# IMPACT OF PROPOSED SAME JOB SAME PAY LAWS ON THE WESTERN AUSTRALIAN MINING INDUSTRY

**November 2023**

## OVERVIEW

> *"Some businesses came to the Senate inquiry in Western Australia from the mining sector saying 'oh this will be a disaster for them' and when they were asked 'do you have an enterprise agreement' they said 'no' and then acknowledged it wasn't going to affect them at all,"*
>
> - Minister Tony Burke, interview on ABC Radio National, 27 October 2023

In light of the allegation that proposed 'Same Job, Same Pay' laws will not have a significant application in Western Australia, we have undertaken the following analysis of the way in which the reforms can apply and impact on WA mining operations.

Over 100 enterprise agreements operate in the resources industry in WA, including those on the attached list. This list is the result of preliminary research and is likely to be a subset only of applicable agreements.

Irrespective of the number agreements applying in Western Australia, broader impacts will also arise from the operation of the proposed laws.

The availability of an alternative protected rate of pay order, for example, allows unions to seek to flow agreements that apply anywhere within a corporate group even if those agreements are not intended to apply to WA.

Additionally, as there is a low threshold for making a regulated labour hire arrangement order (ie the indirect provision of labour), unions will be able to draw links between employees in WA and other EA covered product groups (e.g. in respect of shared services).

The broad discretion given to the Fair Work Commission means that employers will be required to contest applications based on the full range of available benchmarks in order to avoid the imposition of an obligation to pay in accordance with a target agreement of a different employer.

Our analysis indicates that:

1. The Same Job, Same Pay aspects of the Bill indisputably can apply to genuine specialist services contractors;
2. There are a large number of agreements, which apply to hosts, services contractors, as well as labour hire providers, which specifically apply to operations in WA mining operations; and
3. There likely to be exponentially more enterprise agreements that could be used to ground a PROP or alternative PROP order, when you take into account national agreements which are not limited to a particular geographic location and agreements which apply to other entities in a corporate group (which might include entities that do not even perform any work in the resources industry).

Therefore, the scenarios set out below are not only a realistic and foreseeable outcome of the legislation, but may only represent the 'tip of the iceberg', given the broad, almost-unfettered, discretion given to the Fair Work Commission to make Regulated Labour Hire Arrangement (RLHA) orders.

This potential impact is magnified by the anti-avoidance provisions in the Bill, which would prohibit an employer or host from structuring their workforce or drafting their enterprise agreements in a way that minimises the risk of a RLHA order being made (for example, an employer who merely seeks to ensure that the classifications in its enterprise agreement are specific to the work of its employees may fall foul of these provisions).

When considering impact, it should also be noted that not all impacts will be immediate and direct. Applications arising from a new jurisdiction are expected grow and expand over time. Further, the threat of increased costs over and above those arising from existing applicable instruments will impact on investment and employment decisions.

Our conclusion is that the allegation of minimal impact of the laws on the Western Australian mining industry is demonstrably false.

