Ai GROUP SUBMISSION

Department of Employment and Workplace Relations

Submission in response to 'Same Job, Same Pay' consultation paper

12 May 2023

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission in response to the Department of Employment and Workplace Relations (**DEWR**) consultation paper on the Government's 'Same Job, Same Pay' proposal (**Consultation Paper**).

The Consultation Paper describes the 'Same Job, Same Pay' proposal as "ensuring that labour hire workers are paid at least the same as directly engaged employees doing the same work".

The 'Same Job, Same Pay' proposal has caused alarm amongst labour hire businesses. There is widespread concern that it represents an unfair attack on labour hire businesses that comply with relevant workplace laws and which are providing a valuable and legitimate service.

The 'Same Job, Same Pay' proposal has also caused alarm amongst a wide range of manufacturing, construction, maintenance, ICT, consulting and other businesses, small and large, that have entered into contractual arrangements with client businesses to provide services which include a labour component.

There is a major risk that any 'Same Job, Same Pay' requirement will disrupt countless business-to-business contracting arrangements to the detriment of the relevant businesses, their employees and the broader community.

Thousands of small and medium-sized businesses which supply services to larger businesses would be forced to increase the remuneration they pay to their employees in order to comply with the 'Same Job, Same Pay' requirement. This would substantially increase their costs. It would be naïve to assume that these businesses would be able to fully recoup those cost increases from their clients through charging higher prices for their services.

A 'Same Job, Same Pay' requirement could destroy many small businesses and the livelihoods of many business owners.

A 'Same Job, Same Pay' requirement could also result in widespread job losses amongst labour hire employees because client businesses would have little incentive to engage labour hire businesses due to the increased regulatory burden, uncertainties and risks involved in complying with the 'Same Job, Same Pay' requirement.

In addition, the 'Same Job, Same Pay' requirement would be a strong disincentive for labour hire businesses to bargain because of the major problems that will result from trying to comply with their own enterprise agreement as well as with inconsistent remuneration terms in each client's enterprise agreement.

The Government's 'Same Job, Same Pay' proposal is not in anyone's interests and needs to be abandoned.

If a 'Same Job, Same Pay' requirement is implemented despite industry's strong opposition, the requirement should only apply (subject to appropriate exclusions):

- In workplaces where the client business is covered by an enterprise agreement that applies to employees performing the same work as the relevant labour hire worker,
- To labour hire arrangements that fall within the definition of 'on hire' in modern awards,
- In respect of labour hire employees working alongside employee/s of the client business performing the same job on the same site,
- In relation to the lowest paid employee of the client business performing the same job. (Different employees of the client business may be paid a different wage or salary even though they are carrying out the same job),
- In respect of the 'base rate of pay' as defined in section 16 of the FW Act,
- In circumstances where there is at least one employee of the client business performing the same job, and
- After a lengthy transitional period.

The following sections of this submission address the questions and issues raised in the Consultation Paper and are put forward in the event that the Government decides to proceed with its 'Same Job, Same Pay' policy despite industry's strong opposition. Our answers should not be interpreted as in any way indicating that Ai Group agrees with the policy. As stated above, the policy is not in anyone's interests and should be abandoned.

Defining labour hire arrangements within scope

The Government has often referred to its 'Same Job, Same Pay' policy as being aimed at preventing bargained wages and conditions being undercut through the use of labour hire. Given this expressed intent, the requirement should only apply in workplaces where the client business is covered by an enterprise agreement.

The Government has also often referred to the requirement as being aimed at ensuring that workers doing the same job at the same site receive the same pay. Therefore, the requirement should not apply to labour hire employees who are not working alongside an employee of the client business performing the same job on the same site.

If there is no employee of the client business doing the same job on the same site, the 'Same Job, Same Pay' requirement should not apply.

Question 1(a): How should different labour hire arrangements be identified or defined?

The definition of 'labour hire'

Ai Group has addressed the critical importance of the labour hire sector to businesses, employees and the economy in our 1 May 2023 submission to DEWR on National Labour Hire Licensing, and in earlier submissions referred to in that submission. These submissions address the raft of problems that result from defining 'labour hire' in an excessively broad manner.

For the purposes of any 'Same Job, Same Pay' requirement, 'labour hire' needs to be defined in the same manner as reflected in the modern award system. The requirement should not apply to arrangements that do not fall within that definition.

Most modern awards do not use the expression 'labour hire'. Instead, the expression 'on-hire' is used, which is defined as follows:

> '***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.*'

The modern award definition of 'on-hire' was determined by a seven-member Full Bench of the Australian Industrial Relations Commission (**AIRC**) during the 2008-09 award modernisation proceeding following submissions being made by employer groups and unions, and after consultations/hearings.

