

26 May 2023



Assistant Secretary  
Workplace Relations Consultations Branch  
Department of Employment and Workplace Relations  
GPO Box 9828  
Canberra ACT 2601

Sent via email: [WRConsultations@dewr.gov.au](mailto:WRConsultations@dewr.gov.au)

Dear Assistant Secretary

## 2023 WORKPLACE REFORM CONSULTATIONS

The Chamber of Minerals and Energy of Western Australia (CME) is the peak representative body for the resources sector in Western Australia (WA). CME is funded by member companies responsible for more than 87 per cent of the State's mineral and energy workforce employment,<sup>1</sup> ranging from mining (mineral and petroleum commodities) to manufacturing (alumina, basic inorganic chemicals and explosives) and mining support services across more than a hundred sites and a dozen commodities from exploration through to production and closure.

CME appreciates the extension to provide comment on the final measures to be considered for introduction in legislation in the second half of this year as part of the 2023 Workplace Reform Consultation. CME acknowledges several industry associations have engaged with the consultation process to date and provide in-principle support to the views made in the submissions by the Minerals Council of Australia (MCA), Chamber of Commerce and Industry of Western Australia (CCIWA) and Australian Resources and Energy Employer Association (AREEA).<sup>2</sup>

### Context

With cost competitiveness ranking last (15<sup>th</sup>) and effective labour relations fifth last (11<sup>th</sup>) out of 15 indicators for Australia's economic attractiveness,<sup>3</sup> CME is concerned the proposed workplace reforms will reduce flexibility of our agile labour market. Coupled with inflationary and cost pressures, entrenched slowing in the rate of productivity growth,<sup>4</sup> as well as increased regulatory uncertainty is contributing to Australia's perceived label has a high-cost jurisdiction for doing business. The US Department of Commerce for example describes Australia as a 'high cost of labor' destination for trade and investment.<sup>5</sup>

CME considers the maintenance of free-market economy is critical to sustaining Australia's investment attractiveness. We note the first tranche of major workplace reforms recently received Royal Assent in December last year. In addition, there are significant legislative reforms at a Federal level underway in areas of environmental protection, greenhouse gas emissions, corporate taxation for multinationals and market supply interventions such as domestic gas reservation. Amidst this regulatory uncertainty and in contrast to approaches undertaken by other G20 economies to reduce red tape and attract investment,<sup>6</sup> we recommend **delayed implementation of the second tranche of workplace reforms in favour of further consultation and providing the private sector economy with investment stability.**

WA is the largest destination for potential resource sector projects by value at \$412 billion.<sup>7</sup> However, the sector competes in international markets by maintaining a low-cost operational base across the project's

---

<sup>1</sup> Government of Western Australia, [2021-22 Economic indicators resources data](#), average number of individuals onsite under State legislation, Department of Mines, Industry Regulation and Safety, 8 August 2022.

<sup>2</sup> ARREA, [Same Job, Same Pay Consultation Paper](#), submission to the Department of Employment and Workplace Relations, 12 May 2023; MCA, [Response to the DEWR Consultation Paper: Employee-like forms of work and stronger protections for independent contractors](#), 12 May 2023.

<sup>3</sup> IMD World Competitiveness Center, [World Competitiveness Yearbook 2022: Australia](#), country profile, June 2022.

<sup>4</sup> Commonwealth of Australia, [5-year Productivity Inquiry: Advancing Prosperity](#), Productivity Commission, inquiry report no. 100, 17 March 2023.

<sup>5</sup> International Trade Administration, [Australia – Country Commercial Guide](#), US Department of Commerce, 20 July 2022.

<sup>6</sup> US Inflation Reduction Act of 2022; UK Government, [Smarter regulation to grow the economy](#), policy paper, 10 May 2023; Government of Canada, [Report on the internal review of the Red Tape Reduction Act 2015](#).

