



Australian Government
Department of Employment
and Workplace Relations

Same Job, Same Pay

Consultation Paper

April 2023



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The document must be attributed as the *Australian Government, Same Job, Same Pay consultation paper*.

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Overview

In the lead up to the 2022 Federal Election, the Australian Government committed to legislate the proposal that if you do the same job as someone else, you should get the same pay. This is the Government’s **Same Job, Same Pay** measure.

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.

The Australian Government Department of Employment and Workplace Relations (**department**) is now seeking feedback on the direction the Government should take in implementing the Same Job, Same Pay measure. This follows consultation already undertaken with industry stakeholders in 2022.

This paper sets out key issues and questions that stakeholders are invited to consider and respond to. Discussion questions are included throughout the consultation paper and a full list is at **Appendix 1** for ease of reference.

How to provide your feedback

The department will use your views to help develop the final measures for introduction in legislation in the second half of this year.

Please provide your written comments by providing a written submission to WRSubmissions@dewr.gov.au. All submissions will be treated as confidential and will not be published. You can choose to remain anonymous.

Closing date: Submissions close at 11:00pm AEST on Friday 12 May 2023.

If you have questions about providing a response to this consultation paper, please email us at WRSubmissions@dewr.gov.au.

Please keep informed of progress of these reforms at www.dewr.gov.au, including opportunities to be involved in later stages of consultation.

Introduction

Labour hire in Australia

Labour hire workers represent around 2.3% of employed people in Australia (319,900 of 13,852,900).¹ As of 30 June 2022, there were 13,195 actively trading labour hire providers operating in Australia.² Notwithstanding these numbers represent a small cohort of the Australian workforce and employing entities,³ it is unclear how many businesses enter into traditional labour hire arrangements and use externally sourced labour, or how many businesses use other arrangements, such as in-house labour hire (that is, labour hire from an associated entity or entity within the same corporate group).

Workers choose to engage in labour hire work for various reasons, including because it may provide additional flexibility, tailored working conditions, an increase in the variety of work undertaken, and heightened independence to determine work options.⁴ Labour hire can be a source of flexible and varied labour solutions for a range of businesses and can provide surge labour capacity, including so that business can handle peak work periods.

An employed person in the labour supply services industry is more likely to work full-time hours (81%), not have paid leave entitlements (84%), be male (61%), and have median weekly earnings of \$1,246.70 (compared to \$1,250.00 for all employees).⁵ In 2019-20, over a quarter of employed people working in the labour supply services industry were Labourers (27%).⁶ For 83% of Australians employed as labour hire workers (around 266,200 people), their job in the labour supply services industry is their main job.⁷ These workers are likely to earn less than a directly employed worker.⁸

Under the *Fair Work Act 2009* (**Fair Work Act**) a labour hire worker and a directly engaged employee performing the same work for the same host employer may have terms and conditions of employment set by different instruments.

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

¹ Australian Bureau of Statistics (ABS), *Labour hire workers, June 2022* (released 6 December 2022); using ABS, *Labour Account, June 2022*.

² ABS, *Counts of Australian Businesses, including Entries and Exits, July 2018 – June 2022* (released 25 August 2022) (see ANZSIC code: 7212 *Labour Supply Services*).

³ In January 2023, there were 13,721,900 employed people in Australia: see ABS, *Labour Force, Australia, January 2023* (released 16 February 2023). At 30 June 2022, there were 2,569,900 businesses operating in the Australian economy: see ABS, *Counts of Australian Businesses, including Entries and Exits, July 2018 – June 2022* (released 25 August 2022).

⁴ Senate Select Committee on Job Security, *Third interim report: Labour hire and contracting* (November 2021), [2.47] (**Third Interim Report**).

⁵ ABS, *Labour hire workers, June 2022* (released 6 December 2022), using ABS, *Characteristics of Employment, August 2022*; and *Jobs in Australia, 2019-20*.

⁶ ABS, *Labour hire workers, June 2022* (released 6 December 2022), using ABS, *Jobs in Australia, 2019-20*.

⁷ ABS, *Labour hire workers, June 2022* (released 6 December 2022); using ABS, *Labour Account, June 2022*.

⁸ Senate Select Committee on Job Security, *Third Interim Report*, 32 [2.80].

enterprise agreement.⁹ 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.

The Government's Same Job, Same Pay measure

In the lead up to the 2022 Federal Election, the Government committed to ensuring that labour hire workers are paid at least the same as directly engaged employees doing the same work (the **Same Job, Same Pay** measure). The Government intends to legislate the Same Job, Same Pay measure in the Spring 2023 sitting of Parliament.