# SCENARIOS – TYPICAL WESTERN AUSTRALIAN MINING ARRANGEMENTS THAT WILL BE CAPTURED BY 'SAME JOB, SAME PAY'

| Scenario | Key provisions (included at Annexure A) | Comments |
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| **Scenario 1:**<br><br>**Work performed by services contractor employees that is also performed by direct employees**<br><br>• A large, national contractor (**Contractor Z**) provides specialised and highly technical services to the operator of a mine (**Operator A**), which includes the provision of labour (including supervision and management of Contractor A's scope of services) as well as specialised equipment and consumables. Contractor Z is paid a fixed price for the scope of work which is based on the achievement on a particular result.<br>• Contractor Z's employees generally work at a particular site for 4-6 months, before moving to a different site, which might be located on the other side of the country.<br>• Contractor Z has an in-term national enterprise agreement that covers all of its employees.<br>• Operator A also has an enterprise agreement that covers classifications which include the type of work performed by Contractor Z's employees.<br>• RLHA Orders are sought in respect of Contractor Z's employees, with Operator A as the regulated host. | **Section 306E(1)**<br><br>**Section 306E(8)(b)** | The application has strong prospects of success.<br><br>This is a very common practice throughout the mining industry.<br><br>The union will argue, based on the Minister's representations as to the purpose of the reform, that a rate of pay for the work in question has been set for the operation and it is both fair and reasonable that the rates of pay for the operation are extended to all employees performing work for Operator A.<br><br>Contractor Z is a genuine specialist services contractor, but the Bill does not exclude specialist contractors. Under the Bill, a Regulated Labour Hire Arrangement (RLHA) Order can be made in respect of Contractor Z's employees while they perform work for Operator A, despite Operator A not directly engaging any employees to perform precisely the same work as Contractor Z's employees.<br><br>While Contractor Z or Operator A may make submissions that a RLHA is not "fair and reasonable" based on Contractor Z's status as a services contractor, this is only one of 12 factors which the Fair Work Commission (FWC) can consider, including the open ended 'any other matter the FWC considers relevant' (s 306E(8)(f)).<br><br>Large services contractors with operations in many locations/for various operators may be subject to a large number of RLHA Orders, which they would need to track and apply in their payroll systems alongside their normally applicable industrial instruments, and their employees' contracts of employment, creating a confusing system which will be impenetrable for most employers, particularly by smaller companies without dedicated HR/IR expertise and will inevitably lead to compliance issues. |

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| **<u>Scenario 2</u>**<br><br>**<u>Work performed by services contractor employees that is not performed by any direct employees</u>**<br><br>• Operator A engages another contractor (**Contractor Y**). Contractor Y is also a large, national contractor who supplies specialised facilities management services to the resources industry, as well as many other industries, including civil and residential construction, hospitality, education, aged care, and health services.<br>• Due to the specialised nature of the work performed by these workers, Operator A does not directly engage any employees who perform the work undertaken by Contractor Y's employees.<br>• Because Operator A's enterprise agreement has a broad and generic classification structure which relates to skill level rather than specific duties, even though it does not actually engage any direct employees to perform this kind of work, the classifications could arguably cover the type of work performed by Contractor Y's employees.<br>• RLHA Orders are sought in respect of Contractor Y's employees, with Operator A as the regulated host. | **Section 306E(1)**<br><br>**Section 306E(8)(b)**<br><br>**Section 306D** | **The application has good prospects of success.**<br><br>For the same reasons set out in respect of Scenario 1 above, the union will argue, based on the Minister's representations as to the purpose of the reform, that a rate of pay for the work in question has been set for the operation and it is both fair and reasonable that the rates of pay for the operation are extended to all employees performing work for Operator A.<br><br>As these provisions are not intended to be read narrowly and are not limited to a specific kind of work,[1] given that the enterprise agreement is capable of coverage of Contractor Y's employees, the union will have jurisdiction to make an application in this respect. The provisions do not require that the host actually engage direct employees to perform the relevant work.<br><br>Additionally, despite the fact that Contractor Z is a genuine specialist services contractor, as the Bill does not exclude specialist contractors, this will be but one consideration in the FWC's multi-factor test. |
| **<u>Scenario 3:</u>**<br><br>**<u>Work performed by services contractor employees that used to be, but is no longer, performed by any direct employees</u>**<br><br>• Same as Scenario 1, except Operator A's enterprise agreement has a clearly defined classification structure.<br>• Some time ago, Operator A directly engaged employees to provide transportation services, however a decision was made to engage a specialised contractor (**Contractor X**) to provide this work on the basis that it would deliver operational improvements and cost efficiencies, This is because Contractor X delivers services to a range of clients, has state | **Section 306E(1)**<br><br>**Section 306E(8)(a)** | **This application has strong prospects of success.**<br><br>Even though there are no directly engaged employees engaged to perform the same work as Contractor X's employees, an RLHA Order can be made on the basis that Operator A's enterprise agreement *could* cover the work.<br><br>Further, if submissions are made, the FWC must consider whether the host employment instrument has ever applied to an employee of that classification. |

[1] EM at [574].

