are not confined to circumstances where workers perform the same duties or work alongside host employees.

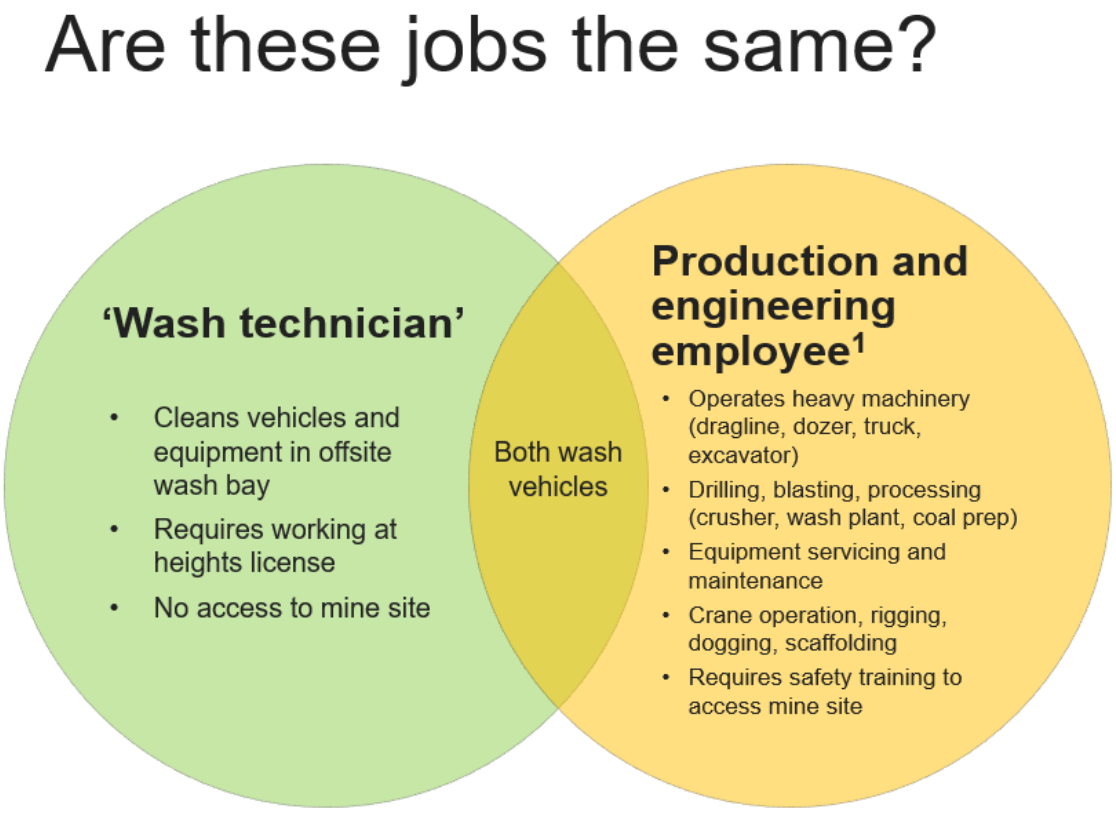
In the *Bengalla decision*, the Commission determined that unskilled ‘wash technicians’ who were responsible for washing mud and dirt off large vehicles in an off-site wash bay were entitled to the ‘same pay’ as directly employed technicians trained to operate heavy machinery and undertake drilling, blasting and processing on the actual mine site. The evidence was that wash technicians *‘do not (and are not capable of) operating mining equipment, or going out into the mine site’*.[30]

The order was made despite the substantial differences in skill level, training, duties and work location and was not confined to workers performing the ‘same job’ or working ‘side by side’.

A Federal Court decision handed down on 19 December 2025 has partially addressed this issue. The decision quashed two orders, and found the Commission must, based on evidence, ‘*define the class, group or cohort of employees in respect of whom an RLHA Order is to be made*’.[31] However, this is not an adequate solution. The Court also recognised that an order could still cover ‘*every type of employee covered by the host employment instrument’*. A subsequent decision by the Commission confirmed wash technicians would continue to be captured by the order.[32]

[25] Rix’s Creek decision, para 33.
[26] Applications by the Mining and Energy Union re Bulga Open Cut Mine [2025] FWC 1273 (‘Bulga decision’), 14 May 2025
[27] Rix’s Creek decision, para 57.
[28] *Applications by the Mining and Energy Union re Blackwater and Daunia Mines* [2025] FWC 1966 (‘Blackwater and Duania Mines decision’), 11 July 2025, para 5(cc).
[29] See for example, Labour Hire Authority Victoria, general definition of labour hire services: https://www.labourhireauthority.vic.gov.au/provider/general-definition-of-labour-hire-services/
30 Bengalla decision, 13 March 2025, para 130.
[31] *Application by the Mining and Energy Union re Bengalla Mining Company Pty Ltd*, [2025] FWCFB 295, 24 December 2025, para 101.
[32] Ibid, para 98.

Mining and Energy Union re Bengalla Mining Company 2025 FWCFB 53 (13 March 2025)



[1.] Production and engineering employee duties are set out in the *Black Coal Mining Industry Award 2020, Schedule A,* which was incorporated into the host's enterprise agreement.

3. It applies even when there is no equivalent 'host' job

The Commission has made regulated labour hire arrangement orders even when the 'host' does not employ workers in 'the same' job, but merely 'could' do so at some stage in the future.[33]

This requires employers to calculate the 'protected rate of pay' for hypothetical roles that do not exist, creating significant uncertainty and undermining the workability of the regime in practice.

To date, neither the government nor the Commission have provided guidance to employers on how to calculate the appropriate rate of pay in such circumstances in which there is no comparator. The apparent policy appears to be to wait for disputes to emerge.

4. Calculating the 'protected rate of pay' carries inherent uncertainty and risk

Employers subject to orders face ongoing uncertainty in determining the protected rate of pay. Practical difficulties arise in identifying appropriate classifications under host enterprise agreements and in applying incentive schemes, allowances, and different rosters.

The regime therefore creates inbuilt uncertainty about what employees should be paid, which may lead to penalties for non-compliance, or 'wage theft', and exposure to back pay claims in years to come. This risk will only continue to grow as more orders are made, adding to the ongoing work of regulators and the Commission, and generating further compliance costs and risks for employers.

[33] Rix's Creek decision, para 33; Mt Arthur decision, para 55.

5. It is not limited to circumstances where bargained rates of pay are 'undercut'

Whilst the government's 2022 policy paper proposed limiting the regime to cases of 'deliberate' wage undercutting[34], the final legislation does not focus 'same job, same pay' on circumstances where 'undercutting' has occurred.

As a result, the regime applies whenever a supplied employee is paid less than they would receive under the host's enterprise agreement, regardless of any effect on bargaining power. This means even small supplies of labour for incidental work, that have no material effect on direct employees' current or future pay, are captured.

6. Ineffective operation of the 'fair and reasonable' safeguard

Commission decisions have made it clear that regulated labour hire orders will be made even where evidence points to significant impacts for employees and businesses, including job losses or substantial financial impacts due to retrospective liabilities being imposed for accrued leave.[35]

In the *Bulga* decision the Commission determined that making an order was 'fair and reasonable' even though it accepted:

> '…many arrangements could become wholly unviable for [the labour hire provider] and it would need to consider its options to respond to those challenges, which may include terminating those arrangements which are commercially unsustainable. WorkPac's employees may be immediately and adversely affected if those arrangements are terminated'.[36]

Arguments that such outcomes render an order not 'fair and reasonable' have not succeeded, with the Commission taking the view that *'that is a consequence of the provisions Parliament has chosen to enact'*.[37]

To date, after more than one hundred orders, the 'fair and reasonable' safeguard has not operated to prevent the making of a single order, raising serious questions about its effectiveness as a protection against outcomes that may be job-destroying.

7. Same pay for different skills and experience

In the *United Wambo decision* the Commission considered a situation where all parties agreed that labour hire employees had fewer qualifications and less experience than their directly employed counterparts at the mine.[38]

Directly employed workers received a single base hourly rate under the 'host' enterprise agreement, which applied irrespective of experience or qualification. In contrast, three labour hire employers had enterprise agreements targeted to lower skilled workers, on a tiered basis. These arrangements were designed to provide workers with access to mining industry jobs with fewer skills and less experience, and to take advantage of pathways that would lead to upskilling and advancement.