The department is seeking views from stakeholders to inform the design and implementation of Same Job, Same Pay as a legislative measure.

Guiding principles

In order to inform the development of the Same Job, Same Pay measure, the department is having regard to several guiding principles:

- Business should be able to access labour hire for genuine work surges and short-term needs
- Labour hire workers should be paid at least the same as directly engaged employees doing the same work
- Disputes about Same Job, Same Pay obligations and entitlements should be dealt with quickly, economically and fairly in the Fair Work Commission
- Targeted anti-avoidance measures are needed to protect Same Job, Same Pay entitlements and ensure long lasting behavioural change

The matters set out in this consultation paper have been informed by these guiding principles, and the department encourages consideration of these in feedback to this consultation process.

Defining labour hire arrangements within scope

It is proposed that Same Job, Same Pay measures apply to labour hire arrangements. Labour hire arrangements have existed in Australia since the 1950s.¹⁰ A traditional labour hire arrangement is one in which a labour hire provider supplies a worker to undertake work at a host employer's business pursuant to a commercial contract with the host employer (Figure 1).¹¹

In traditional labour hire arrangements, an employment relationship usually exists between the labour hire worker and labour hire provider. The labour hire provider pays the worker their wages and other

⁹ See, eg, Senate Select Committee on Job Security, Third Interim Report; Senate Education and Employment Legislation Committee, *Inquiry into the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022* (Report, October 2022); Senate Education and Employment References Committee, *Inquiry into Corporate Avoidance of the Fair Work Act 2009* (Report, September 2017).

¹⁰ Senate Select Committee on Job Security, Third Interim Report, 1 [1.4]; 15 [2.23].

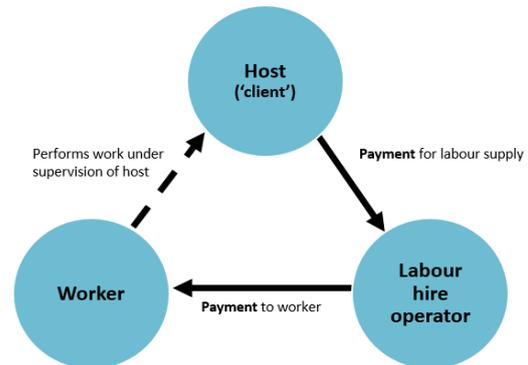
¹¹ *Ibid*, 9 [2.1].

entitlements. There is usually no direct contractual or employment relationship between the worker and the host employer.

However, 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.¹²

The labour supply provider may be a completely separate corporate entity, or a related entity within the same corporate group of companies.

Figure 1.



Arrangements regarding labour supply may involve several tiers of contractual relationships, responsibilities on different parties regarding the management and pay of labour hire workers, and in addition to traditional labour hire arrangements (described above), may include (for example):

- 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.
- 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.

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?

Identifying the 'Same Job'

In order to legislate Same Job, Same Pay measures with clarity about the circumstances in which they apply, it will be necessary to identify when a labour hire worker is performing the 'same job' as a directly engaged employee.

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:

- 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

¹² Ibid, 15 [2.24].

- 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.

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.

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?

Calculating the ‘Same Pay’

Once a host employer and labour hire provider have identified that a labour hire worker is performing the ‘same job’ as a directly engaged employee, the ‘same pay’ payable to the labour hire worker must be calculated.

The department is considering the merits of calculating the ‘pay’ that a labour hire worker should be entitled to (unless their usual pay is higher) with reference to any amounts that fall within the definition of ‘full rate of pay’, as that term is defined in section 18 of the Fair Work Act. Section 18 of the Fair Work Act currently provides:

General meaning

- (1) The **full rate of pay** of a national system employee is the rate of pay payable to the employee, including all the following:
 - (a) incentive-based payments and bonuses;
 - (b) loadings;
 - (c) monetary allowances;
 - (d) overtime or penalty rates;
 - (e) any other separately identifiable amounts.

Meaning for pieceworkers in relation to entitlements under National Employment Standards

- (2) However, if one of the following paragraphs applies to a national system employee who is a pieceworker, the employee’s **full rate of pay**, in relation to entitlements under the National Employment Standards, is the full rate of pay referred to in that paragraph:

- (a) a modern award applies to the employee and specifies the employee’s full rate of pay for the purposes of the National Employment Standards’;
- (b) an enterprise agreement applies to the employee and specifies the employee’s full rate of pay for the purposes of the National Employment Standards;
- (c) the employee is an award/agreement free employee, and the regulations prescribe, or provide for the determination of, the employee’s full rate of pay for the purposes of the National Employment Standards.