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| of the art vehicles and conducts in house servicing and maintenance.<br>• although this work is now completely outsourced to Contractor X, and there are no direct employees that perform the work.<br>• Operator A's enterprise agreement was never updated to reflect its current operations and therefore still contains classifications that cover the transportation services which used to be performed by direct employees.<br>• RLHA Orders are sought in respect of Contractor X's employees, with Operator A as the regulated host. | | |
| **<u>Scenario 4:</u>**<br>**<u>Work performed by services contractor for multiple hosts each with enterprise agreements capable of applying to the contractor's employees</u>**<br>• Same as Scenario 3, however Contractor X's employees provide transportation services to a range of businesses throughout the course of a week or day, all with enterprise agreements broad enough to cover the type of work performed.<br>• Multiple RLHA Orders are sought in respect of each of the relevant hosts. | **Section 306E(1)**<br>**Section 306E(8)(a)** | **This application has strong prospects of success.**<br>There is nothing in the Bill that limits the number of applications being made in respect of a particular employee.<br>This means that the contractor will be in a position where it must apply different rates of pay throughout the course of a week or day. |

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| **Scenario 5:**<br><br>**Contractor employees work between the host's site and the contractor's workshop**<br><br>• Contractor Z performs the work for Operator A partly at Operator A's worksite, and partly at a workshop in a nearby industrial estate.<br>• Some Contractor Z employees perform the work only at Operator A's site, some perform the work wholly at the off-site workshop and some perform work at both sites.<br>• The union makes an application that all employees performing work for Operator A are to be paid the rate of pay in Operator A's enterprise agreement.<br>• RLHA Orders are sought in respect of Contractor Z's employees, with Operator A as the regulated host. | **Section 306E(1)** | **This application has strong prospects of success.**<br><br>In these circumstances, the employer may be required to pay the rate of pay in Operator A's enterprise agreement for the time that the employee works with Operator A and the rate of pay in its own enterprise agreement or contract for the period that the employee is working elsewhere. |
| **Scenario 6:**<br><br>**Contractor employees solely work at contractor's workshop**<br><br>• Same as Scenario 6 above, except Contractor Z's employees perform the work wholly at the off-site workshop.<br>• RLHA Orders are sought in respect of Contractor Z's employees, with Operator A as the regulated host. | **Section 306E(1)** | **This application has good prospects of success.**<br><br>The proposed legislation does not require that the regulated employees actually perform work at the regulated host's worksite. Therefore, provided the employees directly or indirectly perform work for Operator A, even if this is wholly done from Contractor Z's workshop, a RLHA Order is available to be granted. Unions will argue that, as all work is performed for a regulated host, it is not "fair and reasonable" that only employee who perform work at the regulated host's site be covered by a RLHA Order. |
| **Scenario 7:**<br><br>**Contractor employees are engaged on multiple projects at one time and are paid less than the corresponding classification in operators' enterprise agreements**<br><br>• In addition to performing work for Operator A, some of Contractor Z's engineers work on multiple projects at one time for other companies, providing specialised supervision of the relevant projects. | **Section 306E(1)** | **This application has strong prospects of success.**<br><br>Although the engineer engaged by Contractor Z is highly skilled, engaged in specialised tasks and earns well in excess of the high-income threshold, as each operator has a host agreement which can cover the work that the engineer performs, an RLHA Order could be made in respect of the engineer. Such an order can be made irrespective of whether the engineer is paid more or less than the applicable rate in the host's enterprise agreement.<br><br>A RLHA Order entitles the relevant employees to at least the full rate of pay in the relevant instrument, but does not disentitle them |

