‘Same Job, Same Pay’ Consultation Paper

SUBMISSION TO THE DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS

12 MAY | 2023

Introduction

1. Australian Resources and Energy Employer Association (**AREEA**) provides the following submission in response to the *Same Job, Same Pay Consultation Paper* (**Consultation Paper**) released by the Federal Government's Department of Employment and Workplace Relations (**Department**) on 13 April 2023.

2. AREEA's firm position is that if the 'Same Job, Same Pay' policy proposal is implemented in the nature described in the Consultation Paper, the impact on the resources and energy industry will see operations close, jobs lost, regional communities adversely impacted, and state and federal tax and royalty revenues forgone.

3. AREEA is the most diversified employer representatives in the resources sector, with members covering operators of mining and energy projects as well as all the various supply and contracting sectors throughout. As a result. AREEA's member network comprises all employer cohorts which would be impacted by this policy especially if implemented in the blunt and far-reaching manner indicated by the Consultation Paper.

4. Those cohorts could be described broadly as:

    a) *Project owner / operators*, which are often referred as the 'client' or 'host' in regard to labour hire and other contracting arrangements. These owners/operators, which generate billions of dollars in annual national revenues for Australia, would be impacted by this policy on multiple fronts, including:

        - As end users of labour hire services, the added cost, complexity and regulatory burden in accessing contingent labour for managing fluctuations in commodity prices and product demand, among other 'legitimate' uses; and

        - The potential for added cost, complexity and regulatory burden in accessing specialist skills and services via other 'non-labour hire' contracting arrangements, which risk being caught up in this policy if implemented poorly.

    b) *Labour hire providers*, which face significant new regulatory red-tape, administration costs and compliance risks associated with the 'Same Job, Same Pay' policy, despite operating with perfectly lawful enterprise agreements offering above-award wages and conditions, and almost always agreed through bargaining with unions.

    c) *Specialist contracting service providers* which, despite having never been considered 'labour hire' by any industry or social stakeholders, face the real prospect of being drawn into 'Same Job, Same Pay' obligations due to the extraordinarily broad definitions of 'labour hire' proposed within the Consultation Paper.

        - These companies operate in a highly specialised niche in the resources and energy sector. They provide contract services typically with their own unique management and supervisory structures, equipment and technical systems and high levels of autonomy over delivery of their work.

        - One of the most critical issues with design and implementation of the 'Same Job, Same Pay' policy, in AREEA's view, is to ensure these companies and their workforce / commercial arrangements are not clumsily captured within its scope, leading to enormous productivity impacts throughout the economy.

5. In the following submission AREEA provides general views on this policy, specific responses to questions within the Consultation Paper, and alternative models and considerations for the Government on moving forward.

6. AREEA would welcome any opportunities to expand on this submission and / or consult further with the Government on our significant concerns with this policy.

‘Same Job, Same Pay’ is a fundamentally flawed policy

7. AREEA fundamentally opposes the ‘Same Job, Same Pay’ policy.

8. This policy will have adverse impacts on longstanding workforce practices in the resources and energy sector, whereby multiple different employing entities are typically operating at any one site, often with separate scopes of work, overlapping job classifications, qualifications and duties.

9. Even if confined to ‘traditional’ labour hire providers, there are still many challenges this policy presents, including:

    a) In the resources and energy sector, as well as many other industries, it is not uncommon for individuals to hold the same base qualifications and perform similar basic work tasks as a colleague but be paid differently. This is due to an almost infinite number of factors including experience, business operational knowledge, length of service with their employer, qualifications, performance assessments, bargaining power and other differentiating factors;

    b) Labour hire employees engaged temporarily to supplement a site’s direct-hired workforce rarely have the same responsibilities, qualifications, experience in the industry and history of service with an employer. These factors can often justify a different in wages;

    c) There is a significant difference between labour hire employees who are engaged permanently over long periods of time – those who this policy originally intended to provide pay parity for, and the myriad of applications where contingent labour deliver specialised and often short-term contract work. Further, the use of long-term labour hire employees in casual positions has already been addressed with casual conversion rights introduced in 2021;

    d) Resource industry labour hire enterprise agreements are typically reached with unions and must be signed off as lawful by the Fair Work Commission (**FWC**). They offer well-above award conditions and a strong enough employee value proposition to attract thousands of workers during a highly competitive labour market. Everyone has a right to be paid fairly and lawfully by virtue of awards and enterprise agreements; remuneration above this if affected by a range of factors. It is anti-competitive to force this lever for attracting and retaining talent to be removed;

    e) There are potentially hundreds of worksites where labour hire employees can provide services should they be required. It is unrealistic to expect labour hire arrangements to operate with insurmountable levels of red tape, defeating the purpose of engaging labour hire in the first place, being flexibility and choice.

10. Labour hire is a small part of the national resources and energy sector workforce, but where utilised it offers important flexibility in managing fluctuating labour demands and maintaining the commercial viability of projects through various stages of the commodity cycle.

11. Conversely, ‘non-labour hire’ contracting arrangements are widespread and critical to maintaining operations through delivery of specialised services and skills unique to that of their clients.

12. Both competitive and flexible labour hire services and competitive and flexible ‘other’ contracting arrangements are needed to maintain the commercial viability of mining and energy operations.

13. Without those arrangements supplementing permanent site workforces, the strength and viability of the industry will be seriously undermined, resulting in significant negative impacts on Australia’s economic wellbeing.

Limiting the damage of 'Same Job, Same Pay'

14. If the Government is intent on pushing forward with 'Same Job, Same Pay', AREEA submits the following principles as critical to limiting the damage it risks imposing across the economy:

    a) The definition of labour hire must be strictly confined to 'traditional labour hire' and avoid capturing a broader range of working arrangements, such as contractors and service providers.

        - A 'multi-factor test', as set out by AREEA at page 9 of this submission, will be critical to ensuring appropriate delineation between labour hire and other contracting and servicing arrangements.

    b) Where a commercial arrangement is assessed as not falling within the definition of labour hire, it should be entirely irrelevant if there appears to be similar work engaged upon by employees of the client and contracting companies. Once an arrangement is deemed to not be labour hire, 'same job' comparisons should not apply.

    c) The High Income Threshold of $162,000 must apply, as it does to other employee entitlements including unfair dismissal protections and limits on the use of consecutive fixed-term contracts.

        - If such a threshold is not applied, this policy risks extending well beyond protecting vulnerable groups of employees from unscrupulous employer strategies and would instead stifle some of the highest paying employment arrangements in the country through productivity-killing regulatory red tape.

    d) In relation to determining if the 'same job' exists for the purpose of the obligation, there must be an actual real person employed by the client/host under an enterprise agreement in the direct hired role to be used as the comparator for a corresponding labour hire employee:

        - The potential negative impacts of this policy would be amplified immensely if labour hire employees were compared against *prospective* or *hypothetical employees* who *could* be employed by the host/client under their enterprise agreements.

            - This would mean businesses could never choose to outsource or insource certain functions or scopes of work without triggering uncommercial and complex 'same pay' obligations. Enterprise Agreements would be more limited creating unknown impacts on productivity and competitiveness.

        - Further, allowing the above to occur would also be inconsistent with the intent of this policy, namely to ensure there is no disparity between two actual real people performing the potential 'same job' where the client/host has an enterprise agreement that applies to that same job.

    e) It would be far less disruptive to the economy at large, and far more achievable administratively, for 'Same Job, Same Pay' to operate as a new orders jurisdiction within the FWC, rather than as a new universal workplace right inserted into the National Employment Standards or elsewhere in the Fair Work Act.

        - There should be a requirement that 'Same Job, Same Pay' issues are raised, and attempted to be resolved, at the workplace level prior to being brought to the attention of regulators.

          This would be consistent with the purpose of having Model Dispute Settlement Terms within enterprise agreements.

