

**Submission to the Senate
Education and Employment
Legislation Committee
Fair Work Amendment
(Equal Pay For Equal Work)
Bill 2022**

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percapita
FIGHTING INEQUALITY IN AUSTRALIA

About Per Capita

Per Capita is an independent progressive think tank, dedicated to fighting inequality in Australia. We work to build a new vision for Australia based on fairness, shared prosperity, community and social justice. Our research is rigorous, evidence-based and long-term in its outlook. We consider the national challenges of the next decade rather than the next election cycle. We ask original questions and offer fresh solutions, drawing on new thinking in social science, economics and public policy. Our audience is the interested public, not just experts and policy makers. We engage all Australians who want to see rigorous thinking and evidence-based analysis applied to the issues facing our country's future.

Introduction

Per Capita welcomes the opportunity to provide this submission to the Senate Education and Employment Legislation Committee's *Inquiry into the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (Cth)* ('the EPEW Bill').

Per Capita has considered the EPEW Bill and finds its scope woefully inadequate to address the problem it seeks to tackle: to 'stop the exploitation and limit the use of labour hire contracts by removing the incentive for employers to do so, which is lower wages'.¹ This is because the proposed amendments only provide protections for a limited cohort of labour hire employees; those who would be covered by a short list of specified modern awards.²

While we accept that there are certain contexts and mitigating circumstances where limiting the scope of a provision is warranted, the current context is one of precarity, insecurity and exploitation of a discrete subset of workers, making this limitation inadequate. Labour hire arrangements are commonly used in industries other than those which would be covered by the EPEW Bill. For example, across the Victorian food supply chain, labour hire is used extensively to engage agricultural and meat processing workers.³ These workers would likely be covered by the Horticulture or Meat Industry Awards, neither of which are captured by the EPEW Bill.

In stark contrast to the EPEW Bill, the Fair Work Amendment (Same Job, Same Pay) Bill 2021 ('the SJSP Bill') introduced in November 2021,⁴ proposed that a same job same pay obligation (SJSP obligation) be enshrined in the National Employment Standards (NES) of the *Fair Work Act 2009 (Cth)* (FWA).⁵ This comprehensive approach would ensure that modern awards and enterprise agreements would be unable to exclude the SJSP obligation, regardless of industry, sector or duties. This form of regulation would both rectify the crippling pay disparity problems of the present and protect workers against new exploitations in the future.

Per Capita submits that the EPEW Bill should not proceed in its current form. However, we believe the inquiry allows for our submission to discuss how the proposed purpose of the EPEW Bill could be best achieved in future amendments to the FWA.

Legislation is not a mission statement. It is not enough, as provided by Malcom Roberts in the EPEW Bill's second reading, to amend the FWA to merely *encourage* 'employers to make improved provision for their labour requirements by retaining existing staff in permanent work arrangements, while training new staff through apprenticeships and traineeships'.⁶ If this is indeed the purpose of the Bill, it would need to have explicitly provided for that. It does not. Unless the language is clear and unambiguous, it will be exploited.

¹ Commonwealth, *Parliamentary Debates*, Senate, 10 February 2022, 298 (Malcom Roberts).

² Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (Cth) sch 1 item 2 inserting *Fair Work Act 2009 (Cth)* s 333B(4).

³ Anthony Forsyth, *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (Final Report, 31 August 2016) 153-72.

⁴ Lapsed at dissolution on 11 April 2022.

⁵ Fair Work Amendment (Same Job Same Pay) Bill 2021 (Cth) sch 1 item 3, inserting *Fair Work Act 2009 (Cth)* part 2-2 div 11A.

⁶ Commonwealth, *Parliamentary Debates*, Senate, 10 February 2022, 298 (Malcom Roberts).

Further, Per Capita submits that the use of the phrase 'equal pay for equal work' in the title of the Bill, a phrase most commonly associated with the ongoing struggle for gender pay parity, is inappropriate. Particularly, considering that the EPEW Bill seeks only to address the pay disparity of labour hire workers in a mere handful of industries, many of which are traditionally dominated by male workers. The words that our law makers use is important, and this language should not be used for future proposed amendments of this type.

Equal pay alone, will not halt exploitation

Providing equal pay for labour hire workers will not alone halt their exploitation in Australia. More can, and should, be done to disincentivise the inappropriate use of labour hire workers, and to ensure that when the same job is worked, the same pay *and* security is provided.

Per Capita agrees with many of the previous recommendations made by the Senate Education and Employment References Committee following their *Inquiry into Corporate Avoidance of the Fair Work Act 2009*,⁷ and by the Senate Select Committee on Job Security in their *Third Interim Report*.⁸ Among these, were recommendations that:

- a comprehensive national labour hire licensing scheme covering all business sectors, and requiring mandatory registration and continuous compliance with all legal obligations, be introduced;⁹
- labour hire workers be covered by, and able to participate in and negotiate collective agreements directly with the host employer;¹⁰ and
- host employers would have the responsibility for ensuring all labour standards provided in the FWA are afforded to labour hire workers who they engage through agencies.¹¹

None of these recommendations would be particularly difficult to enact, indeed four Australian States / Territories now already have labour licencing legislation.¹² Further, labour hire workers could readily participate in collective agreements with host employers under improved multi-employer bargaining provisions,¹³ and by adopting the same concept of the *Person in Control of a Business or Undertaking* definition in Australia's model Work Health and Safety laws,¹⁴ host employers could be made responsible for all labour standards provided under the FWA.

