

The Senate

Education and Employment
Legislation Committee

Fair Work Amendment (Equal Pay for
Equal Work) Bill 2022

October 2022

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Contents

Members	v
Chapter 1—Introduction.....	1
Use of labour hire workers in Australia	1
Regulation of the labour hire industry.....	3
Overview of the bill	4
Consideration by other parliamentary committees	6
Conduct of the committee's inquiry	6
Chapter 2—Key issues.....	9
Overall views on the bill	9
Support for the principle of 'same job, same pay'	9
Opposition to the bill.....	14
Right principle, wrong implementation	15
The need for a more comprehensive approach	19
Committee view	20
Coalition Senators' additional comments	23
Australian Greens Senators' additional comments	29
Senator Malcolm Roberts' dissenting report	31
Appendix 1 Submissions and additional information	35
Appendix 2 Public hearing and witnesses	37

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Chapter 1

Introduction

- 1.1 The Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (bill) seeks to amend the *Fair Work Act 2009* (Fair Work Act) to require that certain labour hire workers receive at least the same rate of pay as other employees performing the same work.¹
- 1.2 According to the Explanatory Memorandum (EM), the bill 'is designed to limit the use of labour hire contracts by removing the incentive for employers to do so, which is lower wages'. The EM also states that the bill aims to 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'.²
- 1.3 The bill was originally introduced as a private senator's bill by Senator Malcolm Roberts in the 46th Parliament.³ It was restored to the *Notice Paper* in the 47th Parliament on 27 July 2022.⁴

Use of labour hire workers in Australia

- 1.4 According to data from the Australian Bureau of Statistics (ABS), the number of jobs in 'Labour Supply Services' was around 797 712 in 2018–19.⁵ The use of labour hire workers has been particularly widespread in the mining, construction, agriculture, transport and distribution sectors.⁶
- 1.5 Typically, a labour hire worker is someone who enters a work contract with a labour hire agency. The labour hire agency has a commercial contract with a host employer to supply labour. The labour hire worker performs work for the host employer, while the host employer pays the labour hire agency, which then pays the labour hire worker. This type of labour hire arrangement is illustrated in Figure 1.1 below.

¹ Fair Work Amendment (Equal Pay for Equal Work) Bill 2022, Item 1.

² *Explanatory Memorandum*, Fair Work Amendment (Equal Pay for Equal Work) Bill 2022, [p. 2].

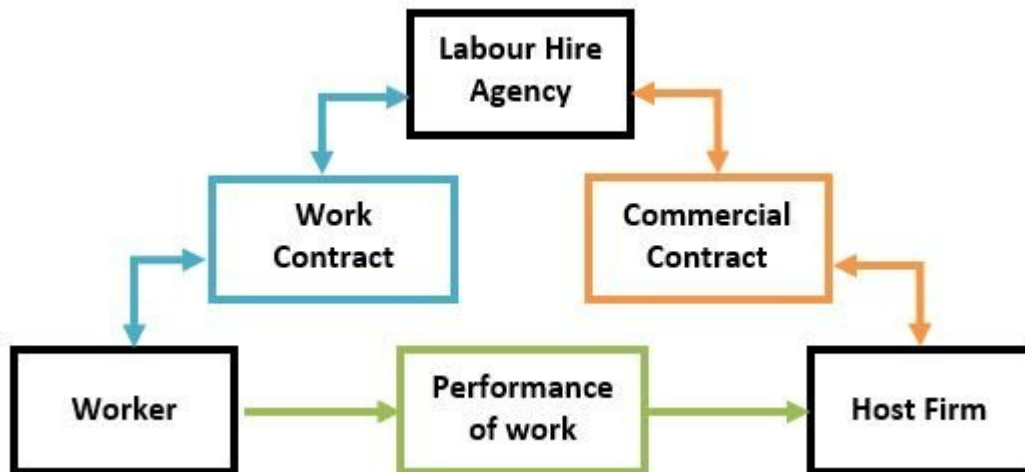
³ *Journals of the Senate*, No. 136, Thursday, 10 February 2022, pp. 4550–4551.

⁴ *Journals of the Senate*, No. 2, Wednesday, 27 July 2022, p. 75.

⁵ Department of Employment and Workplace Relations, *Submission 9*, p. 6.

⁶ See, for example, Queensland Coal Mining Board of Inquiry, *Queensland Coal Mining Board of Inquiry: Report Part II*, May 2021, pp. 373–374; Victorian Government, *Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report*, 31 August 2016, pp. 153–155, 160–161; Australian Manufacturing Workers' Union, *Submission 6*, [pp. 2–3].

Figure 1.1 Typical labour hire arrangement



Source: A Stewart, *Stewart's Guide to Employment Law* (4th ed, 2013) at p. 69.

- 1.6 Under this arrangement there are no direct or contractual relationships between the host and the worker; instead, the worker is engaged by the labour hire agency as an employee or an independent contractor, depending on the circumstances of the arrangement.
- 1.7 Some of the stated advantages of labour hire arrangements for employers include the increased flexibility and cost savings associated with quickly filling gaps in direct-hire workforces and the sourcing of non-permanent labour to support significant projects and operations.⁷
- 1.8 However, the growing use of labour hire and casualisation in Australia have prompted calls to ensure that labour hire is not misused to undercut the pay and conditions of employees performing the same work, regardless of the industry in which they work.⁸ In particular, concerns have been raised that labour hire workers experience lower pay, poorer working conditions, and higher rates of injury when compared to direct hire employees.⁹

Trends in the labour hire sector

- 1.9 The ABS provides a range of data sources in relation to labour hire trends in the Australian economy, including the household survey-based *Characteristics of Employment* and the administrative data-based *Jobs in Australia* publications.¹⁰

⁷ See, for example, Recruitment, Consulting and Staffing Association, *Submission 12*, pp. 1–2; Ms Jessica Tinsley, Deputy Director, Workplace Relations, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 5 October 2022, p. 55.

⁸ See, for example, Mining and Energy Union, *Submission 4*, p. 1; Maurice Blackburn Lawyers, *Submission 10*, pp. 2–3; Australian Manufacturing Workers' Union, *Submission 6*, [p. 3].

⁹ See, for example, Transport Workers' Union of Australia, *Submission 17*, pp. 3–6; Per Capita Australia, *Submission 5*, pp. 5–6.

¹⁰ Department of Employment and Workplace Relations, *Submission 9*, pp. 6–7.

However, the Department of Employment and Workplace Relations (DEWR) has pointed out that there are key technical differences between the estimates in these publications.¹¹

- 1.10 According to the ABS's latest *Characteristics of Employment* data, as at August 2020, there were around 339 400 employees registered with a labour hire firm and around 112 600 registered with and paid by a labour hire firm.¹² However, this is likely to under-report the true figure given the ABS's *Jobs in Australia* data shows that the number of jobs in 'Labour Supply Services' has increased from 584 311 in 2011–12 to 797 712 in 2018–19.¹³
- 1.11 In addition, the Recruitment, Consulting and Staffing Association noted that the labour hire sector 'employs over 500 000 people who are sourced and placed across a variety of industries and workplaces'.¹⁴
- 1.12 DEWR noted in its submission that the median hourly earnings for all labour hire employees registered with and paid by a labour hire firm are \$32.70 per hour compared to \$36.00 per hour for all employees.¹⁵ Other evidence suggests that the pay gap may be as much as 30 to 40 per cent in some industries.¹⁶

Regulation of the labour hire industry

- 1.13 Over recent years there have been several inquiries, at both the state and federal level, into various aspects of the labour hire industry in Australia. These inquiries identified deficiencies and inconsistencies in the way in which the labour hire sector is regulated and recommended various options for improving the regulation and standards of the labour hire industry.¹⁷

¹¹ Department of Employment and Workplace Relations, *Submission 9*, pp. 6–7. The Department of Employment and Workplace Relations noted that the Australian Bureau of Statistics is developing a dedicated *Labour Hire* page on its website, which will provide clear and coherent information on labour hire employment in the Australian labour market.

¹² Department of Employment and Workplace Relations, *Submission 9*, p. 5.

¹³ Department of Employment and Workplace Relations, *Submission 9*, p. 6.

¹⁴ Recruitment, Consulting and Staffing Association, *Submission 12*, p. 1.

¹⁵ Department of Employment and Workplace Relations, *Submission 9*, p. 5. The Department of Employment and Workplace Relations noted that this data does not account for other factors that affect earnings such as classification, workplace settings, age, location, experience, etc.

¹⁶ Coal Mining Industry (Long Service Leave Funding) Corporation, answer to question on notice EEC-BE21-115, Senate Education and Employment Budget Estimates 2021–22, 2 June 2021 (received 16 July 2021).

¹⁷ See, for example, Queensland Parliament, Finance and Administration Committee, *Inquiry into the practices of the labour hire industry in Queensland*, June 2016, pp. 18–26; Victorian Government, *Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report*, 31 August 2016, pp. 83–87; Australian Government, *Report of the Migrant Workers' Taskforce*, March 2019, pp. 99–107.

