FAIR WORK LEGISLATION (CLOSING LOOPHOLES) BILL 2023

PROPOSED GOVERNMENT AMENDMENTS – SAME JOB, SAME PAY

28 November 2023

Outline of the amendments to "same job, same pay"

The government amendments introduced on 28 November will modify the current provisions of the Bill, which provide that the Fair Work Commission must make a "same, job same pay" order in specified circumstances. The amendments include the following new provision:

> *…the FWC must not make the order unless it is satisfied that the performance of the work is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters in subsection (7A).* [1]

This amendment is ostensibly to "exclude" service contractors from "same job, same pay". However, any such exclusion is still entirely at the discretion of the FWC and there is still no definition of either "labour hire" or "service contractor".

Instead, the amendment introduces a separate five factor test, which sets out discretionary factors for the FWC to consider in determining whether a business is a service contractor:

> *(7A) For the purposes of subsection (1A), the matters are as follows:*
>
> *(a) the involvement of the employer in matters relating to the performance of the work;*
>
> *(b) the extent to which, in practice, the employer or a person acting on behalf of the employer directs, supervises or controls (or will direct, supervise or control) the regulated employees when they perform the work, including by managing rosters, assigning tasks or reviewing the quality of the work;*
>
> *(c) the extent to which the regulated employees use or will use systems, plant or structures of the employer to perform the work;*
>
> *(d) the extent to which either the employer or another person is or will be subject to industry or professional standards or responsibilities in relation to the regulated employees;*
>
> *(e) the extent to which the work is of a specialist or expert nature.* [2]

None of these matters are conclusive. It will be a "balancing exercise" for the Commission.

The onus will be on the business to show that it should be excluded based on these five discretionary factors. They will still be captured unless they can litigate their way out, based on this discretionary test.

Effect of the amendments – according to proponents

The amendments do not achieve what their proponents claimed they would when they were announced on 21 November. The government's announcement was reported in the following terms:

> *"the agreement to exempt service contractors from the new workplace laws was signed off on Tuesday by Mr Burke and the Australian Resources and Energy Employer Association..."*
>
> *"These amendments will put it beyond doubt," he said. "We will end up with better legislation as a result of the constructive engagement and industrial expertise that AREEA has brought to the table."*

[1] proposed section 306E(1A)
[2] proposed section 306E(7A)

Level 3, 44 Sydney Avenue
Forrest ACT, 2603
PO BOX 4497
Kingston ACT 2604
Telephone: + 61 2 6233 0600
Email: info@minerals.org.au
Web: www.minerals.org.au
ABN: 21 191 309 229

> *"Under the new changes, tighter criteria will direct the commission to focus only on factual matters of supervision, control, provision of equipment, statutory obligations and whether the work is of a specialist or expert nature."*
>
> *"Contracting businesses will no longer have to prove they are 'wholly or principally' providing a service, rather, on balance, that the arrangement points towards service provision instead of labour hire."*[3]

The actual effect of the amendments

The amendments do not *"exempt service contractors from the new workplace laws"*, as was claimed in the initial media report. Nor do they "put it beyond doubt". There is still a significant risk that service contractors can be captured by "same job, same pay" and they will still be required to litigate their way out to avoid capture.

It is clear that service contractors can be captured, as this will still be a matter for the discretion of the Fair Work Commission. The Supplementary Explanatory Memorandum for the amendments[4] confirms that:

> *"The FWC would be required to consider a list of factors in determining whether this is the case."*[5]

Every service contractor also supplies workers. The amendments confirm that the supply of a service *per se* is no guarantee of anything. The Explanatory Memorandum also confirms that:

> *"To the extent that an arrangement between an employer and a host is for the provision of a service and the supply of labour, the FWC would not be prevented from making an order."*[6]

The discretionary factors are also open-ended and could cover an infinite range of scenarios and outcomes. For example, if a contractor provides electricians but the host also employs electricians, it can be argued that the contractor's electricians are therefore not "specialist" or "expert".

