Ai GROUP SUBMISSION

Senate Education and Employment Legislation Committee

Inquiry into the *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022*

15 September 2022

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee's inquiry into the *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022* (**Bill**).

The Bill would amend the *Fair Work Act 2009* (**FW Act**) to require that labour hire employers pay their employees covered by certain modern awards, rates of pay that are the same or greater than the rates of pay that host employers pay to their employees (including base rates, incentive payments, bonuses, loadings, overtime rates, penalty rates, allowances and other payments).

The equal pay requirement would apply *'in relation to a contract or an arrangement entered into on or after the commencement'* of the legislation.

Ai Group does not support the policy intent behind the Bill (i.e. to require labour hire companies to pay their employees at least the same rate of pay as that paid by client businesses to their own employees). Such a policy is unfair, inappropriate and unworkable for the reasons set out in this submission.

There are also several substantial drafting problems with the Bill, as discussed below.

Accordingly, we urge the Committee to recommend that the Bill is not passed by Parliament.

Labour hire employment in Australia

According to the latest ABS statistics, only 1.1% of the workforce is employed by a labour hire firm. This proportion is lower than it has been over the past 10 years.[1] Therefore, any argument that changes are needed because labour hire employment is increasing is not valid.

Many employees prefer the flexibility that labour hire employment offers them. They enjoy significant flexibility over their hours and work locations. They enjoy a lot of variety and rapidly gain new skills and experiences. Labour hire businesses typically provide work health and safety training and direct management support to their employees. Many provide best-practice employment conditions. Hundreds of thousands of employees choose to work in the labour hire industry.

The vast majority of labour hire companies are reputable in their employment practices and comply with relevant laws and regulations. Of course, there is a small number of employers and employees who do the wrong thing in every industry. However, there is no evidence that the incidence of wrongdoing in the labour hire industry is greater than any other industry.

[1] Characteristics of Employment, Australia.

The National Employment Standards, unfair dismissal laws, general protections and other provisions of the FW Act apply to labour hire employees, just like other employers. Similarly, awards apply to labour hire businesses and their employees. Most awards include a provision in the coverage clause expressly stating that the award applies to labour hire employers and employees.

Ai Group's views on the provisions of the Bill

Ai Group has a number of concerns about the Bill, as set out below.

The expression 'equal pay for equal work'

The expression *'equal pay for equal work'* has a long history with reference to the relative pay rates between men and women. A largely similar expression appears in various sections of the FW Act in relation to the important principle of *'equal remuneration for work of equal or comparable value'*, including:

- Section 134 – The modern awards objective
- Section 284 – The minimum wages objective; and
- Several sections in Part 2-7 – Equal Remuneration.

In the context of gender equality, the term *'equal remuneration'* replaced the term *'equal pay'* many years ago.

Even though the proposed Division 4 of Part 2-9 does not use the expression *'equal pay for equal work'*, this expression appears in proposed clause 52 of Schedule 1 and is likely to lead to confusion given the long history of this expression referring to the relative pay rates between men and women.

The relevant awards

The Bill would directly apply to employers and employees covered by the following awards:

- *Black Coal Mining Industry Award 2020;*
- *Aircraft Cabin Crew Award 2020;*
- *Australian Nuclear Science and Technology Organisation (ANSTO) Enterprise Award 2016;*
- *Fire Fighting Industry Award 2020;*
- *Maritime Offshore Oil and Gas Award 2020;* and
- *Seagoing Industry Award 2020.*

However, the Bill would give the Minister the ability to make regulations potentially vastly expanding the number of relevant awards, and hence vastly expanding the number of employers and employees covered by the requirements in the Bill. The breadth of this regulation making power is not appropriate.

We do not agree with the imposition of the proposed equal pay requirement in any industry, including the black coal mining industry and the aviation industry. Also, we can see no legitimate rationale for why the last four awards listed above have been selected just because these awards do not include casual provisions (as stated in the Explanatory Memorandum for the Bill).

Subsection 333B(1): Definitions of *'labour hire employer'* and *'labour hire employee'*

The Bill does not define a *'labour hire employer'* or a *'labour hire employee'* and this would create risks for a very large number of business-to-business contracting arrangements that are not legitimately regarded as labour hire.

For example, in the Hunter Valley and the Bowen Basin there are hundreds of businesses which provide various services to coal mining clients. For example, many small electrical contracting firms based around Muswellbrook and Emerald send electricians out to coal mine sites from time to time to carry out electrical repairs. There is the risk that these electrical contracting firms could be held to be 'labour hire employers' even though this would appear to not be the intent of the Bill.