Senate Select Committee on Job Security

- 1.14 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.¹⁸ The select committee identified a variety of concerns regarding the labour hire industry, including the insecure and precarious nature of the work, the lack of workplace protections, and varying pay and conditions.¹⁹
- 1.15 In its *Third Interim Report: labour hire and contracting*, the select committee listed 18 recommendations including:
- ...that the Australian Government amends the [Fair Work Act] 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.²⁰
- 1.16 The committee also recommended the introduction of a comprehensive national labour hire licensing scheme for all business sectors and requiring mandatory registration and continuous compliance with all legal obligations.²¹
- 1.17 Currently, there are labour hire licensing regimes in Queensland, Victoria, South Australia, and the Australian Capital Territory, with Western Australia having indicated in principle support to introduce its own scheme.²²

The Australian Government's election commitments

- 1.18 Prior to the last federal election, the Australian Government (government) announced that as part of its *Secure Australian Jobs Plan* it would legislate to ensure that workers employed through labour hire companies receive no less than workers employed directly.²³ The government is currently 'consulting with a range of stakeholders including unions, employer groups, and employers with a view to introducing legislation in the first half of 2023'.²⁴

¹⁸ *Journals of the Senate*, No. 81, Thursday, 10 December 2020, pp. 2890–2891.

¹⁹ Senate Select Committee on Job Security, *Third interim report: labour hire and contracting*, November 2021, pp. 23–32.

²⁰ Senate Select Committee on Job Security, *Third interim report: labour hire and contracting*, November 2021, p. 33.

²¹ Senate Select Committee on Job Security, *Third interim report: labour hire and contracting*, November 2021, p. 34.

²² See, *Labour Hire Licencing Act 2017 (Qld)*; *Labour Hire Licencing Act 2017 (SA)*; *Labour Hire Licencing Act 2018 (Vic)*; and *Labour Hire Licencing Act 2020 (ACT)*.

²³ Australian Labor Party, *Labor's Secure Australian Jobs Plan*, <https://www.alp.org.au/policies/secureaustralian-jobs-plan> (accessed 23 September 2022).

²⁴ Department of Employment and Workplace Relations, *Submission 9*, p. 4.

Overview of the bill

1.19 The bill would insert a new Division 4 of Part 2-9 into the Fair Work Act that would require that certain labour hire employees receive at least the same amount of pay as other employees performing the same work.²⁵

Minimum pay for certain labour hire employees

1.20 The proposed new Division 4 would include a new section 333B which would:

- define the circumstances under which the new requirement would apply to a labour hire employer and host employer, including where the whole roster has been replaced with labour hire employees;
- require a host employer to pay an employee a base rate of pay that is at least equal to, if not more than, the rate being paid to an employee of the host employer, including incentives, allowances, overtime and penalty rates, and any other identifiable amounts;
- clarify that the 'same work for the same pay rate test' should consider employees who may be on the same shift, but working a different roster and therefore may receive a different rate of pay; and
- limit the application of the bill to specific modern awards and allow the Minister to add additional awards by way of disallowable instrument.²⁶

Awards to be covered by the bill

1.21 The bill would apply to labour hire employees under the Black Coal Mining Industry Award 2020²⁷ and the Aircraft Cabin Crew Award 2020, as well as the Australian Nuclear Science and Technology Organisation (ANSTO) Enterprise Award 2016; the Fire Fighting Industry Award 2020; the Maritime Offshore Oil and Gas Award 2020; and the Seagoing Industry Award 2020.²⁸

Penalty for non-compliance

1.22 The bill would provide a new civil penalty that would apply in respect of a worker employed under a labour hire contract where the provisions of the proposed amendments have been breached. The EM notes that 'the penalties in this section are in line with similar penalties for breach of enterprise agreement provisions already contained within the [Fair Work Act]'.²⁹

²⁵ Fair Work Amendment (Equal Pay for Equal Work) Bill 2022, Item 1 would insert a brief explanation of the intent of the new Division 4 of Part 2-9 of the *Fair Work Act 2009*.

²⁶ Fair Work Amendment (Equal Pay for Equal Work Bill) 2022, Item 2.

²⁷ On 30 November 2021, a Full Bench of the Fair Work Commission varied the Black Coal Mining Industry 2010, which was renamed the Black Coal Mining Industry Award 2020.

²⁸ Fair Work Amendment (Equal Pay for Equal Work Bill) 2022, Item 2.

²⁹ *Explanatory Memorandum*, Fair Work Amendment (Equal Pay for Equal Work) Bill 2022, [p. 2].

Application of amendments

1.23 The amendments relating to the pay rate would not have a retrospective application and would be limited to any new labour hire contract entered into after the commencement of the bill.³⁰

Consideration by other parliamentary committees

1.24 When examining a bill, the Senate Education and Employment Legislation Committee (committee) considers any relevant comments published by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) and the Parliamentary Joint Committee on Human Rights (Human Rights Committee).

1.25 The Scrutiny Committee noted that proposed subsection 333B(4) of the bill may raise scrutiny concerns under Senate standing order 24. It noted that this provision 'may raise scrutiny concerns under principle (v) in relation to the incorporation of external material as existing from time to time'.³¹

1.26 The Human Rights Committee did not make any comment on the bill.³² However, the statement of compatibility with human rights concluded that the bill is compatible with human rights because 'it advances the protection of human rights, particularly the right to equal pay for equal work'.³³

Conduct of the committee's inquiry

1.27 On 28 July 2022, the Senate referred the bill to the committee for inquiry and report by 24 October 2022.³⁴

1.28 The committee advertised the inquiry on its website and invited submissions by 14 September 2022. The committee received 18 submissions which are listed at Appendix 1 of this report. The public submissions are available on the committee's website.

1.29 The committee held a public hearing in Sydney on 5 October 2022. A list of the witnesses who gave evidence at the hearing is included at Appendix 2.

³⁰ Fair Work Amendment (Equal Pay for Equal Work Bill) 2022, Item 4.

³¹ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2022*, 7 September 2022, p. 20. Scrutiny principle (v) requires the Scrutiny Committee to scrutinise each bill as to whether it insufficiently subjects the exercise of legislative power to parliamentary scrutiny. Under this principle, the Scrutiny Committee will typically be concerned with bills which provide for the incorporation of external materials as existing from time to time. Should the bill proceed to further stages of debate, the Scrutiny Committee may request further information from the bill proponent.

³² Parliamentary Joint Committee on Human Rights, *Report 2 of 2022*, 25 March 2022, p. 65.

³³ *Explanatory Memorandum*, [p. 4].

³⁴ *Journals of the Senate*, No. 3, Thursday, 28 July 2022, p. 118.

1.30 The committee thanks those individuals and organisations who contributed to this inquiry by preparing written submissions and giving evidence at the public hearing.

Chapter 2

Key issues

Overall views on the bill

- 2.1 There was broad support among stakeholders for the underlying objective of the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (bill) to ensure that labour hire workers receive at least the same rate of pay as other employees performing the same work.¹
- 2.2 Despite this, stakeholders generally raised concerns that the bill as drafted will not achieve its desired outcomes.² For example, most stakeholders who provided evidence to the inquiry, including those who supported the intent of the bill, raised concerns about its limited scope and questioned whether its provisions would operate as intended.³ At the same time, some employer groups queried the need for the bill and suggested it could have unintended impacts on businesses and employees.⁴
- 2.3 In addition, a significant number of stakeholders noted they were actively consulting with the Australian Government (government) on the issues that the bill aims to address. Many of these stakeholders urged all parties to work through this consultation process to develop a legislative response that will deliver the objectives of the bill in a more comprehensive way.⁵

Support for the principle of 'same job, same pay'

- 2.4 Underpinning stakeholder support for the same job, same pay principle was concern about the increased use of labour hire in Australia, pay and conditions disparities between labour hire workers and direct hire employees, and a lack of protection for labour hire workers.

¹ See, for example, Australian Council of Trade Unions, *Submission 7*, p. 1; Mining and Energy Union, *Submission 4*, p. 2; Australian Manufacturing Workers' Union, *Submission 6*, [pp. 1–2]; CFMEU (Construction and General Division), *Submission 13*, p. 2.

² See, for example, Mining and Energy Union, *Submission 4*, p. 2; Australian Manufacturing Workers' Union, *Submission 6*, [p. 1]; JobWatch, *Submission 8*, p. 3; Per Capita Australia, *Submission 5*, pp. 6–7.

³ See, for example, Australian Nursing and Midwifery Federation, *Submission 2*, pp. 4–5; Maurice Blackburn Lawyers, *Submission 10*; Australian Manufacturing Workers' Union, *Submission 6*, [pp. 3–4]; Australian Council of Trade Unions, *Submission 7*, p. 5.

⁴ See, for example, Ai Group, *Submission 11*, p. 9; Maritime Industry Australia Limited, *Submission 3*, [p. 2]; Recruitment, Consulting and Staffing Association, *Submission 12*, pp. 1–2; Australian Chamber of Commerce and Industry, *Submission 18*, p. 5.

⁵ See, for example, Australian Manufacturing Workers' Union, *Submission 6*, [p. 5]; Mining and Energy Union, *Submission 4*, p. 9; Australian Council of Trade Unions, *Submission 7*, p. 5.

