



## **‘SAME JOB, SAME PAY’ TEST CASE**

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**January 2025**

### **The test case**

In June 2024, the Mining and Energy Union filed ten separate applications for ‘Regulated Labour Hire Arrangement Orders’ (i.e. ‘same job, same pay’ orders) covering workers at three BHP coal mines in the Bowen Basin – Goonyella Riverside, Peak Downs and Suraji. The applications cover workers who are employed by BHP Operations Services, WorkPac and Chandler McLeod.<sup>1</sup>

These applications will be heard by the Full Bench of the Fair Work Commission over several weeks from 20 January 2025. Five other parties are intervening in the proceeding, including the MCA<sup>2</sup> and the Minister for Workplace Relations, Senator Murray Watt.<sup>3</sup>

### ***What is at stake – all service contractors could be captured by ‘same job, same pay’, not just labour hire providers***

This case will be a major test case that will consider the extent to which service contractors can be subject to ‘same job, same pay’ orders in the same way as labour hire. The relevant provisions of the legislation provide some discretion for the Commission to exclude certain businesses from ‘same job, same pay’ orders if they are service contractors that provide a specific service, rather than labour hire providers, who provide only labour to the ‘host’ business. However, these provisions are complex and include various discretionary factors that have not yet been tested. Under the legislation, a reverse onus applies – a business will be captured unless it can litigate its way out by persuading the Commission that it should be excluded under these factors.

The Mining and Energy Union is arguing for an extremely broad interpretation that would effectively mean that service contractors would be treated no differently to labour hire providers.<sup>4</sup> For example, the MEU argues that contractors that are subject to safety obligations under coal mine safety legislation are not exempt, because BMA is the coal mine operator for the purpose of that legislation (in other words every contractor is captured). The case could have significant implications for workforce arrangements across the industry. If the Commission adopts the union’s position, it could mean that any service contractor is at risk of being captured by ‘same job, same pay’.

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<sup>1</sup> MEU & AMWU applications for regulated labour hire arrangement orders: <https://www.fwc.gov.au/hearings-decisions/major-cases/meu-amwu-applications-regulated-labour-hire-arrangement-orders>

<sup>2</sup> <https://minerals.org.au/wp-content/uploads/2025/01/Minerals-Council-of-Australia-submissions-to-Same-Job-Same-Pay-test-case-December-2024.pdf>

<sup>3</sup> Minister for Employment and Workplace Relations, *Outline of submissions*, 9 December 2024: <https://www.fwc.gov.au/documents/sites/c2024-3846/c2024-3846-corr-min-2024-12-09.pdf>

<sup>4</sup> MEU, *Outline of submissions*, 2 August 2024: <https://www.fwc.gov.au/documents/sites/c2024-3846/c20243846-meu-submission-2024-08-02.pdf>

Service contractors in the mining industry are businesses that apply expertise, capital and equipment and labour to deliver mining services. Unlike ‘host’ businesses, service contractors do not hold mining leases. They can be small, medium or very large businesses.

Service contractors are distinct from labour hire providers because they provide more than just workers to work ‘in and as part of’ the businesses of their clients.

Almost 40 per cent of workers in the Australian mining industry are employed through service contractors – and almost every major mining project in Australia relies, to varying degrees, on service contractors to conduct their operations.

For example, a large, diversified mining service contractor could provide services to a large open cut coal mine that include everything from mine design to planning and haulage to drilling and blasting operations.

The commercial arrangements that ‘host’ businesses have with contractors are nothing like labour hire arrangements. They are often highly sophisticated arrangements worth tens or hundreds of millions of dollars, in which the contractor manages its own equipment, its own processes and its own workforce. To needlessly jeopardise these arrangements would risk untold uncertainty and disruption across the entire mining industry.

## **The Albanese government’s changing position on ‘same job, same pay’ and service contractors**

### ***What the government claimed in 2022***

Prior to the 2022 election, the then Opposition Leader, Mr Albanese, stated that the ‘same job, same pay’ policy was limited to addressing ‘wage arbitrage’, which was defined as:

*‘a labour hire service provider being able to profit from wage arbitrage where they deliberately source lower cost labour than would be available to the host through a direct employment model.’<sup>5</sup>*

Following the election, the government made similar statements that ‘same job, same pay’ would not extend to service contractors. The government gave an assurance that:

*‘The Government’s Same Job, Same Pay measure seeks to address 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.’<sup>6</sup> (emphasis added)*