As identified in the following extract from a Statement issued by the AIRC Full Bench on 17 November 2009,[1] there was general acceptance amongst employer groups and unions of the definition of 'on-hire' that was incorporated into modern awards: (Emphasis added)

> ***[2]*** *During the consultations which followed the statement of 25 September 2009, it became apparent that most of those participating take the view that labour hire or on-hire employers and their employees should be covered by the award covering the host employer to whom the employees are on-hired and that most modern awards should have a provision in the coverage clause to that effect.*
>
> ***[3]*** *In addition, there is a general view that group training organisations, which employ apprentices and trainees and place them with host employers, and the employees, should be covered by the award covering the host employer and that modern awards with apprentice and/or trainee provisions should have a provision in the coverage clause to that effect.*
>
> ***[4]*** *Several draft clauses were proposed. The differences between the drafts are not great and it is now apparent that there are few differences of substance. We are now faced with a situation in which it is practical to arrive at clauses which will have general acceptance and*

[1] [2009] AIRCFB 925.

should be capable of application in the great majority of the relevant awards. Accordingly we think it is now appropriate to publish some draft model provisions to be inserted in each modern award where relevant.

The definition of 'on-hire' in the award system is well-understood amongst employers, employees, industrial parties and the Fair Work Commission (**FWC**). It is used as the basis for determining wages and entitlements for labour hire employees covered by modern awards and it is sensible for the same definition to be used for the purposes of any 'Same Job, Same Pay' policy.

The dispute settling role contemplated for the FWC under the 'Same Job, Same Pay' policy reinforces the importance of the definition of 'labour hire' aligning with the definition of 'on-hire' in the modern award system. If two different definitions are used for different aspects of the safety net under the FW Act, uncertainty and confusion would result.

Any broader definition of 'labour hire' would disturb countless business-to-business contracting arrangements which involve a labour component.

Question 1(b): Should any arrangements be excluded from the 'Same Job, Same Pay' measures?

An appropriate definition of 'labour hire', as discussed above, reduces the need for the large number of specific exemptions.

However, regardless of what definition of 'labour hire' is adopted, it is important that the following types of workers are not covered by any 'Same Job, Same Pay' requirement:

1. **An independent contractor**

The FW Act and industrial instruments made under the Act deal with relationships between employers and employees, including the National Employment Standards, modern awards and enterprise agreements. Accordingly, any 'Same Job, Same Pay' entitlement should only apply to employees, not independent contractors.

2. **An employee of a business contracted to provide services to another business, if the employee does not work under the general guidance and instruction of the second business**

This proposed exclusion flows from the proposed definition of 'labour hire', as discussed above in relation to Question 1(a).

3. An employee of a business that is contracted to supply a service to a second business rather than contracted to supply labour

Examples of categories of employees who would fall within this proposed exclusion are:

- Tradespersons employed by an electrical contracting, plumbing, air-conditioning or refrigeration business who carry out installation or repair work on customer sites using the tools, equipment, materials and/or components provided by their employer.
- Employees of a cleaning business who carry out cleaning duties at the premises of another business.
- Engineers, designers, IT professionals, lawyers, accountants, trainers and other professionals employed by professional services businesses who carry out work from time to time at a customers' premises.

4. Apprentices and trainees employed by not-for-profit group apprenticeship and traineeship schemes

Group training schemes operated by not-for-profit bodies like Australian Industry Group Training Services coordinate the training of thousands of apprentices and trainees Australia-wide. They fulfil a vital role in the community.

It is not appropriate to include group training arrangements within the definition of 'labour hire' for the purposes of any 'Same Job, Same Pay' requirement.

Imposing such a requirement would increase barriers to the employment of apprentices and trainees and consequently:

- Increase youth unemployment;
- Reduce the career opportunities for many thousands of young Australians; and
- Lead to skill shortages in numerous industries.

Within the modern award system, group training arrangements are differentiated from labour hire arrangements with different model coverage clauses applying to each type of arrangement.

5. An employee placed with a business under a short-term labour hire arrangement

The 'Same Job, Same Pay' requirement should not apply where labour hire employees are supplied for a short period of up to 12 months to supplement the client's workforce.

This exclusion should include, but not be limited to, circumstances where labour hire is used to address an inability to directly recruit staff, to address temporary needs or to obtain specialist skills.