The growth of labour hire in Australia

- 2.5 Evidence provided during the inquiry pointed to an increase in the use of labour hire workers, particularly in sectors such as mining, agriculture, and in transport and distribution.⁶ Recent statistics from the Australian Bureau of Statistics indicated that 86 per cent of workers paid by a labour hire firm or employment agency are employed on a casual basis.⁷
- 2.6 This growth was noted by Per Capita Australia (Per Capita), which argued that the use of labour hire had moved beyond its traditional role in 'providing short term or temporary labour, or workers with specific expertise for specific time-sensitive projects' to become 'a practice on which entire operations and industries are built'.⁸
- 2.7 This view was shared by the Australian Manufacturing Workers' Union (AMWU), which highlighted the increasing use of labour hire by employers irrespective of job type or duration. This includes the practice of large companies establishing their own labour hire companies to supply labour at their workplaces:

The experience of the AMWU is increasingly that more employers across a range of industries prefer to engage labour hire companies to provide cheaper workers, regardless of the nature of the work or the duration of the expected vacancies. This includes the setting up of labour hire companies by large employers and project joint venture partners to provide a cheaper source of labour at their own workplace, sometimes in competition with or instead of their own directly hired employees.⁹

- 2.8 One large employer that has engaged in the practice of setting up its own labour hire subsidiaries, Qantas, confirmed to the committee that this has enabled the company to renegotiate more 'competitive' pay and conditions with its workforce, with the result that conditions for its workers have declined in recent decades:

...Qantas had to be competitive in terms of its rates. If we hadn't done that, essentially what would have happened is we would have had higher costs, higher overheads and higher fares, and we simply would have been competed out of business. So what we have done is create other entities within the group... Those conditions are grandfathered for those who already have them — they hold onto those, no-one is trying to take that away

⁶ See, for example, Transport Workers' Union of Australia, *Submission 17*, pp. 4–6; Australian Manufacturing Workers' Union, *Submission 6*, [pp. 2–3]; Mining and Energy Union, *Submission 4*, p. 2; Per Capita Australia, *Submission 5*, p. 5.

⁷ Department of Employment and Workplace Relations, *Submission 9*, p. 5.

⁸ Per Capita Australia, *Submission 5*, p. 5.

⁹ Australian Manufacturing Workers' Union, *Submission 6*, [p. 2]. See also, Professor Joellen Riley Munton, Professor of Law, University of Technology Sydney, *Proof Committee Hansard*, 5 October 2022, pp. 48–49.

from them—but new people who enter the group are on more modern ones. It almost varies depending on which decade you were employed in.¹⁰

- 2.9 Indeed, the growth in labour usage in the transport and aviation industries was described by the Transport Workers' Union of Australia (TWU) as a deliberate strategy and part of a 'bundle of approaches taken by employers to suppress wages and conditions'. The TWU submitted:

We call it the deliberate fragmenting of work, pushing workers into different groups and essentially pitting them against each other in competition, whether it's through using labour hire, whether it's the creation of artificial, lower-paying subsidiaries, whether it's pushing the work to outside hire or whether it's pushing workers themselves outside of the traditional protections ... into the gig economy.¹¹

- 2.10 The Mining and Energy Union (MEU) noted the impact of this growth on the mining industry and described 'the increased casualisation and exploitation of mineworkers, primarily through the contracting out of jobs by the big mining companies' as a steadily growing 'threat to decent mining jobs in regional Australia'.¹²
- 2.11 Accordingly, many stakeholders called for the implementation of the same job, same pay principle to ensure that workers employed through labour hire companies receive no less than workers employed directly.¹³ For example, the MEU argued that the same job, same pay principle was 'essential in ensuring that all mineworkers are fairly rewarded with fair pay, and safe and secure work, for performing demanding work in an inherently dangerous industry'.¹⁴

Pay disparities and a lack of protections for labour hire workers

- 2.12 It was argued by many stakeholders that labour hire workers often experience disparities in pay and conditions compared those directly engaged by employers and that this can impact the ability of some labour hire workers to exercise their rights in the workplace. For example, JobWatch highlighted analysis from its telephone information service database which revealed 'that

¹⁰ Mr Andrew McGinnes, Group Executive, Corporate Affairs, Qantas, *Proof Committee Hansard*, 5 October 2022, p. 41.

¹¹ Mr Michael Kaine, National Secretary, Transport Workers' Union of Australia, *Proof Committee Hansard*, 5 October 2022, p. 35. See also, Transport Workers' Union of Australia, *Submission 17*, p. 1.

¹² Mining and Energy Union, *Submission 4*, p. 1.

¹³ See, for example, The McKell Institute, *Submission 1*, pp. 2–3; Australian Council of Trade Unions, *Submission 7*, p. 1; Mining and Energy Union, *Submission 4*, p. 2; Australian Manufacturing Workers' Union, *Submission 6*, [p. 3]; CFMEU (Construction and General Division), *Submission 13*, p. 2; Transport Workers' Union of Australia, *Submission 17*, p. 1; Professor Joellen Riley Munton, University of Technology Sydney, *Proof Committee Hansard*, 5 October 2022, p. 48.

¹⁴ Mining and Energy Union, *Submission 4*, p. 1.

labour-hire employees often experience a lower standard of pay and conditions at work and have little recourse available to them'.¹⁵

- 2.13 The MEU argued that employees in the mining industry who are engaged through third-party contractors may be earning 30 to 40 per cent less than individuals in the same role employed directly by a mining company, despite performing the same duties.¹⁶ This statement is supported by data previously published by the Coal Mining Industry (Long Service Leave) Corporation on the wage differential between full time and casual workers in the black coal industry.¹⁷
- 2.14 These figures were similar to those provided by the The McKell Institute, which found that mining jobs offered through labour hire companies provided rates of pay that were only marginally higher than the award rate.¹⁸
- 2.15 This was illustrated by TWU Delegate and Qantas Freight worker, Mr David Masters, who described the differing pay and conditions for labour hire workers employed across six different entities at Qantas' freight facility at Sydney Airport:
- At present we have AAE, Qantas Airways Limited, or QAL, and QGS ground services, as well as three labour hire companies—Blue Collar, Wymap and Precision—with workers all working under different rates of pay and conditions, even though we do the same job at the same facility. All QGS workers are employed on a permanent part-time basis, while QAL and AAE workers are almost all full-time workers. Labour hire workers are generally casuals.¹⁹
- 2.16 Several stakeholders also observed that the insecure and precarious nature of labour hire employment meant that, in addition to lower wages and conditions,

¹⁵ JobWatch, *Submission 8*, p. 2.

¹⁶ Mr Adam Walkaden, National Legal Director, Mining & Energy Union, *Proof Committee Hansard*, 5 October 2022, p. 18.

¹⁷ Coal Mining Industry (Long Service Leave Funding) Corporation, answer to question on notice EEC-BE21-115, Senate Education and Employment Budget Estimates 2021–22, 2 June 2021 (received 16 July 2021).

¹⁸ The McKell Institute, *Wage-Cutting Strategies in the Mining Industry, The cost to workers and communities*, May 2022, p. 3. Instead of earning more to make up for the lack of entitlements, casual mineworkers usually earn at least a third less than permanents, even with their casual 'loading'. This is because labour hire companies – at the direction of mine owners – set pay rates at just above the Black Coal Industry Award minimum, whilst the rates under enterprise agreements that apply to permanent employees are reflective of multiple rounds of collective bargaining as well as the tough working conditions in coal mining.

¹⁹ Mr David Masters, Transport Workers' Union of Australia, *Proof Committee Hansard*, 5 October 2022, p. 36. See also, Transport Workers' Union of Australia, *Submission 17*, p. 6.

many labour hire workers felt constrained in their ability to exercise their rights in the workplace, particularly in relation to workplace health and safety.²⁰

- 2.17 In addition, evidence received from current and former mine workers suggested that the imbalance in power between labour hire workers and their host employers created a risk that workplace health and safety concerns would not always be raised. For example, Mr Stuart Bonds told the committee:

...if you are a casual employee, your employment is day to day. If you are seen to raise questions about safety, it could be perceived that you are a troublemaker and you're causing issues. You might get a 'don't come Monday' statement from the employer. I feel that you're disadvantaged greatly as a casual employee. You don't have any protection.²¹

- 2.18 Likewise, Mr Simon Turner highlighted a case 'where the mining and energy union filed for adverse action against BHP Mount Arthur because this girl ... was complaining about the water carts putting too much water out and making the roads dangerous. She was sacked; she was told not to come back'.²²

- 2.19 The Queensland Coal Mining Board of Inquiry, tasked with investigating an explosion at Anglo American's Grosvenor mine in Central Queensland, concluded with respect to the link between labour hire employment and safety:

The Board's conclusion is that there is a perception among coal mine workers that a labour hire worker or contractor who raises safety concerns at a mine might jeopardise their ongoing employment...the existence of a perception, no matter how widespread, creates a risk that safety concerns will not always be raised.²³

- 2.20 In addition to the impact on safety in the mining industry, other stakeholders raised concerns about the connection between labour hire and unsafe work practices more broadly. For example, in the aviation industry, Qantas' recent illegal outsourcing of almost 1700 workers to outsourced providers including Swissport resulted in serious safety incidents including firearms being unloaded onto baggage carousels, and passenger stairs being removed from a plane while the door remained open.²⁴

- 2.21 Beyond the impact on individual workers, stakeholders also highlighted the impact on the communities in which affected workers live. For example, The McKell Institute referred to the findings of two of its reports, which examined the direct cost of labour hire arrangements and casualisation on employees and the communities where they live. The reports looked at the mining sector across

²⁰ See, for example, Mr Sam Stephens, *Submission 16*, p. 1; Mr Stuart Bonds, *Submission 15*, p. 7.

²¹ Mr Stuart Bonds, *Proof Committee Hansard*, 5 October 2022, p. 2.

²² Mr Simon Turner, *Proof Committee Hansard*, 5 October 2022, p. 2.

²³ Queensland Coal Mining Board of Inquiry, *Queensland Coal Mining Board of Inquiry: Report Part II*, May 2021, p. 14.

