MINERALS COUNCIL OF AUSTRALIA

RESPONSE TO DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS CONSULTATION PAPER:

'SAME JOB, SAME PAY'

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16 MAY 2023

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OVERVIEW

On 14 April 2023, the Department of Employment and Workplace Relations (**DEWR**) released its consultation paper on implementation of the government's 'Same Job, Same Pay' policy (**the Consultation Paper**). This followed a previous consultation process on the policy in 2022, to which the MCA also provided a detailed submission.[1]

Fundamental flaws with the current proposal

At present, the policy that has seemingly been determined by government and is reflected in the Consultation Paper contains four fundamental flaws. Each of these flaws on their own are sufficient to make the policy unworkable. Taken together, they will make it utterly catastrophic.

1. ***Coverage of service contractors and genuine subcontracting***

   Service contracting arrangements and genuine subcontracting, where the business is not 'labour hire' but provide defined services, as opposed to providing just labour, are improperly treated as 'labour hire'.

2. ***Coverage of related entitites***

   Workers or services provided within a corporate group or joint venture arrangement are also improperly treated the same as 'labour hire'. This would capture an almost unlimited array of conventional employment practices, across the private and public sectors.

3. ***Unworkable definition of 'same job'***

   The highly complex, three-limbed definition of 'same job' goes well beyond the common sense meaning of 'same job' and would be unworkable in practice.

4. ***No accounting for qualifications, experience, or employee circumstances***

   There is no attempt to account for the reality that different employees should be paid at different rates of pay because they have a different level of experience, or different qualifications and capabilities. Nor does it account for other differences that affect employee terms and conditions, such as reward for effort, or flexible working arrangements that employees have requested.

These flaws will not only be damaging for businesses, they will also impose perverse unintended consequences on workers, including devastating collective bargaining, promoting further outsourcing and, ultimately, less secure and less well-paid jobs. These impacts are outlined in detail below.

What is the problem to be solved?

The Consultation Paper follows previous government policy announcements on 'Same Job, Same Pay' as well as a private members' bill to implement such a policy that was introduced by the then Opposition Leader, the Hon Mr Anthony Albanese MP, in 2021 (**the 2021 Bill**). However, these have had differing, and sometimes contradictory, explanations of the problem that 'Same Job, Same Pay' is intended to solve. 'Same Job, Same Pay' is not about gender pay equity. However, the government's explanations for what it is about have been incomplete and inconsistent.

The 2021 Bill gave the rationale for the policy as the elimination of 'wage arbitrage', which it defined as:

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

> …a new business model based on 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. [2]

Tt cannot be said that 'wage arbitrage' is an issue in the mining industry. Mining pays the highest wages of any industry, and mining workers are well-paid, regardless of the arrangement they are employed under.

The second reading speech of the Bill includes multiple specific explanations of the problem with which Mr Albanese was concerned. Each of these explanations is reproduced at **Annexure A**.

For example, Mr Albanese refers to *'companies trying to circumvent their obligations to pay their workers directly'*. However, this is not the motivation for the vast majority of the arrangements that would be captured by the 2021 Bill or the Consultation Paper. The proposals in the Consultation Paper do not acknowledge the many legitimate commercial reasons why businesses may adopt arrangements other than 'direct' employment.

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

The government's policy intent remains unclear

The Consultation Paper states that the objectives of the policy are 'limited':

> 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. (emphasis added)

However, the Consultation Paper goes far beyond this stated objective and instead covers a range of other circumstances, which are not at all limited.

Throughout the Consultation Paper, vague statements of policy intent and unsubstantiated (sometimes contradictory) rationales have been made, including:

1. That the measure is seeking to *'address the limited circumstances in which host employers use labour hire to deliberately undercut'* bargained wages and conditions. If this is the objective, why does the proposal also cover so many other arrangements that are the result of collective bargaining and involve no 'undercutting'?
2. That labour hire can have the effect of *'eroding job security'* and *'undermining the framework of enforceable minimum wages and conditions'*. If the objective is to improve job security, why should the policy extend to workers who are already permanently employed in secure jobs and are not even employed by a labour hire business?
3. Previous assurances that the policy would be targeted to 'vulnerable workers' at risk of 'wage arbitrage' appear to have been abandoned, with no attempt to limit the policy in this way, and no explanation as to why.

Notwithstanding our continuing serious concerns about the genuineness of the consultation process, the MCA will use this opportunity to again outline in detail how the government's proposed policy will be impossible to administer in practice and will lead to serious adverse consequences for the mining industry and the broader economy.

[2] Explanatory Memorandum, page 2.

Unintended consequences of a poorly-designed policy

If the 'Same Job, Same Pay' policy is not implemented in a targeted way, it will invariably create a range of unintended adverse consequences, including but not limited to:

1. Discouraging enterprise bargaining by removing any benefits that may be gained by either 'hosts' or contractor businesses from having their own distinct workplace arrangements
2. Suppressing wage growth and productivity gains by removing the link between pay and experience/performance, if 'same job' is defined widely and does not account for such factors
3. Discouraging 'host' employers from engaging a wider range of contractors due to administrative complexity and the risks of non-compliance. This problem will be greater in the minerals industry, where many large businesses pursue policies of encouraging local contractors in regional areas, including smaller businsesses and Indigenous-owned businesses
4. Restricting access to specialist skills and original equipment manufacturer contracts, where service contractors are engaged to provide specific expertise and not just labour
5. Slowing down efforts to diversify mining workforces by shutting down pathways to employment in the mining industry that have proved to be accessible for women, Indigenous Australians and people with a disability
6. Encouraging sub-optimal employment arrangements, such as purely Award-based arrangements (which already provided for 'same job, same pay'), 100 per cent outsourcing, or uniform 'lowest-common-denominator' company contracts
7. Creating uncertainty for business and workers, because it is unclear how the proposed 'Same Job, Same Pay' laws would interact with multi-employer bargaining, and the government has not been able to explain how they are intended to
8. Discouraging international investment in mining, minerals processing and mining-related manufacturing by adding significant uncertainty to Australia's high-cost and complex regulatory environment.

The policy will impose 'Same Job, Same Pay' in all cases – not just labour hire

The policy intent of the government is ostensibly to impose a 'same job, same pay' obligation on workers employed by labour hire providers who perform 'the same job' as employees who are directly employed by the host business. Yet the various proposals in the Consultation Paper will extend this obligation far more widely. As proposed, it will apply to the following arrangements:

- Businesses that engage workers through a labour hire company
- Businesses that engage service contractor companies and are captured by the broad concept of 'labour hire' in the Consultation Paper
- Businesses with business structures comprised of more than one corporate entity.

The implication of the government's proposals as expressed in the Consultation Paper is to impose a 'same job, same pay' obligation in all settings – not just labour hire. If this is the government's policy intent, then it should clarify that this is the case. If it is not its intent, then the policy should clearly not be implemented in the manner proposed in the Consultation Paper.