One of the employers also supplied non-trade qualified maintenance workers, who worked alongside directly employed trade qualified maintenance workers.

The employers' arguments that it would be 'not fair and reasonable' to apply the same pay rates to less experienced or non-trade-qualified workers were dismissed. The Commission decided that the fact that the labour hire employees performed 'the same work' as their directly employed counterparts was sufficient to apply the host agreement rates of pay.

The Commission decision highlights that there is no mechanism under 'same job, same pay' laws to adjust pay on the basis that different employees have different skills, experience and qualifications.

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[34] 'Same Job, Same Pay Consultation Paper', DEWR, April 2023, p. 3: https://www.dewr.gov.au/workplace-reform-consultation/resources/same-job-same-pay-consultation-paper
[35] Bulga decision; Blackwater and Daunia decision; Bengalla decision; Mount Thorley/Warkworth decision; OS decision.
[36] Bulga decision, para 93.
[37] Rix's Creek decision, para 57.
[38] *Mining and Energy Union - Northern Mining and NSW Energy District Branch* [2025] FWC 1932 ('United Wambo decision'), 7 July 2025, para 83.

While employers may perform the ‘same work’ they may do so with different levels of ability and productivity.

Concerns about the impact on job opportunities in regions where mining operates

‘Same job, same pay’ is a relatively recent reform and its full effect on employment will only become clear over time as more regulated labour hire arrangement orders are made and the scope of the regime is further tested.

The MCA is currently investigating these effects in the Queensland coal industry using mine level employment data published quarterly by the Queensland Government. [39] Preliminary analysis of the effect of ‘same job, same pay’ orders on employment at Queensland coal surface mines points to a statistically relevant negative effect relative to comparable mines not subject to the orders.

More empirical work needs to be undertaken to understand the real impact of the orders on employment trends. The MCA encourages the government to undertake this work on a whole of economy basis as ‘same job, same pay’ orders continue to be made.

[39] Resources Safety and Health Queensland, Qld quarterly mine and quarry worker numbers on 30 September 2025, 12 January 2026.

Recommendations

The following recommendations are designed to implement **appropriate limits** to the application of 'same job, same pay' laws, which are in keeping with the way the policy was presented to the public; and to limit **unintended adverse consequences** for industry:

1. Ensure the policy only captures workers who perform the same work, and who have commensurate qualifications, experience and levels of responsibility to their directly employed counterparts.

   Amendment: Add:

   - 306E(1AA) Despite subsection (1), the Fair Work Commission must not make a regulated labour hire arrangement order unless it is satisfied that the regulated employees to be covered by the order, when compared with employees directly employed by the regulated host and covered by the host employment instrument:
   - (a) have commensurate qualifications, experience and levels of responsibility; and
   - (b) perform work in positions that are equivalent in substance.

2. Recognise the legitimate role of labour hire and reflect the government's intent to address 'undercutting' by limiting orders to cases where the supply of labour has a material impact on the directly employed employees' wages.

   Amendment: Add:

   306E(1AB) Despite subsection (1), the FWC must not make the order unless it is satisfied that the supply of labour has the effect of materially reducing the pay that would otherwise apply to employees of the regulated host.

3. Confine 'same job, same pay' orders to work that is **genuinely the same** in both substance and classification. The Fair Work Commission should be required to ensure its orders only capture roles that clearly define the 'kind' of work covered by each order, so they do not capture all work performed, or hypothetical future roles.

   Amendment: Add:

   306E(9)(f) the kind of work covered by the order.

   Note: the kind of work covered by the order must be based on evidence of the work employees actually perform at the site.

4. Prevent unfair back pay claims and penalties. Identifying the 'protected rate of pay' is unworkable in many situations as enterprise agreements and their classifications are not designed to be transplanted to other businesses that had no role in establishing them. Where the Commission has not determined the 'protected rate of pay' and employers have taken reasonable steps in good faith to comply with an order, they should be protected from back pay and penalties.

   Amendment: Add:

   306F(3C) The employer does not contravene subsection (2) if:

   (c) the Fair Work Commission has not determined the protected rate of pay for the regulated employee; and

   (d) the employer took reasonable steps in good faith to comply with subsection (2).

   306F(3D) Nothing in this section allows the recovery of wages arising from genuine uncertainty in the determination of the 'protected rate of pay', where the employer took reasonable steps in good faith to comply with subsection (2).

2. ‘SAME JOB, SAME PAY’ AND SERVICE CONTRACTORS

- Decisions by the Fair Work Commission and the Federal Court have confirmed that service contractors can be captured by ‘same job, same pay’ orders. These decisions demonstrate that the purported ‘exclusion’ of service contactors does not apply in practice.
- The legislation is highly uncertain and discretionary – no service contractor business can have confidence that they will or will not be captured.
- The government’s policy intent is unclear. On the one hand, it asserts that it intended to ‘exclude’ service contractors. On the other, it has stated that this was never its intent.

Service contractors are not excluded from ‘Same Job, Same Pay’ orders

The Fair Work Commission has a wide discretion to decide which businesses are captured under the ‘same job, same pay’ laws.

The Commission is required to apply a ‘multi-factor test’ to determine whether an arrangement is ‘for the provision of a service’.[40] This is a highly discretionary exercise and by the FWC’s own statement, *‘imports a degree of latitude and subjectivity’*.[41]

The Federal Court has also confirmed that this ‘characterisation’ exercise is *‘likely to be a question of fact and degree in any given case’* and that *‘the state of satisfaction reached by the Commission will be matters of evaluation and judgment’*.[42]

The practical reality of this situation for businesses is that there is no clarity about which arrangements are for ‘service provision’ (purportedly excluded) or ‘labour supply’ (captured). Assurances that service contractors would be protected by a ‘*straight exclusion’* (see below) are not being realised in practice.

In the absence of any legal definition or reference point, the Commission is the arbiter of each arrangement, which turns on the facts of each case. This can require long and resource intensive litigation. While the Commission is required to consider certain mandatory ‘factors’ set out in the multi-factor test, it can also consider any other matters it considers relevant.[43] Such decisions can have substantial commercial consequences, yet the merits of the Commission’s judgment cannot be appealed.

[40] *Fair Work Act 2009* (Cth) ss 306E(1A), (7A).
[41] Batchfire decision, para 10.
[42] *BHP Coal Pty Ltd v Mining and Energy Union* [2025] FCAFC 194, 19 December 2025, para 40.
[43] *OS decision* [2025] FWCFB 134, 7 July 2025, para 54.

Case study: BHP Operations Services (OS)

The *BHP Operations Services* proceedings provided a test case of the service contractor provisions, which shows that 'same job, same pay' captures much more than labour hire.[44]

In that case, the Commission found that employees supplied under an integrated services model could be covered by a regulated labour hire arrangement order, notwithstanding arguments that the arrangement was for the provision of services rather than labour hire. This outcome occurred even though OS was contracted and accountable for delivering defined service packages and exercised day-to-day supervision over its employees.

The decision illustrates that the practical boundary between labour hire and service contracting is being determined case-by-case through discretionary characterisation, rather than by clear legislative criteria. As a result, businesses cannot confidently determine in advance whether workforce arrangements will be excluded from the regime, increasing regulatory uncertainty and compliance risk.

It is important to note that the outcome of the case did not turn on the corporate ownership arrangements in place. The Commission applied the discretionary factors in the same way they would be applied to any other business that is not clearly labour hire.

The decision was upheld on an appeal to the Full Federal Court. BHP has applied for special leave to appeal the decision in the High Court.[45]

What was the government's intent?

The terms of reference for this review require it to consider whether the legislation has resulted in 'unintended consequences'. In considering the issue of service contractors and 'same job, same pay', it is very difficult to consider whether the consequences were 'unintended'. This is because the government's intent has been unclear. In fact, the government has expressed contrary and irreconcilable views. Its position has evolved in several ways since the legislation was first introduced.

How the government's position has changed

The government's ***first position*** was announced in October 2022, when the then Minister, Tony Burke, stated that:

> 'The government made a clear policy decision that we did not want service contractors who were providing a service other than effective labour hire to be captured by the labour hire loophole sections of the Act.'