        - Should a 'Same Job, Same Pay' dispute not be resolved at the workplace level, applications could then be made by employees or their representatives and

determined by a Full Bench of the FWC, which would apply a “multi-factor test” such as that set out on page 9.

- This approach would ensure the practical attention is focused on industries and particular employers where employees (or unions) identify what they believe to be wage avoidance behaviour.

  The policy should not operate as an omnipresent contingent liability that all businesses, including both contractors and clients of those services, must assess and account for on an ongoing basis.

f) It is entirely unworkable and unreasonable to consider *full rate of pay* including bonuses, allowances, incentives and other monetary benefits and potentially non-monetary benefits (live-in policies, parental and study leave etc) to be the basis for ‘same pay’ comparisons.

- AREEA’s position is only base rates of pay under the client/host’s enterprise agreement, and clearly identifiable penalties or allowances under the client/host’s enterprise agreement that apply directly to a shift or roster swing worked by a labour hire employee, should form the obligation for ‘same pay’.

g) When assessing ‘same pay’, the relevant comparison between a labour hire employee and a direct-hired employee should be the *lowest available comparator.*

- This is necessary in the common scenario whereby the host employer has multiple people performing what may be perceived as the ‘same job’ but receiving performance-based pay.
- If not set to the lowest comparison, employers and regulators will face the ongoing and unresolvable question of which direct employee should a labour hire arrangement be matched with.

h) Any ‘Same Job, Same Pay’ obligation should not apply to labour hire employees until they have reached a minimum of 12 months service in the host’s operation.

- This would be consistent with limiting any new entitlement/obligations to the stated objective (strategic use of labour hire to permanently replace direct-hired workforces covered by enterprise agreements), and ensure genuine short-term temporary engagements are not made unnecessarily costly or complex.

i) Employers must be afforded a lengthy transition period prior to any new ‘Same Job, Same Pay’ policy taking effect.

- This should reflect the absolute minimum amount of time necessary for labour hire providers and their clients to negotiate replacement commercial contract terms accounting for new obligations in relation to ‘Same Job, Same Pay’.

15. These positions and various others are detailed further below.

Defining Labour Hire Arrangements

Questions:

1. The department seeks to clearly identify the scope and application of legislated Same Job, Same Pay measures.
   a) How should different labour hire arrangements be identified or defined?
   b) Should any arrangements be excluded from the Same Job, Same Pay measures?

16. It is of critical importance to properly define labour hire arrangements.

17. Getting this wrong, in particular by applying too broad a definition and capturing contracting arrangements, would overreach the policy intent substantially and impose serious productivity limiting obligations on employers throughout the 'non-labour hire' parts of the economy.

The traditional 'triangular model' is the only model for labour hire

18. On first principles, it would be highly dangerous for the Government to depart from the definition of labour hire arrangements utilised throughout the Modern Awards system, namely (AREEA emphasis added):

> *on-hire means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client.*

19. As one might expect, guidance material on the FWC's website in relation to labour hire is consistent with the above definition included within most Modern Awards. The FWC's website states the following:

> *A labour hire worker is someone who enters into a work contract with a labour hire agency. The labour hire agency has a commercial contract to supply labour with a host firm. The worker performs work for the host firm. The host firm pays the labour hire agency, and the labour hire agency then pays the worker.*[1]

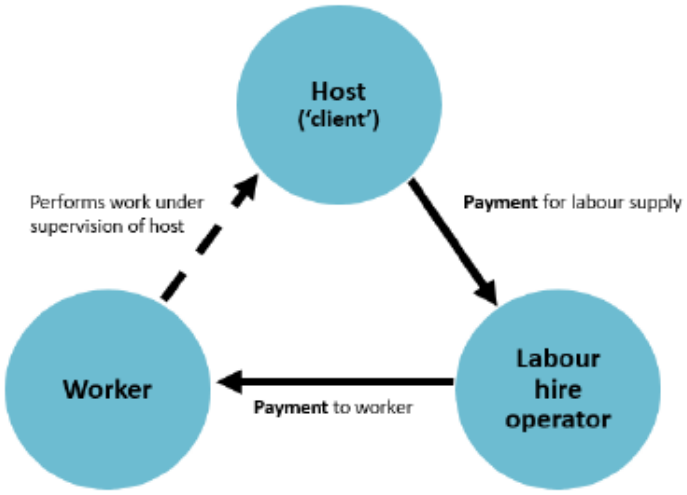
20. It is clear from prevailing definitions and interpretations from Australia's IR authorities that labour hire revolves around the supply of a worker *into* the systems of work and supervision of the client / host business. Emphasis is consistently on the 'performance of work' as reflected in the below diagram, also posted on the FWC's website[2]:

[1] https://www.fwc.gov.au/labour-hire-workers
[2] https://www.fwc.gov.au/labour-hire-workers

21. Note, the 'performance of work' is the defining characteristic here – being that a worker is placed into a host business by a labour hire agency and performs their work directly for and (as made clear by the Modern Award definition) under the guidance and instruction of the host.

22. The Consultation Paper rightly acknowledges the above model is consistent with the general understanding of labour hire arrangements, even referencing that arrangements of this nature have existed in Australia since the 1950s.

23. It also provides the following simplified triangular model demonstrating the understanding that performance of work 'under the supervision of the host' is a core definition feature of labour hire arrangements:



24. AREEA's firm view is the definition of labour hire arrangements for the purpose of 'Same Job, Same Pay' obligations must be limited to the above arrangements. That such arrangements have existed in Australia for over 70 years should be a clear indicator that 'labour hire' is a longstanding concept, clearly defined and well understood by all, and does not require any novel or expansionary new definitions.

25. Where the Consultation Paper goes well beyond the above principles, mistakenly so in AREEA's view, is at page 7 with the following (AREEA emphasis added):

> *…traditional labour hire arrangements are no longer the only type of labour hire arrangement being used by Australian businesses. Labour hire arrangements can be used to supplement short term workforce shortages, outsource specific functions, or even entire workforces, and can take various forms.*

26. AREEA rejects this premise and in particular the underlined section. The key defining feature of labour hire arrangements is that a worker is employed by one entity but performs work under the guidance and supervision of the host / client enterprise, typically alongside direct-hired employees, and apart from providing the worker the entity does not provide other services.

27. If the commercial contract with the client includes services other than the provision of labour to perform work under the guidance and supervision of the client, or if the worker performs work for the service provider, then it is not labour hire. The performance of a business function by a service provider using workers under its guidance and supervision is not labour hire.

28. The outsourcing of specific functions or entire workforces is common practice in the resources and energy sector. Almost always this practice involves the client business utilising specialist skills and expertise of a contracting company to deliver a defined scope of work. Almost never does the execution of that work mean the contractor's employees would perform their duties exclusively under the supervision or guidance of the client's managers or supervisors.

29. The flawed views expressed in the Consultation Paper continue with the suggestion the following scenarios could be defined as labour hire:

a) *Contractor management services*, in which a business (the provider) recruits independent contractors on behalf of a third party (the host) and manages the performance of the contractors.

- AREEA takes this to mean the independent contractors' performance of work is managed by the business which recruited them to the job or project. This scenario is missing the key link between the host/client enterprise and the independent contractor – namely in managing the performance of work, that is critical to characterising the relationship as labour hire.

b) *Recruitment and placement services*, in which one party (the recruiter) recruits or places a worker to perform work for another party (the host). The recruiter does not pay the worker, as the worker is paid by the host either directly or indirectly through an intermediary.

- AREEA finds this a bizarre example. It seems to indicate an individual is placed by a recruitment firm into a business to work and from that point the individual is paid directly by that business. In this example it is not clear who the employing entity actually is and/or if it would be possible for the worker to avoid or circumvent enterprise agreement terms of the business. In either case, the scenario does not reflect the common understanding of labour hire.

