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RCSA Submission to the Senate Education and Employment Legislation Committee on the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022

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Overview

The Recruitment, Consulting and Staffing Association (RCSA) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee (the Committee) regarding the *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022* (the Bill).

RCSA is the peak industry body for the recruitment and staffing industry in Australia, representing more than 850 businesses in recruitment and staffing, which includes the on-hire employment sector. Our industry is a vital and dynamic component of Australia's employment landscape. In Australia, the on-hire sector employs over 500,000 people who are sourced and placed across a variety of industries and workplaces, supporting labour and professional demands across all forms of business and government.

Throughout COVID-19, the on-hire workforce was a vital support for workers, business, and the economy throughout a disruptive and uncertain period. The speed and efficiency of the on-hire industry in mobilising our workforce in response to labour market shifts in the past couple of years kept hundreds of thousands of Australians in work. It also ensured business had access to fast and flexible skills and labour to quickly move out of the economic downturn that transpired from the lockdowns and border closures—enabling Australia to recover more quickly from the economic impacts of the pandemic.

In addition to providing support for business to innovate, grow and create jobs, in many sectors on-hire services fill a need that cannot be met with a permanent workforce. Our member's workforces are often used to provide contingent labour to fill gaps in the direct-hire workforce but also importantly, to provide non-permanent labour to support and sustain significant infrastructure and other projects, or to support businesses to maintain effective operations in sectors where demand for labour can fluctuate significantly across seasons or based on external factors.

In some industries, such as those heavily reliant upon or impacted by commodity prices, the ability for business to expand or contract its workforce in response to pricing shifts underpins its ability to remain viable. In those scenarios, the on-hire workforce is essential to the ongoing operations of that business and to supporting its ability to continue to deliver jobs and economic activity across its industry and across the broader economy.

For many workers in the on-hire sector, flexible work offers them greater autonomy over their working lives. They can choose when and where they want to work, how long for, and for which host-business. It allows them to structure work around their life and other commitments, better facilitating and supporting work within personal priorities such as study, semi-retirement, family or caring commitments.

For many, it provides an opportunity to earn higher wages as well. A study conducted by Melbourne University's Inga Laß and Mark Wooden found that, on average, Australian on-hire workers are paid more than directly hired permanent employees, directly hired fixed term contract employees and directly hired casual workers. The study found that the wage premium for on-hire workers employed on a casual basis is higher than that for other casual workers.[1] It also found that high-paid—which often equates to highly-skilled—on-hire workers have a far more pronounced wage premium than that of casual employees at that same level, and more again for on-hire workers employed on fixed-term contracts, who receive by far the largest wage premium.

A significant proportion of on-hire workers are engaged as casual workers, through their own choice. Earlier this year, RCSA surveyed its membership on the casual employment law changes, including conversion pathways, to understand what engagement with the mechanism looked like in practice. The results revealed that only around 20% of casually employed on-hire workers who were eligible to convert responded to the offer, and the vast majority of that engagement was from employees who were confused or concerned about the offer and what it meant. The actual number of employees who elected to convert upon the offer was 3.2%. The main reason for employees expressly rejecting an offer of conversion was because they wanted to maintain flexibility, while many others preferred to maintain their annual and sick leave loading as a payment within their wage.

In industries where on-hire is used more prevalently to support project-based work, we would anticipate conversion rates would likely be lower again, as staffing firms in these industries are increasingly employing their workers on a permanent fixed term contract basis. Indeed, in the mining sector, RCSA is aware of an increasing number of member businesses offering workers the choice of engagement as a fixed term permanent employee or a casual at the time of engagement. In those scenarios we would anticipate casual conversion to be next to negligible, given employees have usually elected by be engaged by their preferred method up front.

In the context of today's labour market, the vast majority of people working in on-hire work are more likely than ever to be working that way through choice. Employment data suggests that people who prefer to be directly hired by a business have more opportunity to achieve that goal than has existed in almost a generation. With job vacancies sitting 111.1% higher than in February 2020,[2] permanent job opportunities are growing faster than flexible ones,[3] as employers move to 'lock in' talent wherever possible in the face of the current skills and labour shortage.