However, this 'policy decision' was not reflected in the legislation as introduced, which included a range of discretionary factors that would determine whether or not service contractors could be captured. This legislation was effectively the government's ***second position*** on this issue.

This problem was conceded by Minister Burke, which in turn led to the government's ***third position***. This position was reflected in government amendments to the legislation introduced in November 2022 (also described by the government as the 'AREEA amendments'). Under this position, Minister Burke stated that the amendments would:

- *'…put it beyond doubt'* that service contractors would be excluded;
- provide a 'straight exclusion';
- draw a *'clear line'* between labour hire and service contractors;
- remove discretion that the Commission would otherwise have.

However, the legislation as amended did not achieve this goal, as it retained the same discretionary factors, in a slightly modified form.

[44] *OS decision* [2025] FWCFB 134.
[45] *BHP Coal Pty Ltd v Mining and Energy Union* [2025] FCAFC 194.

The government's ***fourth position*** then emerged in the 2024 'test case' of the amendments. This position was expressed in the submissions of then Minister Murray Watt, who intervened in the case in support of the applicant unions. In this case, Minister Watt argued, amongst other things, that:

- it had never been the government's intent to 'excise' any categories of businesses through the 'AREEA amendments'
- there was no 'clear line' between labour hire and service contractors
- the Commission retained broad discretion in interpreting the 'subjective' factors, and
- the 'AREEA amendments' were actually in 'similar terms' to the original legislation.

The contradictions between the government's third and fourth positions are set out in detail below. These contradictions make it extremely difficult for the review to determine what the government's intent was.

Minister Burke, parliamentary debate in 2023	***Minister Watt, submissions in the first 'test case' in 2024***
Minister Burke stated the government's intent was to 'straight exclude' service contractors: *'The new wording, we'll just have a straight exclusion, that if it is a service other than the provision of labour, then they are excluded'.* [46]	Minister Watt argued that this was never the government's intent: *'Thus the intent of sub-ss 306E(1A) and (7A) was not to 'excise' any particular employer from the operation of Part 2-7A'.* [47]
Minister Burke stated the legislation would provide a 'clear line' between labour hire and service contractors: *'And that just gives a really clear line drawn that if it's labour hire, it's covered, if it's service contractors, it's not'.* [48]	Minister Watt argued that there is no clear distinction between 'labour hire' and 'service contractors', and that it is a 'matter of degree': *'… the ordinary meaning of these two concepts are not mutually exclusive, which lends support to a construction of sub-s (1A) which directs the Commission to satisfy itself whether as a matter of degree – the performance or work is properly or more readily to be characterised as for the provision of a service or the supply of labour'.* [49]
Minister Burke stated the 'AREEA amendments' were a substantive change to the legislation: *'the agreement to exempt service contractors from the new workplace laws was signed off on Tuesday by Mr Burke and the Australian Resources and Energy Employer Association...'* *'These amendments will put it beyond doubt,' he said. 'We will end up with better legislation as a result of the constructive engagement and*	Minister Watt argued that the amendments were largely the same as the original bill: '*During the second reading debate on the Bill, the Government moved amendments to insert sub-ss 306E(1A) and (7A) in similar terms to the original first reading test of sub-para 306E(8)(b)'* [51] … *'Nor were sub-ss 306E(1A) and (7A) entirely new "qualifications" that had not been in contemplation at the time of the Minister's Second Reading Speech. A similar form of these provisions was in*

[46] Minister Burke, interview with ABC RN, 22 November 2023.
[47] Minister's submissions, para 17.
[48] Minister Burke, interview with ABC RN, 22 November 2023.
[49] Minister's submissions, para 34.
[51] Minister's submissions, para 16.

industrial expertise that AREEA has brought to the table.' [50]	*the original bill ultimately unenacted sub-para 306E(8)(b)'* [52]
Minister Burke stated the Fair Work Commission would no longer have discretion in determining whether a business was a 'service contractor': *'So that discretion that otherwise would have been there with the Commission won't be there under the amendments.*[53]	Minister Watt argued that the legislation retains very broad discretion for the Commission on this subject. This was confirmed by the Commission's first decision on 'same job, same pay' (the *Batchfire* decision[54]), which the Minister cited: *'While the relevant opinion or state of mind required by sub-s 306E(1) must be reached reasonably, there is "a degree of latitude and subjectivity in the evaluation of the three prescribed matters."'* [55]
Minister Burke stated the amendments would make it easier for service contractors to escape 'same job, same pay': '*Contracting businesses will no longer have to prove they are 'wholly or principally' providing a service, rather, on balance, that the arrangement points towards service provision instead of labour hire*.' [56]	Minister Watt's submissions adopted a different approach: *'The Commission ought to give weight to each matter under sub-paras 306E(7A)(b)-(e) having regard to <u>the extent to which</u> that matter may be relevant on the facts*'. [57] In practice, they will have to satisfy the Commission that the 'extent to which' they are a service provider is 'wholly or principally' that they are. Minister Watt further argued that the service contractor 'exemption' must be interpreted narrowly so as fewer businesses as possible can escape: *'..sub-ss 306E(1A) and (7A) ought to be interpreted narrowly to preserve the statutory intent behind the beneficial or remedial scheme set out in Part 2-7A. It is well settled that beneficial provisions ought to be construed liberally and beneficially, "lest courts become the undoers and destroyers of the benefits and remedies provided by such legislation"..'* [58]

The solution – clearly exclude service contractors through a clear definition of 'labour hire'

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, but with the workers performing work at the direction of the host.

In contrast, service contractors perform specialist tasks, ranging from underground development work, overburden removal, to planned shutdown maintenance and providing catering services.

It is clearly possible to provide a statutory definition of 'labour hire' that does not rely on discretionary factors, and which provides certainty for all parties. This has already been done in other jurisdictions.

[50] 'Labor strikes secret deal to get workplace changes over the line', The Australian, 21 November 2023: https://www.theaustralian.com.au/nation/politics/labor-strikes-secret-deal-to-get-workplace-changes-over-the-line/news-story/e6eca09b2f5497e46b583a0cf2368455
[52] Minister's submissions, para 17.
[53] Minister Burke, interview with ABC RN, 22 November 2023.
[54] *Application by the Mining and Energy Union* [2024] FWCFB 299 ('Batchfire decision'), 1 July 2024.
[55] Minister's submissions, para 23, citing Batchfire at para 10.
[56] 'Labor strikes secret deal to get workplace changes over the line', The Australian, 21 November 2023: https://www.theaustralian.com.au/nation/politics/labor-strikes-secret-deal-to-get-workplace-changes-over-the-line/news-story/e6eca09b2f5497e46b583a0cf2368455
[57] Minister's submissions, para 53.
[58] Minister's submissions, para 46, citing *Chief Executive Officer of Customs v Adelaide Brighton Cement Ltd* [2004] FCAFC 183.

The general definition of labour hire contained in section 7 of the *Labour Hire Licensing Act 2018 (Vic)* provides an example. 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'*:

> **7. Meaning of provides labour hire services – general definition**
>
> (1) A person (a provider) provides labour hire services if—
>
> (a) in the course of conducting a business, the provider supplies one or more individuals to another person (a host) to perform work in and as part of a business or undertaking of the host; and
>
> (b) the individuals are workers for the provider, within the meaning of section 9(1).

Adopting this wording would provide a higher level of confidence that service contractors are clearly excluded. This is borne out in guidance provided by the Victorian Labour Hire Authority, which clarifies that a drilling company providing services at a mine site would not require registration with the Authority.[59]

Recommendation

5. Clearly exclude service contractors from 'same job, same pay' laws, to reflect the government's original policy intent that 'we did not want service contractors who were providing a service other than effective labour hire to be captured by the labour hire loophole sections of the Act.'[60] This should be done through a clear and workable definition of 'labour hire' in the Act, that does not rely on discretionary factors.