<sup>7</sup> Figure 1.3. Commonwealth of Australia, [Resources and Energy Major Projects 2022](#), Department of Industry, Science and Resources, 19 December 2022, p.5.

lifecycle. This cost structure includes employing a workforce that is responsive to cyclical shocks and opportunities, enabling more efficient reallocation of skills in response to demand both temporally and geographically. In compiling this submission, we have consulted with our diverse membership on measures which may affect economic productivity growth.

## Consultation Paper 1 – Same Job, Same Pay

CME considers the potential financial impacts of the proposed Same Job, Same Pay (SJSP) measure on the private sector and broader economy have not been adequately quantified. For example, CCIWA in their submission quoted a resource company representative stating, if the SJSP reforms were introduced and applied to subcontractors (as the proposed definition suggestions), this could cause companies to transition their workforce models to a less-diversified, lower skilled operating model that may be under a fully outsourced arrangement. We expect companies would undertake a workforce review, which could lead to broader declines in productivity due to reduced flexibility in workforce engagement.

It is also unknown if this measure will substantially affect competition between businesses and labour market concentration given Australia's vast geography and declining labour reallocation rates.<sup>8</sup> Further to the Assistant Minister for Competition's speech,<sup>9</sup> the Government should cede advice from key economic and competition agencies on workplace reforms that may unduly affect labour market competition.

### Skills Shortage

At a national level, strong labour demand and a tight labour market is driving the unemployment rate to 50-year lows with workforce participation rates at historic highs.<sup>10</sup> Similarly in WA, full-time employment is at record levels with the unemployment rate its lowest since 2009.<sup>11</sup>

Specifically, the unprecedented and prolonged demand for labour by the WA resources sector has exacerbated existing skill shortages and placed new stressors on local labour supply. Anecdotally, CME members report a deficiency in the number of applicants for positions and have had trouble incentivising workers to relocate closer to site in regional and remote WA. Demand for these trades, professions and unskilled occupations have challenged local supply since COVID-19, with the skills pressures felt in the trades sectors as well as skilled and experienced workers.

Like elsewhere in Australia, labour hire has been a key feature of the WA economy for decades. In the context of an acute and persistent skills shortage across WA, CME is concerned the proposed SJSP reforms could further constrain access to experienced and qualified workers, dampening productivity across the sector. We note labour hire is utilised in a variety of ways in our sector, including as a short-term measure to fill critical workforce gaps or to support temporary but significant increases in demand for discrete project phases such as maintenance and shutdowns. In addition to being competitively remunerated, in many cases these arrangements can have significant flow on benefits to the workers engaged as it can provide a career path for new workers, giving them initial exposure to work in the resources sector, and setting them up with the experience required to gain further employment across the sector.

CME acknowledges the diverse range of perspectives on the issue of labour hire and its future role in the Australian workforce. However, we consider the magnitude and significance of the proposed SJSP warrants further robust consultation, consideration and review to minimise unintended consequences. CME therefore joins many other stakeholders in expressing concerns around the limited consultation timeframe and reiterates the recommendation made by the MCA that **SJSP reforms should not be implemented until after the Government has conducted a thorough review of the significant changes soon to be given effect by the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth).**

### Reform Scope

As noted by CCIWA in their submission, the resources sector is one of many industries which use labour hire to overcome skills shortages, safeguarding against risk due to operational changes, as well as facilitating availability of specialist skills required for tight turnarounds.

---

<sup>8</sup> Reserve Bank of Australia, [Doing Less, with Less: Capital Misallocation, Investment and the Productivity Slowdown in Australia](#), research discussion paper 2023-03, March 2023.

<sup>9</sup> Hon. Dr Andrew Leigh MP, Assistant Minister for Competition, Charities and Treasury, [How uncompetitive markets hurt workers](#), address to Maurice Blackburn Lawyers, 2 March 2023.

<sup>10</sup> Reserve Bank of Australia, [Statement on Monetary Policy](#), 9 February 2023.

<sup>11</sup> Hon. Mark McGowan MLA, Premier; Treasurer, [WA economy remains strong despite global headwinds](#), media statement, 11 May 2023.