A 12-month exclusion from the application of the 'Same Job, Same Pay' requirement would address many seasonal needs to utilise labour hire arrangements. There are a raft of seasonal factors that cause spikes in an organisation's need to access external labour.

It would be logical for at least a similar period of time to be selected as the basis for any limitation on the application of any 'Same Job, Same Pay' principle that is implemented, in recognition of the need for employers to utilise short term external labour to supplement their directly employed workforce.

As stated in the Consultation Paper: "Business should be able to access labour hire for genuine work surges and short-term needs".[2]

The proposed exclusion would also help limit the risk that a labour hire provider would not be prepared to provide labour to a client for a short period because of the administrative burden or cost of complying with any 'Same Job, Same Pay' requirement. This risk is a significant issue that must be carefully weighed by the Government. Many employers are unavoidably and highly dependent upon labour hire.

6. An employee who carries out work for another business under an ad hoc arrangement between the businesses

Examples of categories of employees who would fall within this proposed exclusion are:

- An employee of a farm business assisting another farm business by picking crops for a day;
- An employee of a concreting business providing assistance to another concreting business during a concrete pour.

7. A labour hire employee who is placed with more than one client business in the same pay period

Labour hire businesses frequently supply employees to work for different client businesses over a period of time, including during the same pay period. Some labour hire providers employ thousands of employees who each work at different sites.

The 'Same Job, Same Pay' requirement should not apply in circumstances where a labour hire employee is engaged to undertake work with multiple client businesses during the same pay period. To do otherwise would be near-impossible for payroll systems of many labour hire providers to manage. Most payroll systems have in-built rules about what constitutes ordinary hours and when relevant penalty rates are applicable. The application of a 'Same Job, Same Pay' requirement to multiple client sites and varying levels of 'Same Pay' within the same pay period would create the need for firms to manually override payroll rules, creating a significant and

[2] Page 6.

unmanageable regulatory burden. It would also create an elevated risk of error in correctly calculating an employee's pay.

8. Award-free and agreement-free employees

The 'Same Job, Same Pay' requirement should not apply to award-free and agreement-free employees. The Government has often referred to its 'Same Job, Same Pay' policy as being aimed at preventing bargained wages and conditions being undercut through the use of labour hire. This has no relevance to award-free and agreement-free employees.

Award-free employees are typically paid a salary package based on individual merit. A large proportion of award-free employees prefer to keep the details of their salary package confidential and would oppose the details of their salary package being disclosed to labour hire companies that supply labour to their employer's business.

9. High income employees

It is not appropriate for an employer to pay an employee a high income to be subject to the 'same job same pay' requirement. Consideration should be given to a sensible cut off point for the application of any requirement.

A significant proportion of labour hire workers are professionals and managers[3], highlighting the need for a high-income threshold exemption.

10. Directors and business owners

It is common for the owners of small businesses to be both a director and an employee of the business.

Many small business owners choose to pay themselves a modest salary (e.g. the National Minimum Wage) throughout the year and then pay a director's fee and/or dividends at the end of the financial year when they are in a better position to know what return can be afforded by the business. It would be unfair to disturb such common and legitimate small business arrangements by requiring a business owner or director of a business which provides services to another business (e.g. professional or trade services) to pay him/herself a salary that aligns with the salaries paid by a client to its own employees.

11. An employee of a labour hire business covered by an enterprise agreement

The 'Same Job, Same Pay' requirement should not apply to employees of a labour hire business which has an enterprise agreement that has not reached its nominal expiry date.

Many labour hire businesses have enterprise agreements. The rates of pay in such an agreement may be lower than they would otherwise be as part of a bargain between the employer and the

[3] People working in labour supply services, Labour Account Australia, ABS.

employees which includes additional leave entitlements. It would be extremely unfair for a labour hire employer to be forced to pay its employees higher rates of pay than those in the enterprise agreement as a result of the 'Same Job, Same Pay' requirement, when the employer would have a legal obligation to continue to provide the other components of the bargain.

12. An employee who carries out work for a related entity

An employee who carries out work for, or within, a related entity of the business that employs the employee should not be covered by the 'Same Job' Same Pay' requirement.

Identifying the 'Same Job'

As identified in the Consultation Paper, in order to achieve clarity about the circumstances in which any 'Same Job, Same Pay' requirement applies, it is necessary to identify when a labour hire worker is performing the 'same job' as a directly engaged employee.

The Consultation Paper proposes the following criteria for identifying a 'same job':

- *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*
- *the same duties as an employee covered by the modern award; and/or*
- *the same duties as a specific directly employed employee working in the host.*

Question 2: Would the above-listed criteria capture when a labour hire worker is performing the 'same job' as a directly engaged employee?

