Same Job, Same Pay: Confused outcome

In this Insight, we summarise the key provisions of the Fair Work Amendment (Same Job, Same Pay) Bill 2021 (**Bill**), and identify some of the challenges that it would pose for Australian business in the unlikely event that it became law in its present form.

Context

On 22 November 2021 the Leader of the Opposition, Anthony Albanese, moved the Second Reading of the Bill in the House of Representatives.

The introduction of this Bill reflects long-standing concerns on the part of the Labor Party about what it sees as abusive practices in the labour hire industry, and their corrosive effects on job security. These concerns have led Labor Governments in several jurisdictions to introduce legislation requiring licensing of labour hire providers.[1] This in turn led the Coalition Government to commit to the introduction of a national labour hire licensing scheme, although no legislation to give effect to that commitment has yet been introduced in the Parliament.[2]

Labor's concerns in this area also led it to include in its Platform for the May 2019 federal election a promise 'to legislate for labour hire workers to receive the same pay and conditions as permanent employees. 'Labor's Secure Australian Jobs Plan', which was released in February of this year, contains a similar undertaking. It is in that context that the introduction, and content, of the Bill needs to be assessed.

As is almost invariably the case with Private Member's Bills, there is no realistic prospect of the Bill becoming law in the present Parliament, or indeed in any Parliament where the Liberal/National Coalition has a majority.

Furthermore, regardless of the outcome of the upcoming federal election, it is unlikely that the Bill would become law in anything like its present form. Both parliamentary and extra-parliamentary pressures are likely to see it being substantially amended, and access to the resources of government could realistically be expected to see some of its rougher edges being rounded out.

Nevertheless, the Bill does provide an important indication of the thinking of the Labor Party in relation to an issue that is of very considerable significance to the Australian economy and businesses.

1 See *Labour Hire Licensing Act 2017* (Qld); *Labour Hire Licensing Act 2017* (SA) *Labour Hire Licensing Act 2018* (Vic); and *Labour Hire Licensing Act 2020* (ACT),

2 The Coalition's commitment to national legislation dates from the Morrison Government's announcement in March 2019 that it would implement the recommendations of the Report of the Migrant Workers Taskforce. This Taskforce, chaired by Professor Alan Fels, proposed (amongst other things) the introduction of a labour hire licensing scheme in the horticulture, meat processing, cleaning and security industries. Despite a substantial four-year budget allocation starting in 2019-20, and subsequent restatements of the Commonwealth's commitment to a national scheme, no legislation to give effect to that commitment has yet been introduced in the Parliament.

Key provisions

Overview

According to the Explanatory Memorandum (**EM**) for the Bill, its purpose is to amend the *Fair Work Act 2009* (Cth) (**FW Act**) 'to ensure that workers employed through labour hire companies will receive no less than the same pay as workers employed directly – same job same pay.'

In this context, the Bill is directed at what the EM describes as the 'substantial worker exploitation and inequities' derived from:

> A new business model based on a labour hire service provider being able to profit from wage arbitrage, where they deliberately source lower cost labour than would be available to the host through a direct employment model has distorted the labour market and undermined the enterprise bargaining system.

The Bill proposes to achieve its objectives by means of a two-pronged strategy:

- first, by imposing a ***same job same pay obligation*** (**SJSP Obligation**) on ***labour hire businesses***; and
- second, by imposing a series of ***obligations upon hosts*** who enter into contracts or arrangements with ***labour hire businesses***.

What is a 'labour hire business'?

According to section 123B(1)[3] a 'labour hire business' 'is a person who, in the course of carrying on a business, ordinarily supplies a worker or workers to perform work for another person'.

This constitutes a very broad approach to the concept of a labour hire business. Notably, there is no equivalent to the qualifier that is set out in section 7(1)(a) of the *Labour Hire Licensing Act 2018* (Vic)[4] and which stipulates that the worker must be supplied by the provider 'to perform work in and as part of a business or undertaking of the host'.

It is not entirely clear just what the effect of the omission of this qualifier would be. Conceivably however, it could mean that the legislation would extend to any business that provides workers to perform a discrete task (such as specialised installation or maintenance work) at the premises of a 'host' without those workers in any meaningful sense being under the direction and control of the host, or part of its business.

Who is a 'host'?