The government's proposal means that whenever a worker who is not directly employed comes onto a site or performs work for a 'host' business, an assessment will have to be made by both the 'host' and the company providing the service as to whether the 'Same Job, Same Pay' law is triggered. This will impose a massive handbrake on economic activity and should raise alarm bells, especially given the admission in the Consultation Paper that the government has been unable to determine the economic cost of the policy and is now asking business to determine the cost for it instead.

Box 1: Consequences of a 'Same Job, Same Pay' policy that encroaches on subcontracting

The Consultation Paper proposes that the 'Same Job, Same Pay' policy also apply to genuine subcontracting arrangements.

Such an approach would have knock on effects for small, medium and large businesses and supply chains across Australia. Some likely examples include:

- A self-employed plumber with one employee who secures a job at a residential apartment building would be forced to trawl through the owner's Enterprise Agreement(s), Award(s) and assess the building owner's employment arrangements to determine whether there might be other plumbers engaged by the building owner that might receive different remuneration.
- A residential building head contractor would need to assess each of its contractors' pay and conditions, along with their subcontractors, to ensure they were paid 'the same' as each other and as any direct employees – an outcome that would inevitably reduce supply and increase the cost of housing.
- A manufacturing business with an in-house safety team seeking support and expertise to address safety concerns and improve its safety procedures could find it is unable to source the relevant skills because service contractors are unwilling to risk falling foul of 'Same Job, Same Pay' laws

These examples show how 'Same Job, Same Pay' policy with broad application would create inordinate uncertainty and costs for ordinary business dealings and constrain options for businesses who are simply conducting their affairs in the manner in which they have always done so.

The better way to deliver the election commitment

If the four fundamental flaws outlined earlier are not addressed, then the policy will be disastrous for business and workers. The common problem with each of these flaws is that they all involve incredible over-reach. The policy was supposedly intended to deal with certain 'illegitimate' practices engaged in by a 'limited' minority of labour hire businesses in certain parts of the economy. The policy should therefore be targeted to these issues and not be used as a ruse to attack hundreds of other legitimate and successful arrangements, which have created secure jobs and better pay.

This submission includes an alternative approach that will address the issue that is purportedly behind the policy and be faithful to the government's election commitment, in a way that avoids unintended consequences that will damage businesses and ultimately damage wages.

RECOMMENDATIONS

Timing

The 'Same Job, Same Pay' policy should not be implemented until after the government has had an opportunity to properly consider the effect of the major changes brought about by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act**), which have yet to take effect. This should occur after the statutory review of the SJBP Act. As outlined below, the key elements of 'Same Job, Same Pay' are incompatible with the purported policy intent of the SJBP Act.

Amendments

If the government implements the policy, it should only do so through a targeted approach that is limited only to addressing the problems the policy purports to solve. A targeted approach must include the following elements.

1. **Labour hire properly defined as only labour hire**

   The MCA recommends drawing on the *Victorian Labour Hire Licensing Act 2018* to define 'labour hire provider' as *'a person who, in the course of conducting business, supplies one or more of its employees to perform work in and as part of the business or undertaking of another person (the host).'*

2. **Robust exclusions for service contractors, genuine subcontracting and related corporate entities**

   The MCA recommends including a 'group of entities' exception to the definition of labour hire, consistent with the labour hire licensing schemes of Victoria and Queensland.

   Service contractors must also be explicitly exempted from the definition of labour hire provider.

   If a national labour hire licensing scheme is established, the definition of labour hire adopted in that scheme should be the same as that adopted for 'Same Job, Same Pay'.

3. **A workable definition of 'same job'**

   'Same job' must be defined to enable certainty, minimise compliance burdens and not create unworkable responsibilities on hosts and labour hire providers to perform detailed evaluations of each other's workforce and employment instruments.

4. **A workable definition of 'same pay'**

   The MCA recommends against using any definition of pay other than 'base rate of pay'.

5. **Surge capacity exclusions of 12-months and to fill genuine demand gaps**

   'Same Job, Same Pay' should not apply to labour hire used for a period of 12-months or less. Additional exemptions should be developed to allow businesses to engage labour hire for longer periods where there is transitory demand for additional workers but no likelihood of ongoing employment, for example to accommodate particular project phases.

6. **Targeted to vulnerable lower income workers**

   The policy should be targeted at those workers in lower-paid roles who are at risk of 'wage arbitrage' or 'undercutting', consistent with the government's purported objective.

7. **Does not undermine enterprise bargaining outcomes**

   'Same Job, Same Pay' should not apply where the labour hire employee is employed under an Enterprise Agreement.

8. Utilise existing 'adverse action' laws to achieve compliance

Instead of a policy that overrides all other workplace rights, it is preferable to introduce 'Same Job, Same Pay' as a new workplace right in the existing 'general protections' of the *Fair Work Act*. This new workplace right would prevent host employers (as properly defined), from engaging labour hire providers (as properly defined) for the purpose of undercutting an existing Enterprise Agreement of the host.

EMPLOYMENT ARRANGEMENTS IN THE MINING INDUSTRY

- Mining is the largest contributor to the Australian economy and accounted for 69 per cent of the nation's export revenue in 2021-22.
- Mining is the highest-paying industry in Australia, providing highly skilled and secure jobs, especially in regional and remote areas.
- Labour hire is a small but essential component of mining industry employment, allowing mining to manage demand fluctuations, supplement core skills and provide a career pathway to new workers.

The mining industry already provides secure jobs and better pay

Mining is the largest contributor to the Australian economy, accounting for almost 10 per cent of GDP. The industry is the largest source of the nation's export income, with the resources sector accounting for $413 billion (69 per cent) of the nation's export revenue in 2021-22. In addition, the mining industry:

- Employed 286,000 people in 2020-21 – and directly and indirectly supports over 1.1 million jobs at over 200 operating mine sites and in supply chains[3]
- Pays more on average than any other industry in Australia ($148,000 a year compared to $96,800 across all industries) – with 99 per cent of mining workers earning above-Award wages and conditions[4]
- Provides secure jobs, with 86 per cent of mining workers employed on a permanent basis and 96 per cent employed full time.[5]

The mining industry already provides for both secure jobs and better pay. It has not experienced problems relating to underpayment and exploitation of labour hire workers that have occurred in other industries and which were considered by (amongst others) the report of the Migrant Workers Taskforce.

Almost all mining companies are clients of labour hire providers. Approximately 10.7 per cent of mining workers are labour hire, 50.6 per cent are employed by mine operators, and 38.7 per cent are employed by service contractors.[6]

Labour hire has a positive role in the industry

Labour hire is an essential component of the industry in enabling companies to:

- Manage fluctuations in demand and seize unanticipated expansion opportunities
- Supplement core skills, such as high-quality rehabilitation
- Provide a career entry path to new workers.

