

Mr. Martin Hehir
Deputy Secretary, Workplace Relations
Department of Employment and Workplace Relations
Sent via email to WRSubmissions@dewr.gov.au

25 May 2023

Dear Mr. Hehir,

RE: Consultation in regards to amendments to the Fair Work Act 2009 (Same Job, Same Pay)

The R&CA is a national industry body representing the interest of over 57,000 restaurants, cafes and catering businesses. The R&CA provides tangible outcomes for businesses across the sector, through advocating for evidence based solutions to produce robust and prosperous businesses.

The R&CA welcomes the opportunity to make a submission in response to the government proposed workplace relations reform to the Fair Work Act 2009.

Same Job, Same Pay:

The R&CA does not support the current proposed amendments, on the basis of impacting the legitimate use of labour hire services by the hospitality sector.

The R&CA asserts that the proposed Same Job, Same Pay reforms, will have unintended consequences on businesses engaging with labour hire services.

These unintended consequences include:

- Discouraging businesses from engaging with enterprise bargaining deals, merit based remuneration, and labour hire negotiations.
- Limit the capacity for businesses to address varying demand, skill shortages and temporary labour needs by creating an untenable labour-hire system.
- The disadvantage to directly engaged employees and businesses who enter enterprise bargaining agreements.
- The risk this poses to removing the incentive-based hierarchical pay structure, which values the experience, skills, qualifications an employee brings to the business.

Calculating Pay:

1. The R&CA also notes that the demand for hospitality labour has benefited employees' negotiating capacity, and has incurred higher paying salaries for directly engaged employees.
2. The current proposed amendment would require businesses to calculate 'same pay' including bonuses, allowances, and merit-based remuneration, for labour hire employees conducting the same work as directly engaged employees, thus discouraging enterprise bargaining.
3. This is to the detriment of directly engaged employees and to negotiate pay, terms and conditions above the modern award wage requirements on the basis of seniority, experience, qualifications and years of service.
4. By nature, labour hire employees have less experience and qualifications than their directly engaged counterparts and benefit from the work experience and development opportunities provided to them by engaging with labour hire services.
5. The R&CA stands that any such amendments to the Fair Work Act 2009, would inconsequentially discourage any hospitality business to engage with labour hire services, due to the complexities in calculating employee remuneration schemes.

6. A more workable criteria such as 'Same Value, Same Pay' would encompass other factors such as skills, qualifications, years of service etc. which may account for pay discrepancies between two people performing the 'same job'.
7. In the hypothetical scenario in which a head chef, with over twenty years of service to a business, is temporarily substituted by a labour hire worker, it would be unreasonable to legislate the same negotiated pay when there is such a discrepancy in the value and experience a short-term external employee would likely bring to the business.
8. In this scenario, both personnel would be completing the same duties and responsibilities, highlighting the fallacy of 'same job, same pay' and why 'same value, same pay' is more appropriate.
9. Currently, coverage by the most relevant modern award wage, safeguards against underpayment.

Enforcement:

10. The R&CA stands that a host employer be exempt from penalisation for the non-compliance of labour-hire providers.
11. The onus of compliance should therefore ONLY be placed on the labour hire provider.
12. The R&CA also submits that employee underpayment should only be deemed criminal if there was a deliberate and wilful intent from the employer to withhold pay or entitlements from one or more employees.
13. Wage underpayments by accident or confusion should therefore not be subject as a criminal offence.
14. In place, engagement with the Fair Work Ombudsman should suffice to ensure workers are repaid in a correct and timely manner, and future compliance is assured.

For consideration:

15. The R&CA notes that the hospitality industry is currently facing extreme labour shortages, and by nature requires labour hire services to safeguard businesses against staff shortages, and address surging demand. According to the R&CA 2022 Benchmarking Report over 82% of restaurant and catering employers have experienced some form of difficulty with hiring new staff.
16. The R&CA urges the consideration of the value of the labour-hire industry presented to the hospitality sector, particularly in the context of labour shortages.

Options for reform:

17. A value-based criteria be established to calculate whether a labour hire employee is eligible for remuneration above the modern award wage negotiated by the direct employee, as to not discourage enterprise bargaining.
18. That the host employer be excluded from penalisation if a labour hire employee is underpaid, with the onus of compliance placed on the labour hire service provider.

If you have any questions relating to this proposal, please do not hesitate to contact R&CA's Policy and Campaigns Advisor, Amy Teakle at policy@rca.asn.au.

Regards,

Suresh Manickam



Chief Executive Officer
Restaurant and Catering Australia