



Mining and Energy Union Submission to the 'Fair Work Amendment (Equal Pay for Equal Work) Bill 2022' Inquiry

September 2022



Submission re Fair Work Amendment (Equal Pay for Equal Work) Bill 2022

Introduction

1. The Mining and Energy Union (which is a Division of the Construction, Forestry, Maritime, Mining and Energy Union) (hereafter **MEU**) is the principal trade union representing mineworkers. We also have significant membership in power stations, coal ports and amongst locomotive drivers in the Pilbara. In total, we have over 21,000 members working in the mining and energy industries across Australia.
2. Our members work in the regions. We are proud to have played a leading role in advocating for well-paid, secure and safe jobs that draw their workers from the local regional communities where the enterprises are based. We have actively campaigned for permanent jobs and viable communities in towns as diverse as Moranbah and Blackwater in the Bowen Basin in Queensland; Collie in the South West of Western Australia; Singleton and Muswellbrook in the Hunter Valley, Gulgong and Lithgow in the Western District of New South Wales and Morwell in the Latrobe Valley of Victoria. What all of these towns have in common is that they are located in coal mining regions that depend heavily on the jobs and services that flow from the mining and energy industries.
3. The mining industry has historically been a key source of decent jobs for regional Australia. However, the threat to decent mining jobs in regional Australia has been growing steadily because of the increased casualisation and exploitation of mineworkers, primarily through the contracting out of jobs by the big mining companies.
4. The MEU has campaigned long and hard for mineworkers to receive the Same Pay for performing the Same Job. The Same Job Same Pay principle is essential in ensuring that all mineworkers are fairly rewarded with fair pay, and safe and secure work, for performing demanding work in an inherently dangerous industry. In turn, this will ensure that regional Australia continues to benefit from decent jobs.

5. The MEU acknowledges that the aspirations of the *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022* (hereafter **the Bill**) are positive. The Explanatory Memorandum to the Bill explains that:

*The Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 is designed to limit the use of labour hire contracts by removing the incentive for employers to do so, which is lower wages. This bill is encouraging employers to make improved provision for their labour requirements by retaining existing staff in permanent work arrangements, while training new staff through apprenticeships and traineeships.*¹

6. The Explanatory Memorandum to the Bill further explains:

*The Black Coal Mining Industry Award 2010 contains recently-added protections for casuals. This award has a long history of labour hire contracts being used to destroy hard-won entitlements for workers. Mines will still have the right to use labour-hire contracts, however, the cost of those contracts will no longer be borne by the employee through lower wages.*²

7. The MEU agrees with those statements of aspiration.
8. However, the design of the Bill is such that those aspirations will not be satisfied. The MEU has identified 5 issues of concern with the Bill. The effect of these issues is that the Bill fails to deliver on the Same Job Same Pay principle for mineworkers. Each of the 5 issues of concern are explained below.

The Coal Mining Industry in Australia

9. Before explaining each issue of concern, it should be noted that the benefits provided by the Bill are confined to labour hire employees covered by 6 specified modern awards.³ The Bill defines one of those specified modern awards as the "*Black Coal Mining Industry Award 2010*".⁴ That award no longer exists. That is

¹ Explanatory Memorandum, *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022*, page 2.

² Explanatory Memorandum, *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022*, page 4.

³ Section 333B(1)(b) & 4 of the Bill.

⁴ Section 333B(4)(c) of the Bill.

because on 30 November 2021, a Full Bench of the Fair Work Commission extensively varied and renamed the Black Coal Mining Industry 2010.⁵ The award was renamed “*the Black Coal Mining Industry Award 2020*”.⁶ The variation and renaming of the award came into operation 28 January 2022.⁷⁸

10. Leaving the name of the award to one side, the Bill is clearly focused upon the coal mining industry (and the industries that the other specified modern awards operate in). Given that focus, there is merit in making a few brief points about the Australian coal mining industry.
11. The Australian coal mining industry directly employs approximately 46,400 workers.⁹ While the coal mining industry is a relatively small employer by comparison to other industries, its contribution to the national economy is significant. Coal is Australia’s second largest export (after iron ore) and accounts for approximately 11.5% of Australia’s total exports.¹⁰ Notwithstanding the increase in renewable energy, coal remains the dominant source by which electricity is produced in Australia. Coal was responsible for 54% of the total amount of electricity generated in Australia in 2020.¹¹
12. The coal mining industry is heavily export orientated. Almost all of Australian metallurgical coal, which is used to make steel, is exported.¹² About 75% - 80% of Australian thermal coal, which is primarily used in electricity generation, is exported.¹³ Australia is the largest exporter of metallurgical coal in the world and second largest exporter of thermal coal.¹⁴

⁵ 4 yearly review of modern awards, Black Coal Mining Industry Award 2010, PR736274.

⁶ 4 yearly review of modern awards, Black Coal Mining Industry Award 2010, PR736274.

⁷ 4 yearly review of modern awards, Black Coal Mining Industry Award 2010, PR736274.