Labour hire providers in the mining industry have Enterprise Agreements (**EAs**) in place, which have been negotiated with one or more trade unions – demonstrating that insofar as labour hire arrangements are used in the industry, they support rather than detract from the government's objective of promoting collective bargaining.

[3] Australian Bureau of Statistics, *Labour Force, Australia, Detailed,* November 2022, released 22 December 2022, table 6.
[4] Australian Bureau of Statistics, *Average Weekly Earnings, Australia,* May 2022, released 23 February 2023, table 10h. Australian Bureau of Statistics, *Employee Earnings and Hours, Australia,* May 2021, released 19 January 2022, data cube 5.
[5] Australian Bureau of Statistics, *Labour Force, Australia, Detailed,* November 2022, released 22 December 2022, table 6; *Characteristics of Employment, Australia,* June 2022, released 14 December 2022, table 3.1.
[6] Deloitte Access Economics, *Economic effects of changes to labour hire laws,* report prepared for the MCA, 4 June 2019, p. 47.

WHAT IS – AND IS NOT – LABOUR HIRE

Recommendations

Draw on the Victorian *Labour Hire Licensing Act 2018* to define 'labour hire provider' as:

- A person who, in the course of conducting business, supplies one or more of its employees to perform work in and as part of the business or undertaking of another person (the host).
- Include a 'group of entities' exception to this definition of labour hire, consistent with the labour hire licensing schemes of Victoria and Queensland.
- Explicitly exempt service contractors from the definition of labour hire provider.
- Ensure that if a national labour hire licensing scheme is established, the same definition of 'labour hire' is used.

Why businesses use labour hire

The types of workers that are provided by labour hire business can vary greatly. They can be skilled professionals and tradespeople hired for their particular expertise. They can be hired for short periods for a particular project, or on a longer-term basis. Alternatively, they can be lower-skilled workers in situations where it is more efficient for a business to source workers through a labour hire provider than recruit and train them itself. Labour hire can also include additional workers to provide for 'surge' capacity to manage peaks in demand or on a seasonal basis, when it would not be feasible to employ such workers on an ongoing basis.

Importantly, labour hire providers have exactly the same obligations as any other employers in relation to workplace laws. Most importantly, they provide jobs for hundreds of thousands of Australians. These jobs are just as legitimate as 'direct' employment and should not be disparaged as less legitimate or desirable.

The wrong way to define 'labour hire'

The 2021 Bill used a definition of labour hire that is much broader than any existing definition in other legislation that regulates the labour hire sector, without any of the necessary exemptions. It defined labour hire as:

> …a person who, in the course of carrying on a business, ordinarily supplies a worker or workers to perform work for another person.

The definition misses the defining feature of labour hire, which is that workers are supplied to work *in and as part of* the business or undertaking of the host, ***at the host's direction*** – as opposed to providing work *for another person*. Further, the definition failed to distinguish labour hire from genuine subcontracting, whereby services are delivered under a scope of work and generally involve the provision of equipment, plant and intellectual property, along with labour. Unlike, for example, the definition under the Queensland labour hire licensing legislation, it did not include such exemptions.

This broad definition would capture a range of normal commercial contracting arrangements that are clearly not labour hire, for example self-employed subcontractors, trades services or engineers on resources and building projects.

These are businesses that provide specialist services, whose core business is to provide a specific service with specific expertise. They exist to provide a particular service, rather than to provide workers.

The definition in the 2021 Bill is so broad that it would impact a wide range of other businesses, which will have negative economy-wide consequences. Because service contractors would be required to abandon their own remuneration arrangements and give their employees 'the same' pay as the companies that have contracted their services they will be uncompetitive. Service businesses will

simply exit the market, resulting in the immediate loss of tens of thousands of jobs, and further driving up the cost of living.

How 'labour hire' should be defined – and is already defined

During the consultation process with the MCA, DEWR requested a definition of 'labour hire' to help the government ensure that its 'Same Job, Same Pay' policy is appropriately targeted.

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 the workers perform 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. Service contracting is a legitimate employment arrangement in the mining industry that delivers highly paid, secure jobs, with service contractor workforces generally party to EAs between employers and unions.

Service contractors enhance productivity by providing labour, plant and equipment, safety systems and expertise, which enables new entrants to the mining industry to secure finance and increase production. In fact, almost all major mining projects in Australia have started through the work of service contractors.

Labour hire must also be differentiated from corporate group arrangements. For example, some businesses employ specialised teams of permanent employees who undertake specific safety and productivity projects across multiple sites.

In August 2022, the Prime Minister described the government's 'Same Job, Same Pay' election commitment as:

> Closing the loopholes that allow firms to use labour hire as a tool for driving down pay, rather than as a source of specialist skills.[7]

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

> **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 the policy would exclude service contracting and internal arrangements. This is borne out in guidance provided by the Victorian Labour Hire Agency, which clarifies that a drilling company providing services at a mine site would not require registration with the authority.[8]

To ensure the definition of 'labour hire business' remains appropriately focused, the MCA also recommends it be limited to situations where individuals on-hired to host businesses are employees of the labour hire agency, as opposed to independent contractors. This would avoid labour hire being conflated with other common arrangements, such as subcontracting.

[7] The Hon Anthony Albanese MP, Prime Minister, *Address to the National Press Club,* 29 August 2022.
[8] Victorian Labour Hire Authority, *General definition of labour hire services: Scenario 3*, viewed 24 August 2022.

Related entities in a corporate group that are part of the same business are not 'labour hire'

The 2021 Bill also extended to related entities within a corporate group, even though they were not within the definition of 'labour hire'. Any related entity that employs staff would be captured in the same way as a labour hire business.

Many large businesses have separate business units that provide different services due to different operating circumstances. They may have multiple related entities within a corporate group or joint venture that each employ staff under differing arrangements, including:

- Separate business units that provide different services or operate different projects
- Separate business units that operate under different brands
- Separate corporate entities that are separate due to previous acquisitions
- New business units created to provide new products or services
- Joint venture partners that both contribute workforces to a project.

Such businesses also routinely second staff between business units. All these arrangements would be captured by the proposal in the Consultation Paper. None of them are remotely akin to labour hire by any conventional definition and should be excluded from the legislation.

Similar practices also exist in the public sector, where different agencies have their own terms and conditions, and staff routinely move between them. We are not aware of any case being made to impose 'Same, Job, Same Pay' on the public sector, yet this would be the result of the proposals in the Consultation Paper, if implemented fully.

The existing state and territory labour hire licensing schemes include important exclusions to coverage, some of which are defined in regulations. This includes an exemption for workers provided between related corporate entities that form part of one recognisable business.[9] It would impose an unjustifiable compliance burden if countless small, medium and large Australian businesses and joint ventures had to register as labour hire providers simply because they are structured with more than one entity.