### ***What the government claimed in 2023***

The government’s ‘closing loopholes’ legislation went far beyond this ‘limited’ commitment when it was introduced in 2023. While the then Minister initially claimed that ‘*Completely. Completely. Service contractors have been deliberately excluded*’, it was eventually conceded that this was not the case.<sup>7</sup>

The government then introduced amendments to its legislation, which it claimed would result in service contractors being ‘exempted’. On 28 November 2023, the then Minister for Workplace Relations, Tony Burke, introduced the government’s amendments to ostensibly ‘*exempt service contractors*’ from being captured by ‘same job, same pay’ orders. At the time, Minister Burke stated that:

*‘These amendments will put it beyond doubt...’*

*‘Under the new changes, tighter criteria will direct the commission to focus only on factual matters of supervision, control, provision of equipment, statutory obligations and whether the work is of a specialist or expert nature.’*

*‘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.’<sup>8</sup>*

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<sup>5</sup> *Fair Work Amendment (Same Job, Same Pay) Bill 2021*, Explanatory Memorandum, page 2.

<sup>6</sup> Department of Employment and Workplace Relations, , April 2023, page 3. <https://www.dewr.gov.au/workplace-reform-consultation/resources/same-job-same-pay-consultation-paper>

<sup>7</sup> Minister for Employment and Workplace Relations, Hon Tony Burke MP, *Interview with Andrew Clennell*, Sky News Afternoon Agenda, 5 September 2023.

<sup>8</sup> The Australian, 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>

### **What the government is now arguing in 2025**

Despite Minister Burke’s 2023 assurances, the government is now arguing the opposite. In December 2024, the current Minister, Senator Murray Watt, filed his submissions to the test case, which were written by senior counsel.<sup>9</sup> This position will now be argued by the government in Commission proceedings.

In 2025, the government is now arguing that the amendments do not ‘*exempt service contractors*’ from ‘same job, same pay’, as it claimed in 2023. Nor do they ‘*put it beyond doubt*’, as Minister Burke had claimed. Service contractors can still be captured by ‘same job, same pay’ and they will still be required to litigate their way out to avoid capture. Moreover, the government is arguing that the legislation should be applied ‘liberally’ to spread the ‘benefits’ of ‘same job, same pay’ as broadly as possible, including across service contractors.

### **How the government’s position has changed**

The Minister’s submissions in the current test case are a substantial departure from the assurances given by the previous Minister at the time of the Parliamentary debate, as set out in the table below.

| <b>Minister Burke, 2023</b>   | <b>Minister Watt, 2025</b>   |
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| <p>Minister Burke claimed the government’s intent was to ‘straight exclude’ service contractors:</p> <p><i>‘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’</i><sup>10</sup></p>       | <p>Minister Watt now submits that this was never the government’s intent:</p> <p><i>‘Thus the intent of sub-ss 306E(1A) and (7A) was not to “excise” any particular employer from the operation of Part 2-7A’</i><sup>11</sup></p> <p>Moreover, Minister Watt now adopts the exact opposite approach:</p> <p><i>‘The Minister submits that it is not the intention of sub-s 306E(1A) that the provision of a service means any performance of work that is more than the mere supply of labour...’</i><sup>12</sup></p> <p><i>‘...The Commission’s reaching of that state of satisfaction does not involve any task or process whereby what is described as “mere(ly) suppl(ying) labour” by the employer is first found to exist as a concept, and if the employer provides more than the mere supply of labour, it follows inevitably that the performance of work is to be characterised as being “for the provision of a service”...’</i><sup>13</sup></p> |
| <p>Minister Burke claimed the legislation would provide a ‘clear line’ between labour hire and service contractors:</p> <p><i>‘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.’</i><sup>14</sup></p> | <p>Minister Watt now submits that there is no clear line between ‘labour hire’ and ‘service contractors’, and that it is a ‘matter of degree’:</p> <p><i>‘... 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.’</i><sup>15</sup></p>   |

<sup>9</sup> <https://www.fwc.gov.au/documents/sites/c2024-3846/c2024-3846-corr-min-2024-12-09.pdf>

<sup>10</sup> Minister Burke, interview with ABC RN, 22 November 2023

<sup>11</sup> Minister’s submissions, para 17

<sup>12</sup> Minister’s submissions, para 35

<sup>13</sup> Minister’s submissions, para 35

<sup>14</sup> Minister Burke, *Interview with ABC RN*, 22 November 2023.

