

AUSTRALIAN LABOUR HIRE IN THE SPOTLIGHT

11 May 2022 | Australia

Legal Briefings - By **Olga Klimczak and Adam Lambert**

For many years the labour hire industry has been in the cross-hairs of the labour movement.

There is, without doubt, no shortage of cases where labour hire workers have been subjected to exploitation, either by their employers directly or by the ultimate 'host' (the recipient of their labour). But union concerns extend beyond merely addressing these instances of mistreatment. There is a deep seated objection to the industry at a philosophical level. By limiting an organisation's access to external labour, the bargaining power and perceived job security of the directly employed workforce is maximised.

For decades, unions have aggressively fought for substantial restrictions on the use of external labour in enterprise agreements to the fullest extent that is permitted by law. This has not been enough to curtail the use of labour hire. Whilst ABS data suggests that the prevalence of labour hire is limited (less than 1% of the total Australian workforce) and reasonably steady, it is also widely accepted that labour hire remains a key feature of many Australian workplaces. Indeed, the tight labour market with the current low unemployment rate means that businesses are stretched and reliant on supplementing their existing workforces.

In the lead up to the 2019 federal election, labour hire reform featured prominently in the ACTU's 'Change the Rules' campaign. The perceived issues in the industry had been the subject of various inquiries commissioned by state governments. Some jurisdictions enacted labour hire licensing regimes, imposing a new regulatory framework on labour hire providers and host companies who use their services. The ALP also announced a series of proposed reforms to the industry as part of its commitment to tackle 'insecure work'.

Despite the ALP's defeat in 2019, the attack on the labour hire business model has not relented.

There is now labour hire licensing legislation in four states and territories (Queensland, Victoria, South Australia and Australian Capital Territory), with a fifth (Western Australia) having provided in-principle support to introduce its own scheme.

LABOUR-HIRE-INDUSTRY-MAP.PNG



Additionally, unions have continued to seek their desired changes through the courts. Labour hire businesses, such as Workpac and One Key Workforce, have been the subject of high profile litigation in recent years.¹ The meaning of casual employment (and, in turn, the viability of many labour hire business models) was taken all the way to the High Court. Hosts (i.e. the recipients of the labour hire) have also been targeted in litigation aimed at limiting the rights of the host to remove labour hire workers from their workplaces.² All of these efforts have served the common goal of seeking to undermine the business model for many labour hire providers.

That said, the efforts to achieve change through the courts have only achieved mixed success for the union movement. The High Court did not blow up casual employment contracts across the country. And while, last month, the High Court found that a worker engaged by a labour hire business was an employee, not a contractor, its reasoning for reaching this conclusion has left the union movement dissatisfied. Questions regarding whether a worker is an employee or not, or a casual employee or not, are still ultimately viewed through the rubric of contract law principles. Calls for law reform remain as strong as ever.

At the same time, the labour hire industry has remained in the spotlight in further parliamentary inquiries. In particular, in December 2020, the Senate Select Committee on Job Security was established to inquire into and report on the impact of insecure or precarious employment on the economy, wages, social cohesion and workplace rights and conditions.

As expected, the Committee identified a variety of concerns regarding the labour hire industry. In its Third Interim Report, the Committee listed 18 recommendations for addressing these issues. This list included:

- introducing 'same job, same pay' legislation requiring that the wages and conditions of labour hire workers be at least equivalent to those who are directly employed by their host entities; and
- introducing a comprehensive national labour hire licensing scheme covering all business sectors.

These very recommendations have already been announced as ALP policies ahead of the 2022 federal election. In fact, Anthony Albanese introduced a private member's bill into Parliament in November last year which seeks to give effect to the 'same job, same pay' policy.

While it is to be expected that if such a Bill was to ever be passed by Parliament it would likely be in a substantially amended form, it nevertheless provides a good window into the kinds of reforms that an ALP government would seek to pursue. Some of these features include:

- it is not just about pay – the Bill describes the 'same job, same pay' obligation to also capture 'conditions' of employment, in addition to 'pay';
- 'same' does not mean 'similar' – the 'same job same pay' obligation is to provide pay and conditions '*which are **no less favourable***' than those provided to employees of the host. This would likely mean the labour hire worker would be entitled to all benefits, not just a more beneficial package overall;
- the definition of 'labour hire business' is likely to be broader than what is commonly understood to be 'labour hire' and would possibly capture traditional outsourcing and contracting arrangements with service providers; and
- importantly, the obligations won't just be on labour hire providers. Those who receive labour will have obligations regarding ensuring that labour hire businesses have adequate information in order to comply with the hosts' pay and conditions, contracting requirements, due diligence requirements and affording various other conditions to labour hire workers (like job and training opportunities, and consultation/notice with respect to changing hours of work), effectively attacking many of the commercial benefits of labour hire in the first place.

One Nation has also endorsed the concept of 'same job, same pay'. In February this year, One Nation introduced a bill in Parliament, the *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022*, which would require labour hire workers covered by certain modern awards to receive at least the same pay as other employees performing the same work. Whilst the scope of this Bill is more confined than the ALP's, it demonstrates that the policy of imposing further regulation on the labour hire industry may have broader support in Parliament. The Greens have also identified job security and equality, including workers being paid and treated equally for the same kind of work, as a key part of their policy platform, although it lacks any detail.

There is no doubt that should the ALP win government in May, it will be under considerable pressure to introduce reform to the labour hire industry, as well as other forms of 'precarious' work, including the gig economy, fixed term workers, and casuals. And it has openly said it intends to do so.³ Although we may not hear a great deal of detail regarding the ALP's proposed reforms, it is not hard to guess what might be involved, having regard to recent history.

Businesses should be watching this topic closely.

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1. For instance, see *Workpac Pty Ltd v Rossato* (2021) 392 ALR 39; *Workpac Pty Ltd v Skene* (2018) 264 FCR 536; and *One Key Workforce Pty Ltd v CFMEU* (2018) 262 FCR 527.
 2. For instance, *Johnson v CUB Pty Ltd* [2021] FCAFC 219; and *CFMMEU v BM Alliance Coal Operations Pty Ltd* (2019) 292 IR 183.
 3. Secure Australian Jobs Plan, 15 November 2021.



If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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