More broadly, exclusions defined in the existing regulatory regimes, that cover (for example) vocational placements, recruitment services, secondees, directors and situations where the supply of workers is not the dominant purpose of the business should also be reflected in the proposed legislation.

Service contractors are not 'labour hire'

As outlined above, there is no policy rationale to apply 'Same Job, Same Pay' to service contractors. Moreover, any attempt to do so would be likely to be unworkable in practice.

Service contractors in the mining industry employ workers predominantly on permanent basis and are a critical part of ensuring the industry has access to time critical know-how and expertise to maintain production, undertake maintenance, rehabilitation, shutdowns, and other necessary activities. In many cases they have their own EAs, negotiated with the relevant unions.

The problems of this approach would not be limited to the mining sector. In the construction sector, for example, almost every subcontractor that employs workers on a building site would be treated as a 'labour hire' business. In the public sector, government employees who take temporary placements – while retaining their permanent positions – or work as a contractor to government would all be deemed to be 'labour hire' workers.

[9] See for example: *Labour Hire Licensing Regulations 2018* (Vic), r. 4(1)(b); *Labour Hire Licensing Regulation 2018* (Qld), r. 4(1)(d).

Box 2: Service contracting is key to the success of Australian mining – undermining it would lead to fewer jobs, less competition and less innovation

Service contractors in the mining industry are businesses that apply labour, know how, capital and equipment to deliver mining services. Unlike major mining businesses, service contractors do not hold mining leases. They can be small, medium or 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 has begun with support from service contractors.

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

The company can bring its specialised skills and competitive strengths to the mine site and ensure the mine is productive and meets environmental standards.

This arrangement delivers cost certainty for the mine owner and allows the mine owner and its employees to benefit from the innovation, capabilities and technologies the service contractor brings to site.

The employees of the service contractor are permanently employed at above-Award rates, under an EA negotiated with a union.

The proposal in the Consultation Paper would undermine existing contracts between the 'host' and the service contractor, making the service contractor commercially unviable. In doing so, it would put at risk thousands of jobs, with no guarantee that these workers will be employed elsewhere.

The productivity and viability of the mine would also be put at risk without access to the specialist capabilities and strengths of the service contractor.

Genuine subcontractors are not 'labour hire'

For the same reasons as outlined above, commercial subcontracting is also not 'labour hire', as it involves the provision of a designated service, delivered by the contractor.

The government has previously acknowledged this reality in its recent consultation paper on the proposed national labour licensing scheme, which conceded that there needs to be an exception for 'genuine subcontracting', specifically where a contractor:

> …provides other services aside from labour… (e.g., a building company) subcontracts the entirety of a discrete piece of work to a subcontractor (e.g., an electrician), and the subcontractor has full control and legal responsibility for the work done.[10]

Regrettably, the current Consultation Paper includes no such acknowledgement.

[10] See page 8 and footnote 7 of *National Labour Hire Regulation: Towards a single national scheme*.

WHAT IS 'THE SAME' JOB?

What is 'the same' is not as simple as it appears

The Consultation Paper proposes that the 'same job' be determined by whether an employee does 'the same work'. Whilst this may have rhetorical appeal, it would not be a workable approach, as the 'work' that employees do can vary from day to day, depending on the tasks they are assigned. This is particularly so where employees are employed under 'the same' Award classification but that classification covers a wide band of duties. The same is true of many EA classifications, particularly in mining.

The proposition that two jobs in different organisations can be 'the same' also highlights one of the conceptual flaws at the heart of the proposal. While two jobs can ostensibly involve doing the same work, it can almost never be the case that a job in one organisation is the same as a job in another, because organisations vary in their purposes, work cultures, reputations, expectations on employees, cost-base, profitability, future prospects for growth, policies and procedures, access to resources such as equipment, infrastructure, digital support and intellectual property - among many other features.

These factors can also distinguish separate parts or the same business, which often have distinctive operating environments based on their history, their stage in the life cycle of a project, or their level of commercial viability.

Box 3: The Consultation Paper's approach to defining 'same job' is unworkable for most roles

The example of 'Jane'

The Consultation Paper provides the example of 'Jane', a labour hire worker who works the 'same job' as an employee of a major food production company with an enterprise agreement in place (example 1).

The example refers to 'the work Jane does' being covered by the employer's Enterprise Agreement, which would trigger the 'Same Job, Same Pay' obligation.

Other than in the most straightforward cases, this is not a workable approach. Except in cases where the worker performs the exact same tasks every day, the host and the labour hire business would be required to undertake fresh assessment every day to determine if the obligation is triggered.

If Jane were employed in the mining industry, her job may at first appear to be 'the same' as that of an employee of her 'host' – but the actual work undertaken may be very different.

For example:

- Jane undertakes the same duties as one of the host's employees on one day but is directed to perform entirely different duties the next day
- Jane has some but not all the same duties as the employee of the host
- Jane is a FIFO worker, whereas the host's employee lives locally
- Jane has 3 years of experience, whereas the host's employee has worked for the business for 30 years
- Jane has one qualification, whereas the host's employee is dual trade and some days performs work that Jane is not qualified to do herself
- Jane never works weekends, whereas the host's employee works every second weekend
- Jane works a 7/7 roster, the host's employee works a 3/1 roster
- The host's employee has an individual flexibility arrangement, Jane does not.

Instead of 'same work' being the comparator, a more workable comparator would be *'exactly the same job that Jane is required to do'* – based on her contract of employment and position description and whether there is a comparable employee actually doing the same job, 'side by side' with Jane.

This is not just the case in the private sector but also the public sector. For example, an employee of Treasury at the EL2 salary band can expect a starting salary of $145,869, whereas an employee starting at the Department of Social Services at the same classification would only receive $129,952.[11]

Award classifications are not sufficient to determine 'the same' job

The problem with the proposed definition is illustrated by the Mining Award. Its classifications do not talk about the work employees do – rather they engage the 'way in which they do the work' – e.g. – Basic, Intermediate, Competent, Advanced, Advanced Specialist. These are deliberately broad descriptions. It is not possible to determine the work an employee does based simply on their classification.

The classifications definitions and structure in Schedule A of the Award identify five groups that all use the description 'A Mining Industry Surface Mining and Haulage Employee' (or the other grouping names), *'designated as such by their employer, and performs all tasks as directed by their employer which include but are not limited to…'* (emphasis added).

The Consultation Paper seems to assume that it will be possible to determine whether an employee's job is 'the same' based simply on their classification under an industrial instrument, but this will clearly not be sufficient, particularly under the Mining Award.

In addition, the Mining Award (and many others) also provide that:

> …where an employer is covered by more than one Award, an employee of that employer is covered by the Award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

This further illustrates the problem in using Award classifications as a criteria for comparison.

Enterprise Agreements may also not provide the answer

The problems outlined above are not limited to Awards and may be more complex under certain EAs.

