

13 September 2022

Committee Secretary  
Senate Education and Employment Committees  
PO Box 6100  
Parliament House  
Canberra ACT 2600

**By email:** [eec.sen@aph.gov.au](mailto:eec.sen@aph.gov.au)

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022* (the **Bill**).

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

The disadvantages for workers associated with labour hire work, and other forms of precarious and insecure work, present a serious problem requiring meaningful legislative reform.

While we welcome any contribution which sees the problems associated with labour hire brought to the Parliament's (and the public's) attention, it is important that the issues are considered in a comprehensive way.

We are concerned that the Bill currently before the Committee seeks to address only one problem associated with labour hire work (the problem of labour hire workers being paid less than direct hire workers performing the same work) but its provisions do so only in limited circumstances and without dealing with other issues commonly associated with precarious and insecure work.

While legislative reform in this area is welcome, a more comprehensive approach is needed.

We offer the following discussion on the broader issues associated with labour hire and insecure work, and urge the Committee to ensure that any legislative considerations include these issues.



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## **The problem of labour hire and insecure work**

It is clear that insecure and precarious forms of work have increased and are increasing in Australia.<sup>1</sup>

Insecure and precarious work is characterised by work that involves:

- uncertainty over the length of a job;
- inferior and unpredictable pay;
- inferior conditions of employment;
- irregular and unpredictable working hours; and
- lack of control by workers over pay, conditions and the organisation of work.<sup>2</sup>

The engagement of workers through labour hire arrangements, where a host firm enters into a contract with a labour hire firm for the provision of labour hire workers, is one driver of insecure and precarious work in Australia.<sup>3</sup>

While the use of labour hire arrangements has boomed in recent years, a 2016 Queensland Parliamentary inquiry found that labour hire workers experience lower pay, poorer working conditions, higher rates of injury and fewer opportunities for training and development when compared to direct hire employees.<sup>4</sup>

Our experience in representing Australian workers who have fallen victim to such arrangements is supported by a large body of research that shows that:

- many workers in insecure and precarious employment experience:
  - a high degree of job uncertainty, with short term job engagements and high risk of job loss;
  - little control over wages, conditions and the pace of work;
  - insufficient pay to maintain a decent standard of living; and
  - lower levels of regulatory protection than direct hire or continuing employees;
- insecure and precarious work is often experienced by sectors of the workforce with the least bargaining power including those with lower skills,

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<sup>1</sup> Australian Parliament Select Committee on Job Security, The Job Insecurity Report, February 2022, Chapter 2, part 2.6, accessed at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Job\\_Security/JobSecurity/Fourth\\_Interim\\_Report/section?id=committees%2freportsen%2f024780%2f77987](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Job_Security/JobSecurity/Fourth_Interim_Report/section?id=committees%2freportsen%2f024780%2f77987).

<sup>2</sup> Alexander, Lillian, "Understanding Insecure Work in Australia", McKell Institute Queensland, accessed at: <https://mckellinstitute.org.au/wp-content/uploads/2022/02/McKell-Institute-Queensland-Understanding-Insecure-Work-in-Australia-1-2.pdf>, page 3.

<sup>3</sup> Ibid, 8.

<sup>4</sup> Queensland parliament Finance and Administration Committee, Inquiry into the practices of the labour hire industry in Queensland, Brisbane, June 2016, accessed at: <http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T1028.pdf>

women, migrant workers, young workers, Indigenous workers and people with disabilities; and

- insecure and precarious work exerts downward pressure on the wages, conditions and job quality of direct and continuing employees.<sup>5</sup>

For the reasons set out above, the disadvantages of precarious and insecure work for workers, including labour hire workers, is a legitimate issue requiring detailed consideration and comprehensive legislative reform.

### The purpose and scope of the Bill

The Explanatory Memorandum to the Bill makes clear that the Bill is limited in scope. It:<sup>6</sup>

- amends the *Fair Work Act 2009* (Cth) (**FW Act**) to require that, for labour hire workers covered by certain modern awards, the rate of pay being offered for the labour hire workers is the same or greater as for directly employed workers;
- relates to rate of pay only and is not retrospective;
- is designed to limit the use of labour hire contracts by removing the incentive for employers to do so, which is lower wages;
- encourages employers to make improved provisions for their labour requirements by retaining existing staff in permanent work arrangements, while training new staff through apprenticeships and traineeships;
- provides guidance and instruction to the Fair Work Commission (**FWC**) by effectively requiring an equal pay for equal work provision to be included in enterprise agreements entered into under certain awards;
- is award based to allow wages to be determined by negotiation between employee, union and employer, subject to award provisions; and
- enshrines that the choice of specified awards is based on two factors – a known failure in the market and acting to prevent the potential for labour hire contracts to affect industries covered by awards that do not provide for casual employment

The Bill provides that the FW Act will be amended by:

- adding a new section 333B which:
  - applies if a labour hire employer enters into a contract with a host employer for a labour hire employee of the labour hire worker to perform work for the host employer where, while performing the work, the labour hire employee is in a classification or class of work covered by a specified modern award;

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<sup>5</sup> Rawling, Michael, "Regulating Precarious Work in Australia: A Preliminary Assessment" [2015] UTSLRS 41; (2015) 40 Alternative Law Journal 252.

