



Australian Government  
Department of Employment  
and Workplace Relations

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

Submission of the Department of  
Employment and Workplace Relations to the  
Senate Education and Employment  
Legislation Committee

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

## Introduction

The Department of Employment and Workplace Relations has portfolio responsibility for the *Fair Work Act 2009* (Fair Work Act) and for implementing the *Secure Australian Jobs Plan* announced by the Australian Government before the 2022 Federal Election. Most relevantly, the *Secure Australian Jobs Plan* stated that the Government will ensure that workers employed through labour hire or other employment arrangements such as outsourcing will not receive less pay than workers employed directly.

The Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (the Bill) was introduced by Senator Malcolm Roberts in February 2022 and restored to the Notice Paper on 27 July 2022.

The Explanatory Memorandum for the Bill states “Where there has been a failure of balanced market power this new provision can be employed to restore fairness.” This aligns with the policy intent of the Government’s ‘same job, same pay’ election commitment – to restore fairness between labour hire and directly engaged workers.

This submission provides an overview of the Government’s election commitments relevant to the Bill and includes other background information such as data on use of labour hire in the Australian labour market and international examples of ‘same job, same pay’ regulation.

## The Government’s election commitments on labour hire

Under the Fair Work Act, a labour hire employee and a directly employed employee may be engaged under different industrial instruments, which can result in workers who are on the same job site and undertaking the same work receiving different wages and entitlements.

In 2021, the Senate Select Committee on Job Security heard evidence of labour hire and other non-standard arrangements having a range of negative impacts, such as being misused to undercut the pay and conditions of directly employed employees and limiting workers’ ability to exercise their rights in the workplace. As noted by the Senate Select Committee, ‘evidence indicates that, in many cases, a host’s enterprise agreement does not apply to their labour hire workers, resulting in differential treatment between these individuals and those directly employed by the host.’<sup>1</sup>

The Senate Select Committee also noted a considerable body of research into the safety and health implications of the utilisation of labour hire and other types of temporary and insecure arrangements in the mining industry. These included a higher incidence of fatalities, poorer physical and mental health and a poorer knowledge of, and access to, regulatory employment rights.<sup>2</sup>

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<sup>1</sup> Senate Select Committee on Job Security, Parliament of Australia, *Third interim report: labour hire and contracting* (Report, November 2021), [2.80].

<sup>2</sup> Senate Select Committee on Job Security, Parliament of Australia, *Third interim report: labour hire and contracting* (Report, November 2021), [2.103].

Under the *Secure Australian Jobs Plan*, the Government has committed to delivering more secure jobs, better pay and a fairer workplace relations system. This includes ensuring that labour hire workers, and workers engaged under other non-standard arrangements such as outsourcing, receive no less than directly engaged employees performing the same work.

The Government has acknowledged there are legitimate uses for labour hire, such as instances where employers need to use labour hire to provide surge capacity or provide important expertise that is not available within its own workforce. Businesses across all sectors of the economy can utilise labour hire to complement their existing workforce with specialist skills on a short-term basis. However, the Government is committed to ensuring that labour hire is not misused to undercut the pay and conditions of directly engaged employees performing the same work regardless of the industry in which they work.

The Government is currently undertaking a consultation process to inform the implementation of the ‘same job, same pay’ principle, recognising the complexities of this measure. The Government is consulting with a range of stakeholders including unions, employer groups, and employers with a view to introducing legislation in the first half of 2023. The Government is consulting on a broad range of issues, including the scope of the reform, the various definitions of ‘labour hire’, worker entitlements, comparators, the operation and application of enterprise agreements, the rights and obligations of businesses, including labour hire and hosts, and the potential impact on business, industry, the labour market and the economy.

In addition, the Government has committed to implementing a national approach to labour hire regulation as part of its *Plan to Build a Stronger Pacific Family* election commitment. A nationally consistent approach to labour hire regulation will help to protect workers by promoting greater compliance with workplace and other relevant laws by labour hire companies.

## Labour hire in the Australian labour market

The Australian Bureau of Statistics (ABS) provides a range of data related to labour hire work, workers and businesses. Consistent with advice from the ABS, *Characteristics of Employment* is the best long-standing source of information on labour hire as a working arrangement.<sup>3</sup> Like the Labour Force Survey data, *Characteristics of Employment* describes how Australians are working at a single point in time.