The 'job', which the EA establishes, can be and frequently is fluid and changing; this is exactly why enterprise bargaining was introduced. The labour hire employee's work may be wholly unaffected by such matters and accordingly, merely aligning with EA classifications is misleading.

EAs in the mining industry also provide opportunities for the parties to periodically alter the nature of the work included in roles both for the period of the EA and for shorter periods reflecting decisions made by the employer, e.g., maintenance shutdowns/turnarounds, introductions of new equipment, trialling of new methods, such as where new mining areas are being opened.

The EA represents an agreement reached between known employees and their employer, who have knowledge of the conditions under which work is performed and the impact of external factors. It is not feasible for labour hire employees to take the benefit of wages and other conditions in the EA where they may not have been required to make concessions in negotiations, or take the benefits that the employer has agreed to in return for the agreement of its employees.

Unworkable criteria for 'the same' job

The Consultation Paper includes in its proposed criteria *'the same duties as a specific directly employed employee working in the host'*.

This is also problematic. It requires a provider to 'go looking' for an equivalent employee in the host. Perhaps the host has never employed anyone in such a role; or not for many years; or doesn't own any plant and equipment being provided by the contractor; or can't provide the same service.

[11] Australian Government, The Treasury, *Public Service (Subsection 24(1)—Department of the Treasury Non-SES Employees) Determination 2021*, 5 November 2022, p. 4; Australian Government, Department of Social Services, *Public Service (Subsection 24(1)-Department of Social Services Non-SES Employees) Determination 2021*, 4 May 2022, p. 8.

Applying these criteria would regularly descend into guesswork. It may require a hypothetical 'notional' employee to be invented in order to meet the criteria.

Who has the burden of assessing what is the 'same job'?

The Consultation Paper proposes that obligations be imposed on both hosts and labour hire providers to determine whether the 'same job, same pay' requirement is triggered. It is unclear how this proposition could be workable – there is potential for different views to be taken by different parties as to whether the requirement is triggered – and both parties would need almost complete information of each other's employment and pay structures to undertake proper due diligence. Not only would compliance be administratively unworkable, but unintended consequences could also include privacy concerns and reduced competition concerns. As outlined below, thee will invariably be more industrial disputes arising as a result of differing interpretations.

WHAT IS 'THE SAME' PAY?

'Full rate of pay' is not the solution

The Consultation Paper acknowledges that calculating 'the same' pay is likely to be highly difficult in practice. In response, it proposes that the 'same pay' obligation be calculated in accordance with the existing definition of 'full rate of pay' in the *Fair Work Act*.

'Full rate of pay' is not appropriate, as it would be unworkable in practice, for a range of reasons.

Loadings, overtime and penalty rates, and monetary allowances are negotiated through enterprise bargaining, having regard to a variety of factors, which include the specific working conditions of those employees. They depend entirely upon instructions given by the employers arising from the way they organise the work and the manner in which they decide to deploy labour.

However, where the employer is different, they may not make the same decisions. Contractors of all kinds may utilise different shift patterns, or otherwise deploy labour differently, in the ever-ongoing quest for increased efficiency and productivity. The contractors may never organise their work in the same way as the host.

Additionally, employers have different employee value propositions to attract and retain staff, particularly in mining, where the labour market is tight and competition for workers is strong. Elements of employee remuneration are intrinsically linked to the employee's commitment to the business over a long period, and in recognition of the value of their experience. For example, in mining, many employers offer:

- Performance Incentive Schemes and bonuses, which are based on eligibility criteria that are unique to their business and based on an employee's experience and performance
- Allowances or subsidies for health insurance
- Discretionary leave
- Salary packaging
- Access to employee share schemes
- Residential accommodation
- Childcare.

Box 4: The unworkability of 'full rate of pay' for modern businesses

A large critical mineral mining company has a workforce of over 5000 across its Australian operations.

As is typical in the mining industry, approximately half the workforce is made up of workers from diversified service contractors that bring specific capabilities to the company's mining operations. These service contractors have their own EAs, organisational values and cultures, business systems and remuneration structures.

The company's direct employees receive competitive remuneration and benefits under EAs that substantially exceed the *Mining Industry Award.* Benefits include performance incentives, salary packaging options, entitlements to share-based compensation, salary continuance and more.

If the 'Same Job, Same Pay' obligation were triggered by an employee of a service contractor, the remuneration structure of the worker employed by the service contractor would be replaced with a 'hybrid' of the remuneration, benefits, and incentives of the 'host' and the conditions in the service contractor's EA. It would be extremely difficult for anyone to determine what the correct pay and benefits were – but if either company got it wrong, they would be exposed to penalties for wage underpayment.

‘Base rate of pay’ is the only workable approach

Given the complexity inherent in comparing ‘full rates of pay’, calculating pay on anything other than base rate of pay, as defined in the Act, will be unworkable and lead to unfair, unintended consequences.

It is also notable that examples 2 and 3 in the Consultation Paper both involve the host having an EA. This is likely because ascertaining ‘full rate of pay’ where there is no EA or Award would be practically impossible. This is especially so where there is no actual comparator employee performing ‘the same job’, and the notional, fictional employee, must be imagined.

Furthermore, it would be fundamentally unfair if the subjective and discretionary judgements of the ‘host’ to reward an employee by determining their overall remuneration based on the competence, experience, reliability and loyalty to the business would have to be automatically applied to a labour hire employee with no history in the business and no future commitment to it. This flies in the face of accepted notions of reward for experience and reward for effort, which are essential to the concept of workplace fairness.

ALLOWING FOR TEMPORARY AND 'SURGE' ARRANGEMENTS

Recommendations

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

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

According to the Department:

> The Government has acknowledged there are legitimate uses for labour hire, such as instances where employers need to use labour hire to provide surge capacity….[12]

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

> Employment and Workplace Relations Minister Tony Burke said: 'Workers doing the same job at the same site should get the same pay. There are legitimate uses for labour hire, particularly when companies need a seasonal or surge workforce.'[13]

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

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

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

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

[12] Department of Employment and Workplace Relations, *Inquiry into the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022: Submission of the Department of Employment and Workplace Relations to the Senate Education and Employment Legislation Committee*, September 2022.
[13] The Australian, '*Business alarm at Labor's second IR wave*', 12 December 2022.

THE IMPACT OF ‘SAME JOB, SAME PAY’ ON COLLECTIVE BARGAINING

The imposition of multi-employer bargaining

Since the 2022 consultation process on ‘Same Job, Same Pay’, the government introduced far-reaching changes to Australia’s workplace relations laws, which are now embodied in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**the SJBP Act**).

The SJBP Act makes fundamental changes to Australia’s system of workplace relations, which had not been revealed by the government at the time of the 2022 consultations. The Act introduced compellable multi-employer bargaining, the involuntary imposition of agreements on employers, and the expansion of compulsory arbitration in a range of situations.