Contracting services are not labour hire

30. AREEA is significantly concerned by the expansive definition within the Consultation Paper. This definition would see an enormous range of specialist contracting services that are the lifeblood of Australia's resources projects wrongly defined as labour hire and unduly captured by this policy.

31. This outcome would have devastating productivity and cost impacts on Australia's resources and energy industry, which generates $464 billion in annual export earnings and approximately $46bn in annual tax and royalty revenues[3].

32. AREEA's concerns are perpetuated by the corresponding considerations of definition contained within the Government's *National Labour Hire Regulation Consultation Paper* (**Labour Hire Regulation Paper**).

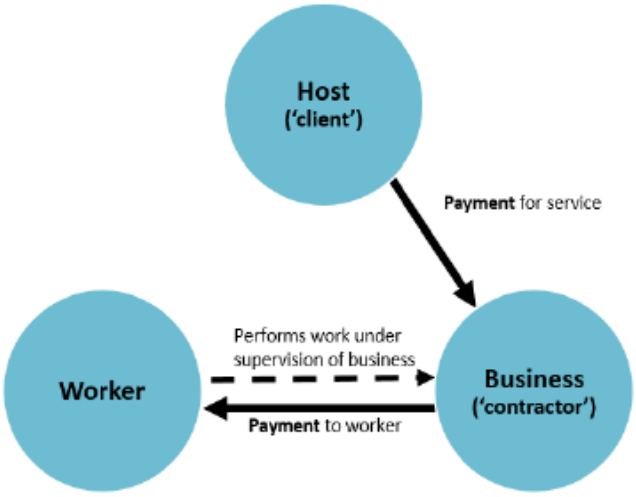
- Note, this is a separate area of policy development for the Federal Government but has overlap and implications for 'Same Job, Same Pay'.

33. The Labour Hire Regulation Paper contains similar arguments that the 'traditional triangular arrangements' are far from the only type of labour hire arrangements in the modern economy. Most concerningly, the Labour Hire Regulation Paper proposes 'Workforce contracting arrangements' should be considered labour hire, and defines such arrangements as:

> *In a workforce contracting arrangement, a business outsources its labour requirements to another business (contractor) and the contractor provides a worker, from its own workforce, to perform the work.*

34. The following diagram is provided to demonstrate its point:

[3] $43.2bn in mining royalties and company tax payments (link) and $2.5bn in forecast PRRT payments (link)



35. This argument put forward by the Labour Hire Regulation Paper is incredible and entirely inconsistent with every definition of labour hire arrangements (or 'on-hire labour') in Australia's history of industrial relations law.

36. The above model effectively describes any contracting or sub-contracting arrangement that involves a worker employed by one business performing work on land or an asset owned by, or in the workplace of, any other business.

37. It would be an extremely dangerous and extensive regulatory overreach if the Government took the view any provision of services involving labour at a client's workplace would fall within the definition of labour hire.

38. The Labour Hire Regulation Paper's casual disregard for any existing authority on defining labour hire is further demonstrated by this section:

> *The definition of labour supply services should apply regardless of:*
>
> - *whether or not the worker is an employee of the provider*
> - *whether or not a contract is entered into between the worker and the provider, or between the provider and the person to whom the worker is supplied*
> - *whether the worker is supplied by the provider to another person directly or indirectly through one or more agents or intermediaries, and*
> - *whether the work done by the worker is under the control of the provider, the person to whom the worker is supplied or another person.* [4]

39. AREEA's firm view is these are exactly the type of considerations that should be examined by regulators when seeking to define a working arrangement as labour hire. Of course it would be relevant whom the worker is formally employed by, in what capacity they are working within a particular workplace and to whom they report to in a supervisory or management capacity.

40. AREEA proposes to the Government that a *multi-factor test* must be developed for the purpose of ensuring regulators (be it the FWC or Fair Work Ombudsman (**FWO**)) have consistent criteria for assessing commercial and workforce arrangements between two entities for the purpose of defining that arrangement as labour hire or non-labour hire.

[4] Page 7, DEWR, *National Labour Hire Regulation: Towards a single national scheme,* March 2023

41. AREEA proposes this multi-factor test could include the following considerations:

AREEA's Proposed Multi-Factor Test for Defining Labour Hire Arrangements

a) The primary characteristic or nature of the business providing employee/s into the workplace of another business (i.e. is the employing entity just a provider of contingent labour, or is it performing independent scopes of work?).

b) The primary characteristic or commercial relationship between the two businesses (are the contractual terms for delivery of labour, or delivery of a scope of work, project or service?), including in relation to commercial risks.

c) Are employees of the contracting company using the host/client's tools, equipment, machinery and/or plant?

d) Are employees of the contracting company performing their work under the direct supervision of employees of the host/client? Or are the supervisory structures provided by the contracting company?

e) What are the lines of management relevant to the contractor employee? Would an issue around performance of work, or leave arrangements, be considered a workforce management issue for the host/client, or a matter for the contracting employer?

f) Do the contractor and its employees have a level of autonomy / control over delivery of their work separate to that of the host/client and its employees? Who is setting rosters, hours of work and making other day-to-day workforce management decisions?

g) What is the composition of the immediate team or working group of the contractor employee/s? Do they form their own work group or are they integrated with teams of client/host employees?

h) Are the contractor employees *fully immersed* within the host/client employees' technology processes and systems of work?

42. It should not be the case that any single or subset of the above considerations would necessarily be determinative. Rather, the multi-factor test would see regulators weigh up a variety of considerations that lead to a *reasonably clear conclusion* that a particular workforce arrangement is labour hire for the purpose of 'Same Job, Same Pay'.

43. AREEA's preferred regulatory model would see this test first applied by a single member of the FWC when considering an application made by an employee or union representative for 'Same Job Same Pay Orders'. By framing this policy as a new orders jurisdiction within the FWC, employing parties would have the ability to appeal the determination to a Full Bench of the FWC and through the Courts, should they fundamentally disagree their commercial arrangements should be considered 'labour hire'.

44. This would be important to build case law precedent on what should be considered 'labour hire' to guide future employer considerations about their obligations.

Exclusions from 'Same Job, Same Pay' obligations

45. It is critical this policy is confined to traditional 'labour hire' arrangements whereby a worker, or workers, are placed to work within a host employer's workplace and are immersed in the host employer's systems of work. This would include the processes, technologies used, supervision and management structure, workflow and all other aspects of people management, as outlined in AREEA's proposed *multi-factor test* above.

46. In the resources and energy industry's complex commercial environment, a holistic assessment is necessary to ensure other types of contractors or service providers who may provide people to a 'host employer's workplace' are not unnecessarily captured by this policy simply because there is some overlap in working duties, classification or skills or employees.

47. There are many forms of specialist contracting arrangements within the resources and energy sector that should not be considered 'labour hire' but would risk capture if the Government takes too broad a view in its definitions.

48. Examples of those contracting arrangements that are not labour hire and should not be captured by 'Same Job, Same Pay' include:

a) *Contract mining services*

Given the mining industry (black coal in particular) has been one of the ALP's focus industries in pursuing its 'Same Job, Same Pay' policy, it is very important the Government understands the distinction between traditional labour hire arrangements that service parts of the mining industry and *contract mining services* used across the industry for delivery of commercial outcomes.