Question 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?

The above-listed criteria are extremely inadequate for determining whether an employee of a labour hire business and an employee of a client business are performing the 'same job'.

In assessing whether two employees are performing the 'same job', it is essential that each of the following eight questions are considered. Two employees should only be considered to be carrying out the 'same job' if the answer to each of these eight questions is yes.

1. **Are the two employees performing the same duties?**

   This is obviously an important factor.

2. **Would the employee of the labour hire business be covered by the same classification as the employee of the client, if the award or enterprise agreement that applies to the client applied to the labour hire business?**

This is an important factor but it is only one of eight very important factors. It cannot be considered in isolation.

Many modern award classification structures contain broad descriptors that cover a raft of skills, competencies and qualifications that would not be amenable, in isolation of other criteria, to be used for the purposes of any meaningful comparison between jobs. For example, the classification structure in the *Clerks – Private Sector Award 2020* is broadly defined to include a wide range of very different jobs as they appear in different industry settings and based on the occupational character of that award. Also, under the *Manufacturing and Associated Industries and Occupations Award 2020* (**Manufacturing Award**) numerous very different jobs fall within the same classification. For example, boilermakers, first class welders, sheet metal workers and fibreglass boat builders are all classified as Engineering Tradespersons – Fabrication.

Similarly, many enterprise agreements contain classifications that cover, but do not accurately describe, the tasks or 'job' that employees may be engaged to perform. Many classifications in enterprise agreements reflect skills, competencies and qualifications rather than the 'jobs' that employees undertake. There is often a benefit in this approach because employees may be required over the course of their employment to utilise a wide range of skills, competencies and qualifications. Such structures promote skill development and the establishment of a career path within an employer's enterprise.

However, labour hire employees are often only required to undertake a narrow range of tasks and consequently many of the skills, competencies and qualifications associated with a particular classification level and wage rate in an applicable industrial instrument are not relevant to their job. In contrast, an employee of a client business may be utilising a much wider variety of the skills, competencies and qualifications associated with a particular classification level and wage rate in an applicable industrial instrument. In such circumstances, the client's employee and the labour hire employee should not be held to be performing the same job just because they are classified at the same level under the relevant industrial instrument.

Many modern awards and enterprise agreements also contain progression-based pay based on time-based or competency milestones required for classification at a particular level. These parameters on classification structures in many modern awards and enterprise agreements do not enable a comparison of 'same pay' based on 'same job' when the type of job and associated pay within that classification can vary so widely.

3. **Are the two jobs being carried out in the same location?**

The Government has also often referred to the 'Same Job, Same Pay' requirement as being aimed at ensuring that workers doing the same job at the same site receive the same pay. Two jobs should not be considered to be the same if they are not carried out at the same location.

There are often significant variations in the above award wages that are paid in different geographical locations, in response to local labour market factors and pressures, e.g. in rural, regional, metropolitan and remote areas.

It would be nonsense to suggest that, for example, an administrative employee of a mining company who is carrying out work at a remote mine site is performing the same job as an administrative employee engaged by a labour hire provider to work at the mining company's head office in the Sydney CBD.

4. **Are the two jobs being carried out at the same time?**

Two jobs cannot legitimately be considered to be the same if they are not being carried out at the same time. Comparisons should not be made to jobs that were once available but no longer exist in a client business and/or which might exist in the future.

If there is no employee of the client business doing the same job on the same site at the same time, the 'Same Job, Same Pay' requirement should not apply.

5. **Do the two employees have similar experience in the relevant industry or occupation?**

It is not appropriate to regard two jobs as being the same if the job in the client's workforce is being carried out by an employee with many years of relevant experience and the job in the labour hire business's workforce is being performed by an employee with little or no experience.

Example

An electrician with many years of relevant experience is employed by the client and the labour hire employee has only recently completed an electrical apprenticeship.

6. **Do the two employees have a similar level of skill and competency in carrying out the duties in the job?**

   It is not appropriate to regard two jobs as being the same if the job in the client's workforce is being carried out by a highly skilled and competent employee and the job in the labour hire business's workforce is being performed by an employee with a low level of skill and/or competency.

   Example

   A highly skilled and competent fitter is employed by the client and the labour hire fitter has a low level of skill and competency.

7. **Do the two employees have a similar level of performance?**

   It is not appropriate to regard two jobs as being the same if the job in the client's workforce is being carried out by an employee with a high level of performance and the job in the labour hire business's workforce is being performed by an employee with a low level of performance.