Table 1 shows the overarching trend and incidence of labour hire employees. Table 2 details various characteristics of labour hire employees.

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<sup>3</sup> “The best source of information on labour hire as a working arrangement in Australia is the annual *Characteristics of Employment* supplement. This provides information on whether employees were registered with a labour hire firm or an employment agency, and also whether they were paid by a labour hire firm or an employment agency.” (Select Committee on Job Security, Answers to Questions on Notice, ABS – Answers to written questions on notice from Senator Sheldon, 22 November 2021, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Job\\_Security/JobSecurity/Additional\\_Documents?docType=Answer%20to%20Question%20on%20Notice](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Job_Security/JobSecurity/Additional_Documents?docType=Answer%20to%20Question%20on%20Notice)).

**Table 1: Trends in labour hire employees, *Characteristics of Employment*, 2008 to 2020**

	2008	2011	2014	2016	2018	2020
Employees registered with a labour hire firm	218,300	228,800	376,000	403,600	399,800	339,400
(% all employees)	(2.5%)	(2.5%)	(3.9%)	(4.1%)	(3.8%)	(3.3%)
Employees registered with and paid by a labour hire firm	131,400	141,700	113,100	119,300	126,300	112,600
(% all employees)	(1.5%)	(1.5%)	(1.2%)	(1.2%)	(1.2%)	(1.1%)

Sources: ABS, *Forms of Employment*, November 2011, 2008-2011; ABS, *Characteristics of Employment*, August 2014 – August 2020, 2014-2020, published data. These data are collected alongside the Labour Force Survey and describe the labour market at a single point in time, in respect of a specific week.

Notes: Data for 2008 and 2011 are for November, data for 2014-2020 are for August. Labour hire data are not reported every year.

Table 2 below shows the median hourly earnings for all labour hire employees registered with and paid by a labour hire firm is \$32.70 per hour compared to \$36.00 per hour for all employees (however, note that this data does not account for other factors that affect earnings such as classification, workplace settings, age, location, experience, etc.).<sup>4</sup>

**Table 2: Characteristics of labour hire employees, 2020**

	Employees registered with and paid by a labour hire firm	Employees registered with a labour hire firm	All employees
<b>Gender</b>			
Male	64.9%	57.4%	50.4%
Female	35.1%	42.6%	49.6%
<b>Full-time or part-time</b>			
Full-time	83.3%	64.1%	67.4%
Part-time	21.2%	36.5%	32.5%
<b>Employment status</b>			
Casual*	85.9%	66.4%	21.9%
Permanent**	14.1%	33.6%	78.1%
<b>Length of time with employer</b>			
Under 12 months	61.8%	53.6%	18.3%
12 months or more	38.2%	46.4%	81.7%
<b>Median hourly earnings</b>			
All employees	\$32.70	\$33.20	\$36.00

<sup>4</sup> ABS, *Characteristics of Employment*, August 2020, published data and unpublished TableBuilder.

Source: ABS, *Characteristics of Employment, August 2020*, published data and unpublished TableBuilder.

Notes: \* 'Employees without paid leave entitlements' is used by the ABS as the primary measure of casual employees. \*\* Employees with paid leave entitlements' is used by the ABS to define permanent employees.

Labour hire data can also be sourced from the ABS *Jobs in Australia* publication. However, due to the different methodology and scope of the underlying data sources, there are key differences between the household survey-based *Characteristics of Employment* estimates and the administrative data-based *Jobs in Australia* estimates. The ABS is developing a dedicated Labour Hire page on the ABS website, which will be released by the end of 2022, to provide clear and coherent information on labour hire employment in Australia.