<sup>6</sup> Derived from Explanatory Memorandum: Outline, p.2

- requires the labour hire employer to pay the labour hire employee, in respect of the work:
  - a base rate of pay for their work hours 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; and
  - any incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or other separately identifiable amounts that are, or would be, payable to an employee of the host employer in the same classification or class of work;
- notes that the provision is a civil remedy provision; and
- identifies six specified modern awards, and makes provision for the Minister to specify other modern awards; and
- inserting at section 539(2) that:
  - an employee, an employee organisation or an inspector may apply for orders in relation to a contravention of section 333B(2);
  - the Federal Court, Federal Circuit and Family Court of Australia, and eligible State or Territory courts may make orders in relation to a contravention of section 333B(2); and
  - the maximum penalty for a contravention of section 333B(2) is 60 penalty units, or 600 penalty units for a serious contravention.

Maurice Blackburn offers the following commentary on the above:

1. In our view, the Bill is narrow in scope and, in the absence of other modern awards being specified by the Minister, the proposed amendments to the FW Act would only apply to workers covered by six modern awards.

The Bill offers no protection to workers in other parts of the economy where labour hire arrangements are common - including construction, transport, hospitality, cleaning and aged care and disability care services;

2. The Bill does not address issues such as lower conditions of employment, less control over hours and higher intensification of work for labour hire employees;
3. It is unclear how the Bill would meet the objective of encouraging employers to make improved provisions for their labour force by retaining existing staff in permanent work arrangements, while training new staff through apprenticeships and traineeships.

While the Bill may have the effect of disincentivising the use of labour hire workers over direct hire employees in some circumstances, it does not necessarily follow that this means that there will be an increase in apprenticeships and traineeships; and

4. It is unclear how the Bill would have a meaningful impact on whether wages are determined by negotiation between employees, unions and employers.

## The regulation of labour hire work in other jurisdictions

Maurice Blackburn believes consideration should be given to the ways in which employee-like rights are conferred on labour hire employees, and other precarious and insecure workers, in other jurisdictions. International experience can be instructive. For example, from the International Labour Organisation's 2016 report, *Non-standard employment around the world: Understanding challenges, shaping prospects*:

- Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work provides that during an assignment to a user firm, "the basic working and employment conditions" of temporary agency workers must be at least those that would apply if they had been recruited directly by the user firm to do the same job;<sup>7</sup>
- In several jurisdictions, only authorised entities can act as labour hire firms, and entities that are not authorised and not subject to the requirements of labour hire firms must offer a service that is distinct from merely employing workers and making them available to a principle. If this is not the case, and the subcontractor providing labour does not exercise control and direction over its workers, those workers may be reclassified as employed by the principal as a way of preventing abuses and the shedding of labour obligations and responsibilities. In continental Europe, for example, the prohibition of separation between the formal employer, who bears the employment risks and liabilities, and the employer who effectively owns the firm and exercises control and direction over the working activities, is reflected in the laws of Spain, France, Italy and Germany;<sup>8</sup>
- In Chile, the Labour Code distinguishes between genuine subcontractors, who autonomously execute works or provide services, and intermediaries, also stipulating that if a subcontractor merely hires out labour, the relevant workers will be considered employees of the principal;<sup>9</sup>
- Another common type of labour protection found in the regulation of subcontracting is to provide for a form of joint or subsidiary liability of the principal vis-à-vis the workers of the subcontractor;<sup>10</sup>
- In Germany, "employee-like persons" are covered by some legal protections normally afforded to employees.<sup>11</sup>

## The need for further reform

Legislative reform that is aimed at addressing the problem of labour hire workers being paid less for the same work when compared to directly hired employees is a necessary and welcome step.

This Bill, however, does not go far enough in addressing the entrenched and well recognised problems associated with labour hire work, and with precarious and insecure work more broadly.

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<sup>7</sup> International Labour Organization 2016, *Non-standard employment around the world: Understanding challenges, shaping prospects*, 31-32.

<sup>8</sup> Ibid, 34.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid 37.

Maurice Blackburn urges the Committee to recommend that what is needed is comprehensive legislative reform aimed at reducing the attractiveness of precarious and insecure work for businesses operating in Australia, and reducing the negative impacts of such work for workers themselves. Reforms that should be considered include:

- regulating the pay and conditions provided to workers engaged by labour hire firms operating in all parts of the Australian economy;
- ensuring employee-like rights and key minimum standards for pay and conditions (including in relation to hours of work and leave) are provided to workers in precarious and insecure employment through legislation; and
- allowing workers who are subject to control by a host firm to be deemed employees of those host firms and entitled to all of the benefits that would normally be afforded to a direct employee of the host firm, and/or providing that liability for the pay and entitlements of labour hire employees is shared by host firms.

Maurice Blackburn would welcome the opportunity to discuss these matters more fully with the Committee, if that would be beneficial.

Please do not hesitate to contact me and my colleagues on \_\_\_\_\_ or at \_\_\_\_\_ if we can further assist with the Committee's important work.

Yours faithfully,

Kamal Farouque  
**Principal Lawyer**  
**Maurice Blackburn**