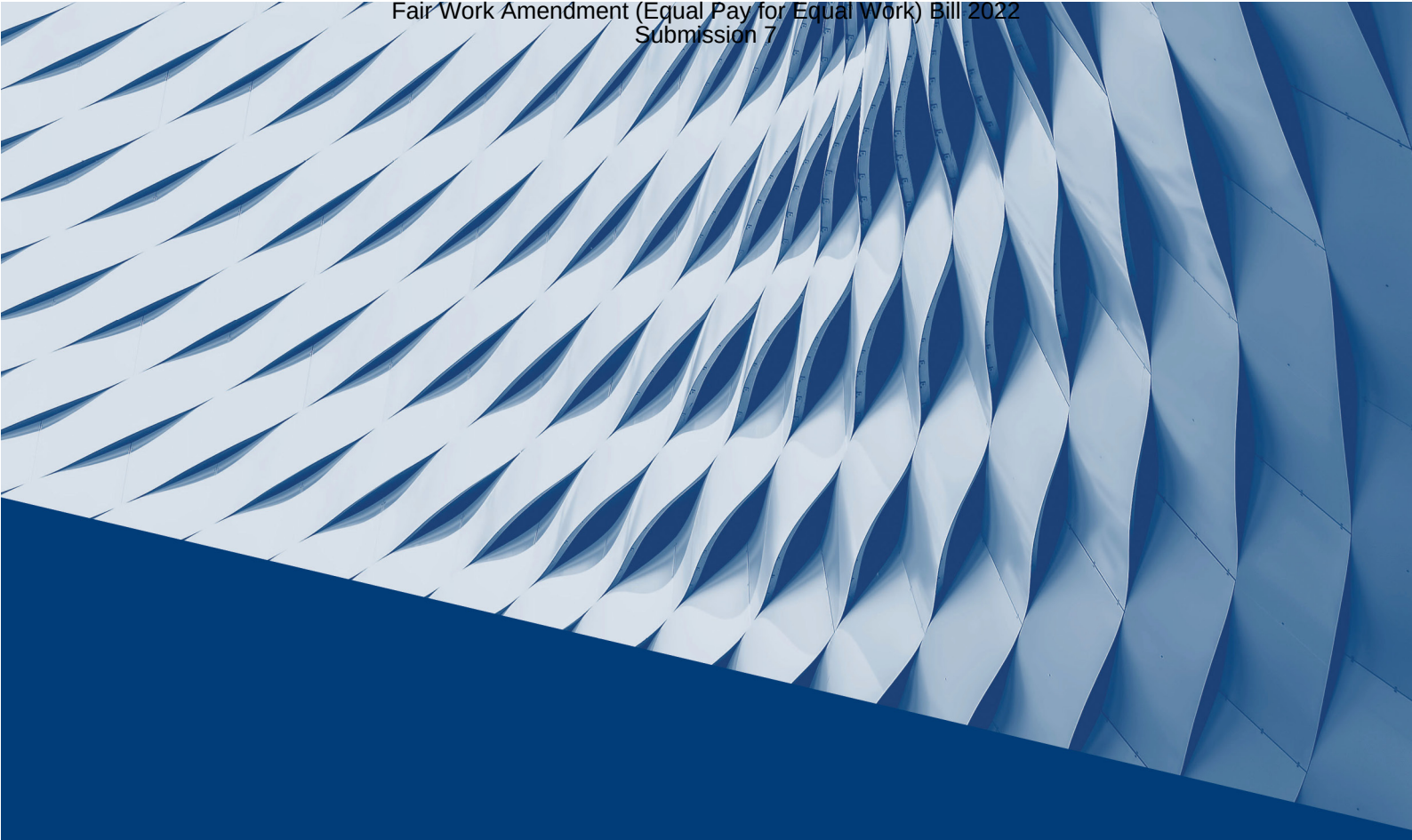

Fair Work Amendment (Equal Pay for Equal Work) Bill 2022

Submission by the Australian Council of Trade Unions to the Senate Education and Employment Legislation Committee.

ACTU Submission, 12 September 2022
ACTU D. No 29/2022

ACTU
australian council of trade unions

Contents

Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For 90 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates which together have over 1.7 million members engaged across a broad spectrum of industries and occupations in the public and private sector.

Recommendation to the Committee

The *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022* ('the Bill') seeks to require that labour hire workers covered by certain modern awards, are offered the same or greater rates of pay than directly employed workers.

The stated intentions of the Bill are: "to limit the use of labour hire contracts by removing the incentive for employers to do so, which is lower wages"; and "encouraging employers to make improved provision for the labour requirements be retaining existing staff in permanent work arrangements, while training new staff through apprenticeships and traineeships."[1]

However, the terms of the Bill are insufficient to give effect to these intentions, as this submission outlines.

Further, while the ACTU supports the general objective of the Bill, we also believe that workers on labour hire arrangements should receive equivalent treatment as well as equal pay, compared to directly employed workers.

[1] Explanatory Memorandum, Fair Work Amendment (Equal Pay for Equal Work) Bill 2022, page 2.