²⁴ Transport Workers' Union of Australia, *Submission 17*, p. 5.

five federal electorates and 'found that \$989 million was lost in economic activity across these electorates alone'.²⁵ Dr Stephen Whelan, the principal author of the reports, told the committee that there was 'a loss of income to employees in the labour hire firms relative to those who are employed directly by the company; likewise, to the communities in which they live through the indirect effects of the lower wages they receive'.²⁶

Opposition to the bill

- 2.22 Some stakeholders questioned the need for the bill on the basis that the misconduct it proposes to address is not widespread across industries and occupations. In doing so, they pointed to existing protections for labour hire workers and the benefits of labour hire arrangements.²⁷
- 2.23 For example, Ai Group claimed that the 'vast majority of labour hire companies are reputable and comply with relevant laws and regulations'.²⁸ It also argued that the National Employment Standards, unfair dismissal laws and other protections of the *Fair Work Act 2009* [Fair Work Act] already apply to labour hire workers, including labour hire companies and their employees.²⁹ Similarly, Maritime Industry Australia Limited (MIAL) argued that it could not 'identify what perceived issue has been identified that would justify legislative intervention of this nature'.³⁰
- 2.24 Other stakeholders, such as the Australian Chamber of Commerce and Industry (ACCI), argued that employers were not engaging labour hire workers to undercut wages and conditions and maintained that 'employers overwhelmingly engage labour hire to manage workforce factors that sit outside their control, such as seasonal demands or skills gaps, mostly on a short-term basis'. The ACCI also claimed that labour hire 'provides flexibility for employees and offers job opportunities that would otherwise not exist'.³¹

²⁵ The McKell Institute, *Submission 1*, pp. 2–3.

²⁶ Dr Stephen Whelan, Associate Professor, School of Economics, Faculty of Arts and Social Sciences, University of Sydney, *Proof Committee Hansard*, 5 October 2022, p. 49.

²⁷ See, for example, Ai Group, *Submission 11*, p. 3; Maritime Industry Australia Limited, *Submission 3*, [pp. 3–6]; Recruitment, Consulting and Staffing Association, *Submission 12*, pp. 1–2.

²⁸ Ms Nicola Street, Director, Workplace Relations Policy, Diversity, Equity and Inclusion, Australian Industry Group, *Proof Committee Hansard*, 5 October 2022, p. 54.

²⁹ Ai Group, *Submission 11*, p. 3.

³⁰ Maritime Industry Australia Limited, *Submission 3*, [p. 2].

³¹ Ms Jessica Tinsley, Deputy Director, Workplace Relations, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 5 October 2022, p. 55. See also, Ai Group, *Submission 11*, p. 2.

- 2.25 While noting that pay disparities exist in a small number of industries, the Recruitment, Consulting and Staffing Association (RCSA) submitted that 'instances of negative pay disparity for on-hire workers compared to their directly hired counterparts is very much the exception, rather than the rule'.³² The RCSA also expressed concern that trying to regulate across all industries where labour hire is used risks creating unnecessary regulatory, administrative, and cost burdens on business.³³ This view was shared by Ai Group, which described the policy intent behind the bill as 'unfair, inappropriate and unworkable'.³⁴
- 2.26 However, both the Department of Employment and Workplace Relations (DEWR) and Maurice Blackburn Lawyers highlighted several international examples where same job, same pay regulation had been introduced.³⁵ For example, DEWR's submission noted that several European countries have 'implemented regulation to ensure that temporary agency workers (the term used by the European Union for labour hire workers) receive the same pay and conditions as employees directly engaged by the same business'.³⁶

Right principle, wrong implementation

- 2.27 While most stakeholders supported the underlying objective of the bill, many argued that its provisions would not be sufficient to give effect to the same job, same pay principle.³⁷ Indeed, stakeholders raised several concerns in relation to the operation of the bill, including a lack of clarity around its key terms and provisions, its limited scope, and whether it would be effective in tackling the issues it aims to address.

Key terms not defined

- 2.28 Several stakeholders raised concerns about the failure to define key terms in the bill, particularly 'labour hire employer' and 'labour hire employee'. For example, the Australian Council of Trade Unions (ACTU) was concerned that this could limit the scope of the bill to arrangements that are understood to

³² Recruitment, Consulting and Staffing Association, *Submission 12*, p. 1.

³³ Recruitment, Consulting and Staffing Association, *Submission 12*, p. 3.

³⁴ Ai Group, *Submission 11*, p. 2.

³⁵ Department of Employment and Workplace Relations, *Submission 9*, p. 7; Maurice Blackburn Lawyers, *Submission 10*, p. 5.

³⁶ Department of Employment and Workplace Relations, *Submission 9*, p. 7.

³⁷ See, for example, Australian Manufacturing Workers' Union, *Submission 6*, [pp. 1–2]; CFMEU (Construction and General Division), *Submission 13*, p. 3.

be labour hire arrangements.³⁸ The ACTU argued that this would 'leave workers engaged through outsourcing arrangements entirely unprotected'.³⁹

2.29 From an industry perspective, the Ai Group argued that the absence of these definitions would 'create risk for a very large number of business-to-business contractors who would be caught by this bill when in fact they're not deemed to be labour hire under the current and established definition of labour hire in Australia's modern award system'.⁴⁰

2.30 In addition, the ACCI observed that any definition of 'labour hire' would 'need to be considered in the context of the [government's] proposed national labour hire registration scheme, especially as inconsistency would be problematic'.⁴¹ The ACCI noted:

Labour hire is hard to define in practice, and could, in the absence of a carefully crafted definition, inadvertently and quite damagingly for employers, employees and communities, capture a broader range of arrangements not usually characterised as 'labour hire', such as service providers, i.e., those companies that provide services rather than labour.⁴²

2.31 Some stakeholders also considered there to be a lack of clarity about the concept of the base rate of pay and that this could create compliance and administrative complexities.⁴³ For example, the ACCI noted that the bill:

...fails to clearly identify which employee 'in the same classification or class of work for the same hours of work' the labour hire employee's pay must be the same as in circumstances where there are several employees earning different wages in that classification or class of work.⁴⁴

2.32 The ACTU argued that the bill could also create a risk that workers who work unrostered overtime may find themselves entitled to be paid only the overtime penalty for those hours of work, rather than both the base rate and overtime.⁴⁵

³⁸ Australian Council of Trade Unions, *Submission 7*, p. 3. See also, Mining and Energy Union, *Submission 4*, p. 5; Australian Manufacturing Workers' Union, *Submission 6*, [p. 2]; Australian Nursing and Midwifery Federation, *Submission 2*, p. 4.

³⁹ Australian Council of Trade Unions, *Submission 7*, p. 3.

⁴⁰ Ms Nicola Street, Director, Workplace Relations Policy, Diversity, Equity and Inclusion, Australian Industry Group, *Proof Committee Hansard*, 5 October 2022, p. 54. See also, Ms Jessica Tinsley, Deputy Director, Workplace Relations, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 5 October 2022, p. 56.

⁴¹ Australian Chamber of Commerce and Industry, *Submission 18*, p. 4.

⁴² Australian Chamber of Commerce and Industry, *Submission 18*, p. 4.

⁴³ See, for example, Recruitment, Consulting and Staffing Association, *Submission 12*, pp. 4–5; Australian Chamber of Commerce and Industry, *Submission 18*, p. 4; Ai Group, *Submission 11*, p. 5.

⁴⁴ Australian Chamber of Commerce and Industry, *Submission 18*, p. 4.

⁴⁵ Australian Council of Trade Unions, *Submission 7*, p. 4.

2.33 Adding to this confusion, Ai Group submitted that the inclusion of the words 'or would be' payable under proposed section 333B(2)(a) of the bill was problematic:

If the intent is that the labour hire employer must pay the labour hire employee the same rate of pay as the host employer pays to its equivalent employees at each point in time, this is captured by the words 'that is payable'. The words 'or would be' are unnecessary, and their inclusion would lead to uncertainty and potential unintended consequences.⁴⁶

Limited scope of the bill

2.34 Several stakeholders commented on the limited scope of the bill.⁴⁷ For example, the ACTU was concerned that businesses could move employees onto contracting arrangements to remove the risk of being covered by the provisions of the bill.⁴⁸ It argued that the 'labour hire sector will no doubt swiftly evolve the language in its contracts to move any employees onto contracting arrangements, to greatly limit the risk of ever being captured by the terms of the bill'.⁴⁹

2.35 The Australian Nursing and Midwifery Federation (ANMF) noted that this would be 'particularly relevant to carers and nurses working in aged care which historically have had lower wages than their public and private acute counterparts'. The ANMF also expressed 'significant concerns around the use of digital platforms and independent contractors in the aged care sector'.⁵⁰

2.36 Similarly, the RCSA warned that some businesses would find ways to circumvent any regulations. RCSA argued that 'any Equal Pay for Equal Work Scheme must consider how it can be applied across all forms of market activity relating to the provision of labour, not just to labour-hire structures'. It noted that any '[r]egulation needs to adequately address the activity and behaviour, not the structure, if it is to have any real impact'.⁵¹

⁴⁶ Ai Group, *Submission 11*, p. 5. See also, Mining and Energy Union, *Submission 4*, p. 8.

⁴⁷ See, for example, Australian Nursing and Midwifery Federation, *Submission 2*, p. 4; Australian Manufacturing Workers' Union, *Submission 6*, [p. 2]; Mining and Energy Union, *Submission 4*, pp. 5–6; Australian Council of Trade Unions, *Submission 7*, p. 3; Antipoverty Centre, *Submission 14*, p. 1.