The following are various sourced descriptions of contract mining services:

- *Industry Definition Contract Mining Services Industry in Australia: Firms carry out core stages of a mining operation as third parties on a fee or contract basis. Contract miners supply both machinery and skilled employees to undertake mineral and resource extraction activities at Australian mining sites.*[5]

- *The main difference between contract mining and owner mining is normally based on who has the most control over that particular mining operation. These operations include rock breakage (drilling and blasting), loading and hauling of ore and waste, mine design, equipment maintenance, scheduling and budgeting. This is most clearly demonstrated by which party owns and operates the mining equipment.*[6]

- *There are many scenarios that might result in a mine owner looking for assistance from a contract miner… (including) considerations such as: operating experience; in house capability (or "bench strength"); resources (people and equipment); attitude to risk; geographic location; and financial capacity – to name just a few.*[7]

As indicated by the above descriptions, contract mining services differ substantially to the type of triangular labour hire arrangements also used in the mining industry to source job-ready contingent labour to supplement existing workforces.

b) *Petroleum production services*

Similar to the above-described contract mining services, petroleum production services involve specialist contracting firms delivering a range of supporting services involved in the extraction and refining of hydrocarbons.

Those services might include drilling, well maintenance, completion, production, supply, and logistical support services, both onshore and offshore. The commercial reasons for utilising such services and the clear distinctions from labour hire arrangements are basically identical to those described above for mining.

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[5] Contract Mining Services in Australia – Market research report, IBISWorld, 26-10-2022, sourced at this link.
[6] Suglo, R. S., (2009), "Contract Mining versus Owner Mining – The Way Forward", Ghana Mining Journal Vol. 11, pp. 61 - 68. Sourced at this link.
[7] MEC Miing 17-11-2017, *Contract Mining: What's your style?* Sourced via this link.

c) *Mining / petroleum maintenance service contractors*

In both the mining and petroleum (oil and gas) sectors, it is very common for project owners (including owner-operators) to outsource the ongoing maintenance of their assets to specialist engineering and maintenance firms, with direct-hired employees focusing solely on regular production and refining operations.

Firms that are awarded multi-year maintenance services contracts for complex resource sector projects are often those that also have expertise in the planning and construction of new projects (technically called 'Engineering, Procurement and Construction Management' providers).

The skills and work of firms and employees who specialise in building and maintaining mining and oil/gas projects are very distinct from the skills and work of those with expertise in running them. Despite this, a superficial viewing of enterprise agreements may not recognise the clear distinction between those firms as there may be overlap of occupations, qualifications, job classifications, roles and duties.

d) *Shutdown service providers*

Shutdown projects are planned outages of entire or substantial sections of a mining or hydrocarbons project for the purpose of large-scale maintenance works, upgrades and refurbishing. Contract providers of shutdown projects employ workers with similar skills to regular maintenance service contractors (engineers, technicians, trades etc) however with specialist experience in planning, managing and executing fast turnaround, high pressure projects.

Like maintenance specialists, shutdown contracting companies and their employees may have similar duties, skills and classifications as their clients in a superficial review of industrial instruments covering the two working groups, however their actual work is vastly different in practice and extremely mobile in nature.

e) *Facilities management and support services*

AREEA's membership base includes large, highly diversified firms that provide full-scale facilities management services to Australia's mining and oil and gas operators.

Those services include accommodation camp design, build and operating – involving cooking, cleaning, laundry services, building maintenance, health services, security, grounds maintenance, mailing services, waste management and more.

It may be the case, on occasion, that enterprise agreements covering employees of facilities management and support service providers have some overlap in skills and occupation classifications with enterprise agreements covering their clients' employees.

However, nobody could reasonably argue a tradesperson performing building maintenance at a mine's accommodation village should be paid the same rates as a tradesperson providing maintenance of complex underground mining equipment at the corresponding mining project. Put simply, they are not the 'Same Job'.

49. Further, exclusions should exist where employers may utilise contractors to manage parts of its assets that are not within the *core industry* of that employer. Examples may include where a mining company engages contract labour to undertake agricultural operations necessary to manage pastoral land where a mine is located; or where trades are engaged for specific construction-related scopes of work distinct from the regular mining operations workforce.

Trade union submissions back the 'triangular model'

50. On a further point, AREEA notes the trade union movement has consistently acknowledged the triangular model is the true test of labour hire. In its 2018 submission to the *Inquiry into wage theft in Queensland* the ACTU defined labour hire as:

a triangular employment relationship that includes the worker, the employment agency who is nominally the employer and the end-user enterprise where the work is undertaken. The end user enterprise is often a large company and in many cases this company will use both its own regular employees alongside workers engaged through the private employment agency or labour hire company.[8]

51. This is consistent with earlier ACTU interpretations of 'labour hire', with its 2005 submission to a House of Representatives' Inquiry also stating:

> *The common element of these arrangements is that an individual works at a host or client but is paid by labour hire operator… (*and)… i*n most cases it is reasonably clear that the labour hire operator is considered to be the employer and that the employee is placed to work with a client firm.*[9]

52. While AREEA does not wish to place too much weight on trade union definitions and views about labour hire, it is noteworthy that even a range of historic ACTU submissions seeking heavy-handed regulation of the labour hire sector recognise the triangular model as definitive, and do not seek to redefine contracting arrangements as labour hire and vice versa.

Identifying the 'Same Job'

53. The Consultation Paper offers the following before setting out its questions on 'same job':

> *The department is considering the merits of identifying a 'same job' with reference to the following criteria, relating to when a labour hire worker is performing:*
>
> *a) duties that align to a classification, job, or duties set out in or covered by an enterprise agreement that applies to the host employer and directly hired employees; and/or*
>
> *b) the same duties as an employee covered by the modern award; and/or*
>
> *c) the same duties as a specific directly employed employee working in the host.*

Questions:

2. Would the above-listed criteria capture when a labour hire worker is performing the 'same job' as a directly engaged employee?
3. Are there scenarios where these criteria would not operate clearly or lead to unintended outcomes? If so, what criteria should be used to identify when a labour hire worker is performing the 'same job' as a directly engaged employee, and why?

54. In AREEA's view the above-listed criteria are too broad and lack any substantive considerations in order to properly identify 'same job' for the purpose of the proposed obligation. Some of the immediate issues AREEA members identify include:

a) 'Same Job' does not mean 'Same Work'

The Consultation Paper uses these terms interchangeably, which is problematic. It is very common in any workplace for employees clearly holding different jobs to sometimes perform the 'same work'.

[8] Page 9, ACTU Submission Inquiry into wage theft in Queensland, August 2018
[9] Page 12, ACTU Submission to the Inquiry into Independent Contractors and Labour Hire Arrangements

For example, tradespeople employed by different contracting companies having to undertake similar preparation, clean-up and/or safety-related work despite having different trades and scopes of work to complete.

It must be recognised that parts of the work completed by various occupations may overlap at times, but this does not mean they are the ‘same’.

b) Variances in how workers are engaged

In the resources sector it is common for some employees at a site to be engaged in ‘fly-in, fly-out’ arrangements, others on residential or ‘drive-in, drive-out’ arrangements. Potentially some working regular day shifts and others night shift; some working regular recurring rosters and others variable rosters, and so forth. Much greater consideration is required on how ‘same job’ comparisons would apply to these variances whereby the duties and work appear similar but the engagement model is very different.

c) Variances in schedules of classifications

There can often be substantial variances in how businesses set out their schedules of classifications. How does the Government propose it deals with the common scenario where a host/client’s enterprise agreement contains three classification levels whereby the labour hire provider (or contractor) enterprise agreements contain five classifications? How could the five levels of employees provided to a client/host be shoehorned into the smaller schedule of classifications in the client’s agreement?

d) Factoring experience into ‘same job’ comparisons

The above-listed criteria are silent on considerations of experience and seniority of employees. Workers are often paid by their progression through the ranks of the classifications schedule at any one workplace, achieved through experience alone. There is no indication in the proposed criteria as to how the policy would deal with the presence of experience-based increments within classification levels.

e) Only a job in an enterprise agreement that applies to the Host

It is not clear, but if the second and third examples of criteria being considered by the department are intended to convey that a job might be considered to be the ”same job” where there is no enterprise agreement that applies to the Host or the relevant job is not covered by the Host’s enterprise agreement, then those criteria should be rejected. The addition of criteria that move beyond comparing an employee of a labour hire provider with a Host employee to whom an enterprise agreement applies, would move any legislative change radically beyond the stated rationale for the proposed “same job same pay” obligations.