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| • The operating companies of those projects are also covered by enterprise agreements with a scope which is sufficiently broad to cover the work of an engineer.<br>• The engineer is paid less than the corresponding classification in the operators' enterprise agreements.<br>• RLHA Orders are sought in respect of Contractor Z's employees, with any one or more of the operators as the regulated host(s). | | from also receiving the benefits under their normal enterprise agreement, or their contracts of employment. This could result in a situation where the contractor's employees are paid far in excess of the regulated host's direct employees at the relevant site. |
| **Scenario 8:**<br><br>**Contractor employees are engaged on multiple projects at one time and are paid on an overall basis more than the corresponding classification in the operators' enterprise agreements**<br><br>• Same as Scenarios 8 and 9 above, however whilst the engineer's base rate of pay is less than the operators' enterprise agreements, the engineer is paid more overall due to an annual bonus, which takes into account the business' and engineer's performance.<br>• RLHA Orders are sought in respect of Contractor Z's employees, with any one or more of the operators as the regulated host(s). | **Section 306E(1)** | **This application has strong prospects of success.**<br><br>Although the engineer engaged by Contractor Z is highly skilled, engaged in specialised tasks and earns well in excess of the high-income threshold, as each operator has a host agreement which can cover the work that the engineer performs, an RLHA order could be made in respect of the engineer. Such an order can be made irrespective of whether the Engineer is paid more or less than the applicable rate in the host's enterprise agreement.<br><br>A RLHA Order entitles the relevant employees to at least the full rate of pay in the relevant instrument, but does not prevent them from also receiving the benefits under their normal enterprise agreement, or their contracts of employment. This could result in a situation where the contractor's employees are paid far in excess of the regulated host's direct employees at the relevant site, This is because the contractor's employees will receive the higher base rate of the host (which does not pay bonuses) plus the bonus from their own employer. |
| **Scenario 9:**<br><br>**RLHA Order sought in relation to agreement of related entity of the host which does not apply to the host's employees in Western Australia** | **Section 306E(1)**<br><br>**Section 306E(8)(b)**<br><br>**Section 306D** | **This application has good prospects of success.**<br><br>These provisions are intended to be read broadly and are not limited to a specific kind of work[2]. The EM further clarifies that:<br><br>*Part 2-7A is intended to apply in broad circumstances to labour hire arrangements. To this end, new subsection 306D(2) would provide that for the purposes of Part 2-7A, a reference to work performed for a person includes a reference to work performed* |

[2] EM at [574].

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| • Operator A only operates iron ore mines (and related infrastructure) in Western Australia. It does not have enterprise agreements at these locations.<br>• However, Operator A is part of a larger corporate group, where some related entities have operations in other areas of Western Australia and other states, including Queensland, South Australia and New South Wales which involve very different minerals (coal, nickel, bauxite), cost and supply pressures and workforces (**Group A**).<br>• From time to time, entities within Group A share materials, equipment and/or staff.<br>• Some of the other Group A entities also have enterprise agreements, although these agreements also have broad and generic classifications.<br>• RLHA Orders are sought in respect of Operator A's employees who are said to be indirectly providing labour to another Group A company.<br>• An alternative PROP order is then sought in respect of another Group A enterprise agreement with the highest rate of pay. | | *wholly or principally for the benefit of the person or an enterprise they carry on. This could include, for example, where a regulated host receives the benefit of a regulated employee's labour either directly or indirectly through intermediary companies. To further clarify this point, new subsection 306D(3) would provide that when determining whether work is performed for a person by an employee of an employer it does not matter whether there is or will be any agreement between the person and the employer relating to the performance of the work. That is, for the purposes of determining which party should be named the 'regulated host' for the purposes of an order made under the new Part, it is not a requirement that there be a direct agreement (or any agreement) between the party receiving the benefit of the work, and the employer employing workers to perform the work.*[3]<br><br>Unions will argue that the absence of an enterprise agreement is contrary to the objects of the Act and should be remedied by an RLHA Order.<br><br>In addition, there is no exception in the Bill for employees working within a corporate structure. In fact, the EM labels these arrangements as 'internal labour hire' and states:<br><br>*internal labour hire arrangements (those where entities within the same corporate group provide labour from one to another…will also be covered by the proposal subject to relevant criteria being met and exemptions not applying* |

[3] EM at [575].