[59] Victorian Labour Hire Authority, *General definition of labour hire services: Scenario 3*, viewed 3 March 2026.
[60] The Australian, *Tony Burke agrees to IR law changes, with casual employment, labor hire concessions*, 31 October 2023: https://www.theaustralian.com.au/nation/politics/back-off-tony-burke-employers-launch-bid-for-a-truce/news-story/20f688e05680924dfeb473d2eb0ec816

3. ‘SAME JOB, SAME PAY’ VARIATION OBLIGATIONS – ADDING FURTHER LITIGATION AND UNCERTAINTY

- A ‘variation obligation’, included in the legislation without forewarning or scrutiny, forces hosts to constantly monitor changes in their contractor arrangements and then litigate their contractors to rope them into orders.
- This is unworkable as it further expands the scope of ‘same job, same pay’ orders and adds ongoing compliance costs and risks on hosts.
- Employers who face variation applications are forced to pay disputed amounts to employees and have no avenue for recovery if the dispute is decided in their favour.

The provisions

Late government amendments to the *Closing Loopholes Act*, introduced nine days before its passage on 7 December 2023, added section 306ED. This section requires hosts to apply to the Commission to vary an existing regulated labour hire arrangement order to capture any new supplies of labour (the *Variation Obligation*).[61] This obligation requires ‘host’ businesses to monitor all their suppliers and contractors and then proactively litigate them to rope them into any existing ‘same job, same pay’ orders that may cover the kind of work they perform.

The obligation is triggered as soon as soon as practicable after the employer becomes ‘aware’ that supplied employees will perform work of the kind covered by an existing regulated labour hire arrangement order.

The Fair Work Commission decision in *Boggabri* has confirmed the Variation Obligation does not just apply to new tenders or new suppliers – it can also extend to existing suppliers, where their work may change or they take on new work.[62] Non-compliance carries civil penalties for the host, where they fail to litigate a contractor in the required time.

Once a variation application is lodged, any affected employer must pay employees at least the protected rate of pay, even if the supplier disputes the application or the Commission later finds the supplier should not be roped in. The Act provides no mechanism for suppliers to recover these overpayments.

Implementation issues

The Variation Obligation is generating ongoing risks and costs for employers who are subject to labour hire arrangement orders:

1. It requires continuous monitoring because it covers existing suppliers, not just new ones

The Commission has confirmed that the Variation Obligation extends to existing suppliers whose arrangements change so that they amount to a ‘new’ supply of labour.[63]

Scenarios that would likely constitute a new supply of labour and trigger the obligation include:

- a host issuing, renewing or extending a purchase order with an existing supplier that expands the work performed on site
- a host reactivating a supply of labour after a break in service (for example, bringing back the same supplier each year to perform maintenance or shutdown work)
- a supplier providing labour on site and then winning additional work through a tender.

[61] Government amendments to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, RL102, 22 November 2023.
[62] *Fair Work Act*, s. 306ED(1) and (2).
[63] *Application by Boggabri Coal Operations Pty Ltd re Mineco Pty Ltd* [2025] FWC 2785 (*Boggabri* decision).

In practice, once an order is in effect, hosts must continuously monitor *all* arrangements that involve a potential supply of labour to ensure that arrangements not covered by an order do not inadvertently trigger the Variation Obligation.

2. Hosts may be required to capture suppliers never contemplated in the original order

The legislation ties the Variation Obligation to whether the 'new supply' of labour relates to the 'kind' of work covered by the original order.[64] However, the FWC's practice has been to issue broad, open-ended orders that do not clearly define the relevant 'kind' of work.

For example, in *Batchfire,* the order simply covers:

> 'employees… who perform work at the Callide Mine near Biloela in the State of Queensland who would, if employed by the Regulated Host, be covered by the host employment instrument…[65]

Because orders do not typically specify the types of work intended to be captured, new or existing supplies of labour may fall within scope even where they perform work never contemplated during the original proceedings and which were never considered in any evidence before the Commission when the order was made. For example, cleaning contractors being captured by an Order originally focused on production workers, but who fall within the scope of the (broadly worded) host agreement.

3. Suppliers are forced to pay disputed amounts and have no avenue for recovery

Under section 306ED(11), once a host lodges a variation application, the named supplier is *immediately* required to pay its employees the protected rate of pay. This applies even if the supplier opposes the application and even if the variation application is ultimately rejected.

There is no mechanism to recover these payments. Suppliers therefore face a financial liability arising solely from the possibility that the Commission may vary an order.

4. The complex and subjective 'service contractor' test will capture more service contractors

The Variation Obligation magnifies the uncertainty created by the highly discretionary 'service contractor' test in ss 306E(1A) and 306E(7A). Employers must put themselves in the shoes of the Fair Work Commission and apply the test to each of their suppliers on a continuous basis. This is far more onerous than the 'point in time' assessment that the service contractor test was designed for. If employers reach the wrong conclusion and 'misclassify' an arrangement as a service provision, they are exposed to penalties and underpayment claims.

The multi-factor 'service contractor test' is highly discretionary and by the Commission's statements, the assessment *'involves questions of degree'* and *'imports a degree of latitude and subjectivity'*.[66] This forces employers into guessing how the Commission might decide cases.

5. 'Hosts' will adopt a risk averse approach and litigate to rope in a broader range of work

As a result of this uncertainty and the risk of penalties for 'non-compliance', host employers will take a risk-averse approach by making variation applications even when it is doubtful whether the Commission will ultimately make the variation. It will then be up to the contractor to litigate their way out by persuading the Commission that they should not be captured by a variation order. In the meantime, it will be required to pay the protected rate of pay.

The same dynamic will apply when there is doubt as to whether a contractor (either a labour hire or a service contractor business) will provide work of the same 'kind' as that covered by an existing Order. The host will err on the side of making the variation application and letting the Commission decide.

[64] Fair Work Act, s. 306ED(1)(a), (b).
[65] *Batchfire Callide Management Pty Ltd Regulated Labour Hire Arrangement Order*, 24 July 2024.
[66] Batchfire decision, p. 6; OS decision, p 13.

Impacts of the Variation Obligation

Compliance burden on businesses

- Hosts must continuously monitor arrangements that involve the potential supply of labour to identify any changes that could trigger the Variation Obligation.
- This requires significant investment in administrative systems, contract-management processes and internal controls to ensure suppliers do not inadvertently move outside their scope of work.

More rigidity and reduced responsiveness

- Mining operations frequently face conditions that can slow or halt production, requiring rapid workforce mobilisation.
- Operational efficiency often depends on leaders being able to quickly assemble teams, including through the use of service contractors and labour hire.
- Where contractors are engaged, mobilisation is often required immediately once negotiations conclude.
- The requirement to undertake Commission processes and secure variations introduces additional steps and delays, potentially impacting project delivery.

More service contractors affected

- Because hosts must continuously assess whether each supplier is providing a service or labour, more service contractors are expected to be drawn into variation applications, even where they were never contemplated in the original Order.
- The 'service contractor test' is subjective and highly uncertain. Hosts taking a risk averse approach would need to lodge variation applications even when it is doubtful whether a contractor should be captured. The onus will then be on the contractor business to litigate their way out by persuading the Commission that it should not be captured.

Increasing compliance risk as more orders take effect

- The industry purchased $161.1 billion in goods and services from almost 59,300 local suppliers in 2023–24. These arrangements change constantly.[67]
- More than one hundred regulated labour hire arrangement orders have been issued, yet only one variation application has been lodged. We can expect significantly more applications as orders remain in place over time.
- As orders become more widespread, hosts will face increased compliance risk.

Scope creep as orders expand beyond initial coverage

- Because the FWC does not define the 'kind' of work covered by each Order, variations risk capturing a broader and broader range of work over time.
- Each variation expands the scope of the order beyond what was considered when the order was first made, leading to 'scope creep' of orders beyond the type of work that was considered when the Commission considered the evidence.

Inflationary pressure in supply chains

- Suppliers who are uncertain about whether they may be required to pay protected rates are already pricing this risk into tenders, putting upward pressure on costs.

[67] Lawrence Consulting, Economic Contribution Study 2023-24, 2025; Minerals Council of Australia, *Australian Mining: Mapped*, released 1 September 2025.

Inappropriate obligations on host employers

- It is inherently incongruous to require a host employer to commence litigation against a subcontractor with whom they have cooperative commercial relations.
- A host business is also likely to have a conflict of interest in commencing such litigation – it would not wish to see an outcome in which its contractor would be subjected to higher costs or have its viability threatened.
- The responsibility for making such applications should continue to lie with unions and employees, in keeping with the application-based design of the regime. Unions, supported by union delegates with new expanded powers, are well placed and resourced to monitor working arrangements at workplaces where they represent workers.