This risk is highlighted by the extremely broad and inappropriate concepts of 'labour hire' reflected in the Queensland and Victorian labour hire licensing legislation. Many hundreds of contracting businesses (that on any reasonable definition are not labour hire businesses) have been forced to obtain labour hire licences under these laws in order to avoid the risks of non-compliance. This has imposed a substantial cost and ongoing regulatory burden on these businesses.

Most modern awards do not use the expression 'labour hire' but rather they use the expression 'on-hire', which is defined as follows:

> ***on-hire*** *means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client.*

If the Bill proceeds, despite Ai Group's opposition, the Bill should be amended to adopt the concept of on-hire employment in the modern award system in order to define a labour hire employer and a labour hire employee.

Paragraph 333B(2)(a): *'or would be'*

Paragraph 333B(2)(a) would require that the labour hire employer pay a labour hire employee:

> *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; and*

The meaning of *'or would be'* is unclear. If the intent is that the labour hire employer must pay the labour hire employee the same rate of pay as the host employer pays to its equivalent employees at each point in time, this is captured by the words 'that is payable'. The words *'or would be'* are unnecessary, and their inclusion would lead to uncertainty and potential unintended consequences.

Paragraph 333B(2)(b): *'or would be'*

The same problem as that identified above arises with the inclusion of the expression *'or would be'* in paragraph 333B(2)(b).

Paragraph 333B(2)(a) and (b): *'payable to an employee'*

The words *'payable to an employee'* in s.333B(2)(a) and (b) could mean that where the client company pays its employees varying amounts, the labour hire company can comply with the minimum pay requirement by paying its employees the amount paid to the lowest paid of the client's employees. However, the meaning is not clear. If this is the intended meaning, such an approach is at least more workable than requiring that some average rate be calculated or that the highest rate apply.

Paragraph 333B(2)(b): incentive-based payments, bonuses, loadings, monetary allowances, overtime, penalty rates and other separately identified amounts

Paragraph 333B(2)(b) appears to require a labour hire company to pay each of the following discrete items to each relevant employee, if such items are paid by the client to its own employees:

(i) incentive-based payments and bonuses;

(ii) loadings;

(iii) monetary allowances;

(iv) overtime or penalty rates;

(v) any other separately identifiable amounts.

This would be unworkable and unfair.

In the black coal mining industry and in other industries, it is common for both client businesses and labour hire businesses to have enterprise agreements with their employees which include loaded rates and/or annualised salaries. With these types of enterprise agreements, most of the items referred to in s.333B(2)(b) are typically incorporated in the loaded rates and annualised salaries.

If a labour hire employer pays its employees a higher total remuneration package than that paid by the client, how can it possibly be fair to require the employer to pay an even higher rate by forcing the employer to pay all of the discrete items in s.333B(2)(b)?

Incentive-based payments and bonuses

It would not be workable or fair to require a labour hire business or other contractor to pay the same incentive-based payments or bonuses to their employees as the client pays to its own employees, for reasons which include the following:

- Production bonuses are common in the mining industry. Bonuses are typically based on the mining company's production performance over a specified period (e.g. quarterly or annually). How could a labour hire employer know what amount it is required to pay each of its employees at each point in time when some employees are only employed for a short period? If the short period of employment for an employee aligned with the time when the mining company paid its employees an annual production bonus, it would be extremely unfair to require the labour hire company to pay the employee the annual bonus.

- Individual incentive-payments are typically based on the performance of each individual employee. Different employees perform at different levels and therefore the same incentive-payment is not paid to each employee. In such circumstances, how could a 'labour hire employer' conceivably determine the amount to be paid to its employees?

- Individual incentive-payments are typically confidential. In such circumstances, the labour hire employer would have no way of knowing the amount that it is required to pay to its employees.

- Some employers pay substantial flat dollar payments to their employees at the commencement of operation of their enterprise agreements. It would be unfair to require a labour hire company to pay its employees such an amount when often labour hire companies have their own enterprise agreements which include a schedule of wage increases, and may have included a flat dollar amount that was payable at a different point in time.

There are a wide variety of different types of bonuses and incentive schemes, including payment by results, merit pay, gainsharing, profit sharing and employee share plans. None of the payments under bonus or incentive schemes are appropriately or fairly included under any 'same job/same pay' requirement.

Monetary allowances

Monetary allowances usually relate to particular types of work that an employee undertakes, particular disabilities that an employee experiences, or particular expenses that an employee incurs.