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

The impact of ‘Same Job, Same Pay’ must now be assessed in the context of the imposition of multi-employer bargaining. This cannot sensibly occur until the SJBP Act reforms have had time to achieve their objectives.

The form of multi-employer bargaining the SJBP Act introduces is designed to have a ‘levelling’ effect on wages and conditions, as it can be used to tie together diverse employers and apply wages and conditions to them under a single industrial instrument. As such, the SJBP Act must be seen as an alternative approach to implementing the government’s commitment to ensure that labour hire workers receive the same pay as directly engaged workers performing the same work. The government has not explained how the two policies are intended to interact, nor why they are both necessary, given their similar objectives.

‘Same Job, Same Pay’ will devastate collective bargaining

The Consultation Paper included the following question:

> As relevant, please include observations on whether there may be positive or negative consequences in relation to enterprise bargaining.

It is inevitable that the introduction of ‘Same Job, Same Pay’ will be the most damaging attack on collective bargaining since the introduction of enterprise bargaining in the early 1990s. They will undermine the objectives of the SJBP Act, which were designed to ‘get employers back to the bargaining table’.

The policy is guaranteed to discourage employers from engaging in bargaining and, should they ultimately do so, guaranteed to undermine and ultimately destroy any benefits gained from bargaining. It directly contradicts the intention of the SJBP Act to spread bargaining across a wider range of employers.

The inevitable outcome of these proposals is that labour hire employers will not bargain, as pay and conditions that they negotiated will be supplanted by the host’s terms and conditions. ‘Host’ employers will also be discouraged from bargaining, as they will be forced to share the benefits of bargained outcomes with someone else’s employees, who were not party to the agreement. In each case, it would make more sense for them to simply apply the relevant Awards, which already provide for ‘same job, same pay’ across an industry.

The only way to avoid such an outcome is to exempt labour hire providers from ‘Same Job, Same Pay’ if they have an existing EA that has not reached its nominal expiry date. This would be entirely consistent with the government’s intent to promote bargaining and not enable labour hire to ‘undercut bargained outcomes’. There can be no undercutting when the labour hire provider has its own bargained outcome in place.

UNINTENDED CONSEQUENCES – THE IMPACT ON BUSINESSES

Unworkable obligations

The 'Same Job, Same Pay' obligation as proposed will require labour hire employers to apply the terms of existing EAs of the host employer, even when they already have their own EA.

This obligation will apply regardless of the wishes of the relevant workers and regardless of whether the EA of the labour hire business is better suited to the work being performed.

The Consultation Paper proposes that 'same pay' be calculated in accordance with each employee's 'full rate of pay'. This will require a 'line-by-line' comparison of each EA, which may contain dozens of relevant terms. This comparison will also need to be done for each individual worker.

It is not clear what would be expected if some terms of the host's EA are more favourable, but others are not. Would the remaining terms of the labour hire company's EA continue to apply? Cherry picking individual terms of multiple EAs, which may include incompatible obligations (e.g., pay periods), will be inherently complex and, in some cases, impossible.

The proposal also appears to require workers performing the same duties to be paid the same rate regardless of their qualifications, experience or the effort they put into their work. In doing so, the proposal creates rather than addresses unfairness. It undermines the value that people should be rewarded for the effort they put into their work and according to their level of skill.

Many more industrial disputes

The Bill will inevitably create many more industrial disputes concerning its application, including:

- Disputes over whether certain EA terms are more favourable to certain workers – it will be a 'line-by-line' test, where some terms of a host EA may apply but the overall EA won't
- Disputes over whether workers are performing 'the same' work
- Disputes over how to calculate the 'full rate of pay' in 'apples and oranges' situations where different EAs have different components of remuneration.

More red tape

Although it will regulate the same subject matter, the 'Same Job, Same Pay' policy will not replace the four separate State and Territory labour hire licensing schemes. The various systems will co-exist and businesses will be subject to multiple sets of red tape. The licensing schemes are already designed to prevent wage arbitrage and exploitation by requiring host businesses to only engage licensed providers who are 'fit and proper' and prohibiting labour hire providers from engaging in inappropriate conduct.

Any national business that currently utilises labour hire is already subject to the four existing sets of regulations. As currently proposed, they will effectively become subject to three additional sets of regulations:

- 'Same Job, Same Pay' as it applies to their labour hire arrangements
- 'Same Job, Same Pay' as it applies to any commercial contracting arrangements
- 'Same Job, Same Pay' as it applies to any related entities.

Labour hire businesses will become unviable

If the Consultation Paper proposal is enacted, the labour hire sector in Australia would cease to exist in anything like its current form. 'Host' businesses would either cease to engage labour hire if they are able to do so, or if they must still do so, they will simply have to live with the increased costs and complexity.

Businesses will factor in lower output without labour hire

By rendering labour hire unviable and compromising the competitiveness of service contractor businesses, host businesses will be forced to make other arrangements. They will lose the productivity benefits that they have achieved through contracting for these services rather than providing them themselves.

Businesses that currently have a proportion of the workforce as labour hire may be forced to insource workers as direct employees. However, the loss of any efficiency that is currently provided by labour hire will mean it will not be possible to retain all existing workers. Jobs will invariably be lost.

The loss of labour hire flexibility in industries such as resources will mean there will be no scope for surge capacity. Unexpected peaks in demand will not be able to be catered for, so they will no longer happen. Businesses will just maintain a constant level of production with no ability to peak-up.

Businesses will be forced to 'bake-in' permanent, ongoing costs. They will simply restructure their operations to factor in fixed output with lower productivity.

Service contractor businesses will become unviable

The Consultation Paper proposal could capture any service contractor business that employs workers to provide the service, which previously has never been considered labour hire by any definition.

It will not be possible to continue to provide services on a commercial basis so service businesses will simply exit the market, resulting in the immediate loss of tens of thousands of jobs.

Service contractor businesses exist to provide a service to the host employer, rather than provide labour. They are not used by host businesses to cut costs or engage in wage arbitrage. They are used because they can provide a specialised service more effectively than the host, who is focussed on its own core business.

Service contractor businesses already have their own terms and conditions for employees, which are specifically adapted to their work, regularly in their own EAs. The cost and complexity of applying the 'Same Job, Same Pay' obligation would in many cases mean it will no longer be possible to provide certain services on a commercially viable basis. Even the risk of being captured by 'Same Job, Same Pay' would be sufficient for them to not even tender for particular jobs.

This will have enormous implications for industries such as the resources sector, in which certain functions such as engineering and catering are typically outsourced on resources sites. Entire sites across Australia would shut down for a period of time as the service contractors depart and the host companies set up new arrangements, which will inevitably be more costly and inefficient. This would be particularly problematic given labour shortages across the country, which are particularly acute in remote areas.