The amendments offer no more clarity or certainty than the original Bill, as it will still be a matter for the open-ended discretion of the FWC. This is consistent with what the government previously indicated was its intention. In Senate Estimates on 25 October, the government made the following statement:

> ***Senator Watt:*** *We would say they are excluded via the commission having the power to consider those matters.*
>
> ***Senator CASH:*** *So there is no strict provision is the answer to the question, though?*
>
> ***Senator Watt:*** *No, but they are excluded because of the matters that have just been explained.*
>
> ***Senator CASH:*** *No, they are not, because that is obviously a decision for the Fair Work Commission. There is no strict provision is the answer to the question. There is no specific exclusion, because, if there was, we would be currently working through a particular section of the bill.*
>
> ***Senator Watt:*** *Yes, but the intent is to exclude those types of businesses via the Fair Work Commission's discretion.*[7]

[3] "Labor strikes secret deal to get workplace changes over the line", The Australian, 21 November 2023: https://www.theaustralian.com.au/nation/politics/labor-strikes-secret-deal-to-get-workplace-changes-over-the-line/news-story/e6eca09b2f5497e46b583a0cf2368455

[4] References are to the Supplementary Explanatory Memorandum, "Amendments to be moved on behalf of the Government", as circulated to non-government MPs on 28 November 2023, hereafter referred to as "the Explanatory Memorandum"

[5] Supplementary Explanatory Memorandum, page 1

[6] Supplementary Explanatory Memorandum, page 19

[7] Minister Watt, Department of Employment and Workplace Relations, Senate Education and Employment Legislation Committee, 25 October 2023

Other amendments that expand the reach of "same job, same pay"

The proponents of the amendments failed to reveal in their announcement on 21 November that the government's amendments would also include a number of other elements that would greatly expand the reach of "same job, same pay". They will make it easier to capture more businesses and make it harder for businesses to escape once captured. They go further than the government ever previously foreshadowed.

The government's amendments do this in five ways:

1. **"Same job, same pay" orders can now also be made to capture "additional employers":**
    - This includes businesses who are not respondents to a union's application to capture a particular "host" employer.[8]
    - This greatly expands the power of unions and the FWC to rope in more businesses.
2. **"Same job, same pay" orders can now more easily reach beyond the "host" business and also capture joint venture partners of that business:**[9]
    - The Explanatory Memorandum confirms that the intent is that:

        > *"circumstances where labour is supplied as part of a joint venture or common enterprise are appropriately captured and taken into account"* [10]

    - This means that the "host" business can be a joint venture partner who is not the actual operator of the project. The Explanatory Memorandum states that it is:

        > *"intended to take into account the various circumstances in which labour hire arrangements may be used, including where employees are provided to work for the benefit of a joint venture or common enteprise between a number of parties. In those circumstances, the regulated host may be determined to be one of the parties to the joint venture of common enterprise.*
        >
        > *For the purposes of this part, the terms 'joint venture' and 'common enterprise' are intended to be read broadly…"* [11]

    - The Explanatory Memorandum further states that:

        > *"this amendment would clarify the FWC may make an order where it is satisfied that the employer would supply labour to a regulated host who is party to a joint venure, whether or not the agreement for the supply of labour is made with the regulated host or another party to the joint venure".*[12]

    - This could mean that "same job, same pay" orders can be be based on an enterprise agreement of a joint venture partner where that partner is not the employer; does not operate the project; and the enterprise agreement used to determine the "same pay" applies in another workplace in another location – possibly on the other side of the country. The Explanatory Memorandum confirms that:

        > *"this would permit employees providing work to a joint venture enterprise to be paid at the same rate as other employees working for that enterprise, where those employees are undertaking work that is <u>similar or the same</u>".*[13] (emphasis added)

    - Note that "same job, same pay" is no longer limited to the "same job" – it can now be "similar or the same".

[8] proposed section 306EA
[9] proposed sections 306D(2)(c); 306E(8)(da)
[10] Supplementary Explanatory Memorandum, page 1
[11] Supplementary Explanatory Memorandum, page 19
[12] Supplementary Explanatory Memorandum, page 19
[13] Supplementary Explanatory Memorandum, page 21

3. **Existing "same job, same pay" orders will be able to be expanded to cover new businesses that supply services to the "host":**[14]

    - The "host" business will be required to apply to the FWC to expand the "same job, same pay" order, with sanctions for non-compliance. It must do so every time it engages a new contractor.[15]
    - In other words, the "host" business must litigate against its own contractors. The existing "same job, same pay" order will automatically apply to a new contractor until the FWC determines the application.[16]

4. **Extension to future enteprise agreements:**

    - If a "host" business makes a new enterprise agreement, that agreement will now automatically apply to any existing "same job, same pay" orders.[17]

5. **Extension to tender processes:**

    - If a "host" business that has been captured by a "same job, same pay" order conducts a tender process, it must proactively notify "all prospective tenderers" that they could also be captured, with sanctions for non-compliance.[18]

Implications of the amendments

An amendment to the discretionary factors in the "service contractor" test is not a genuine exclusion. The key problems will still remain:

1. "Labour hire" is not defined in the Bill, so service contractors can still be treated the same as labour hire; and
2. Service contractors will still be captured by "same job, same pay" unless they can litigate their way out.