[1] Laß, I. and Wooden, M., 2019. The Structure of the Wage Gap for Temporary Workers: Evidence from Australian Panel Data. *British Journal of Industrial Relations*, 57(3), p 474.
[2] Australian Bureau of Statistics. 2022. *Job Vacancies, Australia, May 2022*. [online] Available at: <https://www.abs.gov.au/statistics/labour/jobs/job-vacancies-australia/latest-release>.
[3] Thejobsreport.com.au. 2022. – *AUSTRALIA – The Jobs Report, April – June 2022*. [online] Available at: <https://www.thejobsreport.com.au/report/australia-the-jobs-report-april-june-2022/>.

Pay Disparity

RCSA acknowledges that there are a small number of industries in the labour market where on-hire workers may earn a lower wage than directly hired counterparts who are engaged through a client's own industrial agreement. In the instances, however, it is important to note that the on-hire workers in question are paid in accordance with, and often well-above, the applicable award. Beyond that, on-hire workers in this situation tend to be employed under a staffing firm's own Enterprise Agreement that has been endorsed by the Fair Work Commission (FWC), and in some instances the relevant Union as well.

As identified in the study by Inga Laß and Mark Wooden, across Australia on-hire workers are, on average, paid more than directly hired permanent and casual workers. Given that is the case, it is interesting that there appears to be a very small number of industries where negative pay disparity exists between on-hire and directly hired workers, especially given that some of those industries are ones where all workers—both direct hired and on-hired—are earning well above award rates and are on incomes that are high relative to the broader Australian labour market.

Indeed, evidence indicates that instances of negative pay disparity for on-hire workers compared to their directly hired counterparts is very much the exception, rather than the rule. For that reason, RCSA commends the Bill's attempt to focus its coverage on industries it identifies as being of concern.

RCSA is strongly of the view that regulation designed to address behaviour that is isolated or particular to a specific set of circumstances or sector should direct its coverage and influence to that area alone. The alternative would risk creating enormous regulatory, administrative, and cost burden for businesses undertaking activity which in no way reflects the focus of the legislation itself – in this case, negative pay disparity for on-hire workers.

That being said, it is important that any proposal to limit coverage of regulation to particular industries or awards proposes a robust and transparent method for assessing their inclusion. There is little evidence or commentary that explains why, or how, particular awards were identified for inclusion, nor the evidence that exists to suggest that action is necessary. Moreover, there is no suggestion around what evidence should be used to assess industries or awards for future inclusion should other areas of concern emerge.

While RCSA strongly supports narrowcasting of coverage to industries where there is evidence of concern, we also believe that coverage and inclusion needs to rely on a base of evidence and transparent measures, and not just on media headlines. The administrative and cost impact for business through inclusion in this type of regulation deserves evidence for its application.

RCSA urges the Committee to consider that, given that concern around pay parity for on-hire workers tends to be isolated to industries and awards, in constructing any form of regulatory activity or response, it is equally important to also consider the broader circumstances that may have contributed to its emergence.

In the case of industries and awards identified by the Bill, it is likely that there are broader industrial considerations that are relevant to any solution. For that reason, Equal Pay for Equal Work

regulatory measures are likely to have significant—and in some cases greater—implications for the viability and sustainability of an on-hire staffing firm's clients than for the staffing firms themselves.

The on-hire industry plays a vital and valuable role for business. As expert workforce advisers, managers, and consultants, staffing firms enhance professionalism and outcomes when it comes to workforce management. Clients engage staffing firms for the value and service they bring to this task, not because they present an opportunity to reduce wages and conditions. As mentioned earlier, on average across Australia, on-hire workers earn more than their directly hired counterparts.

In sectors identified for coverage by this Bill, many workers already receive high incomes by comparison to much of the rest of the country and the staffing firms supplying them are valued by their clients as expert workforce managers and advisers. While this regulation is directed at the labour-hire arrangements, the effect of regulation on the on-hire sector is likely to be less impactful for staffing firms than it is for their client businesses. The ability for some of the sectors identified to adapt to meet fluctuating market demand relies upon the ability of industrial instruments to support the flexibility required to deliver sustainable operations in the long term. Any regulatory change needs to be considered within that context.