According to section 123B(2) a 'host' is either:

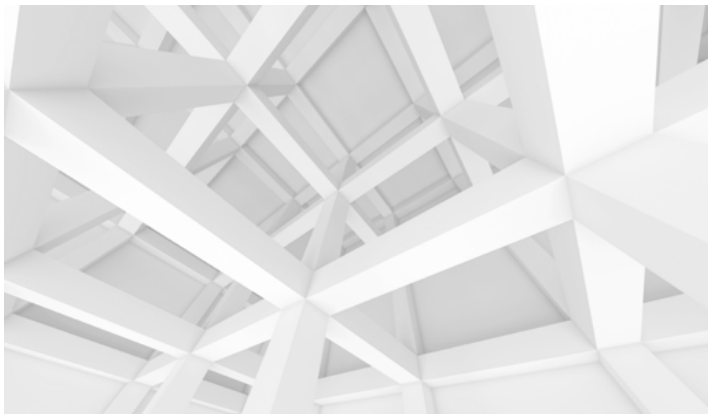
a. a national system employer that engages or proposes to engage a labour hire business; or

b. a constitutional corporation (**Alpha**) that 'so far as each of' four criteria is met:
   - engages or proposes to engage a labour hire business to supply workers at a workplace;
   - work is performed at that workplace by an associated entity of Alpha (**Beta**);
   - an enterprise agreement (**Gamma**) applies to Beta and its employees; and
   - if the work to be performed by the supplied workers were to be performed by employees of Beta, Gamma would apply to those employees.

The drafting of section 123B(2)(b) is not a model of clarity. The use of the term 'so far as each of' the four criteria suggests that not all four criteria must be satisfied for the subsection to apply, but offers no guidance as to how many of them need to apply.

According to the EM the purpose of the provision is to ensure that 'the conditions for workers agreed in enterprise agreements are not undermined by labour hire arrangements.' This is illustrated by the following example:

> EFG Pty Ltd has an enterprise agreement at its manufacturing workplace, which contains a "jump up clause", requiring it to ensure that labour hire workers receive pay and conditions no less favourable than those provided to its direct employees. EFG's holding company, which is not bound by the enterprise agreement, enters into an arrangement with a labour hire business to supply workers to EFG's workplace to perform the work ordinarily performed by EFG's employees. The holding company is a host.



3 For ease of reference the provisions that are proposed to be inserted in the FW Act are referred to as 'sections', although they would, of course, become such only if the Bill became law.

4 None of the other Labour Hire Licensing Acts provides an equivalent to the Victorian qualifier. For example, section 7 of both the Queensland and ACT Acts defines a provider of labour hire services as a person who 'in the course of carrying on a business…supplies to another person, a person to do work'.

What is the same job same pay obligation?

Proposed section 123D requires that all labour hire businesses comply with the SJSP Obligation.

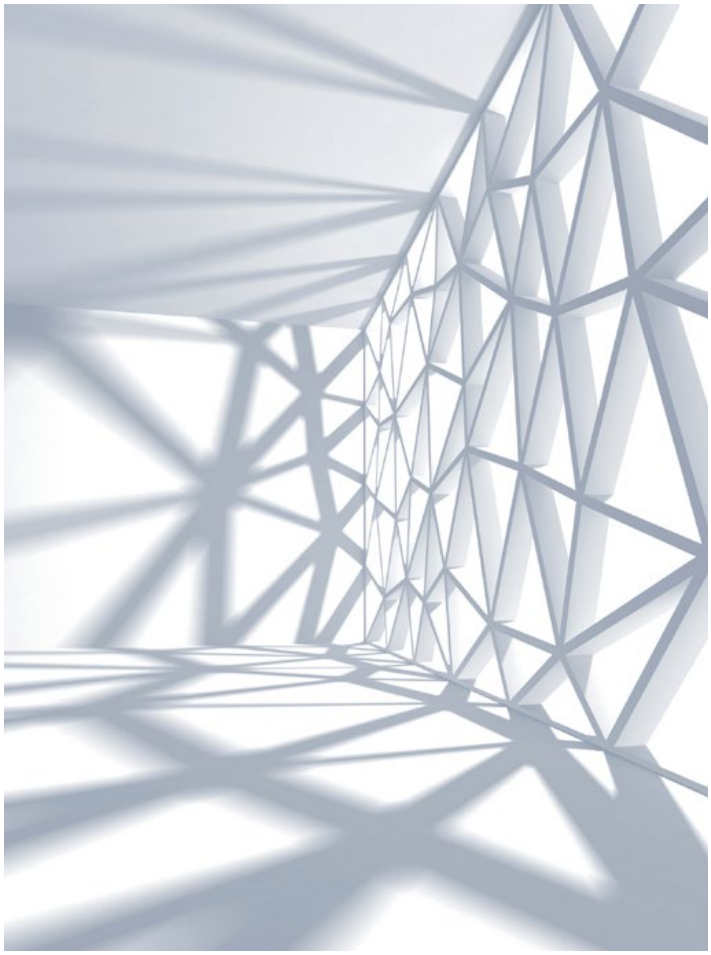
This Obligation is to be enshrined in a new Division 11A of Part 2-2 of the FW Act. This means that it would be part of the National Employment Standards which are binding upon, in effect, all employers in Australia and from which it is not permissible to derogate.