⁷ Senate Education and Employment References Committee, Parliament of Australia, *Inquiry into Corporate Avoidance of the Fair Work Act 2009* (Report, 6 September 2017) ('*Corporate Avoidance of the FWA*').

⁸ Senate Select Committee on Job Security, Parliament of Australia, *Third Interim Report: Labour Hire and Contracting* (November 2021) ('*Third Interim Report*').

⁹ *Ibid* [2.92].

¹⁰ *Corporate Avoidance of the FWA* (n 7) [5.63].

¹¹ *Ibid* [5.64].

¹² *Labour Hire Licensing Act 2020* (ACT); *Labour Hire Licensing Act 2018* (Vic); *Labour Hire Licensing Act 2017* (QLD); *Labour Hire Licensing Act 2017* (SA).

¹³ *Fair Work Act 2009* (Cth) s 172(3).

¹⁴ *Work Health and Safety Act 2011* (Cth) s 5.

We would welcome the opportunity to make future submissions related to other recommendations, including but not limited to the above three, which seek to increase job security in the Australian labour market.

This submission, however, will only consider the need for legislative provisions which implement Recommendation 1 from the *Third Interim Report*: 'to ensure that the wages and conditions of labour hire workers are at least equivalent to those that would apply had these workers been directly employed by their host entities'.¹⁵

Labour Hire Arrangements in Australia

The triangular relationship

Labour hire arrangements in Australia generally involve a triangular relationship where there is a work contract between the worker and the labour hire agency, as well as a commercial contract between said agency and the host employer.¹⁶ Agency workers will generally perform work under the direction, and for the benefit, of the host employer. Yet outside few exceptional situations,¹⁷ these workers are not deemed to be employees of the host employer. They are therefore, not protected by the unfair dismissal provisions in the *FWA*,¹⁸ even in situations where a worker has worked on a full-time basis for a considerable period of time. This is due to a technical quirk of the legislation which allows the host employer to shirk their responsibilities as an employer, similar to the problems that exist within the gig economy and the loopholes that our current regulatory environment has allowed. Unfortunately, the concept of *joint employment*, where there could be more than one employer is yet to be accepted by Australian Courts,¹⁹ and in the absence of a clear intention to create a contract between an agency worker and a host employer, courts will not imply that a contract exists.²⁰

The ease of dismissal, without recourse creates consequences for workplace health and safety. Host firms are bound by the same obligations to agency workers as to directly employed workers, in regard to their work health and safety obligations.²¹ However, the CFMEU contended in their submission to the *Inquiry into Corporate Avoidance of the Fair Work Act 2009*, that:

*Labour hire employees are reluctant to raise concerns about breaches of occupational health and safety standards or about being underpaid. Labour hire employees who do complain are removed from sites either on the instruction of the host builder or on the initiative of the employer.*²²

¹⁵ *Third Interim Report* (n 8) [2.85].

¹⁶ Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 7th ed, 2021) 76 [4.9].

¹⁷ See, eg, *Damevski v Giudice* (2003) 133 FCR 438.

¹⁸ *Fair Work Act 2009* (Cth) pt 3-2.

¹⁹ See, eg, *Fair Work Ombudsman v Eastern Colour Pty Ltd* [2011] FCA 803; *FP Group Pty Ltd v Tooheys Pty Ltd* (2013) FWCFB 9605.

²⁰ See, eg, *Mason and Cox Pty Ltd v McCann* (1999) 74 SASR 438,443; *Wilton and Cumberland v Coal and Allied Operations Pty Ltd* [2007] FCA 725.

²¹ *Work Health and Safety Act 2011* (Cth) pt 2.

²² Construction, Forestry, Mining and Energy Union, Submission No 200 to Senate Education and Employment References Committee, Parliament of Australia, *Inquiry into Corporate Avoidance of the Fair Work Act 2009* (2017) 8 [27].

Growing use of labour hire and casualisation in Australia

Labour hire has expanded far beyond its traditional use. That was, providing short term or temporary labour, or workers with specific expertise for specific time-sensitive projects. Now, its use has expanded far beyond the original intentions, becoming a practice on which entire operations and industries are built. Indeed, as an industry unto itself, labour hire is now valued at approximately \$19 billion a year.²³

This expansion, married with the lack of regulation, has opened the door for the triangular relationship to be utilised as a tool for reducing wages and conditions. No longer is labour hire a tool available to employers experiencing discreet and distinct shortages or deficits, but is now a business model that is planned for, maintained and sustained by a desire to reduce labour costs and return ever more profits into the pockets of shareholders.

