Technical Resources

27th September 2023

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
CANBERRA ACT 2600

Via email: eec.sen@aph.gov.au

Dear Committee Secretary,

As an Australian labour-hire business, I write to express my deep concern with the Government's proposed *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*.

We have been operating for 33 years and over this time we have supplied thousands of highly skilled technical people, to hundreds of clients that have helped complete numerous major projects contributing an enormous amount to the Australian economy.

The Closing Loopholes Bill will inject greater uncertainty and complexity into Australia's already complex industrial relations system. The Bill creates new and unnecessary challenges for both business and workers and has will negatively impact wages and job creation. For that reason, I encourage the Senate to reject the Bill in its entirety.

Same Job, Same Pay measures will create enormous compliance complexity. I am concerned that the Bill does not even consider or contemplate, let alone give clear direction on, the vast number of scenarios where it will introduce confusion and unworkability when it comes to matching a client's industrial instrument.

The government has failed to make a case for the need around changes to casual employment. Instead it has, without justification, proposed to re-create a substantial problem that was addressed effectively by legislation and high court decisions in recent times. The changes make it exceedingly difficult to engage casual employees with any sense of certainty or confidence. Coupled with the recent restrictions on fixed-term contract engagement, the changes will mean that in scenarios where work hours are regular but placements have the potential to be extended, such as project based work, it will be near impossible to employ a worker at all.

The casual changes also have significant implications for the workers our business engages. Once in operation, this Bill will force casual workers to either accept a substantial reduction in take home pay, or have regularity and certainty stripped from their working hours.

The people who work for our business choose on-hire work because it provides a higher rate of pay coupled with the flexibility to manage work around their lifestyle or life stage.

The government claims that decision around casual versus permanent employment will be employee-driven, but there is nothing in the legislation to reinforce that. Instead, the legislation proposes to impose decisions around what can be casual work and what cannot, removing choice from workers and undermining the employment contracts between them and their employers.

The introduction of a post contractual conduct test is extremely challenging for workers who prefer to work as a casual employee with regular hours. It means that they will be forced to choose between a higher rate of pay, or regular hours at the time of engagement. They will no longer have the option of both as they do now.

Casual Employment

The Government's proposed changes to the definition of casual employment will re-introduce enormous risk around engaging casual workers. The Bill disregards recent High Court rulings and works to undermine the contract between an employer and their employee, instead forcing Courts to consider post-contractual conduct, including if the employee is working in a regular way.

As an employer of casual workers, we have many employees that elect to work regular hours as a casual. These hours are often dictated by the demand from both the client, as well as the employee.

These individuals also often require the flexibility that casual employment provides, while also valuing the consistency of having fixed shift each week

Current casual conversion laws provide strong evidence that most people working regular hours as casual employees for extended periods do so through their own choice. Under the current conversion arrangements, we have never had a worker take the option to convert to a permanent employee after 12 months.

These changes will strip the ability of those workers who prefer to work casually to do so, forcing them to choose between irregular and unpredictable hours or a 20% cut in take-home pay.

The new definition, combined with new civil penalty provisions for misrepresenting casual employment, will make it extremely high risk for our business to engage casual workers where there is any chance they will be working the same hours or shifts week to week.

The combined impact of casual changes and limitations on fixed-term contracts introduced by the Government in its *Fair Work Legislation Amendment* (*Secure Jobs, Better Pay) Act 2023* is particularly significant and will make it extremely difficult to engage workers to fill gaps in our clients' permanent workforces. If a worker cannot be engaged as a casual employee because they are working regular hours and is placed in a role which is extended twice or requires a commitment of more than 24 months, there will be no mechanism left under law for us to engage them.

Because our clients engage on-hire workers without assurance of ongoing work or continuation of projects, it is impractical to offer these workers permanent employment on an ongoing basis. Sadly, the on-the-ground outcome will be that individual workers will be removed from roles they may be passionate about, and would have liked to continue in, simply because there is no longer a way that we can legally employ them.

That has significant implication for industries that depend on the adaptability of a temporary workforce, including the mining, oil and gas and infrastructure construction industries who will be

challenged by the prospect of losing valuable talent more regularly as individuals are moved out of their roles to ensure our business remains compliant with employment law.