This proposed approach to calculating ‘same pay’ will mean that any conditions set out in the host’s enterprise agreement that are captured by the meaning of ‘full rate of pay’ will be payable to the labour hire worker, so long as those conditions are enlivened by the ‘same job’ being performed.

The intention is that even if some conditions in an enterprise agreement fall within the meaning of ‘full rate of pay’, they will not be payable to the labour hire worker unless they would also be payable to a directly engaged employee doing the same job (for example, an ‘underground’ allowance in an enterprise agreement may be captured by the term ‘full rate of pay’, but will not be payable to the labour hire worker unless they are actually performing work underground in order to attract the allowance).

Example #2 – Jane is entitled to the ‘same pay’ as an employee at a food production company

Jane is rostered to work a 3 hour night shift. The modern award that usually applies to Jane’s work, the Food, Beverage and Tobacco Manufacturing Award 2020, provides a penalty rate of 50% for the first 3 hours of a night shift on her base rate of pay (\$21.97 per hour).

However, the enterprise agreement applying to the major food production company where Jane is working provides a higher base rate of pay (\$25 per hour) plus penalty rates during night shifts (55% per hour). No other penalties or allowances are payable under the agreement.

Applying Same Job, Same Pay measures, and assuming Jane’s circumstances satisfy applicable ‘same job’ criteria, Jane’s pay for her night shifts must be calculated with reference to the rate of \$25 per hour plus a 55% penalty rate, pursuant to the host employer’s enterprise agreement.

When obligations to identify the ‘same job’ and calculate the ‘same pay’ are enlivened for internal labour hire arrangements, they may apply in circumstances such as:

Example #3 – Mia works for internal labour hire in the services industry

Best Catering uses internal and external labour hire and pays its employees under an enterprise agreement.

Best Catering often uses hospitality services through **Internal Support**, another company in Best Catering corporate group. Internal Support has their own enterprise agreement, but it pays lower rates than the Best Catering enterprise agreement.

The Same Job, Same Pay measures will apply, so that Internal Support must pay Mia, who works for Best Catering and does the same job as Best Catering employees, at least the same as the Best Catering enterprise agreement.

Note: This obligation to pay Mia at least the same pay as provided by the Best Catering enterprise agreement would be enlivened even if Mia was usually paid by Internal Support under an individual contract, or in accordance with the modern award, *where the contract or modern award pays less*

than the Best Catering enterprise agreement.

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?

Implementing Same Job, Same Pay entitlements and obligations

The Government is considering implementing the Same Job, Same Pay measure by amending the Fair Work Act to introduce:

- a) a direct entitlement for labour hire workers to receive at least the same pay as directly engaged employees (the **entitlement**); 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 **obligation**).

The entitlement would apply subject to relevant 'same job' criteria being met.

The obligation would be mutual and is proposed to include consultation and information sharing requirements between the host employer and the labour hire provider, to ensure each entity takes steps to allow the other to comply with the obligation.

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.

Dispute resolution

During previous consultations, stakeholders generally agreed the Fair Work Commission should have a role in resolving disputes about the application and nature of the Same Job, Same Pay measure. Views about the extent of the Fair Work Commission's role and powers differed.

The department is considering whether the Fair Work Commission's existing powers to deal with disputes should form the basis of dispute resolution processes for Same Job, Same Pay matters.¹³ This would mean the Fair Work Commission could deal with Same Job, Same Pay disputes as it sees fit, including by conciliation, mediation and, potentially, arbitration. This could also extend to the making of orders.

Questions:

8. What parameters (if any) should be imposed on the Fair Work Commission's jurisdiction to deal with Same Job, Same Pay disputes, and why?
9. Would the Fair Work Commission's existing powers be sufficient to deal with Same Job, Same Pay disputes? If not, what powers would be needed, and why?
10. Should the Fair Work Commission be authorised to arbitrate disputes (within constitutional limitations)? If not, why not?
 - a) If the Fair Work Commission were authorised to arbitrate disputes, what orders should it be authorised to make, or be precluded from making?

Enforcement

It is proposed the Fair Work Ombudsman provide education and advice to industry and affected parties about Same Job, Same Pay obligations and entitlements. It is also proposed the Fair Work Ombudsman be able to use the various enforcement tools at its disposal to deal with non-compliance with Same Job, Same Pay measures.