8. **Are the two jobs being carried out in the same environment?**

   If two jobs are being carried out in a different environment, they cannot be legitimately considered to be the 'same job'.

   Example 1

   A carpenter is employed by a client business to carry out work on the construction of a high rise building and a carpenter is deployed by a labour hire business to carry out some building maintenance work at the client's head office.

   Example 2

   The client is a Government Department and the labour hire provider is a private sector business. Private sector labour hire businesses should not be expected to match the employment conditions of employees in the public service.

Calculating the 'Same Pay'

The Consultation Paper states that DEWR is considering the merits of calculating the 'pay' that a labour hire worker would be entitled to under the 'Same Job, Same Pay' requirement, with reference to any amounts that fall within the definition of 'full rate of pay' as defined in section 18 of the FW Act.

The Consultation Paper indicates that the Department's proposed approach would mean that any conditions set out in the client business's enterprise agreement that are captured by the meaning of 'full rate of pay' would be payable to the labour hire employee, so long as those conditions are enlivened by the 'same job' being performed. For example, an 'underground' allowance in an enterprise agreement would not be payable to the labour hire employee unless they are performing work underground.

Question 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?

The calculation of 'same pay' with reference to amounts that fall within the definition of 'full rate of pay', as defined in section 18 of the FW Act, is inappropriate and unworkable.

Such an approach would include the following remuneration elements:

- Base rate of pay;
- Incentive-based payments and bonuses;
- Loadings;
- Monetary allowances;
- Overtime
- Penalty rates; and
- Any other separately identifiable amounts.

Annualised salaries and loaded rates

Many businesses have implemented annualised salaries or 'loaded rate' arrangements whereby employees are paid a higher pay rate to account for requirements to work afternoon shifts, night shifts, public holidays, weekend shifts, public holiday shifts and/or rostered overtime. It would be unfair to expect a labour hire company which provides services to that business to pay its employees the same loaded rate as the client pays to its own employees, when the labour hire employees may not work afternoon shifts, night shifts, public holidays, weekend shifts, public holiday shifts and/or rostered overtime.

With annualised salaries and loaded rates arrangements, the rates that are paid are often not able to be readily 'unpacked' into discrete elements.

In the context of enterprise agreements, some loaded rates may also be specifically negotiated between employer and employees under the Better Off Overall Test (BOOT) to account for other 'trade off' or variations to modern award terms and conditions that would otherwise apply. It is unfair to require labour hire businesses to meet the monetary benefits in an enterprise agreement that go beyond the base rate of pay, where the labour hire business does not benefit from other enterprise agreement terms that would make these employee monetary benefits more affordable for an employer. In many instances, if such other enterprise agreement terms were followed, labour hire employers may be contravening the applicable modern award.

In addition, some labour hire businesses pay their employees under an annualised salary or loaded rate arrangement which does not align with the annualised salary or loaded rate arrangements of any of their clients.

Further, many client businesses, including those covered by enterprise agreements, provide monetary benefits beyond the base rate of pay to offset other terms and conditions of the applicable modern award. In the context of enterprise agreements, these monetary benefits and any 'trade-off' of other award conditions are approved by the FWC as part of its application of the FW Act's BOOT.

Overtime and penalty rates

The inclusion of overtime and penalty rates in any 'Same Job, Same Pay' requirement has the potential to operate extremely unfairly, including where a labour hire business and a client business are covered by different industrial instruments that deal with overtime and penalty rates in different ways.

For example, under the Manufacturing Award the regular spread of hours for day workers is between 6am and 6pm, Monday to Friday. If a labour hire employee covered by the Manufacturing Award is placed in a workplace where the client has an enterprise agreement which includes a 7am to 6pm spread of hours, it would be unfair to require the labour hire business to pay its employees penalty rates for ordinary hours worked between 6am and 7pm, just because of the terms of the client's enterprise agreement.

Allowances and loadings

The inclusion of allowances and loadings in any 'Same Job, Same Pay' requirement is unworkable and unnecessary.

Different industrial instruments deal with allowances and loadings in very different ways. For example, in one industrial instrument numerous different disabilities (e.g. hot work, cold work, wet work, dirty work, working at heights) may be rolled up in an industry allowance, but in another industrial instrument each disability may be the subject of a different allowance. Also, in one industrial instrument a particular allowance may be payable daily while in another instrument an allowance dealing with the same subject matter may be payable hourly. Further, in one industrial instrument an allowance dealing with a particular subject matter may be payable on an all-purpose basis but not in another industrial instrument.