Which Pay, Which Worker and Which Site?

RCSA welcomes the ambition of the Bill to limit any Equal Pay for Equal Work Scheme to pay, given the near insurmountable administrative and compliance complexities which would be associated with incorporating employment conditions.

That said, RCSA stresses that clearly defining obligations and expectations within regulation is paramount to compliance and administration of any scheme. We are concerned that the definitions contained within the Bill currently will, in operation, give rise to more questions, issues and errors than they resolve.

More specifically, the concept of a *Base Rate of Pay (*BRoP*)* requires more precise definition. The definition in section 16 of the *Fair Work Act 2009* (FWA) is not fit for purpose in this context. That is because the section 16 definition applies to the BRoP for an individual employee. It does not define a BroP for a group of employees within the same classification, who may all be paid different amounts consistently with the Award. A BroP that is specified in an Award, is a *minimum* not an *average*.

Example: Company X employs three clerks under the same Group A classification pursuant to the *Black Coal Mining Industry Award 2010.*

- Clerk A receives the Award Group A min base rate of pay: $28.07 per hour ($98.240 pw)
- Clerk B receives a slightly higher amount of $29.85 per hour ($1,006.25 pw) – above the Group A min but still below the Group B min.
- Clerk C, for reasons related to scarcity at the time of recruitment, was attracted by a substantially above-award offer and receives $35 per hour ($1,225 pw).

Q1: Company X now seeks a temporary placement of a fourth Clerk D. What is the *'base rate of pay that is, or would be, payable to an employee of the host organisation in the same classification or*

class of work for the same hours of work' for clerk D? Clerk A is *'an employee … in the same classification'.* Is the BroP for Clerk D therefore to be at least $28.07 per hour – the Award minimum? Or is it the average of A, B and C?

Q2: Company X seeks two temporary placements—Clerks E and F to replace Clerks A and C. Do Clerks E and F both receive $28.07 per hour; or does one of them receive $28.07 as the replacement for Clerk A, whilst the other receives $35 as the replacement for Clerk C? Who as between E and F receives the higher amount? Does it come down to a coin toss?

If it is the intention of the Bill that staffing firms should pay their workers in accordance with the lowest amount that their client is paying any of their workers in this classification for the same hours, then the provision is perhaps workable. However, the meaning needs to be stated clearly, and preferably in the legislation, as it has not been stated in the extrinsic materials. If that is not the intention, then the definition of BroP needs to be amended to provide an average or benchmark in this context. Averages and benchmarks will be difficult to establish in the case of host organisations who have many employees working under the same classification.

The notion that the BRoP, in cases where the host organisation does not have employees in the classification, would be the rate determined against *'similar rates of pay for directly employed workers in that industry'* is again a difficult objective. Similar according to what parameters? Award classification only? Time and circumstances of recruitment? Geographic location, State or Territory? Is it an average? Is it a figure within a percentile? Would that be an upper percentile or a lower one? Would a on-hire firm have to have regard to ABS figures, or engage a national accounting firm to undertake a survey and provide a report? Why would the Award minimum not be the benchmark?

The above issues are somewhat resolved where there is an EA in place at the host employer's workplace. EAs are publicly available documents that clearly outline the rates of pay in accordance with the skills and experience of the workers to whom they apply. With far limited discretion in how much these workers are being paid, it may be easier to then ascertain the rates that would be owed to an on-hire worker if an Equal Pay for Equal Work provision applied. Nevertheless, the regulation fails to consider several key questions in its requirement of the Fair Work Commission to ensure it is included in all future EAs.

Firstly, reality has shown that even where there is an EA in place, there is no guarantee that a worker is being paid at that base amount. Analogous to awards, there will be workers—both on-hire and direct-hire—who are paid at a higher rate than that of the EA. In these instances, the Bill provides little clarity as to how a staffing firm will determine which rates are being paid to whom and what they must then pay their workers.