Definition of Employment

In addition to the casual workers that we employ, we also engage independent contractors. Similar to casual workers, these are people who choose to be engaged in this manner given the financial benefits it affords them. In almost every circumstance, these workers receive wages that are far higher the applicable Award rate, usually many multiples higher. This particularly common in the engineering industry, which we supply to, where many professionals choose to be engaged as independent contractors as a way to manage their income and finances.

The Bill's proposed definition of employment, which again is out of step with recent High Court rulings, will make engaging these people as independent contractors high risk for our business. We will have no confidence in engaging these workers, who are actively choosing this method of engagement, where they are working regular hours. The possibility of being found to have 'misclassified' these workers – even if the engagement mechanism is being driven by their choice - is too great a risk and poses significant liability concerns for us as an employer around associated permanent entitlements

Beyond the risk it poses to our business, the proposed reforms will strip choice and agency from workers, inserting government direction into personal decisions about how they choose to live and work. The end result will be to threaten Australia's talent pool in industries that are already suffering from the skill shortage.

Same Job, Same Pay

As a labour-hire business, we are extremely concerned by the compliance challenge created by the Same Job, Same Pay elements of the proposal, outlined in the Bill as Regulated Labour Hire Arrangement Orders.

Across the industries that we supply into, all of our workers are already paid more than their direct-hire counterparts. This reflects the 'on demand' nature of their availability and oftentimes their specialised skills and training. Our current average hourly pay rate is $111 per hour which is far in excess of what their direct hire counterparts would receive.

If there are instances and industries, in which a negative pay disparity exists for labour hire workers, they are very much the exception rather than the rule.

In rare instances where it does occur, that can reflect a lack of professional experience or skill by comparison to a direct-hire workforce. In these cases, labour-hire is typically used as a pathway for workers to gain the experience required to obtain a permanent role with the client or another business in a similar industry.

If there are concerns or evidence of an issue in niche or specific area of the labour market, regulation should deal with it where it exists. The approach of this measure in the legislation is extremely broad and will simply create an enormous raft of new problems across the labour market in areas where there are absolutely no pay parity concerns in the first place.

Not only is there little justification for its broad application, but as proposed it presents an administrative nightmare for our business and will be almost unworkable in practice. Given all of our workers are already earning the same or higher rates of pay than their direct hire counterparts, it will result in a substantial administrative increase in costs for my clients and their consumers, with none of those costs related to higher rates of pay.

I'm concerned the Bill's contemplation of what is involved in matching a client's 'full rate of pay' is superficial and does not reflect or consider the challenges that our business will face in trying to comply with this new law. The proposal in the Bill will not only require us to match rates of pay, but will also require us to match bonuses and other separately identifiable amounts.

The Bill also fails to consider that our workers will potentially be placed on multiple sites in any given year, not just on a single site. Are on-hire workers expected to engage in work in an occupation or industry across multiple host sites not knowing from one placement to the next what their pay and conditions will look like?

Moreover, what happens in scenarios where a worker we on-hire to clients is engaged as a permanent employee with my organisation? Those employees' salaries will be fixed with me but may, in some cases, be greater by the hour than a client's direct employees, but in other instances lower. How am we expected to manage varying rates of pay and leave entitlements for those permanently employed workers ?

It concerns us that the Bill seems to completely disregard the industrial rights and agency of labour hire workers. It essentially strips any on-hire worker subject to Regulated Labour Hire Arrangement Order of their right to engage or influence the industrial instruments that govern their employment. In this sense, the Bill proposes to make them potentially the only cohort of workers in the country who have no right to vote or have any industrial agency over the terms and conditions of their employment.

This Bill threatens to seriously disrupt the way in which we engage workers, and the way that our workers are *choosing* to engage with our business. These changes lack the critical understanding of the current employment market, and their likely outcome will be the exclusion of people who are no longer able to access work that works for them.

This Bill strips rights, certainty and stability from casual and on-hire workers. For a Government that claims to be committed to 'job security', its actions and direction on industrial relations law have done nothing but strip predictability, stability and security from the millions of Australian workers who choose to work flexibly.

By making employment more uncertain and unpredictable for business, it only serves to make the employment landscape more precarious for workers. The Bill is detrimental to both businesses and employees. we implore the Committee to reject this legislation on its entirety.

Yours sincerely,

Luke Iustini

CFO