The ACTU also notes that the new Government has a similar objective to Senator Roberts, who has introduced this Bill, by committing to "ensure that workers employed through labour hire companies receive no less than workers directly employed."[2] Rather than continue to duplicate effort by seeking to fix a flawed Bill, we instead urge the Senator to work with the Government to develop legislation that can best give effect to their shared goals. Further, a united effort between these and other supportive parties would send a clear message that the practice of using labour hire arrangements to undercut workers' terms and conditions must and will end.

We therefore recommend to the Committee:

Encourage Senator Roberts to instead work with the Government to develop legislation that can best give effect to these shared goals.

[2] See *Labor's Secure Australian Jobs Plan*, accessed 6 September 2022 https://www.alp.org.au/policies/secure-australian-jobs-plan

Concerns with the Bill

The ACTU has identified seven concerns with the Bill.

Firstly, the Bill only provides pay protection to *employees* who perform work for a person other than their own employer. It does not cover workers on independent contracting arrangements. This is a glaring deficiency that supports the ongoing exploitation of workers under arrangements that, prior to the decision of the High Court in *Personnel Contracting* would likely have been regarded as sham arrangements under the *Fair Work Act*. The labour hire sector will no doubt swiftly evolve the language in its contracts to move any employees onto contracting arrangements, to greatly limit the risk of ever being captured by the terms of the Bill.

Secondly, given no exhaustive definition is provided to the label "labour hire" as used in proposed subsections 333B(1) and (2), a Court is likely to ascribe an intent to the Parliament to limit the scope of the Bill to arrangements that are understood to be labour hire arrangements. This would leave workers engaged through outsourcing arrangements entirely unprotected, and again, would incentivise companies to deliberately mischaracterise arrangements as external service arrangements to escape regulation. These undesirable results of focussing on form rather substance should be given careful consideration and avoided.

Thirdly, the Bill provides no protection to workers where the contracts or arrangements under which they are deployed to a host involve one or more intermediaries between the relationship of host and labour hire provider. Again, this is a significant loophole that could lead to the already limited protection being offered becoming a dead letter.

Fourthly, the specification of modern awards under proposed section 33B(4) is deeply problematic. Whilst it is expressed in the explanatory memorandum as being based on a judgement of "failure of balanced market power", there are no criteria for making such a judgement. Further it escapes us how a pay disparity between a labour hire worker and a directly employed worker can be regarded as acceptable in one industry or occupation but not in another. For example, the health and care sectors rely extensively on labour hire (to the extent that the Victorian Inquiry into Labour Hire found more labour hire employees in Health Care and Social Assistance than in Construction[3])

[3] Victorian Inquiry into the Labour Hire and Industry and Insecure Work, Department of Economic Development, Hobs, Transport and Resources (2016), at Table 2.2.

and some of the most egregious and now notorious exploitation of labour hire workers has occurred in meat processing[4] and horticulture[5] sectors, yet the relevant modern awards for these sectors are not specified in the Bill.

Fifth, because under proposed section 333B(2)(a) and (3) base rates of pay are only payable to labour hire employees during rostered or ordinary hours of work, employees who work unrostered overtime may find themselves entitled to be paid only the overtime penalty for those hours of work, rather than both the base rate and the overtime penalty. Similarly, in the event that the horticulture award were added to the list of "specified modern awards", the reliance on the existing definition of base rate of pay in the *Fair Work Act* would be ineffective to pass on to labour hire employees any above award payments that may be paid as base rates to directly employed workers.

Sixth, there is nothing in the Bill that directly gives effect to the second objective of retaining a permanent workforce and training new staff. The explanatory memorandum makes reference to a situation in which an employer has replaced their employees with labour hire workers and refers to a mechanism whereby "…the pay being offered by that labour hire contract would be assessed against similar rates of pay for directly employed workers in that industry". However, the Bill contains no such mechanism.

Finally, the Bill falls short of providing equivalency to labour hire workers insofar as it only seeks to require equal wages for work performed, rather than equal treatment. Whilst we recognise that equal treatment falls outside of the stated objectives of the Bill, the Committee should take note that direct employees can receive conditions of employment which they value outside of wages and supplementary payments, such as workplace amenities, access to tools and equipment, study leave and training and development opportunities.

[4] Victorian Inquiry into the Labour Hire and Industry and Insecure Work, Department of Economic Development, Hobs, Transport and Resources (2016), at Chapter 4.2.2; Report on the Fair Work Ombudsman's Inquiry into the labour procurement arrangements of the Baiada Group in NSW, FWO (2015).
[5] Harvest Trail Inquiry Report, FWO (2018) at 34-45; Victorian Inquiry into the Labour Hire and Industry and Insecure Work, Department of Economic Development, Hobs, Transport and Resources (2016), at Chapter 4.2.1.

Conclusion

Taken together, the deficiencies in the proposal Bill mean that it will not meet its stated objective. Rather than seek amendments to the Bill, which would need to be comprehensive, we instead encourage Senator Roberts to work with the new Government on a set of provisions to best give effect to their shared objective.

That law would then stand the best chance of achieving their shared aims. Demonstrating a unified political approach would also send a powerful message that the practice of employers using third parties to undercut pay and conditions of workers must and will come to an end.

address

ACTU

Level 4 / 365 Queen Street

Melbourne VIC 3000

phone

1300 486 466

web

actu.org.au

australianunions.org.au

ACTU Australian Unions