⁸ It is noted that the first reading of the Bill was held on 10 February 2022, which was after the award had been renamed.

⁹ Labour Force, Australia, July 2022, Table 6 of 6291.0.55.001, Australian Bureau of Statistics.

¹⁰ *Trade and Investment at a Glance 2021*, published by the Department of Foreign Affairs and Trade, page 21.

¹¹ *Australian Energy Update 2021*, published by Department of Industry, Science, Energy and Resources, pages 1 – 3.

¹² *Resources and Energy Quartley June 2022*, published by the Office of the Chief Economist, Department of Industry, Science, Energy and Resources, page 51.

¹³ *Resources and Energy Quartley June 2022*, page 61.

¹⁴ *Resources and Energy Quartley June 2022*, pages 51 & 61.

13. The coal price has been and remains at historic highs.¹⁵ The dramatic surge in the coal price, which commenced in late 2021, is best explained by the following two comparisons:
- a) In 2021, Australian Prime Coking Coal (ie. metallurgical coal) was selling for approximately US\$120 per tonne.¹⁶ The price per tonne reached an unprecedented US\$520 earlier this year;¹⁷ and
 - b) In 2021, thermal coal was selling for less than US\$100 per tonne.¹⁸ The price per tonne is currently an unprecedented US\$400.¹⁹
14. The coal price is forecast to stay high and well above historic averages throughout 2023.²⁰
15. The booming coal price has resulted in massive profits for the major mining companies. This is evident from another simple comparison. In 2021, Australia exported 167 million tonnes of metallurgical coal. That generated \$23 billion in earnings. In 2023, a small increase in the amount of metallurgical coal is forecast for export (forecast to be 173 million tonnes) and is expected to generate over \$60 billion in earnings.²¹ This is further evident from the most recent financial results declared by the major mining companies, including:
- a) BHP, which declared profits of US\$9.5 billion from their coal assets in the financial year ending 30 June 2022, which was up from US\$288 million for the previous year;²² and
 - b) Glencore, which declared profits of US\$5 billion from its Australian thermal coal operations for the first half of 2022 (which was up from US\$687 million for the first half of 2021) and profits of US\$923 million from its

¹⁵ *Resources and Energy Quartley June 2022*, pages 53, 56 – 57, 63, 69.

¹⁶ *Resources and Energy Quartley June 2022*, pages 56 – 57.

¹⁷ *Resources and Energy Quartley June 2022*, pages 56 – 57.

¹⁸ *Resources and Energy Quartley June 2022*, page 69.

¹⁹ *Resources and Energy Quartley June 2022*, page 69.

²⁰ *Resources and Energy Quartley June 2022*, pages 53, 56 – 57, 60, 63, 69, 73.

²¹ *Resources and Energy Quartley June 2022*, pages 58 – 59.

²² BHP Annual Report 2022, page 76.

Australian coking coal operations for the first half of 2022 (which was up from US\$51 million for the first half of 2021).²³

16. It is well understood that wages are not keeping up with the cost of living. This is also true in the extremely profitable coal mining industry. The introduction of an effective Same Job Same Pay principle in the coal mining industry will be a key tool to get wages moving for all mineworkers.
17. Finally, it is particularly clear from the above that the extremely profitable coal mining industry can afford to provide all mineworkers with fair pay and safe and secure employment.

Concern 1: Bill requires characterisation of the business of the employer

18. The concept of a labour hire employer and a labour hire employee are central to the scheme of the Bill. That is, the key provisions of the Bill are defined by reference to either or both of those terms, including:
 - a) The activation of the equal pay provision (see s.333B(1)(a) of the Bill); and
 - b) The actual obligation to make the prescribed payment (see s.333B(2) of the Bill).
19. The Bill does not contain a definition of either a labour hire employer or a labour hire employee. Given the significance of both terms to the operation of the Bill, this is a significant omission.
20. In any event, it is problematic that the obligations of the Bill are defined by reference to the concept of a labour hire employer or a labour hire employee. That is because the line between a labour hire employer and a contractor is extremely ambiguous. Imposing the equal pay obligation by reference to a labour hire employer calls for a characterisation of the business of the provider of labour. Given the ambiguity that exists concerning whether an entity is a labour hire

²³ Glencore 2022 Half-Year Report, pages 18 – 19, accessed at <https://www.glencore.com/dam/jcr:507b9273-f06c-4362-970c-3a1c8be272d6/GLEN-2022-Half-Year-Report.pdf>

employer or a contractor, the potential for avoidance of the aspirations of the Bill is evident. An example is given to demonstrate this point.