It is extremely common for employees in the 'same classification or class of work' to be paid different allowances. For example:

- One employee may work underground more often than another;
- One employee may use an explosive power tool or work in a confined space whereas another employee may not;
- One employee may spend more time travelling between mine sites whereas another employee may work only on one mine site and not be entitled to a travelling allowance;
- One employee may use his or her own vehicle to travel on the employer's business, whereas another employee may travel in the employer's vehicle; and
- One employee may be supplied with meals by the employer, but another employee may be required to provide meals and be entitled to an allowance.

Allowances are not appropriately included in any 'same job/same pay' requirement. It would be unworkable and unfair to do so.

Overtime and penalty rates

If mechanical and electrical contractors are included within the concept of a 'labour hire employer', there will be major cost implications for thousands of businesses, which would threaten the viability of many businesses and threaten the jobs of thousands of employees.

These risks and adverse consequences are highlighted by the Bill's inclusion of penalty rates and overtime within the minimum pay requirement.

For example, in the Hunter Valley and Bowen Basin, small and large mechanical and electrical contracting firms are typically covered by the *Manufacturing and Associated Industries and Occupations Award 2020* or the *Electrical, Electronic and Communications Contracting Award 2020*. These awards include a 38-hour week and reasonable penalty rates. In contrast the *Black Coal Mining Industry Award 2020* includes a 35-hour week and extremely generous penalty rates that are much higher than most other awards.

How can it possibly be fair for a mechanical or electrical contracting firm whose office and workshop is based in Muswellbrook or Emerald to be required to treat all time worked beyond 35 hours as overtime, for the time when maintenance staff are carrying out repairs or shutdown work on coal mining sites?

Overtime and penalty rates are not appropriately or fairly included in any 'same job/same pay' requirement.

Any other separately identifiable amounts

The concept of *'any other separately identifiable amounts'* in s.333B(2)(b)(v) is extremely broad and uncertain. A vast array of different payments to employees could be captured.

It would be unworkable, unfair and inappropriate to include this concept in any 'same job/same pay' requirement.

Often businesses do not pay the same rate to employees in the same classification

The minimum pay requirement in s.333B appears to be based on the flawed assumption that all employees of a host employer in the *'same classification or class of work'* are paid the same wage or salary. This is clearly not correct in many circumstances.

For example, some of the awards specified in s.333B(4) cover professional employees (e.g. professional engineers), as do many awards that are not listed but could be included due to the proposed broad regulation making power. It is rare for all staff members of an employer in a particular professional classification to be paid the same salary.

For this reason, as drafted, the proposed minimum pay requirement in s.333B is unworkable.

Geographic locations

The minimum pay requirement in s.333B would apply to all labour hire employees covered by a *'contract or arrangement'* between the labour hire employer and the host employer. The minimum pay requirement in s.333B appears to be based on the flawed assumption that a *'contract or arrangement'* would only cover one workplace. Often this will not be correct.

Many labour hire and contracting firms enter into contracts or arrangement to supply labour (either on an on-hire basis or as part of a contract to supply parts and equipment) at many different locations. The workplaces at each location often operate with very different rosters which consequently leads to different penalty rates and shift loadings being paid.

Also, businesses often pay different base pay rates at different locations due to historical factors (e.g. a particular enterprise may have been acquired from another company) or due to market factors (e.g. higher base rates are often paid to employees who work in remote locations).

These important factors are not addressed in s.333B.

Non-monetary employment entitlements

Even though the minimum pay requirement in s.333B does not include non-monetary employment entitlements, we note that some of the union submissions to the inquiry propose that the Bill be amended to require labour hire employers to match all such entitlements provided by host employers to their own employees. Such an approach would be unfair and unworkable.

For example, some airlines give their employees the ability to purchase airline tickets at only 10 per cent of the cost, provided that seats are available. A 'labour hire employer' has no ability to offer this benefit to its employees. Similarly many employers have employee share schemes. A labour hire employer has no ability to offer its employees access to a client's employee share scheme.

Enterprise agreements

Even though the Bill would only apply to a *'contract or arrangement'* entered into after the legislation commences, this does not address the reality that many labour hire and contracting businesses have their own enterprise agreements. Such agreements are legally binding and commonly contain provisions that cannot be sensibly reconciled with the proposed requirements in s.333B. For example, many enterprise agreements contain loaded rates and/or annualised salaries.

Any 'same job, same pay' requirement that imposed obligations on an employer bound by an enterprise agreement before the nominal expiry date of the agreement would not be fair or workable.

Conclusion

For the reasons identified above, the imposition of a 'same job, same pay' requirement on labour hire and contracting businesses would be unfair, unworkable and inappropriate. This includes the proposals in the Bill that is the subject of the current inquiry.

We urge the Committee to recommend that the Bill is not passed by Parliament.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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