The only genuine exemption is one that defines what is – and isn't – "labour hire" and makes it clear that service contractors (businesses engaged to provide a service, rather than workers) are clearly not "labour hire". This is the only way they can avoid being trapped in FWC litigation through union applications to rope them into "same job, same pay" orders.

Any amendment that does not clearly exclude all service contractors on this basis is an illusory "solution" that will only create even more litigation and uncertainty.

[14] proposed section 306ED
[15] proposed section 306ED(2)
[16] proposed section 306ED(10)
[17] proposed sections 201(5); 306EB; 306EC
[18] proposed section 306EE

The fundamental flaws with "same job, same pay" will still remain:

1. **No definition of "labour hire" or "service contractors":**
    - The only genuine exemption is one that is clearly set out in the legislation, not a discretionary test, to be litigated in the Fair Work Commission.
    - The government has failed to explain why it will not formulate definitions.
2. **No clear exemption – just more litigation and discretion:**
    - In contrast to a clear legislative carve out, whether contractors are captured is still in the hands of the FWC, based on a broad discretion and no definitions.
    - In the inevitable grey areas of service contracting, the reach of "same job, same pay" will be unpredictable, uncertain and subject to a hotly contested litigation in the FWC with no clear boundaries or definitions. It will depend on the FWC's subjective consideration of a wide range of circumstances.
    - There is no existing precedent in the *Fair Work Act* or elsewhere for such an obtuse basis for creating such significant additional obligations on employers.
    - This is, and will remain, extremely poor legislative drafting.
3. **Everyone is in, unless they can litigate their way out:**
    - The onus is still on the business to demonstrate they should not be captured. The complex and subjective multi-factor test still remains. All that changes is the way the test is applied.
4. **The Bill still fails to do what the government said it would do:**
    - The government always said that "same job, same pay" would only apply only to the

        > *"limited circumstances in which host employers use labour hire to deliberately undercut the bargained wages and conditions set out in enterprise agreements made with their employees".*[19]

    - Yet every time it has made such claims, they have been false.
    - In June 2023, when the government first publicised a supposed "deal" to exclude service contractors, Minister Burke claimed that:

        > *"The problem that we are trying to solve is where an enterprise agreement has been put in place where there are agreed rates of pay and then an employer uses a labour hire firm in order to undercut those rates of pay,"* [20]

    - Clearly, the Bill goes much further than this (which appears to have always been the government's agenda).
    - With the most recent amendments, expanding further to joint ventures and "additional employers", the Bill goes even further than before.

[19] 'Same Job, Same Pay Consultation Paper', DEWR, April 2023: https://www.dewr.gov.au/workplace-reform-consultation/resources/same-job-same-pay-consultation-paper. (emphasis added)
[20] "Labor poised to cut deal on 'same job, same pay' laws", The Australian, 12 June 2023: https://www.theaustralian.com.au/nation/politics/labor-poised-to-cut-deal-on-same-job-same-pay-laws/news-story/7f3320e68258707d6e77686e2edafba4