In numerous circumstances, the parameters for payment of allowances and loadings in the industrial instrument that applies to a labour hire business will not be able to be sensibly aligned with the allowances and loadings in the enterprise agreements applicable to clients.

Incentive-based payments and bonuses

It would not be workable or fair to require a labour hire business to pay the same incentive-based payments or bonuses to its employees as a client pays to its own employees, for reasons which include the following:

- Production bonuses are a common form of incentive, particularly in industries such as mining and steel. Bonuses are typically based on the client company's production performance over a specified period (e.g. quarterly or annually). How could a labour hire employer know what amount it is required to pay each of its employees at each point in time when some employees are only employed for a short period? If the short period of employment for an employee aligned with the time when the mining company paid its employees an annual production bonus, it would be extremely unfair to require the labour hire company to pay the employee the annual bonus.

- Individual incentive-payments are typically based on the performance of each individual employee. Different employees perform at different levels and therefore the same incentive-payment is not paid to each employee. In such circumstances, how could a labour hire business conceivably determine the amount to be paid to its employees?

- Individual incentive-payments are typically confidential. Many employees would not wish to have such matters disclosed to third parties. In such circumstances, the labour hire business would have no way of knowing the amount that it is required to pay to its employees.

- Some employers pay substantial flat dollar payments to their employees at the commencement of operation of their enterprise agreements (often to compensate for a delay in reaching a new agreement after the nominal expiry of the previous agreement). It would be unfair to require a labour hire company to pay its employees such an amount when often labour hire companies have their own enterprise agreements which include a schedule of wage increases and may have included a flat dollar amount that was payable at a different point in time.

There are a wide variety of different types of bonuses and incentive schemes, including payment by results, merit pay, gainsharing, profit sharing and employee share plans. None of the payments under bonus or incentive schemes are appropriately or fairly included under any 'Same Job, Same Pay' requirement.

Any other separately identifiable amounts

The concept of 'any other separately identifiable amounts' is extremely broad and uncertain. A vast array of different payments to employees could be captured.

It would be unworkable, unfair and inappropriate to include this concept in any 'Same Job, Same Pay' requirement.

Setting off

It would be unfair to force a labour hire employer to pay all of the discrete pay components falling within the definition of 'full rate of pay' and which are paid by client businesses. The Consultation Paper does not suggest that a labour hire employer will be able to 'set off' amounts paid for one pay component against amounts paid for other components.

Question 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?

The 'same pay' requirement should not extend beyond the 'base rate of pay' as defined in section 16 of the FW Act. This is the only workable approach.

Any 'Same Job, Same Pay' requirement should only apply in relation to the lowest paid employee of the client business performing the same job. Different employees of the client business may be paid a different wage or salary even though they are carrying out the same job.

b) Should 'same pay' extend to conditions that fall outside the definition of 'full rate of pay'? If so, what conditions should be captured and why?

The 'same pay' requirement should not extend beyond the 'base rate of pay' as defined in section 16 of the FW Act.

Implementing Same Job, Same Pay entitlements and obligations

The Consultation Paper states that the Government is considering implementing the 'Same Job, Same Pay' policy by amending the FW Act to introduce:

a) a direct entitlement for labour hire workers to receive at least the same pay as directly engaged employees; and

b) a positive obligation on labour hire providers and host employers to take reasonable steps to ensure the direct entitlement is paid to the labour hire worker.

The Consultation Paper states that the obligation would be mutual and is proposed to include consultation and information sharing requirements between the host employer and the labour hire provider.

Question 6: If an obligation were imposed on labour hire providers and host employers:

a) **What guidance should the FW 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?**

To preserve the status that labour hire businesses are the employers, any 'Same Job, Same Pay' requirement should only impose an obligation on labour hire businesses; not on client businesses.

Excessive regulatory obligations on client businesses would create a high regulatory and cost burden separate to the obligation to pay higher rates of pay and relevant margins charged by labour hire firms. It would further discourage the engagement of labour hire by client businesses.

We agree that a labour hire business should not be required to do more than take 'reasonable steps' to comply with the 'Same Job, Same Pay' requirement.

We are not convinced that there is a need for the FW Act to provide guidance on what steps would be reasonable. We are also not convinced that there is a need for consultation and information-sharing provisions. If the Government intends to proceed with implementing a 'Same Job, Same Pay' information sharing requirement it should first set out its views in relation to such matters and undertake further consultation with industry.

