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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

FAIR WORK AMENDMENT (EQUAL PAY FOR EQUAL WORK) BILL 2022

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator Malcolm Roberts)

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OUTLINE

The Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 amends the *Fair Work Act 2009* to require that, for labour hire workers covered by certain modern awards, the rate of pay being offered for the labour hire workers is the same or greater as for directly employed workers.

This bill relates to the rate of pay only and is not retrospective.

The Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 is designed to limit the use of labour hire contracts by removing the incentive for employers to do so, which is lower wages. This bill is encouraging 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.

The Fair Work Commission adjudicates enterprise agreements. The provisions in the *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022* provide guidance and instruction to the Fair Work Commission, by effectively requiring an equal pay for equal work provision to be included in enterprise agreements entered into under certain awards.

The provision is award-based to allow, as much as possible, for wages to be decided by negotiation between employee, union and employer, subject to award provisions.

The flexibility to use labour hire contracts for unexpected labour demands and in situations like site closures will remain. However, the cost of those contracts will no longer be borne by the employee through lower wages.

Where there has been a failure of balanced market power this new provision can be employed to restore fairness. The choice of awards to which the provision will initially apply is based on two factors:

- 1) a known failure in the market;
- 2) acting to prevent the potential for labour hire contracts to affect industries covered by awards that do not provide for casual employment.

Subsection 333B(4) of the Fair Work Act, as inserted by the Bill, allows the Minister to add additional awards by way of disallowable instrument. This provides the Minister with a quick response framework where a market failure appears.

In addition to situations where employers are using a mix of contract and directly-employed employees, the Bill makes allowance for a situation where a labour hire arrangement has replaced all of the workers on a roster with contract employees. In this situation, the pay being offered by that labour hire contract would be assessed against similar rates of pay for directly employed workers in that industry.

NOTES ON CLAUSES

Clause 1: Short Title

1. Clause 1 is a formal provision specifying the short title of the Bill.

Clause 2: Commencement

2. The Bill commences the day after it receives the Royal Assent.

Clause 3: Schedules

4. Each Act specified in a Schedule to this Act is amended or repealed as is set out in the applicable items in the Schedule. Any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Item 1 – Section 321

Inserts a brief explanation of the intent of the new Division 4 of Part 2-9 of the *Fair Work Act 2009*.

Item 2 – At the end of Part 2-9

Adds a new Division 4 containing one new section 333B to set out the primary provisions of the Bill under the following subsections:

- (1) Defines labour hire employer and host employer;
- (2) (a) Includes the provision that the host employer must pay the employee a base pay rate that is at least equal to, if not more than, the rate being paid to an employee of the host employer. This section includes the phrase “or would be payable” to include situations where the whole roster has been replaced with labour hire employees;
(b) specifies the provisions in this section relate to base pay rate, incentives, allowances, overtime and penalty rates, and any other identifiable amounts.
- (3) Includes a clarification that the same work for the same pay rate test should take into account that some employees may be on the same shift, but working a different roster (generally rotating -vs- fixed), and that different roster may be a factor in their different rate of pay.
- (4) Limits the bill to specific awards (see below). Paragraph (g) allows the Minister to add additional awards as the need may arise, by disallowable instrument.

Item 3 – Subsection 539(2) (after table item 10A)

Includes a new civil remedy provision that will apply in respect of a worker employed under a labour hire contract where the provisions of this bill have been breached. The penalties in this section are in line with similar penalties for breach of enterprise agreement provisions already contained within the *Fair Work Act 2009*.

Item 4 – Application of amendments

Item 4 adds a provision that requires any new labour hire contract entered into following the assent on this bill to comply with the new requirement.

SELECTION OF AWARDS

1. The Black Coal Mining Industry Award 2010 contains recently-added protections for casuals. This award has a long history of labour hire contracts being used to destroy hard-won entitlements for workers. Mines will still have the right to use labour-hire contracts, however the cost of those contracts will no longer be borne by the employee through lower wages.

2. The Aircraft Cabin Crew Award 2020. Recently airlines have been replacing long-existing direct employment agreements with labour hire agreements that substantially undercut wages in the sector. These contracts are being advanced in the name of flexibility rather than the obvious provision, which is lower wages.

3. The remaining awards are included as they currently do not have provision for casual employment. This is because of the safety issues inherent in each industry and the need to have settled, trained staff. While labour hire contracts have not become a problem in these industries, inclusion in this bill is partly for completeness, and partly to make sure they do not become a problem.

- a) the Australian Nuclear Science and Technology Organisation (ANSTO) Enterprise Award 2016;
- b) the Fire Fighting Industry Award 2020;
- c) the Maritime Offshore Oil and Gas Award 2020;
- d) the Seagoing Industry Award 2020.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

The *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022* (the Bill) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Bill amends the *Fair Work Act 2009* by adding a new Division 4 into Part 2-9 to require that certain labour hire employees receive at least the same rate of pay as other employees performing the same work.

A new section 333B within Division 4 sets out the following new subsections:

- (1) Defines the concepts used in this bill;
- (2) Contains the equal pay rate for equal work provision;
- (3) Includes additional clarification of hours of work and roster;
- (4) Limits the bill to specific awards and includes a provision for the Minister to add additional awards from time to time, by disallowable instrument.

Section 3 of the bill includes a new civil remedy provision that will apply in respect of a worker employed under a labour hire contract where the provisions of this bill have been breached.

Section 4 adds a provision that requires any new labour hire contract entered into following the assent on this bill to comply with this provision.

Human rights implications

The Bill is compatible with the International Covenant on Economic, Social and Cultural Rights, including Article 7 - “(a) *Remuneration which provides all workers, as a minimum, with:*

- (i) *Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.*”

Conclusion

This Bill is compatible with human rights because it advances the protection of human rights, particular the right to equal pay for equal work.