According to section 123C, the SJSP Obligation of a 'labour hire business' is to provide to all workers whom it supplies to 'another person' 'pay and conditions which are no less favourable than those that would be required to be paid' to:

- an employee of the other person who was performing the duties of the worker and working the same hours or completing the same quantity of work as the worker; or
- an employee of an associated entity of the other person under an enterprise agreement that applies to employees of the associated entity.

Furthermore if the worker who is supplied to a host is a 'casual' then the labour hire business must pay the worker the casual loading, that would be required to be paid to an employee of the host who was performing the duties of the worker. If no such loading would be payable, then the labour hire provider must pay a loading that 'at least equals the casual loading for award/agreement free employees' (i.e. 25%).

Although the title of the Bill refers to 'pay', it is clear from its substantive provisions that the Bill is intended to apply to 'pay and conditions'. This means that not only are labour hire employees to receive pay that is not less favourable than the employees of the host, they are also to enjoy at least equally favourable terms and conditions in relation to issues such as hours of work, leave, superannuation contributions, and access to goods and services provided by the host on favourable terms.



Exclusions

- Section 123E provides that the SJSP Obligation does not apply in three sets of circumstances:
- where the host employer employs fewer than 15 employees;
- where the contract or arrangement under which worker are supplied relates only to the temporary replacement of workers who are on leave (paid or unpaid) for three months or less, and the contract or arrangement specifies that it terminates at the end of the leave period; and
- where:
  - the contract or arrangement relates only to the supply of workers temporarily to **supplement** the host's workforce for three months or less; and
  - the need to supplement the workforce stems from a **demand for goods or services**, rather than a deliberate reduction in the size of the workforce; and
  - the host has **not entered into a further labour hire arrangement** that deals exclusively with surge capacity.

Section 306G provides for precisely the same exclusions from Part 2.7A which, as appears below, deals with the obligations of hosts.

Obligations of hosts

A new Part 2.7A of the FW Act is to set out a series of obligations for hosts (as defined). They include that they:

- must provide any labour hire business that it engages with 'all the information that the labour hire business reasonably requires' to comply with its SJSP Obligations (section 306A(a));
- must not engage any labour hire business unless that business agrees, as part of the terms of engagement, to comply with the SJSP Obligation (section 306A(b));
- must, during the course of an engagement of a labour hire business, 'take all reasonable steps' to ensure that the labour hire business has complied, and is complying, with the SJSP Obligation;
- must not, as is common practice in the labour hire sector, enter into a contract or arrangement whereby they (as host) are 'prohibited from offering employment' to a labour hire worker supplied by the labour hire business' (section 306B);
- must ensure that any information concerning vacancies in its enterprise that are available to its own employees is also available to labour hire employees who perform work at that workplace (section 306C);
- must ensure that workers supplied to it by a labour hire business are provided with access to the same 'amenities and collective facilities' (such as wash rooms, canteens etc.) as its own employees (section 306D);
- must ensure that workers supplied by a labour hire company are provided with access to the same training opportunities as its own employees (section 306E); and
- must provide workers supplied by a labour hire business with the same rights as its own employees over determination of hours and location of work 'including, but not limited to, rights to consultation, reply and notice' (section 306F).

These obligations would be extremely onerous, and in effect require hosts to treat workers supplied by a labour hire business as if they were its own employees. They must inevitably, and indeed are clearly intended to, have the effect of making the use of labour hire arrangements unattractive to hosts. To the extent that they are directed to abusive labour hire arrangements, that may be a not unreasonable objective. However to the extent that they inhibit the use of a legitimate form of engagement of labour and the provision of business services they constitute a quite unwarranted interference with the operation the labour market.