<sup>15</sup> Minister’s submissions, para 34.

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| <p>Minister Burke claimed the government's amendments were a substantive change to the legislation:</p> <p><i>'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...'</i></p> <p><i>'These amendments will put it beyond doubt,' he said. 'We will end up with better legislation as a result of the constructive engagement and industrial expertise that AREEA has brought to the table.'</i><sup>16</sup></p> | <p>Minister Watt now submits that the amendments were largely the same as the original Bill:</p> <p><i>'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).'</i><sup>17</sup></p> <p>...</p> <p><i>'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 the original but ultimately unenacted sub-para 306E(8)(b).'</i><sup>18</sup></p>  |
| <p>Minister Burke claimed the Fair Work Commission would no longer have discretion in determining whether a business was a 'service contractor':</p> <p><i>'So that discretion that otherwise would have been there with the Commission won't be there under the amendments.'</i><sup>19</sup></p>   | <p>Minister Watt now claims that the legislation retains very broad discretion for the Commission on this subject.</p> <p>This was also confirmed by the Commission's first decision on 'same job, same pay' (the <i>Batchfire</i> case<sup>20</sup>), which the Minister now cites:</p> <p><i>'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."</i><sup>21</sup></p>   |
| <p>Minister Burke claimed the amendments would make it easier for service contractors to escape 'same job, same pay':</p> <p><i>'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.'</i><sup>22</sup></p>   | <p>Minister Watt's submissions adopt a different approach:</p> <p><i>'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.'</i><sup>23</sup></p> <p>In practice, this means employers will have to satisfy the Commission that they are 'wholly or principally' service contractors.</p> <p>Minister Watt is arguing that the service contractor 'exemption' must be interpreted narrowly so as few businesses as possible can escape:</p> <p><i>'...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</i></p> |

<sup>16</sup> '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>

<sup>17</sup> Minister's submissions, para 16.

<sup>18</sup> Minister's submissions, para 17.

<sup>19</sup> Minister Burke, interview with ABC RN, 22 November 2023.

<sup>20</sup> *Application by the Mining and Energy Union* [2024] FWCFB 299 ('*Batchfire*').

<sup>21</sup> Minister's submissions, para 23, citing *Batchfire* at [10].

<sup>22</sup> '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>

<sup>23</sup> Minister's submissions, para 53.

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|  | <i>benefits and remedies provided by such legislation”...’</i> <sup>24</sup> |
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## The impact of the government’s position

Minister Watt’s submissions in 2025 indicate that the government does not now believe that its 2023 amendments exempt service contractors. If its current view is adopted by the Fair Work Commission, then the mining industry’s worst fears about the legislation will be confirmed. The fundamental flaws with ‘same job, same pay’ will remain and the government’s 2023 assurances will be meaningless.

### 1. **No actual exemption – just more litigation and discretion:**

- Under the government’s current approach, there will be no ‘exemption’, only a ‘matter of degree’ as to whether service contractors will be captured.
- In the inevitable grey areas of the ‘matter of degree’, the reach of ‘same job, same pay’ will be unpredictable, uncertain and subject to hotly contested litigation in the FWC, with no clear boundaries or definitions. It will depend on the FWC’s subjective consideration of a wide range of circumstances.
- Minister Watt’s submissions confirm that the supported ‘exemption’ should be interpreted narrowly, so as to capture a broader range of service contractor businesses.

### 2. **Every contractor is in, unless they can litigate their way out:**

- The onus is still on the business to demonstrate they should not be captured. According to the government’s current position, this ought to be extremely difficult, as the ‘benefits’ of the legislation should be interpreted ‘liberally’ to capture as many businesses as possible.

### 3. **The legislation still fails to do what the government said it would do:**

- The government previously said that ‘same job, same pay’ would apply only 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).<sup>25</sup>
- In June 2023, Minister Burke claimed that:  
*‘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,’* <sup>26</sup>
- The government is now arguing that its legislation goes much further than this. According to Minister Watt’s submissions, this was always the government’s intent.

<sup>24</sup> Minister’s submissions, para 46, citing *Chief Executive Officer of Customs v Adelaide Brighton Cement Ltd* [2004] FCAFC 183.

<sup>25</sup> ‘Same Job, Same Pay Consultation Paper’, DEWR, April 2023: <https://www.dewr.gov.au/workplace-reform-consultation/resources/same-job-same-pay-consultation-paper>.

<sup>26</sup> The Australian, *Labour 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>