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

Senate Education and Employment Legislation Committee

ACCI Submission

September 2022



Australian
Chamber of Commerce
and Industry



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Introduction

1. The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to express the views of its members to the Education and Employment Legislation Committee (Committee) about the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (Bill).
2. ACCI has advocated the views of Australian businesses about the regulation of labour hire over a number of years, representing both labour hire providers and the businesses that contract with them (host or client enterprises), as well as the wider community's interest in an efficient labour market and economy. In November 2021, ACCI expressed the serious concerns of employers with the Fair Work Amendment (Same Job, Same Pay) Bill 2021, which would have threatened the viability of labour hire services and caused serious challenges for many workplaces across the country.
3. While the Bill represents an improvement on the Fair Work Amendment (Same Job, Same Pay) Bill 2021, mainly because of its limited scope, ACCI remains concerned that any amendments seeking to legislate a, so called, "same job, same pay" policy² will:
 - a. disenfranchise labour hire employees from rights to collectively bargain by limiting their ability to negotiate their own pay and conditions with their direct employer (the labour hire provider);
 - b. potentially see labour hire employees receive a new rate of pay (which they had no role in negotiating) whenever they are moved to a new host company; this would create ongoing uncertainty for labour hire employees;
 - c. limit employment opportunities, noting that labour hire companies create job opportunities for workers who may not have the skills or experience necessary to obtain employment elsewhere or for those who rely on the flexibility, and diversity of work, that comes with being a labour hire employee; and
 - d. significantly constrain business practices and reduce the flexibility businesses have to manage their workforces to cope with factors outside their control (such as seasonal demands or skills gaps), noting that labour hire workers are an important and legitimate source of flexible, often short-term labour, for a range of different businesses, across a wide range of sectors.
4. In addition to these broader policy concerns, ACCI has identified some specific issues with the Bill, including that:
 - a. while ACCI supports the approach of restricting the scope of this Bill so that it only applies to certain Modern Awards (therefore, specific industries), it's not clear why the particular Modern Awards listed at proposed section 333B(4) have been specified;
 - b. it does not include a definition of labour hire provider, noting that there is no definition at a Commonwealth level and definitions differ in those states that have labour hire registration schemes in place;
 - c. to comply with proposed section 333B, it will be necessary to identify a comparator employee within the host employer (client) in the same classification or class of work; however the Bill does not provide a sufficient test to assist parties in undertaking this comparative exercise; and
 - d. calculating the monetary benefits above a comparative employee's base rate of pay could cause significant practical and payroll complications.

¹ Introduced by the then opposition leader, the Hon. Anthony Albanese MP

² Generally to provide that workers employed by a labour hire company will receive the same pay and conditions as people employed by the host company (or client).

5. Notwithstanding the broader policy and practical concerns listed above, this submission will focus on the specific concerns that ACCI has identified with the provisions of the Bill.

Issues arising from the Bill

Scope and selection of Modern Awards

6. Confining the scope of the Bill to six Modern Awards with ministerial discretion to prescribe further Modern Awards under proposed section 333B(4) is preferable to a scope that could impact all industries in which labour hire operates. This focused approach allows Government, as a matter of policy, to target specific industries where it believes an issue exists.
7. The proposed section 333B(4) seeks to capture six categories of employees:
 - Black coal mining employees;
 - Aircraft cabin crew;
 - Australian Nuclear Science and Technology Organisation (ANSTO) employees;
 - Firefighters;
 - Maritime offshore oil and gas employees; and
 - Employees in the seagoing industry.

Black coal mining and airline industry

8. The proposed explanatory memorandum to the Bill states that the *Black Coal Mining Industry Award 2010* and the *Aircraft Cabin Crew Award 2020* have been specified because black coal mining and airline employers have used labour hire arrangements to “undercut wages” and “destroy hard-won entitlements for workers”.
9. There is no conclusive evidence to support the claim that labour-hire employees are paid less than those who are directly employed by the host company for doing the same work in either industry. The Australian Bureau of Statistics (ABS) issues industry-specific labour force data that provide the best available information for employment and wages in mining. It shows that the median weekly earnings of mining employees paid by a labour hire firm are approximately \$300 more (or 13 per cent higher) than the median weekly earnings of direct hire mining employees³.
10. There is no data available specific to labour hire arrangements in the coal mining industry due to how small the industry is, but data for the wider mining industry is informative. Additionally, the Committee has previously heard evidence that labour hire employees in the coal mining industry are paid on average about \$120,000 annually, which is about 190% of the award rate (approx. \$1,170 per week).⁴ The massive quantum of pay in excess of the statutory minima is an important point when considering whether pay rates of labour hire employees in the industry are “fair” or “just”.

³ Australian Bureau of Statistics, Characteristics of Employment, Australia, August 2021, released 14 December 2021, table 3.2; Average Weekly Earnings, November 2021, released 24 February 2022, table 10H; Employee Earnings and Hours, Australia, May 2021, released 19 January 2022, data cube 5; ABS data cited by Attorney-General’s Department, Answers to questions on notice from Senate Select Committee on Job Security, 3 February 2022, p. 3; Australian Bureau of Statistics, Labour Force, Australia, Detailed, February 2022, released 24 March 2022, table 6.