Challenges for business

Few would quarrel with the proposition that there are instances of abusive and exploitative practices in the labour hire industry, and that they can and should properly be addressed as such. But it is equally important to recognise that bona fide labour hire arrangements are, and ought to be, a legitimate part of the tools that are available to Australian business. In many instances they are a welcome source of enhanced income and flexible work arrangements for employees.

What is absent from the Bill and its ostensible rationale is a proper recognition of the fact that labour hire employers are subject to the same laws as the hosts to whom they supply labour. They are required to comply with modern awards, and can engage in enterprise bargaining in just the same way as hosts. This suggests that perhaps the pay differential between (some) labour hire employees and direct employees engaged by hosts is just a function of the operation of the labour market. At a time of historically low unemployment, these arrangements may simply be a product of the laws of supply and demand.

It is also important that improvement in the terms and conditions of labour hire employees can be achieved under existing laws. Unions have all of the same rights they have traditionally enjoyed to bargain for outcomes which equal those provided by the host. This inevitably gives rise to the question of whether or why laws like this are necessary in the first place.

Even if it is assumed that regulation is necessary to address some abusive behaviours, the lack of clarity in what has been proposed has the capacity to generate a great deal of confusion and uncertainty. For example, the imprecise definition of 'labour hire business' means that contractors of all kinds could find that they were covered by the legislation even though they are not labour hire providers in the conventional sense. They may even find that they are regarded as labour hire businesses for some purposes and not for others. This, in turn, could put both the contractors and indeed their employees in a quite invidious position in some contexts (for example because employees' terms and conditions may vary from assignment to assignment depending on the terms and conditions provided by different hosts).

Again, the requirement imposed upon hosts by section 306A to take all reasonable steps to ensure that the labour hire business 'has complied and is complying' with the SJSP Obligation is likely not only to be administratively onerous for both host and provider, but would inevitably introduce a significant element of uncertainty into relations between labour hire providers and hosts.

This points to the fact that in complying with the SJSP Obligation, it may be no easy task for a labour hire business to determine what pay and conditions it must observe in circumstances where the host does not employ anyone to perform the work performed by the workers that it supplies. In some instances it will be obvious enough what the reference point ought to be – for example where the host is covered by an enterprise agreement that covers all of its employees. But what of a situation where there is no relevant enterprise agreement? Presumably the relevant modern award would be used as the reference point. But which relevant award is to be used? The award applicable to the industry in which the host is engaged, or the award that covers the work performed by the workers provided by the labour hire business? By way of illustration – if a manufacturer of widgets engages a labour hire business to provide cleaners to the business, would the reference point for the pay and conditions of the supplied labour be the modern award that covers widget-making, that being the award that actually covers the host's business, or should it be the award that covers provision of cleaning services, that being the award that would apply to the host's business if it provided cleaning services?

By way of further illustration of the complexities and anomalies to which the Bill could give rise, take the situation where the labour hire business has in place an enterprise agreement that would, on its face, apply to its employees whilst working for the host, but the host has an enterprise agreement that is on less advantageous terms than the provider's agreement, or has no agreement and operates under the relevant modern award. Are the employees of the labour hire business to lose the benefit of 'their' enterprise agreement and to be faced instead with the possibly less advantageous terms of the host's agreement or the award that covers its business?

Not only does this appear to be an anomalous outcome in practical terms, it also creates uncertainty for employees whose terms and conditions may vary depending upon where they are working, and sits uncomfortably with the statutory object of 'achieving productivity and fairness through an emphasis on enterprise-level enterprise bargaining'. [5] As against that, the labour hire business is not positively obliged to reduce the terms and conditions of its employees to those of the host – what it must do is ensure that the terms and conditions afforded to its employees are not less favourable than those provided by the host. Indeed, it would not be possible for the labour hire business to derogate from the terms of its own agreement with its employees – the problem may be, however, that those employees would be able to 'cherry-pick' as between their own agreement and any more favourable terms and conditions provided by the host.

The Bill does not provide clear answers to such questions. As such, it is a cause of concern to many parts of Australian business and it will require amendment lest it introduce an unwelcome and counter-productive element of inflexibility into the labour market as it emerges from the COVID-19 pandemic.

5 FW Act, section 3(g).

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