

ACTUS WORKPLACE LAWYERS

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Government's 'same job, same pay' proposal confirms employers' worst fears

The Government has released a consultation paper about its 'same job, same pay' proposal. The paper has confirmed employers' worst fears.

The consultation paper confirms that the Government's proposal is intended to operate very broadly. Consequently, there will be sweeping adverse implications for employers and many workers.

The 'same job, same pay' proposal is based on the premise that labour hire workers should be paid at least the same as directly engaged employees doing the same job.

The proposal includes a broad conception of 'labour hire'; much broader than the clear and sensible definition in the award system. In the award system, a labour hire arrangement is defined as the on-hire of an employee by their employer to a client, where the employee works under the general guidance and instruction of the client. The Government's consultation paper indicates that the 'same job, same pay' requirement will extend far beyond the 'traditional' labour hire arrangements that are reflected in the award definition. There are countless business to business contracting arrangements which include a labour component that are set to be disturbed by the proposed new requirement.

The thousands of small and medium-sized businesses which supply services to larger businesses should be very alarmed about what is being proposed. The terms of commercial contracts or a lack of bargaining power will prevent many of these businesses increasing prices to enable them to comply with Labor's 'same job, same pay' requirement without hardship. Regardless of whether it is the intent, the policy is bound to destroy many small businesses and the livelihoods of many business owners.

Businesses supplying labour to another business will not only need to match the base rate of pay of the other business; they will need to match penalty rates, allowances, bonuses and a myriad of other pay components. Why should a small contracting business need to match a production bonus that its mining industry client pays to its own employees, or an incentive plan that its retail industry client offers its own employees?

Many large businesses have implemented annualised salaries or 'loaded rate' arrangements for their employees. Under these arrangements, employees are paid a higher pay rate which takes into account requirements to work rotating day and night shifts, to work a specified amount of rostered overtime, to work on various public holidays, etc. Why should a small business that deploys a group of its employees to carry out work at the premises of a larger business have to pay the employees the same loaded rates as the larger business pays to its own employees? The employees of the small business may never work night shifts or rostered overtime.

Pay of course isn't everything. A business and its employees may have reached an enterprise agreement which incorporates lower rates of pay in return for additional leave entitlements. Such arrangements are often highly valued by those employees with caring responsibilities towards children, elderly relatives and those with disabilities. How can it be fair to disturb mutually agreed and beneficial work arrangements within a business just

because the business provides labour in one form or another to a completely different business?

The Government's consultation paper proposes a test for whether two employees are performing the 'same job' which revolves around the duties being carried out by the two employees. The proposed test does not deal with the pattern of hours worked. The employees of a small business may be doing the 'same job' (e.g. carrying out electrical, IT or catering work) as some employees of a client business but the employees of the two businesses may work very different patterns of hours, with hourly or weekly pay rates that reflect the different requirements.

Also, the proposed 'same job' criteria does not address the location where the work is carried out. How can a job carried out in a metropolitan area be validly considered the 'same job' as one carried out on a remote mine site or construction site. The proposed 'same job' test does not include consideration of whether the two employees are working alongside each other. In fact, they could be working thousands of kilometres apart.

The Government could limit its 'same job, same pay' requirement to businesses with enterprise agreements, to base rates of pay, and to employees working in the same location. This would still be problematic for many businesses, but a lot more sensible than the sweeping, unworkable approach outlined in the Government's consultation paper.

The consultation paper indicates that the 'same job, same pay' requirement will be a civil penalty provision under the Fair Work Act. Currently, businesses that breach civil penalty provisions in the Fair Work Act face maximum penalties of \$875,000 per breach, but a separate consultation paper states that the Government is considering increasing the civil penalties by at least five times. The maximum civil penalty under the Fair Work Act would become \$4,125,000 or three times the amount of the underpayment, whichever is greater. The Government is also considering introducing criminal penalties for employers who deliberately or recklessly underpay their employees. Managers and directors could be held criminally liable if they do not do enough to prevent the breaches.

Australia's workplace laws are becoming more and more unbalanced and unfair for employers. The Fair Work Act was supposed to be fair on all parties. There must surely reach a point when many small business owners decide that it is just too risky to employ anyone. At the current time unemployment is low, but this will not last for ever. There is no doubt that the Labor Government's 'same job, same pay' proposal is going to bad for investment, entrepreneurship and jobs.

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