⁴ Job Security Committee, 28 July 2021 Hearing, [Hansard](#), p43-44

11. It's unlikely that any source of data could accurately capture whether a labour-hire employee is being paid less than a direct employee for doing the "same work". A comparative assessment would need to be undertaken on a case-by-case basis and consider the skills, expertise and experience of the employees, the work being undertaken, the shift cycles and rosters worked, and the nature of the payments being made.
12. While any claims that labour-hire employees are paid, on average, less than those who are employed by the host company for doing the same work would need to be tested, this is not the most important issue. Ultimately, the only relevant considerations are whether:
 - a. labour hire employees are paid in accordance with, or far more commonly in excess of, any relevant Modern Award; and
 - b. critically, labour hire employees have had an opportunity to negotiate, and agree to, their own terms and conditions.
13. Labour hire employees have the same rights and protections as employees in all other types of businesses, including the same Modern Award entitlements and the same rights to bargain for terms and conditions in excess of the relevant Modern Award. There is no requirement under Australia's workplace relations framework for enterprise agreements to provide for a particular level of pay above the safety net – only that every employee is better off under the agreement compared to the relevant Modern Award.
14. The right of employees to bargain directly with their own employer for terms and conditions that suit the circumstances of that workforce is the central premise behind enterprise bargaining. Indeed, under our system it is common, and uncontroversial, to see employees of different employers working side by side at the same worksite but employed under different terms and conditions. For example, businesses are engaged to provide different services at sites such as shopping centres, manufacturing sites, construction projects, mine sites and airports. This is not limited to sites where labour hire employees work.
15. If it became law, the Bill would see labour hire employees being the only workers in Australia deprived of the opportunity to negotiate their own pay and conditions.
16. Significantly, questions remain about the impact of this legislation on the object of the Fair Work Act 2009 of 'achieving productivity and fairness through an emphasis on enterprise-level collective bargaining'⁵ when in effect, it deprives labour hire employees of the ability to collectively bargain and determine their own wages.

Other specified industries

17. The proposed explanatory memorandum to the Bill explains that the remaining Modern Awards have been included, despite the industries they apply to not having "a problem" with labour hire arrangements, because these Modern Awards do not "have a provision for casual employment". It states that "this is because of the safety issues inherent in each industry and the need to have settled, trained staff". This is not correct.
18. Casual employment can, and does, exist in each of these industries. Casuals can be engaged under enterprise agreements and individual contracts. It is not the case that the absence of references to casual employment in Modern Awards is evidence of a ban on casual employment in certain industries.
19. It is, therefore, unclear why these Modern Awards have been specified in the Bill.

⁵ Fair Work Act 2009 s 3(f).

No definition of 'labour hire'

20. As there is no clear definition of labour hire provider in Australia the Bill will need to include one. Any definition would also need to be considered in the context of the Federal Government's proposed national labour hire registration scheme, especially as inconsistency would be problematic.
21. There have already been significant concerns raised by business in response to the state/territory governments' differing approaches to defining labour hire for the purposes of the labour hire licensing laws in Queensland, Victoria, South Australia, and the Australian Capital Territory.
22. Labour hire is hard to define in practice, and could, in the absence of a carefully crafted definition, inadvertently and quite damagingly for employers, employees and communities, capture a broader range of arrangements not usually characterised as "labour hire", such as service providers, i.e., those companies that provide services rather than labour.

Identifying the 'comparator'

23. To comply with proposed section 333B, it will be necessary to identify a comparator employee within the host employer (client) in the same classification or class of work; the Bill does not provide a sufficient test to assist parties in undertaking this comparative exercise.
24. It does clarify that the same work for the same pay rate test should take into account that some employees may be on the same shift, but working a different roster and that a different roster may be a factor that justifies their differing rate of pay.⁶
25. The Bill, as drafted, will not assist an employer in determining how, for example, the skills, tenure, experience and qualifications of both employees could affect the comparative assessment. Similarly, there is no guidance to assist employers comparing the work being undertaken.
26. The Bill also fails to clearly identify which employee 'in the same classification or class of work for the same hours of work' the labour hire employee's pay must be the same as in circumstances where there are several employees earning different wages in that classification or class of work. ACCI submits that the relevant comparator ought to be the employee earning the lowest wage in that same classification or class of work as otherwise the legislation would unfairly place direct employees in a position where they are earning less than labour hire workers.

Calculating 'same pay'

27. While ACCI supports the approach set out in the Bill to restrict the obligation for equal entitlements to pay, exclusive of other employment conditions, calculating 'same pay' will still prove difficult for employers in practice.
28. The proposed section 333B(2)(b) would require labour hire employers to pay labour hire employees any incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and any other separately identifiable amounts. This has the potential to pose significant challenges for labour hire companies and the utilisation of labour hire because interpreting the correct amounts that constitute these additional payments is not straightforward.
29. The interpretation of enterprise agreements is often difficult enough for the enterprise that is legally bound by it, let alone for a third party that was not involved in its drafting or the bargaining which led to it.

⁶ Proposed section 333B(3) of the Bill

30. Forcing labour hire companies to interpret numerous different enterprise agreements for potentially hundreds of employees for each individual contracting host entity has the potential to be a insurmountable and extremely costly task. It also unfairly exposes labour hire companies to quite unintentional breaches of the proposed legislation. These are all compounded by the fact that labour hire employees are often working at multiple different sites across a week. To avoid these consequences, only the comparator's base rate of pay should need to be considered and met in any new obligations.

Conclusion

31. The restricted scope of the Bill to specific industries and only the pay of the relevant comparator exclusive of conditions makes it a far more viable solution to purported problems in the labour hire industry than alternatives to date.
32. However, the Bill in its current form still poses serious challenges to the legitimate engagement of labour hire by Australian businesses and to the rights of labour hire employees. The Committee is encouraged to make recommendations for amendments in accordance with the concerns of employers identified in this submission.

ABOUT ACCI

The Australian Chamber of Commerce and Industry (ACCI) is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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