Competitive effects – market concentration and reduced supplier diversity

- Smaller suppliers may withdraw from work due to the financial risks of variation applications and inability to absorb unrecoverable 'protected rate of pay' payments.
- A large 'host' business may have over 1,000 contractors to whom it may provide work. This will typically include smaller businesses and locally-based businesses around particular mine sites. As the compliance burden is increased, hosts will have an incentive to reduce their exposure by rationalising the number of contractors who provide them with work. Smaller often locally-based contractors will be most at risk.

The Variation Obligation is an unnecessary overreach

The purpose of the Variation Obligation appears to be to prevent employers from circumventing a regulated labour hire arrangement order by sourcing labour through an alternative provider.

However, the obligation operates automatically and is triggered by the employer's awareness of relevant circumstances. This creates a standing compliance burden that goes well beyond what is necessary to prevent avoidance. It imposes significant legal risk and compliance costs on employers with limited benefit.

Further, because the obligation is triggered in respect of *any* performance of work covered by an order, the reach of orders can be extended to situations that were never originally contemplated when the order was first made. This may include work undertaken in different geographical areas or work times, depending on how the host enterprise agreement and order are framed.

The 'same job, same pay' framework was deliberately designed as an application-based regime, rather than a broad, economy-wide regulatory obligation. It was always intended that applications would be made by unions and employees, not host businesses. The threshold for making an application is already low. In that context, there is no justification for imposing an additional, automatic compliance mechanism that exposes businesses to significant legal risk and administrative burden.

Further, the objective of preventing avoidance is already addressed through the Act's broad anti-avoidance provisions, which prohibit arrangements made for the dominant purpose of avoiding the application of an order.[68] The Variation Obligation, therefore, adds complexity and exposure without materially strengthening the framework.

Recommendation

6. Abolish the **unworkable employer variation obligation** in ss. 306ED and 306EE, which requires host businesses to continuously monitor their suppliers and then litigate them to rope them into 'same job, same pay' orders. These provisions are unnecessary and onerous. They did not receive parliamentary scrutiny, were never part of the government's policy and were not subject to consultation with industry.

[68] *Fair Work Act*, s. 306SA.

4. UNION DELEGATES' POWERS

- The legislation gives union delegates new powers to *'hinder, obstruct or prevent the normal performance of work'* in any workplace.
- These changes have created uncertainty for employers and overturned the longstanding principle that delegates are employees first and union representatives second.
- These provisions bring with them the risk of abuse including CFMEU-style unionism across other industries, particularly mining.
- Legislative amendment is now urgently required to restore clarity and balance, and address the current situation where employers have had laws apply retrospectively.
- It is not possible to determine whether these are 'unintended consequences' as the government's intent remains unclear.

The legislation

The *Closing Loopholes Act* introduced a broad right for 'workplace delegates' (anyone a union appoints to that function under its rules) to represent the industrial interests of union members and potential members.[69]

This creates a loophole that enables a union to appoint an unlimited number of its members as delegates, who will then have access to these powers.

To further support these powers, union delegates were given powers to communication with employees, access to workplace facilities, and paid time off to receive delegate training, at their employer's expense.[70]

The legislation also created a new general protection for union delegates. Employers must not unreasonably hinder or obstruct a delegate's functions or mislead or refuse to deal with them.[71]

The legislation thus established a clear conflict between broad powers for union delegates and the rights of employers to give lawful and reasonable directions to employees and to manage their workplaces without disruption.

The legislation sought to address this issue by directing the Commission insert a delegates' rights term into modern awards by 1 July 2024, with the intent that employers could rely on these terms as a *'complete statement of their obligations'*.[72]

Subsequent developments

The Commission undertook the award variation process in 2024, adding safeguards that sought to place appropriate constraints on the broad powers delegates had been given.

Amongst other things, the Commission required that, in exercising their powers, union delegates must:

(i) comply with their duties and obligations as an employee;

(ii) comply with the reasonable policies and procedures of the employer, including reasonable codes of conduct and requirements in relation to occupational health and safety and acceptable use of ICT resources;

(iii) not hinder, obstruct or prevent the normal performance of work; and

(iv) not hinder, obstruct or prevent eligible employees exercising their rights to freedom of association.[73]

[69] *Fair Work Act*, s. 350C(2).
[70] *Fair Work Act*, 350C(3).
[71] *Fair Work Act,* ss. 350A, 350B.
[72] *Fair Work Act*, Schedule 1, cl. 95; *Revised explanatory memorandum to the Closing Loopholes Bill 2023, para 830.*
[73] Statement [2024] FWC 1699, Attachment A, XZ.9.

The Commission's approach reflected the longstanding industrial practice that union delegates are first and foremost employees of the business, subject to lawful and reasonable directions from their employers.

The Commission orders were contested on appeal to the Federal Court by the CFMEU and the Mining and Energy Union.[74] A Full Court of the Federal Court accepted the arguments of the unions and ultimately quashed the Commission's 2024 award terms.

The Court's decision ruled that the Commission had fallen into jurisdictional error, *inter alia*, in 'impermissibly limiting' the delegates' rights by requiring that they be exercised subject to the safeguards that the Commission had seen fit to impose.

On 23 January 2026 the Commission released a new award term to comply with the Court's rulings.[75] The term has retrospective effect, applying from 1 July 2024.

Concerns regarding the operation of the amendments

The legislation has resulted in a major expansion of delegates' powers, which:

- undermines the longstanding understanding that delegates are employees first
- exposes employers to civil penalties if they limit delegates' activities, even where such limits are reasonable
- enables delegates to represent all employees within an 'enterprise' and not just those of their actual employer (eg. every employee of every contractor on a mining project)
- creates uncertainty about how far the 'right to represent' extends.

The Court's decision ruled that this had been the intent of the legislation.

It appears this was an intended and explicit consequence of the amendment by the government.

However, while the explanatory memoranda envisaged that certainty for employers in respect of their obligations to delegates was also an intended outcome of implementing the delegates' rights term[76], this has not been delivered.

Under the amendments, whenever employers seek to limit delegates' broad 'right to represent' they run the risk of civil penalties unless they can show that they were 'not unreasonably' hindering the exercise of the rights. Employers have no clarity about how far this extends.

Practical consequences include situations where an employer may risk penalties for denying requests, such as a delegate seeking paid time to travel and campaign for union membership, or the delegate refusing to perform work for their employer in order to spend paid time representing employees of another employer within the broader 'enterprise'. There is also no restriction on how often delegates may exercise their rights, allowing them, in practice, to devote substantial, or their entire work time, to union activities.

In the context of a concerted push by several unions to 're-unionise' mining operations in Western Australia, MCA members are concerned that these rights are open to abuse and risk undermining productivity and workplace harmony. The risk is heightened by the fact that there is no legislative limit to the number of union delegates who can be appointed.

What was the government's intent?

In relation to union delegates' powers, the Commission and the Federal Court have adopted two very different approaches to how the legislation should be applied and the extent to which it can impose checks and balances on such powers. The government has never expressed a view on which of these two approaches it intended.

[74] *Construction, Forestry and Maritime Employees Union v Australian Industry Group* [2025] FCAFC 187.
[75] *Decision*, [2026] FWCFB 5 (23 January 2026).
[76] *Revised explanatory memorandum to the Closing Loopholes Bill 2023, paras 806, 830.*

The effect of the Court's decision was to overturn the various checks and balances that the Commission had determined were fair and necessary in providing safeguards against the abuse of union delegates' powers.

The Court determined that the Parliament did intend for union delegates to be given powers to 'hinder, obstruct and prevent' the performance of work without such safeguards. This is a clear 'loophole' that allows unions to avoid the checks and balances that the Commission had attempted to impose on their powers.

It is not clear whether this was the government's policy intent or not, as the MCA is not aware of any public statements by the government to this effect, nor did the relevant Minister(s) exercise their standing to intervene in either the 2024 award terms proceeding in the Commission or in the Court proceeding. This would have enabled the government to express its view as to its intention. This is regrettable, as some statement of the government's intent would have been of assistance to all parties involved in those proceedings.

The government's failure to express a view also makes it extremely difficult for the current review to assess whether or not the outcome as determined by the Court is an 'unintended consequence'.