⁴⁸ Australian Council of Trade Unions, *Submission 7*, p. 3.

⁴⁹ Australian Council of Trade Unions, *Submission 7*, p. 3. See also, Australian Nursing and Midwifery Federation, *Submission 2*, p. 4.

⁵⁰ Australian Nursing and Midwifery Federation, *Submission 2*, p. 4.

⁵¹ Recruitment, Consulting and Staffing Association, *Submission 12*, p. 8.

- 2.37 Some stakeholders were also concerned about the limited number of modern awards that would initially be covered by the bill.⁵² For example, Maurice Blackburn Lawyers argued that the bill 'offers no protection to workers in other parts of the economy where labour hire arrangements are common – including construction, transport, hospitality, cleaning and aged care and disability care services'.⁵³
- 2.38 In contrast to concerns about the bill's limited scope, some industry stakeholders raised concerns about the breadth of the proposed requirement for labour hire companies to provide additional payments based on the employee's base rate of pay, including incentives, allowances, overtime and penalty rates, and any other identifiable amounts.⁵⁴

The bill would not operate as intended

- 2.39 There were also concerns the definitions and obligations contained within the bill would, in operation, give rise to more questions than they would resolve, particularly in relation to some of the objectives outlined in the bill's second reading speech.⁵⁵ Indeed, despite comments in the second reading speech, there were doubts about how the bill would require an equal pay for equal work provision in an enterprise agreement.⁵⁶ For example, the MEU noted:

If enacted, the provisions of the bill would be found in Division 3 of Part 2–9 of the [Fair Work Act]. Those are matters that the Fair Work Commission would not be required to consider when approving an enterprise agreement. Any suggestion that those provisions would somehow form part of the underlying relevant modern award and then be relevant in application of the BOOT are misconceived.⁵⁷

- 2.40 In addition, several submitters noted that it was not clear how a labour hire provider could comply with the requirements of the bill in circumstances where

⁵² See, for example, Per Capita Australia, *Submission 5*, p. 3; Australian Council of Trade Unions, *Submission 7*, p. 3; JobWatch, *Submission 8*, p. 2; Australian Manufacturing Workers' Union, *Submission 6*, [p. 2]; CFMEU (Construction and General Division), *Submission 13*, p. 3; Australian Nursing and Midwifery Federation, *Submission 2*, p. 4.

⁵³ Maurice Blackburn Lawyers, *Submission 10*, p. 4.

⁵⁴ See, for example, Ai Group, *Submission 11*, pp. 6–9; Australian Chamber of Commerce and Industry, *Submission 18*, p. 4. See also, Ms Nicola Street, Director, Workplace Relations Policy, Diversity, Equity and Inclusion, Australian Industry Group, *Proof Committee Hansard*, 5 October 2022, p. 54.

⁵⁵ Senator Malcolm Roberts, *Senate Hansard*, 10 February 2022, pp. 298–300.

⁵⁶ See, for example, Maritime Industry Australia Limited, *Submission 3*, [pp. 2–3]; Mining and Energy Union, *Submission 4*, pp. 8–9; Recruitment, Consulting and Staffing Association, *Submission 12*, p. 5.

⁵⁷ Mining and Energy Union, *Submission 4*, p. 9.

either they or the host employer are covered by an enterprise agreement.⁵⁸ For example, Mr Brent Ferguson from Ai Group told the committee:

...there is a fundamental difficulty with how you would calculate the entitlements pursuant to this bill where the different entities are operating under different industrial instruments. It is extremely complicated, if not impossible, to work out how you would do that, and it will result in all sorts of unfair outcomes.⁵⁹

2.41 Other stakeholders questioned how the bill would encourage employers to retain existing staff in permanent work arrangements, while training new staff through apprenticeships and traineeships as stated in the Explanatory Memorandum.⁶⁰

Other concerns with the bill

2.42 Other concerns outlined in relation to the bill, included the proposed scope of the Minister's regulation making power in relation to the expanding the number of awards⁶¹ and the potential for confusion arising from the expression 'equal pay for equal work' given its history in relation to the relative pay rates between men and women.⁶²

The need for a more comprehensive approach

2.43 There was strong support from many stakeholders for a more comprehensive response to the issues raised. A number of participants called for all parties to work with the government to develop a legislative response that would deliver on the objectives of the bill in a more comprehensive way.⁶³ For example, Mr Trevor Clarke from the ACTU told the committee:

...we believe a more comprehensive response to the problems it appears to wish to address is warranted. Noting that the government has announced that it intends to advance legislation, including in relation to labour hire, we

⁵⁸ See, for example, Ai Group, *Submission 11*, p. 9; Recruitment, Consulting and Staffing Association, *Submission 12*, pp. 5–6 and 7; Australian Chamber of Commerce and Industry, *Submission 18*, pp. 4–5.

⁵⁹ Mr Brent Ferguson, National Workplace Relations Policy, Australian Industry Group, *Proof Committee Hansard*, 5 October 2022, p. 56.

⁶⁰ See, for example, Maurice Blackburn Lawyers, *Submission 10*, p. 4; Australian Council of Trade Unions, *Submission 7*, p. 4; Australian Manufacturing Workers' Union, *Submission 6*, [p. 4].

⁶¹ See, for example, Ai Group, *Submission 11*, pp. 3–4; Recruitment, Consulting and Staffing Association, *Submission 12*, pp. 6–7. See also, Ms Nicola Street, Director, Workplace Relations Policy, Diversity, Equity and Inclusion, Australian Industry Group, *Proof Committee Hansard*, 5 October 2022, p. 58.

⁶² Ai Group, *Submission 11*, p. 3; Per Capita Australia, *Submission 5*, p. 3.

⁶³ See, for example, Australian Council of Trade Unions, *Submission 7*, p. 5; Australian Nursing and Midwifery Federation, *Submission 2*, p. 5; Manufacturing Workers' Union, *Submission 6*, [p. 5]; CFMEU (Construction and General Division), *Submission 13*, pp. 4–5.

would recommend that all senators and members support the development of a comprehensive response through that process.⁶⁴

- 2.44 Similarly, the RCSA was supportive of the underlying intent of the bill but argued that its aims should not be achieved at the expense of a regulatory system that provides certainty for businesses and employees:

RCSA is committed to getting the right balance between flexibility and responsibility in the labour market, however we are concerned this bill not only fails to strike that balance but creates a series of obstacles for on-hire staffing firms, their workers and their clients, that are extraordinarily difficult to overcome or effectively administer.⁶⁵

- 2.45 To this end, DEWR noted that the government was currently consulting with a range of stakeholders including unions, employer groups, and employers with a view to introducing legislation in the first half of 2023:

The government is consulting on a broad range of issues, including the scope of the reform, the various definitions of 'labour hire', worker entitlements, comparators, the operation and application of enterprise agreements, the rights and obligations of businesses, including labour hire and hosts, and the potential impact on business, industry, the labour market and the economy.⁶⁶

Committee view

- 2.46 The committee would like to thank stakeholders for their engagement in this inquiry, particularly labour hire workers who bravely provided evidence about their personal experiences of being subjected to this form of employment.
- 2.47 While the committee acknowledges there are legitimate uses for labour hire, it agrees with those stakeholders who argue that the pendulum has swung too far and that the use of labour hire has moved well beyond simply filling specialised or short-term skills gaps and has instead become an established mechanism for lowering costs by undercutting wages and employment conditions.
- 2.48 The increased use of labour hire, without particular reference to jobs performed or the duration of employment, appear to have blurred the distinction between labour hire employees and those permanently engaged by the host employer. Indeed, it may also be contributing to the underreporting of labour hire employee numbers, with many workers who have been persistently employed by labour hire firms identifying as employees of an industry, rather than a labour hire firm.⁶⁷

⁶⁴ Mr Trevor Clarke, Manager, Legal and Industrial, Australian Council of Trade Unions, *Proof Committee Hansard*, 5 October 2022, p. 35.

⁶⁵ Recruitment, Consulting and Staffing Association, *Submission 12*, p. 8.

⁶⁶ Department of Employment and Workplace Relations, *Submission 9*, p. 4.

⁶⁷ Senate Select Committee on Job Security, *Third interim report: labour hire and contracting*, November 2021, p. 14.

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- 2.49 The committee is particularly concerned by the practice of some large employers, including Qantas, of using the threat of outsourcing core ongoing workers, such as pilots and flight attendants, to internal or external labour hire entities as a tool to obtain bargaining concessions. Or, as in the case of the almost 1700 illegally outsourced Qantas ground handlers, outsourcing core ongoing work to labour providers to prevent workers from engaging in collective bargaining or protected industrial action.
- 2.50 The committee notes the evidence of stakeholders who argued that labour hire workers often experience disparities in pay and conditions compared to those directly engaged by employers. In particular, the committee is concerned that labour hire employees in some industries may be earning 30 to 40 per cent less than individuals in the same role employed directly by a host employer, despite performing the same duties.
- 2.51 In addition to disparities in pay and conditions, the committee received evidence that labour hire workers feel limited in their ability to exercise their rights in the workplace. The committee was particularly concerned by the evidence of some witnesses that safety and health standards may have been compromised due to labour hire and other types of temporary and insecure arrangements in the mining industry.
- 2.52 Accordingly, the committee supports the broad aim of the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (bill) to ensure that a labour hire worker doing the same job as a directly engaged employee receives the same rate of pay.
- 2.53 That said, the committee recognises that any legislative response must be effective and operate as intended and requires further consideration. Accordingly, the committee must acknowledge the significant misgivings expressed by most inquiry participants about the limited scope of bill and the lack of clarity concerning its key provisions and definitions.
- 2.54 The committee is mindful that the Australian Government (government) is currently engaged in consultation with relevant stakeholders with a view to introducing legislation to address many of the issues raised by this and previous inquiries. The committee is encouraged by the willingness of a wide range of stakeholders to engage constructively on a nationally consistent approach to labour hire regulation that will help to protect workers by promoting greater compliance with workplace and other relevant laws by labour hire companies.