55. Further examples from the resources and energy sector demonstrating the challenges with adopting criteria for ‘same job’ that are too simplistic include:

a) In *contract mining services*, an employee of the client and an employee of the service provider have similar duties and classifications, however they are employed to deliver work on different parcels or scopes of a mining project, with discrete supervisory and management structures and different rosters. This might involve very different work contexts to that undertaken by client employees, such as drilling / blasting work vs loading / hauling. Even if the work contexts appear similar, contract mining services contracts typically see providers bring entire work teams, their own models of work delivery and supervisory and management structures.

b) In *petroleum production services,* a contractor employee is deployed to and moves around various offshore facilities owned by a single client. The employees provide contingent labour to assist with short-term increases in production and where there may be labour gaps at certain offshore facilities. There are clear breaks in the engagement of that contractor employee during the “off swing” periods. Their work

duties vary from facility to facility as required at the time. Their labour is priced at a daily rate basis. In contrast, the client's employees work at the same facility the entire duration of their swing, for longer roster lengths and are paid on an annualised salary basis.

c) In *maintenance service contractors*, technical tradespeople are deployed to deliver a commercial contract related to upkeep of an onshore LNG processing facility. They have the same trade qualifications and similar duties to those employed directly for the regular operation of production equipment, but the scope of work is related to routine level maintenance outcomes and is not directly associated with production or performance targets of the asset which translate to financial performance of the client company.

d) In *shutdown projects,* a team of technical tradespeople and engineers take control of a mining asset for a defined period, often 30 days, to deliver a refurbishment project. The regular employees who operate the asset have been stood down with pay whilst the shutdown project is being executed. Once completed, the shutdown team will move onto the next project with a different client.

e) In *facilitates management and support services*, a worker with electrical trades qualifications is employed to maintain and repair electrical components of accommodation blocks at a remote mining village. They perform similar work duties as electricians employed directly to maintain and repair lights and powerlines at the client's nearby underground mine. They are not performing the same job, including having regard to the complexity of the environment.

56. AREEA submits that before proceeding with the 'Same Job, Same Pay' policy the Government must carefully resolve issues regarding the complexity of 'same job' assessments. At the very least a multi-factor test similar to that outlined on page 9 should be developed to deal with the wide variety of issues at play.

57. This test should seek to factor in considerations of worker engagement, level of experience and responsibility at a worksite, the context and scope of work the employees are engaged to deliver, time spent and expected to remain on site, and so forth.

'Same Job' comparisons must involve actual employees covered by enterprise agreements

58. As aforementioned (page 3), AREEA's firm position is that 'Same Job' considerations must only be triggered when there are two actual, real people working in the two jobs being compared, and where the host/client employee is covered by an enterprise agreement.

59. This would be consistent with the apparent intent of this policy being to eliminate any perceived pay disparity between a labour hire individual doing the 'same job' as a host employee working under an applicable host enterprise agreement. It would be entirely inappropriate and have far greater unintended cost and productivity impacts should the Government's policy allow for:

a) comparisons to take place between actual employees of a labour hire provider and *prospective employees* that could hypothetically be employed under the client/host's enterprise agreement if it chose to do so; or

b) comparison to take place between actual employees of a labour hire provider covered by an enterprise agreement and employees of the host/client who are not agreement covered, but rather have negotiated their own individual contract of employment.

60. Further, the application of the Policy to prospective or other hypothetical employees would have significant negative impacts on enterprise bargaining. This might include disincentivising project owners from negotiating productivity-assisting agreements with broad occupational coverage out of fear it might trigger 'same pay' obligations when engaging contractors.

61. AREEA notes the Consultation Paper provides the following practical example:

> ***Example #1 – Jane works the 'same job' as an employee at a food production company***
>
> Jane is a production worker employed by a labour hire provider to work for a major food production company. Jane is paid according to the relevant modern award by the labour hire provider. The major food production company has an enterprise agreement that has better pay for the classification that covers the work that Jane does.
>
> The Same Job, Same Pay measures will apply, and the labour hire provider will have to pay Jane at least the same pay that employees doing the same work under the enterprise agreement are paid.

62. This scenario lacks any acknowledgement that there is an actual person performing Jane's job who is directly hired by the client. Rather, the scenario references an actual person working for the labour hire provider and compares that person's employment against a classification within the client's enterprise agreement that has a classification "that covers" the work.

63. This seems to suggest the presence of the 'same' broad classification in an industrial instrument is sufficient to trigger 'same pay' obligations, with or without the presence of an actual person performing that job for the client. Amongst other issues, it would be impossible to meaningfully assess whether the work actually being done is the 'same', and to meaningfully assess whether the remuneration being provided for that work is the 'same'. AREEA is concerned by this potential outcome and would welcome clarity.

CALCULATING THE 'SAME PAY'

> **Questions:**
>
> 4. Is calculating 'same pay' with reference to 'full rate of pay' appropriate? Are there scenarios where this would not operate clearly or lead to unintended outcomes?
> 5. If 'full rate of pay' is not an appropriate definition for calculating 'same pay', why not?
>   a) What method of calculating 'same pay' should be used instead, and why?
>   b) Should 'same pay' extend to conditions that fall outside this definition? If so, what conditions should be captured and why?

64. 'Full rate of pay' is not an appropriate definition for calculating 'same pay'.

65. To this point, the limited justifications for the 'Same Job, Same Pay' policy have centred on upholding the primacy of *enterprise agreement* terms and conditions reached between a host/client employer and its employees.

66. This may lead to the logical conclusion that 'Same Pay' obligations could require a labour hire provider to 'bump up' the hourly rate of pay of their employees to a corresponding rate of pay within their clients' enterprise agreements. While this in itself would present challenges, at the very least it would be administratively workable in clearer-cut cases of pay disparity.

67. However, instead the Consultation Paper proposes the obligation involve the *full rate of pay*, or in other words the actual *take home pay* of direct-hired employees.

68. The resources and energy sector, like many others, is experiencing prolonged skills shortages. In such an environment it is very common for employees of any employer to be paid well above rates stipulated in enterprise agreements.

69. As a result the actual take home pay of any employee would be impossible to ascertain by reviewing enterprise agreements alone. Correctly identifying the actual take home pay of employees would require an astonishing level of information exchange involving highly confidential (to the individual), individualised and commercially sensitive remuneration data.

70. AREEA fundamentally disagrees that an individual's take-home pay should be information their employer is obliged to share with a non-associated corporate entity in order to satisfy over-simplified ideals of 'fairness'. This proposal would create excessive administrative burden on all parties by requiring an ongoing, constant exchange of take-home pay information instead of the more reasonable proposal that 'Same Pay' assessments take place at the time of commercial engagement and only reassessed in the event the client/host replaces its enterprise agreement during the term of the contract.

71. In addition to administrative complexities the concept of 'full rate of pay' also raises issues of privacy. Many employees would be uncomfortable and/or potentially not consent to their take home remuneration information be provided to a third-party employer.

Issues with 'full rate of pay' comparisons

72. This proposal also raises the following practical issues that the Government has not indicated any capacity to resolve:

a) How does the Government propose dealing with the very common scenario in the resources and energy sector whereby direct-hired employees of the client/host are paid 'loaded' or 'rolled up rates' which compensates for all public holidays, weekends and other work that may attract penalties, in a flat rate of pay?