The regulatory burden of sharing information between client and labour hire businesses can be mitigated by confining the 'Same, Job Same Pay' requirement to enterprise agreements, where rates of pay and rostering arrangements are generally published and transparent. We do not however suggest that such mitigation is sufficient to alleviate industry concerns over the imposition of additional obligations upon parties that utilise labour hire arrangements.

With regard to criteria and thresholds triggering obligations, and exclusions for particular types of businesses, see our answer to Question 1 above.

Question 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.

Ai Group will seek to address this point in direct consultation with DEWR.

Dispute resolution

Question 8: What parameters (if any) should be imposed on the FWC's jurisdiction to deal with 'Same Job, Same Pay' disputes, and why?

Question 9: Would the FWC's existing powers be sufficient to deal with 'Same Job, Same Pay' disputes? If not, what powers would be needed, and why?

Question 10: Should the FWC be authorised to arbitrate disputes (within Constitutional limitations)? If not, why not?

a) If the FWC were authorised to arbitrate disputes, what orders should it be authorised to make, or be precluded from making?

Under the Australian Constitution, only a Court can exercise judicial powers. Therefore, the FWC's role must necessarily not involve the exercise of judicial powers.

Only a Court should be able to determine whether an employer has breached the 'Same Job, Same Pay' requirement and only a Court should be able to order back-pay.

The FWC's method of dealing with disputes typically involves conciliation, mediation and/or consent arbitration.

Consistent with the FWC's powers under sections 595 and 739 of the FW Act, the FWC should have the power to deal with a dispute about the 'Same Job, Same Pay' requirement in the following ways:

- By mediation or conciliation;
- By making a recommendation or expressing an opinion; and
- By arbitration, if the parties have all/both agreed that the FWC may arbitrate.

Enforcement

Question 11: Should' Same Job, Same Pay' entitlements and obligations be civil remedy provisions in the FW Act?

Question 12: If entitlements and/or obligations in the FW Act were civil remedy provisions:

a) **Who should be able to commence civil remedy proceedings?**

b) **How should this enforcement mechanism fit with any dispute resolution powers conferred on the FWC about 'Same Job, Same Pay'?**

We do not support any 'Same Job, Same Pay' requirement being a civil remedy provision under the FW Act.

The concept of 'Same Job, Same Pay' is highly problematic. If the Government proceeds to implement the proposal despite the strong objections of industry, undoubtedly a raft of problems will result. Accordingly, it is not appropriate for businesses to be exposed to harsh civil penalties for non-compliance.

Question 13: If an underpayment of 'same pay' is established, who should be ordered to rectify it?

Given Constitutional limitations, only a Court should be able to determine whether an employer has breached the 'Same Job, Same Pay' requirement and only a Court should be able to order back-pay.

Question 14: The Fair Work Ombudsman's remit for enforcing the FW Act would capture 'Same Job, Same Pay' matters. Are there any reasons why this should not be the case?

If a 'Same Job, Same Pay', requirement is implemented in the FW Act, it is logical for the Fair Work Ombudsman to have a similar role as it has in respect of other entitlements under the FW Act.

Anti-avoidance measures

The Consultation Paper suggests that the following anti-avoidance provisions could be introduced in the FW Act to protect against corporate avoidance behaviours:

- a general anti-avoidance provision prohibiting labour hire providers and host employers from taking action or entering arrangements to avoid 'Same Job, Same Pay' obligations; and

- enhancement of the General Protections provisions in the FW Act to create specific protections to support or supplement 'Same Job, Same Pay' entitlements and obligations.

Question 15: If a general anti-avoidance provision were introduced to the FW Act:

a) What should the scope of the provision be?

b) What exceptions or defences to the provisions should be incorporated?

Question 16: How should the General Protections be enhanced to protect against avoidance behaviours?

Question 17: Should other anti-avoidance measures be considered? If so, please provide details.

Anti-avoidance provisions relating to the 'Same Job, Same Pay' requirement are not necessary or appropriate.

If a 'Same Job, Same Pay' requirement is included in the FW Act, most likely such a requirement would be a 'workplace right' and protected under sections 340 and 341 of the Act.

Impacts and costs

Question 18: Please describe the cost impacts of 'Same Job, Same Pay' measures on affected parties and the broader economy. Specifically, what cost impacts would arise in relation to:

a) Identifying whether a labour hire worker is doing the 'same job' as an employee

b) Calculating the 'same pay' a labour hire worker is entitled to receive

c) Engaging in 'Same Job, Same Pay' dispute processes in the FWC

d) Any other 'Same Job, Same Pay' issues

Please include any assumptions, data sources or workings in your assessment of cost impacts.