2.55 Noting the concerns raised by stakeholders regarding the effectiveness of the bill, the committee supports stakeholder calls for all parties to work with the government on legislation that can more comprehensively give effect to the policy intent behind this current bill.

2.56 Therefore, the committee recommends that the bill not be passed.

Recommendation 1

2.57 The committee recommends that the bill not be passed.

Senator Tony Sheldon

Chair

Labor Senator for New South Wales

Coalition Senators' additional comments

- 1.1 For the purposes of background, the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 (bill) seeks to amend the *Fair Work Act 2009*. The bill was initially introduced as a private senator's bill by Senator Malcolm Roberts in the 46th Parliament. It was restored to the Notice Paper in the 47th Parliament on 27 July 2022.
- 1.2 Coalition Senators acknowledge Senator Roberts' longstanding connection with, and strong advocacy for, workers within the black coal mining industry. This includes previously working as an underground coalface miner.
- 1.3 The bill is primarily focused on the black coal industry and would require that certain labour-hire workers receive at least the same rate of pay as other employees performing the same task.
- 1.4 Coalition Senators note that, as outlined in the bill's explanatory memorandum, a new civil penalty would apply in respect of a worker employed under a labour-hire contract and that amendments relating to the pay rate would not have a retrospective application and are limited to any new labour-hire contract entered after the commencement of the bill.
- 1.5 This bill would be applicable to labour-hire employees under the *Black Coal Mining Industry Award 2020* and the *Aircraft Cabin Crew Award 2020*, as well as four other awards that currently do not have provisions for casual employment.
- 1.6 Coalition Senators believe this bill erroneously seeks a one-size-fits-all approach, overlooks nuances of the labour-hire industry, will have unintended consequences, and ignores some fundamentals including the desire by some workers to have the flexibility and other benefits afforded to them by being labour-hire employees.
- 1.7 The Australian coal industry has played a significant role in the modern prosperity of the Australian economy. Like other sectors of the mining industry, it has provided numerous employment opportunities and benefited regional communities across Australia. According to the Minerals Council of Australia (MCA), the coal mining industry employs around 50 000 workers, with another 120 000 indirect jobs supported by the industry.¹

¹ Minerals Council of Australia, *Coal: building Australia's future*, www.minerals.org.au/coal-building-australias-future#:~:text=Coal%20is%20a%20cornerstone%20Australian%20industry%20built%20on,120%2C000%20indirect%20jobs%20supported%20by%20the%20coal%20industry

- 1.8 As a valuable commodity, coal is Australia's second largest export (after iron ore) and accounts for approximately 11.5 per cent of Australia's total exports.² While being a strong economic driver and export commodity, coal is an affordable, reliable source of electricity. In 2019, coal supplied over 68 per cent of electricity to the National Electricity Market.³
- 1.9 While there are detractors of coal who seek to diminish and disrespect the valuable role played by the coal industry in job creation and wealth empowerment, without doubt, the coal industry has played a pivotal, influential part in the narrative of the Australian success story.
- 1.10 Coalition Senators note that in December 2020, by Senate resolution, 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'.⁴ This included the function of the labour-hire industry.
- 1.11 Regarding the role of labour-hire, Coalition Senators respect the diversity of views on the matter; however, Coalition Senators do not share the sentiments espoused by some who have sought to demonise the vital function played by the labour-hire industry.
- 1.12 Like other components that constitute the Australian economy, labour-hire is an incredibly important and dynamic contributor to the Australian workforce. Given the acute labour market and severe skills shortage experienced across Australia, the use of labour-hire has a legitimate and practicable application that benefits the industry and local communities.
- 1.13 According to Laplagne, Glover & Fry, 'the number of labour-hire workers in workplaces with 20 or more employees grew from 33,000 in 1990 to 190,000 in 2002, an increase of 15.7 per cent per year'.⁵ Over the past two decades, this has risen to over 500,000 people who work across various industries and workplaces, including the mining sector.⁶

² Department of Foreign Affairs and Trade, *Trade and Investment at a Glance 2021*, p. 21.

³ Minerals Council of Australia, *Coal: building Australia's future*, www.minerals.org.au/coal-building-australias-future#:~:text=Coal%20is%20a%20cornerstone%20Australian%20industry%20built%20on,120%2C000%20indirect%20jobs%20supported%20by%20the%20coal%20industry

⁴ *Journals of the Senate*, No. 81, 10 December 2020, pp. 2890–2891.

⁵ P. Laplagne, M. Glover, T. Fry, *The Growth of Labour Employment in Australia*, Productivity Commission Staff Working Paper, February 2005, p. 4.

⁶ Recruitment, Consulting and Staffing Association, *Submission 12*, p. 1.

- 1.14 Over the past two decades, the mining industry—as a relevant sector within the scope of this inquiry that employs labour-hire—has responded effectively to the varying demands and shifts in commodity prices for coal with necessary levels of flexibility by supplementing and filling required gaps quickly using labour-hire.
- 1.15 Contrary to representations made in relation to labour-hire and proportion of broader workforce, Coalition Senators note that the current use of labour-hire in the Australian workplace is not considered to be at epidemic levels. According to the submission from the Australian Industry Group (AIG), 'only 1.1% of the workforce is employed by a labour-hire firm. This proportion is lower than it has been over the past 10 years'.⁷ Therefore labour-hire employees fill essential needs gaps and meet a market demand within the workforce, which in their absence, would be left unfilled or have to be covered by skilled migration.
- 1.16 It should not be forgotten that the mining industry is the highest paying industry in Australia. According to the MCA, the average wage is \$144 000 compared to the rest of the Australian workforce, where the average is \$95 000.⁸
- 1.17 Coalition Senators note the concerns of some business and industry advocates associated with labour-hire. Some contend that this bill would increase the complexity and administration of engaging labour-hire employees and create significant practical and payroll complications and increased and unnecessary red tape (regulation).
- 1.18 In its submission, AIG states that a policy such as equal pay for equal work is 'unfair, inappropriate and unworkable'.⁹ Additionally, AIG contends the bill does not sufficiently define a 'labour-hire employer' or a 'labour-hire employee', consequently resulting in some businesses inadvertently being caught up by provisions of this bill. As a specific example, consider 'various services to coal mining clients' and the example of electrical contracting firms who occasionally send electricians out to coal mines, and how they might be captured and impacted by this proposed legislation.¹⁰
- 1.19 Coalition Senators note the objections AIG has towards the proposed new power this bill would grant to the Minister to add additional awards by way of disallowable instrument. In its appearance before the committee, AIG indicated that such a provision 'creates a lot of uncertainty for businesses not just within

⁷ Australian Industry Group, *Submission 11*, p. 2.

⁸ Ms Tania Constable, Chief Executive Officer, Minerals Council of Australia, *Proof Committee Hansard*, 5 October 2022, p. 29.

⁹ Australian Industry Group, *Submission 11*, p. 2.

¹⁰ Australian Industry Group, *Submission 11*, p. 4.

the labour hire sector but across industries'.¹¹ This is not conducive to allow business to operate, with confidence, within a robust thriving economy.

- 1.20 Coalition Senators note that the Australian Chamber of Commerce and Industry (ACCI) believes people working in either black coal mining or as airline employees have been the specific focus of this bill because there is a view that people have had their wages reduced for being on labour-hire contracts.¹² On this ACCI said:

There is no conclusive evidence to support the claim that labour-hire employees are paid less than those who are directly employed by the host company for doing the same work in either industry. The Australian Bureau of Statistics (ABS) issues industry-specific labour force data that provide the best available information for employment and wages in mining. It shows that the median weekly earnings of mining employees paid by a labour-hire firm are approximately \$300 more (or 13 per cent higher) than the median weekly earnings of direct hire mining employees.¹³

- 1.21 Additionally, ACCI emphasised that '...labour-hire employees in the coal mining industry are paid on average about \$120,000 annually, which is about 190% of the award rate (approx. \$1,170 per week)'.¹⁴
- 1.22 On whether a wage differential existed between direct employees and labour-hire employees, the MCA gave evidence during the committee's public hearing that 'the median weekly earnings of mining employees paid by the labour-hire firm are approximately \$300 more, or 13 per cent higher, than the median weekly earnings of direct mining employees'.¹⁵
- 1.23 Coalition Senators share the concerns of the ACCI that should this bill be legislated; it would disenfranchise the capacity of labour-hire employees to negotiate their pay and conditions and note that labour-hire employees currently 'have the same rights and protections as employees in all other types of businesses'.¹⁶

¹¹ Ms Nicola Street, Director, Workplace Relations Policy, Diversity, Equity and Inclusion, Australian Industry Group, *Proof Committee Hansard*, 5 October 2022, p. 58.