Other sectors would be equally impacted, including essential services such as Health, Education and Defence. Hospitals outsource functions for various reasons that are not cost-related. They either cannot do certain tasks themselves or they are not their core business, for example food safety and specialised cleaning. Other outsourced tasks performed by service contractors are outsourced due to their complexity, for example bone marrow operating theatres.

The Education and Defence sectors are in a similar situation. The defence forces and schools outsource catering and cleaning as it is not their core business. They are not outsourced for reasons of cost. Many of these services would have to be shut down until new arrangements are made.

Service contractor businesses tender for services on the basis that they can achieve a satisfactory return in providing the service. This depends on having certainty over labour costs and certainty over how work will be performed. Certainty over labour costs is achieved through EAs, yet under the proposal, an EA would cease to apply if a host's EA may cover 'the same' job. The obligation to provide 'Same Job, Same Pay' will destroy this certainty.

In some cases, it may be possible to quantify the costs of ‘Same Job, Same Pay’, in which case it could render the service unviable. In other cases, the costs will be impossible to quantify, due to uncertainty over whether work is ‘the same’, the complexity involved in applying terms of conditions of the host, and the potential costs of industrial disputes. In any of these scenarios, service contractor businesses will decide that it is either too costly or too commercially risky to continue to provide a particular service. Service contractors will no longer even tender to provide such services as it will be too commercially risky – all it could take is the presence of one ‘zombie’ EA in the ‘host’ business to trigger the ‘Same Job, Same Pay’ obligation and render the work unviable.

New investment will go elsewhere instead of Australia

The loss of flexibility in production capacity in industries such as resources will drastically reduce their productivity. This will have implications for the competitiveness of Australia on a global scale.

The Bill will have a direct impact on investment decisions – there will be less new investment in Australian projects. Companies will weigh up the marginal benefits of a new project in Australia compared to an equivalent investment elsewhere.

This problem will be particularly acute in the resources sector, where investment capital is globally mobile and other countries can provide the same resource. As outlined above, ‘Same Job, Same Pay’ will force resources business to bake in a fixed level of output with lower productivity and will remove the existing capacity to peak-up and peak down in response to changes in demand. The loss of this capacity could be worth billions of dollars in lost efficiency and lost returns over the life of a project, and ultimately lost tax revenue for public services. This will be a material factor that will tip the balance against Australia in many cases.

UNINTENDED CONSEQUENCES – THE IMPACT ON WORKERS

As currently proposed, ‘Same Job, Same Pay’ will result in a number of perverse impacts that will actually be detrimental to the workers it intends to assist.

More outsourcing with less secure work

In industries where labour hire is already common, it will be easier for businesses to have no direct employees and instead outsource 100 per cent of their workforce rather than be captured.

It will therefore be in the interests of the business to not employ staff directly and instead pursue 100 per cent outsourcing. This will exacerbate the very problem the policy is intended to address.

More casual work

In some industries, labour hire provides a higher proportion of ‘permanent’ work than direct employment and has actually reduced the level of casualisation. In the resources sector, many businesses have moved to engaging ‘permanent’ workers via labour hire instead of engaging them directly as casuals. Without the benefit of labour hire, businesses may once again employ workers as casuals.

Lower wages

Both labour hire and host employers will not wish to be captured by the ‘Same Job, Same Pay’ obligation and its obligation to apply someone else’s terms and conditions. It will be easier for them to simply rely on the Award minimum, which already provides for ‘same job, same pay’ across an industry.

Sending Australian jobs offshore

Where businesses operate internationally, it will be easier to send work overseas and dismiss Australian workers. The Bill will be an enormous incentive to offshoring.

In some industries, it will be easier for certain businesses to send work offshore rather than contract out work within Australia and run the risk of the additional complexity and disputes that will result from being captured by ‘Same Job, Same Pay’.

The policy will apply to work that is outsourced where the work is performed at another workplace within Australia, in which it will be required to apply terms and conditions from the host workplace. Where the work is done outside Australia it will not be captured.

Uncertainty and industrial disputes

In many cases it will not be clear what is ‘the same’ work or ‘the same’ remuneration. This will inevitably lead to disputes over trivial details, including where the labour hire business disputes the application of terms of the host business EA, thus subjecting both businesses to the dispute.

Foreign-owned businesses will be able to undercut Australian businesses

New foreign entrants will be able to enter markets and undercut existing businesses with impunity. This will be easier for foreign-owned businesses without any legacy EA arrangements in Australia.

New entrants will also be able to avoid making EAs and can instead apply the relevant Award(s), which will be more cost-effective than the EAs of the incumbents. This will be a further contributor to the decline of collective bargaining as a result of the ‘Same Job, Same Pay’ policy.

Job losses in Australian businesses, which won’t be replaced in foreign-owned businesses

As new businesses move in and undercut the incumbents, those incumbents will be rendered increasingly uncompetitive. These (Australian-owned) businesses will then reduce their workforce.

These workers won’t be offered jobs with the new entrants, due to the risk that their more favourable EA terms might transfer with them.

APPLICATION AND ENFORCEMENT OF ‘SAME JOB, SAME PAY’

Obligations on businesses must be realistic

Both the 2021 Bill and the Consultation Paper propose a civil penalty regime for breaches of ‘Same Job, Same Pay’ obligations, with the compliance burden applying to both hosts and providers.

Yet it is not at all clear what steps will be required of them to satisfy their legal obligations. The most important questions remain unanswered. For example:

- What exactly does the host need to do in terms of setting the remuneration arrangements for its providers?
- What information is the provider safely able to rely on that is provided by the host?

In each case, will it be sufficient for each party to simply rely on whatever information is provided by the other, or will they be expected to ‘interrogate’ it to satisfy themselves that it is correct? What is the ‘standard of proof’ for any contravention of their obligations?

Under the current proposal, both hosts and providers would be required to conduct an ongoing, never-ending process of comparisons and reconciliations to comply with their obligations. The obligation to calculate ‘the same’ pay will not just occur at the time of engagement but throughout the life of any contract between the parties.

An impossible compliance burden if the legislation is not targeted

The provision in 306A of the 2021 Bill is entirely unhelpful. It does not outline what information is enough for the host to provide, and for the provider to rely upon. There is no concept of reasonableness in how they should satisfy their obligations.

The 2021 Bill begs more questions than it answers, none of which are resolved by the Consultation Paper. For example:

- Is the host required to provide Taxation records and Payslips for hundreds of employees?
- Is the host required to conduct monthly audits of the labour hire provider’s payroll. Is a statutory declaration required?
- What about situations of a merger or acquisition, where existing management of the host may not know that five years ago, under its previous owners, it used to directly employ workers for certain jobs that are now outsourced but may be ‘the same’? Are they guilty of a contravention by not providing information to their contractors about what was paid to those former employees five years ago?

Worker privacy must be protected

Employers are subject to obligations to protect personal information of employees under Privacy legislation. The SJBP Act also introduced new rights for employees to disclose or not disclose their remuneration, in accordance with their own personal preferences.