- What happens when the relevant pay period and patterns of work do not align? What if certain entitlements are not payable in the period in which the labour hire employee is working for the client/host?
- Would temporary labour hire employees be paid the 'loaded rate' anyway, meaning they would receive pay in lieu of public holiday or weekend penalties they may never actually work?
- This is especially troublesome for casual labour hire arrangements given many client/host enterprise agreements do not cover casual employment arrangements (instead relying upon contingent labour providers to fill casual workforce needs).

b) The above considerations also apply for annualised salary arrangements, which are commonplace in the resources and energy sector. It would be impractical and unrealistic to breakdown an annualised salary arrangement into a comparative hourly or daily rate for the purposes of paying contingent labour employees 'the same'. How does the Government propose to deal with these completely different forms of engagement?

c) How could an individual's pay components explicitly linked to the overall performance of the enterprise – such as retention payments, long-term incentives, performance assessments, production target bonuses or employee share schemes – be apportioned to an hourly or daily rate charge as is typical in labour hire arrangements?

d) How would this concept deal with the common scenario whereby a labour hire provider's terms of employment are less generous than those of the client / host employer in some respects but more generous in others?

- In many cases a client/host employer may provide for higher hourly rates of pay but lower or no penalty rates. Therefore a labour hire employee may receive lesser rates of pay than direct-hired employees on weekdays, but higher rates of pay on weekends. Would it be reasonable for the labour hire employee to have access to both higher weekday rates as well as weekend penalties?

- The purpose of enterprise bargaining is to allow employees and employers to trade-off certain award conditions for EBA terms, provided the workforce is deemed to be 'better off overall'. Does the labour hire employee adopt all the "swings and roundabouts" of the client/host enterprise agreement, or could they 'cherry pick' higher rates of pay without adopting any of the less generous conditions traded off by direct-hired employees for the higher rates?

e) How does the Government propose to deal with the common scenario whereby *all employees* in a particular work group are employed on *performance-based pay*?

- There are examples within AREEA's membership where large groups of employees all doing the 'same job' can take home slightly different pay packets. This is a result of management conducting regular employee-by-employee pay reviews based upon productivity, safety performance and other individualised factors. Should the 'Same Job' be identified, whose take-home pay should the labour hire employees be entitled to?

- It is this scenario (among other foreseeable complexities) that justifies AREEA's position that where 'Same Job' may be identified in a triangular labour hire arrangement, the *lowest available comparator* should form the 'Same Pay' obligation.

f) How does the Government propose labour hire employers deal with circumstances where there are changes in the rates of pay to employees directly hired by the client/host? What if a new EBA is negotiated or the comparative employee is moved up into another classification band?

- Even a slight upward variance in labour rates would make many contracts for the provision of labour untenable. It is unreasonable to expect a labour hire provider (or contractor if caught by a broad definition) to operate in an environment where, if the rates of pay of their client's employees rise, any margin on their services could be eroded to the extent it may be unviable to continue to service the contract.

'Base rate of pay' should be the starting point

73. AREEA's alternative position would be for any 'same pay' provisions to be based on the relevant rates set out in a client's enterprise agreement, comprising base rate of pay and any *clearly identifiable penalties or allowances* that relate directly to the performance and duration of work undertaken by the labour hire employee.

74. Those *clearly identifiable* penalties or allowances may include site allowances, weekend or shift penalties. Allowances that relate to the context or complexity of the work are likely to be less relevant, if proper regard is had to whether the jobs being compared are, in fact, the 'same'.

75. Further, labour hire providers should only be obliged to make 'Same Job, Same Pay' assessments at the time their services are engaged by their client / host. It should not be a rolling administrative exercise, for example by requiring repeated assessments at every pay cycle. The only time a labour hire provider should be required to repeat 'Same Job, Same Pay' assessments would be when workforces involved change substantially and where a new enterprise agreement is reached by the host/client during the term of the contract.

76. While a step in the right direction, limiting 'Same Pay' to the above considerations does not deal with the wide array of other problems including those detailed above and, in addition, complications about how leave entitlements should be calculated, how to deal with Individual Flexibility Arrangements (IFAs) and other foreseeable issues.

77. These complex issues must be carefully considered with employers, ensuring all the possible inconsistencies and complications are thoroughly examined.

Implementing Same Job, Same Pay entitlements and obligations

Questions:

6. If an obligation were imposed on labour hire providers and host employers:
   a) What guidance should the Fair Work Act include about 'reasonable steps'?
   b) To what extent should consultation and information-sharing provisions prescribe the steps to be taken by labour hire providers and host employers to comply?
   c) Should any other criteria or thresholds for triggering obligations apply (for example, criteria or thresholds relating to the length of labour hire engagements)?
   d) Should Same Job, Same Pay obligations apply differently for small business?
7. Are there alternative mechanisms the department should consider in order to confer entitlements and obligations about Same Job, Same Pay? If so, please provide details.

Much greater consideration is required on the obligations

In response to question 6(a) and 6(b)

78. While it is clear that any obligation regarding pay rates of labour hire employees would ultimately fall to labour hire providers (i.e. their employers), AREEA is not convinced the workplace relations system has, or should have, scope to impose a corresponding obligation on clients/host employers.

79. Rather, it is more likely in practice that labour hire employers would stipulate via contractual terms that their clients must provide any information required to assist the labour hire provider to comply with its 'Same Job, Same Pay' obligations.

80. In the event the obligation is not met, any contention between the parties would then become a commercial dispute rather than triggering an investigation by the FWO (or a different regulator) to determine which party was at fault.

81. In either case it would be grossly unfair on both labour hire providers and their clients to introduce significant liability in this space until the plethora of challenges and inconsistencies are resolved (in the event it is possible to resolve them).

82. The suggestion that the FWC could provide guidance on 'reasonable steps' is not, in broad concept, objectionable. However, given the ambiguity around the obligations and absence of any understanding of the enormous complexities involved, let alone how they might be dealt with, AREEA reserves its judgement on this topic until more information is available.

83. The diversity and inherent nuances in the contracting arrangements in the resources sector does not lend itself to prescriptive, 'one-size-fits-all' guidelines. A body like the FWC adopting a case-by-case approach, where an issue has been identified, would be preferable.

12 months service should be the minimum for 'Same Job, Same Pay'

In response to question 6(c)

84. The Government should absolutely seek to introduce a minimum length of engagement for triggering 'Same Job, Same Pay' obligations.

85. In practice this policy will result in significant administrative burden and commercial risks for both labour hire providers, any other contractors which may be captured by the policy, and

clients/end users of their services. It makes no sense to impose such a significant burden on businesses where labour hire arrangements are objectively temporary, such as the utilisation of labour hire casuals to backfill positions until FTE employees are recruited by the principal to the role.

86. While again, AREEA does not agree with this policy being implemented in any form, should it proceed, there should be no risk that the policy will extend beyond circumstances where labour hire or similar contingent labour arrangements are utilised to replace a direct-hired workforce for a considerable period of time to undercut an enterprise agreement.

87. AREEA notes the Albanese Government, in various public policy consultations, often requests stakeholders provide relevant examples from international regulatory models. In relation to 'Same Job, Same Pay', the United Kingdom's *Agency Workers Regulations 2010* (**AWR**) provides a somewhat similar entitlement to what is being pursued here.

88. The AWR provides that after 12 weeks within a particular assignment, temporary agency workers then have a right to equal treatment on pay, holidays and working time, amongst other non-monetary benefits. While the workplace relations systems have substantial differences, the principle that short-term labour hire engagements should not trigger 'equal pay' rights remains applicable, if not more relevant, to Australia.

89. One significant difference between the UK and Australia is the extent to which 'Same Job, Same Pay' would apply broadly across many of the heavy industries at the heart of Australia's economic and societal wellbeing. In comparison the UK's AWR typically has most application in white collar professional services roles.

90. Given how significantly the 'Same Job, Same Pay' policy in its current form will impact large blue and white-collar workforces across Australia's mining, agriculture and construction industries, it is appropriate the minimum service to trigger the entitlement / obligation is 12 months.