In any event, the Court's decision is highly concerning and the MCA submits that the more balanced approach of the Commission should be preferred.

Recommendation

7. Amend the *Fair Work Act* to **restore the balanced framework** endorsed by the Fair Work Commission when it created a delegates' rights term on 28 June 2024, which provided that a union delegate could only exercise their statutory rights subject to the condition that they:
    a. comply with their duties and obligations as an employee
    b. comply with the reasonable policies and procedures of the employer
    c. not hinder, obstruct or prevent the normal performance of work
    d. not hinder, obstruct or prevent eligible employees exercising their rights to freedom of association.
    e. may only represent employees of their own employer and not those of other employees in a broader 'enterprise'.[77]

    This amendment is necessary to provide certainty, prevent abuse, and ensure that industrial representation occurs without substantially disrupting normal business operations.

    The decision of the Federal Court in December 2025 to quash the Commission decision shows that the legislation is clearly not operating as intended.

[77] *Statement* [2024] FWC 1699, pp. 5-6.

5. UNION RIGHT OF ENTRY POWERS TO 'ASSIST' HEALTH AND SAFETY REPRESENTATIVES

- The *Closing Loopholes Act* created a right-of-entry loophole workplaces without permits, notice, or fit-and-proper safeguards.
- This creates serious integrity and safety risks, particularly given documented misuse of HSR roles and corruption within the CFMEU, as highlighted by the Watson Report.
- The government has yet to respond or implement safeguards, while union entries are rapidly increasing and imposing growing productivity impacts on major employers.

The *Closing Loopholes Act* removed the requirement for a union official to hold a right of entry permit if they were entering a workplace to purportedly 'assist' a Health and Safety Representative (HSR).[78]

The amendment created a 'loophole' in which right of entry can be exercised by a union official without giving the usual notice period, and without them meeting the requirements that otherwise apply to permit holders, including 'fit and proper person' requirements.

The amendment was a government amendment, added at a late stage in the legislative process, without the opportunity for any scrutiny through any parliamentary debate or the usual senate inquiry processes.

The loophole allows individuals who have had permits revoked for misconduct or had a permit denied on the basis that they were not 'fit and proper' to nonetheless exercise entry under the guise of an asserted 'request' to 'assist' a HSR.

Under this amendment, a union official such as John Setka – who did not hold a right of entry permit, and who would not meet the 'fit and proper person' test if he applied for one – could gain access to a workplace, without notice, in response to an asserted request to 'assist' a HSR.

The final report of the statutory review of the 2022 'Secure Jobs, Better Pay' legislation recognised the risk associated with the creation of a loophole without any safeguards. It recommended the government *'monitor Health and Safety Representative assistants accessing workplaces without right of entry permits, and take immediate action to address any indications of misuse…*'.[79] Whilst this expression of concern is welcome, it does not go far enough. The capacity for this provision to be abused is obvious and should raise serious concerns given widely reported revelations of systemic corruption in the construction union.

This corruption has often involved the systemic misuse of HSR positions. Recent revelations in the *Watson Report* on corrupt practices by the Victorian CFMEU highlight the central role of CFMEU 'health and safety representatives' in imposing thuggish, corrupt and extremely unsafe practices in workplaces:

> The powerbrokers within the Victorian CFMEU repeatedly abused their power and influence by appointing outsiders to cushy, well-paid positions as delegates or as health and safety representatives. These were not real delegates, these were fake delegates.[80]

Watson Report also makes clear the types of 'workers' who were imposed as HSRs and delegates by the CFMEU:

> The CFMEU was actively employing criminals. During the Setka era the CFMEU was forcing contractors to employ patched bikies, meth-abusers, violent standover men, killers, boxers and cage fighters.[81]

The government has not yet responded to the report, and it is currently unclear whether there is any action in response to the recommendation, including whether any effective monitoring has been put in place.

[78] *Closing Loopholes Act*, Part 16A of Schedule 1.
[79] Emeritus Professor Mark Bray and Professor Alison Preston, *Secure Jobs, Better Pay Review Report*, 31 March 2025 (Recommendation 21), p. 20, 308.
[80] G. Watson SC, 'Rotting from the Top: The CFMEU in Victoria during the Setka Era', para 207: https://www.cfmeuinquiry.qld.gov.au/__data/assets/pdf_file/0005/897476/gw-13-watson-report-victoria-redacted.pdf
[81] Ibid, para 92.

Ensuring the integrity of the right of entry system is a critical issue in the mining industry, with unions currently 'stepping up' their campaigns in the Pilbara and elsewhere. One MCA member experienced over 900 union entries in its WA operations in 2024 alone, an increase of around 300 per cent compared to previous years. Iron ore producers have also recently highlighted the negative impacts of large numbers of union right of entry requests on productivity due to the diversion of resources.[82]

Recommendation

8. Immediately **repeal the loophole that allows worksite access to anyone** on the basis that they are there to 'assist' a Health and Safety Representative. This loophole can be used to give criminals and thugs legal protection so they can intimidate employers and employees in their workplaces.
9. Strengthen the 'fit and proper person' test in light of further revelations of CFMEU corruption and misuse of powers by Health and Safety Representatives and union officials.

[82] The West Australian, *BHP boss Mike Henry fears union activity will stifle long-term investment for WA's iron ore industry*, 17 February 2026; The West Australian, *Rio Tinto CEO Simon Trott joins BHP in warning of 'significant' union burden on WA iron ore*, 20 February 2026.

6. WORKPLACE DETERMINATIONS AND INTRACTABLE BARGAINING

- The 'intractable' bargaining regime is a fundamental shift away from voluntary bargaining to arbitrated outcomes.
- This was never part of the government's policy and is not 'closing a loophole'. It is a fundamental paradigm shift in the bargaining system.
- The ultimate effect will be to progressively destroy the concept of agreed outcomes as the key feature of the enterprise bargaining system.
- The 2023 amendments to 'intractable bargaining' by the government and the Greens political party will destroy any incentive for unions to reach an agreed outcome and will instead encourage the system to be 'gamed' to impose arbitrated outcomes.
- The system rewards uncooperative and intractable behaviour. It encourages manipulation of the process by 'running the clock down' to trigger arbitration after nine months.

The proper role of enterprise bargaining

The bargaining system should play a crucial role in encouraging and incentivising parties to reach outcomes beyond the minimum safety net, that:

- support workplace productivity and profitability, and
- support equitable and sustainable wages and conditions for employees.

Bargaining works best when parties make trade-offs where necessary and find 'win-win' solutions in designing their workplace practices.

However, the bargaining framework has fundamentally changed under successive changes from 2022. These changes have removed the ability of employers to terminate agreements that are no-longer working except in extremely narrow circumstances, making enterprise agreements effectively perennial. In addition, under the intractable bargaining regime, the Fair Work Commission ultimately decides outcomes in place of the parties reaching agreement.

The intent of the 'intractable bargaining' amendments

The government has made two significant changes to the 'intractable bargaining' regime under the Act – first under the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* and then in the *Closing Loopholes Act* in 2023. The intent of the 2023 changes directly contradict that of the 2022 changes.

Under the 2022 amendments, intractable bargaining was presented as a circuit-breaker designed to resolve genuine deadlocks in bargaining in order to support good faith bargaining. As the then Minister explained in his Second Reading Speech, the 2022 amendments were intended to enable the Fair Work Commission to intervene *'where there is no reasonable prospect of agreement being reached'*.[83]

Consistent with that objective, the 2022 legislation required a minimum bargaining period, prior Commission involvement under section 240, and a finding that further bargaining is unlikely to succeed before arbitration can occur. These features reflect an intention that arbitration operate as a last-resort mechanism to break deadlocks, not as a substitute for agreement-making.

However, the intractable bargaining framework as amended in 2023 goes well beyond breaking deadlocks. In practice, it fundamentally alters enterprise bargaining incentives by insulating unions from risk and discouraging parties from pursuing productivity-enhancing trade-offs that support sustainable wage growth. It is unclear whether the was an 'unintended consequence'; however, it is certainly an adverse consequence with respect to the integrity of the bargaining system.

[83] Commonwealth, Parliamentary Debates, House of Representatives, 9 November 2022, p. 2755, (Hon Tony Burke MP).