The Consultation Paper does not provide a solution to this dilemma, notwithstanding that it would require hosts and providers to share intricate details of every aspect of their employees’ remuneration.

Employees may be subject to a raft of discretionary pay and conditions – from payment of bonuses to recognise performance, to granting of special paid leave where there are family or health issues that impact employees.

Is a host required to inform the provider of all of those matters in order to comply with its obligation to provide all of the ‘information’ necessary for the provider to comply with the ‘Same Job, Same Pay’ obligation? Under the current proposal they would be, yet to do so would put them in breach of both

the *Privacy Act* and the employee's right to decide if their remuneration should be revealed to a third party.

A simpler approach – use existing 'general protections' and 'adverse action' provisions

There is no practical way to reduce the compliance burden obligations that will apply to a perennial obligation to assess the 'same job' and 'the same' pay, for every single employee at all times.

A simpler approach is to apply the 'Same Job, Same Pay' obligation by creating a new 'workplace right' in the existing 'general protections' provisions of the *Fair Work Act*.

The protection would prevent host employers (as properly defined), from engaging labour hire providers (as properly defined) for the purpose of undercutting an existing EA of the host.

This mechanism, with its reverse onus, and wide range of remedies, would achieve what seems to be the policy objective, which is 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.

Instead of imposing an un-ending compliance burden on all hosts and all providers in all situations, this approach would empower workers and their representatives to utilise existing (and well-understood) protections in the legislation to deal with illegitimate practices. They would have access to court injunctions, conciliation by the FWC and ultimately civil penalties if they were justified. The onus would be on the business to demonstrate that they have not engaged labour hire for the purpose of undercutting their existing EA. A business that does so would be engaging in 'adverse action' in breach of the 'general protections' and the existing enforcement regime in the Act would apply to such breaches.

Without this requirement in place, the proposed policy clearly over-reaches, because it does not confine itself to situations of 'deliberate undercutting' – instead, it would impose a blanket wage equivalence requirement across the whole economy.

THE BETTER WAY TO IMPLEMENT 'SAME JOB, SAME PAY'

Neither the 2021 Bill nor the approach in the Consultation Paper represent a workable solution to the problem they purport to address. 'Same Job, Same Pay' legislation will have a vast array of damaging unintended consequences. It must be limited only to what is necessary to address the purported problem. It should also be informed by detailed consultations with the business community.

The better approach is to develop new, targeted legislation based on agreed objectives. Any such legislation should be informed by the following principles.

1. **Labour hire properly defined as only labour hire**

   The MCA recommends drawing on the *Victorian Labour Hire Licensing Act 2018* to define 'labour hire provider' as *'a person who, in the course of conducting business, supplies one or more of its employees to perform work in and as part of the business or undertaking of another person (the host)'*.

2. **Robust exclusions for service contractors, genuine subcontracting and related corporate entities**

   The MCA recommends including a 'group of entities' exception to the definition of labour hire, consistent with the labour hire licensing schemes of Victoria and Queensland. Service contractors must be explicitly exempted from the definition of labour hire provider.

   If a national labour hire licensing scheme is established, the definition of labour hire adopted in that scheme should be the same as that adopted for 'Same Job, Same Pay'.

3. **A workable definition of 'same job'**

   'Same job' must be defined to enable certainty, minimise compliance burden and not create unworkable responsibilities on host and labour hire providers to perform detailed evaluations of each other's workforce and employment instruments.

4. **A workable definition of 'same pay'**

   The MCA recommends against using any definition of pay other than 'base rate of pay'.

5. **Surge capacity exclusions of 12-months and to fill genuine demand gaps**

   'Same Job, Same Pay' should not apply to labour hire used for a period of 12-months or less. Additional exemptions should be developed to allow businesses to engage labour hire for longer periods where there is transitory demand for additional workers but no likelihood of ongoing employment, for example to accommodate particular project phases.

6. **Targeted to vulnerable lower income workers**

   The policy should be targeted at those workers in lower-paid roles who are at risk of 'wage arbitrage' or 'undercutting', consistent with the government's purported objective.

7. **Does not undermine enterprise bargaining outcomes**

   'Same Job, Same Pay' should not apply where the labour hire employee is employed under an Enterprise Agreement.

8. **Utilises existing 'adverse action' laws to achieve compliance**

   Instead of a policy that overrides all other workplace rights, it is preferable to introduce 'Same Job, Same Pay' as a new workplace right in the existing 'general protections' of the *Fair Work Act*. This new workplace right would prevent host employers (as properly defined), from engaging labour hire providers (as properly defined) for the purpose of undercutting an existing Enterprise Agreement of the host.

ANNEXURE A

Excerpts from Mr Albanese's second reading speech for the 2021 'Same Job, Same Pay' Bill

Many labour hire firms across Australia operate in a fair way and exist for a good reason. **We have no issue with them.**

But there are **unscrupulous ones making a quick buck off the backs of working people, providing workers to major companies at lower wages** than if the companies had hired them directly. And, therefore, changing the competitive nature between companies within the one industry.

…

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.

…

The company pays less for the work getting done so it can pad the bottom line and **avoids the obligations of providing full-time work.**

…

These firms **exploit casual workers** and **undermine job security**.

…

If you're working for a labour hire company, chances are you'll get as much as 40 per cent less than a permanent worker, even if that worker is doing the same job under the same conditions.

On this government's watch, a **class of economic second-tier citizens is being cemented into place**.

…

The problem of creeping casualisation **and cowboy labour hire firms is affecting a growing number of industries and workplaces**.

…

As I said when I launched that report in Mackay, the scale on which miners are being ripped off through the casualisation of the workforce is a major problem.

…

It is the consequence of the weakness in our current workplace laws that let mining companies use outsourcing strategies to **bypass union negotiated enterprise agreements**.

…

These dodgy practices are also **loopholes exploited by bad employers to undercut workers' wages—which the cowboy labour hire firms are cashing in on**.

…

The fact is, particularly in highly unionised, well-paid sectors like mining, it is **effectively an exercise in busting the benefits of collective action that have been won over generations. It cuts a chunk of the workforce out of the EBA conditions negotiated fairly and in good faith** by workers and their unions with good employers.

…

Labor will uphold the principle that **if you work the same job, you should get the same pay**. It's not complex.

We will legislate to ensure that workers employed through a labour hire company will not receive less pay than workers employed directly. **The use of temporary labour hire to help employers manage increased demand during surge periods or replace absent workers has been around for decades. This bill will not disturb that business model.** That's important. But this new business model that has been adopted under this government **has distorted the labour market and undermined enterprise bargaining**".[14] (emphases added)

[14] Commonwealth, Parliamentary Debates (Fair Work Amendment (Same Job, Same Pay) Bill 2021 Second Reading Speech), House of Representatives, 22 November 2021, 10411 – 10413 (Mr Albanese, Leader of the Opposition).