¹² Ms Jessica Tinsley, Deputy Director, Workplace Relations, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 5 October 2022, p. 54.

¹³ Australian Chamber of Commerce and Industry, *Submission 18*, p. 2.

¹⁴ Australian Chamber of Commerce and Industry, *Submission 18*, p. 2.

¹⁵ Ms Tania Constable, Chief Executive Officer, Minerals Council of Australia, *Proof Committee Hansard*, 5 October 2022, p. 29.

¹⁶ Australian Chamber of Commerce and Industry, *Submission 18*, p. 3.

- 1.24 Coalition Senators note the seismic disruption the COVID-19 pandemic has had on the Australian aviation industry, which was labelled 'an existential crisis' by Qantas.¹⁷ This has also contributed to the reactivation of the sector throughout this year, particularly in response to surge demands as the shadow cast by the pandemic has gradually diminished, resulting once again in increased passenger demand for air travel.
- 1.25 In its testimony during the public hearing the national airline indicated that in relation to its ground handling team—irrespective of whether it consisted of labour-hire employees or direct hire employees—the disruptions experienced during peak times earlier this year would still have resulted in unfortunate disruptions to passengers.¹⁸
- 1.26 In addition, Qantas said that prior to the COVID pandemic when 'baggage handling was fully outsourced' they reported they 'did not have issues meeting demand and living up to the standards that people expect from Qantas'.¹⁹
- 1.27 Coalition Senators note that in response to questioning during the public hearing, Qantas confirmed that both directly employed staff and labour-hire employees can access the staff travel program. It is not restricted only to direct Qantas employees. Under this program, staff can get a 25 per cent discount on any advertised airfare, with more significant discounts for stand-by travel.²⁰

Recommendation 1

- 1.28 That the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 clearly defines 'labour-hire employer' and a 'labour-hire employee'.**

Recommendation 2

- 1.29 Coalition Senators strongly encourages the Australian Government to include genuine, collegiate stakeholder engagement with the labour-hire industry, particularly the mining and aviation industries, relating to its own legislative version of equal pay for equal work, which we understand is currently progressing, and that the Australian Government is not simply blinded by ideological obsession in dismissing the labour-hire industry's legitimate concerns with equal pay for equal work legislation.**

¹⁷ Mr Andrew McGinnes, Group Executive, Corporate Affairs, Qantas, *Proof Committee Hansard*, 5 October 2022, p. 40.

¹⁸ Mr Andrew McGinnes, Group Executive, Corporate Affairs, Qantas, *Proof Committee Hansard*, 5 October 2022, p. 42.

¹⁹ Mr Andrew McGinnes, Group Executive, Corporate Affairs, Qantas, *Proof Committee Hansard*, 5 October 2022, p. 42.

²⁰ Mr Andrew McGinnes, Group Executive, Corporate Affairs, Qantas, *Proof Committee Hansard*, 5 October 2022, p. 43.

Recommendation 3

1.30 That should a version of equal pay for equal work legislation be moved by the Australian Government, that it include a requirement for a review of the legislation's impact on the labour-hire industry, related businesses, and employees 18 months from the time of Royal Assent.

Recommendation 4

1.31 That the Fair Work Amendment (Equal Pay for Equal Work) Bill 2022 not be passed.

Senator Matt O'Sullivan

Deputy Chair

Liberal Senator for Western Australia

Senator Kerryne Liddle

member

Liberal Senator for South Australia

Australian Greens Senators' additional comments

- 1.1 The Greens support the recommendation in this report that the bill not be passed.
- 1.2 We thank all witnesses that appeared before the Committee and those that provided submissions for their comprehensive evidence in relation to the bill. We also thank Senator Roberts for his efforts to highlight and address this important issue.
- 1.3 We strongly support the premise of the bill; workers should be afforded equal pay for work of equal value.
- 1.4 We share stakeholder concern about the increased use of labour hire in Australia, the pay and conditions disparities between labour hire workers and direct hire employees, and the lack of protections for labour hire workers. We note the important evidence provided to the committee by stakeholders, indicating that labour hire workers experience lower pay, poorer working conditions and higher rates of injury when compared to direct hire employees.
- 1.5 We support a more comprehensive approach to the regulation of labour hire and insecure work more broadly. All workers in regular, ongoing jobs should be employed under permanent work arrangements, with casual and contract work restricted to limited circumstances. All workers must be afforded the same basic rights, including fair pay, secure work and holiday and sick leave.
- 1.6 Our labour law needs to be reformed to effectively enforce the regulation of labour hire and insecure work arrangements. This includes removing any incentives for employers to use labour hire contracts, including being able to pay labour hire employees lower wages than direct hire employees.
- 1.7 Reform is particularly needed in the care economy, as care work has been historically undervalued as a price of its 'feminisation'. Workers in the care economy must be equally paid regardless of their employment instrument. Work must be secure and ongoing, especially as continuity of care is a key characteristic of quality care.
- 1.8 Greens Senators agree with the recommendation to not proceed with the bill based on consensus among stakeholders, including the Australian Council of Trade Unions (ACTU), the Transport Workers' Union of Australia, the Australian Nursing and Midwifery Federation (ANMF), and the Australian Manufacturing Workers' Union, of a raft of significant issues with the bill.
- 1.9 Stakeholders indicated that a number of components of the regulation of labour hire as proposed in the bill need clarification. For example, the ACTU was concerned that the definitions of 'labour hire employee' and 'labour hire

employer' may limit the scope of the bill to labour hire arrangements, leaving workers engaged through outsourcing arrangements 'entirely unprotected'.¹ The ACTU and the ANMF expressed concern that labour hire companies will 'rapidly change the language in their contracts to move employees onto contracting arrangements' and circumvent the provisions of the bill.² The ANMF indicated that 'this is particularly relevant to carers and nurses working aged care which have historically had lower wages than their public and private acute counterparts'.³ The ANMF also noted concerns around the increased use and promotion of digital platforms and independent contractors in the aged care sector.⁴

- 1.10 Greens Senators note the Government has promised to introduce legislation to ensure labour hire employees are not paid less than direct hire employees. We look forward to working with the Government to ensure this legislation effectively regulates and enforces improved conditions and protections for labour hire employees. We will continue to advocate for an end to all forms of insecure work.

Senator Mehreen Faruqi
Member
Greens Senator for New South Wales

Senator Barbara Pocock
Member
Greens Senator for South Australia

¹ Australian Council of Trade Unions, *Submission 7*, p. 3.

² Australian Nursing and Midwifery Federation, *Submission 2*, p. 4; Australian Council of Trade Unions, *Submission 7*, p. 3.

³ Australian Nursing and Midwifery Federation, *Submission 2*, p. 4.

⁴ Australian Nursing and Midwifery Federation, *Submission 2*, p. 4.

Senator Malcolm Roberts' dissenting report

- 1.1 I thank the Committee for their work and for this report. We commend the committee for their report and dissent from the committee's recommendation.
- 1.2 I am pleased this report accurately reflects the detrimental effect on wages and conditions that has been experienced by workers employed under labour hire contracts across certain industries.
- 1.3 This report also details the detrimental effect on occupational health and safety of all workers on a site, not just those employed under labour hire agreements.
- 1.4 Finally, the report also accurately describes the effects on communities of the reduction in local spending caused by taking wages out of their community.
- 1.5 My bill seeks to protect the rights of directly employed workers in industries where there is no provision for casual employment. This is based on a simple assumption – if the award does not make provision for casual employment because of the nature of the work, then using a labour hire firm to conduct an end-run around the award by supplying casuals on a labour hire agreement is wrong.
- 1.6 The Committee report correctly identifies the Black Coal Mining Industry Award 2020 and the Aircraft Cabin Crew Award 2020 as being subverted in this manner.
- 1.7 The remaining awards are included in the *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022* as a 'line in the sand'. While labour hire agreements are not being abused in these industries, explicitly including those awards in this legislation was designed to ensure labour hire firms do not treat these awards as a new profit centre once the opportunity for exploitation is removed from coal mining and aircraft flight operations.
- 1.8 I know the witnesses that were called to testify about their treatment under labour hire contracts were pleased to have the opportunity to publicly testify on this matter and I thank the Committee for that.
- 1.9 However, these workers were not always afforded such an opportunity.
- 1.10 When I was elected to the Senate in 2019, I was contacted by Stuart Bonds in the NSW Hunter region. Stuart listed case after case where black coal workers had been employed under labour hire agreements that resulted in a 40 per cent reduction in their pay. More troubling were the stories of exploitation and victimisation these workers received, especially following a safety report or physical harm.
- 1.11 Simon Turner testified to the committee on his terrible experience and he is one of many.

- 1.12 Workers like Simon tried for many years to receive justice. The mine owner and the labour hire company ignored them. The union let them down. Their local member let them down. It was only when these workers came to One Nation that progress was made.
- 1.13 The Australian Labor Party promised legislation to correct this exploitation in 2018. Their proposed legislation did not materialise until December 2021 and then lapsed at the election. While the government is clearly working on their version of the *Fair work Amendment (Equal Pay for Equal Work) Bill 2022*, the reality is we have not seen that legislation yet and it may not be brought forward for another 8 months.
- 1.14 One Nation believes 5 years of promises is a disgrace that calls into question the ALP's commitment to fixing exploitation through the use of labour hire agreements. It should be noted these agreements include provisions to unionise the contracted workers while sending a river of superannuation contributions to the Union that signed off on the agreement in the first place.
- 1.15 One Nation's *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022* remains the only legislation before the Parliament designed to correct this injustice.
- 1.16 The following sections address specific issues raised in the report.