Moreover, with the Explanatory Memorandum outlining how the Bill will not be retrospective, and therefore presumably not applicable to current EAs, in instances where on-hire workers are covered by a host-site's EA, the regulation will work to create two classes of on-hire workers:

1. Those who are working to an Award or EA with an Equal Pay for Equal Work provision contained; and
2. Those who are accounted for in a current host-site's EA, where although there are minimum rates of pay, discretion may be taken to pay the direct-hire workers a greater amount.

Is the Committee therefore satisfied that the Equal Pay for Equal Work may potentially only apply to the first class of workers?

The Bill also fails to account for situations in which on-hire workers are subject to their own EA. As previously advised, many staffing firms have developed, and are event currently re-negotiating, their own EAs with their workforce. How will these agreements interact, or be dealt with, under a proposed Equal Pay for Equal Work Scheme?

Also, concerningly, the Bill seems to completely ignore a major function of the on-hire workforce, in its failure to account for—or even consider—the impact of the regulation on a worker's movement across multiple host-sites and the subsequent application of multiple rates of pay that might apply to their work.

The challenge for workers deployed on multiple short-term assignments is significant. It means that workers will not have any certainty about the income they receive from one assignment to the next and prevents an opportunity for them to establish an individual or collective arrangement that suits their specific circumstances. RCSA asserts that this Bill does as much to challenge employee rights as it does to address deprivation.

In fact, this Bill creates an environment where on-hire employees could find themselves paid under an agreement struck with a person who is *not* their employer and with whom they have no ongoing employment relationship. Moreover, it poses a challenge of confidence for those workers, who will not necessarily have any insight or understanding around their anticipated income from one assignment to the next. Any Equal Pay for Equal Work Scheme would need to give far greater consideration to those complexities before implementation could occur.

While there are a considerable number of questions arising from its application to EAs, the failure to limit Equal Pay for Equal Work measures to EA covered employees threatens to make the regulation unwieldy and impossible to administer. It proposes to impose an obligation upon an on-hire firm to obtain contractual information from their clients about any private arrangements in place with workers performing the 'same class of work as their on-hire worker and ensure that those arrangements are matched. It imposes no such obligation upon the on-hire clients' business to provide that information.

Limiting the Minister's Capacity to Broaden the Legislation

As outlined earlier in this paper, RCSA believes that regulation that limits coverage to industries or awards should involve a robust and transparent method for assessing inclusion. There is little evidence or commentary to suggest how particular awards were identified for inclusion. Likewise, there is little transparency around what evidence should be used to assess industries or awards for future inclusion should other areas of concern emerge.

Given that the choice of awards referenced in the Bill is driven, according to the *Explanatory Memorandum*, by two factors:

a) *a known failure in the market;*
b) *acting to prevent the potential for on-hire contracts to affect industries covered by awards that do not provide for casual employment*

There should also be some provision that limits the Minister's power under section 333B(4)(g) to extend the range of specified awards merely 'by legislative instrument' to like cases that can be demonstrated by evidence. Failure to do so will have the effect that the amendment will be perceived as 'the thin end of the wedge', and potentially used to enforce an ideological misconception in the many industries where on-hire workers are paid more than their direct-hire counterparts.

Retrospective Application

As previously discussed, pay disparities between on-hire and direct-hire employees under the industries and awards referred to in the Bill have commonly arisen from the relevant host-employer's inability to meet both the terms of an EA and project demands. For this pay disparity to be truly rectified, however, the Bill would need to address these agreements, rather than simply leaving them to continue in operation. Not doing so, leaves the regulation open for on-hire workers currently covered by their host-site's EA to be paid less than their direct-hire counterparts.

To this end, RCSA contends that the Bill must introduce Sunset Clause for all current EAs made under the Awards. Not only would this provide opportunity for these EAs to be re-negotiated, but it would ensure that *all* on-hire workers within these industries would be covered by Equal Pay for Equal Job provisions.

Consideration and Application to Other, Competing Forms of Labour Supply

For any Equal Pay for Equal Job Scheme to be effective, lawmakers must consider—and make provision for—potential arrangements and activity within the market that will seek to undermine or circumvent it.