The consultation paper states the intention of the SJSP reforms is 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 (EA) made with their employees. CME agrees with CCIWA that anything beyond addressing this specific issue would give rise to a raft of unintended outcomes, including impact on widespread, legitimate uses for labour hire. CME therefore also reiterates the recommendations put forward by MCA and ARREA that the **scope of the reforms be limited to 'true' instances of labour hire and targeted to those workers who may be at risk of wage arbitrage or undercutting; with appropriate exclusions for contract services, genuine subcontracting and labour hire employees employed under an EA.** CME understands ARREA's submission and associated Ministerial briefing outlines the complexity of contracting arrangements used across the WA resources sector.

A further issue CME wishes to highlight relates to a lack of clarity regarding the definition and scope of key terms discussed in the consultation paper. It is noted the definition of these terms will have direct bearing on the application of the proposed reforms in practice. For example:

- It is unclear whether a definition of 'Same Job' would narrowly apply to awards, agreement classification levels or whether position descriptions or actual duties would be assessed.
- 'Same Pay' as a key term is also complex. It will be important to ensure there is clarity regarding whether it includes a reference to pay under modern awards, EA or alternatively actual contractual pay rates.
- There are complex considerations around how general anti-avoidance provisions would be applied in practice, as well as how alleged anti-avoidance conduct would be investigated and its enforcement.
- The dispute resolution process is unclear, and a carefully considered process is required to deliver just outcomes to parties on all sides.

**CME recommends additional clarity be provided on how key terms will be defined and reiterates the recommendations put forward by the MCA and ARREA that:**

- 'Same Job' be defined to enable certainty, minimise compliance burden and avoid the imposition of unworkable responsibilities on employers and labour hire providers.
- 'Same Pay' be clearly defined as 'base rate of pay'.
- SJSP should not apply where the labour hire employee is employed under an EA.

CME recommends that **additional stakeholder consultation on these terms, their definitions and application is provided to ensure intended policy outcomes are achieved with reasonable practicability for industry.**

## **Consultation Paper 2 – Compliance and enforcement: Criminalising wage theft**

CME considers that employees are entitled to fair and accurate payment of their wages without exception. Also, employers who act dishonestly ought to be held to account. However, a fine balance between protecting vulnerable workers against overregulation of business needs to be achieved.

CME notes the consultation paper refers to the findings of the Migrant Worker Taskforce (the Taskforce) and notes the Government's commitment to implementing the Taskforce's final report recommendations. Specifically, recommendation 6 recommends criminal sanctions be introduced only for the *'most serious forms of exploitative conduct, such as where that conduct is clear, deliberate and systemic'*. Any new criminal sanctions should be limited only to a knowledge-based offence, which also corroborates the 2019 Inquiry into Wage Theft in WA which expressly did not accept that unintentional underpayment of wages and entitlements should attract a criminal sanction.<sup>12</sup> Given there is no precedent nor recommendation, CME warrants caution in proceeding with a recklessness offence. It would also fall outside of the Government's commitment to legislate the Taskforce's recommendations.

We also reiterate the MCA's view that a penalty regime for recklessness exists under the civil penalty regime. Sanctions for 'serious breaches' would be better suited to regulate situations of underpayment where there is no dishonest intent instead. A criminal sanction for wage 'underpayment' rather than wage 'theft' risks imposing an additional compliance burden on the resources industry which can be disproportionately disruptive given an increasing burden of compliance as discussed below.

---

<sup>12</sup> Tony Beech, [Inquiry into Wage Theft in WA](#), report for the WA Government, published 6 December 2019.

Consistent with other industry submissions, CME agrees this consultation is a missed opportunity to review how payment regulations might be simplified and streamlined to reduce the regulatory cost of compliance on business. Companies are increasingly allocating more internal resources towards non-productive activities such as technical applications of modern awards, EA provisions, corporate quasi-regulation requirements and voluntary industry self-regulation. Some of these payment related reporting requirements include the Workplace Gender Equality Agency Act 2012 (Cth), Modern Slavery Act 2018 (Cth), Payment Times Reporting Act 2020 (Cth) and Building and Construction Industry (Security of Payment) Act 2021 (WA). More efficient and effective regulation that accommodates this existing reporting environment would deliver better outcomes to the economy more broadly. CME urges the Consultation Branch to take an open-minded approach to reform in this space and continue dialogue with industry to understand its concerns to the specific measures proposed.