The bill does not act widely enough

- 1.17 I note the examples of exploitation raised in testimony to the Committee in respect of industries in addition to the six awards listed in *Fair work Amendment (Equal Pay for Equal Work) Bill 2022*.
- 1.18 My bill allows the Minister to add additional awards by disallowable instrument where such exploitation is detected. It also allows the Minister to remove that inclusion should an industry collaboratively resolve such exploitation. This is surely best practice – only act where there is a problem and only for as long as the problem exists.
- 1.19 The *Fair Work Act 2009* is 1100 pages long. Adding additional complication by making the provisions of *Fair work Amendment (Equal Pay for Equal Work) Bill 2022* cover 700+ awards 'just in case' will needlessly add to the cost and complexity of our industrial relations system.

The bill does not make suitable definitions of key concepts

- 1.20 The definitions are sufficient for every submitter to correctly understand the intention of the bill. Some then went on to say the definitions were incomplete, even after correctly identifying the meaning of the words used.
- 1.21 The wording was chosen after careful deliberation and having mind to one reality of our legal system. Once a term is given a specific meaning, that meaning is considered as being the full meaning of that term. In effect detailed definitions

are used to limit the application of a term. This allows for deficiencies in definitions to be used as loopholes to be exploited.

- 1.22 That is why the *Fair Work Act 2009* is 1100 pages long. I do not intend to add to the disaster that Act is by playing the game so many of the 'IR Club' call for.
- 1.23 It is up to the Fair Work Commissioner to decide if a labour hire agreement falls under the provisions of the *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022* or not. Should the Fair Work Commission fail to honour the intent of the legislation then, and only then should we wander into the legal minefield of definitions that become exclusionary rather than inclusionary.
- 1.24 Finally on this topic, defining concepts in this bill such as equal pay further than I have is bound to fail. Each of our 700+ awards operate in many different circumstances. A clearly expressed principle is much more likely to be effective in guiding the deliberations of a Fair Work Commissioner than wording that attempts to cover every eventuality.
- 1.25 The fact there are so many workers getting ripped off so badly for such a long time is a damning indictment on the IR Club and the *Fair Work Act 2009* itself. How about we don't keep making the same mistake and start using clear language expressing clear principles and rely on the Fair Work Commissioners to exercise their wisdom and knowledge to follow those principles in their judgements.

The bill would not act as intended

- 1.26 The intention of the *Fair Work Amendment (Equal Pay for Equal Work) Bill 2022* is to create an additional test to be added to the many tests an enterprise agreement must pass to be approved by the Fair Work Commission. The location of this test in a new division of Section 321 of the *Fair Work Act 2009* was designed to show this 'equal pay for equal work' test is a separate and distinct test not related to the Better Off Overall Test (BOOT).
- 1.27 The logic is simple. The Commissioner will ask if this enterprise agreement is made under a designated award, and if so, does the agreement meet the provisions of this bill.
- 1.28 The location and wording of the bill is fit for this purpose.

Conclusion

- 1.29 The supposed downsides that some vested interests attribute in broad terms without specifics come from the same people and groups who were advised repeatedly of the current unacceptable state yet did nothing to end the blight on their industries and they continue to do nothing.
- 1.30 The same vested interests misleadingly used averages in the Sydney inquiry to hide the facts that we have repeatedly raised illustrating the abuse some workers

are suffering. This raises questions as to their intent and to the manner in which they raised these misleading statistics.

- 1.31 Employers who do the right thing have nothing at all to fear from this bill.
- 1.32 I urge the Committee not to wait for a government bill that has been promised for a very long time and is still some distance away, if it ever appears, and act to end this exploitation now. Innocent hard-working and honest workers need protection and safety and need it now.

Senator Malcolm Roberts

Member

Pauline Hanson's One Nation Senator for Queensland

Appendix 1

Submissions and additional information

Submissions

- 1 The McKell Institute
- 2 Australian Nursing and Midwifery Federation
- 3 Maritime Industry Australia Limited
- 4 Mining and Energy Union
- 5 Per Capita Australia
- 6 Australian Manufacturing Workers' Union
- 7 Australian Council of Trade Unions
- 8 JobWatch Inc
- 9 Department of Employment and Workplace Relations
- 10 Maurice Blackburn Lawyers
- 11 Ai Group
- 12 RCSA - Recruitment, Consulting and Staffing Association
- 13 CFMEU (Construction and General Division)
- 14 Antipoverty Centre
- 15 Mr Stuart Bonds
- 16 Mr Sam Stephens
- 17 Transport Workers' Union of Australia
- 18 Australian Chamber of Commerce and Industry

Answer to Question on Notice

- 1 Minerals Council of Australia, answer to questions on notices asked by Senators Sheldon and Liddle on 5 October 2022, received 11 October 2022.

Tabled Documents

- 1 Opening statement tabled by Mr Adam Walkaden, National Legal Director at the Mining and Energy Union at a public hearing in Sydney on 5 October 2022.

Additional Information

- 1 Additional information provided to the committee by Mr Sam Stephens, the Fair Work Commission Decision [2018] FWCA 5992, Tesa Mining (QLD) Pty Ltd, Tesa Group – Enterprise Agreement 2012, 26 September 2018.
- 2 Additional information provided to the committee by Mr Sam Stephens, the Fair Work Commission Decision [2018] FWCA 1974, Ravensworth Coal Management Pty Ltd T/A Ravensworth Surface Operations, 2017 Ravensworth Open Cut Enterprise Agreement, 5 April 2018.
- 3 Additional information provided to the committee by Mr Sam Stephens, an Excel Spreadsheet, ABS Coal Industry Data, 2019-20, released 28 May 2021.

- 4 Additional information provided to the committee by Mr Sam Stephens, an Excel Spreadsheet, compilation of data from AusTender.
- 5 Additional information provided to the committee by Mr Simon Turner at the hearing on 5 October 2022. Extract from Commonwealth Courts Portal in relation to Simon Alexander Turner v Ready Workforce (A division of Chandler Macleod) Pty Ltd.
- 6 Additional information provided to the committee by Mr Simon Turner at the hearing on 5 October 2022. Screen shot from Commonwealth Courts Portal.
- 7 Additional information provided to the committee by Mr Turner at the hearing on 5 October 2022. Ready Workforce Workplace Agreement 2007.
- 8 Additional information provided to the committee by Mr Simon Turner at the hearing on 5 October 2022. Federal Circuit Court of Australia: Construction, Forestry, Mining and energy Union v Hunter Valley Energy Coal Ltd [2017] FCCA 1559 – Reasons for Judgement.
- 9 Additional information provided to the committee by Mr Simon Turner at the hearing on 5 October 2022. Federal Court of Australia, Appeal judgement Secretary, Attorney-General's Department v Warren [2022] FCAFC 118
- 10 Additional information provided to the committee by Mr Simon Turner at the hearing on 5 October 2022. Fair Work Commission Decision: Ready Workforce (A Division of Chandler Macleod) Pty Ltd T/A Chandler Macleod (C2021/8025) dated 7 June 2022.
- 11 Additional information provided to the committee by Mr Simon Turner at the hearing on 5 October 2022. Federal Court of Australia, Ridge v Hays Specialist Recruitment (Australia) Pty Ltd, Order, dated 4 August 2022.

Appendix 2

Public hearing and witnesses

Wednesday, 5 October 2022

The Grace Hotel, 77 York Street
Sydney

Mr Stuart Bonds, Private capacity

Mr Simon Turner, Private capacity

Recruitment, Consulting and Staffing Association

- Mr Charles Cameron, Chief Executive Officer

The WorkPac Group (via teleconference)

- Mr Hamish Griffin, Chief Executive Officer
- Mr Cameron Hockaday, Chief Commercial & Risk Officer

RGF Staffing APEJ (via teleconference)

- Mr Peter Acheson, Chief Executive Officer
- Mr Mark Graham, Chief People Officer

One Key Resources

- Mr Ben Lewis, Managing Director

Mining & Energy Union

- Mr Adam Walkaden, National Legal Director

Minerals Council of Australia (via teleconference)

- Ms Tania Constable, Chief Executive Officer
- Dr Matthew Steen, General Manager – Economic Policy & Workplace Relations

BHP/BHP Operations Services (via teleconference)

- Mr Matthew Furrer, Vice President, Operations Services
- Mr Steve Smith, Group Employee Relations Officer

Anglo American Australia (via teleconference)

- Mr Ben Mansour, Head of Human Resources
- Mr Chris Newman, Employee Relations Manager (Anglo American Steelmaking Coal)

Australian Council of Trade Unions

- Mr Trevor Clarke, Manager, Legal & Industrial

Transport Workers' Union of Australia

- Mr Michael Kaine, National Secretary
- Mr Dave Masters

Qantas (via teleconference)

- Mr Andrew McGinnes, Group Executive, Corporate Affairs
- Mr Andrew Finch, General Counsel & Group Executive, Office of the CEO

Professor Joellen Riley Munton, Private capacity

Dr Stephen Whelan, Private capacity

Ai Group

- Ms Nicola Street, Director – Workplace Relations Policy, Diversity, Equity & Inclusion
- Mr Brent Ferguson, Head of Workplace Relations Policy

Australian Chamber of Commerce and Industry

- Ms Jessica Tinsley, Deputy Director – Workplace Relations
- Mr Scott Barklamb, Director – Workplace Relations