ANALYSIS OF GOVERNMENT AMENDMENTS – CLAIMS VERSUS REALITY

Claim	Reality
Under the new changes, tighter criteria will direct the commission to focus only on factual matters of supervision, control, provision of equipment, statutory obligations and whether the work is of a specialist or expert nature. *Contracting businesses will no longer have to prove they are 'wholly or principally' providing a service, rather, on balance, that the arrangement points towards service provision instead of labour hire.*[21]	Wrong • This is not a genuine exemption for service contractors. It is tweaking the existing discretionary factors in the "fair and reasonable" test that currently allow them to be captured, and will still allow service contractors to be captured in future. • This "solution" is highly litigious – all service contractors are still captured until they can litigate their way out. • There will still be five discretionary elements that any contractor must litigate their way through in order to escape. It is still highly uncertain and highly complex. • More complexity is not the solution to the problem – more complexity is the problem.
Under the changes, the Fair Work Commission will be prevented from making labour hire pay orders where businesses are providing a service to a client rather than supplying labour.[22]	Wrong. • The Bill currently provides that the Commission "must" make a "same job, same pay" order unless it is not "fair and reasonable" to do so, based on a multi-factor test. There is a reverse onus on the employer to demonstrate it is not "fair and reasonable". • The onus will still be on the employer – it is captured unless it can litigate its way out under the amended multi-factor test. • The Explanatory Memorandum confirms that: *"To the extent that an arrangement between an employer and a host is for the provision of a service <u>and</u> the supply of labour, the FWC would not be prevented from making an order."* [23]
"only businesses providing labour hire to clients could be captured by future orders…"[24]	Wrong. • Changing discretionary elements in the test will still mean that non-labour hire service contractors can still be captured. • As with all discretionary tests, there will be "shades of grey" – some service contractors may be able to litigate their way out based on the discretion of the FWC, but others will not. • The fundamental problem still remains – every service contractor in every industry is in, unless they can litigate their way out. • If the government was genuine about only including labour hire, then the legislation could be simple and straightforward and say this clearly. Instead, it will remain highly contentious, unclear, and litigious.
"contracting businesses delivering services to mining, energy and all other sectors of the Australian economy will be exempt from proposed new	Wrong. • No contracting business is "exempt" from being subject to an application to rope them into "same job, same pay".

[21] "Labor strikes secret deal to get workplace changes over the line", The Australian, 21 November 2023: https://www.theaustralian.com.au/nation/politics/labor-strikes-secret-deal-to-get-workplace-changes-over-the-line/news-story/e6eca09b2f5497e46b583a0cf2368455

[22] "Labor strikes secret deal to get workplace changes over the line", The Australian, 21 November 2023: https://www.theaustralian.com.au/nation/politics/labor-strikes-secret-deal-to-get-workplace-changes-over-the-line/news-story/e6eca09b2f5497e46b583a0cf2368455

[23] Supplementary Explanatory Memorandum, page 9

[24] AREEA CEO, quoted in "Labor strikes secret deal to get workplace changes over the line", The Australian, 21 November 2023: https://www.theaustralian.com.au/nation/politics/labor-strikes-secret-deal-to-get-workplace-changes-over-the-line/news-story/e6eca09b2f5497e46b583a0cf2368455

labour hire regulation (commonly known as the 'Same Job Same Pay' policy). *"This is the guarantee AREEA has fought for over several months, on behalf of its members including miners and energy producers, and all contracting sectors delivering critical support services."* [25]	• The onus is still on the business to show why they should not be captured. The discretionary multi-factor test remains. All that changes is the way the test is applied. • There is no "guarantee" of anything. No Minister, nor anyone else, can make any "guarantee" of how an independent tribunal will apply a highly discretionary statutory test in future proceedings.
"The new wording, we'll just have a straight exclusion, that if it is a service other than the provision of labour, then they are excluded" [26]	Wrong. • It is not a "straight exclusion". This comment implies that the legislation will have a clear "carve out" in the Bill itself, when it is the case that any exclusion will be up to the discretion of the FWC. • The onus will still be on contractors to litigate their way out in the FWC and demonstrate that they are a contractor, based on the various discretionary factors. • No Minister can predict what an independent tribunal may or may not decide in future, and the amendments still do not mean that contractors can be assured of a particular outcome.
So that discretion that otherwise would have been there with the Commission won't be there under the amendments. And that just give s a really clear line drawn that it it's labour hire, it's covered, if it's service contractors, it's not." [27]	Wrong. • The question of whether or not a service contractor is captured will continue to be a matter for the FWC to decide, based on its discretionary application of a multi-factor test. • It is wrong and misleading to assert that its discretion will be removed. • There will be no "really clear line" between labour hire and service contractors. It will continue to be unclear, as the whole concept is discretionary. • The Minister's own department has confirmed that no "clear line" can be drawn: *"One of the interesting drafting challenges that we faced with this was that there is no universally accepted definition of 'service contractor', so the initial approach that was taken in the bill was to make service contracting a factor that the Fair Work Commission had to take into account in determining whether it was fair and reasonable to make the relevant order. That was done through making it one of the factors and then having a list of sub factors, which, based on stakeholder feedback, indicate the presence of a service contract. But one of the surprising pictures when looking into that development process is that you cannot just pick up a definition of 'services contract'; there is really not one out there."* [28]

[25] AREEA announcement, 21 November 2023
[26] Minister Burke, interview with ABC RN, 22 November 2023
[27] Minister Burke, interview with ABC RN, 22 November 2023
[28] DEWR, evidence to Senate Committee inquiry into the 'Closing Loopholes' Bill, 10 November 2023 (pp 83-84 of the Hansard)