Further exacerbating the insecurity of these workers is the fact that they are most often employed by agencies on a casual basis.²⁴ There are multiple links in the chain of responsibility, which allow the extraction of additional profit from workers' paycheques. As such, labour hire has become a major contributor to the growth in casualisation in Australia. Recent statistics from the ABS indicate that 86% of workers paid by a labour hire firm or employment agency are employed on a casual basis.²⁵

Most concerning, we are fast becoming an outlier amongst the developed economies of the world, as one of the least secure places to work. Among OECD countries, Australia has one of the highest rates of casual workers.²⁶ Approximately 2.4 million Australian workers are casually employed, representing almost one in four workers.²⁷ Casual employment has also expanded past its traditional use for irregular work. More often it mirrors the working arrangements of permanent or ongoing employees, sans the protections provided to these employees. Today 60% of casual workers, work the same hours each week.²⁸ Where once Australia was regarded worldwide as the 'working man's paradise', that paradise has long since been lost and we are now earning our global reputation as the workers purgatory, where working people are kept on indefinite precarious contracts around which no secure life can be built.

Laws must cover all workers and all industries

In their submission to the Senate Select Committee of Job Security in 2019, the CFMMEU submitted the lived experience of their members was that 'casual labour hire is easily around 30% of all coal mining jobs in New South Wales and is routinely over 50% in Queensland'.²⁹ There is no doubt that mining companies have embraced the labour hire business model in a particularly aggressive way. However, labour hire is

²³ Australian Council of Trade Unions, 'Labour Hire 2021' (policy paper, ACTU congress 2021, 2021).

²⁴ *Kool v Adecco Industrial Pty Ltd* [2016] FWC 925 [45].

²⁵ As they have no paid leave entitlements: Australian Bureau of Statistics, *Characteristics of Employment*, (Catalogue No 6333.0, 11 December 2020).

²⁶ OECD, *OECD Employment Outlook 2019: The Future of Work* (Report, 2019) 59-60.

²⁷ Australian Bureau of Statistics, *Working Arrangements*, (Catalogue No 6336.0, 14 December 2021).

²⁸ Stewart, *Stewart's Guide to Employment Law* (n 16) 67.

²⁹ Construction, Forestry, Maritime, Mining and Energy Union, Submission No 113 to Senate Select Committee on Job Security, Parliament of Australia, *Job Security Inquiry* (20 May 2021) 2.

now a feature of all industries. In Victoria, of the 5387 labour hire or employment agencies with licenses currently in force:

- 11% provide workers in manufacturing,
- 9% in health and social services,
- 8% in security, and
- one quarter provide cleaners.³⁰

This does not mean that the same issues exist in all industries. However, to ensure that no workers are left behind, any future proposed amendments in this area needs to cover all industries. This can be achieved, as proposed in the SJSP Bill by including a SJSP obligation in the NES.

Why a same job same pay guarantee must be provided in the NES

The NES provides a critical safety net in the FWA. Contraventions of these standards are a breach of core objectives of the FWA and penalties apply.³¹

The NES have effect regardless of the industrial instrument in place. Agreements and awards have no effect to the extent that they purport to exclude the NES, even if some other entitlement is provided in lieu.³²

There will always be a need for some labour hire arrangements in Australia. We agree with the Prime Minister, who whilst in opposition asserted that '[m]any labour hire firms across Australia operate in a fair way and exist for a good reason.'³³ It is the behaviour of the unscrupulous ones 'making a quick buck off the backs of working people, providing workers to major companies at lower wages'³⁴ that a same job same pay obligation would curtail.

Future iterations of the SJSP obligation must be included in the NES to catch those unscrupulous firms, who operate in all industries, from mining to farming. It is appropriate that this be part of the NES safety net.

Conclusion

As we have argued in this submission, the EPEW Bill should not progress in its current form. At it's core, the Bill rightly takes aim at the scourge of labour hire, but ironically differentiates between seemingly deserving workers in male dominated heavy industries, and supposedly less deserving workers in female

³⁰Register of Licensed Labour Hire Providers', *Labour Hire Authority* (Web Page, 6 September 2022) <<https://register.labourhireauthority.vic.gov.au/>>.

³¹ *Fair Work Act 2009* (Cth) s 44.

³² *Ibid* ss 55(1), 56.

³³ Commonwealth, *Parliamentary Debates*, House of Representatives , 22 November 2021, 10411 (Anthony Albanese)

³⁴ *Ibid*.

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dominated services industries. This is all the more galling given that the Bill is entitled with a common phrase applied to the fight for gender equality and pay parity.

Further, given that the ALP has committed to introducing *same pay same job* legislation in its first year, which will require consulting with unions and employer representatives and others to ensure the legislation is workable, we believe that the EPEW Bill is an intentional subversion of this commitment and the process it seeks to implement.³⁵

We look forward to the opportunity to provide further submissions on proposed legislation in this area, particularly any Bill which seeks to cover all workers in all industries.

We thank the members of the Senate Education and Employment Committee for their consideration of this submission.

³⁵ 'Labor's Secure Australian Jobs Plan' *Australian Labor Party* (Web page) < https://alp.org.au/policies/job_security_plan>.