The 'Same Job Same Pay' policy is a significant change to Australia's workplace relations laws and the structure of many business and commercial arrangements who engage labour from other entities.

It is a reasonable expectation that the proponents of this policy be able to properly cost its impact on business and the broader economy. Citing the lack of available data, is an admission that the full cost impacts cannot be adequately assessed as part of the Government's consideration as to

whether the costs of this policy would outweigh the benefits provided to groups of employees, who if are labour hire employees, currently comprise 2.3% of the total workforce population.

Data could be more accurately used if the 'Same Job, Same Pay' proposal was more appropriately targeted in its application, as suggested above by Ai Group. For instance, confining 'Same Job, Same Pay' to circumstances where an enterprise agreement exists at the client business would enable a transparent assessment of wages as contained in those enterprise agreements published online.

In any event, the adoption of 'Same Job, Same Pay' measures would impose four types of costs on the economy:

1. Compliance costs to affected businesses, in the form of identifying 'same job' alignments across their labour hire workforce, calculating pay differentials and applying payroll adjustments. Members are deeply concerned about the foreseeable extent of such costs.

2. Legal costs to affected businesses, in the form of seeking legal advice on the above compliance activities, and engaging in dispute resolution processes at the FWC.

3. Wage costs to affected businesses, in the form of higher wage payments to identified labour hire worker.

4. Indirect costs to downstream businesses within the supply chain, in the form of increased prices for goods and services produced by labour hire employing firms. Assuming that that this policy would apply to Government bodies who engage labour hire, it is likely that it would also the cost of providing Government services.

It should be noted that of the above, costs (1), (2) and a component of (4) are regulatory burden costs, which will be imposed on the economy irrespective of whether labour hire workers are found to be paid at different rates to other employees.

Question 19: What other positive and negative consequences of this measure could arise for:

a) **labour hire workers and directly engaged employees**

b) **labour hire providers (including small business)**

c) **host employers (including small business)**

d) **specific industries or sectors, as applicable**

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

The 'Same Job, Same Pay' proposal has caused alarm amongst labour hire businesses. There is widespread concern that it represents an unfair attack on labour hire businesses that comply with relevant workplace laws and which are providing a valuable and legitimate service.

The 'Same Job, Same Pay' proposal has also caused alarm amongst a wide range of manufacturing, construction, maintenance, ICT, consulting and other businesses, small and large, that have entered into contractual arrangements with client businesses to provide services which include a labour component.

There is a major risk that any 'Same Job, Same Pay' requirement will disrupt countless business-to-business contracting arrangements to the detriment of the relevant businesses, their employees and the broader community.

Thousands of small and medium-sized businesses which supply services to larger businesses would be forced to increase the remuneration they pay to their employees in order to comply with the 'Same Job, Same Pay' requirement. This would substantially increase their costs. It would be naïve to assume that these businesses would be able to fully recoup those cost increases from their clients through charging higher prices for their services.

A 'Same Job, Same Pay' requirement could destroy many small businesses and the livelihoods of many business owners.

A 'Same Job, Same Pay' requirement could also result in widespread job losses amongst labour hire employees because client businesses would have little incentive to engage labour hire businesses due to the increased regulatory burden, uncertainties and risks involved in complying with the 'Same Job, Same Pay' requirement.

In addition, the 'Same Job, Same Pay' requirement would be a strong disincentive for labour hire businesses to bargain because of the major problems that will result from trying to comply with their own enterprise agreement as well as with inconsistent remuneration terms in each client's enterprise agreement.

The Government's 'Same Job, Same Pay' proposal is not in anyone's interests and needs to be abandoned.

Transition

Question 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?

Appropriate transitional arrangements need to be implemented to reduce hardship for businesses and employees.

Such arrangements should include at least two years' notice of the implementation of the 'Same Job, Same Pay' requirement. Labour hire companies and their clients will need time to re-negotiate commercial contracts. Labour hire employers will also need to adjust employment terms and conditions for a large number of employees.

The 'Same Job, Same Pay' requirement should not apply to employees of a labour hire business which has an enterprise agreement. Many labour hire businesses have enterprise agreements. The rates of pay in such an agreement may be lower than they would otherwise be as part of a bargain between the employer and the employees which includes other additional benefits, such as additional leave entitlements. It would be unfair for a labour hire employer to be forced to pay its employees higher rates of pay than those in the enterprise agreement as a result of the 'Same Job, Same Pay' requirement, when the employer would have a legal obligation to continue to provide the other components of the bargain.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry, retail, social and community services and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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