21. The example is a hypothetical. Mine ABC is an underground coal mine with 3 development panels. 2 of the 3 development panels are exclusively staffed by permanent employees of Mine ABC. Those employees are covered by an enterprise agreement negotiated by the MEU. Mine ABC has contracted with Company DEF for a 2 year period for Company DEF to perform all work in the 3rd development panel. The only workers in that 3rd development panel are employees of Company DEF. The employees of Company DEF work to their own rosters. In undertaking work in that 3rd development panel, Company DEF provides some machinery and equipment, and its own supervisors.
22. The employees of Company DEF are paid 30% less than the employees of Mine ABC. The employees of Company DEF have less beneficial terms of employment and less secure employment than employees of Mine ABC.
23. The employees of Company DEF perform the same job as the employees of Mine ABC. That is, both sets of workers are operating the same machines and equipment to extract coal, albeit in different geographical areas of the same mine.
24. In the above example, it is unlikely that Company DEF would be characterised as a labour hire employer. It is more likely that Company DEF would be characterised as a contractor. As such, the Bill would impose no obligations in this scenario – notwithstanding that the employees of Mine ABC and Company DEF are performing the same job. Such an outcome is at odds with the aspirations of the Bill.
25. The aspirations of the Bill – and the Same Job Same Pay principle more broadly – will best be satisfied by a legislative scheme that imposes the same (or equal) pay obligation by reference to a robust definition of same job.

Concern 2: Bill imposes liability only on the labour hire employer

26. As the Explanatory Memorandum to the Bill makes clear, the aspiration of the Bill is to change the behaviour of the host employer.
27. However, the Bill only imposes obligations and liability on a labour hire company.²⁴
28. The MEU considers that such an approach does not best meet the aspirations of the Bill. Rather, the most effective means of changing the behaviour of the host employer is to impose obligations and liability on both the entity that provides the labour and the host employer.
29. It should also be noted that entities that provide labour to host employers can sometimes be structured in a way so that they hold little assets. A company structured in that way will be unable to meet any orders made by a Court for payment of compensation or the like for breach of the payment obligations in the Bill. Such an outcome would plainly be at odds with the aspiration of the Bill.

Concern 3: Ambiguity as to what is meant by would be payable

30. The payment rule is set out at s.333B(2) of the Bill. Section 333B(2)(a) of the Bill provides for payment of:

a base rate of pay for the labour hire employee's hours of work that is no less than the base rate of pay that is, or would be, payable to an employee of the host employer in the same classification or class of work for the same hours of work (emphasis added).

31. The MEU suggests that the words "*or would be*" in s.333B(2)(a) are ambiguous. The Bill does not provide any guidance as to how those words are to be interpreted or applied.
32. The MEU notes the following comments made Senator Roberts in the Second Reading Speech of the Bill:

In addition to situations where employers are using a mix of contract and direct-employed employees, the Fair Work Amendment (Equal Pay for

²⁴ Section 333B(2) of the Bill.

Equal Work) Bill 2022 makes allowance for a situation where a labour hire arrangement has replaced all of the workers on a roster with contract employees.

In this situation, the rate of pay being offered by that labour hire contract would be assessed against similar rates of pay for directly employed workers in that industry.

33. To the extent that it is suggested that the inclusion of the words “*or would be*” in s.333B(2)(a) of the Bill achieve the outcome discussed in the Second Reading Speech, the MEU respectfully disagrees that those words would result in that outcome. Moreover, it is unclear how any other provisions of the Bill would result in the outcome discussed in the Second Reading Speech.

Concern 4: Bill is concerned only with monetary amounts

34. The obligations imposed by the Bill are not confined to the base rate of pay. Rather, the obligations extend also to the monetary amounts identified at s.333B(b) of the Bill.
35. The MEU is supportive of the obligation being extended beyond the base rate of pay. However, for the aspirations of the Bill to be satisfied, consideration should be given to the inclusion of certain valuable non-monetary conditions of employment.

Concern 5: The Bill would not effectively require an equal pay for equal work provision in an enterprise agreement

36. The MEU notes the following comments made Senator Roberts in the Second Reading Speech of the Bill:

The Fair Work Commission adjudicates enterprise agreements. The provisions in the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 provide guidance and instruction to the Fair Work Commission, by effectively requiring an equal pay for equal work provisions to be included in enterprise agreements entered into under certain awards.

37. The MEU respectfully disagrees that the Bill would effectively require an equal pay for equal work provision in an enterprise agreement.
38. The matters that the Fair Work Commission must consider when deciding whether to approve an enterprise agreement are prescribed at Division 4 & Division 5 of Part 2 - 4 of the *Fair Work Act 2009* (**FW Act**).
39. If enacted, the provisions of the Bill would be found in Division 3 of Part 2 – 9 of the FW Act. Those are matters that the Fair Work Commission would not be required to consider when approving an enterprise agreement. Any suggestion that those provisions would somehow form part of the underlying relevant modern award and then be relevant in application of the BOOT are misconceived.

Summary

40. For all of the reasons explained above, the Bill does not meet its well meaning aspirations.
41. The MEU otherwise supports the ACTU submission into this Bill, and adopts the recommendation made by the ACTU. Namely, that we encourage Senator Roberts to instead work with the Government to develop legislation to ensure that **all** mineworkers have well-paid, secure and safe jobs, and we work together to end the contracting out of the mineworker jobs in the mining industry.