Data from the latest *Jobs in Australia* publication are shown in Table 3.<sup>5</sup> Using this publication, labour hire employees are identified by reference to the main activity of their employer/business, which in this case is Labour Supply Services.<sup>6</sup>

**Table 3: Labour Supply Services *Jobs in Australia*, 2011-12 to 2018-19**

	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
People employed in Labour Supply Services* (% all persons)	271,319 (2.1%)	258,125 (2.0%)	270,742 (2.1%)	277,907 (2.1%)	288,672 (2.2%)	313,834 (2.3%)	359,872 (2.6%)	381,075 (2.7%)
Jobs in Labour Supply Services** (% all jobs)	584,311 (3.2%)	540,623 (3.0%)	563,460 (3.1%)	586,707 (3.2%)	599,399 (3.2%)	660,318 (3.4%)	766,211 (3.9%)	797,712 (4.0%)

Source: ABS, *Jobs in Australia*, 2011-12 to 2018-19, unpublished TableBuilder, Labour Supply Services as defined using ANZSIC Class 7212.

Notes: \* Refers to people employed in Labour Supply Services at any point in the year in their main job. \*\* A person can hold several jobs during the year, either concurrently or consecutively.

The key technical differences between the *Characteristics of Employment* data and the *Jobs in Australia* data are summarised below.

- There are limited demographic or employee characteristics information from *Jobs in Australia* (limited to the small selection of characteristics available from tax data).
- The *Jobs in Australia* data are cumulative for the financial year, rather than for a reference week (as in *Characteristics of Employment*). It captures employed people who worked in Labour Supply Services at any time during the year and so numbers will be higher than those in *Characteristics of Employment*.

<sup>5</sup> The next release is scheduled for 8 November 2022.

<sup>6</sup> Labour Supply Services includes contract labour service, labour on-hiring service, labour staffing service, labour supply service and temporary labour hire service. This includes the administrative and support staff of labour hire firms as well as labour hire employees.

- The *Jobs in Australia* jobs data are affected by job switching and multiple-job-holding: a person can have several jobs throughout the year with one or many employers, some of which may be held concurrently with others.<sup>7</sup> This will mean higher numbers than in *Characteristics of Employment* which counts people.
- *Jobs in Australia* data of labour hire employees include those who are identified by reference to the main activity of their employer/business, which in this case is Labour Supply Services. This includes both labour hire workers and the administrative and support staff of labour hire businesses.
- *Jobs in Australia* data include labour hire employees who are short-term non-residents in the country, as well as owner managers, including independent contractors, coded to Labour Supply Services. These workers are all out of scope of *Characteristics of Employment* and so are not included in that data.

## International examples of ‘same job, same pay’ regulation

There are international precedents of ‘same job, same pay’ regulation. For example, a number of European countries have implemented regulation to ensure that temporary agency workers (the term used by the European Union for labour hire workers) receive the same pay and conditions as employees directly engaged by the same business.

In 2008, the European Union issued a Directive on Temporary Agency Work (2008/104/EC) which has been implemented by member states such as Ireland, Germany and the Netherlands, as well as the United Kingdom. The Agency Workers Regulations 2010 Guidance, published by the Department for Business, Energy and Industrial Strategy, provides extensive guidance on the implementation of the United Kingdom’s *Agency Workers Regulations 2010*.<sup>8</sup>

Biggs and Toms (2015) produced a conference paper examining the influence of the *Agency Workers Regulations 2010* on the UK Economy:<sup>9</sup>

- The Paper did not find that there had been a reduction in agency worker utilisation or an increase in sub-12-week placements that mean the agency worker does not satisfy the qualification period for equal treatment.
- Quantitative data relating to rates of pay for agency workers with tenure of 12 weeks or more suggested that systemic avoidance by employers of the Regulations was unlikely to occur. The authors also referred to their interviews with recruitment consultants who stated a willingness to comply with the Regulations, and data about agency worker utilisation and tenure.
- Data showed significant wage increases for agency workers with tenure of 12 weeks or more.

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<sup>7</sup> *Jobs in Australia* will capture additional people job-switching due to the longer time period, but it only counts each person once.

<sup>8</sup> Department for Business, Energy and Industrial Strategy (2019) *Agency Workers Regulations 2010 Guidance*, Gov.uk website, accessed 6 September

<sup>9</sup> Biggs, D and Toms, S (2015) *The Agency Workers Directive and its Influence on the UK Economy*, CIPD Applied Research Conference 2015, accessed 5 September 2022.