Closing Loopholes No. 2 amendments

Amendments inserted into the 'Closing Loopholes No.2' legislation by the government and the Greens political party that prohibit the Commission from issuing a workplace determination which contains conditions 'less favourable' to a union or employee have substantially altered bargaining incentives for the worse.[84] This is a loophole. The amendments remove the incentive to bargain, opening the bargaining system to abuse and 'gaming' by unions.

The amendments included the following requirements:

1. Arbitrated outcomes must be 'not less favourable' to unions and employees
    - In arbitration of a bargaining dispute, the FWC must ensure any term it makes is 'not less favourable' to any employee or union covered by the existing enterprise agreement. This applies to any disputed terms except those that provide a wage increase. This is a 'line-by-line' test with no requirement to make an 'overall' comparison.[85]
2. 'Agreed' terms must be included in the arbitrated outcome
    - The FWC must examine the bargaining history to form a view about whether any terms have been agreed to, from the time the union applies for an 'intractable bargaining declaration'.

The impact of the legislation

The amended 'intractable bargaining' rules expanded the Fair Work Commission's powers in setting pay and conditions in workplaces. It has also changed the dynamics of collective bargaining, because it is no longer possible for an employer to 'not agree' to an enterprise agreement if negotiations are not constructive.

The productivity benefits of enterprise bargaining are only realised where enterprise agreements are actually agreed by the parties. Forcing arbitrated outcomes on businesses undermines the very idea of enterprise agreements. It also undermines the quality of outcomes, breaking the crucial nexus between pay and productivity on which the system of enterprise bargaining had, until now, been based.

They will mean the bargaining system can be gamed by unions to trigger arbitration in circumstances where an arbitrated outcome is likely to deliver a better outcome for the union than negotiation, or where the union lacks the resources or level of employee support necessary to achieve its desired goals through negotiation.

These amendments are alarming and unprecedented. They were never part of the government's policy. Until the current government, it would have been unconscionable for any form of litigation to be predetermined in such a way that one class of litigants can never be worse off.

Victorian Government's criticisms

The government-Greens amendments were implemented despite criticism from the Victorian government, which rightly pointed out that the *'not less favourable'* test in the amendments *'removes the incentive for unions to reach an agreement as they know that they will be no worse off on a clause by clause basis as against a current enterprise agreement'*.[86]

The Victorian Government's appeals to the government were ultimately ignored.

[84] *Fair Work Act 2009* (Cth), ss 270A(2) and 270(3).

[85] *Fair Work Act 2009* (Cth), s. 270A(3).

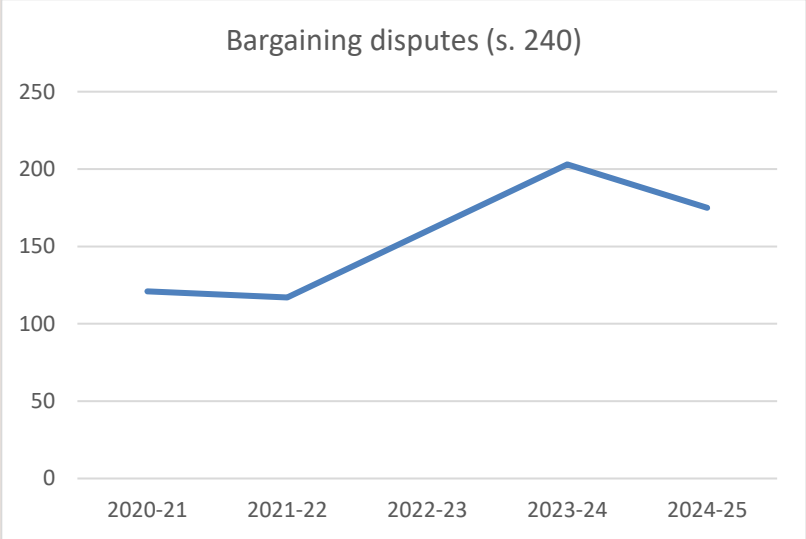
[86] Letter from Tim Pallas MP, Minister for Industrial Relations, Victoria to the Hon Tony Burke MP, Minister for Employment and Workplace Relations, Australia, 16 January 2024 (BMIN-24010095).

The legislation may be driving uncooperative bargaining

Available evidence suggests the legislation, including the intractable bargaining amendments, may be driving more bargaining disputes and uncooperative bargaining. This is because:

- obstructive behaviour is encouraged, as lack of progress on bargaining can be cited as evidence that bargaining is 'intractable'
- unions who adopt uncooperative tactics are rewarded, as they are insulated from risk in the event of an intractable bargaining workplace determination.

From 2021-22 to 2024-25, the Fair Work Commission has reported a 50 per cent increase in bargaining disputes, which is a prerequisite for obtaining an 'intractable bargaining declaration'.[87]



'Agreements' in name only

For over 30 years, the Australian workplace relations system has been founded on the concept of the freedom of businesses and workers to engage or not engage, in collective bargaining at the workplace level.

It is only when enterprise bargaining is based on the ability of either party to agree or not agree that it can deliver superior productivity benefits and wage outcomes. This is because businesses and employees are best placed to understand their needs and find 'win-win' outcomes.

By making forced arbitration the endpoint of the bargaining process – rather than a negotiated and agreed endpoint – the amendments have undermined the core concept of agreement-making. It is not an exaggeration to say that these changes risk destroying any concept of cooperative bargaining with mutually agreed 'win-win' outcomes.

If the practice of arbitrating wages and conditions becomes more prevalent, we will inevitably see a negative impact on productivity, as damaging outcomes are imposed on businesses.

Encouraging 'ambit' claims and uncooperative bargaining

The amendments strongly incentivise unions to make 'ambit' claims during bargaining. As soon as a term is 'proposed' by a party during bargaining, it can potentially form part of an arbitrated outcome.[88] The

[87] Fair Work Commission, Annual Reports from 2021-22 to 2024-25.
[88] *Fair Work Act*, s. 240(1).

FWC has confirmed that this could include draft terms, claims, counter claims, or even issues or topics raised for discussion and not documented.[89]

Under the new settings a union has nothing to lose and everything to gain by raising as many 'proposed' claims as possible through the bargaining process and refusing to concede to non-contentious employer claims. Each claim made, however unreasonable, would become a risk for the employer in the event of an intractable bargaining determination.

MCA members have observed that, with intractable bargaining now freely available, unions have been disengaged during bargaining processes and less willing to make concessions.

MCA members advise that unions now have no incentive to genuinely bargain. In some cases, they are not even turning up to meetings. As this flows through the system through future bargaining rounds, there will be more recourse to arbitration, as the system positively encourages unions to use it as the 'first-resort' option.

The system is now designed to reward parties that strategically withhold agreement to trigger arbitration, given that the amendments mean that unions bear no risk, and will therefore never have to make any concessions.

Destroying the Better Off Overall Test

The 'no less favourable' test requires that each clause in a proposed workplace determination be assessed against the corresponding clause in the existing enterprise agreement. This is a radical change that revives the 'line-by-line' approach the government has previously accepted was inappropriate in the context of the Better Off Overall Test.

It is incredibly poor public policy to have two separate statutory tests to assess industrial instruments, yet that is what the legislation now provides:

- for agreed outcomes, the test is the Better Off Overall Test, which is compared to the applicable award
- for arbitrated outcomes, the test is now the 'Better Off In Every Respect Test', which is compared to the previous agreement.

The practical impact of this perverse outcome is that unions will inevitably 'game' the system and push for arbitrated outcomes, knowing that the new test will guarantee a better outcome than that which would otherwise apply.

Encouraging employers to take a risk-averse approach to bargaining

Perversely, the amendments discourage employers from making concessions during bargaining, out of concern they will be held to those concessions under the 'no less favourable' test. The issue arises because of the nebulous nature of the concept of an 'agreed term'.[90]

The FWC has made it clear that 'agreement' under the new regime *'does not require formal agreement necessary for contract law'*. Even concessions that are made in principle and subject to an 'entire agreement' being reached do not necessarily protect an employer from later being deemed to have agreed.[91]

Every case turns on its own facts, and the Commission's assessment of whether there was a 'meeting of the minds' in relation to a particular term. In other words, employers can never be certain about what they have 'agreed' to and might then be held to under an arbitrated outcome.