The obligations proposed reach well beyond the stated policy objectives

In response to question 7

91. Rather than consider 'alternative mechanisms' the Government should completely re-think the manner in which it is proposing to implement 'Same Job, Same Pay'. Put simply, there is no justification for the Government seeking to pursue this policy in as broad and blunt a manner as indicated in the Consultation Paper.

92. Multiple parts of the Consultation Paper reflect the ALP's longstanding narrative on 'Same Job, Same Pay', that it is designed to deal with specific strategies of some employers to utilise labour hire arrangements to circumvent enterprise agreement rates negotiated with their direct workforces.

93. On page 3 the Consultation Paper states (AREEA emphasis added):

> *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.*

94. On pages 5-6 the Consultation Paper states (AREEA emphasis added):

> *Evidence recently accepted by several Senate inquiries has shown that some employers use these arrangements to deliberately undercut bargained pay and conditions and to avoid bargaining for an enterprise agreement. This can have the effect of eroding job security and undermining the framework of enforceable minimum wages and conditions established by the Fair Work Act, including wages and conditions negotiated through enterprise bargaining.*

95. Further, Labor's *Secure Australian Jobs Plan*, released well prior to the 2022 Federal Election, states (AREEA emphasis added):

> *Labor will ensure that workers employed through labour hire companies receive no less than workers employed directly. We have seen too many examples of companies across a variety of industries deliberately using labour hire and to undercut the negotiated pay and conditions of workers who are employed directly.*[10]

96. The proposals for design and implementation of 'Same Job, Same Pay' as outlined throughout the Consultation Paper are highly inconsistent with the above passages. Both in Opposition and now in Government, the ALP has repeatedly referenced *deliberate* strategies to undercut wages to justify and build support for the policy.

97. However now the Government is at the design stage it has varied from this position and is seeking much broader application of the policy.

98. AREEA's view is if the Government intends to pursue this policy, it should revisit the evidence base from which it purports the justification arises.

99. Most notably, the policy should not extend to an array of other contracting arrangements that have not been the subject of any concerns or complaints in regard to contract labour being used in inappropriate or illegitimate ways (such as seeking to undercut terms and conditions of direct-hired employees).

100. A more appropriate, measured approach would be to limit and/or trial the policy in specific industries and employers where those concerns have arisen, and then, only to the extent that there is clear evidence that the engagement of labour hire is intended to undercut wages and conditions negotiated through enterprise bargaining.

Dispute Resolution, Enforcement & Anti-Avoidance

101. Questions 8-10 raise issues in relation to the FWC's role in hearing and resolving disputes.

102. AREEA sets out its view at paragraph 40 of this submission that, if the Policy is to be implemented at all, it should be through providing the FWC with a new jurisdiction to issue 'Same Job, Same Pay' orders, on application by an employee or their representative (i.e. a union), and only after the dispute had been attempted to be dealt with at the workplace level.

103. This should be considered a much-preferred alternative to enshrining 'Same Job, Same Pay' as a universal workplace right in the Fair Work system – a proposition that would create omnipresent liabilities and risk for just about every business in the country seeking to use any form of contracting service.

104. The Policy involves many ambiguous and novel concepts. It is quite different to the type of longstanding and generally well understood minimum conditions originally included in the NES. A heavy-handed regulatory approach is not appropriate.

105. The 'softer regulatory approach' of simply allowing for a Full Bench of the FWC to hear applications and make orders, only after parties had attempted to resolve the issue in the workplace, would have two important effects:

    a) It would see application of the policy naturally lean toward those industries, employers and employees whereby there is an actual perceived problem to be dealt with. While there may be some vexatious claims (which could be dealt with through a few entry hurdles) for the most part employees and unions would only bring applications in cases

[10] Found via post published on the Prime Minister's website, last updated 15-11-2021: https://anthonyalbanese.com.au/media-centre/secure-australian-jobs-plan

where they believe there is genuine avoidance behaviour occurring through labour hire arrangements.

b) It would provide the usual avenues for appeal, such as employers appealing the determination of their arrangements as 'labour hire' instead of 'contracting'. This would ultimately result in the FWC and Australia's Courts setting important precedents to guide employers and unions on how certain commercial arrangements may be defined and to what extent characteristics of work lead to 'Same Job' and, potentially, 'Same Pay' comparisons, amongst other things.

106. The Consultation Paper raises the prospect of the FWC arbitrating disputes. AREEA sees no issue with arbitration taking place to settle disputes at the tribunal level, but only on consent of both parties. This would be consistent with arbitration powers granted to the FWC in relation to other aspects of Australian IR law.

107. Beyond the views outlined above, AREEA reserves judgement on what further role, if any, the FWC should have in administering the policy. Like much of the 'Same Job, Same Pay considerations, it is difficult for employers to provide deeper views whilst so many of the fundamental issues with this policy in its current proposal remain unresolved.

108. Questions 11-14 raise issues in relation to enforcement of the obligation, including by the FWO.

109. For the same reasons detailed at paragraph 98 above, AREEA reserves its judgement on what role, if any, the FWO should play in enforcing this policy. As a general response:

a) The 'Same Job, Same Pay' obligation should not be a civil remedy provision. It would be highly inappropriate for employers to be penalised for non-compliance with an entirely novel area of Australian employment law that has not yet been thoroughly developed or tested in practice.

b) Missed 'Same Pay' obligations should not be considered in the same vein as general wage underpayments. The latter reflects a contravention of minimum standards in modern awards, bargained outcomes and individual contracts of employment.

Those circumstances have no equivalence with a potential shortfall between an employee's otherwise lawful remuneration and a higher rate negotiated by and payable to another employee.

c) The FWO should take an educative role in ensuring compliance with any future 'Same Job, Same Pay' policy. Active investigations and punitive enforcement would be highly inappropriate for the same reasons outlined at 100(a) above.

110. In relation to anti-avoidance measures (questions 15-17), AREEA reserves its judgement until further information is released with regard to how the Government intends to proceed with implementation of this policy.

Impacts and Costs

111. Questions 18 and 19 relate to impacts, costs and consequences of this policy.

112. This policy will have enormous impacts, costs and consequences across the economy. Those will include on thousands of commercial contracts in which labour is part of service delivery; on longstanding workforce and operational practices; on employment opportunities and pathways into key job-creating industries; and on future investment and employment.

113. AREEA provides the following general comments on impacts and costs. In addition, AREEA firmly recommends the Government undertake a widescale review to understand and quantify the liabilities and likely cost impacts on the Australian economy and labour market, prior to proceeding with any future model for 'Same Job, Same Pay'.

Impacts on existing commercial arrangements

114. Should 'Same Job, Same Pay' be legislated, on the day it takes effect it would send shockwaves through thousands of existing commercial contracts.

115. As detailed throughout this submission, the manner in which the policy is framed in the Consultation Paper would see it capture not only traditional labour hire arrangements but also the wide array of contracting and service delivery models critical to ongoing operations and maintenance of resources and energy sector projects.

116. The policy would result in the terms of an enormous range of commercial contracts being immediately disrupted. Upwards revision of labour costs involved in delivering contracts would render many of them immediately unviable, with many operators likely to lose money should they continue to service those contracts.

117. AREEA raises the question – who will be liable if/when thousands of contracts become uncommercial to continue servicing? The result will inevitably be contracting businesses abandoning commercial arrangements due to frustrations of contract issues, leaving thousands of employees out of work.

118. Scenarios that would arise as a result include:

    - Contracting businesses making thousands of people redundant from their roles, not only imposing enormous costs on those businesses but also leading to a rise in unemployment; and
    - Significant costs imposed on the Commonwealth Government given many contracting businesses would declare bankruptcy and, rendered unable to pay their redundancy obligations to employees, requiring the Fair Entitlements Guarantee to pick up the tab for retrenched workers.