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| **Scenario 10:**<br><br>**Contractor employees are paid more than the corresponding classification in the operators' enterprise agreements, however an agreement within an operator's corporate group includes a more beneficial rate of pay**<br><br>• Same as Scenario 8 above, however the engineer's rate of pay is well in excess of the rate set out in any of the operators' enterprise agreements. This is because most of the enterprise agreements have not been renewed for 4-6 years.<br>• However, Operator A is part of a corporate group with multiple in-term enterprise agreements. One of those agreements covers work for Operator B at a remote mine, where it is difficult to attract engineers and relates to a different resource entirely.<br>• The union applies for a RLHA Order in respect of the Operator A and simultaneously applies for an Alternative PROP Order in respect of Operator B's enterprise agreement.<br>• RLHA Orders are sought in respect of Contractor Z's employees, with Operator B's agreement used to support an Alternative PROP Order. | **Section 306M(3)**<br><br>**Section 306D** | **This application has strong prospects of success.**<br><br>An Alternative PROP Order may be made in respect of any enterprise agreement within the corporate group.<br><br>This means that the union could apply for an RLHA order in respect of the employer that is in receipt of the services, while simultaneously applying for a more beneficial rate of pay within the corporate structure. The alternative PROP is subject to a broad FWC discretion.<br><br>The EM states:<br><br>*This Subdivision is intended to apply where parties consider that the host employment instrument that applies (or would apply) under a regulated labour hire arrangement order should not apply to certain regulated employees, and that an alternative covered employment instrument should apply instead. This may be the case where the alternative covered employment instrument better reflects the type of work or classification of work to be performed under the regulated labour hire arrangement. Such an application could also arise where the rate of pay specified under the alternative covered employment instrument more fairly compensates for work of the type to be performed under the regulated labour hire arrangement.*[4] |
| **Scenario 11:**<br><br>**Work performed by direct employees at the direction of specialised contractor**<br><br>• Senior employees employed by Operator A are, from time to time, asked to work at the direction of Supervisors engaged by Contractor Z. For example, to provide their input in respect of electrical upgrade works.<br>• Operator A does not have an enterprise agreement, but Contractor Z has a national enterprise agreement, which | **Section 306E(1)** | **This application has strong prospects of success.**<br><br>As the Bill does not define labour hire, it can apply to any scenario in which the employees perform work "directly or indirectly" for another business, including where employees of the host work or liaise with the contractor.<br><br>This means that a RLHA order can be made in respect of the host's employees on the basis that they are providing indirect labour to Contractor Z. |

[4] EM at [634].

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| could cover senior employees such as those employed by Operator A to provide input on the project.<br>• RLHA Orders are sought in respect of Operator A's employees, with Contractor Z as the regulated host. | | |
| **Scenario 12:**<br>**Work performed by employees across companies**<br>• Group A (set out in Scenario 9) has decided to introduce a human resources platform, 'Workday', nationally and across all groups.<br>• The purpose of Workday is to streamline workforce management, which will be used to manage timesheets, payroll, and leave entitlements to assist with pay compliance across the business.<br>• As these processes vary across product groups and assets across Group A, a project team is established, comprising of employees across iron ore, coal, nickel, bauxite, as well as IT, Payroll and Legal.<br>• In addition to their regular site-based duties, employees across the project are required to share learnings from their particular groups, provide input on the platform and meet with stakeholders across Group A once a week.<br>• An RLHA order is made in respect of the employees in Iron Ore on the basis that their work on the project is indirectly providing labour to the coal business. | **Section 306E(1)**<br>**Section 306E(8)(d)** | **This application has a good prospects of success.**<br>For the same reasons set out in respect of Scenario 9, this application has strong prospects of success. |
| **Scenario 13:**<br>**Work performed by employees within Group A**<br>• In respect of Group A (set out in Scenario 9), an engineer is seconded from one business within Group A, without an in-term enterprise agreement, to a another with an in-term enterprise agreement. That enterprise agreement has a sufficiently broad scope to cover the senior manager's work. | **Section 306E(1)** | **This application has strong prospects of success.**<br>For the same reasons set out in respect of Scenario 9, this application has strong prospects of success.<br>A RLHA Order entitles the relevant employees to at least the full rate of pay in the relevant instrument, but does not prevent them from also being receiving the benefits under their normal enterprise agreement, or their contracts of employment. Again, this could result in a situation where the contractor's employees are paid far in excess of the regulated host's direct employees at the relevant site. |