Consistent with existing practice, it is expected the Fair Work Ombudsman would take a risk-based and intelligence-led approach to monitoring, investigation, compliance and enforcement activities.

The department is considering whether legislative provisions regarding Same Job, Same Pay entitlements and/or obligations would be civil remedy provisions and how those provisions could be enforced beyond the jurisdiction of the Fair Work Commission.

Questions:

11. Should Same Job, Same Pay entitlements and obligations be civil remedy provisions in the Fair Work Act?
12. If entitlements and/or obligations in the Fair Work 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 Fair Work Commission about Same Job, Same Pay?
13. If an underpayment of 'same pay' is established, who should be ordered to rectify it?
14. The Fair Work Ombudsman's remit for enforcing the Fair Work Act would capture Same Job, Same Pay matters. Are there any reasons why this should not be the case?

¹³ Fair Work Act s 595.

Anti-avoidance measures

It is proposed that anti-avoidance provisions be introduced in the Fair Work Act to protect against corporate avoidance behaviours. Anti-avoidance measures would be aimed at prohibiting action or arrangements in order to avoid Same Job, Same Pay obligations. The department is considering:

- 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
- whether the General Protections provisions in the Fair Work Act could be enhanced to create specific protections to support or supplement Same Job, Same Pay entitlements and obligations.

Questions

15. If a general anti-avoidance provision were introduced to the Fair Work Act:
 - a) What should the scope of the provision be?
 - b) What exceptions or defences to the provisions should be incorporated?
16. How should the General Protections be enhanced to protect against avoidance behaviours?
17. Should other anti-avoidance measures be considered? If so, please provide details.

Impacts and costs

There are significant limitations with current data relating to the use of labour hire arrangements in Australia. The multi-party nature of labour hire arrangements, the various forms labour hire can take, and the lack of reporting obligations on parties who use labour hire, mean these types of work are more challenging to identify and measure. There is also limited information on the contractual arrangements between labour hire providers and host employers. Data limitations mean that understanding the regulatory impact of reform on labour hire arrangements is complex.

Questions:

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 Fair Work Commission
 - d) Any other Same Job, Same Pay issuesPlease include any assumptions, data sources or workings in your assessment of cost impacts.
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.

Transition

The impact of Same Job, Same Pay measures on workers and business may require a transition period before any entitlement or obligations commences.

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?

Appendix 1 – Discussion questions about Same Job, Same Pay

Defining labour hire arrangements within scope

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?

Identifying the 'Same Job'

2. Would the criteria set out on page 8 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?

Calculating the 'Same Pay'

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' is appropriate, and why?
 - b) Should 'same pay' extend to conditions that fall outside this definition? If so, what conditions should be captured and why?

Implementing Same Job, Same Pay entitlements and obligations

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.

Dispute resolution

8. What parameters (if any) should be imposed on the Fair Work Commission's jurisdiction to deal with Same Job, Same Pay disputes, and why?
9. Would the Fair Work Commission's existing powers be sufficient to deal with Same Job, Same Pay disputes? If not, what powers would be needed, and why?
10. Should the Fair Work Commission be authorised to arbitrate disputes (within constitutional limitations)? If not, why not?
 - a) If the Fair Work Commission were authorised to arbitrate disputes, what orders should the Commission be authorised to make, or be precluded from making?

Enforcement

11. Should Same Job, Same Pay entitlements and obligations be civil remedy provisions?
12. If entitlement and/or obligation in the Fair Work 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 Fair Work Commission about Same Job, Same Pay?
13. If an underpayment of 'same pay' is established, who should be ordered to rectify it?
14. The Fair Work Ombudsman's remit for enforcing the Fair Work Act would capture Same Job, Same Pay matters. Are there any reasons why this should not be the case?

Anti-avoidance measures

15. If a general anti-avoidance provision were introduced to the Fair Work Act:
 - a) What should the scope of the provision be?
 - b) What exceptions or defences to the provisions should be incorporated?
16. How should the General Protections be enhanced to protect against avoidance behaviours?
17. Should other anti-avoidance measures be considered? If so, please provide details.

Impacts and costs

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 a directly engaged employee
 - b) Calculating the 'same pay' a labour hire worker is entitled to receive
 - c) Engaging in Same Job, Same Pay dispute resolution processes in the Fair Work Commission
 - d) Any other Same Job, Same Pay issues

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

19. What other positive and negative 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 enterprise bargaining.

Transition

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?