For example, over the last five years, 'Labour Hire' Licensing Schemes have been introduced in Victoria, Queensland, South Australia, and the Australian Capital Territory. Except for South Australia, the scope of these schemes capture on-hire arrangements across the entire industry. Although these Schemes appears far reaching, this is superficial. The effect of focusing regulation upon the structure of a on-hire arrangement, as opposed to the behaviour – ie: the activity of supplying labour as a significant portion of a 'service' - has seen a number of unscrupulous operators simply evolve into provision of a contract service, which happens to rely heavily on labour provision. This enables them to avoid coverage of on-hire licensing schemes, and their enforcement provisions, but carry on with supplying labour to clients under a different model.

As noted by the former Government's Migrant Workers Taskforce in 2019, 'while the scope of the laws are still to be tested, it appears that there is a risk that some laws will only capture traditional triangular supply type on-hire arrangements and not workforce contracting arrangements that form a critical source of labour in some sectors. As a result, it is unclear to what extent the laws as drafted will achieve their objective of protecting vulnerable workers'.[4]

[4] 2019. *Report of the Migrant Workers' Taskforce*. Attorney-General's Department, p 105.

We have also seen independent contracting arrangements increasingly used to avoid employer obligations, including proper pay. Particularly in the aged and community care sectors, platforms posing as 'job-matching services' have been successful in placing these workers in facilities, as well as in people's homes. By avoiding an employment relationship, they can offer cheaper alternatives to employed labour that carry significantly greater risk for the worker and the end-user.

There is no doubt that there will be operators who explore the opportunities of avenues such as these to continue their behaviour outside of the coverage of this Bill, undermining its ambition and putting pressure on operators adhering to equal pay for equal work provisions. RCSA therefore submits that any Equal Pay for Equal Work Scheme must consider how it can be applied across all forms of market activity relating to the provision of labour, not just to labour-hire structures. Regulation needs to adequately address the activity and behaviour, not the structure, if it is to have any real impact.

Relevance in Evolving Industrial Relations Landscape

Following the Government's Jobs and Skills Summit, we are seeing enhanced discussion around significant changes to the industrial relations regulation landscape. Multi-employer bargaining—which would presumably see labour-hire providers and their workforces drawn into industry-wide negotiations and agreements—has the potential to impact upon any Equal Pay for Equal Job Scheme that is introduced, given the desired outcome is relatively similar in both.

Although RCSA acknowledges that the Bill was drafted prior to the Summit, these current discussions must now be considered when assessing the draft legislation before the Committee. Going on step further, perhaps these debates should even be played out before introducing a scheme that may prove redundant in the face of concurrent industrial relations changes.

Summary

RCSA understands and supports the overarching intent of the *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022,* but not at the expense of a regulatory system that provides certainty for businesses and employees. We, at RCSA, welcome the opportunity to participate in this and other discussions around pay parity.

We remind legislators that the issues this Bill proposes to address are not widespread across industries and occupations, and that on average, on-hire workers are paid more than directly hired permanent employees, directly hired fixed term contract employees, and directly hired casual workers.

It is important to understand, as well, the depth of complexity involved in the proposal and its implications for businesses to administer and comply with the measures outlined. To that end, we have concerns around the naivety of its approach and the impact of its failure to adequately consider the complexity of its measures for businesses for whom it imposes obligations.

RCSA is committed to getting the right balance between flexibility and responsibility in the labour market, however we are concerned this Bill not only fails to strike that balance but creates a series of obstacles for on-hire staffing firms, their workers and their clients, that are extraordinarily difficult to overcome or effectively administer. Each of the concerns outlined in this submission would need to be resolved before RCSA could support any form of this Bill's presentation to Parliament.

As always, RCSA is happy to work with the Government, Senator Roberts and any other interested parties to discuss and expand on these matters in greater detail.

About RCSA

RCSA is the peak industry body for recruitment, staffing and workforce solutions in Australia and New Zealand.

RCSA promotes and facilitates professional practice within the recruitment and staffing industry. It sets the benchmark for industry standards through representation, education, research and business advisory support to our member organisations and accredited professionals who are bound by the ACCC authorised RCSA Code for Professional Conduct through membership.

RCSA is a proud member of the World Employment Confederation, the voice of the recruitment and staffing industry across 50 countries, and the Australian Chamber of Commerce and Industry, Australia's largest and most representative business network.