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| • The engineer receives benefits such as a bonus, health insurance and travel allowance, which are provided by way of contract and not available to employees covered by an enterprise agreement. | | |
| **Scenario 14:**<br>**The unions can pick and choose which agreement within a corporate structure should dictate the employee's rate of pay**<br>• In respect of Group A (set out in Scenario 9), after a RLHA Order is made, a more beneficial agreement is made within the host's group.<br>• Another union applies for an Alternative PROP Order in respect of the new enterprise agreement, so that the employee who is subject to the RLHA Order receives the benefits of the new enterprise agreement. | **Section 306M(3)**<br>**Section 306D** | **This application has good prospects of success.**<br>If a RLHA Order has been made (or even merely applied for by one union) the FWC could make an Alternative PROP Order based on a separate application from the same or a different union, which applies the full rate of pay from any enterprise agreement that applies to any entity within the corporate group, including one which might not even apply at the relevant site or operation.<br>The availability of Alternative PROP Orders allows applicants to snake through a corporate group to find the most beneficial agreement to apply, even if that agreement does not cover the relevant operation or site. This could result in the contractor's employees being paid far in excess of the regulated host's direct employees at the relevant site. |
| **Scenario 15:**<br>**Contractor employees entitled to double dip on benefits under RLHA Order**<br>• While Contractor Z's employees are covered by the Contractor Z enterprise agreement, they are also engaged under common law contracts which provide for benefits above those required by the EA, including up to a 20% annual bonus each year.<br>• Operator A's EA provides for a 10% annual bonus to be paid to covered employees provided that Operator A meets certain corporate performance metrics. | **Section 306F(4)**<br>**Section 18(1)** | **This application has good prospects of success.**<br>If a RLHA Order is made, Contractor Z's employees would be entitled to the 'full rate of pay' provided for in Operator A's enterprise agreement, including the 10% bonus, as well as any benefits under Contractor Z's agreement or their employment contracts that are more beneficial to them, including the 20% bonus.<br>A RLHA Order entitles the relevant employees to at least the 'full rate of pay', which is defined as including:<br>*(a) Incentive-based payments and bonuses;*<br>*(b) loadings;*<br>*(c) monetary allowances;*<br>*(d) overtime or penalty rates;*<br>(e) *any other separately identifiable amounts.* |

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| **Scenario 16:**<br><br>**Unions can pick and choose the regulated host**<br><br>• Contractor Z engages subcontractors (**Contractor X**) to perform work at its direction in the delivery of services on Operator A's mine in the Pilbara. Operator A does not have an enterprise agreement at this particular site but Contractor Z does. Operator A does not direct or supervise the work of Contractors X and Z's employees. | **Section 306E(1)**<br><br>**Section 306M(3)** | **This application has good prospects of success.**<br><br>A RLHA Order could be made in relation to Contractor X's employees with the regulated host being either Operator A or Contractor Z.<br><br>Further, an Alternative PROP could be ordered which applies terms from any enterprise agreement that covers any related entities to Operator A or Contractor Z. |
| **Scenario 17:**<br><br>• To facilitate the performance of the relevant services, Operator A supplies a contract administrator to Contractor Y and Contractor Z, both with enterprise agreements. The role of the contract administrator is to act as a liaison between Operator A and Contractors Y and Z.<br>• An RLHA Order is made in respect of Operator A's contract administrator with Contactor Y or Contractor Z as the regulated host. | **Section 306E(1)**<br><br>**Section 306M(3)** | **This application has good prospects of success.**<br><br>A RLHA Order could be made in relation to Operator A's employees with the regulated host being either Contractor Y or Contractor Z.<br><br>Further, an Alternative PROP could be ordered which applies terms from any enterprise agreement that covers any related entities to Contractor Y or Contractor Z. Under the provisions, it is possible for an entity to be both a regulated host and an employer subject to a RLHA. |