### **Consultation Paper 3 – Extend the powers of the Fair Work Commission to include ‘employee-like’ forms of work**

Fundamentally, the consultation around ‘employee-like’ forms of work highlights the varied and complex nature of working arrangements, and the difficulty in distinguishing independent contractors who have control and sophistication in their business relationships, against the minority of vulnerable independent contractors who do not enjoy the same level of sophistication or control. CME submits the consultation should consider independent contracting as a spectrum, rather than a binary split of employee-like versus not employee-like. Across all economy sectors and independent contractors, there is variability in sophistication and control.

While the consultation paper outlines the Government’s intention to define the gig economy (to the exclusion of other classes of work), there are strong industry concerns about the legal complexity of moving further down the independent contracting spectrum. As the consultation paper touches on, the common law view on a worker’s status as an ‘employee’ or an ‘independent’ contractor has persistently been scrutinised in the courts and any workplace measure to legislate its definition would not be without challenge.

CME is concerned the flexibility to enter commercial arrangements with independent contractors may be unduly reduced under the proposed reforms. **It is critical the definition of ‘employee-like work’ is clearly defined and the scope of its application targeted towards independent contractors that need protection.**

### **Consultation Paper 4 – Provide stronger protections against discrimination, adverse action and harassment**

The health and safety of our people, including their physical and psychological safety, is the number one priority for the WA resources sector. Industry has been clear in our commitment to continue to work hard to eliminate any instance of discrimination, bullying, sexual harassment or other behaviours that threaten people’s personal and psychological safety at work.

CME notes the commencement of the Work Health and Safety Act 2020 (WA) (the WHS Act) on 31 March 2022, providing a vital foundation for the modern management of psychosocial and related harassment in the workplace. Under WA’s modernised WHS Act, a ‘person conducting a business or undertaking’ has positive duty of care to ensure, so far as is reasonably practicable, the physical and psychological health and safety of workers. Therefore, under the existing legislative framework, employers have a duty of care to prevent sexual harassment as a risk to a worker’s psychological health and safety. With regard to the proposed reforms in the consultation paper, CME affirms that any positive duties should avoid overlapping or duplication of positive duties in the model WHS laws, where appropriate.

As a member of the MCA Respect@Work Taskforce, CME considers the views in MCA’s submission broadly reflect the views of the WA resources sector. This includes the recommendation that any changes to the ‘adverse action’ regime preserves the existing legal test and subsequent High Court cases, as this jurisprudence is well understood and delivers fairness.<sup>13</sup>

CME notes the significant overlap of the proposed Fair Work Act 2009 (Cth) amendments in the consultation paper with existing anti-discrimination legislation such as the Disability Discrimination Act 1992 (Cth), Equal Opportunity Act 1984 (WA), and Sex Discrimination Act 1984 (Cth). It is understood that these pieces of legislation are intended to fulfill different purposes and these differences should therefore be considered when replicating areas such as indirect discrimination and definitions of disability.

---

<sup>13</sup> Bendigo TAFE vs Barclay (2012) HCA 32.

CME supports the alignment of frameworks and consistency in terminology, however notes that it presents the risk of inconsistency in judicial interpretations. CME recommends that the Consultation Branch ensure that obligations are replicated in full, to prevent increased complexity and unintended inconsistency. For example, if not replicated in full, the amendments may not allow for relevant exemptions in existing anti-discrimination legislation being carried over. **CME formally supports the recommendations outlined by MCA, notably, the support of the broad principles outlined in the discussion paper, to guide the development of the reforms.**

Should you have questions regarding this submission, please contact Adrienne LaBombard, Director, Policy and Advocacy, [REDACTED]

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rebecca Tomkinson', with a stylized flourish at the end.

**Rebecca Tomkinson**

Chief Executive Officer