Little consideration appears to have been given to the broad-reaching, macro-economic impacts of 'Same Job, Same Pay' of the nature described above. This is precisely why the Government should:

a) Reconsider pushing forward with its 'Same Job, Same Pay' policy during precarious times for the national economy with the RBA suggesting Australia is a 50% chance of being pushed into a recession[11]; or

b) Should the Government proceed with this policy, spend appropriate time investigating what the possible impacts on the broader economy may be; and

c) Ensure that any future implementation of 'Same Job, Same Pay' be aligned to the principles AREEA sets out on pages 4-5 to ensure it is appropriately focused and defined in order to limit the unintended damage it will cause throughout the economy.

Impacts on the resources and energy sector

119. As detailed throughout this submission, 'Same Job, Same Pay' threatens to fundamentally disrupt longstanding workforce and commercial arrangements throughout the Australian resources and energy sector.

120. Within the 'Defining Labour Hire Arrangements' section (from page 5) AREEA details just some of the plethora of contracting arrangements that are critical to both operating and maintaining mining, oil and gas and related projects nationally.

121. These include contract mining services; petroleum production services; mining / petroleum maintenance service contractors; shutdown service providers; facilities management and

[11] Commins, P (11-05-23) *The Australian* "Only 'one in two' chance to avoid recession, says RBA"

support services; as well as traditional labour hire companies which provide critical contingent skills and headcount to manage fluctuating market demands.

122. By infringing on the ability of providers in those sub-sectors to offer competitive, flexible and commercially viable services to clients, mining and hydrocarbons operations in Australia will shut. This is not hyperbole or an exaggeration of the possible impacts of the 'Same Job, Same Pay' policy – rather a realistic view of what would occur should key providers in these niche critical sub-sectors within the resources and energy sector be rendered uncommercial.

123. To quantify what this may mean for Australia:

    a) According to the 2023 Federal Budget papers, tax receipts (since the October 2022 Budget) have been revised up by $42 billion in 2023–24 and almost $135 billion over the five years from 2022–23 to 2026–27 "underpinned by higher commodity prices";

    b) High commodity prices are also driving a surge in export earnings. After a record $422 billion in 2021–22, resource and energy export earnings are forecast to reach $464 billion in 2022–23; and

    c) The resources sector contributes approximately $46bn in annual tax and royalty revenues.[12]

124. By powering the nation's finances, the resources and energy sector is enhancing the economic opportunities, security and well-being of all Australians. The Government is better placed to invest in critical public services such as Medicare, hospitals, schools, aged care and infrastructure.

125. 'Same Job, Same Pay' puts this at serious risk.

126. Further, the Australian resources industry directly employs over 287,000 workers[13], is estimated to account for over 1 million Australian jobs through economic flow-on effects[14], and has the highest paying median wage in the economy at $2,497 per week[15].

127. In short, with this policy the Government is potentially jeopardising thousands of employment opportunities in the highest paying sector of the economy for the purpose of addressing perceived 'unfairness' pertaining to a minority (and diminishing) number of workplace arrangements.

Impacts on future investment

128. In addition to the impacts on the present contribution of the Australian resources and energy sector, the Government must carefully consider the impacts on future investment and growth.

129. The enormous economic and employment opportunities that comes from securing investment in major resources and energy projects is well known in Australia. The previous Australian resources and energy investment boom saw almost $400 billion of major project capital injected into the nation between 2003 and 2012.

130. This directly created 161,000 new resources jobs, saw the sector support about 1.1 million jobs throughout the economy, increased real wages by 6 per cent and raised household disposable income by 13 per cent. The contribution of the resources and energy industry, as detailed above, is now at record levels due to the projects approved and completed during the previous investment phase.[16]

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[12] $43.2bn in mining royalties and company tax payments (link) and $2.5bn in forecast PRRT payments (link)

[13] ABS (February 2023) Labour Force, Australia, Detailed

[14] Raynor, V. and Bishop, J. 2013 *Industry Dimensions of the Resource Boom: An Input-Output Analysis*, RBA Research

[15] ABS (December 2022) Employee earnings

[16] Raynor, V. and Bishop, J. 2013 *Industry Dimensions of the Resource Boom: An Input-Output Analysis*, RBA Research

131. Australia now has a significant opportunity to secure the next wave of major resources and energy project investment. According to the Commonwealth Department of Industry, Australia's major project investment pipeline presently contains:

    a) 423 potential new major resources and energy projects, representing between $572-702 billion of capital expenditure;

    b) More than 112,000 construction jobs associated with the building and commissioning stages of these new projects; and

    c) Nearly 60,000 long-term employment opportunities associated with the operational / production phase of these new projects.[17]

132. In short, the next 'resources investment boom' is at Australia's fingertips and has the potential to dwarf the economic and employment benefits of the prior boom which ended in 2012.

133. The ability to attract foreign capital and secure these new projects is determined, in part, by stable and predictable regulatory settings; cost competitiveness with other comparable first-world nations; and the ability for complex, multi-faceted construction and production related contracting arrangements to be utilised in every aspect of the projects.

134. The 'Same Job, Same Pay' policy would have a negative effect on all these conditions, especially if implemented in the broad-ranging, unconsidered nature as proposed within the Consultation Paper.

Transition

> **Questions:**
>
> 20. Should there be a transition period before Same Job, Same Pay measures commence operation, if enacted? If so, how long should the transition period, and why?

135. Should the Government proceed with 'Same Job, Same Pay', despite fundamental issues with the policy, there must be significant and well considered transitional arrangements in place. Without those, the wide economic and employment impacts outlined above would both be expediated and exacerbated.

136. The Government must work with industry to understand what an appropriate transition period would be prior to 'Same Job, Same Pay' provisions taking effect. AREEA recommends further consultation and stakeholder engagement takes place specifically on understanding how the proposed new policy would impact existing commercial contracts for contingent labour and related contracting services.

137. For example, in the mining and energy sectors it is common for operational and maintenance contracts to be awarded in blocks of several years up to a decade. During that time, labour rates paid by the principal / client to their direct workforce would change, drastically affecting the commercial parameters and viability of the contract.

138. The Government should provide a transitional period which at least allows adequate time for existing contracts to be considered on potential changes to labour costs and risk factors not previously considered.

[17] *Resources and energy major projects: 2022*, Department of Industry, Science and Resources

139. AREEA notes the Government has demonstrated a propensity towards somewhat lengthy transition times for other industrial relations reforms that would materially impact on current and future workplace arrangements. Most notably:

    a) The changes brought about by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* to workplace flexibility obligations, enterprise bargaining processes, and multi-employer bargaining, were all provided with a six-month transitional period prior to taking effect.

    b) The changes brought about by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* to the use of fixed-term contracts and pre-2009 agreements ('zombie agreements') were provided a 12-month transitional period prior to taking effect.

140. All social partners would agree the 'Same Job, Same Pay' policy represents a disruption to employment practices that dwarfs the above (with the possible exception on 'multi-employer bargaining'). This is especially the case when factoring in broader changes to regulation of the labour hire industry including development of a national labour hire licensing framework.

141. Therefore, appropriate weight must be placed on the gravity of change proposed here when determining transitional arrangements.

ABOUT AREEA

AREEA is Australia's resources and energy industry group and has provided a unified voice for employers on workforce and other industry matters since 1918.

AREEA's membership spans the entire resources and energy industry supply chain, including exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to these sectors.

AREEA works to ensure Australia's resources and energy industry is an attractive and competitive place to invest and do business, employ people and contribute to our national well-being and living standards.

AREEA members across the resources and energy industry are responsible for a significant level of Australian employment, with an estimated 10% of our national workforce, or 1.1 million Australians, employed directly and indirectly as a result of the resources industry.

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