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[89] *Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd T/A Qube Ports* [2024] FWC 1646, 24 June 2024.

[90] Fair Work Act, s 274(3).

[91] *United Firefighters' Union of Australia v Fire Rescue Victoria* [2024] FWCFB 43, paras [108]-[157]; *Transport Workers' Union of Australia (179V) v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd* [2024] FWCFB 287, para 8.

Encouraging restrictive workplace practices: entrenching low productivity

The amendments mean that no disputed non-wages term in a proposed enterprise agreement can ever be less favourable (to a union or employees) than the existing enterprise agreement. These settings have already encouraged unions to adopt aggressive bargaining strategies, which are likely to lead to more industrial action in aid of 'ambit' claims.

The predictable result will be the gradual inclusion of more restrictive work practices in enterprise agreements, which can never be reversed without union agreement.

The more industrial action is engaged in, the better a union's chances of persuading the Commission that bargaining is 'intractable'.

Recommendation

10. Amend the intractable bargaining framework to restore the Fair Work Commission's powers to determine arbitrations as it sees fit, and to incentivise bargaining that supports both productivity and wages. This should be done by repealing the government-Greens party amendments that prohibit any term of a workplace determination from being 'less favourable' to a union or employee in any respect. These amendments have created new loopholes that allow the bargaining system to be manipulated to trigger arbitration, in which a particular side is guaranteed to always win.

APPENDIX A – INCREASE IN IR REGULATION

Act or instrument	Before government sworn in (23 May 2022)	Most recent version
Fair Work Act	Compilation No. 44 1 September 2021 Vol 1: 637; Vol 2: 458 **Total: 1095 pages**	Compilation No. 69 7 November 2025 Vol 1: 507; Vol 2: 465; Vol 3: 452; Vol 4: 240 **Total: 1664 pages**
Fair Work Regulations	Compilation No. 36 11 Sep 2021 - 13 Dec 2022 **190 pages**	Compilation No. 55 1 November 2025 **236 pages**
Building and Construction Industry Improvement (Consequential and Transitional) Act 2005	C2005A00112 09 March 2005 - 05 February 2023 **17 pages**	Repealed
Building and Construction Industry (Consequential and Transitional Provisions) Act 2016	C2017C00273 C01 23 August 2017 - 05 February 2023 **25 pages**	Repealed
Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022	Not in existence	C2022A00050 09 November 2022 **23 pages**
Coal Mining Industry (Long Service Leave) Administration Act 1992	C2021C00373 C21 01 September 2021 - 31 December 2023 **77 pages**	C2024C00635 C24 14 October 2024 **81 pages**
Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992	C2021C00478 C08 01 September 2021 - 31 December 2023 **29 pages**	C2024C00578 C10 14 October 2024 **31 pages**
Independent Contractors Act 2006	C2021C00495 C09 01 September 2021 - 25 August 2024 **38 pages**	C2024C00351 C10 26 August 2024 **37 pages**
Fair Work (Digital Labour Platform Deactivation Code) Instrument 2024	Not in existence	F2024L01573 5 December 2024 **18 pages**
Fair Work (Model Terms) Determination 2025	Not in existence	F2025L00202 25 February 2025 **15 pages**
Fair Work (Road Transport Industry Termination Code) Instrument 2024	Not in existence	F2024L01574 05 December 2024 **13 pages**
Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023	Not in existence	F2023L00551 17 May 2023 **13 pages**
Independent Contractors Regulation 2016	F2024C00362 C01 11 April 2024 - 25 August 2024 **10 pages**	F2024C00783 C02 26 August 2024 **10 pages**
Coal Mining Industry (Long Service Leave) Payroll Levy Regulations 2018	F2018L00217 07 March 2018 - 30 June 2023 **8 pages**	F2023C00557 C01 01 July 2023 **11 pages**
TOTAL PAGES	**1489**	**2152**

Note: The following has not been counted: Workplace health and safety regulations; instruments related to specific companies; regulations that do not create a significant compliance burden on private sector employers, (e.g. the National Workplace Relations Consultative Council Act 2002); consequential amendments to legislation that does not form part of the Fair Work system; amendments to anti-discrimination legislation; amendments to modern awards, e.g. to include a delegates' rights term; explanatory memoranda, Fair Work Commission orders, case law, guidance material etc.

APPENDIX B – MEASURES UNDER REVIEW

The Department of Employment and Workplace Relations provides a list of the 'Closing Loopholes' measures on its website, which is set out below for completeness. The MCA has not commented on all the measures, or the provisions of the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022*, which also form part of the review.

Fair Work Legislation Amendment (Closing Loopholes) Act 2023

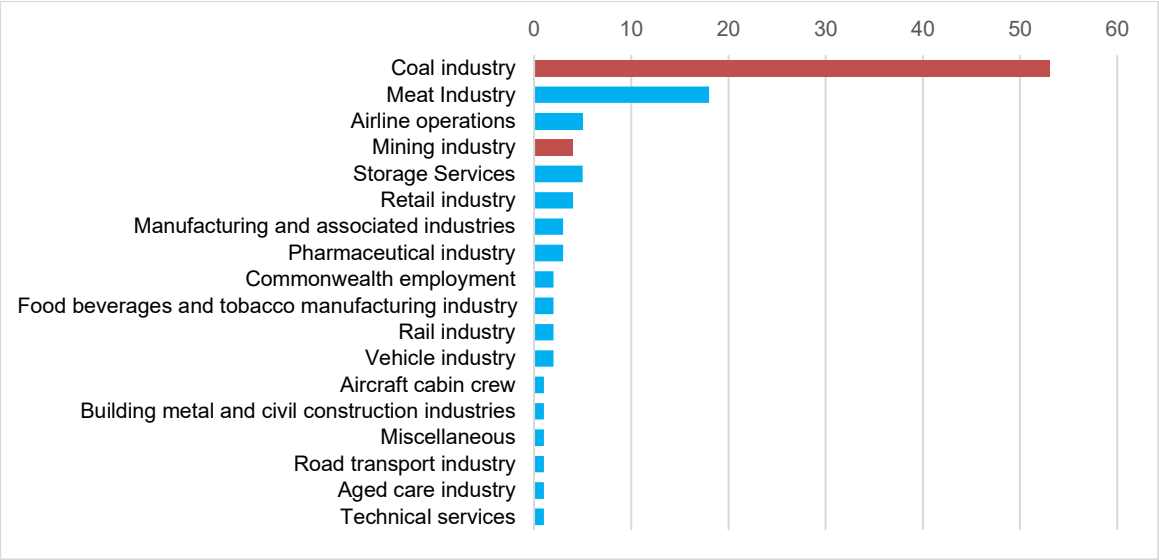
- Compliance and enforcement: Criminalising wage theft
- Regulated labour hire arrangement orders (Closing the labour hire loophole)
- Enhancing delegates' rights
- Provide stronger protections against discrimination, adverse action and harassment
- Addressing anomalous consequences of the small business redundancy exemption in insolvency contexts
- Conciliation conference orders
- Entry to assist Health and Safety Representatives
- Amendments to *Asbestos Safety and Eradication Agency Act 2013*
- Amendments to the *Safety Rehabilitation and Compensation Act 1988*
- Industrial manslaughter and other work, health and safety reforms

Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024

- Extend the powers of the Fair Work Commission to set minimum standards for 'employee-like' workers
- Allow the Fair Work Commission to set minimum standards to ensure the road transport industry is safe, sustainable and viable
- Give workers the right to challenge unfair contractual terms
- Stand up for casual workers
- Compliance and enforcement: Civil penalties and sham contracting
- Meaning of 'employee' and 'employer' in the *Fair Work Act 2009*
- Enabling multiple franchisees to access the single enterprise agreement stream
- Strengthening right of entry to investigate underpayments
- Fair Work Commission preparing enterprise agreement model terms
- Transitioning from multi-enterprise agreements
- Repeal de-merger from registered organisations amalgamation provisions
- 'Intractable bargaining' and workplace determinations'
- Right to disconnect

APPENDIX C – ‘SAME JOB, SAME PAY’ ORDERS MADE

Number of regulated labour hire arrangement orders made by industry orders made



Source: MCA analysis of Fair Work Commission orders made under s. 306E (to 1 February 2026).